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A Mixed Model for Transitional Justice: Lessons from Kenya and South Africa

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by

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Abstract

While there has been plenty written about transitional justice being implemented in African states that have undergone civil wars, transitional justice literature has yet to discuss how transitional justice can be a mechanism for states that have experienced mass violence and human rights abuses- but whose conflict/violence did not result in a civil war- to prevent the toppling of the government and the rise of a full scale civil war. However, scholarship has been limited in addressing the volatile situation of states that have experienced, or are experiencing mass intrastate conflict, and how intrastate conflict or the aftermath of intrastate conflict can produce civil war and the complete dismantling of government. Consequently, the question is how can transitional justice be used to prevent African states plagued with intrastate violence from erupting in civil wars? This thesis argues that a mixed model implementation of transitional justice in which civil society (individuals, groups, and non-governmental organizations) and regional governments/officials partner to build institutions and promote democratic involvement with the state government, is the most effective strategy to prevent African states afflicted with intrastate violence from ensuing civil war. This thesis conducts case studies on Kenya and South Africa, two states that pursued transitional justice and have avoided civil war, to assess the mixed model approach to transitional justice.

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Introduction

During the late 1980s and early 1990s a variety of formerly authoritarian

countries in Latin America and Eastern Europe underwent transformations from states of

conflict to democracy (Teitel, 2003). The approaches taken by states during the process

have become known today as transitional justice (Kritz, 1995). Transitional justice is

designed to provide justice to victims of oppressive regimes and to reform states'

governments in order to prevent the reemergence of human rights abuses. The measures

taken to reform governments usually consist of reforming institutions, increasing the rule

of law, and building democracy. Through providing justice to victims and reforming

states' governments, transitional justice ultimately strives to achieve a sustainable peace.

Traditional practices of transitional justice have been performed using a top-

down approach in which international and national leaders develop the policies and

mechanisms for transition, with minimal input received from a country's civil society

(Backer, 2003; Turner, 2013). Practices of transitional justice have occurred throughout

the world (Hansen, 2010) and while each state that has undergone transitional justice is

worthy of study, this thesis is narrowed to transitional justice in Africa.

While many states in Africa have applied transitional justice as a move toward

sustainable peace, African states have overwhelmingly done so in response to a civil war

(Burundi, Sierra Leone, Uganda, Central African Republic, Liberia, Rwanda, and the

Democratic Republic of the Congo) (Hansen, 2010). Although it is necessary for African

states to become democratically transformed after being afflicted with civil wars, another

question worthy of inquiry is presented: can civil wars in Africa be prevented? Kenya and

South Africa are two states that have faced substantial intrastate violence, and have undergone transitional justice, but have not resulted in civil war.

The exceptional cases of Kenya and South Africa thus raise the question of this research: can transitional justice be used to prevent African states plagued with intrastate violence from erupting in civil wars? This thesis argues that a mixed model implementation of transitional justice in which civil society (individuals, groups, and non-governmental organizations) and regional governments/officials, partner to cooperatively build institutions and promote democratic involvement with the state government, is the most effective strategy to prevent African states plagued with intrastate violence from ensuing civil war. This thesis conducts case studies on Kenya and South Africa, two states that pursued transitional justice and have avoided civil war, to assess if transitional justice is a viable mechanism to prevent the eruption of civil wars in Africa.

Chapter One provides an overview of transitional justice as a scholarly field, describing the various definitions that have been proposed in the field, the history of transitional justice, and the traditional mechanisms of transitional justice. Additionally, the relevant transitional justice literature is reviewed and critiqued. Since transitional justice is a relatively new scholarly field, its practices and theories are still developing. At the inception of transitional justice, scholars primarily focused on rebuilding or strengthening a transitional society's rule of law, under the assertion that a strong rule of law could be used to prevent the reemergence of human rights violations (Teitel, 2003; Crocker, 1999). More recently, scholars have discussed the important role civil society could play in the transitional justice process (Backer, 2003; Lundy and McGovern, 2008;

McEvoy, 2007; Andrieu, 2010). However, within the scholarly community there has yet to be any work specifically addressing how civil society can be incorporated into the transitional justice processes occurring in Africa.

Although the first four sections of Chapter One do not directly correspond to this thesis, the sections are worthy of discussion to introduce the reader to the field of transitional justice. Furthermore, explaining the mechanisms of transitional justice is necessary in order to understand how the mechanisms apply to the theoretical framework of this thesis and the Kenyan and South African case studies. Having identified a working definition of transitional justice, the mechanisms of transitional justice, and the pertinent transitional justice literature, a thorough description of transitional justice is provided to give the reader sufficient knowledge of the field of transitional justice. With a comprehensive description of transitional justice, the prescribed theoretical framework of this thesis and an evaluation of Kenya's and South Africa's applications of transitional justice can be understood.

Chapter Two proposes a theoretical framework (the mixed model approach to transitional justice) that can be used to determine how African states plagued with intrastate violence can utilize transitional justice to prevent the emergence of civil wars. In order for the proposed theoretical framework to be effective, there are several conditions that must be taken into account. The first condition that must be accounted for is the amount of time that has passed between the intrastate violence that produced the need for transitional justice in order to ensure transitional justice can be properly executed so that a balance can be made between forward-looking solutions (solutions designed to solve former problems and promote progress) and backward-looking

solutions (solutions designed to recognize a society's former violence and provide reconciliation to victims). The additional components of the proposed theoretical framework of this thesis is that states, civil society, and regional actors/officials must equally contribute their knowledge on the issue at hand, cohesively determine policy initiatives, operate with full transparency, and examine and reform the institutional weaknesses that allowed intrastate violence to transpire. Finally, the chapter also provides a table that is

Chapter Three and Chapter Four provide in depth case studies on South Africa and Kenya. Each case study provides historical background to understand how each state developed institutional weaknesses that resulted in intrastate violence and the need to pursue transitional justice. While there are differences between the cases of South Africa and Kenya, the underlying problem that produced intrastate violence in the two states is identical: inequality. British colonialism left South Africa and Kenya with deeply embedded inequalities after each state attained independence, and intrastate violence became perpetuated as a result domestic inequity. In addition to being selected as a case study because South Africa did not have a civil war, South Africa was also selected because its transition was completed about fifteen years ago, which allows for an evaluation of the effect of its transitional justice policies.

South Africa's colonial history constructed racially exclusive policies between the black Africans and the European colonizers (the British and the Boers, or, Dutch farmers). The racially discriminatory policies were carried on with South African independence and were formally adopted as the apartheid system. The apartheid system ultimately led to violent conflict between the National Party, the organizers of the

apartheid government, and black African rebel groups, most notably, Nelson Mandela's African National Congress. Because South Africa's transition is complete, the effects of South Africa's policies can be evaluated, which can assist with answering how African states with intrastate violence can be used to prevent civil war.

Similar to South Africa, the cause of Kenya's intrastate violence is inequality, which was also deeply sowed into Kenyan society by British colonialism. With the onset of colonial rule, British colonialism brought over forty-ethnic groups who had previously lived independent of each other, into one new territory. Some of Kenya's Africans had moderate living conditions under colonialism, but others were not allowed to own any land and had to work for the Whites for barely any compensation. The ethnic Kikuyu rebelled against colonial rule during the Mau Mau rebellion from 1952-1960, which eradicated colonial rule. During the Mau Mau rebellion, Jomo Kenyatta emerged as leader among the Kikuyu, and was eventually elected president once Kenya gained its independence.

Kenyatta's presidency was characterized by disproportionately favoring his own Kikuyu group and community. Kenyatta's practice of favoritism was continued by presidents Moi and Kibaki, marginalizing Kenya's ethnic groups that were not of the party in power, which exacerbated ethnic tensions. Election violence became the norm since the ruling party controlled which groups received resources, fueling the dynamic that led to 2007/2008 post-election violence in which 1,500 were killed and 600,000 were displaced. Kenya's case of transitional justice emerged in response to the 2007/2008 post-election violence, but was also tasked with countering Kenya's longstanding inequality.

While the historical background of each case may be extensive, a thorough description of each state's history is necessary to portray how British colonialism left deeply embedded structural inequalities within Kenya and South Africa. With the South African and Kenyan cases, the problems did not lie in race and ethnicity themselves, but rather inequality, which were determined by race (South Africa) and ethnicity (Kenya). The paramount issue of the South African and Kenya cases of transitional justice is thus inequality.

South Africa and Kenya exhibit two cases in which transitional justice was used to prevent civil wars from erupting, answering the thesis question. However, the implementation of transitional justice in South Africa and Kenya had their shortcomings and strengths. The shortcomings of both cases, however, demonstrate the necessity of a prescribed mixed model approach of this thesis that engages regional governments, state actors, and civil society. More specifically, an analysis of Kenya and South Africa reveals the importance of rebuilding institutions. Institutions can be tangible (such as police or court systems) or intangible (such as a culture of violence or racism), but when both institutions are weak, inequality and conflict can be practiced unchecked, perpetuating intrastate violence. South Africa's housing and economic institution have been maintained since the end of apartheid, leaving South Africans with chronic racial inequality. From the opposite spectrum, Kenya's judiciary and electoral reforms promulgated by their 2010 constitution, allowed for Kenya's first, relatively peaceful, presidential election in 2013. Overall, institutional reform is a vital component of the transitional justice process in African states in order to avoid an escalation to civil war.

Finally, in Chapter Five, conclusions are made assessing how the proposed theoretical framework of this thesis applies to Kenya and South Africa and compares the results of the two cases. Additionally, in Chapter Five, the limitations of this thesis are discussed along with the possibilities of future research other African cases, but also the possibility of developing a transitional justice model for regions outside of Africa.

Chapter One: Literature Review

This chapter describes the conceptions of transitional justice within the scholarly community and the actors actively engaged in the actual transitional justice process. Focusing on previous contributions by scholars, governmental and non-governmental actors, this chapter identifies the various definitions and theories of transitional justice that have been proposed as the practice of transitional justice has evolved. In order to analyze theories pertaining to transitional justice, it is essential to understand how theorists define transitional justice.

Section Two discusses the varying definitions of transitional justice within the scholarly community as well as a description of the mechanisms of transitional justice including: justice, truth seeking, reparations and institutional reform and vetting. Section Three provides an overview of the history of transitional justice as discipline, citing the different interpretations of the origin of the practice of transitional justice. There is a significant range in the interpretation of the origin of transitional justice, with some scholars arguing transitional justice originated in the ancient world, while others argue transitional justice is a relatively new phenomenon beginning at the end of World War I.

Section Four examines the major theoretical framework surrounding transitional justice, describing the mechanisms of transitional justice as well as the dilemmas of the practice. As will be further explained, the theoretical framework surrounding transitional justice has been conceived predominantly from case studies, and while the cases that have developed the field are noteworthy, the focus of this chapter is geared to the application of transitional justice on a theoretical level. Additionally, a critique of the

approaches will be provided to evaluate how the proposed theories can be applied both to the case studies of this thesis (South Africa and Kenya) and to future instances of transitional justice. Based off an analysis of the existing literature of transitional justice, it is revealed that a mixed model approach in which civil society (individuals, families, and organizations separate from the government), local, and state leaders not only work together, but are dependent upon each other to implement transitional mechanisms, is the most effective form of policy implementation. Furthermore, the above mixed-model approach will prevent the reemergence of political violence and will lead to peaceful development.

1. What is Transitional Justice?

There is no universally accepted definition for transitional justice. Numerous legal and scholarly definitions have been proposed, each with a specific motives in mind. The diversity of definitions does allow a deeper understanding of the issue, but these differences can also be problematic. This section analyzes the frequently cited definitions of transitional justice among scholars and the actors in the process, highlighting the themes and unique facets of each definition. A trend among each of the definitions is an unclear description as to whom should implement the elements of transitional justice. Furthermore, many of the definitions are incongruent with the states they are intended to address as they do not take into consideration state capacity. After assessing the utility of each definition, the most effective definition of transitional justice is identified which will be used for this thesis. Each of the definitions have their strengths and limitations, but as will be revealed later in this section, one definition must be used consistently throughout

this thesis, otherwise varying results and interpretations will be produced.

The *International Journal of Transitional Justice* explains transitional justice needs to be "defined broadly so as to engage with a wide spectrum of civil society and government initiatives. A broad definition transitional justice is of particular importance as the field itself continues to grow and evolve in concept and scope" ("About the journal," 2014) While a broad definition may be valuable in the sense that it can be applied to a wide range of circumstances, a more concise definition is needed for the scope of this thesis. Through specificity, a definition that can be evaluated emerges, which can be used to determine the success or failure of a state's endeavors towards creating a more stable and peaceful society.

The first use of the term transitional justice can be attributed to Kritz's (1995) *Transitional Justice: How emerging democracies reckon with former regimes* according to Villalba (2011). Since the coining of the term transitional justice, numerous definitions have also developed. In addition to the term transitional justice, the words "transitional" and "justice" have different associations among many actors in the process. Most scholars see the term transitional referring to a political transformation typically towards "liberal change" (Hansen, 2010, p. 25) as opposed to a description of justice, yet the prevalent acceptance of a move toward liberal change does not mean that all practices of transitional justice strive towards liberalism (Hansen, 2010). Turner (2013) references Christine Bell's (2009) broad definition of the term, which claims transitional justice consists of:

> The range of mechanisms used to assist the transition of a state or society from
> one form of (usually repressive) rule to a more democratic order, [and]

transitional justice has become the dominant language in which the move from

war to peace. (Turner, 2013 p. 193-194)

Bell's (2009) broad definition raises many questions, which will be discussed in the

Critique of Definitions section. A more concise definition of transitional justice comes

from the International Center for Transitional Justice, which is identifies transitional

justice as:

the set of judicial and non-judicial measures that have been implemented by

different countries in order to redress the legacies of massive human rights

abuses. These measures include criminal prosecutions, truth commissions,

reparations programs, and various kinds of institutional reforms. ("What is

transitional justice?," 2014)

The definition from the International Center for Transitional Justice is effective in several

ways as it distinguishes between judicial and non-judicial measures, and puts judicial and

non-judicial measures in the same playing field, demonstrating transitional justice is more

extensive than mere trials and is not a field exclusive to state actors.

In 2004, United Nations Secretary General Kofi Annan sought to explain the role

of the United Nations in the transitional justice process describing how the international

community in the latter half of the twentieth century has worked to have a collective view

and procedure for the application of justice (Annan, 2004). Speaking on behalf of the

United Nations, Annan defines transitional justice as:

the full range of processes and mechanisms associated with a society's attempts to

come to terms with a legacy of large-scale past abuses, in order to ensure

accountability, serve justice and achieve reconciliation. These may include both

judicial and non-judicial mechanisms, with differing levels of international

involvement (or none at all) and individual prosecutions, reparations, truth-

seeking, institutional reform, vetting and dismissals, or a combination thereof.

(Annan, 2004, p. 4)

In the report, Annan continues to emphasize the importance of the rule of law asserting

that although the United Nations has been effective with fortifying domestic law in

countries recovering from mass violations of human rights, there have been instances in

which the United Nations' intervention has been incongruous with national dynamics,

creating domestic tension (Annan, 2004, p.4). This definition is designed to be adaptable

to different actors and situations, expounding the necessity of understanding which

resources will be most effective in the implementation of transitional justice.

1.1 Critique of Definitions

There are a myriad of definitions of transitional justice that have been proposed

since Kritz's (1995) coining of the term, but they are all similar to the general approach

of the definitions provided by Annan (2004), Bell (2009), the International Center for

Transitional Justice (2014), and the International Journal of Transitional Justice, with the

differences only being that of semantics.

Each of the preceding definitions have limitations that will be outlined in this

section. As will be discussed in the state capacity section of this thesis, the difference

between the conception and the practicality of transitional justice must also be considered

as the prescribed mechanisms of transitional justice in each definition may not be feasible

in societies undergoing a transition (Hansen, 2010). More specifically, the definitions, in

order to be effective with prescription and evaluation, must have operational capacity, meaning they can be implemented by regimes reckoning with a former history of human rights abuses.

Bell's (2009) definition is characterized with ambiguities as it is unclear how repressiveness and peace are defined. Moreover, Bell (2009) does not explain who implements said mechanisms and does not describe what the move from war to peace means, making it appear that transitional justice measures are needed after every instance of armed conflict regardless of the magnitude of violence. Additionally, Bell (2009) does not indicate whether these mechanisms apply to interstate warfare, intrastate warfare, or interstate and intrastate warfare.

The International Center for Transitional Justice's (2014) definition for transitional justice takes their interpretation a step further than Bell (2009), but also has its own issues of vagueness. Although the International Center for Transitional Justice's (2014) definition makes the distinction between judicial and no judicial mechanisms, which is crucial as many historical examples of transitional justice have been implemented by those outside of the judiciary, the definition still neglects to distinguish who should carry out such measures. Furthermore, the goal of transitional justice is to compensate former abuses, yet the term "redress" brings its own set of questions. The term "compensation" is synonymous to finding a remedy, but what exactly is that remedy? While a redress can be achieved by the International Center for Transitional Justice's listed agencies may be the prescription for redress, it does not explain what a redress is or how it can be measured. A "redress" could be viewed as trying to bring back a society to its condition prior to human rights abuses, but it cannot fully be derived from

the International Center for Transitional Justice's (2014) definition. While a one-size-fits-all blueprint for determining what a transitional society needs may be incongruent with the society's actual needs, the International Center for Transitional Justice's definition does not provide general goals for which regimes should strive. A more narrow definition of transitional justice, that also establishes the general goals of the process, is necessary for the evaluation of cases of transitional justice case to determine if the case had a successful transformation.

Annan's (2004) definition is limited too as it does not explain who the actors are in the process, yet it provides more insight than the preceding definitions as it explains what transitional justice is in terms of what the end goal should be. The other definitions describe the mechanisms of transitional justice, yet leave the purpose of the mechanisms open to question. While the prior abuses that shaped societies to undergo the transitional justice process are predicated upon unique political contexts and history, and the restorative process should be specific to the context of the society undergoing transition, providing general goals of the transitional justice process provides a model that can be used to direct future cases of transitional justice and evaluate former implementations of transitional justice. The elements societies should strive for to be successful that Annan (2004) cites- accountability, justice, and reconciliation- are equivocal, yet a degree of broadness is necessary. Annan (2004) constructs a general path, yet leaves the path open to societies to determine how accountability, justice, and reconciliation are to be achieved. Accountability may be achieved in the form of truth commissions, which have been a widespread practice beginning with Latin American states transitioning from authoritarian governments to democracy in the 1980s and 1990s (Hansen, 2010), yet

accountability has taken, and can take, a variety of forms including public testimonial as was the case in South Africa (Hansen, 2010). Justice being dependent upon culture, additionally takes a variety of forms and can be conceived as prosecution, amnesty, and restoration to previous societal conditions. Moreover, while reconciliation is normally associated with theological views, a theological interpretation is not the exclusive basis of reconciliation.

The latter section of Annan's (2004) definition highlights the mechanisms that have been consistently used in former cases of transitional justice, similarly to the International Center for Transitional Justice. Overall, while there is vagueness in the definition, it is effective in the sense that it identifies the conditions that prompt the need for transitional justice, the goals of transitional justice, and the common methods that have been used for implementation, to give the reader the most thorough understanding of transitional justice. The scope of this thesis will provide a detailed prescription of the most effective form of transitional justice, but throughout the remainder of this thesis, transitional justice will refer to Annan's (2004) definition.

2. Mechanisms of Transitional Justice

Building upon Annan's (2004) definition, this section of the thesis describes the commonly used mechanisms of transitional justice, describing criminal trials, reparations, truth commissions, vetting, and institutional reforms. Villalba states, " Four processes are believed to constitute the core of transitional justice, even if there is disagreement about what each of them entails and the relationship that should exist between them" (Villalba, 2011, p.3). Similarly to Annan (2004), the four processes are: a justice process, directed

at criminal punishment; a reparation process to assist victims of mass atrocities; an investigative truth process, to determine what transpired during the period of conflict; and, an institutional reform process to prevent future human rights violations (Villalba, 2011). The mechanisms of transitional justice have been the subject of critique among many scholars in the field, raising questions of whether all of the above processes should be incorporated, who should be the actors in the process, and to how the above processes should be implemented. Different scholarly interpretations of transitional justice will be discussed in the section, A Critical Review of the Theoretical Framework in Transitional Justice, of this chapter, while the following subsections will provide an overview of how criminal trials, truth commissions, and reparations and institutional reforms have traditionally operated.

2.1 Criminal Trials

Although there may be varying views on the process and extent of trials, there is a shared conviction in the transitional justice arena that perpetrators of war crimes, genocide, and crimes against humanity should be prosecuted (Villalba, 2011; Schabas 2006). Transitional justice trials have been held at the international level (the International Criminal Court), national level (state courts), local level (such as the *gacaca* courts in Rwanda) and the hybrid level/special courts (The Special Court for Sierra Leone) (Hansen, 2010). Traditionally, transitional justice may have been thought of as operating at the national level, but international developments throughout the twentieth century, including the formation of the United Nations and the International Criminal Court, have a caused a shift in focus, with international law now dominating the

transitional justice discourse (Schabas, 2006).

The pursuit of national trials can be traced to the concept of state sovereignty as established through the 1648 Peace of Westphalia (Schabas, 2006). The Westphalian model traditionally disregards international law under the premise that states have free decision making ability. When it comes to issues of transitional justice, states have the ability to prosecute perpetrators of human rights abuses in a manner of their choosing (Schabas, 2006). Despite the dominance of international law, several countries in transition including, Argentina, Chile, Colombia, Ethiopia, and Germany have conducted national trials (Hansen, 2010; Villalba, 2011).

At the national level, different approaches towards criminal trials have been used. Argentina conducted national trials exclusively for *junta* military leaders of the former dictatorial regime, whereas lower ranked military members were excluded from the process (Hansen, 2010). The Argentine government did attempt to put other lower-ranking personnel on trial, yet prosecutions were halted by the "due obedience law," which prevented subordinate military and law enforcement officials from being prosecuted since they were following the orders of their superiors (Nino, 1991). The decision to focus on bringing only the main leaders to justice and the due obedience law can be attributed to the negotiation between the Argentine judiciary and military (Hansen, 2010).

Other national courts have pursued more comprehensive trials to be applied to a broader spectrum of perpetrators. The trials associated with the reunification of Germany toward the end of the Cold War differs from the Argentine national trials as low-ranking officials were prosecuted in addition to prominent state leaders (Hansen, 2010). In the

former German Democratic Republic, approximately 22,000 crimes were probed, yet a mere 500 cases actually made it to national trials (Offe & Poppe, 2006). Nonetheless, border security agents were convicted, but received limited sentences (Offe & Poppe, 2006). Additionally, the Ethiopian case dealing with the atrocities of the Mengistu regime's Ethiopian Red Terror and Ethiopian Civil War had expansive prosecutorial measures (Tiba, 2007). 5,000 individuals, who both directed orders and carried out orders, were brought to trial, and approximately one-fifth of those indicted were found guilty (Tiba, 2007).

In addition to national trials, international law and international actors have taken a significant role in transitional justice trials. The 2010 Guidance Note on transitional justice by Ban Ki-moon, current Secretary General of the United Nations, is a key source of justification for the United Nations' involvement in transitional justice. The 2010 Guidance note states:

The normative foundation for the work of the UN in advancing transitional justice is the Charter of the United Nations, along with four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law. Specifically, various UN instruments enshrine rights and duties relative to the right to justice, the right to truth, the right to reparations, and the guarantees of non-recurrence of violations (duty of prevention). In addition, treaty bodies and court jurisprudence, as well as a number of declarations, principles, and guidelines have been instrumental in ensuring the implementation of treaty obligations. To comply with these international legal obligations, transitional

justice processes should seek to ensure that States undertake investigations and prosecutions of gross violations of human rights and serious violations of international humanitarian law, including sexual violence. Moreover, they should ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and guarantees of non-recurrence of violations, in accordance with international law. (Ki-moon, 2010).

Additional sources of international law through the United Nations come from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide states that contracting parties must recognize genocide as a crime and must be something of which, "they undertake to prevent and punish" (General Assembly, 1948, article 1). Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obligates states to "ensure all actions of torture are offences under its criminal law" (General Assembly 1984, article 4, section 1) and "Each State Party shall make these offences punishable by appropriate penalties" (General Assembly, 1984, article 4, section 2).

The obligations of the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, require states to address crimes of torture and genocide and have been used to justify international intervention in the event states fail to fulfill their requirements. The United Nations Security Council has, under the confirmation of the Charter of the United Nations, established several international criminal courts Including

the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, The Special Court for Sierra Leone, and the Special Tribunal for Lebanon (Schabas, 2006). The Security Council's 2004 Presidential Statement, asserts the importance of transitional justice and the need for Security Council intervention:

> The Security Council emphasizes that ending the climate of impunity is essential in a conflict and post-conflict society's efforts to come to terms with past abuses, and in preventing future abuses. The Council draws attention to the full range of transitional justice mechanisms that should be considered, including national, international and 'mixed' criminal tribunals, truth and reconciliation commissions, and underlines that those mechanisms should concentrate not only on individual responsibility for serious crimes, but also on the need to seek peace, truth and national reconciliation. The Council welcomes the report's balanced appraisal of the lessons to be learned from the experience of the ad hoc international criminal tribunals and 'mixed' tribunals.
>
> The Security Council recalls that justice and rule of law at the international level are of key importance for promoting and maintaining peace, stability and development in the world. (Thomson, 2004, p. 2)

Moreover, the Security Council has cited the Rome Statute of the International Criminal Court to identify its duty of intervention. Article 13(b) of the Rome Statute states, the International Criminal Court may handle crimes if "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations" (Rome Statute of the International Criminal Court, 1998). The Security Council has granted

allowed the International Criminal Court jurisdiction during the Darfur crisis of 2002 and Libyan crisis of 2010 (Villalba, 2011).

The International Criminal Court has further been incorporated into the transitional justice discourse. Under Article 5 of the Rome Statute, the International Criminal Court is given jurisdiction to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (Rome Statute of the International Criminal Court, 1998). The Rome Statute grants the International Criminal Court authority to conduct its own trials if states do not prosecute crimes of genocide, crimes against humanity, war crimes, and crimes of aggression that have occurred within the respective country's borders or were perpetrated by the country's citizens (Rome Statute of the International Criminal Court, 1998). Transitional justice mechanisms employed by states that are non-judicial or do not fall in line with the Rome Statute are no longer valid based off the 2010 Review Conference of the International Court (Hansen, 2013). The overarching scope of the International Criminal Court has not functioned without controversy though: a notable criticism is the International Criminal Court's investigation of the Lord's Resistance Army in northern Uganda, which was viewed as an impediment to harmonious progress (Waddell & Clark, 2008).

Besides the United Nations and the International Criminal Court, other international treaties have cited a commitment toward pursuing international law to address human rights violations associated with transitional justice. According to Villalba (2011):

the International Covenant on Civil and Political Rights, the European

Convention for the Protection of Human Rights and Fundamental Freedoms, and

the American Convention on Human Rights, do not expressly incorporate such an

obligation [to prosecution], [but] all of them do expressly include the right to a

remedy, which has been understood by their respective monitoring bodies to raise

an obligation in relation to human rights violations, such as disappearances,

torture and arbitrary killings. (Villalba, 2011, p. 4)

Another legal precedent comes from the case *Velázquez Rodriguez v. Honduras*

(1988), in the Inter-American Court on Human Rights a case dealing with the Honduran

government's practices of forced disappearances during the Honduran economic crisis. In

its concluding remarks, the Inter-American Court of Human Rights stated: "States must

prevent, investigate and punish any violation of the rights recognized by the Convention

and, moreover, if possible attempt to restore the right violated and provide compensation

as warranted for damages resulting from the violation" ("*Velázquez Rodriguez v.*

Honduras Inter-American Court of Human Rights Series C No.

1.," 1988, paragraph 166). As demonstrated, a wide range of approaches have been used

by a diverse group of actors to pursue justice through trial when reckoning with the

transitional justice process.

2.2 Reparations

Another mechanism of transitional justice is established upon the notion that

severe violations of human rights need to compensate victims through the form of

reparations (Hansen, 2010; Villalba, 2011). In regard to international law, "any state that

breaches its international obligations (by action or omission) has the obligation to

produce reparation" (Villalba, 2011, p. 6). Additionally, Under Article 75 of the Rome

Statute, "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation" ("Rome Statute of the International Criminal Court," 1998, article 75). Thus, reparations can be demanded from individuals and states under international law (Villalba, 2011). Some actors provide reparation even though they have no legal obligation such as the Colombian government's Administrative Reparation Program directed at Colombian victims of guerilla fighters and the United States Agency for International Development's financial assistance for health care to victims of the Pinochet regime in Chile (Villalba, 2011).

