

# Can Habermas' Theory of Communicative Action Provide a Framework of Inspiration for Practices of Discursive Mediation in Post-Election Kenya?

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## Abstract

This article examines how Habermas's theory of communicative action provides insights for mediation processes and conflict resolution in general. It lays its assumptions that people in society are in relationship and that presuppositions of argumentation proposed by Habermas can assist direct focus on fundamental elements of conflict resolution. Kenya in the wake of the violently disputed presidential elections of 2007 is undergoing a transition period where both the perpetrators and the victims of the violence are seeking justice and reparation respectively. Inherent in the process is the emerging debate on reconciliation and retribution. The failure of International Criminal Court (ICC) to successfully prosecute the six suspects who had been indicted to face charges of criminal culpability in the post-election violence builds a case for alternative conflict resolution approaches. The paper adopts a methodology that discusses the mediation process through conceptual metaphors used in reference to ICC. A closer interpretation of the metaphors can assist the parties to prepare a resolution process that derives from Habermas ideas of the 'conditions of communication'. This paper proposes the use of these ideas to constrain abuses of their authority, and ultimately offer mediators a new opportunity to help re-establish positive relationships thereby contributing to the post-election violence transition debate in the post-election violent Kenyan society.

**Key words:** communicative action, post-election violence, reconciliation, justice, metaphor.

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## INTRODUCTION

In any society, there is a common human need for effective ways of relating to each other. This paper explores how Jürgen Habermas's theory of communicative action can justify mediation as an aid to those ways of relating. Fundamental recognitions, including Habermas's presuppositions of argumentation and our derived conditions of communication, can show how mediation is a valuable alternative for people experiencing conflict in our society. Kenya in the wake of the 2007/2008 post-election violence has been grappling with the question of justice and reconciliation- how to heal a nation that was ravaged with violence, destruction of property, displacement and death of people, inter-tribal animosities and arson [1]. The collapse of the criminal cases at the International Criminal Court (ICC) involving 6 key

Kenyans who bore the greatest responsibility for the violence has kept open the road to resolving the conflict. How does society deal with criminal justice and still maintain intrapersonal communicative ability? The ongoing debates within the field of mediation — such as the debate about transformative and transactional mediation practices — can be evaluated within Habermas's theory of communicative action thereby improving the likelihood of the field resolving a division among practitioners that threatens the vulnerable community of practice [2]. And finally, the theory of communicative action provides a way to build an effective bridge between the impasse experiences that sometimes occur in mediation and the handoff of those situations into the legal system for resolution as witnessed in the Kenyan case. Mediation is a field still in search of an organizing theory, a theory defensible as

theory within the field, useful in practice to the individual mediator, and ethically (normatively) acceptable to both the mediator and the parties in conflict.

The discussion centres on the preservation of the underlying, inherent relationship among people. This focus has a number of specific consequences: it reconciles the debate between settlement (transactional mediation) and relationship (transformative mediation); the mediator need not give up one goal in pursuit of the other but can connect the two — even when the process of mediation calls on the mediator to focus and realize each goal separately [3]. This focus sharpens mediation practice in various ways by revealing the underlying assumptions that people need to honour for effective discussion (“presuppositions of argumentation”). It also flags new opportunities for mediators, first to assist the parties in navigating a transition from mediation to other post-impasse options by encouraging “conditions of communication” and then, upon rendering of decision, to assist the parties in reclaiming the original presuppositions so that relational life can proceed. Finally, it invites a new relationship between the field of mediation and the justice system that would honour the power of relationship despite conflict.

## BACKGROUND

During the 2012 election campaign period in Kenya, the two main political alliances set stage for a fierce political battle by adopting conventional metaphors in their discourses. Two of the indictees at the ICC, Uhuru and Ruto formed an alliance of parties sympathetic to their fate of indictment at ICC to face charges of crimes against humanity. Under the campaign name of UHURUTO (an acronym for Uhuru and Ruto) they contested for the presidency and running mate position. The alliance went by the name JUBILEE. This coincidentally and metaphorically mark Kenya’s fiftieth (50<sup>th</sup>) anniversary of independence. The choice of Jubilee was a symbolic reminder of Kenya’s sovereignty. In a way it brought memories of pain, suffering and tribulations of Kenyans under colonial rule. A similarity was drawn between the six indictees at ICC (Uhuru Kenyatta, William Ruto, Joshua Sang, Henry Kosgey, Mohammed Hussein Ali, and Francis Muthaura) and the six freedom fighters (Jomo Kenyatta, Ochieng Oneko Paul Ngei, Bildad Kaggia, Kungu Karumba and Fred Kubai) who were incarcerated at Kapenguria during the struggle for independence. In a way ICC being an international body was viewed by this group as an outsider or imperialist interfering with Kenya’s sovereignty and internal affairs. This view is supported by Sagan [4] who argues that one of the major criticisms’ levelled against ICC is racism as it only targets African victims. It is on this platform of resistance to neocolonialism that Jubilee launched their campaign and galvanized support to eventually win the election.

