

The ICC and The Situation in Kenya:

Impact and Analysis of the Kenyatta and Ruto/Sang Trials



Natalie M. Block

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Committee:

Frederick Lorenz

Sara Curran

James Long

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Natalie M. Block

University of Washington

Abstract

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Natalie M. Block

Chair of the Supervisory Committee:

Frederick Lorenz, J.D.

Jackson School of International Studies

The ICC and the Situation in Kenya is an in-depth analysis of the patterns and predictions revolving around the criminal cases of President Uhuru Kenyatta, Deputy President William Ruto, and Joshua Arap Sang at the International Criminal Court. Written as a Master's Thesis for the Jackson School of International Studies and the Evans School of Public Affairs, the paper utilizes a combination of policy analysis, program evaluation, and statistical and financial analysis to provide a comprehensive understanding of the Situation. The Kenya Cases represent a critical turning point in the history of international justice. The Situation is a critical turning point because it is the first time that power has been prosecuted by the ICC in which the cases were initiated by the ICC prosecutor, and the first time that such cases have occurred in a country that is considered 'stable' and a leader in the region. Two sitting heads of state, whose power has increased instead of waned, are being tried for crimes against humanity in opposition to the wishes of many Security Council members and most in the African Union.

For all those who suffered in Kenya in 2007 and 2008.

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Abbreviations

AU	African Union
CICC	Coalition for the International Criminal Court
CORD	Coalition for Reforms and Democracy
KANU	Kenya African National Union
KNDR	Kenya National Dialogue and Reconciliation Monitoring Project
ICC	International Criminal Court
ICCOP	International Criminal Court Outreach Programme
ICL	International Criminal Law
ODM	Orange Democratic Movement
P5	Permanent Five Members of the United Nations Security Council
PEV	Post-Election Violence
PNU	Party of National Unity

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INTRODUCTION

The Situation in Kenya is the legal term for the combination of circumstances, cases, events, rulings, and other related occurrences in reference to the International Criminal Court's involvement in prosecuting the highest level offenders of the 2007-2008 Post Election Violence (PEV) in Kenya. There are numerous academic analyses of the investigation, pre-trial proceedings, and trials. There are thousands of pages of news stories on the cases and on the political turmoil that surrounds them, but there are many unanswered questions. The impact of the International Criminal Court on Kenya has not been analyzed in depth, nor has there been an assessment of the impact of the Situation in Kenya on the International Criminal Court. For the first time in history, power is being prosecuted by the ICC in cases that were initiated by the ICC prosecutor. The President and the Deputy President of Kenya are on trial at the International Criminal Court for their involvement in the Post-Election Violence in Kenya of 2007-2008 that sent the country into chaos.

This work seeks to fill in the current gaps in the robust discussion of the ICC and the Situation in Kenya. The recent change in practice and norms surrounding the individual prosecution of leaders for major human rights violations frames the current body of international criminal law. This change is a repeated phenomenon that is referred to as the "justice cascade" by many scholars in international relations and refers to the work of Kathryn Sikkink. Sikkink theorizes that key turning points in the development of international criminal law (ICL) have created a safer world where violators who previously held any level of power can potentially be tried.¹ The "Justice Cascade" predicts that human rights violators can be tried when their power wanes. This trend has been shown throughout history. However, this is not the case for Uhuru

¹ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton & Co., 2011).

Kenyatta and William Ruto who were elected to the presidency only after being accused by the ICC. This may be a rare example of political power consolidated and increased as a result of criminal charges. Why are the Kenya cases different from the existing pattern of ICL cases? I posit that the Kenya cases represent a critical turning point in the history of international justice. The Situation is a critical turning point because it is the first time that power has been prosecuted by the ICC in which the cases were initiated by the ICC prosecutor, and the first time that such cases have occurred in a country that is considered 'stable' and a leader in the region. Two sitting heads of state whose power increased after indictment, instead of waned, are being tried for crimes against humanity in opposition to the wishes of many Security Council members and many in the African Union. Due to these new occurrences, the implications and impacts of the Kenya cases are critical to the future of international criminal law.

Overview of the ICC

The International Criminal Court (ICC) is the first permanent international court designed to prosecute the most heinous offenders of human rights. Unlike the International Court of Justice, the ICC is a criminal court with the power to try individuals for committing grave atrocities. The main goals of the ICC include putting an end to impunity for the worst crimes that impact the international community, bringing justice to victims and perpetrators, and deterring future acts of violence.² Proponents of the permanent court also believe that bringing peace to war-torn communities should be a goal. In 1998, 160 governments gathered to create the Rome Statute which regulates the operations and existence of the ICC. The court began operations in

² ICC - CPI, "ICC - About the Court," *ICC - CPI*, 2010, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

2002 when the 60th country ratified the Rome Statute.³ The court is an independent entity and is not an organ of the United Nations, although it retains an important relationship with the UN Security Council.⁴

The functions of the court are divided into four offices: the Presidency, the Registry, Chambers and the Office of the Prosecutor. The Presidency ensures that administrative tasks are completed such as judicial appointments or the enforcement of sentences imposed by the Court. The Registry is responsible for public outreach, witnesses, defense, and victim protection and ensures that trials are fair, impartial and public. The Registry is also responsible for supporting the Office of the Prosecutor and Chambers with administrative and staff support. Chambers consists of the 18 judges which are assigned to the Pre-Trial, Trial or Appeals Division and preside over cases in their division. Judges are elected by States Parties. The Office of the Prosecutor is an independent organ of the court which serves to investigate, analyze, and prosecute the crimes that fall into the Court's jurisdiction.⁵

The Court sits in The Hague, the Netherlands and has sought to prosecute cases in the situations of Kenya, Uganda, the Democratic Republic of the Congo, the Central African Republic, Mali, Cote d'Ivoire, Sudan, and Libya. The ICC Office of the Prosecutor is also currently investigating situations in Afghanistan, Guinea, Georgia, Colombia, Honduras, Korea, and Nigeria.⁶ Situations encompass all cases that are related in the same country. Situations can be brought to the ICC in three different ways. First, any country that is a State Party to the Rome

³ A group of 10 states ratified the statute together in a special UN ceremony and therefore were all designated the 60th State Party.

⁴ ICC-CPI, "Understanding the ICC" (ICC Outreach, 2013), 3–7.

⁵ Ibid., 5–9.

⁶ "Situations and Cases," accessed November 6, 2013, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

Statute can refer a Situation, as occurred with Mali.⁷ Second, the UN Security Council can refer a Situation to the ICC as was done in the case of Libya. Third, the Office of the Prosecutor can begin an investigation under *proprio motu* powers. *Proprio motu* refers to ‘one’s own initiative.’ It is the independent judgment of the Prosecutor to decide which crimes to investigate. Article 15 of the Rome Statute states that the Pre-Trial Chamber must approve the investigation, but the Prosecutor has little oversight aside from this.⁸ The first Situation that was brought to the Court by the Prosecutor’s own power was the Situation in Kenya. The conditions leading to the charges are described later in this paper.

Politics in Kenya

The politics of the Republic of Kenya are very complex. However, many of the issues surrounding elections, politicians, political parties, and politics in general can be traced to a desire for political power, mostly among elites. Many covet political power in Kenya, but land has been one of the main reasons for political gamesmanship in Kenya since independence in 1963. Colonization by the British disrupted settlement in many areas of Kenya, most notably in the fertile Rift Valley where most of Kenya’s agricultural products originate. The British moved into the area en masse and forcibly displaced native pastoralist Kenyans, such as the Kalenjin and Maasai tribes.⁹ After independence, Jomo Kenyatta, the first president of Kenya gave most of the fertile British lands to members of his own tribe, the Kikuyu, who practice a more settled

⁷ The UN Security Council referred the Situation of Libya to the ICC in 2011 after the human rights violations, especially against civilians, in the armed conflict in Libya caused an international uproar. The UNSC also requested that the Prosecutor report to the Council every 6 months on actions taken by the ICC in Libya. In contrast, the situation in Mali, a State Party, was referred by the country itself. The Minister of Justice wrote to the Prosecutor of the ICC in July 2012 requesting assistance in prosecuting those responsible for the grave human rights violations that had occurred since and especially during January 2012 in the north of the country, calling upon Article 14 of the Rome Statute which ensured that State Parties to the statute could refer cases to the ICC. The conflict in Mali arose between the government and rebel factions, much like the conflict in Libya.

⁸ “Rome Statute of the International Criminal Court,” *United Nations*, November 10, 1998, 11–12, <http://www.un.org/law/icc/>.

⁹ Human Rights Watch (Organization), *Slaughter among Neighbors: The Political Origins of Communal Violence* (New Haven: Yale University Press, 1995), 103.

agricultural lifestyle.¹⁰ When Kalenjin and Maasai peoples returned to their ancestral grazing areas in the Rift Valley after independence, ethnic tension and multiethnic areas resulted. When Daniel Arap Moi, a Kalenjin, succeeded Kenyatta to the Presidency, he gave land rights and prominent political positions to people in his tribe. The benefits that a tribe can receive from having ‘their man’ in power are expansive. The downsides to being a tribe out of power can mean death due to starvation because of a lack of land and economic opportunity.¹¹ Therefore, the importance of political power in Kenya is greater than in many developed countries and helps to explain why elections throughout Kenyan history have been violent.

The post-election violence (PEV) that occurred in 2007-2008 in Kenya was not the first time that violence erupted along ethnic lines. Inter-ethnic violence erupted in the lead-up to the 1992-1993 elections, leaving 1,200 people dead and 300,000 displaced.¹² Many people were forcibly displaced to alter voting registries in favor of one candidate or another. In multiethnic areas of the country organized gangs would drive out a specific tribe in order to ensure that area’s vote for their candidate and threaten other tribes to prevent them from voting. The displaced persons fled to areas that were held by their tribe, which voted for their ‘own’ candidate. This form of displacement is similar to gerrymandering because it ensures that the tribe that remained in the multiethnic area received that territory as well as areas where they have consolidated power in the vote.¹³ This practice occurred again in 1997-1998, although casualties were not as high. The violence in the 1990s was known to be organized, in many instances, by

¹⁰ The Kenyatta family also received a huge amount of land and therefore wealth due to Jomo’s land distribution. It is estimated that Jomo and now his son, the president, Uhuru Kenyatta own “500,000 acres of prime land spread across the country” (“Africa’s 40 richest”, 2013).

¹¹ Human Rights Watch (Organization), *Slaughter among Neighbors*, 102.

¹² Daniel Branch, *Kenya: Between Hope and Despair, 1963-2011* (New Haven: Yale University Press, 2011), 207.

¹³ Lisa Misol et al., *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya*. (New York: Human Rights Watch, 2002), 36–42.

political elites. Accountability never occurred at any level for these crimes.¹⁴ After the Rome Statute was ratified by Kenya in 2002, the ICC became an international accountability mechanism that could prosecute organizers of political violence.

The Situation in Kenya

The elections of 2007-2008 were some of the bloodiest in Kenyan history. During the violence it is estimated that up to 1,200 people died and over 600,000 people were displaced.¹⁵ The atrocities began on December 27th, 2007 when an apparently fraudulent election was held and the opposition protested violently.¹⁶ The towns of Mombasa (on the east coast), Eldoret, Kericho, Kisumu, Nakuru and parts of Nairobi (specifically the Kibera slum) saw the highest levels of violence. In the 2007-2008 elections, it was declared that incumbent President Mwai Kibaki, a Kikuyu, was victorious over his challenger Raila Odinga, a Luo. Odinga had partnered with elites of the Kalenjin tribe for the contest, including William Ruto. The international community released data reporting that the election results had been fraudulent and that Odinga had won. In the weeks following the announcement of Kibaki's 'victory' attacks began on Kikuyu peoples, which turned into multi-ethnic violence involving many tribes. Eventually a power-sharing agreement was reached in February when Odinga became Prime Minister under Kibaki and the violence ebbed.

The atrocities committed prompted the investigation of the crimes through The Commission of Inquiry on Post-Election Violence, also known as the Waki Commission. The

¹⁴ Ibid., 34.

¹⁵ "Municipalities and IDPs Outside of Camps," 3, accessed June 7, 2014, <http://www.brookings.edu/~media/research/files/reports/2013/05/kenya%20displacement/idp%20municipal%20authorities%20kenya%20may%202013%20final>.

¹⁶ In the 2007-2008 elections, it was declared that the incumbent President Mwai Kibaki won. Many international observers admitted that there had been fraud, vote-rigging, and ballot stuffing on both sides. The Independent, a UK newspaper closely following the election for months, reported that even with fraud on both sides accounted for Kibaki could not have won the election (Bloomfield, 2008).

Commission was comprised of Kenyan Justices and international legal representatives. It began investigation in February of 2008. In October of 2008, the Commission gave a list of alleged perpetrators to Kofi Annan, the former UN Secretary General. Upon the inaction of the Kenyan Government to investigate or prosecute the crimes, Annan gave the names to the Prosecutor of the ICC, who at the time was Luis Moreno Ocampo.¹⁷

In 2009, the ICC opened an investigation regarding post-election violence in Kenya in 2007-2008. The ICC cases were initiated by the Prosecutor Ocampo under the Court's *proprio motu* powers.¹⁸ The situation was not referred by the UN Security Council or by the Republic of Kenya. The Office of the Prosecutor identified six elites who were accused of organizing the violence.¹⁹

The Pre-Trial Chamber confirmed charges against three of the accused in January 2012.²⁰ In one case, Uhuru Muigai Kenyatta is accused of being an indirect co-perpetrator of crimes against humanity including rape, murder, deportation, persecution and other inhumane acts.²¹ Uhuru Kenyatta was elected president of Kenya in the 2013 elections. Appendix 1 demonstrates the timeline and major events in the Kenyatta Trial. In another case, William Samoei Ruto and Joshua Arap Sang are each accused of being an indirect co-perpetrator or contributing, respectively, to crimes against humanity including murder, persecution, and the deportation or

¹⁷ "Cases and Situations - Kenya," *Coalition for the ICC*, 2013, <http://www.coalitionfortheicc.org/?mod=kenya&idudctp=2&order=titleasc>.

¹⁸ William Schabas, *An Introduction to the International Criminal Court* (Cambridge, UK; New York: Cambridge University Press, 2007), 160.

¹⁹ These elites were the "Ocampo Six:" Uhuru Kenyatta, Francis Muthaura and Mohammed Hussein Ali who were opposed to members of the political party Orange Democratic Movement (ODM) and William Ruto, Joshua Arap Sang and Henry Kosgey who were ODM members and who organized violence against the Party of National Unity (PNU) members.

²⁰ Originally Henry Kosgey, a fourth, did have his charges confirmed by the Pre-Trial Chamber, but his case was dropped shortly afterwards.

²¹ "Kenya ICC-01/09," *ICC - CPI*, accessed June 15, 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx.

forcible transfer of population. Ruto was elected deputy president in 2013.²² Appendix 2 demonstrates the timeline and major events in the Ruto and Sang Trial. There is a third case that has recently begun which involves the alleged intimidation or corrupt influence of witnesses in the Ruto/Sang trial by a man named Walter Osapiri Barasa. The trial of Ruto and Sang began on the 10th of September in 2013 and is ongoing and the case against Kenyatta has been postponed, again, to begin October 7th, 2014.²³

Issues and Controversies around the Situation

The International Criminal Court is often faulted for bias, inefficiency, and a lack of impact.²⁴ These problems and accusations have only grown with the Situation in Kenya. In the past, accused have been warlords, military officers, or political leaders that had fallen from power due to defeat, international intervention or both.²⁵ The Situation in Kenya has many firsts. It is the first time that a powerful political figure will be tried at the ICC, the first time a case has been brought to the Court by the Prosecutor, the first time the accused have increased their power democratically after being indicted, the first time a powerful leader in not just a country, but a region will be prosecuted, and the first time that a case will come to an international tribunal based upon political violence, not part of an armed conflict. Many issues and controversies have arisen due to this.

²² The Kenyan Deputy President position is similar to a Vice President. Ruto won this election when he joined with Kenyatta as a running mate, despite their being on opposite sides during the 2007-2008 violence and from rival tribes.

²³ "Kenya ICC-01/09."

²⁴ The Court is faulted for bias by those who believe the Court is controlled by powerful states, such as many in the AU because all current cases are in African countries. It took the Court more than 10 years to produce its first verdict and millions of dollars to do so, so it is often accused of inefficiency when compared to ad hoc tribunals. There are very few case studies which seek to measure the impact of the ICC on any particular country, but conflict is ongoing in most areas where the ICC has cases and it is difficult to reach victims in remote areas of Africa when the Court is in Europe. Therefore, it is often faulted for a lack of impact as well.