Villalba (2011) cites that reparations can consist of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as possible complementary forms of redress" (Villalba, 2011, p. 6). Many questions of reparations have arisen and there has yet to be a consensus on how reparations are to be issued. The ambiguities that are brought into the reparation debate involve who are considered victims, who should provide reparations, should reparations be issued on a case by case basis or should be all given equally according to an established standard, and how to measure if the amount/extent of provided reparation is satisfactory (Villalba, 2011).

Doxtader & Villa-Vicencio (2004) and Roht-Arriaza & Orlovsky (2009) claim that while reparations are designed to amend a situation so that a society may go back to its status prior to the outbreak of violence, the truth is impossible to erase no matter how much money or other resources are directed at treating the problem. Another dilemma with reparations comes from determining if past harm or current suffering should be the criteria for the issuance of reparations (Hansen, 2010). As demonstrated, the issuance of

reparations is a complex process characterized with ambiguities. However, reparations can still be used to provide compensation to victims.

2.3 The Truth Process

As stated by Annan (2004) and Villalba (2011), truth seeking and truth commissions are a common element in transitional justice practices. Similarly, to prosecutions and reparations, truth seeking can be traced to international law. According to Roht-Arriaza & Mariezcurrena (2006), the violence and human rights violations that occurred that prompted a state to enter a period of transition, are often executed covertly with an unclear picture of who was involved in the atrocities. Truth seeking is thus not only beneficial to victims, but also to the judiciary and other state and international government officials to find out what happened in order to properly issue indictments, restructure government institutions and policies, and prevent a regress of violence.

The Geneva Convention is one of the first international treaties to address policies dealing with missing persons. The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) of 8 June 1977 has sections discussing the policies parties must pursue when it comes to missing persons. Article 33, Section 1 states:

> As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches. (International Committee of the Red Cross, 1977)

Article 33 further explains that all missing persons are documented to the International Committee of the Red Cross or through the Central Tracing Agency (which is responsible for tracing information to the families of detainees affected by conflict) and, if found deceased, it is reported if their death was related to conflict or occupation (International Committee of the Red Cross, 1977).

International law directed at missing persons can also be found in the United Nations' Office of the High Commissioner for Human Rights' Committee on Enforced Disappearances, which is tasked with ensuring State Parties follow the International Convention for the Protection of all Persons from Enforced Disappearance. Article 24 of the Convention states victims, those who were disappeared or those affected by another's forced disappearance, have the right to know the reason for the forced disappearance and the investigatory actions state parties have pursued (Office of the High Commission for Human Rights, 2006). The convention additionally calls each state party to "take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains" (Office of the High Commission for Human Rights, 2006, article, 24, paragraph 3). Moreover, the convention guarantees victims the right to reparations which may be in the form of, " (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition" (Office of the High Commission for Human Rights, 2006, article, 24, paragraph 3).

Aside from legal obligations, states have commonly pursued truth seeking through truth and reconciliation commissions. Some scholars argue truth and

reconciliation commissions can be a more effective form of reckoning with the past than judicial measures (Villalba, 2011; Freeman, 2006). Truth and reconciliation commissions can be defined as "a commission of enquiry created by the state (usually the executive or parliament) to investigate heinous crimes committed during conflict or repression and to produce recommendations for dealing with the consequences" (Villalba, 2011, p. 8).

Truth and reconciliation commissions have been widely used and have appeared in the most prominent cases of transitional justice (Hayner, 2001). According to Hayner (2001), there have been "at least twenty-one official truth commission established around the world since 1974" (Hayner, 2001, p. 14-15). Truth and reconciliation commissions are not without complexity and controversy (both characteristics will be discussed in the critical review section of the thesis) though, but the approach of truth and reconciliation commissions are commendable in the following areas listed by Minow (1998), Teitel (2003), and Hansen (2010), which can also be demonstrated by their continued use. As Minow (1998) argues, truth and reconciliation commissions may be preferable to victims as their stories are valued and not interrogated as they would be in court. Truth and reconciliation commissions can also be a form of a preventative measure, which can deter future perpetrators (Teitel, 2003), but can also expand criminal liability (Hansen, 2010).

While truth and reconciliation comissions may be seen as a dignitary measure toward victims, some scholars view truth and reconciliation commission as a less valuable pursuit of justice that should only be used as a substitute when prosecutions are infeasible (Hansen, 2010). In contrast to the previous view of the inefficacy of the truth and reconciliation commissions, some truth and reconciliation commissions- such as Argentina's- were able to facilitate increased prosecution (Hayner, 2001). South Africa's

truth and reconciliation commission strategy of "trading truth for amnesty and amnesty

for truth" was an effective means of moving toward a peaceful transition as it prevented a

reemergence of violence (Doxtader &Villa-Vicencio, 2004). Based on the precedence of

truth commissions and their continued appearance in contemporary cases of transitional

justice, it is likely that truth and reconciliation commissions will continue to be a key

element of transitional justice.

2.4 Institutional Reform and Vetting

The final key element of the transitional justice process is institutional reform.

The focus on institutional reform is to prevent atrocities from reoccurring (Villalba,

2011). While in transition, states address not only former events, but also the

institutional structure that allowed atrocities to transpire. The two sectors primarily

targeted at reform are those related to security and justice (Villalba, 2011). In order to

ensure proper accountability, the actors and institutions in the fields of security and

justice must be addressed or further misconduct will continue. In doing so, state and

international actors study which institutions, or lack thereof, allowed the violations to

occur.

Vetting is a lesser used mechanism of the transitional justice process that is used

to assess individuals as another preventative measure. Vetting can be defined as the

"processes for assessing the integrity of individuals to determine their suitability for

continued or prospective public employment" (Duthie, 2009, p. 17-18). Through vetting,

it is decided if public officials shall remain in office or be eligible for office if they are

potential employees (Hansen, 2010). Vetting is often directed at security personnel as a

means of preventing future cases of impunity (Villalba, 2011). Within the scholarly field, some argue vetting can also increase the rule of law, such as Annan (Hansen, 2010). Finally, vetting has been traditionally associated with issues of due process and has yet to be targeted at victims hoping to see certain officials removed from office (Hansen, 2010).

3. A History of Transitional Justice

To understand the full scope of transitional justice, it is essential to explain how the history of transitional justice has shaped its development. Although transitional justice is a relatively new field of study, there is no universal contention on the origins of the practice of transitional justice. Transitional justice dates as far back to the ancient world by Lanni (2010) who argues that the Athenians' response to the reign of thirty tyrants- a pro-Spartan oligarchy who ruled after the Athenians' defeat in the Peloponnesian War and severely restricted Athenians' citizenship rights- consisted of many elements of contemporary transitional justice such as attaining reconciliation through pardons and prosecutions, truth seeking in the form of remembering the past, and reforming the institutions in Athens. Elster (2004) also cites two cases of transitional justice in Athens in which democracy was toppled by an oligarchic group, to then be restored to democracy. Elster (2004) also identifies a large historical gap in the practice of transitional justice as another case of transitional justice did not occur until the English Restoration. After the English Restoration, transitional justice was not practiced until post-Napoleonic reconstruction (Elster, 2004).

Other scholars see transitional justice as a more recent practice. Teitel (2003) cites transitional justice as a practice emerging after World War I through the collective action

taken with the Treaty of Versailles and the international community's punishment for

Germany's War of Aggression. Arthur (2009) identifies transitional justice as beginning

in the late 1980s and early 1990s in response to a changing political world. The collapse

of the Soviet Union and the independence gained by Latin American states breaking free

from colonial rule, placed newly independent states on a move toward democratization

(Arthur, 2009). As there is no unified origin of transitional justice, there is also no

unifying framework regarding the implementation of transitional justice itself; however,

the diverse views on the implementation of transitional justice will be discussed later in

this chapter in the section, A Critical Review of the Theoretical Framework of

Transitional Justice

3.1 Transitional Justice Emerging After World War I and World War II

Teitel (2003) breaks down the practice of transitional justice into three phases of

evolution. Phase I occurred during theinterwar period after World War I and was

characterized as an international condemnation to Germany (Teitel, 2003). Phase II began

with the post-Cold War period and the development of truth and reconciliation

commission (Teitel, 2003). Finally, Phase III started in the post-millennial period, and the

practices of forgiveness, reconciliation, theology were assimilated into the process of

transitional justice. Teitel (2003) claims transitional justice first emerged during the

interwar period after World War I, citing the Versailles Treaty as the first collective

action oriented towards transitional justice. Conceptions of transitional justice are

traditionally directed by the international community, in conjunction with national

leaders, in response to a state's internal affairs rather than the former wrongs one state

commits against others (Teitel, 2003). However, unlike the traditional approaches of transitional justice, Teitel's (2003) identification of punishment for Germany's war of aggression is distinct as it was focused largely on a general policy of punishment on one state, Germany, for its actions imposed on other states. While the policies Teitel (2003) cites could be considered practices of transitional justice, they fall more in line with an international justice response as the policies imposed were characterized through punitive measures as opposed to the rebuilding of a state. At the same time, however, Teitel (2003) explains that each phase of the transitional justice genealogy builds upon one another following a linear progression toward the commonly accepted contemporary uses of transitional justice such as the importance of the rule of law, truth commissions, and policies of reconciliation and the role of theology.

Other scholars argue the international response in the post-World War II world set the stage for the emergence of transitional justice. The international response to war crimes through the Nuremberg trials and the Tokyo Charter in response is commonly identified by scholars as being a mechanism toward strengthening the rule of law (Turner, 2013; Arthur, 2009; Crocker, 1999; Lundy & McGovern, 2008; McEvoy, 2007).

The most notable difference from the post-World War II model of transitional justice in comparison to interwar transitional justice was a shift from national punitive measures to international criminal justice of former Nazi officials, transcending state liability to individual liability (Teitel, 2003). Ultimately, The United States, Great Britain, France, and the United Soviet Socialist Republic collectively indicted twenty-one top ranking Nazi officials ("Nuremberg Trials Fact Sheet," 2014). Allied Control Council Law 10 also enabled the extensive prosecution and execution of Nazis (Telford, 1949).

Allied Control Council Law 10 recognized Crimes against Peace, War Crimes, Crimes

against Humanity, and criminal membership as being criminal (Telford, 1949). The key

component of Law 10 was that nationality and capacity were disregarded as those who

followed orders or were connected to Nazi organizations or German offices were

adjudged as being criminal (Telford, 1949).

The pursuit of international law was thought to more effectively ensure higher

impartiality and thus strengthen the rule of law (Teitel, 2003). A renewed rule of law was

conceived (and in many instances today, is still thought) to prevent future atrocities since

impunity would no longer be tolerated. Similar to the goals of preventing a redress of

violence during institutional reform and vetting, prosecutors during the Nuremberg trials

hoped the trials would serve as a form of deterrence, shifting away from individual guilt

and focusing instead on how hate and the abuse of power could produce atrocities:

> Chief Prosecutor Robert Jackson observed that, "[o]ne of the dangers ever present
>
> is that this Trial may be protracted by details of particular wrongs and that we
>
> [may] become lost in a 'wilderness of single instances.' He argued that the
>
> officials who were tried at Nuremberg should not be condemned as individuals
>
> alone, but as 'living symbols' that represented 'racial hatreds,' fierce
>
> nationalisms,' and the 'arrogance and cruelty of power'. (Leebaw, 2008, p. 104)

Additionally, Justice Robert Jackson explained an additional purpose of the Nuremberg

Trials was to provide historical evidence of the atrocities of Nazism, similar to the role of

contemporary truth and reconciliation commissions (Leebaw, 2008).

The legacy of the Nuremberg Trials can connect to contemporary cases transitional

justice. International prosecution of individuals is evident today with the indictment of

state leaders to the International Criminal Court, such as Augusto Pinochet.

The International Military Tribunal for the Far East Charter, commonly referred to as the Tokyo Charter, pursued an analogous approach to the Nuremberg Trials with its main purpose being the deterrence of future aggression (Picart, 2011). Additionally, due to deterioration of the United States' relations with China and the U.S.S.R. at the onset of the Cold War, the United States was hoping to gain an ally through the demilitarization and democratization of Japan (Picart, 2011). To achieve the goal of transforming Japan, the Allies pressed for individual for individual prosecution. Article 6 made it clear that the vindication of "following orders" was unacceptable as it stated:

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires. (International Military Tribunal for the Far East Charter, 1946)

The establishment of a historical record was the other major component of the Tokyo Accord. The intentions of the Tokyo Accord, however, may have been driven by the political interests of the Allied Powers, as the accord was framed so the Japanese would believe their government officials acted out of brutality and led the Japanese to war under a pretense (Picart, 2011). The legal devices used by the Allied Powers, directed at Japan and Nazi Germany, mirror contemporary mechanisms of transitional justice, such as international prosecutions.

Many non-academic sources such as non-governmental organizations argue

transitional justice began as more states became independent in the late 1980s and early 1990s with the collapse of the Cold War (Turner, 2013). Although non-governmental organizations did play a role in the response to the aftermath of World War II, their involvement has been the most salient with assisting newly independent states during their democratization processes during the 1980s and 1990s (Teitel, 2003).

As the preceding examples illustrate, there are diverse views on the foundation of transitional justice. While, the differences in dates may not be significant, it is the mechanisms of transitional justice taken from each interpretation that reflect the theoretical framework regarding transitional justice. [1] As was discussed above, and will be discussed more thoroughly in the following section, a prominent feature of transitional justice practices is the establishment of a strong rule of law in transitional governments, connecting to the commonly held top-down approach with international and national leaders being the key players in the transitional justice process. The more recent advocacy of a bottom-up approach towards transitional justice, with civil society and non-governmental organizations being the central figures, has not received substantial scholarly attention until recently and still lacks the use of detailed case studies to evaluate the effectiveness of a bottom-up approach.

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[1] Please see the previous section on the mechanisms of transitional justice. The preceding historical cases focused on justice and truth seeking, building the conception of transitional justice as it is contemporarily known.

4. A Critical Review of the Theoretical Framework of Transitional Justice

As explained in the preceding section of this chapter, transitional justice has a wide array of interpretations in relation to its theoretical framework. From a broad perspective, transitional justice can be categorized topically in the academic community into the following: a top down approach, focusing on the rule of law and others aspects of legalism; justice based on peace; truth commissions; forgiveness and reconciliation; and the role of civil society. Overall, while some scholars have identified the potential pivotal role civil society can play in the transitional justice process, (Backer, 2003; Andrieu, 2010) there has yet to be any significant study of the possibility of its salience. The scholars who do discuss civil society's role are mainly propositional with their claims, failing to thoroughly assess the role civil society has played in the past and could potentially play in the future (Teitel, 2003; Backer, 2003; Andrieu, 2010). The theoretical framework designed to prevent African states from ensuing civil war that is prescribed in this thesis, extensively incorporates civil society. Because of civil society's involvement to the prescribed theoretical framework in this thesis, it is necessary to first cite the existing view within transitional justice literature on the utility of civil society.

4.1 Rebuilding the Rule of Law

As transitional justice is a relatively new field of study, there has yet to be significant theorization of the topic (Turner 2013). Teitel (2003) is widely acknowledged as being one of the first conceptualizations of a transitional justice framework. The practices after World War II took an internationalist response "thought to guarantee the rule of law" (Teitel, 2003 p. 73) to correct the "mistakes" made after the World War I

response, which consisted of "legal transplants of treaties, conventions, and constitutionalism" (Teitel, 2003 p. 74). In addition to rectifying former wrongs, the post-World War II period was also marked with theories of modernization under the assumption that an increase in the rule of law would lead to a state's development (Teitel, 2003).

Strengthening the rule of law during the transitional justice process is also highly regarded among other scholars (Bell, 2009; Derrida, 1992; Douzinas, 2005). Turner (2013) highlights the impact of Teitel's (2003) framework of transitional justice left by explaining, "Once a normative element was established in transitional justice literature, all efforts at peacemaking became subject to evaluation according to the requirements of that framework itself" (Turner, 2013, p. 198). Following the value placed on the framework of transitional justice was the contention that the rule of law trumped the previous ubiquity of international and national politics (Turner, 2013). The framework emphasizing the rule of law took such a dominant role that it excluded other pursuits of justice and truth seeking (Nagy, 2008). Teitel's framework regarding the rule of law and the prevalence of its use by scholars and transitional justice practitioners does have a logical basis as societies in transition face dilemmas surrounding the rule of law. For example, societies that have been plagued with political violence see the laws of the regimes that committed atrocities as illegitimate and untrustworthy. Citizens of transitional societies can argue that if a legitimate body of legalism was present, victims would have been protected or at least better treated in response to the atrocities of which they were subjected. Teitel (2003) and Derrida (1992) argue a transitional population wants the security of law, but recognize there is a sharp contrast between what law is and

what law should be. Therefore, a new body of legalism can fill the vacuum of accountability and help the population's transformation towards a new system (Teitel, 2003; Derrida, 1992). International human rights law can thus be viewed as an independent standard that will supersede the society's political turmoil (Turner, 2013). International human rights law can be a source of legitimacy that will provide a new source of judgment as a form of progress through its formality and *modus operandi*, or procedures (Davies, 2001).

A major weakness of having a transitional justice framework oriented around the rule of law is the presumption that a strengthened rule of law will automatically lead to justice and peace. As previously explained, law is viewed by some scholars as being a neutral institution, that when adhered to, will mediate conflict and lead to the stable rebuilding of a state (Derrida, 1992; Davies, 2001. However, it is vital to distinguish between how law is theorized on paper and how it is actually applied through decision making and enforcement.

While rebuilding national law to be viewed as more legitimate among the population may lead to peaceful change in some circumstances, other issues arise that must be exercised with caution. Having a rule of law that is viewed as being more legitimate does not mean that the law will be just nor will it automatically lead to peace. Law may be regarded as being equally applicable to all people of a society, but law may in reality be enforced entirely differently with conviction or immunity being predicated upon demographic or ideology. Moreover, law is a product of politicians whose decision making and legislation creation can be far from neutral. Even in states that are legally stable and have never gone through a modern form of transitional justice, like Canada or

Switzerland, their laws are still shaped by political biases. Often times, transitional justice cases are established to deal with violent ethnic conflict- such as the Hutus and the Tutsis in Rwanda and Burundi (Hansen, 2010). With transitional justice consisting of a new group in power, it is possible that if the new wielders of power were formerly oppressed, they may use their authority disproportionately harm the previous oppressors, which may incite another cycle of violence. The reform of national law can consequently be exclusionary and dangerous.

International law has similar problems to national law in the areas of conception and practice. The Genocide Convention, manifested by human rights lawyer Raphael Lemkin, was designed to prevent the atrocities from the Holocaust from reemerging. As a conception, the Genocide Conventions may be useful, but has yet be used for its desired purpose (Power, 2013).There have been many incidences of what have been argued to be genocides since the Holocaust, including Pol Pot's Khmer Rouge in Cambodia, the Hutus and Tutsis in Rwanda and Burundi, and the Janjaweed and non-Arab population in Darfur, but the international community failed to act on the genocide convention. Moreover, other conventions such as the Universal Declaration for Human Rights, call for rights that would lead to a much more peaceful world if each state ensure all of its citizens were granted a convention's rights. However, states may ratify any international convention, but ratification can be used only symbolically and is then never practiced (Power, 2013). All of these circumstances are a result of the anarchic nature of the international community. If a state has a history of violating human rights, it is very unlikely that they will follow the stipulations of any treaty.

The pursuit of international justice can also prove problematic due to issues of

state sovereignty. While the International Criminal Court has increasingly played a more significant role in transitional justice, states have freedom when it comes to determining who and which cases will actually be sent. The selectivity of International Criminal Court cooperation can be exemplified when leaders of African states have indicted figures to the International Criminal, such as Joseph Kony (leader of the Lord's Resistance Army that operated throughout Uganda) but response was limited when the governments themselves were accused of violating human rights (Forsythe, 2012). When it comes to intervention by United Nations peacekeepers, states also have the authority to deny their entry (Power, 2013). While the Security Council may direct sanctions at a particular state, this is no guarantee that the conflict will cease (Power, 2013).

Strengthening the rule of law has led to some improvements, but a weakness of the rule of law approach is it limited scope as civil society has usually been excluded from the reformative process (Turner, 2013). Teitel (2003) does mention that civil society can begin to get involved in the transitional justice process in Phase III, but neglects to state what their role should be nor what type of relationship they should have a with other actors.

An overall flaw with the previous recommendations is that those who are implementing the policies are often not the ones who had actually been affected by human rights abuses. Although the international community may have more resources in dealing with the problem, it does not mean they have a full understanding of what the problem is. Civil society, those who had been directly affected by former mass violence. are left out of the picture under the assumption that the international community knows what is best for them (Andrieu, 2010). In the case of Chile for instance, Spain may have

had justification to prosecute Pinochet, but this measure neglected work with Chile's civil society. Although there is not going to be a universally accepted opinion among the Chileans of how to handle the Pinochet issue, those who were affected by his actions were minimally involved in the decision making process (Crocker, 1999). Although strengthening the rule of law is necessary in states in which legalism has been traditionally weak, other components are vital to transitional justice and deserve as much attention.

4.2 A Shift from the Rule of Law

Unlike the previous section, there is a school of thought in transitional justice that holds the rule of law at a much lower value. Teitel (2003) acknowledges one central difficulty with the implementation of transitional justice is that transitional democracies are not the same as liberal democracies, but does not address the implications of this claim (Teitel, 2003). The successful incorporation of Phase I and Phase II practices of transitional jusitce (truth commissions, forgiveness, and reconciliation) can only be played out if the conditions are right. It is rare that there is no spillover violence or instability from the former regime. In such an environment, leaders place higher value on regime and state stability, even if it may not be ideal, before drafting a transitional justice blueprint (Turner, 2013).

Catherine Turner (2013) provides insight into the relationship between law and politics through a deconstructive method. Turner (2013) explains transitional justice has evolved into a normative framework and, "central to this evolution has been a resurgence of the idea of international human rights law and belief in the capacity of law to transcend

partisan politics and therefore mediate social change" (Turner 2013, p. 194). The propositions surrounding the rule of law "speaks to values and working practices such as justice, objectivity, certainty, uniformity, universality, rationality, and so on are particularly prized in times of profound social and political transition" (McEvoy, 2007, p. 417).

Turner's (2013) deconstructive analysis criticizes the rule of law response arguing that law does not equal justice. The foundation of transitional justice has been so greatly shaped by the rule of law that it does not allow any room for questioning what justice is (Sokoloff, 2005), which creates an environment attempting to hide violence rather than solving such forms of conflict (Turner, 2013). Truth and reconciliation commission and trials, tenets of rule of law measures, can become more problematic than they are useful. Truth and reconciliation commissions have been viewed as a mechanism that can parsimoniously allow for a state progress towards stable rule, but truth and reconciliation commissions do not take into account the state structure and ideology that may have led to the original violence, making a state prone to reproducing violence (Derrida, 2003). The rigid structures of truth and reconciliation commissions also only allow for opinions that fall into what is accepted by their respective commission, and differing views or methods of attaining the truth are dismissed (Turner, 2013).

Turner continues to argue that truth commissions can become an "arbitrary standard" (Turner, 2013 p. 207) that does not promote community engagement, and only calls for questions to be applied to a weak-standing caliber (Turner, 2013). Justice is more complicated than mere application to law and is a transformative process going beyond politics and the judiciary (Turner, 2013). Kieran McEvoy (2007) also finds fault

in the concept of legalism. He identifies the term "magical legalism," originally

conceived by Stan Cohen, which is used by governments to deny accusations under the

reasoning that what they are being accused of is illegal- either because of national laws or

ratification of an international convention, such as the Convention Against Torture- and

thus could not happen (McEvoy, 2007). "Magical legalism" embodies the disconnect

between the reality of the transitional society and the "law talk" being used by those in

power (McEvoy, 2007). Law may be put in place directed at areas commonly seen as

beneficial, like equality under the law and due process, but the institutions that carry out

the laws (such as courts and law enforcement) may be absent or driven by corrupt

motives. Another criticism of the rule of law is that international law may be overly

retributive (McEvoy, 2007). Criminals should be held accountable, but their prosecution

must done with the objective of justice and sustainable peace kept in mind. The problems

associated with prosecution can be observed in the transitional justice processes in

Eastern Europe after the Cold War that were criticized by scholars for not being

retributive and living up to the Rome Statute (McEvoy, 2007). Rather than looking at the

reality of the situation, the rule of law, however idealistic it may be, has traditionally

taken priority with transitional justice operations.

4.3 Towards a Normative Framework

David Crocker (1999) outlines a normative framework consisting of eight

elements that can be used as goals societies should strive for or could be used to evaluate

the policies of transitional justice. Crocker's (1999) framework is based upon previous

cases of transitional justice, and his eight part framework provides a decent

understanding of what should occur in the transitional justice process. Although many of

Crocker's (1999) propositions fall in line with other theoretical framework, he is

discussed exclusively in this section as each of his propositions build upon each other

(Crocker, 1999).

Crocker's (1999) framework can be broken down into the following components.

The first component is seeking truth, which should be used to identify former perpetrators

and the moral heroes to emphasize accountability (Crocker 1999). The second

component is providing a public platform for victims, which Crocker (1999) argues, "is

essential, for secrecy about human rights abuses, enforced through violence and

intimidation, was one of the conditions that made possible extensive campaigns of terror"

(Crocker 1999, p. 52). Third is establishing accountability and punishment, raising the

question of who should be tried and who should be pardoned (Crocker, 1999). Crocker

(1999) states a definitive theory is currently lacking in determining how these questions

should be answered, but previous work has made such determinations by equating a

perpetrator's knowledge and to what extent the perpetrators were able to not commit to

following orders. Fourth is strengthening the rule of law, relating to due process and

impartiality in order to prevent victor's justice, meaning that the perpetrators of abuses do

not receive the justice they arguable deserve (Crocker, 1999). Fifth is compensating

victims, which can consist of monetary reparations and access to services, but can also

consist of symbolic representation, such as building memorials and museums (Crocker,

1999). Sixth is striving towards institutional reform and long term development by

building basic institutions including, "the judiciary, police, military, land tenure system,

tax system, and the structure of economic opportunities" (Crocker, 1999, p. 59).

Furthermore, some cultural characterizations, like racism, must be addressed and move towards eradication (Crocker, 1999). Seventh is striving for reconciliation to allow for a shared a healing process (Crocker 1999). Eighth is allowing for public deliberation, consisting of building room for establishing testimony for victims and confession for perpetrators, though caution must be exercised so former hostilities are not refueled (Crocker, 1999).

Crocker (1999) contextualizes his framework by explaining that it is dependent upon local conditions such as whether or not a state has a history of democratic institutions. Additionally, while the fulfillment of one goal may lead to the attainment of the others, a state may not necessarily be ready for full implementation of the entire framework and may have to wait for local conditions to improve (Crocker, 1999).

While Crocker (1999) does ask many important questions that must be considered during the transitional justice process, he does not explain who should be the one answering the questions or asking them, which again reinforces the lack of attention paid to the potential role of civil society in the peace process. Crocker (1999) poses the question of whether it is morally acceptable for the international community to prosecute a crime that was nationally legal in the state in which the action occured or if it is one that the government pardons; however, the speculating over the effectiveness of international prosecution or national pardon is the wrong method of questioning. Rather than having prosecutor issues being handled by the international community, they should be left to be questioned domestically.

As will later be argued, non-governmental organizations are often more in touch with the local people who were affected by former episodes of mass violence than state

leaders. are and especially more in tune than international organizations. Civil society along with non-governmental organizations should be the ones determining if former perpetrators should be pardoned or prosecuted working in conjunction with state leaders and regional governments rather than providing the international community exclusive discretion over transitional justice policies. The pursuit of transitional justice must be done on a cooperative basis, with a state's civil society and a regional government holding state actor (either of the former or transitional regime), in check to ensure that former human rights abuses do not resurface. If the state is left to these decisions on their own (as will be analyzed in Chapter Two), they will likely revert to former behaviors.