Raila Odinga, the ODM leader and Kalonzo Musyoka, the WIPER leader who were seen to be favouring ICC justice campaigned for the Presidency and running mate position by the name CORD (Coalition for Reform and Democracy). CORD symbolically denoted a twisted slender and flexible material used to tie, bind, connect or support. In a broader sense CORD was likened to a thread that united all Kenyans irrespective of their ethnic backgrounds. The campaign strategy was to use CORD to unite Kenyans while Jubilee was to unite Kenyans and glorify Kenya’s sovereignty against foreign impositions. This developed into a campaign discourse that was characterized by sharp differences in regard to the ICC process which developed into an US versus THEM contest. In the final campaign rally held at Nyayo Stadium on 2<sup>nd</sup> March 2013 Raila captured this state by referring to CORD as *nguvu za mabadiliko* (forces of Change) whereas JUBILEE represented *nguvu za bezo* (forces of impunity).

On the 2<sup>nd</sup> November 2012 Uhuru and Ruto (Uhuruto) of Jubilee alliance conducted a campaign rally in Bomet (Rift Valley). Despite indictment at ICC, Ruto, the running mate to Uhuru under Jubilee alliance declared his resolve to contest in the elections. Ruto reiterated that they will honour the pre-trial chamber summons of the ICC and present their side of the story on the post poll chaos. In the following utterance one can easily see how the Jubilee camp tailored its meaning especially in painting their opponents in Cord as having fixed them at The ICC:

*Wale waliotupeleka huko wataaibika na shetani atashindwa.*

(Those who engineered our indictment at The Hague will be shamed and the devil shall loose)

*Shetani* (Satan) in the above utterance is depicted twofold: as an evil being capable of tormenting and as a wicked person who was behind their trial at The ICC. The durability of such narratives, as well as their inherent plasticity, has significant implications for the potential for further violence and the prospects for reconciliation in Kenya. Ultimately instead of revealing ICC as an International judicial process that aims at offering justice, fighting impunity and holding top leaders to accountability, the discourses portray ICC as having a desired goal to hurt the suspects. It is presented as a hostile enemy to be fought at all costs. This theme creates animosity against ICC and draws a sharp division among people supporting ICC and those against it. Such a situation prevents people from establishing a harmonic approach to resolving a conflict. It widens the differences and creates a THEM versus US scenario that prevents a rational approach to bring about understanding.

At a political rally in Ruiru Kiambu on January 30 2012 one of the Jubilee supporters, Moses

Kuria owned up that witnesses were coached to give false evidence implicating their opponents.

*Hiyo ilikuwa ni miereka ya kisiasa.*

(It was a political wrestling match).

In the example above, ICC is likened to and in the process reduced to a game of wrestling. The conceptualization of ICC in terms of games builds the notion of completion. Kuria builds the notion of a sporting activity that is characterized by strength or might. He who wields more power is bound to win. In this context, ICC is used to settle political scores. ICC trial is an example of a critical moment in the suspects' social and political life as exemplified in the debates in which the indictees were prevailed upon to resign their public offices and not to contest in the 2007 presidential elections in Kenya. This was seen a political tool to bar some people from contesting the elections. In the televised presidential debate of February 12, 2013 Uhuru Kenyatta in answer to a question how he will govern the country and at the same time attend to the ICC court, he said that the ICC was a personal challenge. Such utterances provide mediators with another opportunity to help the parties find common ground even in the midst of adversarial engagement. Within the perceived anarchy of conflict, each party tends to see his or her own sense of the Right as the only valid standard. The conflict takes on the additional valence of Right versus Wrong, so it involves not just each party putting forward his or her own best sense of the situation and his or her own needs, but rather each party maintaining a universe with moral meaning.