²⁵ Slobodan Milosevic, of Serbia, was a former head of state prosecuted by the ICTY, but he was turned over to the Court for crimes committed during war and died before being sentenced. Charles Taylor could have been a sitting head of State, of Liberia, that was tried and convicted by the Special Court for Sierra Leone, but he resigned before his trial began. Omar al-Bashir is the President of Sudan and is currently wanted for crimes against humanity, but has not been arrested or tried in any fashion. The Kenya cases are truly unique in their prosecution of power.

Many people believe that the ICC should not have intervened because the crimes committed in the PEV were not grave enough offenses to be tried internationally. While there is no defined threshold for violence or suffering that can amount to a crime against humanity, there are other cases which could have been tried instead of those in Kenya. Others critique the investigations of the Prosecutor. Of the original six accused, only 3 Kenyans are left to stand trial. Fabricated and exaggerated evidence and witness tampering led to the dismissal of the other cases.²⁶ These accusations are aimed at the prosecution side, but the defense is equally if not more guilty of witness tampering.²⁷ The witnesses in the trials that are left have been intimidated, bribed, or corrupted by a number of people. This recently resulted in the charges against Mr. Barasa.²⁸

Outside of legal proceedings, the election of Kenyatta and Ruto to the Presidency has led the African Union to request that the ICC suspend the cases, and many African nations have threatened to withdraw from the court completely. Some African nations have been pushing for all African Union members, who are also States Parties, to withdraw from the Rome Statute; however, this effort has thus far failed. In Kenya, the Kenyan National Assembly voted to withdraw from the Rome Statute in September 2013. In order for the Republic of Kenya to legally withdraw from the ICC, the Kenyan Government must submit a written statement to the UN Secretary General. This has not yet occurred. Even if the Kenyatta administration decides to

²⁶ Originally the "Ocampo Six" were Uhuru Kenyatta, Francis Muthaura and Mohammed Hussein Ali who were opposed to members of the political party Orange Democratic Movement (ODM) and William Ruto, Joshua Arap Sang and Henry Kosgey who were ODM members and who organized violence against the Party of National Unity (PNU) members. After the pre-trial hearings all the cases were dropped except for those against Kenyatta, Ruto and Sang. Aside from Sang, all the accused were high-ranking members of government, political parties, and tribes when the violence occurred. In the case of Muthaura, a key witness admitted to lying in their testimony and so the case was dropped. Both Kosgey's and Ali's cases were dropped due to insufficient evidence as ruled by the judges.

²⁷ CHARLES CHERNOR JALLOH, "International Criminal Court--Jurisdiction--Prosecutor's Proprio Motu Power to Initiate Investigations--Contextual Elements of Crimes against Humanity--State or Organizational Policy--Complementarity.," *American Journal of International Law* 105, no. 3 (2011).

²⁸ Walter Osapiri Barasa is charged by the Prosecution with three counts of offences against the administration of justice consisting in corruptly or attempting corruptly to influence three ICC witnesses in the case against Deputy President William Ruto and Joshua Arap Sang. He is not yet extradited from Kenya to the Hague.

formally withdraw from the Rome Statute, the current trials can continue. The ICC has temporal jurisdiction over crimes committed in Kenya between 2002 and one year after the date of the withdrawal.²⁹

The location of the trials has also raised accusations from many who claim that justice is difficult to bring to the people of Kenya if the trials are held in Europe. Trial Chamber V (A) which sits on the Ruto/Sang trial recommended to the plenary of judges that all or portions of the trial be held in Kenya or in Tanzania at the now unused seat of the International Criminal Tribunal for Rwanda.³⁰ This was considered to bring justice closer to the victims. Yet, the plenary of judges did not receive the required 2/3 majority to move the trial from The Hague citing costs and security issues as insurmountable.³¹ The Ruto/Sang Trial has also caused controversy over whether Mr. Ruto should be allowed to miss large portions of his trial due to the requirements of his official duties as Deputy President. The current ruling on the presence of the accused is that Ruto must be present during most of his trial and will be excused on a case by case basis.³² The Kenyatta trial has been postponed multiple times due to procedural issues and the need for extended preparation from both the Defense and the Prosecution sides, although reporting has rumored that delays were due to the need for the President to deal with the terrorist

²⁹ Andrew Cannon, "Kenyan MPs Approve Motion to Withdraw from the International Criminal Court | Lexology," accessed June 15, 2014, <http://www.lexology.com/library/detail.aspx?g=b0192db0-c4e1-4315-8cf3-494785213739>.

³⁰ There are 15 judges that comprise the Chambers, not including the 3 judges who are in the Presidency as well.

³¹ Judgment 1636031, "Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place Where the Court Shall Sit for Trial in the Case of the Prosecutor v. William Sameoi Ruto and Joshua Arap Sang," *ICC - CPI*, accessed June 15, 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/presidency/presidency/Pages/911.aspx.

³² Judgment 1669852, "Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(A) of 18 June 2013 Entitled 'Decision on Mr. Ruto's Request For Excusal from Continuous Presence at Trial,'" *ICC - CPI*, July 31, 2013, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/appeals%20chamber/Pages/834.aspx.

attack on Westgate Mall.³³ The latest extension of the trial is in relation to the lack of evidence of the Prosecutor. They have until October 7th to prepare a case against Kenyatta using his financial records or the case will likely be dismissed.

Despite all of these difficulties, the recent Truth Justice and Reconciliation Commission Report that was compiled by a number of prominent scholars, lawyers, and international observers, has cited Kenyatta and Ruto as leaders of organized violence in the 2007-2008 PEV and continues the calls for justice.³⁴ Legally, the Court has the temporal and regional jurisdiction over PEV cases according to the Rome Statute. They also have the power to prosecute crimes against humanity, genocide, war crimes, and starting in 2017 the crime of aggression. Heads of state can be tried under the Rome Statute. The last jurisdictional question in relation to the Situation in Kenya revolves around the principle of complementarity. Complementarity provides that the International Criminal Court will not intervene in a country unless that country is unwilling or unable to pursue justice themselves. In this way, the Court ‘complements’ national judiciaries because primary responsibility for prosecution lies with the nation in question. If it is found that the State is unwilling or unable to prosecute then the ICC will intervene.³⁵

In the Situation in Kenya, the national judiciary had six years to progress towards prosecutions and has failed to do so. Therefore, the ICC has abided by the principle of complementarity in its investigation and subsequent prosecutions of citizens of the Republic of Kenya. There was never a realistic attempt to bring charges against perpetrators in Kenya by the national judiciary, as will be discussed in Chapters 1 and 3. The International Criminal Court

³³ Daniel Howden, “Terror in Westgate Mall: The Full Story of the Attacks That Devastated Kenya | World News | The Guardian,” *The Guardian*, October 4, 2013, <http://www.theguardian.com/world/interactive/2013/oct/04/westgate-mall-attacks-kenya-terror>.

³⁴ TJRC Kenya. *Truth Justice and Reconciliation Commission Final Report*, May 26, 2013.

³⁵ Schabas, *An Introduction to the International Criminal Court*, 134.

will continue to have jurisdiction over the crimes committed in the PEV in Kenya as long as the principle of complementarity remains intact.³⁶

The Justice Cascade Theory

The development of International Criminal Law is a relatively new phenomenon. Kathryn Sikkink proposes that the expansion of individuals tried in fair criminal cases is a trend that can be traced.³⁷ The significant increase in the number of trials in the last three decades is the result of changing international norms. The justice cascade is a metaphor used by Kathryn Sikkink and others to describe the process or rather the rapid increase in the number of individual human rights prosecutions around the world. The justice cascade is a phenomenon in which, in a relatively short time period, global norms have changed to value the rights of individuals above the rights of States. Sikkink proposes that the origin of these new norms lies with individual agents while the diffusion or the cascade of justice is seen in times of transition between types of government or styles of governing. The theory predicts that when the power of violators wanes there are consequences, typically in the form of trials.³⁸ This theory will be used as a mechanism to evaluate the impact of the Kenya Cases on both the country of Kenya and on the International Criminal Court. It will be expanded upon in subsequent chapters.

Outline

The discussion surrounding the Situation in Kenya has been largely focused on political elites, the legitimacy of the ICC intervention, and the possible outcomes. An impact analysis is missing from the current discussion. The first chapter of this work analyzes the impact of the ICC on Kenya and what that means in the policy world. A deep discourse analysis using news

³⁶ In a recent decision in the Situation in Libya the Court found that the State was pursuing cases against the accused in an ICC case and so dropped the investigation and prosecution based on the principle of complementarity.

³⁷ Sikkink, *The Justice Cascade*.

³⁸ *Ibid.*

sources, academic works, government publications, court decisions and personal interviews is combined with historical case studies and country comparisons to evaluate the impact of the ICC on the country of Kenya.

The International Criminal Court (ICC) has a number of goals in their pursuit of the worst criminals. The most paramount is to bring justice to victims, perpetrators, and humanity.³⁹ The Registry of the Court seeks to bring justice to the victims through legal representation, the Trust Fund for Victims and Outreach Programmes. The funding currently allocated for outreach is limited and public opinion of the Court in Kenya is not high. Therefore, the second chapter of this work analyzes data public opinion polls and ICC Outreach data, in order to determine the impact of the ICC Outreach Programme in Kenya.

The third and concluding chapter analyzes the impact of the Situation in Kenya on the ICC and why it is so critical in the development of international law. The conclusion reveals the role of the international community along with the broader impacts and future outlook for the ICC and the Situation in Kenya. As in the first chapter, the concluding chapter uses news sources, academic works, government publications, court decisions and laws, and personal interviews in a discourse analysis combined with a financial condition analysis of the Court to evaluate the impact of the Kenya Cases on the ICC.

³⁹ ICC - CPI, "ICC - About the Court," 8.

CHAPTER 1: IMPACT OF THE ICC ON KENYA

The International Criminal Court seeks to have a positive impact on systems of justice worldwide. The mission statement of the ICC identifies its main goals as putting an end to impunity for the worst crimes that impact the international community and bringing justice to victims and perpetrators.⁴⁰ The question of how the ICC impacts individual countries is rarely studied in detail. This chapter begins to answer this question. The term impact is used broadly here. The ICC is not designed to conflict with State Parties, but rather to affect and influence occurrences within them. Not all the ‘impacts’ discussed here will be significant or long-lasting, but the record of how an international court can effect and influence a country, even in simple ways, is critical to the development of international law and the advancement of human rights.

The International Criminal Court has a number of direct and indirect mechanisms that it successfully utilizes or fails to control when the Court intervenes in a country. The direct mechanisms that the Court uses are contained within its Outreach Programmes and the Cases themselves. The Court can directly influence domestic legal situations, increase education about the Court or international law, provide reparations, or provide justice. In contrast, an indirect mechanism of the Court is the threat or presence of the ICC which casts a large shadow over involvement in violence and human rights. This has caused a wide range of results including unification, deterrence, stability, and judicial change in Kenya.

The direct impacts of the ICC will be discussed first. These impacts all involve the effect, or lack of effect, of the Court on individuals. The intervention of the ICC in Kenya has had a large impact on political figures, specifically those who have been accused and those who are closely aligned with accused persons. The Kenyatta/Ruto alliance was directly caused by the

⁴⁰ Ibid.

Court's effort to provide justice to the people of Kenya. The increase in risk to witnesses is also a direct impact caused by the Court's efforts to provide justice. The ICC also has the power to provide reparations and directly impact individuals. The failure to do so in this case also affects Kenyans. The Court's Outreach Programmes will be discussed in detail in Chapter 2. The ICC has thus far failed to influence the domestic legal situation, as no lower level offenders have been tried. Yet, the direct impacts and mechanisms and their failures have given rise to even greater impacts through indirect mechanisms that the Court cannot control.

The indirect mechanisms of the Court stem from the presence and the legal threat of the ICC. The 'shadow' of the ICC influenced the writing of the 2010 Constitution, the creation of an independent judiciary, and a judiciary which is influenced by international norms. The threat of the Court also led to peaceful elections in 2013. Ironically, the Court has succeeded in increasing unity in Kenya – unity in opposition to the Court.

While analyzing the impact of the Court on Kenya, it is imperative that the Situation in Kenya be viewed with reference to the cases in International Criminal Law that have come before it. Many scholars, such as Kathryn Sikkink, who are optimistic about the ICC, believe that deterring future acts of violence and bringing peace to war-torn communities should be goals of the Court. According to Sikkink's justice cascade theory, when leaders of countries are tried for crimes against humanity or other similar human rights violations it typically occurs during a time of transition. It also encourages the prosecution of lower level offenders in the affected country as well as promoting peace, democracy and human rights. This chapter will explore how Kenya does not follow the pattern of countries where the theory was developed as the power of those accused only increased after they were charged.

The justice cascade theory demonstrates that “skeptics” of prosecutions argue trials have a wholly negative impact because they

“[1] destabilize democracy . . . [2]can increase human rights violations . . . [3]can increase or prolong conflict . . . [4]and that prosecutions impede the consolidation of the rule of law.”⁴¹

Yet, the justice cascade theory argues that accountability prosecutions do not bring about these negative effects. However, in every study that is presented as evidence to the theory the accused are no longer in power or at least are no longer directly in charge of government. The ICC Kenya Cases are certainly an exception to the norm in international justice as the accused came to power (or increased power) after being accused of crimes against humanity. Therefore, to evaluate the theory this chapter will discuss each of the four claims about the impact of trials. As proven below, the claim that prosecutions destabilize democracy and impede the rule of law is not true for the country of Kenya. There was no visible increase in human rights violations and the conflict was not prolonged or re-ignited by the intervention of the Court.

Direct Mechanisms and Impacts

The International Criminal Court has several direct mechanisms that they can utilize to impact the countries that they operate in. By holding Cases and operating Outreach Programmes the Court can try to curb the violent actions of political figures, influence political alliances or political divisions, pursue justice, provide reparations and representation, and affect perspectives of human rights and of the Court. In the Situation in Kenya, the Court is holding Cases and operating several Outreach Programmes. As discussed below, these mechanisms have directly impacted individuals and groups of individuals.

⁴¹ Sikkink, *The Justice Cascade*, 142.

Political Figures and Human Rights Violations

One of the largest impacts of the ICC upon Kenya has been upon specific political figures. The International Criminal Court is often viewed by proponents as a deterrent for both previous offenders and a warning to potential offenders. According to international law scholar Mark Drumbl, “retribution and general deterrence are the two most prominent punishment rationales in international criminal law.”⁴² Drumbl also clarifies the difference in general and specific deterrence. General deterrence is an effort to dissuade others from committing similar crimes in the future whereas specific deterrence is determined to prevent the offender on trial from reoffending in the future.⁴³ The justice cascade theory predicts that prosecutions do act as a deterrent and cause human rights violations to decrease. The cases in the Kenyan Situation were initiated, in part, to act as a deterrent, both general and specific, for future crimes and criminals. In order for human rights to improve in Kenya, the threat and practice of organized ethnic violence must be mitigated. The organizers of the violence must be deterred. The trials thus far have not increased violations. Organized violence in the 2013 Presidential Election was non-existent. The impact of the ICC has not resulted in widespread organized violence. This outcome is consistent with the justice cascade theory. However, Kenyatta and Ruto did gain popularity and power due to the ICC’s efforts to provide justice and the lack of violence could be due to other factors.

While a number of influential political figures could be discussed, those who were most effected were the original six accused by the ICC and Raila Odinga. At a basic level the ICC impacted their pocketbooks, as travel to and from The Hague is not paid for by the ICC for defendants. Each of the original six accused made multiple trips to Europe from Kenya for their

⁴² Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge; New York: Cambridge University Press, 2007), 60.

⁴³ *Ibid.*, 61.

pre-trial hearings and had to pay for lodging and food, as well as travel. For Uhuru Kenyatta, the 26th richest man in Africa in 2011, this was not a problem. William Ruto, Francis Muthaura, Mohammed Hussein Ali, and Henry Kosgey are also wealthy Kenyan politicians who had no trouble raising money or support from the public to help fund travel that they could already afford.

In fact, during the opening of the Ruto/Sang trial it is estimated that 100 Kenyan MPs flew to observe the trials and show support.⁴⁴ As an observer in 2011, the author of this paper can confirm that the pre-trial hearings also drew many prominent Kenyans living around the Netherlands, such as the Kenyan ambassador to the Netherlands –Rose Makenna. However, for Joshua Arap Sang the ICC trial has proven to be an extraordinary financial burden. Due to his accused participation in the PEV, Sang lost his job as a radio broadcaster in Kenya and had to raise money through crowdsourcing to afford travel to his own trial. At the end of September when Ruto flew home after the trial opening, Sang was forced to remain in detention in The Hague due to a lack of funds.⁴⁵ Before the ICC indictments, few people had heard of Sang – the only non-politician accused – outside of his home area of Kitale in the Kalenjin area of Rift Valley.⁴⁶ Now, Sang is famous in Kenya and around the world, although at the cost of his occupation and potentially his freedom.