4.4 The Role of Forgiveness

Another component of transitional justice that is often underplayed is the role of forgiveness. Forgiveness is a product of theological and philosophical reasoning (Philpott, 2006), but Nicholas Wolterstorff (2006) argues there is room for the place of forgiveness in the role of the state. Wolterstorff (2006) defines forgiveness as "the foregoing of one's right to retributive justice, in some way and to some degree" (Wolterstorff, 2006, p. 90), which will be the definition used for the remainder of this section. Wolterstorff's (2006) work provides a theoretical framework for the implications of state forgiveness based upon retributive rights. If a state and the victim(s) in a state both agree to forgive a perpetrator, no issues arise (Wolterstorff, 2006). However, if the state agrees with a policy of forgiveness and the victims are opposed to forgiving the perpetrator, and the state follows through with forgiveness, victims' rights to retribution are usurped, breaking the trust citizens have on the state (Wolterstorff, 2006). Despite,

the assertion that granting forgiveness may create a disturbance between the state and the victims Wolterstorff (2006) asserts that forgiveness is still worth the pursuit advocating that

> the only possible way, to move forward from a period of deep injustice to a situation in which the member or society are sufficiently reconciled to make possible a just and stable polity is for the state to forgive a good many of the perpetrators of injustice. (Wolterstorff, 2006 p. 110)

Wolterstorff's (2006) assertion however appears to be arbitrarily made. While Wolterstorff (2006) claims that forgiveness can be a useful tool in moving towards a sustainable peace and harmonious society, he neglects to explain how forgiveness can actually be detrimental to a transitional society. Following previous historical cases, societies in transition are characterized by former large scale violence as a result of mass killings, civil war, and forced disappearances- all of which can traumatize not only the victims directly, but also the victims' families and communities. Because of the legacy of violence, those affected typically seek some form of closure either through reparation or witnessing perpetrator prosecution. Thus, policies of forgiveness implemented by the state can be incongruent with civil society, making the people feel the state is not representative of them and may incite further conflict. For Wolterstorff, forgiveness of perpetrators will allow the state to focus on a forward-looking policy. Although looking forward is a necessary approach in transitional justice, if done prematurely, it may reproduce former tensions. Forgiveness and a forward looking strategy can only be implemented effectively if civil society and the state are in agreement.

4.5 The Role of Civil Society in Transitional Justice

As the previous scholars reveal, there is a strong acceptance of a traditional top-down approach centered on the rule of law with state and international leaders being the key players in the transitional justice process. More recently however, a school of thought has formed advocating for an alternative, mixed-model approach in which civil society, and non-governmental organizations play the dominant role in executing transitional justice (Backer, 2003; Andrieu, 2010; McEvoy, 2007; Lundy & McGovern, 2008).

The reason for advocating for a mixed-model approach incorporating civil is primarily driven by perceived failures from the traditional, top-down approach. What is often dismissed when using the top-down approach is that transitional, post-conflict societies have weak central states usually lacking the ability of creating a new national narrative (Andrieu, 2010). The majority of states that are going through, or, have experienced, transitional justice are not homogenous, and a national approach- be it through truth commissions or pardons- rarely adapts to the diversity and complexity of a state's people (Andrieu, 2010). If the goal of transitional justice is to move a state towards democracy and building democratic institutions, then a public sphere of an engaged civil society is needed for the normative framework (Crocker, 1999). However, a bottom-up approach driven at the local level may also be problematic. Unity may be achieved within groups, but may not necessarily be achieved among groups, even if transitional justice transpires from the local level of a state. Therefore, the national leaders should work in conjunction with local leaders to develop comprehensive policies that will benefit individual groups but will still congruently benefit the state as a whole. Although some policies may be exclusive to meet the needs of groups there must be a

mechanism/institution in place to ensure the products of transitional justice do not inadvertently create or amplify conflict. Thus, an actor above the state level is needed to oversee, but not monopolize, the transitional justice process to ensure the undergoing measures can be effectively adapted at the state and local levels.

Additionally, allowing for public deliberation will move a state closer toward reconciliation. While unity may not be achieved, public deliberation can at least set the stage for dialogue, which can help facilitate building trust, which can, in turn, allow for institutional operation. (Andrieu, 2010) Although public deliberation may not create an immediate solution as rule of law proponents would advocate, it does ensure that voices are heard and the issues are context specific to local dynamics (Andrieu, 2010; Lundy & McGovern, 2008). Civil society should not be regarded as the end all solution as civil societies can establish exclusionary or other problematic policies that may be overly retributive and may amplify previous conflict. Having a transitional justice process receptive to local dynamics does not advocate for civil society acting entirely on its own though: a cooperative relationship should be in place between a regional governing body, state government, and civil society as the government has resources civil society lacks, but civil society can pressure the government into pursuing certain practices to lead to improved effectiveness in transitional justice, and a regional government can provide accountability and oversight during the transition to guarantee the cooperation and satisfaction of state and local actors.

Backer (2003) further argues for a bottom-up approach by identifying six key roles non-governmental organizations and civic associations can likely perform better than actors which consist of the following: data collection and monitoring; representation

and advocacy; collaboration and consultation with local populations; intervention; acknowledgement of past abuses and compensation; being a parallel source of authority that can be used to direct local populations; and providing research and education. Backer's (2003) description of the utility of non-governmental organizations plays into Andrieu's (2010) notion that local populations often have a distrust of the government, but may be more receptive to non-governmental actors.

Despite the potential role civil society can play in the transitional justice process, it has yet to receive significant scholarly attention. Lundy & McGovern (2008) did present a case study of how the Ardoyne Commemoration Project in Northern Ireland illustrated an effective bottom-up truth telling process for sustainable peace. However, there are other cases of transitional justice that have incorporated civil society, but have not been fully studied. Backer (2003) acknowledges that his proposed framework has yet to be tested, but can be done through large *n* analysis or in depth country case studies. Kenya, and South Africa all have been intensely studied for their former and/or ongoing practices of transitional justice, but they have yet to be evaluated and analyzed for the role their civil society has played.

As demonstrated through the critical review of the theoretical framework of transitional justice, there are a myriad of scholarly views on the practice of transitional justice. However, there are several areas of transitional justice that have yet to be discussed on a scholarly level. First, transitional justice has not addressed the potential contribution a regional government could provide in cases of transitional justice. Although, the role of the international community is utilized in the theoretical framework of several scholars (Teitel, 2003; Derrida, 1992; McEvoy, 2007), it is unclear who is

specifically considered to be members of the international community. Furthermore, the present literature has identified several problem with the use of the international community in the transitional justice process, including the overly retributive nature of international prosecution (McEvoy, 2007), the noncompliance of states to international law (McEvoy, 2007), and the general incongruity between the international community and the state undergoing transition (Turner, 2013). However, the problems of noncompliance to international law and the disconnect between the international community and a state are solvable, but have not yet been discussed in transitional justice literature. As Backer (2003), Lundy and McGovern (2008), Andrieu (2010), and McGovern (2007) assert, civil society is capable of greatly contributing to the transitional justice process, but a framework addressing the specific steps civil society should take during transitional justice is currently lacking. A final hole within transitional justice literature is a lack of analysis on pursuing transitional on a regional basis.

Although Backer (2003) developed a theoretical framework for the partnership between state leaders and civil society, he did not address the importance of having extra-state oversight and assistance during transitional justice proceedings. Keeping in mind the issues surrounding the involvement of the international community and civil society into the transitional justice process, this thesis develops a theoretical framework on how regional governments, state actors, and civil society can cooperate to attain a successful transition, advancing an area currently lacking in transitional justice scholarship. Moreover, the theoretical framework of this thesis is prescribed on a regional basis (Africa) to establish a new strategy for the execution of transitional justice.

Chapter Two builds a theoretical framework that fills the current lacuna in

transitional justice literature on the relationship among regional governments, state actors, and civil society in the transitional justice process. Additionally, the framework is designed specifically for cases of transitional justice in Africa. The construction of the theoretical framework for transitional justice is designed to further the field of transitional justice, but to also answer the research question of this thesis, can transitional justice be used to prevent African states plagued with intrastate violence from erupting in civil wars? The theoretical framework developed in Chapter Two will then be applied to the cases studies of this thesis (South Africa and Kenya) as a tool for evaluating transitional justice and answering the research question.

Chapter Two: Transitional Justice: A Framework for Analysis

While there has been plenty written about transitional justice being implemented in states that have undergone civil wars, transitional justice literature has yet to discuss how transitional justice can be a mechanism for states that have experienced mass violence and human rights abuses- but whose conflict/violence did not result in a civil war- to prevent the complete toppling of the government and an escalation to full scale civil war. Scholars have addressed the importance of using a forward looking strategy (an approach that is oriented towards seeing how a society can progress toward sustainable peace) (Teitel, 2003; Crocker, 1999; Backer, 2003). However, scholarship has been limited in addressing the volatile situation of states that have experienced, or are experiencing mass intrastate conflict, and how the aftermath of intrastate conflict .can produce civil war and the complete dismantling of government. Consequently, the question is how can transitional justice be used to prevent African transitional societies from erupting in civil wars? This thesis argues that a mixed model implementation of transitional justice in which civil society (individuals, groups, and non-governmental organizations) partners with regional governments/officials, such as the African Union, to cooperatively build institutions and promote democratic involvement with the state government, is the most effective strategy to prevent African states plagued with intrastate violence from ensuing civil war. This chapter develops a theoretical framework for transitional justice, addressing the conditions and possibilities which African states can face.

A mixed model approach in which civil society (individuals, groups, and

organizations independent from the government) partners with regional governments/officials, such as the African Union, to cooperatively build institutions and promote democratic involvement with the state government is the most effective form of implementing transitional justice in Africa.

By following a mixed model approach for transitional justice, a theoretical framework can be developed that can evaluate former cases of transitional justice in Africa and additionally direct future cases of transitional justice in Africa. The prescribed theoretical framework is narrowed to Africa for several reasons. First, the theoretical framework is designed for the scope of this thesis. Although the apartheid in South Africa and the 2007/2008 post-election violence in Kenya were different in terms of their direct causes and time periods, both cases share a history of British colonialism that left deeply embedded inequalities with each country's respective African populations (with South Africa's disparity being predicated racially and Kenya's inequality being predicated upon ethnicity). Additionally, the effects of state violence were not isolated to the states in which they occurred as Lesotho, a country landlocked within South Africa, supported apartheid refugees (Ioydu, n.d.) and Uganda housed refugees from Kenya after the 2007/2008 post-election (Iyodu, n.d.).

Another reason for narrowing the theoretical framework to Africa is that there is a growing resistance within the African Union towards the International Criminal Court as African leaders feel they are being racially targeted. ("UN rejects Africa bid to halt Kenya leaders' ICC trials," 2013). Because of the dispute with the International Criminal Court, the transitional justice approach for cases in Africa is unique and worthy of its own model. The prescribed model, as demonstrated below, is flexible to reflect each

state's dynamic, but is directed exclusively for cases of transitional justice in Africa. The following framework outlines the possible situations with which transitional societies are faced.

1. Transitional Justice Contexts

While a myriad of nominal categories can be produced to classify states' contexts for pursuing transitional justice, the proposed theoretical framework for this thesis identifies two contexts that prompt the undertaking of transitional justice. In scenario one, the violence and political climate is intensified to such an extent that the government is viewed as illegitimate and civil war follows with the intention of complete governmental reform. Unfortunately, scenario two has been the case for many African states (Burundi, Sierra Leone, Uganda, Central African Republic, Liberia, Rwanda, and the Democratic Republic of the Congo) (Hansen, 2010).

In scenario two, however, a state has institutional weakness that produces intrastate violence, but the violence is the result of a power struggle and is not targeted at completely delegitimizing the government, and does not result in civil war. Scenarion two is relevant to the thesis question of can transitional justice be used to prevent African states afflicted with intrastate violence from erupting in civil wars? Corresponding to the scope of this thesis, using a mixed model approach of transitional justice as a mechanism to prevent civil war, the prescribed theoretical framework will only be applied to scenario two, in which a state experiences mass intrastate violence, but their conflict does not result in civil war.

2. The Time Factor

Another factor that must be taken into consideration for states undergoing the transitional justice process is time. Time is another component of transitional justice that has received minimal scholarly attention, but the amount of time passed from when crimes or human rights abuses were committed is critical, as the time factors affects both the feasibility of implementing mechanisms of transitional justice as well as the reconciliation of victims of former violence. The theoretical framework of this chapter identifies and evaluates three time periods when states begin to transform, which are categorized into the following: immediately transpiring after cessation of violence; occurring after violence has been quelled but also after enough time has been allotted so the previous conflict does not dominate daily life on an aggregate level, but has not been so substantial that memories and sentiments associated with the former conflict have faded within the state; and, an excessive amount of time in which it is perceived by civil society and international or regional actors/governing bodies, that the tactics being employed by the state are not motivated by maintaining civil order, but are instead being used as a stalling technique, so the state can continue practices of impunity.

The categorization of time periods is nominally measured, and while it may at first appear to be more logical to use a ratio scale for time, a nominal scale is used because allotted time in the context of transitional societies must be flexible. While one can examine the amount of time it has taken previous cases of transitional justice to play out, it is essential to have time reflect the dynamic of the state, so the amount of time elapsed in previous cases of transitional justice should only serve as a general guidepost. For this thesis, Rwanda's timeline can be used for directing the timing of transitional

justice, but should not be exactly mirrored to the Rwandan transitional justice timeline.

Rwanda is worthy of being modeled for the construction of a guidepost for the timing of

transitional justice because Rwanda had the highest magnitude of violence seen in

contemporary history with an estimated 800,000 to 1,000,000 killed over a period of

roughly 100 days (Hansen, 2010). Additionally, the Rwanda case highlights the political

reality of how time consuming the transitional justice process can be. Because the

Rwandan case does have a higher magnitude of violence than other African states, the

proposed theoretical framework in this thesis can follow a slightly shorter time period

than Rwanda. With the importance of the time factor in mind, this section further

discusses how time can affect the transitional justice process.

Solutions implemented immediately after violence has transpired, may be

satisfying to victims, but have the potential to be overly retributive. In Rwanda, the

International Criminal Tribunal for Rwanda was established the same year as the

Rwandan genocide, but did not begin trials until three years later (Hansen, 2010).

Moreover, Rwanda's localized *gacaca* courts, were not established until eleven years

after the Rwandan Genocide (Hansen, 2010). Following the average time it took to

establish the International Criminal Tribunal for Rwanda and the *gacaca* courts,

immediacy can generally be considered any point within seven years of state violence. If

former perpetrators are not given fair proceedings and treatment, those who are of the

same demographics as the perpetrators can view the new regime as corrupt or barbaric

and violently turn on the ruling party in outrage of the people of the same group. When

applied to cases in Africa, where emphasis is highly placed on one's ethnic or racial

identity, overly retributive policies to perpetrators can intensify ethnic or racial tensions.

Moreover, another drawback from quickly implementing a transitional justice process is that it may be more focused on short term solutions. Short term solutions are important; however, if short term solutions are not supplemented with long term solutions that address how a government's structure and institutions either created- or allowed inequities and human rights abuses to continue- the state may become plagued with additional mass violence.

Although it is necessary for time to pass so the national sentiments are not overly retributive to perpetrators, allowing too much time to pass is also problematic. Following Rwanda as an example, the *gacaca* courts (established eleven years after the Rwandan genocide) were used to accelerate trials due to growing national frustration ("The Justice and Reconciliation Process in Rwanda," 2104). Thus, if over ten years has passed and no form of transitional justice has been implemented or discussed, it will appear that the state operates with a culture of impunity in which mass violence is tolerated. However, if the state has communicated and shown that a mechanism for transitional justice is being established, grievances can be reduced as long as the state follows through with their proposals. Yet if over ten years has passed and no action has been taken, the state will be consequently viewed as sympathizers of the former regime, creating a distrust and disconnect between civil society and the state. Following the scenario in which no action has occurred in over ten years, victims may come to the realization that because former perpetrators were not tried for their violations, victims can retaliate, taking retribution into their own hands without fear of prosecution and continuing a cycle of violence.

The ideal time period for the implementation of transitional justice should thus occur in between what would be considered to be immediate action and the likelihood

that there will be no state action. Pursuing the implementation of transitional justice, generally within seven to ten years (following the Rwandan model), after intense feelings of retribution have been quelled, but there is still faith and the desire to pursue transitional justice is the ideal option. Although not without flaws, waiting a moderate amount of time (as argued earlier in this section) is effective for several reasons. By waiting for a period of at least seven years after the violence has ended to execute mechanisms of transitional justice allows the gravity of the previous situation to fade and for focus to be placed on the needs of the victims, but in a manner which provides closure to victims but does not outrage former perpetrators, or those who associate with former perpetrators. Additionally, civil society will have already moved slightly past the former violence, demonstrating that progress can be made, and thus orienting civil society to seek forward looking solutions, those that are geared toward reforming society from its former culture of violence into sustainable peace.

A drawback of waiting a moderate amount of time is that citizens is that anxious citizens of the state may make the assertion that because immediate changes have not been made, the new regime is politically stalling, creating a loathing of the government by some citizens. However, the disappointment some may face from not seeing immediate solutions can be minimized from being fully transparent during transitional justice proceedings, which will be discussed in later in this section. Even if some support is lost among civil society members for not taking immediate action, the benefit of waiting a moderate amount of time before applying transitional justice outweighs the revert of violence that can accompany immediate solutions.

3. Actors in the Transitional Justice Process

Following the prescribed mixed model approach of this thesis, there are three groups of actors in the transitional justice process: state leaders (executive members of government, ministers, cabinet officials, parliamentarians, etc.); civil society (individuals, groups, local/community leaders, and organizations independent from the government); and, regional actors (members of the African Union, and/or current or former leaders of other African states). The attitudes and actions of each of the three main actors may vary from case to case, but the theoretical framework in this thesis addresses the relationships and outcomes that can transpire among state actors, regional actors, and civil society.

Ultimately, for transitional justice to be effective, state leaders must be responsive to the demands of regional actors and civil society, to ensure that perpetrators are held accountable for their actions and that their people achieve reconciliation and are no longer in a system prone to violent victimization. While some state actors, may be open to cooperating regionally and domestically to move toward a sustainable peace, the state will not always cooperate. Although a new regime may be empowered, the regime may follow the same ideology and practices as their predecessors and avoid pursuing any form of transitional justice. The first category is a weak, or uncooperative, state: one that will avoid bringing former perpetrators to justice and will ignore the plight of their civil society and the demands of regional actors. The second category is a strong state, which encourages the application of transitional justice in order to transform its governance for the benefit of civil society.

Similar to state actors, there are two categories for civil societies in transition. The

first category is the strong, activist civil society who will energetically participate in the transitional justice process, providing information about the history and nature of human rights abuses in the state, voicing possible solutions, and representing the views of their constituents or encouraging their constituents to actively participate in the process. The second categorization is a weak civil society that is disconnected from its counterparts and the state. If a weak civil society does have the resources to aid in the transitional justice process, it does not do so out of inefficacy or fear of state retaliation.

As mentioned in the critical review of transitional justice, Backer (2003) discusses the potential contributions civil society can provide to the transitional justice process. Backer (2003) develops a theoretical framework outlining how a government-civil society relationship can direct cases of transitional justice. However, a limitation of Backer's framework, is neglecting to establish a mechanism to mediate cases of conflict or standstill between civil society and state actors. This thesis builds upon Backer's work by including a regional governing unit to monitor and assist civil society and state actors during the implementation of transitional justice.

While traditional cases of transitional justice may rely on international actors like the United Nations and the International Criminal Court, African states have had a tumultuous relationship with the two institutions. As a substitute for the use of international actors, the African Union and/or other African leaders, can be used to monitor and assist with cases of transitional justice in African states. The African Union is hypothesized to be more effective and credible than the United Nations and the International Criminal Court because of their shared African identity with African states undergoing transition. Table 1 on page 60 below, describes the possible relationships

states and civil society can have, while Table 2 on page 63, describes the possible

situations each combination state-civil society combination can encounter. Table 2 also

explains the role the African Union should take in response to the dynamic between a

case's state and civil society. In the event that the state is resistant to pursuing

transitional justice, the African Union is to put pressure on the state, threatening sanctions

and International Criminal Court involvement if the state does not cooperate.

Additionally, the African Union is to work with civil society so they have the opportunity

to participate in the transitional justice process and understand the purpose and direction

of transitional justice

Table 1: Types of state-civil society partnerships in the African Union

	Type of State	
Type of Civil Society	Strong state; strong civil society	Weak state; strong civil society
	Strong state; weak civil society	Weak state; weak civil society

Based off Table 1 (pictured above), the most ideal partnership is one in which the

state and civil society are both strong. However, even if both the state and civil society

are strong, oversight is still needed by a regional authority such as the African Union.

Openness and desire to pursue transition does not mean that the state or the civil society

has the capacity to undergo a transformation. In each of the other scenarios (weak state

with strong civil society, weak state with weak civil society, and strong state with weak civil society) assistance from a regional government or actors is needed, which, for this thesis, is the African Union due to its historical involvement and perception among African states. The African Union can partner with civil society to ensure that its needs are met as seen in Table 2 on page 63. The partnership between the African Union and civil society is the necessary mechanism to answer the thesis question of how transitional justice be used to prevent African transitional societies from erupting in civil wars?

Once the dynamic has been established among state actors, regional actors, and civil society, the direction of transitional justice must then be constructed. In order to prevent the outbreak of civil war, four conditions must be met: (1) states, civil society, and regional actors equally contribute their knowledge of the situation and reach a consensus on policy initiatives and transitional justice mechanisms. Following past cases of transitional justice and building upon the prescribed theoretical framework, if conflict does arise, it is typically between state actors and civil society leaders. In the event this happens, the regional government stipulates terms of negotiations for the state, and if the state does not agree, sanctions are to be imposed. (2) During transition, the three actors must operate with full transparency to keep the citizens knowledgeable of the process and provide them the opportunity to give feedback and suggestions on how to unfold the transition. Additionally, transparency must be used to avoid confrontation with the United Nations or the International Court. (3) Immediately cease any ongoing state violence. If one group is still being afflicted with violence they will be unable to focus on the transitional justice process. (4) Regional governments, state actors, and civil society leaders must examine the institutional weaknesses that caused intrastate violence to

transpire and work towards institutional reform to prevent a return to violence. In this context, institutions are not exclusively tangible government bodies. Institutions can include cultures of violence, and ethnic division, competition, and conflict.

Having proposed a theoretical framework for preventing states afflicted with intrastate violence from erupting in civil war, the following two chapters of this thesis will utilize two in-depth case studies on Kenya and South Africa, to test the prescribed mixed model approach for transitional justice.

Table 2:

Theoretical Framework for a Mixed Model Approach for Transitional Justice in the

African Union

Type of state and type of civil society	Interactions between state and civil society	Involvement of African Union	Future direction of process
• Strong state • Activist civil society	State and civil society cooperate to assess political climate and determine the immediate measures to be taken.	African Union assists with public outreach and surveys the needs of civil society.	Survey information is collected and public discussions are held on what measures to implement, such as the pursuit of justice versus truth.
• Weak state • Weak civil society	State resists the pursuit of transitional justice while civil society remains quiet.	African Union talks to civil society leaders to assess their views on state actions and commits to representing civil society's views and fully and regularly disclose updates	If civil society feels the environment is safe, they become active actors. If civil society still feels threatened, they continue to be represented by the African Union.
• Strong state • Weak civil society	State willing to move forward, but civil society is timid to take action.	African Union discusses with the state government the benefit of incorporating civil society. African Union reaches out to the public.	If state does not cooperate, economic sanctions or International Criminal Court Indictment is threatened.
• Weak state • Strong civil society	Civil society actively pressures state government to enact policy changes, but states resist	African Union collects information on previous or ongoing abuses from Civil Society and publicly makes terms for state action	If the state cooperates, African Union and civil society continue to monitor the state and explains international action will be taken if state ceases cooperation.

Chapter Three: The Case of South Africa

This chapter will analyze South Africa's case of transitional justice in which South Africa's apartheid regime, the National Party, ceded power, and through negotiations with the African National Congress (a political party that was formed in opposition to the apartheid) allowed for the first non-racial elections and the end of apartheid in 1994. The case of South Africa is commendable in several areas as it resulted in a peaceful transfer of power, and South Africa's Truth, Justice, and Reconciliation Commission allowed numerous South Africans the opportunity to achieve reconciliation. However, a weakness of South Africa's case of transitional justice is its inability to address and reform the deeply rooted racial inequalities and culture of violence within South African society. To fully comprehend the lessons from South Africa's case, a historical overview is necessary to demonstrate why South Africa underwent the process of transitional justice. Racial stratification within South Africa originated from British colonialism and is deeply rooted in South Africa's history. Although South Africa's historical background does not directly correspond to the argument of this thesis, it provides the background information to understand South Africa's ongoing and complex legacy of apartheid.

In regard to theoretical framework of this thesis, South Africa presents a case in which there was a strong state (between the National Party and the African National Congress) and a weak civil society. South Africa's civil society during the transition from apartheid to democracy was not weak in the sense that it was inactive (there were many non-governmental organizations who assisted state leaders during the process), but rather

South Africa's case transition was subjected to the terms and negotiations between the National Party and the African National Congress. With the move towards democracy, South Africa was in a pivotal point as the black South Africans, who had been chronically oppressed by the whites, could have reciprocated oppression to the National Party and white South Africans. However, South Africa's employment of transitional justice prevented an escalation of violence that could have resulted in a civil war.

The use of transitional justice to prevent the escalation of violence in South Africa supports this thesis. However, South Africa's failure to reform the institutions that created inequality has placed South Africa in a volatile position. Although there is no longer formal apartheid rule, the racial inequalities and culture of violence within South Africa are prevalent today. Overall, South Africa presents a case, in relation to the theoretical framework of this thesis, which began in the right direction towards sustainable peace, as South Africa decided to implement the transitional justice process. However, its neglect to incorporate civil society and regional actors into the transitional justice process, as well as its failing to address the institutional weakness within South Africa, has prevented a complete transition, leaving South Africa afflicted with violence.

1. Historical Background

The founding of South Africa came from a Dutch group in 1652 under the leadership of Jan Van Riebeeck, which was originally designed to only be a trading post (Ross, 1999). To solidify the establishment of the colony, two sociolegal classes were created, consisting of the free immigrants from Europe and slaves from the east African coast, Indonesia, India, and Madagascar (Ross, 1999). Following the appropriation of

land and the creation of class, the Dutch colony was created, with Cape Town becoming the central authority of the area (Ross, 1999).

British imperialism expanded to the Cape Colony of South Africa under the notion of British hegemony and global influence. The British surmounted the Cape Colony in 1795, but it was quickly returned to the Dutch; however, the British reconquered the colony in 1806 (Ross, 1999). British leadership still continued the system of Roman-Dutch law. Corresponding to the policies in other British colonies, the slave trade was prohibited in 1808 (Thompson, 1995). British colonialism was accompanied with a ubiquity of Christian missionaries who provided the formerly exploited Khoikhoi people with a divinely driven Christian worldview (Ross, 1999). The enactment of Ordinance 50 in 1828 disbanded the legal impairments of colored people, and in 1834, formal slavery was abolished as was British slavery in the Caribbean.[2]

The Xhosa people, one of the native tribes in South Africa, fought several wars in the first half of the 19th century with the British (Thompson, 1995). Although the Xhosa outnumbered the British, the Xhosa were no match for technological weapons of the British, and the British ultimately prevailed and drove the Xhosa out of the Eastern Frontier to be settled near the Khoi, creating ethnic tension (Ross, 1999). The rumor of the creation of a parliamentary system, united the Khoi and the Xhosa, out of fear that slavery would return (Ross, 1999). War broke out in 1850 between the British and the now united Xhosa and Khoi, in an attempt to resist colonial rule (Ross, 1999). The British

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[2] The abolishment of legal slavery did guarantee full liberation though. Many slaves were forced to complete apprenticeships prior to complete freedom. Additionally, former slaves were left with few employment opportunities and usually remained working on the farms they formerly served. While they were paid, legislation was created to disproportionately benefit former slave employers (Ross, 1999).

eventually conquered Xhosaland, destroying crops until the Khosa surrendered (Ross, 1999).

Although there were divisions within the White population of the region, the Whites were united racially. Together whites embraced ethnocentric ideology, under the premise that as Christians they were more civilized and had the authority control the land and labor of South Africa (Thompson, 1995). Despite differences in language and occupation, the Boers and the British worked together in their conquest of the native black Africans (Thompson, 1995). The cleavages within black African societies, prevented the unification of a defensive front against the Whites, ultimately resulting in their conquest (Ross, 1999).

The discovery of gold in Kimberley, South Africa and diamonds in Transvaal (the area north of Vaal river near Johannesburg) and the mining industry associated with the resources, additionally laid the foundation for racial stratification between the Whites and Africans (Thompson, 1995). Whites worked supervisory roles, generated high income, and had a high degree of employment mobility, whereas the blacks received significantly lower wages and were subjected to living in meager compounds for black African males (Thompson, 1995). However, there was also division within racial categories as Afrikaners (white people of German and Dutch ancestry who spoke Afrikaans) who worked in rural areas in comparison to English speaking immigrant who worked in the town (Thompson, 1995). Black South Africans were also heterogeneous. What Whites categorized as "Coloureds" consisted of slaves from other areas of Africa, but also the island nations of Madagascar and Indonesia (Thompson, 1995).