### **Habermas's presuppositions of argumentation**

Despite the tension and conflict among Kenyans in relation to the 2007/2008 disputed election result and the resultant violence the Serena accord brokered a peaceful settlement and hence the formation of a coalition government. A government that was structured on a power sharing policy between the two main political parties: Party of National Unity (PNU) and the Orange Democratic Movement (ODM). The negotiations at Serena revealed that people, even in conflict, possess a human relationship that makes mediation possible — a fundamental recognition of the other, regardless of any external manifestations in language or actions or even of any internal recognition. People are generally relational creatures. Even in conflict people are richly aware of each other, despite their judgments and emotions of the moment. In short, people are always already related. This basic relationship may be deepened and elaborated by culture, language, and people's deliberate efforts, but the existence of the relationship does not depend on these contingencies — they simply express the relationship. In fact, culture, language, and people's deliberate efforts are built on the presupposition that there is another with whom we relate. Based on such a relationship, this paper argues that the mediator can

operate even when conflict has called into question the parties' more elaborated levels of relationship.

This paper is cognisant of the relationship that existed inherently among the parties and personalities involved in the conflict and mediation process. The Habermas account is considered as the best suited for application to mediation — which is, after all, specifically concerned with talking things out, with coordinating people's behaviour. In Habermas's view, whenever we speak to each other we have always already accepted certain "presuppositions of argumentation" — that is, characteristics of speech oriented toward coordinating action. We are related to each other in our involuntary, implicit, prior, common acceptance of these conditions, even at the very moment that we use speech to deny any relationship with the other.

The presuppositions of argumentation that Habermas [15] as cited from Alexy's [5] extensive analysis are provided below in the interpretation of utterances about ICC.

1. Logical and semantic rules of speech, that is, rules by which we know that the speech has at least the form of a coherent argument: consistency in one's communication.

(1.1) No speaker may contradict himself.

(1.2) Every speaker who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all relevant aspects.

(1.3) Different speakers may not use the same expression with different meanings.

2. Procedural rules necessary for a search for truth organized in the form of an argument:

(2.1) every speaker may assert only what he really believes.

(2.2) a person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so.

3. Rules governing any process having the goal of reaching a rationally motivated agreement:

(3.1) every subject with the competence to speak and act is allowed to take part in a discourse.

(3.2) everyone is allowed to question any assertion whatever.

- Everyone is allowed to introduce any assertion whatever into the discourse.

- Everyone is allowed to express his attitudes, desires, and needs.

(3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (3.1) and (3.2).

The presuppositions of argumentation are general symmetry conditions that every competent

speaker who believes he is engaging in an argument must presuppose as adequately fulfilled [15]. These presuppositions of argumentation bear on both the process of mediation and the responsibility of the mediator. In the process of mediation, these presuppositions offer a way to disentangle the complex and often hidden knots that bring people to impasse. The assumption is that the difficulty in solving a conflict and in repairing a relationship comes from some violation of these presuppositions. The process of mediation then becomes, for mediators personally, a commitment to ensure that these presuppositions are established, fulfilled, and pursued. Knowing these presuppositions can provide the mediator a practical checklist of potential areas of breakdown in the process, thereby allowing him or her to suggest opportunities or different directions. In the subsequent section these presuppositions are applied to mediation through the metaphors discernible from ICC discourses.

### Mediation through metaphor

It can be argued that metaphor works by organizing and interpreting experience and by positioning one relative to the problem. Metaphor use in discourse makes it possible for one to reorganize, re-interpret and re-position thereby direct attention to where solutions may be more easily found. At a prayer meeting in Biomet, Uhuru was quoted as follows:

*...twajua kwamba tunatembea kwenda Hague, Mungu akiwa mbele, ukweli utajitokeza. Tutarudi hapa. Hiyo ndege itawekwa parking hapo tu dakika chache. Wale ambao wanabeba the greatest responsibility wataingia warudi huko sasa waende kukaa. Sisi tutafanya kazi pamoja kama jirani...*

(We are going to The Hague. With God as our guide, the truth shall set us free. The plane that will bring us back is the same plane that will take the real suspects to face trial. Together we shall work as neighbours).