The other members of the “Ocampo Six” also had their careers affected by the ICC.⁴⁷ After pressure from their own political party, both Uhuru Kenyatta and Francis Muthaura resigned from their government positions in 2012 after their charges of crimes against humanity were

⁴⁴ “Broke Joshua Arap Sang Unable to Raise Airfare to Travel Back to Kenya Appeals for Help,” *WHERE IS KENYA.COM*, accessed June 15, 2014, <http://whereiskenya.com/broke-joshua-arap-sang-unable-to-raise-airfare-to-travel-back-to-kenya-appeals-for-help/>.

⁴⁵ Ibid.

⁴⁶ The Hague Justice Portal, “Situation in Kenya » The Hague Justice Portal,” *The Hague Justice Portal*, 2014, <http://www.haguejusticeportal.net/index.php?id=11604>.

⁴⁷ The Ocampo Six are the original accused in the Kenya Cases: Kosgey, Ali, Mathaura, Kenyatta, Ruto, and Sang.

confirmed by Pre-Trial Chamber II of the ICC.⁴⁸ Kenyatta was the Finance Minister and the Deputy Prime Minister, while Muthaura was the Head of Public Service and Secretary to the Cabinet. Under the terms of resignation Kenyatta was able to keep his title of Deputy Prime Minister and was able to run for the Presidency in 2013, which he won.⁴⁹ Muthaura, at the age of 67, was appointed to another position of power by President Kenyatta last year as a chairman to the LAPSET Corridor Development Authority.⁵⁰ The ICC may have removed Kenyatta and Muthaura from power in Kenya, but only temporarily.

The notoriety of the ICC had less of an effect upon Henry Kosgey and Mohammed Hussein Ali. Both men left or were removed from their respective posts of Industrialization Minister and Police Commissioner, but neither were directly related to the pressure of the ICC. Henry Kosgey resigned as Industrialization Minister in 2011 after being accused of graft, not after being accused of murder, rape and other crimes against humanity.⁵¹ Ali was moved from his post as Police Commissioner to Chief Executive of the Postal Corporation of Kenya by President Kibaki in 2009 after reports surfaced that he had aided in the corruption of the police force and practiced extrajudicial killings, before the PEV.⁵²

Aside from the six political figures that were accused, Raila Odinga was also affected by the ICC intervention in Kenya. The 2007 elections were disputed by Odinga as he narrowly lost to Mwai Kibaki. Allegations of election fraud resulted and violence erupted in many parts of the country. In the 2013 presidential elections, Uhuru Kenyatta and William Ruto won in a close but

⁴⁸ Nation Reporter, "Uhuru, Muthaura Bow to Pressure, Step aside," *The Daily Nation Kenya*, January 26, 2012, <http://www.nation.co.ke/news/politics/-/1064/1314328/-/h59ue8/-/index.html>.

⁴⁹ Ibid.

⁵⁰ Olive Burrows, "Muthaura among 26 New Heads of Parastatals," *CFM News Capital News*, December 28, 2013, <http://www.capitalfm.co.ke/news/2013/12/muthaura-among-26-new-heads-of-parastatals/>.

⁵¹ Eric Ombok, "Kenya's Kosgey Steps Down Amid Graft Probe; Third Minister Since November," *Bloomberg*, January 4, 2011, <http://www.bloomberg.com/news/2011-01-04/kenyan-industrialization-minister-henry-kosgey-resigns-citizen-tv-reports.html>.

⁵² Al Jazeera, "Kenya Dismisses Police Chief," *Al Jazeera English*, September 9, 2009, <http://www.aljazeera.com/news/africa/2009/09/20099973439637785.html>.

peaceful race with fraud on both sides. Although Odinga did challenge the results, he urged his supporters to remain peaceful.⁵³ Odinga turned to the reformed judiciary to rule on the validity of the election. He called for the judiciary to review the legality of the election and accepted their decision that Kenyatta won.⁵⁴ This acceptance of the judicial review process helped to prevent a repeat of the PEV. While the true cause of presidential-loser Raila Odinga's call for peace in 2013 is widely debated, it can be assumed that the ICC involvement in Kenya did affect his decision. The ICC was widely criticized in 2010 for not charging Raila Odinga and Mwai Kibaki (opponents in the presidential race) with crimes against humanity, since they were the leaders of the political parties at that time. Odinga, in 2013, was well aware that he would not be immune from prosecution by the ICC should violence erupt again.⁵⁵ Although what would have happened had the ICC not intervened cannot be proven, it can be assumed that general deterrence did affect Odinga's choice to remain peaceful and to publically advocate for peace.

The current President of Kenya, Uhuru Kenyatta, is accused of crimes against humanity by the International Criminal Court and experts in the field believe that this has had an impact upon his governing style. Kenyatta's indictment has been cited as the reason he could be called "Kenya's gentlest president."⁵⁶ This nickname has been granted due to Uhuru's lack of vulgar language, and affinity for negotiation. Unlike his father and other predecessors, Kenyatta has shown that he chooses negotiation over violence. In 2013, a teachers' strike was not suppressed by police, but President Kenyatta urged the strikers to return to work and promised salary

⁵³ "Raila Odinga's Speech Following Supreme Court Verdict," *Kenya Stockholm Blog*, accessed June 15, 2014, <http://kenyastockholm.com/2013/03/31/raila-odingas-speech-following-supreme-court-verdict/>.

⁵⁴ "Kenya: PM Odinga Concedes after Supreme Court Decision," March 30, 2013, <http://www.africareview.com/News/PM-Odinga-concedes-after-Supreme-Court-election-decision/-/979180/1734892/-/khxo8c/-/index.html>. He most likely did this due to a combination of the ICC threat, international pressure, and the fact that the judge on the Supreme Court is a friend of his.

⁵⁵ "Raila Odinga's Speech Following Supreme Court Verdict."

⁵⁶ Torome, Juliet. "Juliet Torome on the International Criminal Court's Effect on African Leaders. - Project Syndicate," accessed February 22, 2014, <http://www.project-syndicate.org/commentary/juliet-toromeon-the-international-criminal-court-s-effect-on-african-leaders>.

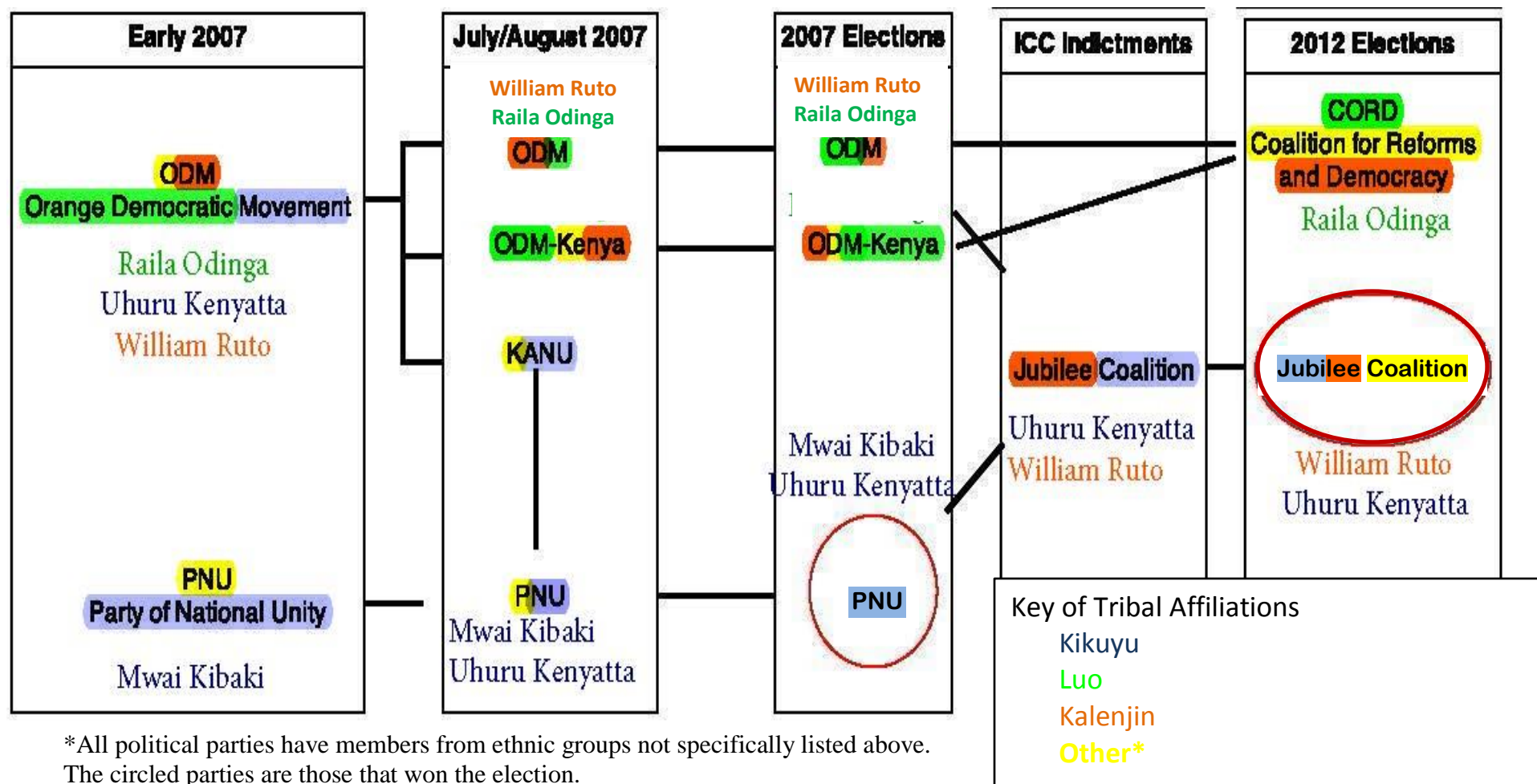
negotiations.⁵⁷ The lack of “government” violence in Kenya since Kenyatta’s election is an indication that the ICC indictment has forced the President’s actions into the international limelight with many waiting to point out mistakes. Kenyatta’s actions appear to be curbed, at least in part, by the presence of justice watchdogs whether or not the ICC tries or convicts him. The ICC impact upon political figures has been varied, but there was no increase in human rights violations due to the ICC involvement so the impact is a net positive for the people of Kenya who seek justice through legal avenues.

Political Parties and Prolonged Conflict

The political parties in Kenya are constantly changing. There are new alliances and reform coalitions at every election. However, the political parties that ran for election in late 2013 were directly impacted by the trials of Kenyatta and Ruto/Sang in The Hague. Figure 1.1 demonstrates the main political parties in the 2007 elections including major political leaders and tribal affiliations and compares that to the status of parties and political figures in 2013.

⁵⁷ Ibid.

Figure 1.1



As Figure 1.1 shows, the major parties in the 2007 and 2013 elections are not formed exclusively according to tribal affiliation. Each political party has a variety of different tribal groups that support its political leaders. For the purposes of this study, the ethnic groups of Kikuyu, Luo and Kalenjin are of the most interest because they are three large tribes whose people were victimized in the PEV and whose political leaders were directly involved in both the PEV and as suspects for the ICC investigations. In 2007, Mwai Kibaki was the incumbent president. In the hopes of running a successful campaign, William Ruto, Raila Odinga and Uhuru Kenyatta originally teamed up under the Orange Democratic Movement banner. However, due mostly to internal competition the ODM group split in July with Kenyatta and KANU leaving to support Kibaki – a fellow Kikuyu. Only one month later ODM split again as some Kalenjin and Luo formed the ODM-Kenya party in opposition to the Ruto-Odinga alliance. In the December 2007 elections, Kibaki was declared the winner and violence erupted between Kikuyu, Kalenjin and Luo. There were independent international reports that Odinga and ODM had actually won the election and books have been written about *Odinga's Stolen Presidency*.⁵⁸

The announcement of the Ocampo Six aligned the two Kenya cases along tribal and party lines. Ruto, Sang and Kosgey are all Kalenjin associated with ODM at the time of the PEV while Kenyatta and Muthaura are Kikuyu associated with PNU. Ali is of Somali descent and aligned with PNU. As the cases against Kosgey, Ali, and Muthaura fell apart at the ICC, Kenyatta and Ruto joined forces for the 2013 Presidential Election in the Jubilee Coalition. This particular shift in political parties was caused by the ICC indictments against Kenyatta and Ruto as their effort to show unity and innocence to their country, international community, and the ICC. During the 2013 Presidential Elections, the Jubilee Coalition was the main opponent to the front

⁵⁸ Okoth Osewe, "Mapambano Stores Online," *Mapambano.com*, 2012, <http://www.mapambano.com/pages/stores.htm>.

runner, CORD – the Coalition for Reforms and Democracy led by Raila Odinga. There was media buzz about Ruto’s desire to switch sides and support Odinga, but the Jubilee Coalition held together and was declared the winner of the election.⁵⁹ The political impacts of the ICC are vast and varied, but the ICC intervention was the largest factor in creating the Kenyatta Administration and the lack of 2013 PEV indicates that the ICC involvement did not prolong the conflict.

*Democracy, Human Rights and Violence in the Kenyatta (Anti-ICC) Administration’s
Election and Governance*

The Jubilee Alliance was created as a pact between Ruto and Kenyatta in an effort to show their innocence and an attempt to get their cases dropped by the ICC. The effort of the ICC to provide justice was the mechanism that directly created this alliance, although the ICC did not cause the Kenyatta Administration to be elected, despite popular beliefs. After the election the Kenyatta Administration was targeted by the media as owing its fame and successful election to the ICC indictments.⁶⁰ Reports showed that the Kenyan people “voted for impunity,” that they banded together against an outside force.⁶¹ Despite the rumors and opinions of national and international media, there is evidence that the ICC did not heavily impact the decision of voters and that Kenyatta and Ruto did not win a majority in the first round of voting. In a 2013 election exit poll, researchers Karen Ferree, Clark Gibson, and James Long surveyed 6,258 Kenyans. Their findings indicate that claims that Kenyatta won a majority in the first round of voting are likely flawed. Also, voters were not overly concerned with the ICC. The Kenyatta/Ruto

⁵⁹ William Makora, “Let Uhuruto Not Panic,” *Kenya Today*, December 7, 2012, <http://www.kenya-today.com/news/let-uhuruto-not-panic>.

⁶⁰ James Long, Karen Ferree, and Clark Gibson, “Voting Behavior and Electoral Irregularities in Kenya’s 2013 Elections,” *Journal of Eastern African Studies*, February 7, 2014, 1–21, doi:<http://dx.doi.org/10.1080/17531055.2013.871182>.

⁶¹ Dayo Olopade, “Will Kenya Vote for Impunity?,” *Latitude*, June 8, 2012, <http://latitude.blogs.nytimes.com/2012/06/08/will-kenya-vote-for-impunity/>.

campaign made the ICC an issue of Kenyan sovereignty, while Odinga claimed that they were ‘war criminals.’⁶² Yet, despite campaign efforts, only 3% of respondents in the exit polls named the ICC as the most important issue in deciding who to vote for.⁶³

This would mean that Kenyans did not vote for impunity, but rather that they voted based upon other concerns such as security or the economy, 13% and 27% respectively.⁶⁴ While the ICC may not have been the most important issue in voter decision it did impact the probability of voting for Odinga by about 12%.⁶⁵ Furthermore, the exit poll data shows that Kenyatta and Ruto did not receive a majority in the first round at the level that the IEBC reported with a 5% probability of error. The upper bound of the confidence interval for those who voted for Kenyatta/Ruto was 44.2% according to the exit poll while the IEBC claimed it was 50.07% and therefore a majority. These results tend to indicate that Kenyatta and Ruto did not actually win a majority in the first round.⁶⁶ The ICC did impact the voting of Kenyans in 2013, but not in the ways that many predicted. There was no consensus among Kenyans that they were voting for Kenyatta/Ruto in an effort to exonerate the pair from all charges. Therefore, the ICC involvement had no or had a very minimal impact on the voting and furthermore the democracy of the 2013 Elections.

While the election did not depend upon the indictments of the Court, the Kenyatta Administration does owe its initial coalition to the ICC, as it is highly unlikely that Ruto and Kenyatta would have joined forces had one or both of them not been slated for trial in an

⁶² James Long, Karen Ferree, and Clark Gibson, “Voting Behavior and Electoral Irregularities in Kenya’s 2013 Elections.”