The Natal government, a colony in the southern portion of South Africa,

imported laborers from India until the end of the 19th century who eventually

outnumbered the Whites. The South African War, between the British and the Boers

(Dutch farmers), resuled in the conquering of the Transvaal and Limpopo republics,

solidifying South Africa as a federal state of the British empire (Thompson, 1995).

Despite the inclusive constitution drafted by the British in the Cape Colony, the British

maintained the Boer's racial organization of black subordination, preventing blacks from

voting in parliamentary elections (Thompson, 1995). In 1910, the Cape Colony, Natal,

the Transvaal, and Orange Free State united as the Union of South Africa (Ross, 1999).

The unification of the colonies was characterized and maintained by the ascendancy of

White Governance (Thompson, 1995).

The political climate at the end of the 19th century prompted the British, Boers,

and the rulers of the Natal Colony to adopt racially exclusive practices against the black

Africans.[3] In October 1908, a delegation comprised of representatives of Natal, the

Orange River Colony, the Transvaal, and the Cape Colony met to draft a constitution for

a South African union (Ross, 1999). Agreement was quickly found, and in May of 1909,

an amended constitution was approved by the four colonies. The constitution establishing

the Union of South contained several provisions that perpetuated racial politics of

contemporary South Africa. The government was modeled after Great Britain in which:

the executive was responsible to a majority in the lower house of Parliament,

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[3] The outnumbering of blacks in the Natal colony produced a state of uncertainty among whites in Natal over their state capacity to control Africans. Additionally, Whites in other states feared Natal incapacity would have a spillover rebellion into their own regions. The issue of black rebellion in Natal attracted Whites to the option of South African Unification. For the British, a federation of South Africa aligned with the mission of British imperialism and was rooted in former proposed policies in the 1870s. Conversely to the reasoning of the British, the Boers hoped South African unification would weaken imperial control and solve trade disputes. (Thompson, 1995)

named the House of Assembly; the Senate, the upper house, was indirectly elected and weaker in several respects; and there was no bill of rights. In addition with two exceptions to be noted, laws amending the constitution could be enacted in the same way as other laws-by simple majorities in both houses of parliament. The judiciary thus had scarcely any scope for testing the validity of acts of parliament. That institutional system of winner take all, devoid of checks on the legal competence of a majority party was to have momentous consequences. (Thompson, 1995, p. 150)

The four colonies also had differing policies on voting rights for black Africans. Transvaal and the Orange Free State were the most restrictive as voting was exclusive to whites (Thompson, 1995). In the Natal colony a small population of blacks, coloureds, and Indian laborers were allowed to vote (Thompson, 1995). The Cape Colony continued its inclusive policy of allowing blacks to vote (as long as they met literacy and monetary standards), but membership to Parliament was prohibited (Thompson, 1995).

Two final provisions of the constitution significantly shaped South African history. Judicial commissions were to be established to separate regions of the country into electoral areas for the voting of the lower house of parliament that contained equal numbers of voters (Ross, 1999). Finally, English and Dutch were declared South Africa's official languages (Thompson, 1995). On May 31, 1910, Louis Botha began serving as prime minister of South Africa, a state in which blacks outnumbered whites roughly four to one, setting the political tone of South Africa for the remainder of the 20th century (Thompson, 1995).

The South Africa Native National Congress, a group driven to eradicate racial segregation and the prohibition of blacks in Congress, was founded in 1912 (Ross, 1999). The Native's Land Act of 1913 was one of the most significant pieces of legislation that contributed to the future apartheid structure. The Native's Land Act decreed territorial separation between the Whites and blacks (natives), restricted black ownership of land outside the designated black region (approximately 7% of South Africa) and prohibited share-cropping with White farmers (Truth and Reconciliation Commission, 1998). Moreover, the act resulted in the implementation of the forced migration of Africans, resulting in hundreds of deaths. Black Africans were mainly opposed to the act's provisions that prohibited them from acquiring more land even if black Africanshad the money. Moreover, Whites could remove black Africans from the land on which they had been living a longer period of time than the Whites (Muller, 1981).

Finally, the Mines and Works Amendment Act of 1926 followed the former colonial restrictions of employment on the basis of color. The Mines and Works Amendment act prohibited certificates of competency (licenses for mining operations) for machinists, surveyors, and blasters to be issued to black Africans, disenfranchising them from the higher end of mining jobs (Muller, 1981).

1.1 Apartheid Era

In 1948, Whites elected Dr. D.F. Malan of the National Party, which ushered the formalized structure of South African apartheid (Ross, 1999). The election's victory can be attributed to advocating for apartheid while campaigning (Ross, 1999). After being elected, Malan gave extra parliamentary seats to South West Africa and expelled

coloured from the Cape Province to ensure the National Party would be reelected (Ross, 1999). The government continued to "segregate every aspect of political, economic, cultural, sporting and social life, using established legal antecedents where they existed and creating them where they did not" (Truth and Reconciliation Commission, 1998, p. 30). Overall, the government was racially engineered for White dominance (Truth and Reconciliation Commission, 1998).

A series of legislative acts further entrenched the apartheid system.[4] White actions were largely driven by the perceived threat of black Africans. In addition to state violence of the gun, black Africans were subjected to forced migrations, in which villages and suburbs were often completely, or at least partially destroyed, stripping Africans of their homeland (Thompson, 1995). It is estimated that during the apartheid, roughly 3.5 million Africans were forcefully relocated to compounds where they lacked jobs (Truth and Reconciliation Commission, 1998). Working African men were routinely confined to unsanitary, single sex compounds that did not allow them to see their families (Truth and Reconciliation Commission, 1998).

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[4] The following acts were passed to preserve White supremacy. The Population Registration Act of 1950 categorized South Africans into four racial categories, characterized with ambiguities that occasionally separated kin into different races (Truth and Reconciliation Commission, 1998). The 1950 Group Areas Act advanced the principles of the 1913 Native's Land Act, separated people into geographical zones on the basis of race (Truth and Reconciliation Commission, 1998). Interracial marriages and sexual relations became void under the 1949 Prohibition of Mixed Marriages Act (Truth and Reconciliation Commission, 1998). Public facilities and areas, such as beaches and parks, were accessible to only certain races, effectively barring blacks. The 1953 Bantu Education Act restructured education, as authority of African schools was transferred to the Bantu Education Department that operated under the conviction that black's education should solely be gear to the limited opportunities available to them (Truth and Reconciliation Commission, 1998). The other noteworthy component of the Bantu Education Act was the discontinuance of mission school, which was responsible for educating many black intellectuals (Truth and Reconciliation Commission, 1998). The legacy of the Bantu Education Act left African children lacking the skills to assimilate into the South African economy(Truth and Reconciliation Commission, 1998). The 1953 Black Labour Relations Regulations Act was implemented to prevent blacks from joining labor unions and also made strikes by black workers illegal (Truth and Reconciliation Commission, 1998).

Structural violence also plagued black Africans. While some White authorities acknowledged weakness and injustices with the apartheid system, the fallacies of the apartheid were justified under assertion that apartheid was still a legal system and was a superior alternative to the dictatorships in other areas of Africa (Truth and Reconciliation Commission, 1998).Conversely, the Truth Commission cited the systems was a "'crime which was institutionalized as the law'" (Truth and Reconciliation Commission, 1998, p. 42). The Vorster Laws contributed to the institutional violence as they restricted Africans' use of the rule of law through suspending the writ of habeas corpus, reducing bail rights, and enabling the legislature to implement minimal jail sentences (Truth and Reconciliation Commission, 1998). The preceding policies minimized the courts' authority, putting them in a position subordinate to Parliament. With a weak judiciary the racially discriminatory policies of the government went unchecked, though the state had no problem taking extra-legal measures as evidenced by the State Security Council of the 1980s (Truth and Reconciliation Commission, 1998).

In order to prevent African unification, the Bantu Self-Government Act was passed in 1959 (Truth and Reconciliation Commission, 1998). Under the Bantu Self Government Act, African reserves were no longer benefited from indirect representation in Parliament, and were granted independent rule (Truth and Reconciliation Commission, 1998). While the National Party argued independence was granted with the idealistic intention of returning governance to Africans' traditional structure, the Truth Commission concluding these measures were designed to further fragmentation African identity. Out of fear of the unification of Africans grouping under the shared circumstance of oppression, independence was granted to make Africans identify

themselves on the basis of ethnicity rather than race (Truth and Reconciliation Commission, 1998). The National Party only advocated for a shared nationality for whites, whereas black Africans "were thought to belong to one of the following groups: Xhosa, Zulu, Swazi, Tsonga, Ndebele, Venda, North Sotho, South Sotho, Tswana, Indian and Coloured" (Ross, 1999, p. 135).

During the apartheid, the government also took drastic measures to censor media. The National Party worked to eradicate all forms of media viewed as seditious and attempted to preclude the influx of outside liberal ideology from contaminating and/or inspiring South African rebels. Ross (1999) describes media censorship, stating:

> To do this, books, periodicals, music and films were checked, and frequently
> banned, with the Publications Control Board...the government controlled the radio
> and refused to allow the establishment of a television service, considering,
> undoubtedly correctly, that it would not be able to prevent the imported
> programmes a television service would have had to show from rotting the fabric
> of South African society. (Ross, 1999, p. 134)

The African National Congress, a national liberation movement formed in 1912, was a paramount source of internal resistance to the National Party. Prior to the instatement of apartheid, the Youth League was created within the African National Congress- under the leadership of Nelson Mandela, Walter Sisulu, and Oliver Tambo- with the assumption that if freedom were to be obtained, it would have to be done through their own actions ("A brief history of the African National Congress," n.d.). The African National Congress began the Defiance Campaign one year after the National Party Rose to Power, campaigning against apartheid laws. The African National

Congress later collaborated with the Congress of Democrats, the South African Coloured

People's Organization, and the South African Congress of Trade Unions, collectively

formed the formed the Congress Alliance ("A brief history of the African National

Congress," n.d.). The Congress Alliance drafted the Freedom Charter advocating for

equal housing, security, and education ("A brief history of African National Congress,"

2011). Some members of Congress Alliance viewed the membership of non-blacks in the

group as detrimental and disbanded from the Congress Alliance and created the Pan

African Congress (Ross, 1999).

During the 1950s the South African government continued to enact restrictive

legislation that was met with a series of campaigns and protests, leading up to the 1960

Sharpeville massacre, which dramatically changed the dynamic between the National

Party and its dissenters. The Abolition of Passes and Documents Act of 1952 restricted

the movement of Africans as it required them "to carry a 'reference book' – pass by any

other name- which noted their employment history and residence rights" (Ross, 1999, p.

119). Unless Africans' reference books noted they had worked for the same employer for

ten years in an urban city, or for multiple employers over a fifteen year span, Africans

were not granted permanent residence in urban or White areas (Ross, 1999).

Additionally, if a blakc African was found without their reference book, he/she was

arrested and jailed for thirty days ("1960: Scores die in Sharpeville shoot-out," 2008).

The government later evicted residents from Sophiatown (a cultural center for Africans

and communist followers and an area devoid of state control) in 1956 claiming it was

cleaning up a slum; however, it was perceived by Sophiatown's residents as an attempt to

quell government opposition (Ross, 1999).[5] In response to the government's control of

African movement, the African National Congress started a campaign of defiance in

which members of the African National Congress intentionally broke laws to demonstrate

what they viewed as the unjust nature of the laws (Ross, 1999).

Restrictive policies were heightened in 1955 when the National Party proclaimed

the women were required to possess passes at all times. Resistance campaigns continued

to be implemented by African nationalist groups against the Pass Laws (Ross, 1995). The

Pan African Congress organized a campaign in 1960 where protestors gathered at police

stations throughout the Vaal region and burned their passes (Muller, 1981). On March

21, 1960 Protests in two cities (Evaton with 20,000 protestors and Vanderbijlpark with

4,000 protestors) were relatively peaceful in comparison to the protest at Sharpeville

(Ross, 1999). 5,000 protestors arrived outside the Sharpeville police station, and after

three hours, the police, unable to control the situation, began opening fire on the

protestors ("1960: Scores die in Sharpeville shoot-out," 2008). In total, there were 69

fatalities and 186 people wounded (Muller, 1981).

Following the Sharpeville Massacre, the Pan African Congress organized a march

through Cape Town (Ross, 1999). The march was organized by Phillip Kgosana, and

pressured the government into suspending the pass laws for ten days (Ross, 1999). After

negotiating with police Kgosana dismantled the march as he was promised to be able to

talk with the Minister of Justice later, but that night Kgosana was arrested and the African

National Congress and the Pan African Congress were also officially banned by the

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[5] The Sophiatown eviction was not the government's first attempt to eradicate ideology in opposition to the apartheid. In 1950, the Suppression of Communism Act was passed, disbanding the Communist Party and its supporting organizations.

government (Ross, 1999).

The outlawing of the African National Congress and the Pan African Congress triggered an armed response by both groups. The *Umkoonto we Sizwe* was a military wing created by Nelson Mandela of the African National Congress and the *Poqo* military wing was created by the Pan African Congress (Ross, 1999). The *Umkoonto we Sizwe* and the *Poqo* were formed under the notion that after the Sharpeville Massacre, non-violent protest was ineffective, and change could now only come from armed resistance (Ross, 1999). However, leaders of the Pan African Congress were soon arrested (Ross, 1999). After a series of sabotage attacks on the government by the *Unkhonto we Sizwe*, the government responded by permitting executions as a punishment for sabotage attacks and increased the authority of the police to allow detainees to be kept for three months without trial (Muller, 1981). Nelson Mandela went abroad in an attempt to garner international support for the plight of the African National Congress, but was arrested upon returning to South Africa (Ross, 1999). Nelson Mandela, Govan Mbeki and Walter Sisulu, all leaders of the African National Congress were convicted of treason and imprisoned on Robben Island (Ross, 1999).

During the 1970s, student protests began to arise. In 1976, tens of thousands of students gathered to protest their school curriculum, but the police opened fired on the group, killing one thirteen year old boy (Muller, 1981). The Sanizedoweto protests triggered other student rebellions of national liberation, which consequently resulted in 1,000 deaths, with the majority projected to have been done by the police (Ross, 1999). During the 1980s, resistance continued and was practiced by students, civics, and women's organizations. The African National Congress sought reform of reserves and

destroyed Black Local Authorities to create community driven governance. The government responded by using emergency power to detain 300,000 people and also used the South African Defence Force to direct killings and the bombing of homes of prominent African National Congress members ("A brief history of the African National Congress," n.d.).

Despite governmental reforms, political tension escalated throughout the 1980s. A new tricameral constitution was produced in 1983 allowing for quasi-authority by blacks and coloureds in their communities, but national authority still resided with the whites (De Klerk, 2002). The African National Congress expanded organizational outreach and affiliated with United Democratic Front and the Congress of South African Trade Unions (De Klerk, 2002). Clashes between the government and African National Congress continued as the African National Congress led protests, boycotts and attacks against the government. The government responded by restricting political activism, arrested and killed thousands, and employed security officers to assassinate leaders of government opposition (De Klerk, 2002).

Internal conflict and economic crises, coupled with external political pressures, drove the National Party and the African National Congress to negotiations (De Klerk, 2002). In opposition to the apartheid, a series of sanctions was imposed on South Africa. The European Communities, the first pillar of the European Union, "banned imports of iron, steel, gold coins from and new investments in South Africa" (Levy, 1999, p. 7). Japan similarly banned investments, steel, and gold coins (Levy, 1999). The United States passed the Comprehensive Anti-Apartheid Act, which banned the importation of iron, textiles, coal, uranium, steel, and agricultural products and also minimized loans to

South Africa (Levy, 1999). The European Communities, Japan, and the United States were South Africa's largest importers, and while each severely restricted trade, they did not restrict gold or diamonds (Levy, 1999). Non-economic sanctions were also imposed, including banning South Africa's participation from international athletic events (Levy, 1999). During the 1980s, South Africa was also undergoing an economic crisis from a shortage of labor in white, industrialized regions, yet the situation was worsened by the apartheid's restriction of black labor (De Klerk, 2002). The dire economic situation and gridlock from internal conflict drove the African National Congress and the National Party to the realization that negotiations were needed (De Klerk, 2002).

The election of President F.W. de Klerk in 1988 ushered political transformation in South Africa. In 1990, de Klerk announced that all anti-apartheid groups were unbanned and Nelson Mandela was freed from prison shortly thereafter (Ross, 1999). After secretive talks of negotiation, multi-party negotiations began, and a Constitutional Assembly was formed and was tasked with creating a new constitution (De Klerk, 2002). After the new constitution was enacted, the first non-racial elections occurred and Nelson Mandela was elected president of the temporal Government of African Unity (Ross, 1999). During the five year term, the Mandela presidency focused on eradicating political violence and promoting national reconciliation through the Truth and Reconciliation Commission (Ross, 1999).

Under the leadership Archbishop Desmond Tutu, the Truth and Reconciliation Commission was established to confront human right abuses from 1960 until 1994 ("Promotion of National Unity and Reconciliation Act 34 of 1995," 1995). The Truth and Reconciliation Commission was comprised of the following committees: The Human

Rights Violations Committee, to address violations of human rights; the Reparation and

Rehabilitation Committee to handle reparations; and, the Amnesty Committee to review

and determine the granting of Amnesty ("Promotion of National Unity and

Reconciliation Act 34 of 1995," 1995). The Truth and Reconciliation Committee

collected 22,000 statements from eighty communities, which were used to determine the

issuance of reparations (Backer, 2005). The Amnesty Committee required those who had

committed gross violations of human rights to apply for amnesty under the condition of

stating full disclosure of former events, proving their intentions were solely political, and

publicly scrutinized by the media, victims and Truth and Reconciliation Commission

actors (Backer, 2005). The following section of this chapter presents an analysis of the

Truth and Reconciliation Commission and how its actions connect to the role of civil

society, non-governmental organizations, and institution building in transitional justice.

2. An Evaluation of South Africa's Case of Transitional Justice

South Africa is commonly viewed as a paramount case of transitional justice.

More specifically, South Africa's Truth and Reconciliation Commission is considered to

be one of the most effective truth commissions and has been emulated by other

transitional societies (Chapman & Van der Merwe, 2008). As evidenced in the historical

background section of this chapter, the apartheid left a legacy of violence in South Africa

(Chapman & Van der Merwe, 2008). During South Africa's transition to democracy

during the 1990s, South Africa was tasked with confronting a racially stratified society in

which political violence was a ubiquitous solution to societal disparity:

Violent resistance had occurred at various points during colonial and apartheid

rule, and violent state oppression was intrinsic to the system, as response to protests and advocacy of political reforms. When it was banned in 1961 the ANC [African National Congress] initiated an armed struggle. The period of 1961 to 1994 saw violent acts committed by all side of the conflict, particularly by state security forces, resulting in thousands of deaths. (Chapman & Van der Merwe, 2008, p. 7)

Violence is still structurally embedded in South Africa, and, despite a move to democracy, constitutional reform, and completion of the Truth and Reconciliation, there are still racial divisions caused by South Africa's contemporary social and economic institutions. The failure to address South Africa's racialized state institution creates a hostile environment prone to a reemergence of intense political violence. An evaluation of South Africa's pursuit of transitional justice supports the hypothesis of this thesis. South Africa's incorporation of civil society into its Truth and Reconciliation Commission and its ability to allow for a peaceful transition of power supports the importance of having a mixed model approach in which civil society and policy makers partner for backward-looking justice. However, South Africa's failure to address the root causes of violence in its governmental structure supports the hypothesis of having a civil society-national/international actor partnership to pursue forward-looking justice. This section of the chapter will first analyze South Africa's Truth and Reconciliation and will then analyze contemporary issues in South Africa to assess the effectiveness of South Africa's transitional policies.

The establishment of the Patriotic Front in 1991 was a pivotal step towards the pursuit of changing and strengthening South Africa's rule of law. The Patriotic Front

consisted of ninety-two anti-apartheid groups that negotiated with the National Party over the terms of the transition of government power (Ross, 1999). After the Patriotic Front negotiations, there were two talks called the Convention for a Democratic South Africa, which called for an interim government to handle the transition of power (Ross, 1999). The second Convention for a Democratic South Africa (CODESA 2) never reached a resolution due to political deadlock resulting from a failure between the National Party and African National Congress over the percentage necessary for the transitional assembly to make constitutional amendments (Ross, 1999). However, the first Convention for a Democratic South Africa drafted the CODESA Declaration of Intent, which described the tenets of their future constitution (Ross, 1999).

After the failure of the second Convention for a Democratic South Africa, the Multi-Party Negotiating Process was formed and its constituents wrote the Interim Constitution that Parliament brought into effect in 1994 (Thompson, 1995). The Interim Constitution advanced the rule of law in several respects. The previous 1983 constitution rested all control of black African affairs in the State President (Thompson, 1995) whereas the Interim Constitution explicitly grants all people regardless of race or gender equal protection under the law and instituted a Constitutional Court with the power of judicial review (Thompson, 1995). Within the Interim Constitution, the National Assembly and the Senate formed the Constitutional Assembly who were tasked with creating a new, permanent Constitution. The Interim Constitution furthered the rule of law yet the Interim Constitution also presented several weaknesses during the period of rule of the Government of African Unity, centered on the issue of amnesty.

Although South Africa's Truth and Reconciliation Commission is commonly thought to be the result of critical policy analysis, the Truth and Reconciliation Commission was actually the product of political limitation (Chapman & Van der Merwe, 2008). The National Party dictated a transition could only be made if amnesty was granted to apartheid's political abuses (Chapman & Van der Merwe, 2008). The National Party was very insistent on the granting amnesty as evidenced by its incorporation into the post-amble of the South African Interim Constitution (Chapman & Van der Merwe, 2008). Dullar Omar, the newly elected Minister of Justice feared that granting amnesty to perpetrators would create a culture of impunity, but the problem of amnesty was solved by making it dependent upon confessing truth (Chapman & Van der Merwe, 2008).

The South African Truth and Reconciliation Commissions had numerous public hearings for victims and perpetrators during the apartheid history. Victim hearings took place in eighty communities across South Africa that typically had several hundred local residents in attendance (Chapman & Van der Merwe, 2008). However, less than 2,000 of the 22,000 victims made their statements publicly, whereas the remaining cases were formally taken outside the public sphere by statement takers (Chapman & Van der Merwe, 2008). After telling their story, victims normally received a letter verifying their statement and were told if they were eligible for reparations (Chapman & Van der Merwe, 2008). Out of the 7,000 applications for amnesty, 1,973 perpetrators were able to make public statements, since the vast majority of perpetrators were found to be criminally based instead of politically motivated (Chapman & Van der Merwe, 2008). South Africa's Truth and Reconciliation Commission also had institutional hearings to

discover if sectors' roles, like prisons and the health community, played an oppositional or discriminatory role in the apartheid. In total, the Human Rights Violations Committee took 21,296 statements and tallied 36,935 gross violations of human rights with an average of 1.6 violations per victim.[6] The final volume of the report list forty-one pages of victims' names, including unknown victims (De Klerk, 2002).

While many of the mechanisms and results of transition of South Africa during the late twentieth century is laudable in several areas (notably its pursuit of perpetrator accountability and its extension of governmental transparency), a closer investigation reveals a fragile solution neglecting to address the economic and social structures that caused systemic political violence. Additionally, being that the initial transition took place over a decade ago, an evaluation of the effectiveness of South Africa's policies targeted at preventing political violence and addressing economic inequality can be performed. Although there may have been several missed opportunities (as will be discussed in this chapter) during South Africa's transition, the lessons from the missteps of the case can be used to develop a model for sustained peace through the incorporation of civil society, democratic institutions, and non-governmental organizations in future cases of transitional justice including Kenya and its 2007 post-election violence.

The Truth and Reconciliation Commission was responsible for handling the gravest human right violations. However, similarly to the institutional makeup of transitional South African security institutions, the Truth and Reconciliation was subject to political pressure from the National Party as they restricted the actions of the Truth and

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[6] South Africa's Truth and Reconciliation Commission defined grove violations of human rights as "Killings torture, severe ill treatment abduction. (De Klerk, 2002)

Reconciliation Commission (Simpson, 1998). The National Party did not allow full incorporation of non-governmental organizations during the process of transition, and the National Party also restricted the Commission's power of search, seizure, and subpoena (Simpson, 1998). While the end result of the Truth and Reconciliation Commission is commendable, there were logistical problems during the commission's investigations as there were only sixty members of the commission who collected 20,000 testimonies (Simpson, 1998).

Members of the National Party were not the only one who could claim issues of bias during the commission's investigation as twelve of the sixty members of the Truth and Reconciliation Commission were police officers of the apartheid regime (Van der Merwe & Lamb, 2009). The involvement of former police officers into the investigative team may have been biased in their reporting and interviews. Although there is no direct evidence of the twelve former police officers operating subjectively in favor of their own interests or of the National Party, the possibility of bias cannot be out-ruled. Moreover, even if the twelve former officers worked with complete objectivity, the perception held among South Africans may have lead civil society to think the former officers were acting with bias and consequently affecting the credibility of the Truth and Reconciliation Commission.

The Truth and Reconciliation Commission also had inherent contradictions that frustrated South African civil society. The Truth and Reconciliation was tasked at only covering gross violations of human rights, and thus only the perpetrators of gross human rights would receive amnesty. Amnesty can arguably be claimed to advance reconciliation; however, the exclusivity of those eligible to be granted amnesty meant

that perpetrators of less severe human rights violations would face trial (Simpson, 1998).

At the same time, the granting of amnesty can also be viewed as creating what Simpson

(1998) refers to as a culture of impunity. Potential perpetrators may reason that if

perpetrators from the past were not convicted, they may also be able to commit offenses

without the fear legal ramifications (Simpson, 1998). Another fallacy of the policies of

the Truth and Reconciliation Commission and the Government for African Unity was that

while those who were identified as victims in the Truth And Reconciliation Commission

Report were given $6,417 (United States dollars) in reparations, their monetary

compensation was not given until 2003 after the perpetrators who confessed were granted

amnesty (Van der Merwe & Lamb, 2009). The policies of amnesty to perpetrators, but

trials to lower level offenders, and postponing the issuance of reparations until after

amnesty was granted, creates what can be viewed as a society placing a higher value on

criminal treatment than on the needs of a victim.

Furthermore, the apparent lack of priority given to the victims of apartheid era

violence could have continued a distrust of the government, and thus prevent a sustained

peace. A lack of trust in the government accordingly dissuades civil society from

participating in government, and without civil society's involvement, the government

may go on to implement self-beneficial policies, perpetuating a cycle of government and

civil society clashes. If measures regarding perpetrators are analogously implemented in

other societies undergoing a transition a distrust of the government will ensue.

Another area lacking in the Truth and Reconciliation Commission process was the

minimal assistance from non-governmental organizations. During the apartheid era, a

variety of non-governmental organization actively collected information (Van der Merwe

& Lamb, 2009). Additionally, non-governmental organizations assisted the Truth and Reconciliation Commission in selecting its members and also provided educational outreach to South Africa about the aims and procedures of the Truth and Reconciliation Commission (Simpson, 1998). However, after the onset of the Truth and Reconciliation Commission's investigations, non-governmental organizations were dismissed (even human rights non-governmental organizations that had a deep knowledge of the apartheid that could have contributed to the commission), because the National Party viewed such organizations as being biased and corrupting the process (Simpson, 1998).

Human rights oriented non-governmental organizations may operate with bias, yet operating the Truth and Reconciliation Commission with complete objective is also nearly impossible task. Since non-governmental organizations are not affiliated with the government, they may have more credibility among the people as they have nothing to gain politically (such as being elected to government office). Although not completely neutral, non-governmental organizations can act with a greater neutrality than the African National Congress or the National Party and could have evaluated the commission's procedures and findings, serving as a mechanism to keep both parties accountable.

2.1 Evaluation of Reconciliation

Limited success was attained in the area of reconciliation by the victims. The minimal reconciliation can be attributed to politicians determining the rights and compensation of the victims (Simpson, 1998). Providing 120 hearings for victims throughout each region of South Africa does connect with the victims and civil society, but only providing testimonies does not equate to comprehensive victim and citizen

engagement. As Simpson (1998) argues, not all victims are the same, nor do they desire the same forms of reparation. Some victims may be satisfied by obtaining symbolic reparation, which may have occurred from being acknowledged in the Truth and Reconciliation Report or by having the opportunity to address their perpetrator. Other victims may seek monetary reparations, while others may not achieve reconciliation unless the former perpetrators are indicted, prosecuted, and imprisoned. It is presumptuous to assume that there were not those who achieved full reconciliation through testimony and government recognition, yet there is also documentation that some South Africans were disheartened and even enraged that those responsible for killing their loved ones faced no criminal sanctions (van Zyl, 1999). Additionally, the granting of amnesty clashed with number 22 of the Bill of Rights in the Interim constitution, stating, "every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum" (Simpson, 1998).