In the above extract, Uhuru invokes the name of God to pronounce his innocence. The metaphoric expression *Mungu akiwa mbele* (With God as our guide) clearly illustrates how Uhuru positions himself in relation to the criminal charges at The Hague. As such, he focuses his predicament in the hands of God and seeks support from other Kenyans, *tufanye kazi pamoja Kama majirani* (work together as neighbors). Through metaphor large amounts of information are automatically assimilated, abstract ideas conveyed, alternative perspectives and possibilities are unconsciously integrated, and new inferences become possible. By declaring his innocence, Uhuru shifts culpability to other culprits who in his opinion will ultimately stay longest at The Hague. Besides revealing hidden assumptions, metaphor re-casts the logic of facts, emotions, needs, intuitions and behaviors, and brings them into a working whole. *Ndege*, (The aero plane) that will fly them back from ICC will be the

same plane that will fly the actual perpetrators of violence and crime to ICC. Metaphors categorize information, assign probabilities, hide some things and fill in when information is missing. Uhuru manages to communicate a collective view of innocence and eventual freedom targeting ICC as unfair and discriminative. This affects how difficulties are thought about and how the meaning of things is created and communicated.

The social context and environment of the ICC discourses is discussed as an instrument for affecting change and not just for disclosing thought as proposed by Habermas [6]. Lakoff and Johnson [7] observe that humans experience their environment through their bodies and also construe the world in terms of their bodily experiences. The manifestation of these experiences is language. Ordinarily people form a pictorial representation of an idea once they hear of it. With time, the image created over a concept influences the way such a concept is interpreted. The argument by Lakoff [8] is that speakers of a particular language form an Idealized Cognitive Model over a concept and any time such a concept is mentioned, this model crops up in their minds.

Lakoff's [8] ideas set the basis for exploring the implications of Habermas' Communicative Action Theory [6] in regard to the discursive action types and the subsequent validity of the knowledge claims within the ICC debate. Habermas [6] considers language as a means for coordinating actions. The six major metaphoric themes associated with ICC- as RELIGIOUS WAR, as POLITICAL WAR, as JUSTICE, as NEO-COLONIALIZATION, as a MONSTER, as an ANIMATE BEING offer conflicting conceptualizations of ICC in providing a coherent world view or framework for understanding language and its impact on conflict situations. These themes are viewed in the prism of offering justice and genuine reconciliation. Though ICC is an international judicial system of justice, the above mentioned themes suggest a conflicting view in which ICC is portrayed both as an enemy to the people of Kenya and as a savior to the real violence victims in providing justice and retribution.

These themes demonstrate bipolarizing tendencies in ICC discourse. Bipolarizing is a term that is used to portray two extreme positions or standpoints which are completely different from each other. It is realized in the encoded concepts of *wale wengine* ('other') and *tuko pamoja* (we are together). The discourses of belonging and exclusion typified in *wale wengine* (other) engender an understanding of ethnic identity.

The metaphoric expression *tuko pamoja* (in solidarity) is understood in the source domain as mobilising UNITY. It is a call to mobilize for collective action against ICC. This call is intended to paint the

indictees as unfairly victimized and therefore requiring support. It is a form of ethnic (Kikuyu, Kalenjin) balkanization against ICC. Because language is an instrument for effecting change and not just a vehicle for disclosing thought, it must be analyzed and interpreted in terms of the speaker and the hearer's social environment according to Habermas' Communicative Action Theory [6]. A central assumption is that: to communicate is to perform an act, such as stating facts, making requests, making promises, or issuing orders [9]. The statement, "*Tuko pamoja*", (In solidarity) commits the speaker to a future course of action, which in turn affects the hearer. Hence, by uttering the sentence the speaker says something, does something in saying the sentence, and affects the hearer by saying the sentence. Speech acts are performed to make factual statements, to request someone to do something, to make promises and commitments, to effect change, and to express a personal feeling.

In order to understand an utterance in the paradigm case of a speech act oriented to reaching understanding, the interpreter has to be familiar with the conditions of its validity; he has to know under what conditions the validity claim linked with it is acceptable or would have to be acknowledged by a hearer [5]. The interpreter obtains this knowledge from the context of the observed communication or from comparable contexts? Thus the interpreter cannot become clear about the semantic content of the expression '*tuko pamoja*' independently of the action contexts in which participants react to the expression with a "yes" or no" or an abstention. It ultimately builds an 'us' verses 'them' scenario of the pro ICC (read CORD) and anti ICC protagonists (read JUBILEE). Communicative action requires an interpretation that is rational in approach which expands the truth-conditional approach to semantics into a general theory of the internal relationships between meaning and validity. As suggested by Habermas [6], this involves shifting the level of analysis from semantics to pragmatics, extending the concept of validity to include types of claims other than truth, identifying the validity conditions for the different types of claims, and establishing that, in these other cases as well, the meaning of an utterance is inherently connected with the conditions for redeeming the validity claims raised by it.