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ However, in the exit poll data 11.84% of respondents refused to answer who they voted for. Therefore if all of those who refused to respond in fact voted for Kenyatta/Ruto there is a chance, however statistically unlikely, that the Jubilee Coalition in fact won the election ‘fairly’ in the first round.

international court. Therefore, the ICC did have an impact upon presidential politics in Kenya. The Kenyatta Administration has continued to push for the ICC to postpone or drop the cases against sitting heads of state for a variety of reasons. The original arguments claimed that due to instability in the country (such as the terrorist attack at Westgate Mall) and the requirements of being the head of government the cases should be postponed.⁶⁷ The African Union requested that the UN Security Council defer the cases for 1 year based upon insecurity in Kenya.⁶⁸ The trial of Uhuru Kenyatta has in fact been postponed four times now. Originally set in July 2013, the defense and prosecution both needed more time to prepare a case and so it was pushed back to October, then November, then February 5th 2014 and is now scheduled for October 7th, 2014.⁶⁹ While the trials were not postponed for reasons citing the power of the accused, this could have sent a powerful negative message. For instance, if a defendant can avoid trial by working to settle an unstable country, then they have an incentive to destabilize that said country, and of course to entrench themselves in power. There is no evidence that Kenyatta or members of his administration have worked to destabilize the country. In fact, as was discussed above, Uhuru Kenyatta could be considered the country's gentlest president which is in part an effect of the ICC. In the case of Kenya, ICC involvement did not cause democracy to become destabilized; however, that does not mean that the justice cascade theory predictions are correct for all Situations.

The Lack of Domestic Legal Influence

The International Criminal Court is designed to operate under the principle of complementarity. Simply put, the purpose of the ICC is not to replace national courts or

⁶⁷ In September 2013, the Islamist militant group al-Shabab attacked the Westgate shopping Mall in Nairobi, Kenya with grenades and automatic rifles, killing around 70 people (Howden, 2013).

⁶⁸ "Africa Backs ICC Kenya Case Delay," *BBC News*, February 1, 2011, <http://www.bbc.com/news/world-africa-12332563>.

⁶⁹ "Situations and Cases."

jurisdictions, but to complement them. The Rome Statute explains that “states retain primary responsibility for trying the perpetrators of the most serious crimes.”⁷⁰ The Court will only intervene if the State Party is *unwilling* or *unable* to try the crimes themselves. Ideally, national courts will try lower level individuals who are accused of committing human rights abuses, while the ICC only prosecutes the highest level offenders. The justice cascade theory indicates that the rule of law is strengthened when accountability occurs, while opponents of criminal prosecutions argue that the rule of law is impeded when trials occur.

In reality, the Republic of Kenya never attempted to hold any trials surrounding the prosecution of offenders in the post-election violence of 2007-2008. There are no current, public plans to begin trials. In other countries, show trials have been held after periods of intense violence to humiliate one leader or political party while attempting to promote a sense of unity among the remaining population. These trials are not fair or just since the judge has often already decided the defendant is guilty. Unlike the trial of Nelson Mandela in South Africa, or of countless political dissidents in China and Russia, show trials were not held in Kenya. The lack of action by the Kenyan government, especially within the judicial system highlights the unwillingness of the government to prosecute. The threat of ICC intervention did nothing to affect the action of the Kenyan judicial system because no action was taken.⁷¹ The impacts that can be seen by the ICC on the Kenyan judicial system are indirect effects through the new 2010 constitution which will be discussed below. Outside of the political and judicial arenas, the ICC has had direct impacts on individuals, especially victims, witnesses and those seeking reparations.

⁷⁰ ICC-CPI, “Frequently Asked Questions,” *ICC - CPI*, 2013, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/index.aspx.

⁷¹ There were a few legislative bills involving the possibility of starting a hybrid tribunal to try perpetrators, but all bills were shot down in parliament and the judiciary did not attempt to start any trials outside of legislative recommendation.

Victim Participation and Reparations in the Pursuit of Justice

The ICC has numerous programs that are designed to specifically reach and impact the people in the countries where the Court has cases. In particular, the Victims Participation Programme and the Outreach Programmes are designed to target the common person affected by violence. The ICC Outreach Programme in Kenya is the sole topic of Chapter 2. Thus far, the victims have not seen justice or reparations. These direct mechanisms of the Court have failed to have a positive impact.

Although the ICC only tries the most powerful offenders in grave situations, the Court seeks to positively impact those who are most affected.⁷² Among the responsibilities of the International Criminal Court are to deliver justice, to avoid impunity, and to aid victims. The ICC encourages victim participation in the trials at all stages. The International Criminal Court is the first court that allows victims participation in trials. Victims are entitled to file submissions before the Chambers of the Court during any portion of the trials although it is fed through the Registrar.

Unlike any other previous international court, the ICC also allows for victims to appoint their own legal representative who presents their case to the Chamber. If there are a large number of victims, the victims can be appointed a lawyer by the Registrar.⁷³ This legal representative is not a prosecutor or a defense lawyer, but simply attends hearings on behalf of the victims. The hope is that through victim participation in the trials the victims will “rebuild their lives.”⁷⁴ Overcoming grave human rights abuses to oneself or loved ones is difficult to do, but the ICC

⁷² Schabas, *An Introduction to the International Criminal Court*, 231.

⁷³ ICC-CPI, “ICC - Victims and Witnesses,” *ICC - CPI*, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx.

⁷⁴ *Ibid.*

works to allow victims full access to Court proceedings and monetary compensation for loss in certain circumstances.

There were 628 victims who filed for recognition as victims from the Court at the start of the Ruto/Sang trial and they are represented by Wilfred Nderitu.⁷⁵ Nderitu is allowed to examine witnesses and protect the rights of his clients. He recently ensured that testimony by a witness was not altered by clarifying translation problems.⁷⁶ Yet in 2013, 93 victims requested to withdraw from the trial, which many speculated was due to security concerns.⁷⁷ The victims (from various ethnic groups) jointly wrote a letter to the Victims and Witnesses Office explaining their withdrawal. The group claimed that they did not support the prosecution of the newly elected President or his Deputy President. They requested that their names be removed from the list because “we do not want to claim for compensation from people we don't have any complaint against.”⁷⁸

The letter also stated that the victims did not feel that the Prosecutor had their best interests at heart.⁷⁹ While there is speculation as to whether the claims in the letter came of their own free accord or were influenced, 17% of the victims left the judicial proceedings before the Ruto/Sang trial began. The withdrawal could signal many things. Perhaps the victims felt pressured, threatened, or were paid to drop the cases, perhaps the victims truly felt like the ICC was not listening to their needs, or that they are simply more loyal to their leaders than to foreign

⁷⁵ ICC Press Release, “Ruto and Sang Trial Opens at the International Criminal Court,” *ICC - CPI*, September 10, 2013, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr939.aspx.

⁷⁶ Tom Maliti, “Defense Lawyer Says Ruto Did Not Attend Two Rallies; Witness Insists Ruto Was Present,” *International Justice Monitor*, February 26, 2014, <http://www.ijmonitor.org/2014/02/defense-lawyer-says-ruto-did-not-attend-two-rallies-witness-insists-ruto-was-present/>.

⁷⁷ “Standard Digital News : : KTN - KTN Video | More Witnesses and Victims Withdraw from Ruto’s ICC Case,” accessed March 2, 2014, http://www.standardmedia.co.ke/ktn/?videoID=2000072004&video_title=more-witnesses-and-victims-withdraw-from-ruto-s-icc-case.

⁷⁸ Bernard Momanyi, “Kenyan Victims Withdraw From ICC Proceedings - Institute for War and Peace Reporting - P213,” *Institute for War and Peace Reporting*, June 7, 2013, <http://iwpr.net/report-news/kenyan-victims-withdraw-icc-proceedings>.

⁷⁹ Ibid.

justice. If any of these three are true than the ICC is failing to aid the victims that it is sworn to serve.

The Kenyatta trial has around 585 registered victims although it is estimated that there are at least 20,000 victims that are eligible for representation by the Court. Fergal Gaynor is the victims' Common Legal Representative that ensures their rights are protected during trial.⁸⁰ At the status conference held for the Kenyatta Administration on February 5th, 2014 Gaynor argued to the Chamber that Kenyatta had purposely obstructed his own case.⁸¹

If a defendant is found guilty, victims have the ability to seek reparations from the defendant or the Trust Fund for Victims.⁸² There are no verdicts in the Kenya Cases yet so victims have not been able to receive reparations. Yet, the Trust Fund for Victims is also able to finance projects for the benefit of victims. There are over 30 ongoing projects in Uganda and the DRC; however, there are no projects in Kenya and no plans for projects to begin. Since the Kenyan Parliament voted to remove Kenya as a State Party to the ICC, the Trust Fund for Victims will no longer provide assistance to those in need.⁸³ Therefore, the victims of the PEV who are registered with the ICC will likely not see reparations, even if a defendant is found guilty. The Court may not have increased the danger or threatened the peace of victims; however, the ICC has not improved the situation of those in need, nor rectified wrongs as the justice cascade theory suggests.

⁸⁰ The Hague Trials Kenya, "Fergal Gaynor, the Man Who Speaks for 20,000 Kenyatta Case Victims at the ICC," *The Hague Trials Kenya*, February 26, 2014, <http://thehaguetrials.co.ke/content/fergal-gaynor-man-who-speaks-20000-kenyatta-case-victims-icc>.

⁸¹ Tom Maliti, "Victims' Lawyer Accuses Kenyatta of Obstructing His Case," *International Justice Monitor*, February 5, 2014, <http://www.ijmonitor.org/2014/02/victims-lawyer-accuses-kenyatta-of-obstructing-his-case/>.

⁸² The Trust Fund for Victims was established by the Rome Statute to financially assist victims of the crimes that the Court has jurisdiction over.

⁸³ Jennifer Easterday, "Q&A with the Executive Director of the Trust Fund for Victims Pieter W.I. de Baan « ICC Kenya Monitor," *The ICC Kenya Monitor*, September 12, 2011, <http://www.icckenya.org/2011/09/qa-with-the-executive-director-of-the-trust-fund-for-victims-pieter-w-i-de-baan/>.

Violence and Witnesses to the Trials

While the country of Kenya has not seen an increase in human rights violations due to the ICC intervention, witnesses to the trials or those thought to be witnesses have seen this increase. The witnesses to the trials risk their safety that of their family, their jobs and financial security to testify for the ICC. Many witnesses have dropped out because of security concerns or have been removed by the Prosecutor for questions of the truth of testimony after recanting statements.⁸⁴ There are currently 21 witnesses in the Ruto/Sang trial, down from the original 40.⁸⁵

The Kenyatta Trial has not started yet, and the exact original number of witnesses has not been reported, but in the last year alone 7 were removed and there are now 27 witnesses left.⁸⁶ The witnesses who are no longer testifying are the key witnesses in both cases which ensured that the cases would be confirmed by the ICC Pre-Trial Chamber. The impact of the removal of these witnesses is unknown, but it seems that without eye-witness testimony, especially in Kenyatta's case, the charges may be dropped. That would prevent witnesses from telling their story and quite possibly prevent justice. There is widespread speculation that witnesses have been killed, threatened, or injured in an effort to silence their testimony. The Kenya National Dialogue and Reconciliation Monitoring Project (KNDR) found that as early as April 2010, witnesses and potential witnesses were being intimidated into silence. "Deaths, threats, and intimidation of potential witnesses have forced many witnesses into hiding locally or abroad. The

⁸⁴ Tom Maliti, "Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year," *International Justice Monitor*, January 16, 2014, <http://www.ijmonitor.org/2014/01/prosecutor-withdraws-seven-witnesses-in-kenyatta-case-in-past-year/>.

⁸⁵ ICC-CPI, "Frequently Asked Questions."

⁸⁶ Maliti, "Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year."

absence of a functional witness protection programme has made it difficult for some of the witnesses to remain in the country (*sic*).”⁸⁷

The ICC Impact on Human Rights

The pursuit of justice, providing of reparations, and outreach by the ICC have directly impacted human rights for victims, witnesses, the accused, and political figures. These mechanisms have also created impacts on human rights in Kenya, although they are largely confined to the aforementioned groups. Since the intervention of the Court, violence overall has been minimal. In the 2013 elections, the ICC’s involvement and the Kenyatta/Ruto alliance acted as a partial deterrent against violence.⁸⁸ The decrease in violence is a beneficial effect for those who believe the ICC should seek to improve human rights. Yet, the Court has not reduced ‘ordinary’ crimes in Kenya. In 2008 before the ICC intervention, rape was measured at 735 cases or 1.9 per 100,000 people.⁸⁹ In 2009 after the intervention it increased to 847 cases or 2.1 per 100,000 people.⁹⁰ These numbers only measure the reported cases. The Court *is* expected by many to reduce human rights violations caused by organized crime. The number of deaths during the 2007-2008 PEV totaled 1,200. The deaths during the 2013 elections totaled 19. Several police officers were killed by a separatist group on Election Day, but the elections and protested results were very peaceful.⁹¹

⁸⁷ South Consulting, “The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project Status of Implementation,” *KNDR*, April 2010, v, [http://www.dialoguekenya.org/Monitoring/\(April%202010\)%206TH%20Review%20Report.pdf](http://www.dialoguekenya.org/Monitoring/(April%202010)%206TH%20Review%20Report.pdf).

⁸⁸ Susanne D. Mueller, “Kenya and the International Criminal Court (ICC): Politics, the Election and the Law,” *Journal of Eastern African Studies*, January 22, 2014, 2, doi:10.1080/17531055.2013.874142.

⁸⁹ Kauko Aromaa et al., eds., *Survey of United Nations and Other Best Practices in the Treatment of Prisoners in the Criminal Justice System* (Helsinki: European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), 2010), 38.

⁹⁰ *Ibid.*, 37.

⁹¹ Edmund Blair and Joseph Akwiri, “At Least 19 Killed on Kenya Coast during Election Day,” *Reuters*, March 14, 2014, <http://news.msn.com/world/at-least-19-killed-on-kenya-coast-during-election-day>.

The ICC has not had a marked difference on human rights scores in Kenya from 2008-2013. According to Freedom House, Kenya has remained a “partly free” country during that time period.⁹² The country received a rating of 4 for political rights, 3 for civil liberties, and 3.5 for freedom in 2009 after the ICC intervention. In 2008 and 2011, the Freedom House scores for Kenya were identical to those in 2009.⁹³ Yet, progress for some human rights was measured in the Cingranelli-Richards (CIRI) data on human rights.

The physical integrity index in CIRI is a measure of extrajudicial killings, torture, political imprisonment, and disappearance indicators. Kenya received a 2 in 2008 and 2009, but that increased to a 4 in 2010.⁹⁴ This shows an improvement in human rights related to physical integrity.⁹⁵ However, in measuring Kenya’s electoral self-determination from 2007-2010 the country scored a 1 every year which indicates “that while citizens had the legal right to self-determination, there were some limitations to the fulfillment of this right in practice.”⁹⁶

Human rights are often defined to be more than self-determination and the right to live, freedom of speech is often also included. Freedom of speech can be a victim of political strife. During the confirmation of charges hearings for the Kenyan cases at the ICC, the ICC suppressed the freedom of speech by publicly stating that any hate speech issued during the deliberations would be considered in confirming the charges of the accused.

Judge Trendafilova of Pre-Trial Chamber II warned the accused that hate speech would not be tolerated by the Court. She explained that after reading of “some movements towards re-

⁹² Freedom House, “Kenya | Freedom House,” March 2013, <http://freedomhouse.org/country/kenya#.U6Wd-LEVeio>.

⁹³ A rating of 1 is the best score a country can receive while a 7 is the worst it can receive.

⁹⁴ D Cingranelli and D Richards, *Human Rights Dataset* (CIRI, 2013), http://www.humanrightsdata.org/myciri/my_ciri.asp.

⁹⁵ A zero represents no respect for human rights while an 8 is full respect.

⁹⁶ D Cingranelli and D Richards, *Short Variable Descriptions for Indicators in the CIRI Human Rights Dataset*, CIRI (CIRI, November 22, 2010), 5, http://www.humanrightsdata.org/documentation/ciri_variables_short_descriptions.pdf.

triggering the violence in the country by way of using some dangerous speeches” she felt compelled to caution the accused.⁹⁷ If the free speech of the accused was intended to incite hate or violence, the judge reminded the suspects that they would be in violation of their summonses to appear and in violation of crimes over which the Court has jurisdiction.⁹⁸ The ICC directly impacted the freedom of speech for the 6 accused by restricting their right to express themselves. This action was taken in order to preserve peace and prevent the accused from re-offending, although it had a minimal impact on the people of Kenya as a whole.

Conclusions on the Direct Mechanisms and Impact

The conclusions that can be drawn from these data are limited. The social impact of the International Criminal Court upon the country and people of Kenya will be further explored in the following chapter as the ICC Outreach Programme seeks to inform the greater population about what the Court is doing and what the Court can do for the people of Kenya. Major political figures were heavily affected by the ICC intervention especially the ‘Ocampo Six’ and Raila Odinga. The ICC is directly responsible for the creation of the Jubilee Alliance and therefore the election of Kenyatta and Ruto to the Presidency. However, despite international media claims, the fame of the ICC did not affect voters as much as was predicted.