Overall, the political pressure the Government of African Unity was faced with by the National Party's restrictions reduced the amount of reconciliation that could be achieved by South Africans as they decided to pursue a blanket approach incongruous with the needs of the victims. Furthermore, the argument brought forth by the National Party, that no perpetrators would come forward was not an entirely accurate prediction, as few perpetrators initially confessed even once amnesty was guaranteed (Simpson, 1998). Many of the latter perpetrator confessions actually came from the intelligence provided by Eugene De Kock, former apartheid assassin (Simpson, 1998).

The narrow solution derived by the Government of African Unity dismayed South Africans who were affected by political violence during the apartheid creating mistrust

and perceived corruption among government officials which are still present in contemporary South Africa. Even if strong institutions are rebuilt, coupled with a new constitution, if the needs of the victims are not fully and properly addressed, a sustained peace cannot be formed. South Africa's practice of transitional justice failed to meet the above standard and is still facing the consequences of it. It is crucial to also note that the discovery of truth is not the end-all solution as some victims may need more than an acknowledgement of what had happened in the past.

2.2 Institutional Building

In order for a transition to operate, the South African government needed institutional support. During the planning of the transition of power; however, weaknesses began to emerge, starting with the institutional framework. Lacking capacity and African National Congress membership, officials from the apartheid regime remained in power (Simpson, 1998; Van de Merwe & Lamb, 2009). Specifically, the South African military and police force were comprised of members of the National Party. Moreover, twelve of the Truth and Reconciliation Commission's investigators were police officers of the apartheid regime. During negotiations, the military and police stated they would not provide security during the elections process if amnesty was not granted to the perpetrators of the apartheid regime (Simpson, 1998). Conversely, there were also members of the African National Congress who had also violated human rights during the apartheid era as figures estimate the African National Congress was collectively responsible for the killing of 1,300 during the apartheid era (Van der Merwe & Lamb, 2009).

There were other problems of institutional membership including state bureaucrats from the apartheid regime who sought to hold onto their positions of authority for as long as they possibly could. Additionally, new government officials from the African National Congress lacked the experience to effectively run institutions (Simpson, 1998). However, institutional progress was made during South Africa's transition. Under the apartheid regime, police operations were executed in secrecy, whereas the government under the African National Congress implemented increased transparency operations of the security sector. Despite the progress made, the police sector of South Africa is still plagued with corruption. Today, the police often act with brutality with high rates of civilian death while in police custody (Van der Merwe & Lamb, 2009). The inability of the security sectors of South Africa to operate without the influence of the political party of which they were trying to break away, prevented a comprehensive source of reconciliation to victims of the apartheid era. A larger encompassing, society wide, transformation is needed to redress the systemic violence of the apartheid regime.

3. A Look past the Truth and Reconciliation Commission

Following the Truth and Reconciliation Commission, President Mandela signed the constitution the Constitutional Assembly drafted into law, which became effective starting on February 3, 1997 (Ross, 1999). In 1999 Thabo Mbeki was elected president and was reelected in 2004, but resigned in 2008 ("A brief history of the African National Congress," n.d). During his presidency, Mbeki shifted focus from reconciliation to economic growth ("A brief history of the African National Congress," n.d). In 2008,

Kgalema Motlanthe finished Mbeki's term, but Jacob Zuma was elected president in 2009 ("A brief history of the African National Congress," n.d). With the completion of Truth and Reconciliation Commission and transition from apartheid to non-racial rule complete, and a period of over ten years elapsing, an examination of South Africa's after legacy of transitional justice can be conducted. Unlike other contemporary cases of transitional justice, such as Kenya, South Africa presents the opportunity to evaluate the long term effects of transitional justice.

Several scholars stress the importance of transforming the entire South African society to address deeper social and economic inequalities rooted in structural framework to create a sound and enduring culture free from a return to political violence (Simpson, 1998; Backer, 2005; van Zyl, 1999; Van der Merwe & Lamb, 2009), yet scholarship examining the long-term effects of South Africa's transitional justice policies has been limited.

To evaluate the effectiveness of South Africa's case of transitional justice, this thesis examines a variety of data surrounding economic and social perceptions in South Africa. Afrobarometer has conducted five rounds (years 2000, 2002, 2006, 2008, and 2011/2012) of surveys in South Africa to assess the political atmosphere. Each round of questionnaires consists of 2400 cases from citizens 18 and older through random sampling to obtain a proportional and representative sample from South Africa. The data from 2011/2012 is currently unavailable, but the following section discusses the data collected from the 2000, 2002, 2006, and 2008 questionnaires.

3.1 Governmental Problems

By examining South Africans' perceptions of the government, an analysis of the effectiveness of South Africa's case of transitional justice can be performed. Each round of questionnaires asked respondents to list the top three problems facing South Africa (with the exception being the 2000 survey, which only asked for the two top problems). Table 3 on page 92 identifies the top four most important problems facing South Africa from each round of questionnaires. As Table 3 on page 92 indicates, economic and security issues are commonly regarded as being the most important problems among South Africans, with the majority of answers being centered around unemployment and job creation, poverty, housing, and crime and security. AIDS is also a problem of heavy concern among South Africans. It is important to note that because the above data are from perception surveys, the problems listed may not be ranked analogously to expert analysts. However, perceptions among the people are vital to determining a government's effectiveness. For example, if the people perceive certain institutions to be corrupt, such as the police, the institutions will not be heavily used creating a further disconnect between the government and the people.

Table 3: Top Issues Facing South Africa from 2000-2008

Prevalence	First Highest Response	Second Highest Response	Third Highest Response	Fourth Highest Response
Round 1: 2000 First response	Crime (11.7%)	Job Creation (7.8%)	Unemployment (5.25%)	Housing (4.2%)
Second Response	Job Creation (28.7%)	Crime (18.65%)	Unemployment (18.2%)	AIDS (5.1%)
Round 2: 2002 First Response	Unemployment (59.8%)	Crime & Security (9.0%)	Poverty (7.2%)	Housing (3.8%)
Second Response	Unemployment (15.3%)	Crime (12.4%)	Housing (7.2%)	Education (6.8%)
Third Response	Crime & Security (12.1%)	AIDS (11.5%)	Housing (11.0%)	Unemployment (8.0%)
Round 3: 2006 First Response	Unemployment (46.4%)	Crime & Security (12.1%)	Poverty (7.1%)	Housing (7.0%)
Second Response	Unemployment (20.7%)	AIDS (10.7%)	Poverty (9.9%)	Housing (9.6%)
Third Response	AIDS (10.4%)	Unemployment (9.9%)	Crime & Security (9.8%)	Housing (8.8%)
Round 4: 2008 First Response	Unemployment (35.9%)	Managing the Economy (11.9%)	Poverty (9.8%)	Crime & Security (9.3%)
Second Response	Unemployment (15.2%)	Housing (9.3%)	Crime & Security (8.9%)	Poverty (8.0%)
Third Response	Crime & Security (13.9%)	AIDS (9.4%)	Unemployment (8.6%)	Corruption (8.3%)

Sources: (Afrobarometer, 2000; Afrobarometer, 2002; Afrobarometer, 2004,

Afrobarometer, 2006; Afrobarometer, 2008)

Since the questionnaire of 2000, economic perceptions among South Africans have improved. In 2000, 68.4% of respondents were dissatisfied with the country's present economy, with 14% satisfied (Afrobarometer, 2000). In 2002, there was 59.6% dissatisfaction rating, but a 29.4% satisfaction rating (Afrobarometer, 2002). In 2006, 27.8% were dissatisfied and 46.3% were satisfied (Afrobarometer, 2006). For 2008, 47.8% were dissatisfied and 49.9% were satisfied (Afrobarometer, 2008).

Issues of crime and corruption also plagued South Africa during the apartheid and as the data from Afrobarometer indicates, these problems still persist. There is a strong lack of trust in the government's ability to fight crime and corruption. According to the Afrobarometer questionnaires, in 2000, 27.6% of respondents claimed the government was "not very well" at fighting corruption and 39.5% said the government was "not at all well" at fighting corruption (Afrobarometer, 2000). In 2002, 33.5% said the government was "very badly" fighting corruption and 30.0% said the government was "fairly badly" fighting corruption (Afrobarometer, 2002). The confidence in the government fighting corruption improved in 2006 with 24.8% was "very badly" fighting corruption and 26.3% claiming the government was "fairly badly" fighting corruption (Afrobarometer, 2006). Although there was a decrease in 2006, 51.1% of respondents lacked faith in South Africa's ability to fight crime (Afrobarometer, 2006). Disappointment was also prevalent among South Africans when it came to their view on the government's ability to fight crime. For 2000, 56.9% of respondents stated the government was "not at all well" at reducing crime (Afrobarometer, 2000). In 2002, 51.1% answered the government was "very badly" handling the reduction of crime (Afrobarometer, 2002); and, in 2008, 41.2% stated the government was "very badly" handling the reduction of crime (Afrobarometer,

2008). In summation the data collected from Afrobarometer indicates there is still a high level of distrust for South Africa's government and institutions among South Africans.

In addition to economic inequality, it is important to see if South Africans perceive an unequal treatment from the government due to ethnic differences. As Table 4 indicates below on this page (94), a substantial portion of respondents believe their fellow South Africans are mistreated on the basis of race. Measuring perceived mistreatment among ethnic groups provides insight as to how well the government has succeeded with its transition from apartheid rule. The data collected from 2002 and 2008 in particular (when over two-thirds of respondents indicated governmental mistreatment on the basis of ethnicity) reveal that while formal apartheid has been abolished, its forces are still at work, and through the respondents' eyes, little progress has been made. Even if the government treats everyone equally, regardless of their demographic information, the trust among the people is dramatically lacking and South Africa's transparency of proceedings must be improved.

Table 4: Mistreatment among Ethnic Groups in South Africa

Year	2002	2006	2008
Percentage total of those who stated ethnic groups were sometimes, often, and always mistreated.	66.2%	43.2%	72.4%

Sources: (Afrobarometer, 2002; Afrobarometer, 2006; Afrobarometer, 2008)

The poor and unequal economic situation, prevalence of crime, and distrust and perceived corruption of the government among South Africans demonstrates the legacy of apartheid. While the Truth and Reconciliation Commission may have aided in providing reconciliation, such sentiments may prove to be ephemeral due to the failure to address the deeply embedded economic and social inequities. Unfortunately, the removal of apartheid legislation did not automatically result in racial equality. The previous apartheid restrictions on housing, work, and education (although no longer formally in place) still endure, leaving blacks and coloureds at a disadvantage when it comes to employment and the earning of income. Despite the abolishment of apartheid, many blacks were left in bereft conditions, lacking skills, education, money, and homes to improve their situation. As shown in Table 3 on page 92, unemployment and housing have been among the top concerns of South Africans in the post-apartheid era.

Additionally, as the preceding corruption measures indicate, the people's distrust and dissatisfaction of the government is ever present. During the apartheid era, the government routinely carried out abductions, assassinations, and orders of torture, creating a reputation as being instigators of violence (Truth and Reconciliation Commission, 1998). Even though the African National Congress has become empowered, the African National Congress was also responsible for implementing violence. The dual history of the violence sponsored by the apartheid regime and the African National Congress creates an image that sponsored violence is characteristic of the ruling party, and that the ruling party can manipulate its power for its own benefit. Overall, the apartheid history has left South Africans with the association of the government being a corrupt institution.

Moreover, despite the progress that has resulted from the transitional justice process, the legacy of the apartheid system has expanded outside the governmental actors, leaving South African society with a culture of violence. During the apartheid era, violence was a prevalent tool used to solve problems by both state and non-state actors. The state used physical force to regulate blacks (who the state thought was the main threat to security and stability) during the apartheid, while anti-apartheid groups, such as the African National Congress, used violence with the hopes of dismantling authority (Van der Merwe, 2013). Although apartheid is no longer in place, there are groups who, from the government's view, need to be regulated (criminals and women) since they are viewed as threats to stability and security.

With blacks no longer being the primary threat to state, the state has moved on to predominantly pursuing criminal offenders. While the combatting criminals may appear to be laudable on the surface, the excess amount of violence used in its execution perpetuates the culture of violence, showing the people that violence is the solution. Then Deputy Minister Susan Shabangu described the need for using maximum force as she stated, "you must kill the bastards [criminals] if they threaten you or the community. You must not worry about regulations. I want no warning shots. You have one shot and it must be a kill shot" (Van der Merwe, 2013, p. 70). While deadly force is necessary in some cases of violent confrontation, Shabangu states community threats require fatal confrontation. Obviously not all community threats are severe enough that the organizers must be killed, but Shabangu's policy highlights the view that violence is to be used as a blanket solution (Van der Merwe, 2013).

The utilitarian view on violence explains contemporary cases of excess police force. For example, in August 2012 34 miners were killed and 78 miners were injured when the police interrupted a protest at the Lonmin Platinum Mine, marking the worst form of police violence since the Sharpeville Massacre (Van der Merwe, 2013). Furthermore, violence also serves as an indicator as to what is important. When it comes to protests, the state overwhelmingly responds to violent protests (Van der Merwe, 2013) and ignores non-violent protest. South Africa's state action thus reveals to the people that violence is the only way to be recognized, leading groups to the assumption that their protest tactics must use violence or the injustice they are fighting will be ignored (Van der Merwe, 2013). If the state were to respond to non-violent protests, more groups will shift to non-violent demonstrations, but for now violence is the language between the people and the state.

The view of violence as being a form of control and a solution transcends to South Africa's civil society as well as seen with the dominance of sexual violence. While violence was used for social stability in the apartheid regime, sexual violence is similarly used in the domestic sphere (Moffett, 2006). In 2006, South Africa had the highest rate of rape globally and it was estimated that one in three women would be raped at one point during their lifetimes (Moffett, 2006). Women, hold a numerical majority and possess skills many men do not have, which can make them a potential threat to male authority (Moffett, 2006). Women's potential threat mirrors the threat whites saw from blacks. The threat of blacks to white supremacy triggered the "need" for violence to racially regulate blacks and keep black in positions of subordination (Moffett, 2006). Drawing upon the use of violence for racial control, many men across class, race, and religion regularly rape

women, since violence is the only way they have been exposed to solving problems

(Moffett, 2006).

The South African government has routinely prevented a discourse on the issues

of sexual violence under the guise of apartheid's legacy. When the issues of rape is

publicly addressed, the government does not participate in nor value the discussion,

arguing that rape unfairly targets black men accusing them of all being beastly predators

(Moffett, 2006).[7] However, rapes are not only committed by black men; the majority of

rapists are black, but then so is South Africa's total population. (Moffett, 2006). In one

interview, a male taxi driver openly claimed to routinely "gang-bang" women with his

male friends, claiming that "these women [those who walk around town alone and with

confidence] hey force us to rape them" (Moffett, 2006, p. 138). As "showing the

'darkies' [blacks] their place," (Moffett, 2006, p. 138) was widespread during the

apartheid, women today are victims of analogous regulatory violence used on blacks

during the apartheid as Moffett (2006) argues;

> [Women] are perceived as sufficiently subversive and threatening as to compel
>
> men to 'discipline' them through sexual violence. What is more, it rape is
>
> believed to be deserved – if a woman is simply being 'corrected' , or 'taught a
>
> lesson' it is somehow not considered to be a criminal activity. (Moffett, 2006, p.
>
> 138).

The violence imposed on women exhibits South Africa's continued tradition of

using violence as a mechanism of control and a tool for solving problems. Additionally,

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[7] A televised ad that had South African born Charlize Theron asking how men how many women they had raped was taken down by the Mbeki administration since it was viewed by the Mbeki administration as unfairly and inaccurately depicting all blacks of being rapists (Moffett, 2006).

the frequency of rape reveals that women are unable to take any reporting action on their own,[8] and for those that do, South Africa's criminal justice system will favor the male, the one of higher authority. Overall, the widespread violence and inequality throughout South Africa, supports this thesis's model for transitional justice about engaging civil society and gathering their input during the building of institutions.

4. Application of Theoretical Framework to South Africa

In regard to the theoretical framework of this thesis, South Africa represents a strong state and weak civil society partnership with mixed results. During its move from apartheid to democracy, South Africa had the potential to erupt in civil war (Ross, 1999). As theorized in the theoretical framework of this thesis, had the African National Congress and recently empowered black South Africans become overly retributive towards white South Africans, the cycle of racially imposed violence would have continued.

Because South Africa's transition is complete, it can be assessed within the theoretical framework of this thesis. South Africa is identified as having a strong state because the conditions of negotiation of governmental transformation and perpetrator justice were dictated by state rulers without regard to the needs and desires of the victims of apartheid and South Africa's civil society as whole. Although the decision of granting amnesty for truth did prevent an escalation of violence or inflictive retribution, civil society was left outside of the decision making process, creating an perception that civil

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[8] In many instances women have been killed or severely beaten for even being near police stations as their presence raises the suspicions they might be informants (Moffett, 2006).

society's opinion are irrelevant or unimportant. Additionally, South Africa did not meet the other prescribed conditions in the theoretical framework of this thesis: operating with transparency and addressing the institutional weaknesses that produced intrastate violence.

As previously mentioned, there were sectors of civil society who were unaware South Africa's Truth and Reconciliation Commission existed, while others who provided statements for the commission (but did not publicly testify) did not know where their statement would go, nor what purpose their statement served (Simpson, 1998). Additionally, South Africa also did not address the need to reform institutions that produced inequality. As the data demonstrated in the previous section of this chapter, South Africa is still faced with racial inequality in terms of housing and employment (Afrobarometer, 2000; Afrobarometer, 2002; Afrobarometer, 2004; Afrobarometer, 2006; Afrobarometer, 2008). Moreover, South Africa's culture of violence has continued as evidenced by the prevalence of crime in South Africa.

While the decisions made in South Africa during its transition cannot be reversed, they validate the prescribed framework of this thesis. If the goal of transitional justice is to provide reconciliation to victims, prevent future transgressions, and move toward sustainable peace, civil society and regional governments must be engaged during the transitional justice process. Because South Africa's case of transitional justice was handled domestically without regional or international involvement, the incorporation of South Africa's civil society was dependent upon state cooperation: since state actors did not take the initiative to engage civil society, there was no possibility for significant civil society action, exemplifying the need for regional government involvement. It can be

argued that for the case of South Africa it was not necessary to engage civil society and reform institutions in favor of expedient solutions. However, a fallacy with the assertion of not engaging civil society and reforming institutions is that, as contemporary South Africa demonstrates, the problems persist, compromising a sustainable peace. Regional oversight is needed to keep state actors in check and ensure civil society is incorporated into the transitional justice process. While issues such as inequality may not be able to be completely eradicated, they can be minimized and addressing institutional reform will lead to a more complete transition and reduce the possibility of future civil war.

Chapter Four: The Case of Kenya

Kenya presents another case in which transitional justice was used in a context unrelated to civil war. Unlike South Africa, Kenya embodies a situation in which there is a weak state, but a strong civil society. Although Kenya's 2007/2008 post-election violence was the result of deeply embedded inequality, Kenya has taken significant reform over the last five years that has led to a new direction for Kenyan society free of its traditional violence associated with elections. Kenya's case of transitional justice is closely connected to the theoretical framework of this thesis for the route to be taken with a weak state and a strong civil society due to the high level of transparency that has been used throughout the process and its move towards institutional reform. Additionally, as demonstrated by Kenya's relationship with the International Criminal Court, the importance of a regional, African owned process, is enforced.

This chapter first provides a description of Kenya's history to identify how British colonialism transformed Kenya into a society characterized with ethno-driven politics, which resulted in ethnic tension, producing a tradition of violence associated with elections. After Kenya's historical background is provided, this chapter narrates the continuous dispute between Kenya and the International Criminal Court as well as the reforms Kenya has undergone in its case of transitional justice. Finally, the events in Kenya will be analyzed in relation to the theoretical framework of this thesis.

1. Historical Background

The area now referred to as Kenya had several foreign influenced before British colonial rule in the late 1800s. The Bantu people and Cushitic speaking tribes from northern Africa significantly expanded the area now known as Kenya leading up to the first century A.D. ("Early Kenya history," n.d.). In the first century A.D., Arabs began to travel to the Kenyan coast to trade slaves, gold, and shells ("Kenya Timeline," n.d.). Arab trade brought Islamic influence to Kenya and the Bantu language turned into the Swahili dialect, which had strong roots in Arab words ("Early Kenya history," n.d.).

In 1498, Portuguese Vasco de Gama arrived on Kenya's coast with the aspiration of creating a naval stronghold for Portuguese trade routes ("Early Kenya history," n.d.). In 1505, the Portuguese invaded again, destroying cities and robbing the Africa's East Coast ("Kenya Timeline," n.d.). Portuguese occupation was met with opposition by the Ottoman Arabs though, who fought the Portuguese for control of the region for nearly two centuries ("Kenya, Timeline," n.d.). By the early 18th century, Arab Ottomans defeated the Portuguese and all Portuguese were expelled from Kenya by 1730 ("Early Kenya history," n.d.). After the Portuguese left the Ottoman Arabs resumed their focus on the slave trade. In the late 18th Century, the British took interest in controlling trade routes to India and began to coerce the Arabs in Kenya, taking several essential trading ports in the 1880s along with the Germans ("Early Kenya history," n.d.). In 1888, the Imperial British East Africa Company settled the region, slowly stripping control of the region from the Arabs and by 1895, the British created the area into its own protectorate called British East Africa, (Don Nanjira, 2010).

The colonial policies of the British produced ethnic inequalities and divisions that still affect contemporary ethnic tensions. Prior to British Colonialism, ethnic divisions were minimal as different ethnic groups would trade and intermarry (Ndege, 2009). The 1884/1885 Berlin conference established the conditions of Kenya's colonial occupation by the British (Ndege, 2009) and developed territorial boundaries without regard to geography or input from Kenya's people. The colonial boundaries drawn by the British brought more than forty ethnic groups who had previously been independent of each other into one territorial state, planting the seed for ethnic division (Ndege, 2009). Kenya's new colonial boundaries lead to competition for resources among ethnic groups, fueling ethnic tensions (Ndege, 2009). The British colonial administration curtailed Kenya's sovereignty as indigenous leaders were replaced with colonial rulers who based their decisions off of Britain's policies and pursuit of capitalism rather than the political climate in Kenya (Ndege, 2009).

During the colonial era, the British imposed racially discriminatory legislation, only allowing the whites access to fecund land and made Africans work for the whites for minimal compensation (Ndege, 2009).Britain's colonial rule also dramatically reshaped the social structure of Kenya. Christian missionaries eradicated African culture under the notion that eternal salvation could only be achieved through Christ and complete rejection of traditional cultural/religious practices (Ndege, 2009). Christian missionary doctrine claimed the colonial regime was brought by God to save Kenyans, which pushed for increased obedience to the colonial state.

Areas in which the British settled developed better infrastructure in terms or education, roads, and commerce in comparison to regions in which the British did not

settle. Moreover, British settlement resulted in the development of a three class system, consisting of "European settler farmers, the middle class African farmers, and the landless Africans" (Muhula, 2009, p. 99). Britain's colonial legacy left Kenya with regional imbalances that have continuously fueled ethnic conflict.

During British rule, Kenya was relatively peaceful with little internal resistance until the middle of the 20th century when the Mau Mau Rebellion from 1952-1960 was fought primarily between the Kikuyu people and the British Army; however, there were anti-Mau Mau Kikuyu who fought alongside the British (Anderson, 2005). After the 1946 shooting of African protestors in Nairobi, an outraged group of Kikuyu soldiers organized to forcefully combat colonial rule ("Kikuyu- the Mau Mau uprising and independence," 2003). The Kikuyu soldiers gathered additional membership, forcing them to take oaths of allegiance (those who broke allegiance were killed) and steal firearms to prepare for violent resistance ("Kikuyu- the Mau Mau uprising and independence," 2003). The group of Kikuyu rebels became the Land Freedom Army, which was known by the British as the Mau Mau movement ("Kikuyu - the Mau Mau uprising and independence," 2003).

In response to the assassination of British ally, chief Waihiu, by the Land Freedom Party, the British government declared a state of emergency and enacted martial law in 1952 ("Kikuyu - the Mau Mau uprising and independence," 2003). After martial law was declared, Jomo Kenyatta was arrested along with one hundred fellow Kenya African Union, an organization striving for Kenyan independence ("Kikuyu- the Mau Mau uprising and independence," 2003). Despite a lack of evidence and Kenyatta's claim to be uninvolved with Land Freedom Army, Kenyatta was convicted of incitement

and was sentenced to seven years of imprisonment; however, his imprisonment gave him the image of being a martyr by the Kikuyu people ("Kikuyu - the Mau Mau uprising and independence," 2003).

The Land Freedom Party continued their rebellion using guerilla warfare and terrorism to combat white settlers and British loyalists ("Kikuyu - the Mau Mau uprising and independence," 2003). The British responded by restricting the forest areas of Mt. Kenya, the location of Land Freedom Army strongholds. Those who lived in the forest areas had their homes burned and residents of the area faced regular torture in attempts by the British to obtain information ("Kikuyu - the Mau Mau uprising and independence," 2003). Moreover, Africans of the area could be shot without question if they were found in the forest areas ("Kikuyu - the Mau Mau uprising and independence," 2003). The Kikuyu people, even those who had no affiliation with the Land Freedom Army, were gathered into overcrowded "protected villages" where they had twenty-three hour curfews ("Kikuyu - the Mau Mau uprising and independence," 2003). The British continued to retaliate by detaining approximately one-third of the Kikuyu men (approximately 100,000) without trial or criminal conviction over the next two years.

Although the British were successful militarily, the campaign ensued against the Land Freedom Army was incredibly expensive and depleted European Public Opinion ("Kikuyu - the Mau Mau uprising and independence," 2003). Newspaper articles were published comparing the British policies in Kenya to Hitler and "one soldier testified in court that his officer had said he could shoot anybody he liked as long they were black, because he wanted increase his company's score of kills to fifty" ("Kikuyu - the Mau Mau uprising and independence," 2003).

There is a lack of consensus within the scholarly community as to what was the main contributing factor toward Kenyan independence, but the most prevalent theory is that the resources and force needed by the British government to maintain their colonial dominance would not be supported among the British public (Nissimi, 2006). Prior to complete independence from British colonial rule, native Kenyans were able to run for the Legislative Council, and were elected to it in 1957 (Nissimi, 2006). In 1960, the British government removed the State of Emergency. The Mau Mau Uprising ultimately resulted in mass deaths of Kenyans:

> Over this time, between 80,000 and 100,000 Kikuyu had been imprisoned in concentration camps, more than a million Kikuyu and Embu civilians had been shifted into "secure" areas, and around 11,500 suspected Mau Mau were killed (of which 1,000 were hanged). If you also count deaths from disease and starvation in the "protected villages", the total death toll was nearer 150,000. The Mau Mau for their part killed around 2,000 people, most of them Kenyans: of the 95 Europeans who lost their lives, 32 were civilians. The perverse truth is that more white settlers died in road accidents on the streets of Nairobi during the emergency than at the hands of the LFA. ("Kikuyu - the Mau Mau uprising and independence, 2003")

Following the lifting of the State of Emergency, the British government began negotiating with African Leaders and created a transitional constitution that allowed African Leaders to take the majority of seats in the Legislative Council ("Kikuyu - the Mau Mau uprising and independence," 2003). The Kenya African Union was transformed into the Kenya African National Union, while the Kenya African Democratic

Union was formed by non-Kikuyu and non-Luo politicians out of fear that the Kenya

African National Union would disproportionately favor the Kikuyu and Luo, a precursor

of future ethnic relations ("Kikuyu - the Mau Mau uprising and independence," 2003). In

the May 1963 elections, Kenyatta was elected prime minister and the Kenya African

National Union won 124 legislative seats while the Kenya African Democratic Union

won 83 seats ("Kikuyu - the Mau Mau uprising and independence," 2003). Following the

establishment of the Kenyatta regime, Kenya was declared independent on December 12,

1963 ("Kikuyu - the Mau Mau uprising and independence," 2003).