The primary function of conceptual metaphorical representation is mapping the structure of our experience from a concrete and more familiar domain to an unknown concept of ICC with the aim of making it more understandable to people. As Charteris-Black [10] points out, "Metaphors can only be explained by considering the interdependency of its semantic, pragmatic and cognitive dimensions. It is the gateway through which persuasive and emotive ways of thinking about the world are molded by language use".

Metaphor is therefore active in both the development of a conceptual framework for representing new ideas and in providing new words to fill lexical gaps. It fulfils the basic need of people to make sense of events in the world. ICC is therefore readily understood when it is related to familiar aspects like RELIGION, POLITICS OR MONSTERS within the Kenyan environment. When ICC is viewed within the prism of the political landscape of Kenya involving Jubilee alliance and Cord alliance it becomes easy to interpret the various discourses.

The negative attributes ascribed to ICC – ICC as A MONSTER and ICC as AN ANIMATE BEING rouses fearful emotions rather than reason. ICC is thus constructed as punitive and cruel. A sharp boundary is drawn between people who support ICC and those against it in the context of victimhood. Who are the real victims of ICC process? Are they the post-election violence victims or the indictees at the ICC? ICC conceived in terms of suffering (*msalaba, mzigo*) does not envisage true justice or reconciliation. Alternatively, ICC is seen as more dividing, exclusive and alienating. After the post violence elections of 2007 in Kenya, the debate that emerged regarded the implications of transitional justice for Kenya's liberalizing prospects. The question of punishment or impunity or whether there is an obligation to punish in a democratic transition is debatable. Teitel [2] suggests that, despite the moral argument for punishment in the abstract, various alternatives to punishment could express the normative message of political transformation and the rule of law with the aim of furthering democracy. Among the alternatives is Habermas approach of Communicative action which implies that individuals focus primarily on reaching understanding or consensus. Communicative action differs from instrumental and strategic action because objectives are not imposed but, rather, they are based on mutual acceptance which signifies a win-win situation in a conflict resolution process. Reaching understanding takes priority over rational efficiency and efficacy. Successful communicative action implies veracity as the primary validity claim. Because the goal is reaching understanding, communicative action calls for candor, truthfulness, and sincerity.

The metaphorical theme of ICC as POLITICAL WAR does provide alternative viewpoints of the constructed picture of the ICC unfolding events which become natural or commonsensical. This theme generates emotional responses which become hard-line stances or ideologies [11]. This is quite evident in the election campaign rallies conducted by both CORD and JUBILEE alliance parties. Cord championed itself as the force of unity and change and therefore supported ICC as a way of ending impunity in Kenya. Jubilee on the other hand sought to assert Kenya as an independent state, free from neo-colonial influences through ICC. As these ideologies develop, communication strains

further and common understanding becomes difficult. ICC therefore ceases to be an alternative source of justice to the group of Kenyans that oppose its adoption as a form of justice for the Post Election Violence (PEV) victims. The communicative model of action does not equate action with communication. Language is a means of communication which serves mutual understanding, whereas actors, in coming to an understanding with one another so as to coordinate their actions pursue their particular aims. Concepts of social action are distinguished by how they specify this coordination among goal-directed actions of different participants [5].

Reflecting on Lakoff and Johnson's [7, 12] metaphor ARGUMENT IS WAR with the linguistic realizations "to win an argument," "to attack a point" and "indefensible claims" the ICC judicial process is conceived in terms of war pitting the pro-ICC crusaders on one side against the anti-ICC on the other side. This ultimately strains the reconciliation process in so far as the redressing of the atrocities committed in the PEV is concerned. This view that is critical of criminal justice is captured in the sentiments of one of the speakers at the prayer meeting held at Afraha Stadium, Nakuru on 29/01/2012:

*Umoja hujengwa na maridhiano wala sio adhabu. Adhabu hueneza utengano nchini.*

'Unity comes from reconciliation not from punishment. Punishment will increase division in this country....'