It is apparent that the ICC intervention in Kenya did not drastically increase or decrease human rights abuses in Kenya, statistically speaking. Victims and witnesses have dropped out of testifying en masse stating fear or that they have no wish to see their leaders prosecuted. Opinion polls by IPSOS found that 41% of those surveyed, in July 2013, would support the withdrawal of the African Union from the ICC if the Kenya Cases weren’t returned to Kenyan or East African

⁹⁷ Nzau Musau, “ICC WARNS OCAMPO 6 OVER HATE SPEECH,” *The Star*, April 8, 2011, <http://ads.the-star.co.ke/news/article-67140/icc-warns-ocampo-6-over-hate-speech>.

⁹⁸ Ibid.

jurisdiction.⁹⁹ This is a radical change from the IPSOS opinion poll of February 2012 in which 80% of respondents supported the resignation of Uhuru Kenyatta due to the ICC charges (he was then Deputy President).¹⁰⁰ Most victims and witnesses who stayed registered with the Court are unlikely to receive reparations. Yet, organized political crimes against humanity decreased after the ICC became involved and did not occur in the recent election. Although there has been no effort to try lower level offenders, this all leads to the same conclusion. The Situation in Kenya follows the predictions of the justice cascade theory as the direct impacts did not undermine the rule of law, destabilize democracy, prolong conflict or increase human rights violations. The direct mechanisms have also given rise to indirect and uncontrollable effects.

Indirect Mechanisms and Impacts

The ICC has many indirect mechanisms through which it impacts or influences the countries where it works. The most obvious and influential of these mechanisms is the ‘shadow’ of the ICC or the threat of prosecution. The ‘shadow’ of the ICC is referenced by scholars, politicians and political satirists in many Situations, but the Situation in Kenya has seen the greatest impacts. Through the threat of the direct mechanisms that the Court controls the ‘shadow’ of the ICC has influenced the writing of the 2010 Constitution, including the creation of an independent judiciary and a judiciary which is influenced by international norms. The threat of the Court also led to peaceful elections in 2013. However, indirect mechanisms cannot be controlled by the Court. Ironically, the Court has succeeded in increasing unity in Kenya –

⁹⁹ IPSOS, “Ipsos Synovate Polls_SPEC_Barometer_July_2013,” *IPSOS.CO.KE*, July 2013, http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls_SPEC_Barometer_July_2013.pdf.

¹⁰⁰ IPSOS, “Level of Satisfaction with ICC Ruling,” *IPSOS.CO.KE*, February 2012, [http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Level%20of%20Satisfaction%20with%20ICC%20ruling%20\(February%202012\).pdf](http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Level%20of%20Satisfaction%20with%20ICC%20ruling%20(February%202012).pdf).

unity in opposition to the “foreign court.” The presence of the ICC has created indirect impacts that are far more powerful than any that direct mechanisms have sought to create.

Democracy and the Rule of Law: The ICC Threat Encourages the 2010 Constitution

The successful referendum of the new constitution in 2010 affected all aspects of the Kenyan government and the lives of Kenyans. There is no conclusive proof that the ICC involvement in Kenya caused the constitution to be drafted and passed, but there is too much correlation to avoid a discussion of the impacts of the Court on the Kenyan Constitution. A new constitution had been the goal of many in Kenya for twenty years before any action was taken to create a new national system that was approved by the public in a referendum. Many Kenyan scholars and politicians in prominent positions are convinced that the move towards a new constitution was caused by the violence. Gichira Kibaara is the permanent secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs and was instrumental as a liaison officer during the 2007-2008 violence for President Kibaki’s party to the AU Panel working on the peace agreement. In a November 2011 interview with New Africa Mr. Kibaara claimed:

“I think the violence was a wake-up call,” Kibaara says before the violence, “there was a certain complacency about a Kenya that had always been seen as a country doing well, an example in Africa, a country that had not had military coups when most African countries had had several . . . So a certain complacency had developed when things were taken for granted . . . where the judicial process was taken for granted; but now no more; the violence was a wake-up call in a very radical way, so the people actually started to listen.”¹⁰¹

¹⁰¹ “Made in Kenya A Constitution for the People, by the People.: EBSCOhost,” 51, accessed February 11, 2014, <http://web.a.ebscohost.com.offcampus.lib.washington.edu/ehost/pdfviewer/pdfviewer?sid=35142819-ffa7-4142-8cb8-e8ef04f4c00d%40sessionmgr4002&vid=7&hid=4207>.

However, pre and post-election violence had occurred in Kenya before and the violence was just as grave in 1992-1993 as in 2007-2008.¹⁰² A new constitution was not created in 1993.¹⁰³ Therefore, the violence was not the only factor which caused the new constitution to be drafted, voted upon and passed in 2010. There are two major differences in the political atmosphere around Kenya between the early 1990s and the late 2000s. One is that the International Criminal Court has jurisdiction over the crimes committed in the 2007-2008 violence, while it did not yet exist in the early 1990s. The second major difference is the power of the executive branch.

The elections of 1992-1993 were the first multi-party elections to occur in Kenya since independence. During the 1992-1993 violence there was one party which had excessive power, led by the incumbent President, Daniel Arap Moi¹⁰⁴. There were accusations by Human Rights Watch and others that Moi had organized and incited the violence and rigged the election in which he won. Impunity ruled the day.¹⁰⁵ In contrast, the executive branch in 2008 consisted of a coalition government between two major political leaders, Mwai Kibaki and Raila Odinga. Nearly three years after their joint election, the new constitution was approved by 67% of the population.¹⁰⁶

¹⁰² It is estimated that at least 1,500 people were killed in the 1992-1993 violence, whereas the 2007-2008 did have some estimates that high, but it is more likely that the actual count was closer to 1,200 deaths. Both of these episodes of violence were horrific, but they are comparable in terms of intensity.

¹⁰³ In fact, a referendum for a new constitution was not held until 2005 and it failed miserably. Those who voted 'no' joined together to create the Orange Democratic Movement, a political party that was at the heart of the 2007-2008 violence.

¹⁰⁴ Moi stepped down in 2002 and allowed multi-party elections in which Mwai Kibaki won. In a report on the laundering of finances under Moi during his 26 year reign it was found that over 3 billion U.S. dollars had been stolen from the people of Kenya.

¹⁰⁵ Branch, *Kenya*, 135.

¹⁰⁶ Jeffrey Gettleman, "Kenyans Approve New Constitution," *The New York Times*, August 5, 2010, sec. World / Africa, <http://www.nytimes.com/2010/08/06/world/africa/06kenya.html>.

Mancur Olson's theory of power and prosperity shows that those in power, just as other rational actors, act upon incentives.¹⁰⁷ There was no incentive for Moi to create a new constitution, giving more rights to others, especially giving power to an independent judiciary because it would only serve to undermine the corrupt practices that enriched his power, position and pocketbook. Years later in March 2008 the coalition government came into effect after months of negotiation and violence. The power-sharing agreement did not require the government to create a new constitution, yet it was assumed and discussed. In 2009 drafts were entertained for such a proposal. This act continues to follow Olson's theory of power in that the shift from more authoritarian-style governing to democracy occurs organically when no single player can consolidate power.¹⁰⁸ However, the turn to power-sharing does not ultimately explain why the 2010 Constitution was passed while efforts during the previous 20 years or even earlier in the coalition did not succeed.

An interview with the current Chief of Staff of the Judiciary, Duncan Okello, revealed the surprise of the success and the understanding that outside forces impacted the decision to push for a new constitution:

"It is unprecedented that a country that was plunged into civil war more or less, and has a coalition government for that matter, has been able to put together a new constitution within a year and a half, and very progressive constitution to boot . . . the delivery of that constitution has also challenged a lot of the political theory about coalition governments, and I was one of those sceptics [who said] that coalition governments tend to resort to the lowest common denominator . . . the constitutional project has been on for the last 20 years. It is a big achievement . . . especially at a time when the two arms of the coalition *were both feeling insecure (sic, emphasis added)*."¹⁰⁹

¹⁰⁷ Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (New York: Basic Books, 2000), 3–4.

¹⁰⁸ *Ibid.*, 33–36.

¹⁰⁹ "Made in Kenya A Constitution for the People, by the People.: EBSCOhost," 50.

The insecurity of President Kibaki and Prime Minister Odinga were directly related to the ICC investigation. In November 2009, the draft of the constitution was released to the public, while in September 2009 the ICC Prosecutor had indicated the intent to investigate if action was not taken by July 2010.¹¹⁰ There was no certainty that Kibaki and Odinga would not be investigated and tried by the Court. The change in power of the executive branch, even before the constitution, was due in part to the fact that leaders during or after their political careers could be tried for crimes against humanity by the International Criminal Court. The justice cascade theory proposes that international justice has proven to curb the actions and previously unlimited power of executives for fear of trial. “Perpetrators of abuse have reacted to the justice cascade . . . By the end of the 1990s their [perpetrators] calculus changed because they needed protection from the increased threat of prosecution.”¹¹¹ Some perpetrators have fought for amnesties or shifted blame, but I argue that in the case of Kenya, reform efforts were made as a way to win over the Kenyan people and the international community. The greatest reform effort that Kibaki and Odinga could have accomplished was a new constitution, and so a new constitution was drafted, advertised and passed into law. Unlike many opponents of criminal prosecutions claim, the ICC involvement did not destabilize democracy, but actually improved it. Similarly, the rule of law was not impeded by the Court’s investigations, but was strengthened.

In summary, the two major political differences between the early 1990s and late 2000s in Kenya involved the impact, reach, and presence of the International Criminal Court. The violence certainly encouraged the public and NGOs to advocate for a new constitution, but after 20 years of advocacy it was only when the ICC began to pressure Kenya and investigate the

¹¹⁰ Lucianne Limo, “Standard Digital News - Kenya : Draft Constitution to Be Released This Month, Says Chairman,” November 10, 2009, <http://www.standardmedia.co.ke/article/1144028145/draft-constitution-to-be-released-this-month-says-chairman?searchtext=Kenya&searchbutton=SEARCH>.

¹¹¹ Sikkink, *The Justice Cascade*, 145.

violence that substantial progress was made in creating the 2010 constitution. The new constitution created sweeping changes for the country in political and social sectors, but the most critical change that occurred according to the ICC was a reform of the judiciary. Therefore, it is to the judicial impacts of the Court on Kenya that we turn to next in an effort to see how democracy and the rule of law were affected by the Court.

The 2010 Constitution – Judiciary Changes

The threat of ICC involvement pushed negotiations for a new constitution forward and ensured that judicial changes were a component of the new laws. The most important change includes the provisions for strengthening the independence of the judiciary, in part, in the hope that corruption coming from other branches of government will be stemmed. The 2010 Constitution also rewrote the laws governing the judiciary to include more room for international influence from cases conducted in other commonwealth countries. There are relatively few other changes to the judiciary; however, one key change is an effort to rewrite public opinion.

The Previous Kenyan Judicial System

In order to understand why the changes to the Kenyan Constitution that were indirect effects of the ICC are so significant, it is critical to understand what existed in Kenya prior to the ICC involvement. The Republic of Kenya operates its judiciary under a common law system that was adopted during British colonial rule. In the early 20th century, the court system in Kenya was used as “one of the main weapons for colonial domination . . . a tool at the disposal of the dominant political and economic groups.”¹¹² After independence, the public opinion of the

¹¹² Yash P Ghai and McAuslan, *Public Law and Political Change in Kenya; a Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi; New York: Oxford University Press, 1970), 34.

judiciary did not change and there were many problems.¹¹³ The difficulties of the Kenyan system upon independence stemmed from both a supply and a demand dilemma. The supply of educated lawyers and judges was limited and what qualified courts did exist were not in demand by the population due to a lack of trust. First, there was a significant dearth of qualified African lawyers in Kenya to develop a reliable court system with judges, magistrates, and lawyers from different ethnic backgrounds and religious practices.¹¹⁴ The few lawyers that were practicing were initially linked tightly with and controlled by the government that was often corrupt, further alienating the common people. A weak judiciary served the purposes of the legislative and executive branches of government and there was no incentive for any particular political group to create an independent or reliable court system. For example, until recently, any land that was not titled, by law, “defaults to government ownership” in which it was often then distributed to the political supporters of whoever was in power.¹¹⁵

The incentives to keep the judiciary weak led to inaction and a lack of development in the legal system. Individual judges are also at fault as corruption, mostly bribing, was rampant. In 2003, a report was publicized after an investigation that found that half of the judges on the Court of Appeal – Kenya’s highest court at the time – were corrupt.¹¹⁶ This lack of development in case law and precedent in Kenya, at least from independence until the early 2000s, was caused by the lack of political will to strengthen the judiciary, the corruption of judges inside the judiciary and political leaders who controlled the legal system from outside the courts. The rule of law in Kenya was weak and did not apply to those with political power.

¹¹³ Polls of public opinion on the judiciary revealed a constant distrust as less than half the people of Kenya continually reported “confidence” in the judiciary (Crabtree and Tortura –Gallup, 2009).

¹¹⁴ Sandra Fullerton Joireman, “The Evolution of the Common Law: Legal Development in Kenya and India,” *Commonwealth & Comparative Politics* 44, no. 2 (July 2006): 202, doi:10.1080/14662040600831636.

¹¹⁵ *Ibid.*, 203.

¹¹⁶ “BBC NEWS | Africa | Half of Kenya’s Judges ‘Corrupt,’” accessed February 6, 2014, <http://news.bbc.co.uk/2/hi/africa/3152928.stm>.

Under President Kibaki in the early 2000s, anti-corruption was a major goal, but the judiciary did not change significantly. New judges were appointed in place of those fired or suspended over corruption charges in the high courts, but there was no big push for reform on all levels.¹¹⁷ The post-election violence in 2007-2008 left the judiciary and other parts of the Kenyan government exposed as unable to provide for the Kenyan people.

The PEV in 2007-2008 ended upon the promise of a coalition government and talk of a new constitution. The international community's and especially African Union's involvement in negotiating the peace led to the Waki Commission which investigated the violence. Their legal recommendation was to create a truth commission and a hybrid tribunal in which the weak national court system would be supplemented by the stronger international commonwealth countries' support and expertise.¹¹⁸

The Kenyan government did not respond to the recommendations of the Waki Commission to prosecute individuals responsible for the PEV. As part of the recommendations by the Commission, a deadline was put in place in which Kofi Annan was tasked with giving information to the ICC should there be inaction.¹¹⁹ The evidence was handed to the ICC in July 2009.¹²⁰ Between 2008 and 2009, the parliament introduced several bills to establish a hybrid court and President Kibaki publically promised to reform the judiciary and the police, but all plans and legislation were voted down.

¹¹⁷ "Kibaki Appoints More Judges," accessed February 6, 2014, <http://www.statehousekenya.go.ke/news/june03/2003040601.htm>.

¹¹⁸ ICTJ, "The Waki Report: The Facts - ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf," *International Center for Transitional Justice*, 2011, <http://ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf>. The vision of the Waki Commission was to create a hybrid tribunal very similar to the Special Court for Sierra Leone in which both national and international judges sat on cases involving the violence during the prolonged civil war in Sierra Leone.

¹¹⁹ Kofi Annan is the former Secretary General for the United Nations. He was a key leader in negotiating the peace during the PEV in Kenya.

¹²⁰ Chandra LekhaBrown, Stephen Sriram, "Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact," *International Criminal Law Review* 12, no. 2 (April 2012): 221, doi:10.1163/157181212X633361.

As Sriram and Brown highlight, Kenya was heavily influenced by the “shadow” of the ICC – the mere existence of it.¹²¹ Although, no legislation was passed and no grand reform movement occurred before the ICC investigation began in November 2009, the continued discussion at all levels of government was caused by the potential of ICC involvement. The Waki Commission could have been completely ignored on both a domestic and international level, like many commissions before it, yet it had the threat of ICC intervention to force a continued discussion of the topic of trials.

The continued discussion of the possibility of ICC involvement at both the public and government level ensured that civil society organizations continued to push for justice and that people listened to those who called for prosecutions.¹²² According to Mugambi Kiai from the Open Society Institute, “the possibility of ICC involvement catalyzed an unprecedented interest in international criminal accountability, which resulted in a large-scale *de facto* civic education campaign.”¹²³ The importance of constant pressure on the government and especially on the judiciary cannot be overstated, because the focus of the public agenda in 2010 influenced the new constitution that was being written and approved at the same time.

The momentum caused by the continued discussion of ICC involvement was not one-sided. Those opposed to the ICC intervention had a stake in reforming the Kenyan judiciary to invoke or feign the existence of the principle of complementarity and have ICC trials cancelled in favor of national trials. On the other hand, those in support of the ICC intervention also supported reforming the judiciary as a way of ensuring more perpetrators could be tried. Thus, the threat of ICC intervention created a tenuous, but unified objective for many in Kenya – to

¹²¹ Sriram, “Kenya in the Shadow of the ICC.”