Britain's colonial legacy left Kenya with a political system based on ethnicity

(Raftopoulos, Mungure, Rousseau, and Masinjila, 2013). Independent Kenya was built on

regional interest, rather than a cohesive, national interest (Muhula, 2009). Education used

the indigenous language of the ruling party, rather than the national language (Swahili),

and the geographical boundaries from British colonialism were maintained, producing

political and economic cleavages (Muhula, 2009). Accountability and oversight were

weakened by a continuation of colonial policy, which limited parliamentary power, but

allowed for vast executive power. The Official Secrets Act, a law maintained from the

colonial regime, allows the executive to not disseminate data on distribution of state

resources to its citizens (Muhula, 2009). Ndege (2009) explains:

The colonial state centralized, racialized and ethnicised power. This

administrative set up, save its racial trappings, was wholly inherited by the post-

independence regime. In a fundamental sense post-colonial governance became

even more autocratic. Unlike the governor who was accountable to the House of

Commons, Kenya's post colonial presidents have hardly been accountable to

Parliament (Ndege, 2009, p. 2)

The President of Kenya was given extensive political power as he can appoint

ministers and other constitutional offices (Muhula, 2009). The Presidents' Political

constituencies were primarily based off of the singular ethnicity of the ruling party,

directing resources to their patronage. Ethno-political patronage was consequently

responsible for non-ruling groups to receive disproportionately less access to land

distribution, water and sanitation services, education, and health (Muhula, 2009). Ethno-

regionalist policies were implemented at the onset of Kenyan independence, which

created disparities of resources among Kenya ethnic groups, fueling the ethnic tension

leading up to the 20007/2008 post-election violence. President Jomo Kenyatta focused

development on his home of the Central Province, whose community members received

higher access to social service and great political representation than other provinces

(Muhula, 2009). After President Kenyatta's rule, President Moi continued the divisive

land policies of the British disproportionately benefit the Rift Valley community

(President Moi's home) (Muhula, 2009). Muhula (2009) describes how ethnic

marginalization has embedded Kenya, marking elections and politics with conflict among

Kenya's ethnic group:

It is the actions of the governing elite that elevate ethnic differences to conflict

inducing status. By promoting exclusive economic benefits to sections of the

country that promise the most political support, successive ruling elites have

created grievances that are channeled as ethnic sentiments in every election. At

worst, this situation has made it difficult for citizens to expect fair treatment if one of their own is not in power. (Muhula, 2009, p. 86)

1.1 A History of Violence

After colonialism, the office of the presidency held excessive power in the areas of the law, policies, and institutions. Before a multi-party democracy emerged in Kenya, Jomo Kenyatta ruled as president from 1963 until 1978, followed by Daniel Moi from 1978 until 2002 ("Transitional justice in Kenya: A toolkit for training and engagement," 2010). The Kenyatta and Moi regimes, however, were just as abusive as British colonial powers, and the Kenyatta and Moi regimes built a culture of impunity for criminal actions and human rights violations and also violently countered political opposition, laying for the foundation for the political violence that ensued following the 2007 Kenyan elections ("Transitional justice in Kenya: A toolkit for training and engagement," 2010).

President Kenyatta's term was characterized with ethnic monopoly over political rule (Prunier, 2008). In 1969, Kenyatta's Kenya African National Union banned opposing political parties and later passed a constitutional amendment in 1978, which prohibited other political parties from questioning the legitimacy of elections (Dercon & Gutierrez-Romero, 2010). During his presidency, Kenyatta ensured the Kikuyu controlled political order in Kenya; the Luo protested the system but were forcefully silenced (Prunier, 2008).

While Kenyatta served as president, the Kikuyu spread throughout Kenya, usurping land from different tribes (Prunier, 2008). According to the Kikuyu, the former

land of white settlers now belonged to the Kikuyu under the premise that the Kikuyu

were martyrs responsible for the independence of Kenya (Prunier, 2008).[9] Kenyatta's

death in 1978 brought vice president Daniel arap Moi, from the Kalenjin tribe, into the

presidency who transferred virtually all political power to his fellow Kalenjin and

minority allies by 1986 (Prunier, 2008). The move to multiparty democracy in 1992 and

1997 prompted Moi to use state-violence to suppress the Kikuyu and divide Kalenjin

allies to more easily maintain political dominance (Prunier, 2008).

Daniel Moi's Kenyan African National Union began the breakdown of public

order during the 1980's. Under the Moi regime, youth were utilized to carry out Moi's

corrupt practices. Youth vigilantes under the Kenyan African Union were authorized to

wrest money from small business and the country's disenfranchised (Kagwanja, 2009).

There were also frequent violent skirmishes between youth who were legitimately

employed and those who operated from through the Kenyan African Union (Kagwanja,

2009). Youth were also used as puppets by the state to fight against the state's dissidents,

which also allowed the government to circumnavigate allegations of human rights abuses.

The legacy of election violence can be traced to the 1992 elections:

> Ahead of the 1992 election, the state started playing the communal card to
> conceal thereal motives and nature of the violence It mobilised 'Masai morans'
> and 'Kalenjin warriors' painted with red ochre or clad in traditional shukas
> (cotton sheets) and wielding traditional weapons such as spears, arrows or swords,
> to cleanse and drive out of the Rift Valley communities suspected of supporting

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[9] In several instances however, the land the Kikuyu were reclaiming historically belonged to African tribes (Prunier, 2008).

the opposition such as the Kikuyu, Kisii, Luo and Luhya. Between 1992 and

1993, state-sponsored violence which came to be deceptively described as 'tribal'

or 'ethnic' clashes over water, land or cattle killed no less than 1,500 people and

displaced over 300,000 others. The logic of this intense re-traditionalisation' of

violence was 'informal repression' which enabled Moi to win controversial

victories in the 1992 and 1997 multiparty elections. (Kagwanja, 2009, p. 370)

The Moi government also established the Youth for KANU 1992, which served as

militia to buy votes for the 1992 elections. During the 1997 elections, another militia

emerged known as the *Jeshi la Mzee* to combat the growing support for constitutional

reform. The *Jeshi la Mzee* went to cities in Kenya including the Nairobi, Nakuru, and

Mombasa to violently disrupt the rallies in favor of constitutional reform supported by

the National Convention Assembly and their corresponding National Convention

Executive Council. Moreover, private goons, or *Jeshis*, were utilized by Moi dissidents

across the political spectrum, creating a culture of what Kagwanja (2009) termed

"warlord politics," further embedding a culture of extra-state violence:

> By the time Moi exited power in 2002, Kenya had become a cesspit of myriad
>
> bands of 'tribal' bandits and cattle-rustlers in the northern and coastal parts of the
>
> country and more than two-dozen known private militias in rural and urban areas.
>
> (Kagwanja, 2009, p. 370)

Kenya's elections in 2002 intensified ethnic tensions, setting the preconditions for

the 2007/2008 post-election violence. Moi, who was growing old, thought that he could

continue to influence politics by instating power to Jomo Kenyatta's son, Uhuru (Prunier,

2008). Moi believed that Uhuru, who was inexperienced with politics, would be an

"empty symbol" (Prunier, 2008) for the Kikuyu people, and consequently keep the Kikuyu in a position of subordination. However, loyalties fell to Mwai Kibaki, also a Kikuyu, of the National Rainbow Coalition, which was comprised of all of the opposing political parties (Dercon & Gutierrez-Romero, 2010). Because Kenyatta and Kibaki were both Kikuyu, it was projected that attention would be given to national issues rather than the previously ubiquitous ethno-political competition (Dercon & Gutierrez-Romero, 2010).

Kibaki won the presidency and immediately brought new policies, such as free primary education, and economic growth to Kenya (Dercon & Gutierrez-Romero, 2010). However, corruption soon became widespread in the Kibaki regime with economic growth disproportionately benefiting the already affluent Kikuyu people and numerous financial scandals (Prunier, 2008).

Additionally, crime began to rapidly increase in urban areas, ethnic conflict increased over land disputes, and a violent showdown ensured between the Mungiki and state police (Prunier, 2008). The Mungiki criminal gang arose to combat the National Rainbow Coalition's violent actions in the Rift Valley, by killing 50 people in what was thought to be retaliatory attacks from the KANU party. The National Rainbow Coalition perceived the Mungiki to be a threat to state security and authorized police to "shoot to kill" to destroy the Mungiki sect (Prunier, 2008). The "shoot to kill" order was consequently viewed as violating human rights, and the National Rainbow Coalition eventually allowed the Mungiki a thirty day amnesty (Prunier, 2008).

The National Rainbow Coalition continued to use excessive force against those suspected of being in the Mungiki and a 2007 report by the Oscar Foundation Free Legal

Aid Clinic-Kenya found 8,000 Mungiki suspects had been killed by the police along with 4,000 people whose whereabouts and status (alive or dead) were unknown. Furthermore, the Kenya National Commission on Human Rights found the police had executed 500 over a seven month period in 2007 (Kagwanja, 2009).

Kibaki's militia, disconnect from the marginalized (Kibaki benefited from the economy while other tribes were left in poverty), and failure to produce a new constitution, brought significant distaste and opposition to the Kibaki regime (Prunier, 2008). Raila Odinga (Luo) and Kalonzo Musyoka (Kamba), who formerly supported Kibaki and served as Roads Minister and Environment Minister respectively, formed the Orange Democratic Movement in opposition to Kibaki, but the Orange Democratic Party soon after fractured into two parties with Musyoka going to the new Orange Democratic Movement Kenya (Dercon & Gutierrez-Romero, 2010). Odinga's campaign was focused on the following: the ethnic tensions in Kenya arguing that the Kikuyu had unfairly taken everything from the other ethnic groups; expansion of crime and violence; and, economic policies that only benefited those in power (Prunier, 2008). Despite weak political standing, Kibaki decided to run for president in the 2007 elections, under the new Party of National Unity, since National Rainbow Coalition had disbanded (Dercon & Gutierrez-Romero, 2010).

1.2 The 2007 Elections

As a result of Odinga's campaign messages, Kibaki's perceived failures as president, and the Kikuyu's history of preferential treatment during Kenyatta's rule- while the other forty-one ethnic groups in Kenya continued to face marginalization-

aversion toward the Kikuyu grew (Dercon & Gutierrez-Romero, 2010). While there was

a lack of evidence that the Kikuyu had unjustly benefited from Kibaki's rule, the

perception of having unequal treatment given to the Kikuyu amplified the already intense

ethnic tensions in Kenya (Prunier, 2008). Anti-Kikuyu propaganda was spread

throughout the Rift Valley of Kenya, claiming that Orange Democratic Movement

victory in the 2007 elections would result in the killing of at least one million Kikuyu, to

prevent the Kikuyu from having any political influence in future elections (Kagwanja,

2009). The phrase "Kenya against the Kikuyu" gained popularity and further plans about

Kikuyu eradication were strategized, which involved creating allegation of fraudulent

elections if the Orange Democratic Movement did not win the presidency and

implementing ethnic cleansing to combat unfavorable election results (Kagwanja, 2009).

The previous extra-state violence led to violence spreading and being grouped

into the following: *spontaneous violence* in ethnically mixed urban areas; *organised

violence* by the power elite in the Rift Valley region followed by largely organised

retaliatory violence by both criminal gangs such as the Mungiki and the Taliban and

politicians across the board; and *state violence* by security agencies" (Kagwanja, 2009, p.

367).

The 2007 Election Day generally ran smoothly as 14 million registered voters

voted on December 27, 2007. Samuel Kivuitu, chair of the Electoral Commission of

Kenya, initially expressed faith in the validity and peacefulness of the elections (Hansen,

2011). However, Kivuitu's prediction was not based on contextual analysis: as a

government official Kivuitu was obligated to project faith and confidence in the

government he served; if he did not, the government would have no credibility (Dercon

& Gutierrez-Romero, 2010). On December 29, Kivuitu claimed the tallying of the votes may be fraudulent due to the delay of receiving ballot counts from district surrounding the capital (Hansen, 2011). The Leaders of Party of National Unity and the Orange Democratic Movement debated the results that were coming in from Kibaki's main areas of influence (Nakuru, the Eastern Province, and Nakuru) (Hansen, 2011).

Kibaki won with 4,584,063 votes in comparison to Odinga who garnered 4, 352, 993 votes (Hansen, 2011). The third candidate, Musyoka of the Orange Democratic Movement-Kenya received only 879, 903 votes, but viewed the elections as fair and was appointed by the Party of National Unity as vice-president. The fact that Kibaki only won by a 2% of the total votes created the image that the election results were modified just enough to make it appear that Kibaki had legitimately won (Dercon & Gutierrez-Romero, 2010). The Orange Democratic Movement did not support the results of the elections and demanded Kibaki claim defeat and have another counting of the ballots (Hansen, 2011).

Conversely, The Party of National Unity argued that votes for Odinga had been manipulated in the Nyanza and Rift Valley areas. However, the Kriegler Commission, a commission tasked with investigating the legitimacy of the elections, found that ''the conduct of the 2007 elections was so materially defective that it is impossible for IREC [Independent Review Committee] or anyone else to establish true or reliable results for the presidential and parliamentary elections'' (Kagwanja, 2009, p. 368). Kivuiti responded to the disputes by stating the courts would be able to make the proper decision, yet the Orange Democratic Party countered Kivuiti's proposition under the premise of bias since judges had recently been appointed by Kibaki. The Orange Democratic

Movement also rejected having third-party magistrates hear the cases, leaving no institution available to mediate the disputed election results (Kagwanja, 2009).

In response to the post-election crisis, Archbishop Desmond Tutu, who chaired South Africa's Truth and Reconciliation Commission, attempted to broker negotiations between Kibaki and Odinga (Hansen, 2013). However, Tutu's mediation was unsuccessful as Kibaki claimed he was legitimately elected while Odinga claimed the elections were fraudulent (Hansen, 2013). After Tutu's negotiation attempts, John Kufuor, African Union Chairman and president of Ghana, attempted to broker a solution between Kibaki and Odinga, but was unsuccessful (Hansen, 2013). However, Kufuor then proclaimed an African Union Panel of Eminent African Personalities was to be created to mediate the conflict in Kenya (Hansen, 2013).

Kofi Annan, former Secretary-General of the United Nations, was invited, and agreed to be the chair of the African Union Panel of Eminent African Personalities, along with Tanzanian President Benjamin Mkapa and Lady Grac a Machel who previously served as First Lady in Mozambique (Hansen, 2013).The negotiations also resulted in the formation of the Keynan National Dialogue and Reconciliation on January, 29 2008 whose objectives were, "(1) to bring about a political resolution in order to end the violence; and (2) to facilitate a dialogue to address the longer term structural problems in Kenya that had enabled this level of violence" (Hansen, 2013, p. 309). The Kenya National Dialogue and Reconciliation Committee was largely approved by the international community,[10] but was also regarded as being an "African solution to an

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[10] The Kenya National Dialogue and Reconciliation Committee was supported by the European Union; the United Nations with provision of technical assistance and support and visit to Kenya by Secretary General

African problem" (Annan, 2008, p. 2). Annan continued the pursuit of the responsibility

to protect as he stated:

> It was when I got on the ground and saw the ethnic nature of the killings and the
>
> conflict that the responsibility to protect, and the Rwandan and the Yugoslavian
>
> stories came to my mind. It came to me very strongly that we need to work very
>
> fast to contain it before it got out of hand. (Annan, 2008, p. 17)

The Kenya National Dialogue and Reconciliation Committee established a bodywork to

confront Kenya's history of political violence (Hansen, 2013). The agenda instituted by

the Kenya National Dialogue and Reconciliation Committee called for the formation of

transitional justice mechanisms to resolve immediate and long-term solutions. After six

weeks, negotiations concluded with a resolution of the presidential dispute accepted by

Kibaki and Odinga ("Transitional justice in Kenya: A toolkit for training and

engagement," 2010). The power sharing model derived from Annan's negotiations

consisted of Kibaki serving another term as president, while the position of Prime

Minister was created for Odinga to provide political authority for both the Party of

National Unity and the Orange Democratic Movement ("Transitional justice in Kenya: A

toolkit for training and engagement," 2010).[11] Due to the numerous cases of rape during

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Ban Ki-moon; Jean Ping, Chairperson-Elect of the African Union; and the Centre for Humanitarian
Dialogue in Geneva (Hansen, 2013; Lindenmayer & Kaye, 2009); The United States strongly supported the
negotiations process as they pressured the Kenyan government stating that failure to produce negotiations
would result in the need of an "external solution," but did not specifically state what such a solution would
be (Lindenmayer & Kaye, 2009). Then United States President, George W. Bush, sent Secretary of State
Condoleezza Rice to Kenya on February 18 to assist the African Union Panel of Eminent African
Personalities with the negotiation process (Lindenmayer & Kaye, 2009). Rice went on to publicly state that
failure to resolve the post-election crisis would allow Kenya to never practice business with the United
States as they previously did.(Lindenmayer & Kaye, 2009).

[11] The National Accord and Reconciliation Act of 2008 stated the Prime Minister was to be, "an elected
member of the National Assembly who is the parliamentary leader of- (a) the political party that has the
largest number of members in the National Assembly; or (b) a coalition of political parties in the event that

the post-election violence, Grac a Machel ensured United Nations Security Council

Resolutions 1325 was implemented and its principles embedded into the new constitution

(Hansen, 2013).[12]   At the onset of violence, Odinga and Kibaki were originally opposed

to negotiations, but as the violence spread and the death toll rose, both parties entered a

stalemate in which they knew negotiations were necessary (Hansen, 2013). Annan argued

a power sharing model would be the optimal solution to reduce violence as he stated:

> I had come to an early conclusion that a rerun would be a bad decision, and bad
>
> decisions get more people killed [...] So I felt that we needed to find a way of
>
> dealing with the disagreement over the election by looking forward, and not
>
> trying to rerun, repeat or something that would not give you the result you want,
>
> but may also get people killed. And when looking at the election results, it was
>
> clear to me that there was no way that either party could run the government
>
> effectively without the other. So some type of partnership/coalition was going to
>
> be necessary. (Hansen, 2013, p. 309)

One problem present with the formation of the transitional justice process was

that previous investigations were viewed as corrupt as they were used to benefit political

causes or to destroy evidence from political opposition so Kenyans were skeptical of the

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the leader of political party that has the largest number of members of the National Assembly does not
command the majority in the National Assembly" ("The National Accord and Reconciliation Act 2008,"
2008, p. 1). The Prime Minister is also responsible "to coordinate and supervise the execution of the
functions and affairs of the Government of Kenya including those of ministries; b) may assign any of the
coordination responsibilities of his office to the Deputy Prime Ministers, as well as one of them to deputise
for him; shall perform such other duties as may be assigned to him by the President or under written law"
("The National Accord and Reconciliation Act 2008," 2008, p. 1)

[12] Security Council Resolution 1325 (S/RES/1325) emphasizes the pivotal role women play in transitional
societies and encourages the incorporation of women into United Nations security proceedings (United
Nations Security Council, 2000). TheSecurity Council Resolution also advocates for the protection of
women from sexual assault and other forms of gender-based violence during violent conflict (United
Nations Security Council, 2000).

legitimacy of a transitional justice process (Hansen, 2013). The process may have been

adopted because the leaders involved assumed independent accountability would not be

formed, corresponding to the previous culture of impunity (Hansen, 2013). Additionally,

the prescribed transitional justice measures may have also been used to advance political

causes as the Party of National Unity's approval of investigations may have been formed

under the assumption that the investigations may have confirmed innocence among the

Party of National Unity and place the blame on the Orange Democratic Movement

(Hansen, 2013). Kenyan leadership has also prevented the full development of the truth

seeking. President Kibaki appointed Ambassador Bethuel Kiplagat to chair the

commission, but Kiplagat was a civil servant of the Moi regime and was accused of

illegally acquiring land, and participating in the Wagalla massacre of 1984 (Hansen,

2011). His appointment may have been made to attack the credibility and thus limit the

commission's capabilities, following the former trends of truth commissions (Hansen,

2013). The Truth, Justice and Reconciliation Commission was also underfunded and only

received $1.6 million dollars when the budget was estimated to be $10 million dollars

(Hansen, 2013).

1.3 The 2007/2008 Post-election Violence

The 2007/2008 post-election violence left widespread atrocities across Kenya. As

stated earlier, elections in Kenya were normally accompanied by violence, yet the

aftermath of the 2007 elections was unprecedented and excessive in comparison to

Kenya's previous elections ("Transitional justice in Kenya: A toolkit for training and

engagement," 2010). In total, it is estimated 1,500 people were killed and 600,000

Kenyans were internally displaced ("Transitional justice in Kenya: A toolkit for training and engagement," 2010) and 12,000 Kenyans fled northwest to Uganda as refugees (Iyodu, n.d.). Six out of eight Kenyan provinces were affected in both urban and rural settings (Rogo, 2009). Before the elections, rival ethnic groups violently clashed and mobs lynched members of ethnic groups (Prunier, 2008). Following the election, spontaneous, organized, and state conducted violence became widespread (Kagwanja, 2009). After the election results were announced, randomized killing of opposing ethnicities and property violence began (Kagwanja, 2009). A series of retaliatory violence ensued between Kibaki supporters (the Kikuyu, Kamba, and Kisii ethnic groups) and Odinga supporters (Luo and Luhya ethnicities):

> Angry mobs looted and torched property in Kisumu, including banning the
> Ukwala supermarket and homes and property of the Kikuyu, Kamba and Kisii.
> Violence spread to the Kisii Rongo border area where Luo youths burned
> sugarcane plantations belonging to Kisii, eliciting retaliation from the Kisii who
> torched Luo homes. (Kagwanja, 2009, p. 378)

Kenya's ethnically diverse slums were plagued with looting and violence as Kikuyu mobs forcibly circumcised Luo males (Kagwanja, 2009). There was also a reemergence of formerly dormant criminal gangs- including the Taliban, Bagdad Boys, and Mungiki- who rendered punitive killings (Kagwanja, 2009). Violence spread throughout Kenya and was also directed those who sought refuge in internally displaced camp (Kagwanja, 2009). One of the most gruesome acts occurred when Kalenjin youth ignited the Assemblies of God church, which burned alive thirty-five internally displaced people including, women, children, and those with disabilities (Kagwanja, 2009). Earlier

in 2007, William Ruto became the leader of Kalenjin and is alleged to have directed post-election violence (Kagwanja, 2009). Kalenjin leaders and former military officers trained an army of youth and promised them future employment and remuneration for fighting against the enemy Kikuyu people (Kagwanja, 2009). The Kikuyu youth militia later destroyed the Uasin Gishu area causing "205 deaths, 21,749 Internally Displaced Persons (IDPs) and massive destruction of property, including 52,611 houses burnt and 58 civilian vehicles belonging to civilians and two to the government" (Kagwanja, 2009, p. 380) which accounted the majority of the post-election carnage.[13]

Ethnic tensions continued to amplify when the Kikuyu violently responded to allegations of their people being burned alive in Kiambaa. In January 2008, the Kikuyu retaliated by organizing attacks of youth mobs at the Kalenjin, Luo, and Luhya communities. Additionally, "Ethnic militias threatened to burn down the Tigoni holding centre, one of the many centres hosting an estimated total of 8,889 non-Kikuyu IDPs across central Kenya and Nairobi" (Kagwanja, 2009, p. 380).

During the stalling of the Party of National Unity-Orange Democratic Movement negotiations, the communities comprised heavily of Kikuyu people continued to retaliate. Militias affiliated with the Party of National Unity created various stop posts along the Nairobi-Nakuru highway which forced those riding in busses and vans to show forms of national identification and members of the Luo and Kalenjin groups were lynched (Hansen 2011).

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[13] It is thought that 1,300 were killed in the Uasin Gishu area and a range between 400,000-600,000 were displaced (Kagwanja, 2009).

The post-election violence allowed the Mungiki criminal gang to reemerge (after formerly being shut down by Kenyan police) and serve as the guardians of the Kikuyu community and recruited Kikuyu youth who had been displaced by the conflict. The Mungiki were used to combat the Kalenjin militias and the Taliban (a Luo militia). Some incarcerated Mungiki were also released from prison to help with retaliation measures and attacked Orange Democratic Movement protesters (Kagwanja, 2009). Finally, government officials, including members of parliament and civil servants, were alleged to have utilized the Mungiki to resist and counter the Luo and Kalenjin. While the Mungiki did play an extensive role on behalf of the Kikuyu, they were not universally accepted among the Kikuyu and many officials of the Party of National Unity did support the Mungiki. Moreover, using the Mungiki as a form of identification was also used excessively as all Kikuyu youth were often referred to as being Mungiki, and the identification of the Mungiki has also been falsely applied to other gangs and militia members who had no association with the original Mungiki gang (Kagwanja, 2009).

The state's response to the post-election violence was characterized by excessive violence and incapability to protect Kenyan citizens. Kenyan police consisted of 35,000 regular commissioned officers; the general service unit who focused on riot control; the administration police who were tasked with assisting the regularly commissioned officers as well as safeguarding the provincial administration (Van der Merwe & Lamb, 2009). Additionally, the national security and intelligence services provided national support. The police did not have the training or the machinery to properly protect Kenya's people. However, the police were also professed to operate with bias, prompting the elite class to hire gangs and bodyguards for protection. The Commission of Inquiry into Post-Election

Violence, commonly referred to as the "Waki Commission", found that all of the fatalities, from gunshots (405) came from the police, who were also accused of mass accounts of rape (Van der Merwe & Lamb, 2009). Overall, the police were incapable of preventing and even minimizing the post-election violence due to a lack of procedural knowledge as well as acting through partiality (Van der Merwe & Lamb, 2009).

2. Kenya and the International Criminal Court

Since the 2007/2008 post-election violence, there has been an ongoing dispute between Kenya and the International Criminal Court. Government officials and the civil society of Kenya- as will be more thoroughly discussed in this section- have differing views about trying perpetrators/organizers of post-election violence before the International Criminal Court at The Hague (Hansen, 2011). Some presume that trials by at the International Criminal Court will ensure greater accountability and prevent biased rulings that may be formed in the Kenyan Judiciary, while others assert domestic trials are appropriate as localized justice will provide a stronger sense of reconciliation (Hansen, 2013; Hansen, 2011). Opinions regarding the intervention of the International Criminal Court have also fluctuated depending on who was indicted by the International Criminal Court (Hansen, 2011).

The recommendation from the Commission of Inquiry into Post-Election Violence precipitated debate regarding the pursuit of an international or localized pursuit of justice (Hansen, 2011). The Commission of Inquiry into Post-Election Violence, which was promulgated by the Kenya National Dialogue and Reconciliation Commission to investigate post-election violence, concluded a Special Tribunal for Kenya was to be

formed, yet the bill to establish the special commission was rejected in parliament

(Hansen, 2011).[14] The majority of parliament did not support the use of a special tribunal

due to perceived corruption and bias within the Kenyan judiciary (Hansen, 2011). In

response to parliament's rejection to create a special tribunal, William Ruto, then

parliamentarian stated, "Kofi Annan should hand over the envelope that contains names

of suspects to the International Criminal Court at The Hague so that proper investigations

can start" (Nation News Team, 2009). However, after being indicted by the International

Criminal Court, Ruto reversed his earlier stance, advocating instead for a localized justice

process (Muindi, 2011). Prime Minister Odinga also changed his stance on Kenyan

justice, but for reasons different than Ruto. In 2009, Odinga sought a local approach

(Nation News Team, 2009), yet later favored the use of the International Criminal Court

(Muindi, 2011). Then Finance Minister, Uhuru Kenyatta, and Ruto claimed Odinga's

rationale for changing his opinion was because Odinga's opponents had been indicted by

the International Criminal Court, Odinga was using the International Criminal Court to

eradicate political opposition, intensifying the already present political divisions (Muindi,

2011).

 During the debate between using a local or international approach to justice,

Annan became frustrated and sent a list containing the names of those who were

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[14] The Special Tribunal for Kenya would, "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. The Special Tribunal shall achieve this through the investigation, prosecution and adjudication of such crimes" ("Report of the Commission of Inquiry into Post-Election Violence," 2008, p. 472). The Special Tribunal for Kenya was to be comprised of "Kenyan and international judges, as well as Kenyan and international staff," ("Report of the Commission of Inquiry into Post-Election Violence," 2008, p. 472) and was to be granted authority to "take custody of all investigative material and witness statements and testimony collected and recorded" ("Report of the Commission of Inquiry into Post-Election Violence," 2008, p. 475).

allegedly lead organizers of the 2007/2008 post-election violence to the International

Criminal Court in July of 2009 (Hansen, 2011). The International Criminal Court's Pre-

Trial Chamber II processed Annan's list and called the Prosecutor to investigate the post-

election violence. After investigations, the court summoned Francis Muthaura, William

Ruto, and Uhuru Kenyatta (the three of whom were running for president in 2012) along

with three other individuals deemed to be most responsibility in the post-election

violence (Hansen, 2011). In December 2010, the Kenyan Parliament presented a bill

supporting Kenya's withdrawal from the Rome Statute (the statute empowering the

International Criminal Court), was nearly unanimously passed, and it was also stated the

new constitution would be the only necessary resource to move past post-election

violence (Hansen, 2011). The bill to disband from the International Criminal Court,

however, was never acted upon by government officials (Hansen, 2011).