Inherent in this utterance is the idea that indictment at ICC is a punishment. The speaker considers ICC as a punitive measure and therefore counterproductive to the reconciliation process. ICC seen as a punishment creates division in the country and defines the negative perception towards it. ICC is perceived as A MONSTER thereby creating conflict among the

Kenyan ethnic communities. Indictment at ICC brought Uhuru and Ruto who were great political enemies together. They used their indictment to mobilize their communities in demonizing ICC. ICC is then looked at as an external factor that brought together the Kikuyu and Kalenjin communities in the Jubilee alliance; a manifestation of reconciliation. How then does the metaphoric expression *umoja hujenga maridhiano* (unity is key to reconciliation) in reference to ICC help build consensus. When language is analyzed and interpreted in terms of the speaker and the hearer's social environment, it is viewed as an instrument for effecting change and not just a vehicle for disclosing thought. This interpretation closely relates to Habermas who draws his inspiration from the Speech Act Theory [13, 14] that claims that to communicate is to perform an act. Speech acts are performed to make factual statements, to request someone to do something, to make promises and

commitments, to effect change, and to express a personal feeling [9]. Because the purpose of communicative interaction is uniquely goal oriented, this example accentuates performative aspects of language; by requesting for reconciliation (*kujenga maridhiano*) among Kenyans, the speaker actually states and performs the act of building brotherhood in Kenya.

It has emerged that metaphor is at the root of essential concepts such as that of emotion, human relations and wants and needs. Based on Habermas [6], resolving the 2007/2008 PEV disputes may sometimes best be done by identifying the kinds of metaphors around which the ICC debates revolves and simply helping disputants understand both their semantic and pragmatic differences so as to reach *Sinnverstehen* or interpretive understanding. Because metaphor is so influential in creating our subjective realities and what they mean to us, considered use of metaphor can take dispute resolution beyond the question of who is going to get what. It offers particular help when we are hoping not just to encourage compromise or impose settlement but to remedy underlying issues and resolve matters at a depth that brings more real satisfaction and everlasting peace. In the Habermian discursive action, by engaging in discourse, organizations can ultimately be impelled towards greater democracy and emancipation.

ICC as Justice is a theme that expresses confidence in criminal process of accountability. ICC is conceived in terms of *haki* (justice), *imani* (confidence). This is viewed alongside Habermas' [6] account that is concerned with talking things out or coordinating people's behaviour. In Habermas' view, whenever we speak to each other, we have always already accepted certain "presuppositions of argumentation"-that is, characteristics of speech oriented towards coordinating action. People are rational creatures. People, even in conflict, possess a human relationship that makes mediation possible – a fundamental recognition of the other, regardless of any external manifestations in language or actions or even internal recognition [3].

According to Habermas [6], there is a common human need for effective ways of relating to each other. Communicative Action Theory can be used to justify mediation as an aid to those ways of relating as an alternative for people experiencing conflict in society. It can be used to provide criteria to evaluate ongoing debates within the field of mediation – such as the debate about transformative and transactional mediation practices. Viewed alongside the normative criminal justice process at The ICC as a transactional practice, an understanding of the different meanings communicated in metaphors could be utilized in bringing about common understanding or change to society which is transformative. Central to Habermas philosophy is the distinction between strategic and

communicative action. When involved in strategic action, the participants strive after their own private goals as evidenced in negative portrayal of ICC through demonization (*shetani*) and neo-colonial perspectives. Such conceptualization of Kiswahili metaphors on ICC do not address the core justice and reconciliation process but seek condemnation. When involved in communicative action, the participants are oriented towards mutual agreement. The motivation for cooperation is therefore not, empirical but rather rational, that is ability to justify what one says. Thus the participants achieve a common definition of the situation in which they find themselves. This consensus is reached by negotiations about the validity claims raised within the metaphors used.

Each metaphor is to be examined on three claims: a claim to truth, a claim to justice and a claim to sincerity. A claim to truth entails that the speaker contends to represent the factual contents of the metaphor as they are. The claim to justice regards adequacy of the projected interpersonal relation between the speaker and hearer. The claim to sincerity entails that the speaker is genuine in the uttering of the metaphor. Habermas ultimately distinguishes three worlds of reference, the objective world, the social world and the subjective world. Therefore the claim to truth refers to the objective world, the claim to justice refers to the social world of the participants, and the claim to sincerity refers to the subjective world of the speaker. These three validity claims can be questioned and accounts provided resulting in a definite agreement or a definite disagreement or a decision to enter into a discussion about the presuppositions. Language in this case plays a very important role as a means for coordinating non-strategic action towards mutual agreement. Habermas proposes a new relationship between the field of mediation and the justice system that would honor the power of relationship despite the conflict.