¹²² *Ibid.*, 222.

¹²³ *Ibid.*, 237.

reform the judiciary in the 2010 Kenyan Constitution. The ICC strengthened the rule of law as the justice cascade theory predicts.

*Strengthening the Rule of Law and Democracy: The Independence of the Kenyan
Judiciary*

The importance of independence in a judiciary is discussed at length in numerous theories. Thomas Hobbes in *The Leviathan* identified the legal system as the guardian of the social contract between citizens and government.

When citizens choose to exit the state of nature and give up certain freedoms for protection from others by a government, they enter a social contract. If the government breaches that contract, citizens have a right to rebel, revolt or leave the contract. However, the key piece that is often not discussed in analysis of Hobbes' theory is that there is an intermediary between absolute peace and chaotic rebellion – an independent judiciary. “When conflicts between citizens or between the State and citizens arise, there is a place that is independent from undue influence, that is trustworthy, and that has authority over all the parties to solve the disputes peacefully. The Courts in any democratic system are that place of refuge.”¹²⁴

Hobbes is joined in his support for an independent legal system by John Adams (1776) in his *Thoughts on Government*:

“The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful

¹²⁴ Alnashir Visram, “The_Role_and_Responsibility_of_the_Courts_under_the_Constitution_of_Kenya_2010,” *Kenya Law*, 2011, 6, http://www.kenyalaw.org/kl/fileadmin/Download_Journal/Judges_Colloquium_2011/6.%20The_Role_and_Responsibility_of_the_Courts_under_the_Constitution_of_Kenya_2010.doc.

administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.”¹²⁵

The importance of an independent judiciary is not lost upon the authors of the 2010 Kenyan Constitution and there are many changes that seek to improve upon this ideal. The previous constitution vested power in the executive and legislative branches of government, but “did not explicitly vest the judicial power in the Judiciary.”¹²⁶ It was possible, under the old constitution, for the power of the judiciary to be usurped by the other branches of government and for cases to be tried at courts created and controlled by executives or legislative assemblies. This is the problem of a lack of institutional independence where under the country’s governing laws the judiciary is at least partly influenced or dependent upon other branches of government. The 2010 Constitution solves the problem of institutional independence by creating an independent judiciary. The first two articles relating to the judiciary confirm that “judicial authority is derived from the people and vests in” the courts and that the courts are independent “of any person or authority.”¹²⁷ The new court system certainly has institutional independence and is therefore able to try perpetrators of the 2007-2008 violence. The principle of complementary states that the ICC will intervene only when a state is unable or unwilling to try cases themselves. Kenya is able to try cases in a fair and just manner under the new court system that has institutional independence.

Article 159, which discusses the power of the judiciary, explicitly states that “justice shall be done to all – irrespective of status [and] that justice shall not be delayed.”¹²⁸ For the victims of the 2007-2008 violence, justice has been delayed over 6 years with no plans to begin trials or

¹²⁵ Ibid., 7.

¹²⁶ Ibid., 1.

¹²⁷ LAWS OF KENYA, *The Constitution of Kenya, 2010* (Attorney General Nairobi, 2010), http://www.wipo.int/clea/docs_new/pdf/en/ke/ke019en.pdf.

¹²⁸ Ibid.

augment investigations in the future. Although the Kenyan Judiciary is able to try cases involving the 2007-2008 PEV, it is clear that Kenya is unwilling to do so. Therefore, the ICC has jurisdiction over the cases against Uhuru Kenyatta, William Ruto, and Joshua Sang.

The other type of independence is decisional independence which claims that judges should be free to decide cases based only upon law and fact “without external interference.”¹²⁹ There is always the possibility that decisional independence will be compromised due to media coverage, threats upon the safety of judges and/or juries and numerous other difficulties in high profile cases. The best way to defend against decisional independence is to have comprehensive training and competent lawyers. Kenya has come a long way in the training of individuals since independence and there are numerous prestigious law schools in Kenya now. The International Criminal Court has also taken an interest in training the next generations of lawyers in how the ICC operates through their Legal Outreach Programme in which seminars and meetings are held to provide information to members of the Kenyan law community.¹³⁰

The independence of the judiciary in Kenya is now legally established under the new constitution. Yet, the lack of action shown in relation to the post-election violence indicates that the ICC retains full jurisdiction over these cases in Kenya due to ‘unwillingness.’ The ICC is designed so that lower level offenders are the responsibility of the country in question, while only higher profile defendants are tried by the ICC. Although the ICC was a factor in the passing of the 2010 Constitution, the new legal system has not tried any lower level offenders. Yet, the impact of the ICC in the judiciary is not confined to the change in independence as international influence over the judiciary was also a change in the new constitution.

¹²⁹ Harry Stephen Arunda, “The Extent of Judicial Independence and Separation of Powers under Kenya’s Legal System,” 2012, <http://harrystephenarunda.wordpress.com/2013/09/18/the-extent-of-judicial-independence-and-separation-of-powers-under-kenyas-legal-system/>.

¹³⁰ “ICC - Outreach in Kenya,” accessed October 24, 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/kenya/Pages/outreach%20in%20kenya.aspx.

The Rule of Law: International Influence

Influence is very difficult to measure quantitatively; however, it is not difficult to identify. The new constitution opens the Kenyan Judiciary to more international influence. It embraces the idea of “best international practices” which means that its articles have norms and principles of international law embedded in them.¹³¹ Therefore, many argue that Kenya has a renewed obligation to “abide by its international commitments, which have now been recognised as being a source of Kenyan laws (*sic*).”¹³² Kenya’s international commitments are numerous, especially in the areas of human rights and international law.

Table 1.1 List of major international law treaties, guidelines, and commissions for Kenya.¹³³

ICCPR – United Nation’s International Covenant on Civil and Political Rights	UN Guidelines on the Role of Prosecutors
ACHPR – African Charter on Human and Peoples’ Rights	African Commission on Human and People’s Rights
UN Basic Principles on the Independence of the Judiciary	Latimer House Guidelines for the Commonwealth
UN Basic Principles on the Role of Lawyers	The Bangalore Principles on Judicial Conduct
UN Convention Against Corruption	African Union Convention on Combatting Corruption

¹³¹ South Consulting, “The Kenya National Dialogue and Reconciliation Monitoring Project -Review Report,” *KNDR*, October 2010, [http://www.dialoguekenya.org/Monitoring/\(October%202010\)%20TH%20Review%20Report.pdf](http://www.dialoguekenya.org/Monitoring/(October%202010)%20TH%20Review%20Report.pdf).

¹³² *Ibid.*, 37.

¹³³ This table is adapted from information available at *Report of the International Legal Assistance Consortium and International Bar Association Human Rights Institute*, February 2010, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DCD20276-7C7C-4321-92A1-DD43531F93A1>.

Table 1.1 identifies the major treaties, guidelines, and commissions that Kenya is a signatory or member of. The numerous associations listed above all pressure the Kenyan Judiciary to act in a manner that upholds their various calls for justice. As of 2010, Kenya was also a signatory and State Party to the Rome Statute of the International Criminal Court. The impact of the ICC upon Kenya, in respect to international best practices, can be interpreted as negative in the pursuit of the rule of law. The pressure of the ICC encouraged Kenyan MPs to vote to leave the ICC, which will be discussed further in Chapter 3. Yet, there are also positive indicators of the ICC best practices influence.

Law groups around Kenya have opened up and expanded seminars with international groups and topics in support of ICC goals. The Law Society of Kenya holds seminars each week that are compulsory for new advocates and they teach on topics such as “Practice of Law in International Institutions,” “Developing Jurisprudence in Criminal Law Practice” and “Constitutional Law and Human Rights.”¹³⁴ The large annual law conference held in 2011, as the pre-trial hearings for the Kenya cases were occurring at the ICC, included speakers from a number of commonwealth countries and most notably a judge from the ICC. Honorable Joyce Aluoch presented to the conference upon the involvement of the ICC in Kenya to promote understanding and the perspective of the ICC.¹³⁵ This annual law conference sponsored by the Kenyan Judiciary was themed “Rebuilding Confidence in the Kenya Judiciary” as part of a larger effort to encourage international best practices in the hopes of changing the negative public

¹³⁴ Law Society of Kenya, “Law Society of Kenya Continuing Legal Education Program Calendar of Events 2014,” *Lsk.or.ke*, January 2014, <http://www.lsk.or.ke/images/forms/2014/2014%20calendar.pdf>.

¹³⁵ The Kenya Law Conference was set up by the National Council for Law Reporting which is a state corporation controlled by the judiciary.

opinion of the court.¹³⁶ The influence of the ICC and other international legal institutions on the legal practices of Kenya is a positive impact as more lawyers are trained in international best practices.

Public Opinion

The effort to reform the judiciary was not only undertaken in the legal framework of the 2010 Constitution, but also in the communication operations of the court in order to change public opinion. The corruption of the court under previous presidents and the inability of the court to settle the election problems of 2007-2008 created a negative stigma about the court. In July 2010, the Final Report of the Task Force on Judicial Reforms reported that “runaway and unabated corruption, political interference, ‘gatekeeping’, tribalism, and nepotism were amongst the factors that contributed to low public trust and confidence in the judiciary.”¹³⁷ In 2009 a Gallup Poll showed that only 27% of Kenyans had confidence in the judicial system. This was a dramatic change from the 54% who had confidence before the PEV.¹³⁸

The same poll that measured the confidence of Kenyans also asked about whether they favored trials at the ICC or in Kenya. A majority favored the ICC in 2009, and although they were typically more educated than those who did not favor the ICC, this is likely due to the lack of faith in the judiciary. The judicial campaign reforms that have been introduced, such as increased transparency, identify the goals of the judiciary as complements to the work that the ICC and other international law groups are conducting in Kenya in the hopes of creating a trusted, reliable court system that upholds human rights. Between 2009 and 2014 while the

¹³⁶ “Kenya Law: Judges Colloquium 2011,” *Kenya Law*, June 2011, <http://kenyalaw.org/kl/index.php?id=1927>.

¹³⁷ Infotrak Research and Consulting, “Judiciary Perception Survey,” *ICJ Kenya*, September 2012, http://www.infotrakresearch.com/downloads/Judiciary_perception_survey.pdf.

¹³⁸ Gallup Poll, “Lacking Faith in Judiciary, Kenyans Lean Toward The Hague,” August 5, 2009, <http://www.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx>.

Kenyan Judiciary sought to increase support and was thus far unsuccessful, the ICC lost support in nearly every province of Kenya which will be discussed and analyzed in Chapter 2.

Democracy in the 2010 Constitution

The Republic of Kenya is a constitutional democracy by definition, but one riddled with a history of corruption, ethnic and political violence and questionable elections. The justice cascade theory predicts that democracy will be strengthened by international human rights prosecutions as rights are upheld. The multiparty democratic state, level of executive power and devolution are the most important political changes seen in the new constitution that are indirect effects of the shadow of the ICC. The involvement of the international community in curbing the power of the Kenyan executive is rooted in the existence of the ICC, although it is not an expressly written goal of the Court. Without a court that can legally violate national sovereignty, the threat of international pressure upon peace and democracy efforts is less powerful.

The role of the ICC is often debated. Many proponents of international law claim that the ICC should have a greater role in restorative and transitional justice and in the “prevention of crimes.”¹³⁹ Following this logic, the ICC would be interested in affecting future conduct since it was developed “for present and future generations” according to the Rome Statute.¹⁴⁰ Therefore, the enforcement of multiparty elections, and a reduction of the power of the executive especially through the devolution process are in the interest of the ICC. These are measures in the 2010

¹³⁹Jeremy Sarkin, “The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies.,” *Studies In Ethnicity & Nationalism* 11, no. 1 (2011): 1. Restorative justice refers to bringing calm or peace to victims and perpetrators. It restores a society to harmony. Truth commissions, amnesties, hybrid tribunals, local trials, national trials, international prosecutions or any combination could be used in restorative justice. Transitional justice occurs when a nation or society moves from one era to the next typically in relation to its style of government. For example, the justice cascade theory uses case studies from Argentina and Uruguay as evidence that the move from an authoritarian government to a democracy requires dealing with the past in some form of justice.

¹⁴⁰ *Ibid.*, 2.

Constitution designed to decrease ethnic violence.¹⁴¹ These political changes between the old and new constitution, which are in line with the objectives of the ICC, are not easy to develop in countries with histories of autocracy and corruption.

Returning to Olson's Theory of Power, autocrats who are in power do not give it up willingly, but only when they cannot control the area with their own absolute power. In other words, power dynamics will change only when there are multiple powerful forces in play in which no party can dominate all the other parties.¹⁴² The politicians of Kenya are not all autocratic by nature, but they are self-rational actors. Very few would choose to alter the power that rests with the President if they had the potential to be the President. For example, Raila Odinga, the former Prime Minister of Kenya, was initially in support of devolution and removing power from the center before the 2007 elections. However, "Odinga had learned in 2007 that he could win an honest presidential election, so he was disinclined to dilute presidential power."¹⁴³

Despite the resistance by powerful politicians to reduce the influence of the executive, the 2010 Constitution clearly calls for a multi-party democratic state in which the influence of the executive is limited in particular by moving power from the center to many smaller counties.¹⁴⁴ Under Olson's theory, this occurrence can only be explained by the introduction of equally powerful groups. The constant party and alliance switching in Kenya certainly support this; however, there is another factor that must be addressed. Olson claims that democracy can also occur if it is imposed from outside forces, such as in Germany and Italy after WWII.¹⁴⁵ This idea can be extended to the fact that peace, justice, and power distributions can be imposed from

¹⁴¹ Eric Kramon and Daniel N Posner, "Kenya's New Constitution," *Journal of Democracy* 22, no. 2 (2011): 89–103. The devolution process is occurring in Kenya as power is removed from the national or central offices in the capital and is spread out to more county and local officials.

¹⁴² Olson, *Power and Prosperity*, 33–36.

¹⁴³ Kramon and Posner, "Kenya's New Constitution," 93.

¹⁴⁴ "Made in Kenya A Constitution for the People, by the People.: EBSCOhost," 50.

¹⁴⁵ Olson, *Power and Prosperity*, 30.

outside forces. The involvement of the international community in curbing the power of the Kenyan executive is due to the ICC. The ICC is an institution with the power to try and imprison those who violate international norms of peace and justice thereby influencing power distributions.¹⁴⁶ Many African countries have altered constitutions to increase the power or longevity of executives, yet in Kenya the 2010 Constitution curbed this power in part in an effort to promote peace and reduce ethnic violence.¹⁴⁷ “The [Kenyan] political class has been set back on its heels by a recent wave of high-profile anticorruption investigations and the ICC.”¹⁴⁸ The ICC is an integral part of the move towards greater human rights protections, even though that may not be part of its official role.

The Indirect Impact of the ICC on Kenya

The impact of the ICC on the 2010 Constitution is indirect, but multi-pronged. The involvement of the ICC did not undermine the rule of law as opponents of prosecutions claim under the justice cascade theory, but rather strengthened it in several ways. The investigation and the threat of the ICC allowed a robust, continuous discussion on how to reform the judiciary, in part in order to ensure that the ICC would not have to intervene in Kenya again. The media buzz about the ICC led into the 2010 Constitution which created important changes in the Judiciary of Kenya. The independence of the judiciary is a new feature of the court system that draws its importance from judicial and political theory, but also from the norms of international law that the ICC represents. Efforts in Kenya to increase knowledge of international law, human rights, and the legal system are all impacts of the ICC in Kenya. However, the ICC did not yet persuade the reformed judiciary to hold trials involving perpetrators of the PEV in 2007-2008. No action

¹⁴⁶ If the ICC intervenes in a country and tries and imprisons a political leader, the Court then indirectly changes the power dynamics in that country as power is redistributed amongst the leaders that are left in a way that would not have occurred had the imprisoned leader still been present.

¹⁴⁷ Kramon and Posner, “Kenya’s New Constitution.”

¹⁴⁸ Ibid., 99.

has been taken by the judiciary or for that matter, by the politicians in the executive and legislative branches of government. Finally, the devolution of power away from the executive in the 2010 Constitution was also encouraged by the addition of the ICC as a player.

Conclusions on the ICC Impact

The interaction between the International Criminal Court and the Republic of Kenya has been profound through both direct and indirect mechanisms of the Court. The justice cascade theory predicts that human rights prosecutions will not destabilize democracy, will decrease human rights violations and the length of conflicts, and will not impede the rule of law. In the Situation in Kenya, democracy and the rule of law has been strengthened since the ICC intervention. The 2010 Constitution brought about changes that were influenced by the presence of the ICC. An independent judiciary that is more open to international influence still failed to try those who caused the 2007-2008 PEV and the ICC stepped-in. The ICC intervention also decreased the possibility of violence resurfacing in the next election. The presence of the ICC and the intervention in Kenya drastically altered the political arena as Kenyatta and Ruto joined forces for the 2013 Presidential election on an anti-ICC mindset and won the elections. Without the ICC investigation and confirmation of charges against these two politicians such a political alliance would not have existed. Due to the indirect effect of the threat of prosecution and the direct effect of the unlikely alliance created by the ICC, the 2013 elections were peaceful. This is the largest observable impact that the ICC had upon the country of Kenya.