The lack of follow through with the issue of Kenya being removed from the Rome

Statute prompted the state to take other measures to circumnavigate the International

Criminal Courts summoning (Hansen, 2011). Vice President Kalonzo Musyoka garnered

the support of the African Union to postpone International Criminal Court prosecutions

under their shared sentiment that the International Criminal Court impacted Africa's

sovereignty and investigations could create issues of insecurity (Hansen, 2011).

Additionally, the Kenyan government sent a petition to the International Criminal Court

challenging the court's authority under Article 19 of the Rome Statute (the statute

authorizing the creation of the International Criminal Court) (Hansen, 2011).[15] However,

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[15] Article 19 of the Rome Statute allows a state to challenge the admissibility of a if a state "is investigating or prosecuting the case or has investigate or prosecuted" (Rome Statute, 1998).

Pre-Trial Chamber II rejected Kenya's request under the grounds that there was no evidence suggesting an investigation had commenced for the six alleged perpetrators (Hansen, 2011). Finally, Ruto, Kenyatta, and Musyoka formed a coalition under the purpose of gaining power in 2012, yet ironically, Ruto and Kenyatta were opposition during the 2008 post-election violence, making it appear their only shared view is the avoidance of accountability. The above rationale to dismiss the involvement of the International Criminal Court is contradictory and Kenya may be viewed as using any defense possible to avoid accountability:

> On the one hand, the government has sought a deferral of the ICC [International Criminal Court] cases, claiming that prosecuting the Ocampo Six will jeopardize peace and stability in the country. But, on the other hand, the government has attempted to challenge the admissibility of the ICC cases, arguing that a domestic accountability process involving the six ICC suspects has commenced. (Hansen, 2011, p. 15)

There is also a lack of cohesion within the Orange Democratic Movement political party. A statement arguing for the importance of using the International Criminal Court to perform investigation was sent on behalf of the Orange Democratic Movement by Secretary General Anyang' Nyong'o, contradicting Vice President Musyoka's campaign against the International Criminal Court ("Reject Kenya Plea, Orange Asks UN," 2011). Moreover, the Vice Chair, Deputy Organizing Secretary, and Deputy Secretary General of the Orange Democratic Movement also rejected Vice President Musyoka's stance ("Reject Kenya Plea, Orange Asks UN," 2011). Then President Kibaki, of the Party of National Unity also rejected International Criminal Court

involvement (Hansen, 2011). However, a 2011 poll by the Kenya National Dialogue and Reconciliation Commission found that 78% of respondents were "very/somewhat happy" about International Criminal Court investigations ("Draft Review Report," 2011).

Some view the debate surrounding the International Criminal Court has intensified the already present political divisions. National conflict can spiral downwards to local communities so addressing national conflict is necessary to deter future political violence. Leaders are representatives of their communities and an attack on a leader is typically viewed as an attack on the leader's respective group. Involvement of the International Criminal Court thus becomes problematic as the conviction of leaders may stir unrest in the leader's community, yet there is a possibility that the trials may allow civil society to understand the trials are individualistic and are not representative of their ethnic group (Hansen, 2011). Ethno-driven hate speech accompanied debate in the International Criminal Court, which can negatively affect peace and security. An example of ethno-driven hate speech identified by Hansen (2011) comes from Public Works Assistant Minister Mwangi Kiunjuri:

> If we don't talk about Raila [Odinga] now, we shall be caught unawares as a
> community . . . . Raila is not a good person. He is like the animal that eats the
> chicken and its eggs . . . . A hyena is hunted by a man and his in-law and a house
> that is divided is destroyed by one stone . . . . A hyena hunts by following you in
> the hope that your swinging hand will fall off. But we must get rid of this hyena
> now . . . . Let me tell you, uncircumcised boys [making reference to the Luo
> ethnic group to which Odinga belongs] are not invited to dowry negotiations
> because, as you know, boys will always take time to sing their play songs. An

uncircumcised boy's goings are only ended when he faces the knife. (Hansen,

2011, p. 24)

2.1 Recent Developments between Kenya and the International Criminal Court

The International Criminal Court has demonstrated progress in combatting the

formerly ubiquitous impunity surrounding Kenyan political elite. During initial hearing at

The Hague, William Ruto claimed his charges "can only be possible in a movie"

(International Criminal Court, 2012). On January 23, 2012, Pre-Trial Chamber II of the

International Criminal Court made charges to members of the Party of National Unity

and Orange Democratic Movement (International Criminal Court, 2012). Muthaura, then

Kenyan Head of Public Service, and Kenyatta, then Finance Minister, were found

directly responsible or indirectly responsible as co-perpetrators for, "murder, deportation

of forcible transfer of population, rape, persecution, and other inhumane acts all

constituting crimes against humanity under the Rome Statute" (Hansen, 2011

[Afterward], p. 32). Ruto of the Orange Democratic Movement was similarly charged

with "contributing to the crimes of murder, deportation or forcible transfer of population,

and persecution, amounting to crimes against humanity" (Hansen, 2011 [Afterward], p.

32). In response to the charges, Kenya's attorney general stated Kenyatta and Muthaura

would remain in public service (Hansen, 2011 [Afterward], p. 32).

In September 2013, the Kenyan Parliament again passed a motion to disband from

the International Criminal Court, but it is still unclear if Kenya will actually disband from

the International Criminal Court ("Kenyan MPs agree to withdraw from International

Criminal Court," 2013). Even if Kenya withdrew from the International Criminal Court

though, the cases of the six alleged perpetrators of post-election violence would continue ("Kenya's William Ruto formed an army for war, ICC hears," 2013). William Ruto went on trial at The Hague in September 2013 and claimed to be innocent of his three charges of murder, persecution, and forcible transfer of people ("Kenya's William Ruto formed an army for war, ICC hears," 2013). Ruto's lawyer stated the charges surrounding Ruto were fabricated while Fatou Bensouda, chief prosecutor, argued Ruto had worked for over year leading up to the 2007 presidential elections to exacerbate the ethnic tensions between his Kalenjin ethnic group and Kenyatta and the Kikuyu people ("Kenya's William Ruto formed an army for war, ICC hears," 2013). Leading up to Ruto's trial, the African Union gathered to discuss withdrawing from the International Court as members of the African Union perceived the International Criminal Court was politicized and was building cases with selectivity bias ("African Union summit on ICC pullout over Ruto trial," 2013).

In response to Kenya's motion to leave that International Criminal Court, Prosecutor Bensoudo emphasized that neutral judges were the only ones who could make fair decisions, unlike Kenyan politicians ("ICC Prosecutor: 'Only judges can decide Ruto case,'" 2013). President Kenyatta requested in October 2013, one month before his trial at the International Criminal Court that his trial be through a video link in order to accommodate Kenyatta's duties as Kenyan president ("Kenya's Uhuru Kenyatta requests ICC trial video link," 2013). One day after Kenyatta's request to have a video-linked trial, Kenyatta's lawyers wrote to the International Criminal Court seeking the dismissal of Kenyatta's cases as defense witnesses had been intimidated while prosecution witnesses were viewed as biased and corrupt ("Kenya president Kenyatta's ICC trial 'must be scrapped'," 2013).

The African Union is also in protest of the International Criminal Court's indictments as being unfair to Africa since African leaders are the only ones to have been indicted ("Kenya president Kenyatta's ICC trial 'must be scrapped'," 2013). Later in October 2013, the majority of judges presiding over Kenyatta's trial allowed Kenyatta to not be physically present for parts of the trials so he could continue his duties as president in Kenya, as long as Kenyatta was present for the opening and closing statements, victim hearings and the verdict ("Kenya's president Kenyatta 'excused most of ICC trial'," 2013).

Conversely, Ruto was not granted as much absence privileges by the International Criminal Court as Kenyatta, because Ruto was only allowed to return to Kenya when deemed absolutely necessary ("Kenya's William Ruto loses ICC trial attendance ruling," 2013). Kenyatta's original trial start date of November 12, 2013 was later postponed until February 5, 2014 granting Kenyatta time to respond to the aftermath of the Westgate mall attack by terrorist group Al-Shabab ("Kenya's Uhuru Kenyatta: ICC case delayed," 2013). Kenyatta's trial has since been postponed twice: the first postponement was granted in January to allow the prosecution extra time to gather information,[16] and the second postponement came in April 2014, pushing Kenyatta's trial to October to again allow the prosecution more time to collect records for their case ("Uhuru Kenyatta trial: ICC delays start until October," 2014).

In November, 2013, the United Nations Security Council rejected a resolution proposed by Rwanda requesting the trials of Kenyatta and Ruto to be suspended for one

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[16] Prosecutor Bensouda submitted a request to the International Criminal Court to adjourn Kenyatta's case because her case no longer had sufficient evidence as one of Bensouda's witnesses no longer wanted to testify, and another confessed to providing a fictitious statement ("ICC prosecutor seeks to adjourn Kenyatta trial," 2013)

year ("UN rejects Africa bid to halt Kenya leaders' ICC trials," 2013). An opinion poll

surveying 2,060 Kenyans found that "67% of those asked wanted Mr Kenyatta to travel

to the ICC and clear his name. 25% of respondents said Mr. Kenyatta should not attend"

("UN rejects Africa bid to halt Kenya leaders' ICC trials," 2013). The International

Criminal Court agreed to allow some defendants to provide evidence through a video

(Kenyatta trial: ICC may allow video-link evidence," 2013). Kenya's ambassador to the

International Criminal Court, Macharia Kamau, has pushed for current serving heads of

state to be excluded from prosecution until their term is over since international trials

interfere with their ability to perform executive duties (Kenyatta trial: ICC may allow

video-link evidence," 2013).[17] Based off Kenya's previous attempts to avoid the

International Criminal Court, Kenya's cooperation with the International Criminal Court

extraditions is doubtful, but in March of 2014, Kenya's high court stated Kenyan

Journalist Walter Barasa, who allegedly bribed the prosecution witnesses in Ruto's trial,

could be extradited to The Hague ("Kenya court allows Walter Barasa's ICC extradition,"

2014). The transfer of Barasa has yet to occur, but is to be arranged by Joseph Ole

Lenku, Interior Minister of Kenya ("Kenya court allows Walter Barasa's ICC

extradition," 2014). The extradition of Barasa is questionable, and based off Kenya's

previous attempts to postpone involvement with the International Criminal Court,

Barasa's extradition may be delayed.

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[17] President Kenyatta is the first current head of state to stand trial at the International Criminal Court ("UN rejects Africa bid to halt Kenya leaders' ICC trials," 2013)

3. An Evaluation of Kenya's Pursuit of Transitional Justice

The Kenyan case of transitional justice is commendable in several areas and supports the hypothesis of this thesis. The Kenyan case of transitional justice can also add to the theoretical framework of the field of transitional justice, and the lessons derived from the Kenyan case, can be applied to future societies undergoing a transition. Additionally, lessons gained from the South African case can also be applied as future policy recommendations for Kenya. This section of the thesis will evaluate the effectiveness of Kenya's pursuit of transformation, provide future recommendations for Kenya, and finally discuss how the Kenya case connects to the broader field of transitional justice and the hypothesis of this thesis.

3.1 Loss of Land

Since British colonialism, Kenya has experienced disparities in land distribution, creating an environment prone to human rights violations (Robins, 2011). Failing to resolve unequal access to land to provide basic sustenance to Kenyans will perpetuate one of the root causes of violence in Kenya. As Robins (2011) explains:

> The denial of access to land is often accomplished with violence and force, hence directly violating the victims' physical integrity. This invariably leads to the loss of livelihood or subsistence, hence violating the basic economic and social rights of victims. In other cases, access to land is taken away through corruption or through "legalized" land grabbing that disregards the customary and possessory rights of the victims' communities. (Robins, 2011, p. 33)

The Kenyan post-election violence brought many Kenyans to live in internally

displaced camps (Robins, 2011). The marginalization of women in the camps often prompts them to perform transactional sex as means of generating income (Robins, 2011). One victim of post-election violence living in Nyanza, Kenya described the life of women in internally displaced camps:

> When we went to the camps to look for the women we didn't find them there because they had gone to the bars [to work as prostitutes] because they were not economically stable. If such women could be empowered to start their own businesses and those who do not have houses could be built houses then that would be very fair and helpful to them. Without that then I cannot assure you that prostitution among us will cease; we will just go to the bars because we cannot stay here when our families are starving. (Robins, 2011, p. 30)

Even if land was not violently seized, a lack of access to land is a human rights violation as it excludes people from access to basic resources and prevents pastoralists from earning a living or "working the very land they have lost," (Robins, 2011, p. 36). Land eviction and displacement also has a history of being predicated by ethnicity. One Ogiek, a hunter-gatherer group in East Africa that has suffered land discrimination, explains cultural significance of land and the needs of reintegration:

> We should be given back our rightful land where our ancestors used to live so that we may also be like the other people and feel that we are recognized. We would also like to be built schools, hospitals, and infrastructure so that we may also get involved in the development process like other communities. (Robins, 2011, p.39)

Recent reforms have addressed land disparities and may lead to sustainable progress. Kenya's new constitution has taken measure to address land violations, such as

allowing widows the ability to inherit land (Robins, 2011). The new constitution

constructed a National Land Commission to:

(e) to initiate investigations, on its own initiative or on a complaint, into present or

historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in

land conflicts;

(g) to assess tax on land and premiums on immovable property in any area

designated by law; and

(h) to monitor and have oversight responsibilities over land use

planning throughout the country

("The Constitution of Kenya," 2010, p. 106)

The National Land Commission, if executed as it is described in the new

constitution, has the potential to address and resolve the deep rooted problems that have

led to violence in Kenya; however, the effects of the National Land Commission have yet

to be seen.

3.2 Truth Seeking and Government Acknowledgement

While victims sought, and continue to seek, a variety of forms of reparation,

victims generally agree that some form of government recognition is needed. In a 2011

survey, while Kenya's Truth, Justice, and Reconciliation Commission was gathering

statements, 23% had no knowledge of the Truth, Justice, and Reconciliation Commission,

while 40% knew a little about the commission and 37% claimed to be very familiar with

the commission (Robins, 2011). Moreover, 80% of those interviewed had not been

contacted by the Truth, Justice and Reconciliation Commission (Robins, 2011). The 2011 survey was supposed to be representative of each region in Kenya, so the respondents' lack of knowledge of the Truth, Justice, and Reconciliation Commission reveals the commission's outreach efforts were not representative. Although the final reports from the commission have already been published, future truth commissions may be more effective if civil society and non-governmental organizations are incorporated into the process to help promote future truth and reconciliation commissions. If the truth and reconciliation commission is unable to meet with certain groups or communities, non-governmental organizations or civil society groups can collect statements as well.

The pursuit of prosecutions can counter Kenya's former culture of impunity, and, according to Table 4, nearly half of Kenyans surveyed in 2011 believe justice came from prosecutions. Furthermore, when victims were asked if those who committed violations should be prosecuted, 82% agreed, while 14% did not support prosecutions (Robins, 2011). The minority who opposed prosecution supported their position on the basis of their religious beliefs (e.g. Christian forgiveness) or the speculation that prosecutions would only amplify hostilities (Robins, 2011). When it came to the International Criminal Court, 82% surveyed did not feel the Kenyan judiciary could be trusted to hold trials perpetrators and 74% advocated for involvement by the International Criminal Court. Sentiments surrounding International Criminal Court involvement were similar in 2013 when 67% thought President Kenyatta should go to The Hague to confirm his innocence while 25% thought he should not attend ("UN rejects Africa bid to halt Kenya leaders' ICC trials," 2013).

4. The Kenya National Dialogue and Reconciliation Monitoring Project

The following analysis comes from the Kenya National Dialogue and Reconciliation Monitoring Project's May 2013 report, "Kenya's 2013 Elections: A review of preparedness". As will be discussed below, there has been significant progress as a result of Kenya's institutional reforms promulgated by Kenya's new constitution. However, there are also shortcomings, such as Kenyan police being perceived as operating corruptly.

As Figure 1 below on this page (137) shows, feelings of safety regarding elections has nearly doubled (28% safer in December 2008 and 53% safer in December 2012. The new Constitution and its institutional reform have helped build public trust and increase perception of security ("Kenya's 2013 Elections: A review of preparedness," 2013).

Figure 1: Perceptions of Safety in Comparison to 2007 Elections

	Dec-08	Aug-09	Feb-10	Dec-10	Jun-11	Oct-11	Sep-12
Safer	28%	52%	58%	72%	50%	52%	41%
Less Safe	45%	27%	19%	13%	35%	34%	44%
About the same	27%	20%	23%	14%	14%	14%	15%
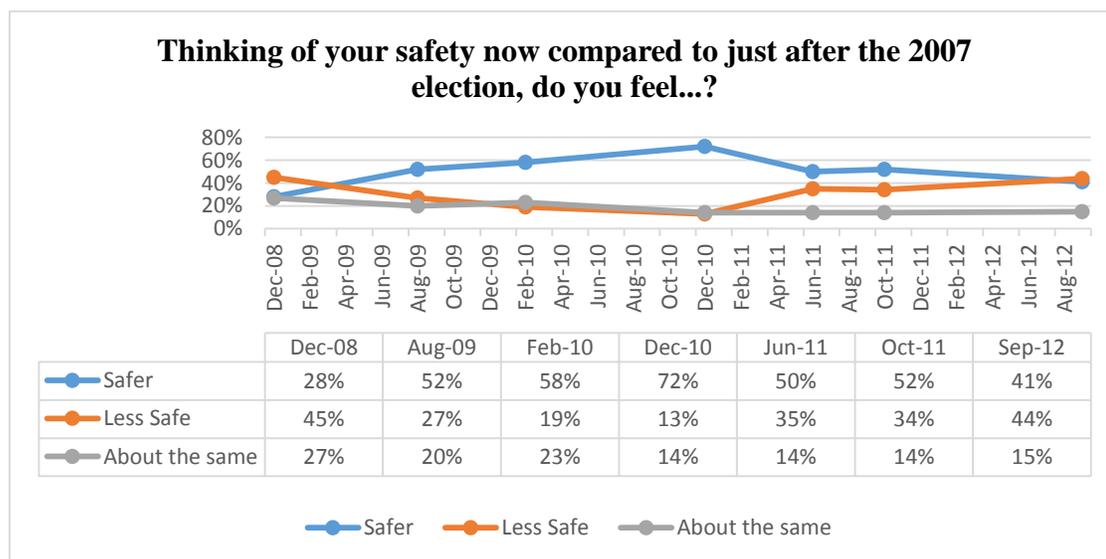
Source: ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 18)

As indicated in Figure 2 below on this page (138), confidence in the Kenyan judiciary has risen significantly since 2008. The advent of the new constitution at the end of 2009 can partially explain the start of a rapid increase in judicial satisfactions as the constitution guaranteed judicial independence ("Kenya's 2013 Elections: A review of preparedness," 2013). The vetting of judges and magistrates in 2012 was viewed by some as carryover of judicial corruption since judges during the post-election violence period were reinstated ("Kenya's 2013 Elections: A review of preparedness," 2013). However, at the same time, the vetting process may also prompt Kenyans to assume that only the qualified, unbiased judges were permitted to continue serving, which may explain why the public's perception of the judiciary has since slightly increase.
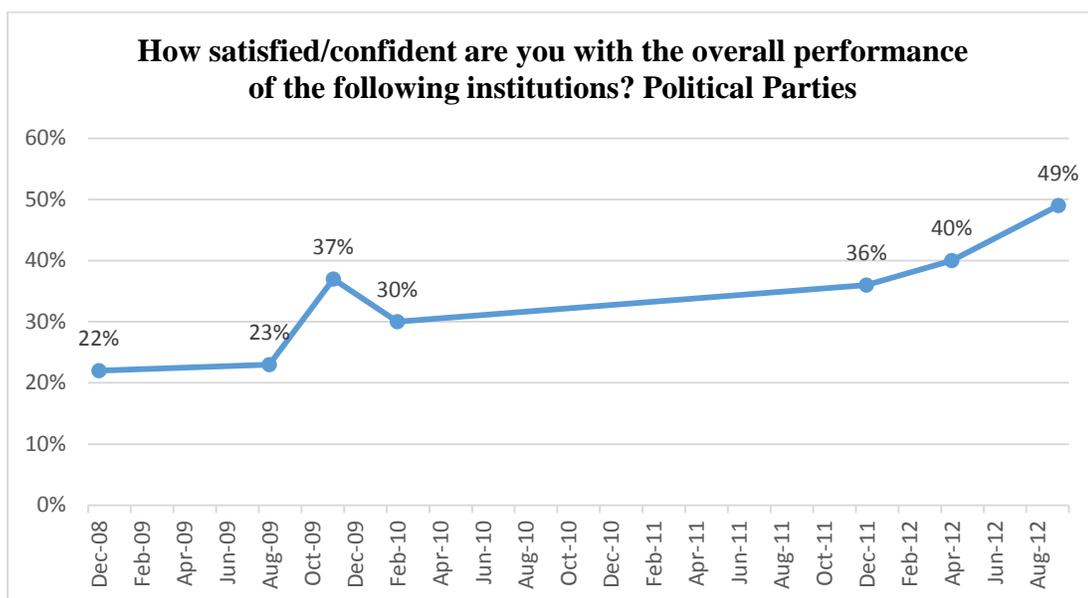
Figure 2: Judicial Satisfaction
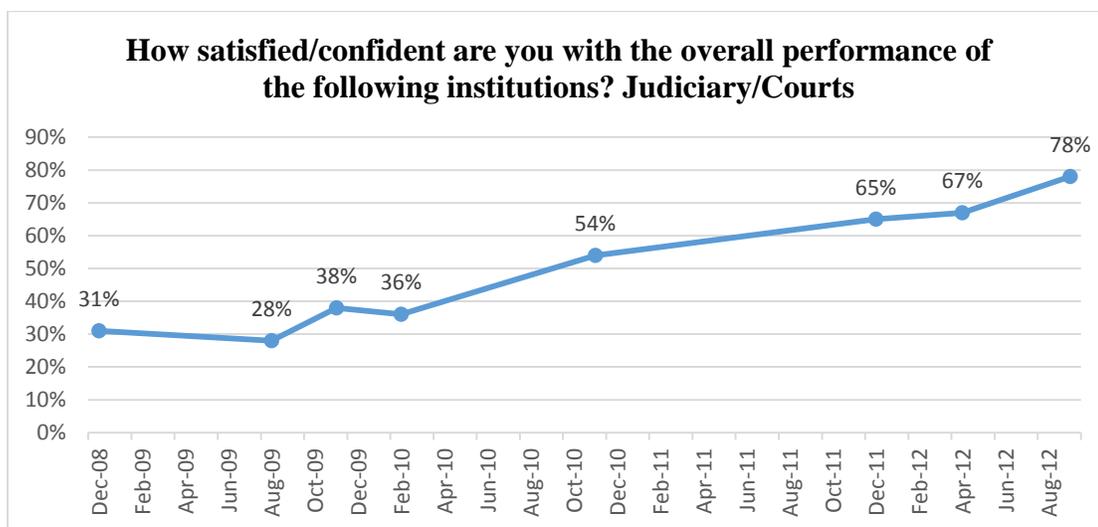
Source: ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 8)

The public's confidence in political parties has been on the rise as indicated in Figure 3 on page 140, but there are still several concerns about political parties. Political parties are still commonly predicated upon ethnicity and leadership ("Kenya's 2013 Elections: A review of preparedness," 2013). The leaders of political parties are also often viewed as being the leaders of their ethnicity and leaders' policies have spurred division within Kenyan society. Ethno-political alliances have been frequently made, but ethno-political alliances are problematic as the main discussion of the alliances revolve around ethnicity and winning power, but do not address government policy ("Kenya's 2013 Elections: A review of preparedness," 2013). Even in political parties in which there are no political alliances, political party membership is largely dictated by ethnicity, meaning Kenyans support a political party because the leader of the party is of their ethnicity and not because of policy stances ("Kenya's 2013 Elections: A review of preparedness," 2013).

Despite the problems associated with ethno-drive politics, satisfaction with political parties has been on the rise in Kenya as portrayed in Figure 3 on page 140. The increase in political party satisfaction may be the result of Kenya' constitutional reform directed at institutionalizing political parties to cover broad political issues and move away from ethno-politics ("Kenya's 2013 Elections: A review of preparedness," 2013).
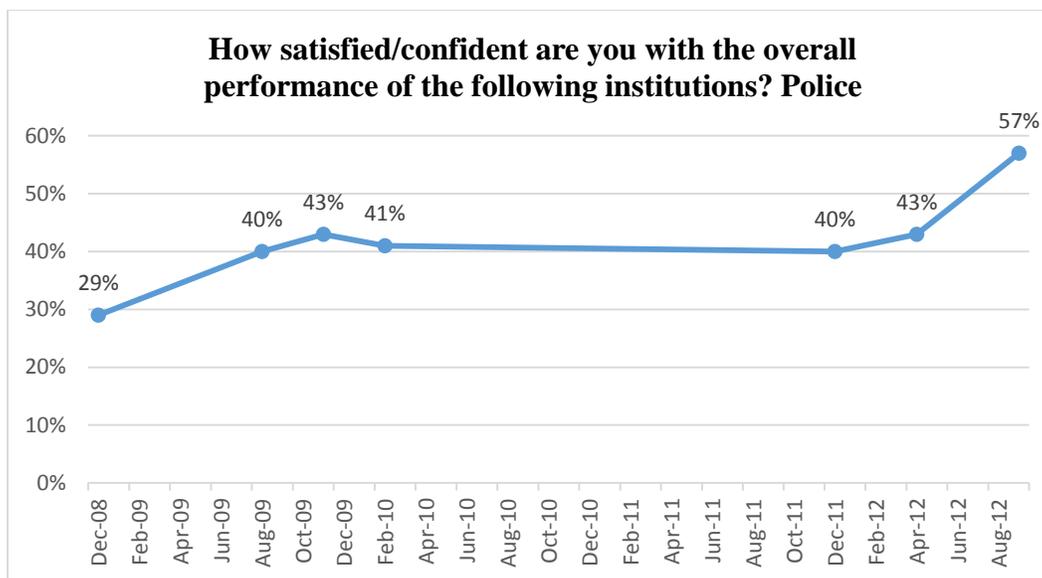
Figure 3: Political Party Satisfaction

How satisfied/confident are you with the overall performance of the following institutions? Political Parties

Source: ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 9)

As evidenced by Kenya's history in the previous section of this thesis, the police have been an adversary among the Kenyan people. Reforming the police and security institutions is necessary to lead to transformative change in Kenya. Without strong security institutions, Kenyan civil society and politicians will likely continue to use violence similar to the build-up to, and the actual post-election violence. Because the police were not trusted, Kenyan politicians utilized their own militias to advance their cause and Kenyan citizens engaged in direct combat with each other (Kagwanja, 2009). Establishing a trustworthy and competent security sector in Kenya will allow for organized and less violent resolutions of conflict and will enable Kenyans to feel safer in their daily lives.

Figure 4 on this page (141) shows that satisfaction with the police has increased substantially since the post-election violence (29% of respondents were satisfied with the police in December 2008, whereas 53% of respondents were satisfied with the police in December 2012). While Kenya's new constitution has called for administrative and institutional changes, an actual change in police services has yet to occur as police are still perceived by the public operating with ethnic bias ("Kenya's 2013 Elections: A review of preparedness," 2013).

Figure 4: Police Satisfaction

How satisfied/confident are you with the overall performance of the following institutions? Police

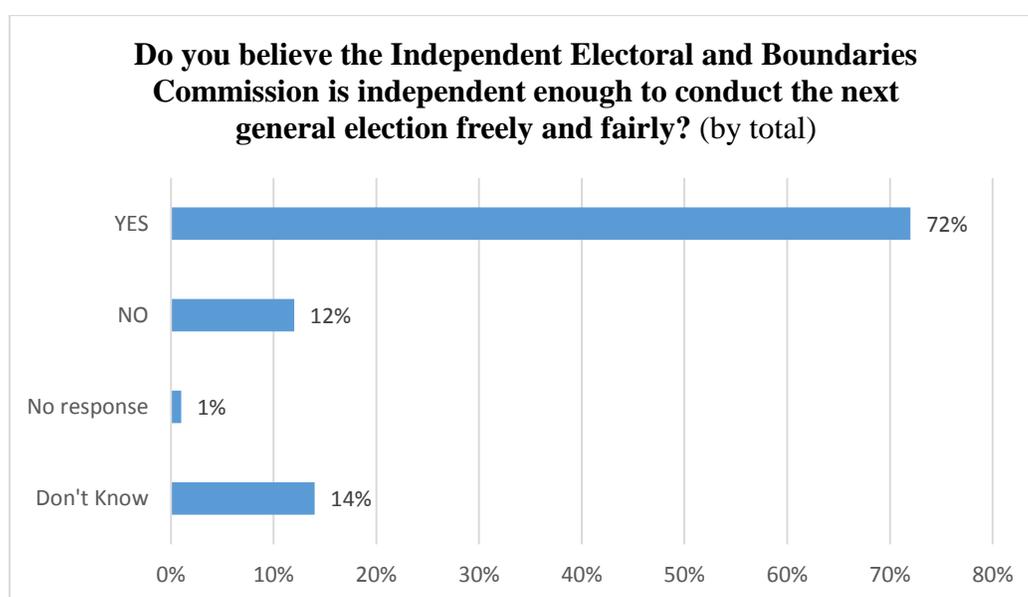Source: ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 10)

A recent development that devastated public perception of the police came in October 2013 when a sixteen year old girl was sexually assaulted by six men who also threw her in a pit latrine resulting in the fracturing of her back and waist-down paralysis ("Kenyans accuse police of ignoring gang rape," 2013). When the survivor, known as Liz, complained to the police, three of the alleged perpetrators were only ordered to cut grass around police headquarters and were then set free without any police investigation ("Kenyans accuse police of ignoring gang rape," 2013). The impunity of the police sparked outrage in Kenya and internationally, resulting in massive protest and the formation of a petition of 1.2 million signatures demanding the rapists are arrested and prosecuted ("Kenyans demand gang-rape justice in police petition," 2013).