## CONCLUSION

The effect then of examining conflict in Habermasian terms is to expand the scope of mediation and help people to preserve, fix and renew their underlying communicative relationship. ICC as has emerged in the discussion is a legal system in dispute resolution whose outcome will be painful to some. The metaphors identified have shown how the parties in conflict have characterized themselves as opponents in a battle between right and wrong. All of this divides the parties from one another, regardless of the issue, and breeds continuing conflict. If the conflict and its resolution involve winners and losers, the outcome at the ICC is likely to negatively affect reconciliation process. Are the losers going to believe in it?

The journey of conflict is a long and difficult one for many parties. While they seek settlement and resolution of their issues, parties also struggle with the

questions of meaning and relationship that inevitably arise. Many mediators and decision-makers prefer to avoid wrestling with the conundrum of relationship issues and focus their energies on generating settlements. This paper has argued that relationship preservation is always an issue between parties – whether strangers or intimates. Habermas's theory of communicative action properly asserts that parties can recognize, acknowledge, and preserve a communicative connection between them based on the presuppositions of argumentation inherent in the human experience of trying to coordinate behavior. All human beings assume the posture of relationship with each other. Mediation creates a unique space for people to explore that.

Indeed, given that parties often lose the willingness and desire — though never the capacity — to preserve relationship, mediators are responsible for articulating the presuppositions and creating safe space for the parties to act upon them. Even when facing impasse, mediators can help parties discuss the conditions under which they can preserve human relationship as they agree to disagree and submit to some compulsory resolution process, such as trial. This recognition affirms the powerful contribution that transformative mediation makes to our understanding of and respect for relationship, while simultaneously acknowledging that transactional mediators pursue the worthy goal – essential to many parties – of settlement. The two goals need not be exclusive, and if mediators look at conflict in the light of Habermas's theory of communication, they can reconcile settlement with relationship-building.

This perspective leads us into the interface between mediation and the legal system. The court's role can extend beyond simple conflict resolution; the courts can enable the preservation of relationship – in how they receive the parties, in how they conduct the trial, and in the kinds of decisions they hand down. All these implications and applications are drawn from a consistent theoretical orientation of communicative action.

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## REFERENCES

1. Report of the Commission of Inquiry into Post-Election Violence, Republic of Kenya. (2008), [8.http://www.communication.go.ke/Documents/CI\\_PEV\\_FINAL\\_REPORT.pdf](http://www.communication.go.ke/Documents/CI_PEV_FINAL_REPORT.pdf)
2. Teitel, R.G. (2000). *Transitional justice*. Oxford. Oxford University Press.

3. Chilton, S & Cuzzo, M.S.W. (1999). Habermas theory of communicative action as a theoretical framework for mediation practice, in *Conflict Resolution Quarterly*, 1-61
4. Sagan, A. (2010). African criminals/African victims: The institutionalized production of cultural narratives in International Criminal Law. *Millennium Journal of International Studies*, 39(1) 3-21.
5. Alexy, R. (1978). Eine Theorie des praktischen Diskurses [A Theory of Practical Discourse. In Oelmlüller, ed. 1978.
6. Habermas, J., McCarthy, T., & McCarthy, T. (1984). *The theory of communicative action* Boston: Beacon press, 1: 308.
7. Lakoff, G., & Johnson, M. (1980). *Metaphors we live by*. Chicago: The University of Chicago Press.
8. Lakoff, G. (1987). *Women, fire and dangerous things: What categories reveal about the mind*. Chicago: The University of Chicago Press.
9. Janson, M. A., Woo C. C., & Smith, L. D. (1993). Information systems development and communicative action theory. *Information & Management*, 25(2), 59-72.
10. Charteris-Black, J. (2004). *Corpus approaches to critical metaphor analysis*. New York: Palgrave MacMillan.
11. Fairclough, N. (1989). *Language and power*. London: Longman.
12. Lakoff, G., & Johnson, M. (2003). 'Afterword' in *Metaphors we live by*. Chicago: The University of Chicago Press.
13. Austin, J.L. (1962). *How to do Things with Words*. Oxford: Oxford University Press.
14. Searle, J. (1969). *Speech acts. An essay in the philosophy of language*. Cambridge: Cambridge University Press.
15. Habermas, J. (1990). *Moral consciousness and communicative action*. MIT press.