Why does the ICC impact upon Kenya matter to the future of international criminal law? The impact of the Court has been highly debated for years. Many opponents of the ICC and of international criminal law claim that prosecutions destabilize democracy, increase human rights violations, increase or prolong conflict and impede the consolidation of the rule of law. The

Kenya cases are an important case study to test these theories, because the power of the accused is immense when compared to retired generals in Latin America or rebel leaders in the custody of the ICC.

Conversely, supporters of the increase in international criminal prosecutions worldwide claim that the positive impacts of prosecutions outweigh the negative results. Those countries in transition to democracy actually see increases in human rights protections due to prosecutions. Kathryn Sikkink and her justice cascade theory predict that as power wanes and individuals can be tried, prosecutions strengthen human rights worldwide. The Situation in Kenya is a unique case study for supporters of ICL because it is not a country in transition from dictatorship to democracy. Kenya is not a perfect democracy, but the Kenya Cases represent a unique opportunity to test the impact of international criminal law on countries not qualified as ‘in transition.’ These results could be used to create a new theory of the justice cascade that incorporates the possibility of trying individuals in power or those who committed crimes while in power.¹⁴⁹

In Kenya, democracy has become stronger since the PEV and the ICC intervention as the new constitution attests to, despite inconsistencies with the presidential election. While there is some evidence that the new administration has practiced witness tampering or threatening, the violence seen in the 2007-2008 period was not repeated in the most recent elections. Opponents of international justice claim that prosecutions can cause more violence as ex-generals and ex-authoritarians seek a return to power to avoid prosecution. In Kenya, two of the accused certainly sought power to avoid prosecution. Although Kenyatta and Ruto sought power through democratic means, it is probable that their election to the presidency was in fact engineered.

¹⁴⁹ The call for prosecutions of U.S. officials under the Bush Administration for torture is widespread, although it is not discussed in the U.S. media as often as abroad.

The Kenya Cases may support the idea that accused individuals will seek power, but there is little evidence that this has increased violence, in fact it seems that the unlikely alliance ensured that mass violence did not occur in the 2013 elections. The rule of law in Kenya is stronger and the judiciary is now more independent, but there is still widespread impunity and corruption. The prosecutions by the Court did not negatively impact the country as opponents of international justice predicted, despite the fact that the accused came to power after being accused which is in opposition to Sikkink's and other proponents' predictions. The ICC has had an impact upon the country of Kenya through direct and indirect mechanisms and the overall result is a positive one, despite the fact that the Court cannot control what its intervention influences.

CHAPTER 2: EVALUATION OF ICC OUTREACH

Unlike the indirect mechanisms described above, the ICC Outreach Programmes operate directly in Kenya. Their impact upon the opinions and understanding of the ICC among the people in Kenya is critical to the legitimacy of the Court. Due to the nature of the data gathered here, this impact evaluation will use generic output measures as controls. Profiles for Central, Rift Valley, and Nyanza provinces, as well as Nairobi are analyzed in depth, compared to one another and to that of the entire country which serves as the generic control. These provinces were selected because they are locations where PEV was widespread, because ethnicities of defendants are majorities in the province, or both. Although provinces are now less important due to the devolution of the 2010 Constitution, when the violence occurred provinces held important identity and power structures which make analysis at the provincial level critical to assessing impact. This impact evaluation determined that the impact of the ICC Outreach Programme (ICCOP) is minimal because other factors have more influence in determining opinions. The ICC is not reaching the goals it sets because it is failing to reach its target audience. There are many ways to improve the access and reach of the current program such as relocating some activities which are discussed at the end of the chapter.

Purpose of the Evaluation

This evaluation comes at a critical time for the International Criminal Court. In the history of the International Criminal Court, the ICC has never begun a case based upon the initiative of the Prosecutor and has not tried anyone in “power.” Previous cases have involved ex-leaders and heads of state, but they have mostly been defeated men who were no longer capable of mobilizing massive public support or acquiring powerful allies to resist their arrest or

trial. The legitimacy of the Court is tenuous as it has only finished two cases in the 12 years of its existence and all cases have African defendants.

The Parliament and some of the media in Kenya are controlled by the President. Outreach may be the only effective way to garner support within Kenya. That is why it is essential to estimate the program's impact and determine which areas of the program need more attention. A successful outreach program is difficult to measure, but the value of any small success in Kenya is that the same concepts and efforts can be applied to other Situations. The recommendations at the end of this chapter include gathering more information about participants, improving access to and for target clients, and working with local leaders in advance of holding activities. These serve to enhance the probability of success for ICC Outreach.

Brief Overview

There are four components of ICC Outreach which target different communities: the Community Outreach Programme, the Legal Outreach Programme for legal practitioners, bar associations and magistrates; the Academic Outreach Programme in particular schools and universities; and the Media Outreach Programme including traditional media, new media and vernacular radios. The Community Outreach Programme is designed to bring understanding of the ICC process and proceedings to the community, especially women and displaced populations. The purpose of the programs is to clarify misconceptions, garner support for the ICC investigation and trials and bring judicial proceedings to affected communities.¹⁵⁰ All of the Outreach Programmes in Kenya are currently in full operation under the leadership of Maria Kamara who is the ICC Outreach Coordinator for Kenya. The field office is in Nairobi – the country's capital.

¹⁵⁰ "ICC - Outreach in Kenya."

Target Clients

The Legal, Academic, and Media Outreach Programmes operate almost entirely in Nairobi and its surrounding area. Most media outlets have headquarters there; the largest universities and legal associations are also located in the capital area. The ICC Community Outreach Programme (COP) in Kenya seeks to reach and inform those most affected by the post-election violence in 2007-2008.¹⁵¹ The COP is specifically targeted to assist women and displaced persons. The main areas of violence were in western Kenya, especially in the Rift Valley where settlements are ethnically mixed. The towns of Eldoret, Kericho, and Nakuru in Rift Valley, Kisumu in Nyanza and parts of Nairobi (specifically the Kibera slum) saw the highest levels of atrocity in the west and are therefore the geographic locations that the Community Outreach Programme is operating in or seeking to operate in. There is no age limit or specific requirement to receive the services or information of ICCOP. The ICC seeks to have maximum impact within their target population and therefore works to inform as many as possible.

The ICC Programme is supposedly designed to assist participants from all tribes. Tribal and ethnic divisions were the basis of the post-election violence. Fair treatment of all sides is the first step in achieving reconciliation. Clients are self-selected and there is no random selection process or application procedure. The Outreach Staff will enter a specific geographic location such as Kisumu and hold meetings, distribute pamphlet information, or broadcast trials live from The Hague, The Netherlands, as well as other activities.¹⁵² The purpose of the program is to reach as many people as possible and there are no specific or planned restrictions to participation.

¹⁵¹ Ibid.

¹⁵² For more activities see the impact theory in Figure 2.1.

Impact Theory

The ICC Outreach Programme has a very simple theory of change, or impact theory, that they advertise in their program description. As is exhibited in Figure 2.1, the inputs of staff and financial resources facilitate activities, such as educational meetings and feedback surveys, which are predicted to have an output of an increased knowledge of the ICC and the court cases involving their country. The outputs lead in the long-term to the outcome of peace in the communities and justice served for the victims, perpetrators, and humanity.¹⁵³ The main problem with this theory is that it does not account for the true goals of the ICC for their outreach in Kenya, namely legitimacy and respect. The prosecution of two sitting heads of state has never been done before by the ICC, especially democratically elected heads of state. The Court needs to have legitimacy in the eyes of the people it is trying to serve if it hopes to achieve peace or justice. Therefore, an altered theory of change is also represented in Figure 2.1 as the last point of legitimacy should be a goal of the ICC although it is not explicitly stated by outreach material.

Service Utilization and Program Organizational Plans

The service utilization plan that is derived from the theory of change predicts how to reach the target population, provide and sequence service contacts, and conclude the program when services are no longer needed. This is represented in Figure 2.1 as Outputs. The best way to reach the target population is to operate information and outreach activities in the communities where the greatest violence occurred. Holding meetings in community centers, churches and other highly frequented locations provides the highest possibility for target interaction with the delivery system. Broadcasting on the radio in native tribal languages also allows for a high possibility of interaction. In the service arena it is entirely possible that targets do not receive or participate in the outreach since the process requires self-selection. However, there is a high

¹⁵³ "ICC - Outreach in Kenya."

possibility that those who do not participate will hear about the program's existence which is an important first step, and which is how the Court can estimate larger numbers of people reached than face-to-face contact suggests.

The program's organizational plan can be found in the Inputs and Activities portions of the impact theory in Figure 2.1. The inputs represent the resources and the constraints used to operate the program. Funding for the ICCOP comes from the central ICC budget which is derived from States Parties who provide monetary contributions to the Court as part of their obligations for being members.¹⁵⁴ In this way there is always guaranteed funding for the program, but the amount varies and is difficult to change based upon changing needs or scope. Other inputs are more easily altered as the Court has access to highly trained staff, interpreters, and technology from previous outreach programs. The activities that the Outreach Programme in Kenya provides are numerous and can be broken down into direct contact with the target population and indirect contact with the target population. Radio broadcasting would be indirect, while holding community meetings would be direct. The Court can reach more people through indirect methods, but the effect of such an effort does not necessarily guarantee the outcomes that the ICC seeks.

¹⁵⁴ ICC - CPI, "ICC - About the Court."

Figure 2.1

Impact Theory

Inputs

- Staff and Administrative expertise and training
- Financial resources
- Translator and Interpreter training and knowledge
- Technical equipment (Computers, video teleconferencing, projectors, etc.)

Activities

- Community meetings with ICC presentations
- Distribution of brochures and pamphlets in native tribal languages
- Projection of live streaming of the trials in The Hague for whole communities and for female viewing only
- Radio and TV broadcasts of advertisements or parts of trials
- News media and press releases of important information and/or statements

Outputs

- Increased knowledge of the ICC
- Increased understanding of the court cases in Kenya
- Decrease in misrepresentation
- Increase in documentation of target audience needs

Short-Term Outcomes

- Increase in positive messages via word of mouth and/or advertisements
- Decrease in the villianization of the ICC
- Increase in support for ICC actions and investigations
- Increase in discussion on further steps in the judicial process and community involvement
- Addressing the concerns of the target population in relation to the ICC

Long-Term Outcomes

- Peace in previously war-torn communities
- Justice
- Reconciliation
- Court legitimacy and ultimate survival

Impact Evaluation Design: General Control Comparisons

As with any evaluation, the desired design is either a randomized experiment to account for the lack of a counterfactual or a design in which the counterfactual is accurately represented. The ideal randomized experiment would be for participants to be randomly selected in any area of the country and be assigned to attend a certain activity. After which, the selected treatment individuals would complete the ICC Programme and provide survey data as well as the randomly selected control (non-treatment) participants. In reality, the ICC only operates in a select few areas where violence occurred and participants are self-selected, not randomly assigned. Therefore, a randomized experiment method must be foregone for the general control quasi-experimental method described below.

The impact evaluation design here selects regions non-randomly based upon the level of PEV and the intervention of the ICCOP. After an analysis of the current state of the region, the results are compared to the generic controls of the results of the country of Kenya. The differences between these areas provide insight into the impact that the ICCOP has upon the opinions of Kenyans and how ethnicity impacts opinions in relation to the ICC. This case comparison method is not the most reliable or exact way to determine impact, however, based upon the data limitations it is the best option.

Data and Data Collection

The level of knowledge about the ICC and the level of support based upon opinions have been measured over time by several consulting companies. In reference to opinions, all of the data used in this evaluation is from IPSOS or South Consulting.¹⁵⁵ The major challenge to this

¹⁵⁵ IPSOS is a large international company that does global market research. Their Kenya branch has polled and surveyed large numbers of Kenyans about their opinions and knowledge of the ICC for several years. Data used here is pulled from nation-wide surveys that were conducted between January 2010 and June 2014. South Consulting is a consulting firm that was hired by the Kenya National Dialogue and Reconciliation which was created

data is that the available reports are presented as written information and raw datasets are not available to the general public. Unless it is published, the location of respondents who support or have knowledge of the ICC is not able to be determined. There is consequently a very small sample size for this evaluation of data collected over 5 years. Statistical calculations and regressions using this data are statistically insignificant despite the fact that each survey conducted includes information from more than 1,200 people. All respondents to these surveys were eighteen years or older and were selected based upon cluster, or stratified random sampling, to ensure that the reported results were representative of all areas of the country.¹⁵⁶

The other important data collected came directly from the ICC Outreach office in The Hague, The Netherlands. It represents the data that the ICC has collected between 2011 and 2013 about how many activities were held in Kenya and estimates of how many people were reached recorded per month. The limitation of this data is the same as the opinion data from the consulting firms. There is no record of who the ICC is reaching, just that they are reaching someone. The specific data that refers to who is attending ICC outreach events does not currently exist. Furthermore, it would be extremely difficult to measure exactly who is listening to the radio or watching the ICC on TV, especially in the remote areas of Kenya. Due to the limitations of the data that exists and the data that is available, a generic control case comparison is the best way to differentiate between regions and begin to isolate impact. This research design allows for the clearest and most accurate answers to the research questions posed.

to negotiate an end to the PEV. They have been monitoring progress since that time and often surveyed participants about the ICC between 2010 and 2014. The nation-wide surveys that were used in all data calculations can be found in Appendix 3.

¹⁵⁶ South Consulting conducted both nationwide and IDP specific surveys. Only countrywide data are included here.

What can be Accomplished?

The data that can be collected and analyzed does limit the statistical analysis that can be accomplished. However, it is still possible to address the following research questions:

What is the impact of the ICCOP on opinions of the Court in Kenya? Does direct or indirect outreach have a larger impact? Who is the Court reaching with its outreach? What is the knowledge level of those in Kenya about the actions and activities of the Court? How does the opinion of the Court differ between regions and over time? Is there an adverse reaction to scheduling and then canceling activities? What lessons can be learned from these findings?

The International Criminal Court and the Kenyan people can greatly benefit if outreach is designed to *effectively* reach the greatest number of people possible. This evaluation helps to determine areas where impact exists and where it could be expanded.

Does direct or indirect outreach have a larger impact?

Through direct activities the ICC estimates that they reached a total of 2,445 people through outreach in 2011. That number increased substantially in 2012 when it was estimated that 5,835 people were reached directly. A year later the estimated total number of people directly reached in Kenya through outreach was at its lowest of 1,164. Therefore in 2013, the ICCOP contacted directly through either a seminar, workshop, or meeting 0.003% of the Kenyan population while 32% voted in the 2013 Elections and 16% voted for the ICC defendants.¹⁵⁷

Through indirect activities the ICC estimates that they reached at most 20 million in 2011 through radio and TV broadcasting and press releases. They predict that they reached at most 30

¹⁵⁷ James Long, Karen Ferree, and Clark Gibson, "Voting Behavior and Electoral Irregularities in Kenya's 2013 Elections."

million in 2012 and 35 million people in 2013. The ICCOP began social media posts and campaigns in 2013. Therefore, the ICCOP is likely to continue this trend and increase their online and on air presence while decreasing or keeping constant their direct efforts. Even if the ICC estimates are overestimated by a factor of 10,000, the indirect programs still reach substantially more people than the direct programs. Although a direct activity may provide more education or understanding, the enormous difference in access indicates that indirect outreach has a larger impact.

Who is the Court reaching?

The ICCOP is comprised of the Community Outreach Programme for women and displaced persons, the Legal Outreach Programme for legal practitioners, bar associations and magistrates; the Academic Outreach Programme in particular schools and universities; and the Media Outreach Programme. Between 2011 and 2013 the ICC Outreach Team conducted an average of 13 interviews per month with the media and had participation from numerous media outlets. During the same timeframe the Court handed out 3,762 legal information kits. The ICC does not have any current measures which signify whether or not the populations they are reaching are students, but began recording women's only activities and attendance in 2012. During 2012 and 2013, only 7 women-only meetings, seminars and workshops were held, but when other direct activities are included approximately 2,381 women were directly reached by the ICCOP in 2 years. For a program that seeks to reach women only 34% of those directly contacted were women. Furthermore, there is no measure of whether or not those being reached are displaced persons or other victims of PEV. The radio broadcasts are accessible, even to those in the IDP camps, although there is no guarantee that they will seek to listen to them. The best indication of whether or not displaced persons have been reached is the location of the direct

activities. The location of each and every direct activity is not clearly recorded in any publically accessible data. However, for the month of January the ICCOP does release exactly where it holds activities. In 2011 and 2012, the years that data is available, only one activity was held outside of Nairobi. It was not held in an area where IDPs now live or where violence was high during the PEV of 2007-2008. In fact, it was not even held in Kenya. The one activity that was held outside of Nairobi was a journalist training session in Soroti, Uganda in which 4 journalists attended.¹⁵⁸ Therefore, while it is not clear exactly who the ICCOP is reaching with their direct activities, it is clear that they are not reaching large numbers of women or IDPs. The security situation and funding are large restrictions on the ability of the ICCOP to reach its target audience; however, if the target audience is not adequately reached, the impact of the Outreach Programme on Kenyans does not result in the outcomes that the Court champions.