In response to the protests, Keynan Chief Justice Willy Mutunga sent the case to the National Council for the Administration of Justice (Kenya rape: Chief Justice Mutunga promises 'action'," 2013). The protests and the petition in response to Liz's case highlight deep dissatisfaction with Kenyan police. Although a case can be made that the police who neglected to properly respond to Liz's case are not representative of all Kenyan police, the reality of police conduct is trumped by police perception. Given Kenya's deeply rooted history of turmoil with the police, Liz's injustice will only amplify sentiments of police corruption. The progress that had been made with police perception leading up to 2013 has likely plummeted, but the true effects cannot be known until Kenyans are surveyed.

In response to Kenya's history of electoral disputes and election violence, the Independent Electoral and Boundaries Commission was established by the new constitution with the task of providing donation regulation, voter education, legitimate

voter registration, and "accurate counting, transmission, collation and announcement of results" ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 39). Leading up to the 2013 elections, the Independent Electoral and Boundaries Commission was highly regarded among Kenyans (see Figure 5 below on this page).

Figure 5: Perceived Impartiality of Independent Electoral and Boundaries Commission

Do you believe the Independent Electoral and Boundaries Commission is independent enough to conduct the next general election freely and fairly? (by total)

Source: ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 46)

Additionally, when asked if there was a dispute in the upcoming election, respondents expressed high levels of trust in the Electoral Commission, International Election Observers, Christian Church Leaders, and Kofi Annan while there was a greater distrust with political parties and presidential candidates (see Figure 6 on page 144). Although politicians may hold significant power, the data indicates their influence is not

as strong with the Kenyan population as it may have previously been. While the 2007/2008 post-election violence was atrocious, it appears to have transformed Kenyans views on politics, and, with more emphasis being placed on international and/or independent mechanisms, Kenyan politicians will be pressured to move away from former practices of corruption.

Figure 6: Trusted Mediators in the Event of Election Violence

If violence were to recur as a result of disagreement about the results of the upcoming presidential election, to what extent would you distrust or trust the following as mediators?			
	trust	distrust	Don't know
Political parties	37%	62%	1%
Presidential Candidates	47%	52%	1%
The Election Commission	75%	24%	1%
International Election Observers	75%	21%	4%
Christian church leaders	83%	16%	1%
Muslim leaders	68%	29%	4%
Kenyan Courts	68%	31%	1%
Kenyan Civil Society	68%	26%	6%
Kofi Annan	75%	22%	3%
Donors/diplomats	68%	28%	4%

Source: ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 43)

5. Assessment of 2013 Elections

An analysis of Kenya's 2013 elections is a powerful indicator to evaluate Kenya's transformative progress since the 2007/2008 post-election violence. As previously explained, since Kenya's transition to multiparty democracy, each presidential election has been accompanied by violence, with the most severe violence occurring in the previous 2007-2008 elections (Hansen, 2011). Overall, Kenya's 2013 elections, although

not without flaws, were relatively peaceful. While the election results were contested, Kenya's High Court decision, and the respect and obedience of its decision, is evidence of the effectiveness of Kenya's institutional changes and progress.

Before the elections, technology was implemented in order to facilitate fairness of elections and prevent the spread of hate speech and violence (Kalan, 2013). A biometric system, in which fingerprints and photographs were recorded, was also used to register voters to prevent fraudulent votes (Kalan, 2013). In order to monitor and prevent the spread of hate speech, Umati (a multi-lingual project to monitor social media speech) was created to stop the flow of hate speech (Kalan, 2013). Legislation was recently enacted, which required the registration of mobile SIM cards to track SMS messages, so in the event hate speech is spread through text messages (as it commonly was in 2007/2008), hateful messages would be flagged by Umati, and could be traced back to the sender to hopefully reduce the spread of hate speech (Kalan, 2013).

The presidential election began on March 4, 2013 elections fairly calmly, with many embracing the campaign for peaceful elections (Greste, 2013). However, the electronic vote tallying machines, designed to prevent fraudulent dissemination, suffered glitches and resulted in the ballots having to be hand count in Nairobi, and it was rumored that rejected ballots had it made into the collection to be hand counted. ("Frustration grows over Kenya vote-count delay," 2013). Kenya's 2010 constitution requires that a candidate must receive 50% of votes to be elected president or second election must be held, and the vote counting delays prompted many to think runoff election was going to be necessary ("Frustration grows over Kenya vote-count delay," 2013). After all of the votes had been counted, it was confirmed by the Independent

Elections and Boundaries Commission that Kenyatta had won the election (Brownsell, 2013).

Presidential runner-up Odinga contested the election results though, claiming that results had been tampered and votes from the strongholds of support for Odinga, like Ndhiwa, had been lost (Brownsell, 2013). Odinga submitted an appeal to Kenya's Supreme Court stating "'Democracy is on trial'" (Brownsell, 2013). A group of Odinga protesters gathered outside the Kenyan Supreme Court, where the election ruling was to be made, and were teargased by police, but the protesters did not retaliate ('Kenya's Odinga challenges election result," 2013). Odinga clearly told his supports that they could speak out, but could not use any violence and had to wait for the Supreme Court decision ('Kenya's Odinga challenges election result," 2013).

Odinga's directives demonstrate a transformation since 2007 in which violence broke out before decisions were even made and also exhibits respect for Kenya's judiciary, whereas Odinga's Orange Democratic Party in 2008 completely rejected the decision (Kagwanja, 2009). On March 31, 2013, the Supreme Court concluded Kenyatta had won freely and fairly and was to be sworn in on April 9, 2014. ("Kenya court upholds Uhuru Kenyatta's poll win," 2013). Violence began between youth and police in Odinga's largest support area, Kisumu, resulting in two gunshot wounds ("Kenya court upholds Uhuru Kenyatta's poll win," 2013). However, Odinga later publicly stated the court had spoken and its decision was to respected and wished Kenyatta luck as president ("Kenya court upholds Uhuru Kenyatta's poll win," 2013). Violent protest in Kisumu continued and five people were killed by police forces and seven were detained by police, but the violence was isolated and the majority or protesters stopped their actions once

Odinga admitted defeat ("Kenya deploys forces to contain violence," 2013).

Although the 2013 were not without complete violence, in comparison to the 2007/2008 elections in which approximately 1,500 were killed, great progress has been made and Kenya's cycle of election crises had been broken. One explanation for Kenya's peace elections is:

> Kenyans said the calmer atmosphere this time was in part because of far greater trust in the reformed judiciary that ruled on the disputed vote, and also because former Prime Minister Raila Odinga was swift to fully accept the verdict despite his disappointment. ("Kenya deploys forces to contain violence," 2013)

The Kenya National Dialogue and Reconciliation 2013 report leading up to the 2013 (Figure 2 on page 133) indicated a high level of trust in the judiciary, which was reflected by the respect for the 2013 election dispute ruling by the Supreme Court. Although there are several areas of Kenyan society still in need of transformation, Kenya's institutional building centered on elections (the cause of the 2007/2008) can be deemed successful.

6. Constitutional Reform

After a twenty year process, a referendum in August 2010 approved a new constitution characterized with checks and balances (Greste, 2010). Kenya's previous constitution arguably granted excessive power to the president and fueled Kenya's ethno-driven politics. Kenya's old constitution allowed the president to make cabinet appointments without the approval of parliament (Greste, 2010). Past presidents, who were regarded as leaders of the political party and their ethnic group, predominantly

appointed members of their ethnicity into cabinet positions, causing marginalization among other ethnic groups (Kagwanja, 2009).[18] Kenya's new constitution provide for parliamentary discretion and senatorial review for presidential appointments, a land commission to review property disputes and displacement (see Reparations sections), a Judicial Service Commission, and a citizen's Bill of Rights (Greste, 2010).

The citizens' Bill of Rights granted negative rights and positive rights addressing former structures that lead to state violence, ethnic division, and land discrimination ("The Constitution of Kenya," 2010). For example, citizens are guaranteed freedom from being "subjected to any form of violence from either public or private sources," ("The Constitution of Kenya," 2010, p. 25). Freedom from state and private violence contradicts the former deeply rooted violence in which politicians utilized their own militias and criminal gangs were prevalent (Kagwanja, 2009). While freedom of speech of is granted, the new constitution recognizes the problems speech has historically created and excludes speech that can be used as "(b) incitement to violence; (c) hate speech; or (d) advocacy of hatred that - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm," ("The Constitution of Kenya," 2010, p. 26). The incorporation of the exceptions of hate speech was present leading up to the 2013 elections in which Umati was used to monitor and track hate speech (Kalan, 2013). The citizens Bill of Rights also grants each person the right to, "either individually or in association with others, to acquire and own property—(a) of any description; and (b) in any part of Kenya" ("The

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[18] Violence and threats were directed at the Kikuyu people by the Luo and other ethnic groups who were motivated by feelings of relative deprivation (former President Kibaki's ethnicity) leading up and continuing through the 2007/2008 elections (Kagwanja, 2009).

Constitution of Kenya," 2010, p. 29), granting citizens a right that had previously been characterized with ethnic discrimination.

The reforms in the 2010 constitution lay a durable foundation for peaceful change. Although the effects of some of the institutional changes in the 2010 constitution have yet to be realized, Kenyan society is headed in the right direction. The 2013 presidential election revealed how the 2010 constitution improved Kenya's rule of law. Odinga, his supporters, and Kenyan society respected the Supreme Courts electoral decision and, had Kenyatta not received 50% of the votes, preparations were being made for a runoff election as dictated by the constitution ("Frustration grows over Kenya vote-count delay," 2013). While the 2010 Bill of Rights are not able to prevent citizens' rights from being violated, and violations of citizen's rights may not immediately make it to court, when violations are reported, the explicit wording in the constitution will provide benefits to victims previously unavailable. Finally, the already visible increase of respect for the rule of law and Kenya's isnstitutions is an indication that equitable treatment and rights will eventually transcend to Kenyan citizens.

7. Application of Theoretical Framework to Kenya

In regard to the theoretical framework of this thesis, Kenya represents a case with a strong civil society and a weak state, a relationship opposite to South Africa. Prior to the 2007 elections, Kenya was characterized as a strong state with a weak civil society, since political opposition was eradicated, often through the use of force (Kagwanja, 2009). However, the international attention that was given to Kenya in response to its 2007/2008 post-election violence can be largely attributed to the change in state and civil society

dynamic and validates the proposed theoretical framework of this thesis. Although

unsuccessful, the first attempts at negotiation by Desmond Tutu, who chaired South

Africa's Truth and Reconciliation Commission, set the tone for a regional response to the

conflict.

The negotiation strategy pursued by Koffi Annan highlights the importance of

incorporating of regional actors into the transitional justice process. The high level of

transparency with civil society by Annan (2008) increased Kenyan perceptions of the

process being legitimate. Although pressure was not exclusively exerted on a regional

basis during the post-election violence itself, Kenya's case exhibits how the threat of

sanctions can influence state actors. Although some of the states that threatened sanctions

(United States and Canada) hold higher economic and political power than African states,

the results of the Kenya case can further develop the theoretical framework for

transitional justice as a mechanism to prevent civil war.

Based on the traditional relations within the international community, it is highly

unlikely that the African Union would be allowed to exclusively monitor cases of

transitional justice without the oversight of the United Nations and the International

Criminal Court. However, negotiatio999ns can be made between the African Union and

the International Criminal Court on the basis that the African Union can take charge of

the process as long the United Nations maintains ultimate oversight. With future cases of

transitional justice with weak states, the African Union can explain to state governments

that failure to cooperate with the directives of the African Union will result in sanctions

from other international actors. Overall, the case of Kenya corresponds to the theoretical

framework with a weak state and a strong civil society: through regional or international

pressure to the state exemplifies a move toward negotiations.

Another lesson that can be applied from the theoretical framework of this thesis to Kenya is Kenya's institutional transformation. Since the 2007/2008 post-election violence the two most significant institution weaknesses in Kenya have been reformed. The first institutional weakness is ethno-drive competition for power. Although a temporary solution, the creation of the office of prime minister for a power sharing model took a step towards combatting Kenya's ethnically exclusive political system. Additionally, Kenya's constitution reform limiting presidential power highlights the necessary condition of reforming the institutional structures that produce violence as prescribed in this thesis.

The pinnacle of Kenya's institutional reform can be seen from its 2013 elections. Kenya's transitional justice process rightly reformed electoral institutions, since elections had traditionally been accompanied by violence, leading up to the ultimate outbreak during the 2007 elections. The establishment of the Independent Electoral and Boundaries Commission is one example of how institutional reform can prevent an eruption of violence. The results of Kenya's of Kenya's 2013 elections, although not without flaws is a testament to the importance of institutions. While the election results were originally viewed as fabricated by presidential candidate Odinga, what the crucial component exhibiting Kenya's institutional is that Odinga accepted the Supreme Court ruling that the elections were fair. Odinga's acceptance of the court's opinion reveals its perceived legitimacy and the move from Kenya's former culture of using violence as a tool to settle transgressions. However, Odinga's action reveals the high regard for the court that it was not only that violence was not used, but that Odinga voluntarily

cooperated and respected the court's decision.

The contributions of non-governmental organizations in Kenya has also shaped Kenya's progress (Turner, 2012). Several non-governmental organizations in Kenya have risen to further combat the ethnic divisions that have created institutional weaknesses in Kenya, which has allowed violence to transpire (Turner, 2012). For example, the non-governmental organization, Ni Sisi! has worked throughout Kenya to assess the needs of those affected by the 2007/2008 post-election violence without regard to one's demographics. As seen from the literature review of this thesis, the use of non-governmental organizations can often perform better outreach efforts than the government, creating a locally owned process (McEvoy, 2007; Backer, 2003). Additionally, as the data from Figure 6 shows, civil society groups were trust by over two-thirds of respondents ("Kenya's 2013 Elections: A review of preparedness," 2013, p. 43).

The final lesson that can be applied from the theoretical framework of this thesis to the Kenyan case is the importance of a shared identity during the transitional justice process. As the developments between Kenya, the African Union, and the International Criminal Court reveal, there is a lack of cohesion in determining how perpetrators are to be tried. Kenya and the African Union's protests to the nature of the International Criminal Court stem from a perceived sense the International Criminal Court acting with a racial bias, and thus legitimizing the court in the eyes of Africans, and the fact that the court is in Europe, which detracts from the concept of an "African Solution to an African Problem".

Despite the progress made from Kenya's case of transitional justice, there are still

several shortcomings. As Robins (2011) exhibited, Kenyans are diverse in their needs of reparations. Implementing a blanket form of reparations will not suit the needs of all of the victims. While Kenya's constitution calls for the reform of land distribution, there are still numerous groups lacking access to areas that were once called home (Robins, 2011). Additionally, action still must be taken to treat those who were displaced during the 2007/2008 post-election violence.

In the large picture though, Kenya's pursuit of transitional justice is fairly young and is still developing. A comprehensive assessment of the Kenyan case of transitional justice cannot be evaluated until the issues of prosecutions, reparations, and land reform have been solved. However, if Kenya continues its institutional transformation with an active civil society (and a now active state) Kenya's future appears to be promising.

Chapter 5: Conclusion

In summation, this thesis has reviewed the existing transitional justice literature and has conducted two case studies on South Africa and Kenya to answer the research question of, how can transitional justice be used to prevent African state plagued with intrastate violence from erupting in civil wars? Although South Africa and Kenya did not perfectly follow the mixed model approach of transitional justice as prescribed in this thesis, the areas in which South Africa and Kenya deviated from the model, reinforce the importance of having an engaged civil society, the reformation of institutions, and a regional body to oversee the transitional justice process and ensure accountability. In addition to answering the research question, this thesis has contributed to the body of transitional justice scholarship as this thesis has developed a theoretical framework that discusses how the African Union and civil society can partner to pressure African states into pursuing effective policies of transitional justice.

While South Africa and Kenya highlight cases that answer the research question, since the intrastate violence in both countries did not erupt in civil war, the avoidance of civil war and the cessation of intrastate violence are not the only indicators that should be used in determining whether a state's practice of transitional justice was successful. Having thoroughly discussed the South African and Kenyan cases of transitional justice individually, the results of each case can now be compared. Additionally, the lessons derived from Kenya and South Africa can be discussed in relation to the theoretical framework of this thesis and future cases of transitional justice.

South Africa was able to avoid civil war during its transition from apartheid to multiparty democracy, but its pursuit of transitional justice reveals the importance of having an engaged civil society and addressing long term problems and institutional weaknesses. The extensiveness of South Africa's Truth and Reconciliation Commission is laudable as the commission was able to collect 22,000 statements from eighty different communities. However, the successes attained from South Africa's Truth and Reconciliation Commission were limited due to domestic opposition.

The Truth and Reconciliation Commission's operations would have been an ideal time to engage South Africa's civil society to assess what the top problems facing South Africans were and to also seek civil society's input on which institutions and areas of government needed reform. However, the Truth and Reconciliation Commission's duties with civil society were limited to statement taking and hearings. Additionally, it can be perceived that preference was given to perpetrators over victims during the Truth and Reconciliation Commission's operations since perpetrators were granted amnesty before victims were given reparations. The decision to grant amnesty to perpetrators arose from opposition by the National Party. The African National Congress compromised to suit the demands of the National Party, who stated they would not provide security during elections if amnesty was not granted to apartheid perpetrators. However, the African National Congress's compromise over amnesty, ultimately compromised the needs of South Africa's civil society and the potential for long term solutions.

The internal opposition and the compromise of long term solutions reveals the importance of using a mixed model approach of transitional justice. The lack of cohesion within South Africa surrounding the direction of the Truth and Reconciliation

Commission could have been circumnavigated by following the prescribed theoretical framework of this thesis. The African National Congress was subjected to the terms of the National Party since no other options were available. However, the African Union could have intervened in the process to develop a policy that was acceptable by civil society and state leaders and threaten the imposition of sanctions on South African leaders who were unwilling to cooperate during the process. Additionally, if the provision of security for elections was so vital, security could have been provided by African Union peacekeepers to elude the demands of the National party.

An examination of contemporary South Africa evinces the necessity of engaging civil society during the transitional justice and seeking long term institutional reform. Since its transition, South Africa has not experienced intrastate violence of the severity that characterized apartheid, but only a fragile peace has been formed. Since South Africa's transition is complete, the effectiveness of its transitional justice measures can be evaluated. As shown in South Africa's case study, apartheid's legacy of economic inequality and a ubiquitous use of violence creates a volatile condition. Moreover, as the data from Afrobarometer indicates, perceptions among South Africans of the South African government are low, intensifying the disconnect between civil society and the government. The chronic inequality coupled with the utilitarian view of violence and excessive police force creates an environment similar to South African apartheid prior to the Sharpeville Massacre. An outbreak of mass intrastate violence cannot be easily predicted, but if the ultimate goal of transitional justice is sustainable peace, South Africa has been unsuccessful.

While it can be argued that institutional reform is not a primary priority due to the complexity of the process, the proposed theoretical framework of this thesis can be used as a mechanism to assist the rebuilding of institutions. The issue of sexual violence in Africa can be used to exemplify the theoretical framework of this thesis. The issue of sexual violence in South Africa embodied a situation in which there was a weak state, but a strong civil society. Despite strong activism within South Africa's civil society toward eradicating sexual violence, the Mbeki presidency ignored the initiatives. However, within the context of combating sexual violence, the African Union could have empowered civil society and negotiated with the state government to pursue action so the culture of violence could begin reformation and solidify South Africa's transition to sustainable peace.

The efficacy of institution building in the transitional justice process can be drawn from the case of Kenya. Kenya's institutional reform that was produced by its 2010 constitution was the apex of its transitional justice measures. A comparison of Odinga's response to the 2007 presidential elections and the 2013 presidential elections displays how institutional reform can dramatically quell intrastate violence. During the dispute of the 2007 presidential elections, Odinga was presented with the option of having the court settle the dispute, but Odinga rejected the use of the courts, arguing that they were biased in favor of the Kibaki regime, making the courts untrustworthy to Odinga. However, in 2013 Odinga again disputed the election results, but trusted the reformed Kenyan Supreme Court to settle the dispute. While the Supreme Court found Kenyatta was the rightful winner of the presidency, Odinga respected the court's decision and ceased his opposition. Odinga's approval of the Supreme Court quelled the violent opposition

among Odinga's supporters, preventing what could have been another massive outbreak of violence. Odinga's view of the judiciary also corresponds to the common views among Kenyans as highlighted in the findings of the Kenya National Dialogue and Reconciliation. As a lack of strong institutions allows intrastate violence and conflict to transpire, strong, reformed institutions can prevent or at least minimize violence from occurring as evidenced by Kenya. In regard to the research question of this thesis, about how transitional justice can be used to prevent the eruption of civil wars in Africa, institutional reform is thus a vital component of the process since institutions regulate violence.

Continuing with the concept of institution building, another lesson that can be taken away from South Africa and Kenya is the salience of perception. With pertinence to the building of institutions, there is the possibility that institutions may be rebuilt only to be weaker than they originally were. Therefore, institutions must be rebuilt so they can function legitimately; yet, more importantly, the institutions must be perceived to be legitimate among the people. In transitional societies, the perception of institutions is more important than the actual capacity of institutions. Because transitional states have a history of corruption and perpetration of human rights, their societies have a tainted image and disassociation with their government. Even if a government's institutions are fairly and effectively operating, if they are not perceived to be legitimate, they will not be utilized by their states' people, which can prompt a state's civil society to take matters into their own hands. Going back to the comparison between Odinga's actions between the 2007 and 2013 elections, Odinga did not know for sure if a fair ruling would be made in 2007, but did not utilize the courts due to his perceived corruption of a biased court.

Although the Kenyan judiciary had undergone reform since 2007, Odinga was not able to fully assess the validity and legitimacy of the Supreme Court, but because he perceived the court to be legitimate, he respected its ruling on the 2013 elections.

The police are a key institution that must not only be critically assessed during the implementation transitional justice, but must be highly perceived among a country's civil society even after the completion of the transitional justice process. Police are government officials who civil society interacts with the most frequently. Therefore, overall perceptions of the government can be highly predicated upon perceptions of the police. Since police are tasked with maintaining security, if the police are not trusted, security measures may be initiated by a state's civil society, which can spread violence. The excessive police force used in South Africa today through policies such as "shoot to kill", and the practical impunity Kenyan police granted Liz's rapists, build a credibility gap between the respective civil societies and government. For transitional justice to be effective great emphasis must be put on the police since they are often the focal point of the government.

Perception is also salient in transitional societies in areas outside of institutions. For example, the legitimacy of South Africa's Truth and Reconciliation Commission was compromised due to its membership of former apartheid officials. In Kenya, it is highly unlikely that all of the Kikuyu did not disproportionately benefit from Kikuyu presidents, and, during the 2007/2008 post-election violence, not all of the Kikuyu youth were of the Mungiki gang, but because the Kikuyu were perceived to have been favored by Kikuyu presidents and the Kikuyu youth were perceived to be members of the Mungiki gang, violence escalated.

What can be taken away from South Africa and Kenya, and applied to future cases of transitional justice, is that in areas in which groups have been chronically marginalized, the oppressed will not base their actions on perceptions rather than facts. Consequently, it is essential that outreach measures are enacted in order to reduce perception associated problems. However, because the state government will likely be viewed as biased, outreach approaches will be most effective if done by the African Union, corresponding to the theoretical framework of this thesis. Because the African Union cannot benefit from the process, but also has a shared identity, the African Union has the potential to increase civil society's trust and involvement within the governmental sphere.

The results of Kenya's case of transitional justice provide insight into the practice of prosecution during the implementation of transitional justice. Although Kenya has cooperated with the International Criminal Court, Kenya's cooperation has been accompanied with reluctance and animosity. While Kenya has followed each order of the International Criminal Court, Kenya has also tried to disband from its membership. Trials are necessary to ensure a culture of impunity is not continued; however, trials must also be perceived to be legitimate in order to foster reconciliation and prevent backlash from those associated with the perpetrators. Even if the International Criminal court rulings turn out to be just and well founded they may not be respected among the Kenyans. However, as the data from Chapter Four indicated, most Kenyans were in favor of trials being conducted by the International Criminal Court, differing from the views of Kenyan state leaders.

Although Kenya's trials have already started, future cases of transitional justice must be able to mediate disputes surrounding trials for if a dispute is unresolved, no trials may transpire and a culture of impunity will continue. As a possible solution, special tribunals (as initially suggested for Kenya) could be constructed with the assistance of the African. African Union involvement is critical due to the heavy emphasis identity receives in African politics. Special Tribunals can additionally allow victims to be present and more connected to the process than they could be if trials were held at The Hague. Furthermore, if reconciliation can be provided to victims, victims will be more inclined to then focus on forward-looking institutions that can provide progress and sustainable peace.

Overall, the cases of South Africa and Kenya provide many lessons that can be applied to the theoretical framework of transitional justice as well as future cases of transitional justice. South Africa and Kenya demonstrate that transitional justice is a viable mechanism to prevent the outbreak of civil war in African states plagued with intrastate violence. Yet transitional justice must be exercised cautiously, with particular focus placed on engaging a state's civil society and strengthening institutions to create an environment in which institutions are highly regarded among civil society as being legitimate and large-scale violence cannot be easily perpetuated. For transitional justice to have its greatest amount of success, it must correspond to the identity of the people, or as Kofi Annan stated, be "An African solution to an African problem". Transitional justice can be effective if the prescribed mixed-model approach of this thesis is utilized, as the shortcomings of each case- such as the lack of attention given to the needs of the

victims of apartheid- could have been solved by having the African Union partner with civil society to direct (or pressure, in cases of resistance) state action.

Finally, there are several limitations of this thesis. One limitation is that while in depth case studies have been utilized, two cases may not be sufficient to develop a theory centered around the thesis question. Another limitation of this thesis comes from the nature of developing a theoretical framework. This thesis discussed four types of relationships between the state and civil society, but this does not mean that transitional societies will neatly fall into one of the four categories; in some cases they may not fall into any of them if the state and/or civil society is mixed. With a theoretical framework, there are unlimited possibilities for scenarios and actions, and a more extensive framework is worthy of future development and study. This thesis only serves as foundation for future study of transitional justice.

The above limitations, however, can be addressed by future research. The prescribed model of this thesis can be applied to future cases in which African states have intrastate violence, but have not fallen to civil war. For example, Cote d'Ivoire, has a similar history to Kenya as it suffered post-election violence in 2010 and ethnic tension has transcended into Cote d'Ivoire's political sphere. A case study on Cote d'Ivoire using the prescribed theoretical framework of this thesis is a possibility for future research. Furthermore, a more extensive theoretical framework could be developed and reapplied to Kenya and South Africa. While there are no other African states that have implemented transitional justice, but have not erupted in civil war, the theoretical framework of this thesis can be used to assess possible options and direct a state that is beginning the transitional justice process. However, there are currently no African states

about to about to implement transitional justice, so such research cannot begin until an African state starts the process. Lastly, the prescribed theoretical framework can be adapted to regions other than Africa, like Latin America or Southeast Asia, for future research. Other regional governments, such as the Community of Latin American and Caribbean States or the Association of Southeast Asian Nations, could serve as the regional organization to work with a state's civil society and state government to implement transitional justice in a matter similar to the prescribed framework for Africa.

In closing, there are many complications and issues with the practice of transitional justice, yet transitional justice has been used to successfully move societies from authoritarian rule to democracy. It must also be taken into account that transitional justice is a relatively young field of study that is still evolving. As more states undergo transitional justice, more lessons will be learned that will benefit future cases of transitional justice, and the move to a sustainable peace.

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