In order to accurately analyze whether or not the individual programs are achieving their short-term and long-term outcomes, such as bringing justice to victims and communities, the ICC needs to collect more data. No program that fails to reach its target audience can be successful in what it sets out to do. Yet, even as the program fails to provide direct information and access to those who need it most, reaching parts of the Kenyan population is more beneficial than reaching none.

¹⁵⁸ ICC - CPI, "Public Information and Outreach in Kenya Calendar of Activities - January 2012" (ICC Outreach, January 31, 2012), <http://www.icc-cpi.int/NR/rdonlyres/DA677307-855A-4284-9FA6-ABC74E4A7C6E/284231/OutreachRAKEN201201ENG.pdf>.

Profiles: Kenya

Table 2.1	Kenya Statistics
Literacy Rate	87.4% ¹⁵⁹
Ethnic Majority	Kikuyu 22%, Luhya 14%, Luo 13%, Kalenjin 12%, Kamba 11%, Kisii 6, Meru 6%, African (Somali) 15%, other 1% ¹⁶⁰
Poverty Level	Below Poverty Line 43.4% ¹⁶¹
Level of Violence in PEV	High Levels of Violence concentrated in towns of Eldoret, Kericho, and Nakuru in Rift Valley, Kisumu in Nyanza, Mombasa in Coast, and parts of Nairobi (Kibera slum) ¹⁶²
ICC Outreach Level	Full Program from Nairobi Field Office, Direct and Indirect Activities
Number of IDPs	After Violence – 663,921 Individuals ¹⁶³
News Access	Newspapers, Radio, Television, Internet

The following provincial profiles will all be compared to the generic profile for the country of Kenya as a whole. The country of Kenya has a literacy rate of 87.4% which indicates that a very large portion of the population has the ability to follow news reports and judicial decisions that

¹⁵⁹ "The Development and State of Art of Adult Learning and Educations (ale)," accessed June 7, 2014, http://www.unesco.org/fileadmin/MULTIMEDIA/INSTITUTES/UII/confintea/pdf/National_Reports/Africa/Africa/Kenya.pdf.

¹⁶⁰ Central Intelligence Agency, "The World Factbook- Kenya," 2013, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

¹⁶¹ "Poverty Research - Geographic Dimensions of Well-Being in Kenya: Where Are the Poor? From Districts to Locations (Volume One)," accessed June 7, 2014, <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTPOVRES/0,,contentMDK:20382755~menuPK:791424~pagePK:64168182~piPK:64168060~theSitePK:477894,00.html>.

¹⁶² L. Muthoni Wanyeki, "The International Criminal Court's Cases in Kenya: Origin and Impact," *Institute for Security Studies Papers*, no. 237 (2012): 3.

¹⁶³ Brookings Institute. "Municipalities and IDPs Outside of Camps." p. 4.

are released about the ICC and the Kenya Cases and read the informational kits that the ICC Outreach Programme distributes. However, the most common forms of news access in Kenya are TV and radio, so literacy is not a requirement for accessing news about the Court and the progression of the Cases. The ICCOP has dedicated radio programs that are broadcast across Kenya in five languages to reach as many people as possible. The radio campaign that was started in 2010 is entitled “Understanding the International Criminal Court.” It is broadcast in the English, Kiswahili, Kalenjin, Kikuyu and Luo languages and is broadcast over national and communal channels.¹⁶⁴

A major reason for choosing the above languages for radio broadcasting is the ethnic make-up of the country. A very large portion of the population speaks both Kiswahili and English. However, the ethnic or tribal breakdown shows how many other languages are also spoken. Around 22% of the population is Kikuyu, while Luhya, Luo and Kalenjin populations are roughly 14%, 13%, and 12%, respectively. The ethnicities of the ICC defendants are Kikuyu and Kalenjin and the greatest levels of violence often involved these two tribal groups during the PEV.¹⁶⁵ The highest levels of violence and the largest numbers of displaced persons occurred in and around the towns of Eldoret, Kericho, and Nakuru in Rift Valley, Kisumu in Nyanza, Mombasa in Coast, and parts of Nairobi (Kibera slum). It is estimated that the total number of internally displaced persons (IDPs) across Kenya totaled 663,921 individuals.¹⁶⁶ Partially due to the large number of displaced persons, the distribution of ethnicities in Kenya is always

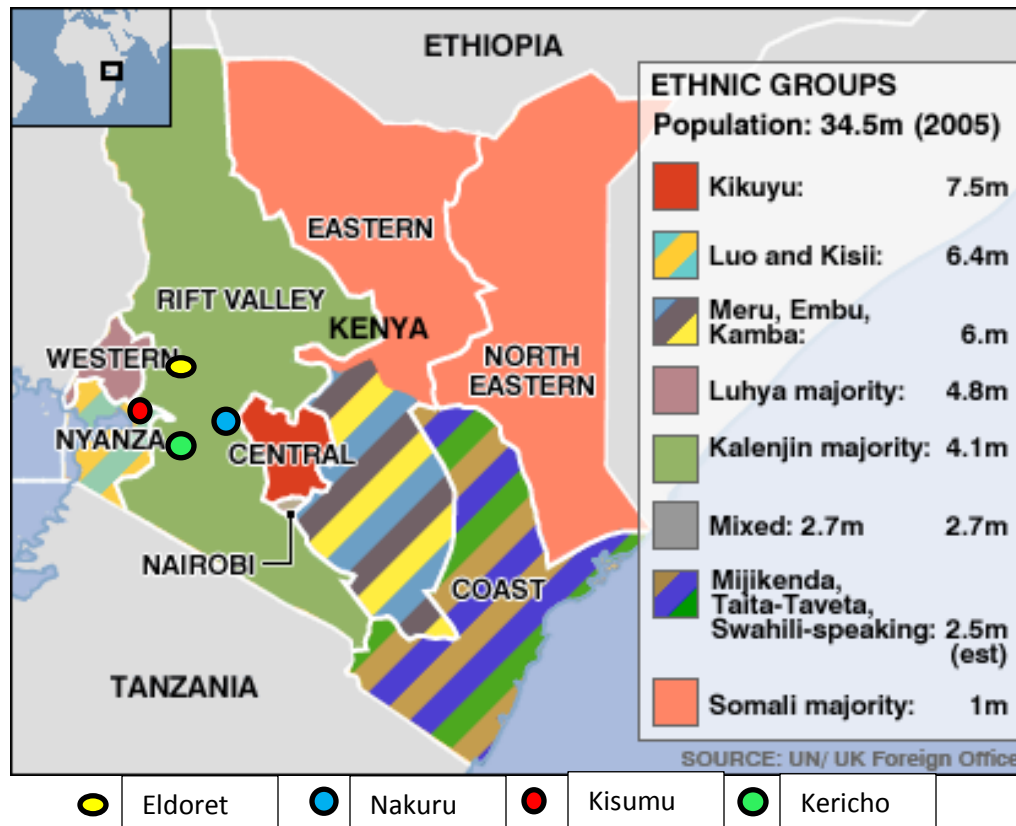
¹⁶⁴ ICC-CPI, “The ICC Launches Outreach Programme Radio Campaign in Kenya,” *Press Release*, December 3, 2010, [http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/Pages/pr606.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/Pages/pr606.aspx).

¹⁶⁵ Central Intelligence Agency, “The World Factbook- Kenya.”

¹⁶⁶ Brookings Institute. “Municipalities and IDPs Outside of Camps.” p. 4.

changing, but the following map demonstrates the basic ethnic make-up of the country, although the exact population figures are much closer to 38 million now.¹⁶⁷

Figure 2.2

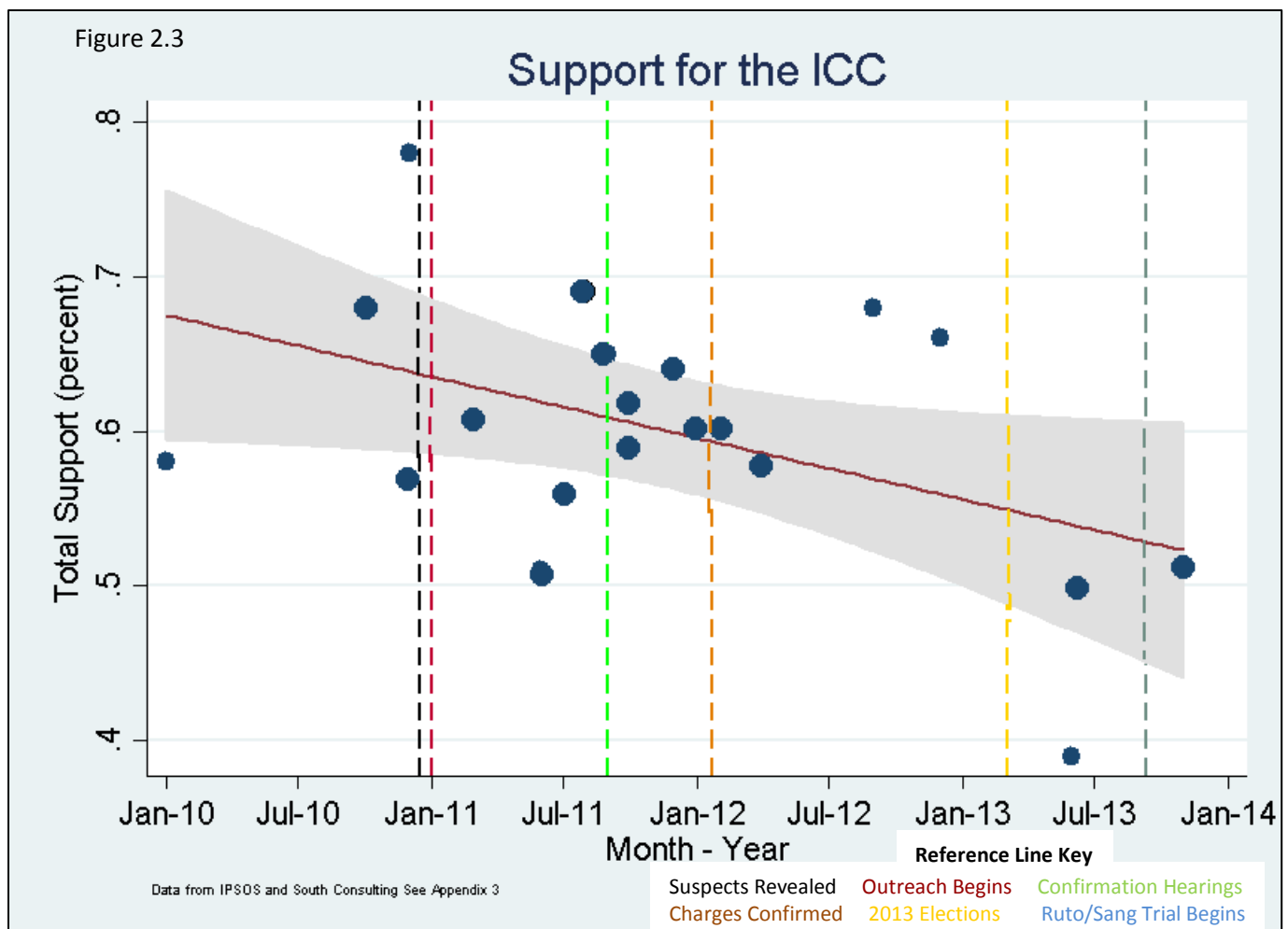


The poverty level in Kenya is also rapidly changing, but hovers around 43% and the country has large rural areas that are difficult to reach. The ICC has made efforts to reach all parts of the country through direct activities such as handing out information kits and holding question and answer sessions, but also through indirect activities such as radio broadcasts, TV interviews, or press releases. The support for the ICC has varied substantially overtime as the cases have progressed or had difficulties. The following graph represents the change of opinion on whether

¹⁶⁷ Map courtesy of UN/UK Foreign Office – 2008. “Kenya Opposition Wants New Polls,” *BBC*, January 4, 2008, sec. Africa, <http://news.bbc.co.uk/2/hi/africa/7171552.stm>.

the respondents support the ICC intervention in Kenya. As discussed above the data comes from surveys conducted by IPSOS and South Consulting.

The trend of the data in Figure 2.3 below represents that the popularity of and support for the ICC in Kenya decreased over time. In the beginning of 2010 the support level was around 60%. Over the next three years it peaked at about 79% and bottomed out at just below 40%. The level of support has remained relatively within the bounds of 55-70%, as the confidence interval in gray around the fitted line indicates. The last known measure of support was in November 2013 at which time the support level was just above 50%. The reference lines indicate when events that had a large impact on the Kenya Cases, and likely the perspective of the ICC,



occurred. The Ocampo Six were revealed in December 2010 when one survey measured a support level of 79% while another measured 58%. Shortly after that the ICCOP began in Kenya and has been running ever since. Most of the data points are clustered between the start of the confirmation hearings and when the charges were confirmed for Kenyatta, Ruto, Sang, and Muthaura. The election of Kenyatta and Ruto occurred in March 2013 and the support level of the ICC dropped to under 40% shortly thereafter. The trial of Ruto and Sang began in September 2013. The data points do trend towards a downward shift overall, but there are several points of increase. This could be due to a sampling problem, random chance, or events occurring that increased the confidence of the Kenyan people in the ICC. It is possible that ICCOP activities contributed, even in a small margin, to these increases. Whether or not the ICCOP had an impact on the total level of support, it is clear that the Outreach Programmes and activities did not lead to a drastic decrease as the support level has remained within fairly tight bounds for the country as a whole. The ICCOP, no matter how small the impact, should be continued.

Reason for Support

Table 2.2 Reason for Support ¹⁶⁸		Date (Month – Year)						
	Jun-11	Oct-11	Dec-11	Feb-12	Mar-12	Apr-12	Jul-13	Nov-13
To provide justice for PEV victims	36%	44%	46%	67%	67%	59%	24%	40%
To end impunity in Kenya	7%	29%	22%	8%	8%	16%	30%	23%
To reveal the truth of what happened	4%		15%	8%	8%	8%		
To prevent future violence	4%	16%	11%	5%	5%	12%	9%	5%
Don't trust Kenyan Courts	6%	10%	6%	2%	2%	3%	34%	24%
Other/RTA	10%	0%	1%	1%	0%	1%	2%	

The reason that individuals support the ICC varies, but the majority of respondents fell into the categories listed in the table above. The largest reason for support on average was to provide justice to the PEV victims followed by to end impunity, to learn what happened and to prevent future violence. The proportion of those who support the ICC also responded that they do so because they do not trust the Kenyan Courts. This response was not very popular in 2011 or 2012; however, in 2013 around 1/3 of respondents who supported the ICC claimed to do so because of a lack of faith in the Kenyan Judiciary, namely after the election of Kenyatta and Ruto.

¹⁶⁸ South Consulting, *4TH Review Report on Electoral Preparedness (February 2013)*, KNDR (South Consulting, February 2013), [http://www.dialoguekenya.org/Monitoring/\(February%202013\)%204TH%20Review%20Report%20on%20Electoral%20Preparedness.pdf](http://www.dialoguekenya.org/Monitoring/(February%202013)%204TH%20Review%20Report%20on%20Electoral%20Preparedness.pdf); IPSOS, *Ipsos Polls SPEC Barometer November 2013*, Kenya Barometer (Ipsos.co.ke, November 14, 2013), http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos_Polls_SPEC_Barometer_November_2013.pdf.

For those who claimed that they did not support the ICC the answers were even more varied. Most respondents claimed that the suspects should be tried locally, in a tribunal, or that the wrong suspects were on trial. Very few respondents believed that the process would bring more violence or that the ICC was not competent. In fact, when asked if the ICC trials would bring violence well over 50% of respondents continually replied that it was unlikely for every poll between 2011 and 2013. Yet, when the question that was asked changed to what will happen if the ICC fails to charge *any* suspects over 50% of respondents in December 2010 and 32% in June 2011 replied that it was likely violence would occur.¹⁶⁹

What is the knowledge level of those in Kenya about the Court?

A main goal of the ICCOP is that the intentions and actions of the Court are not misunderstood and that there is widespread understanding of the ICC. A South Consulting survey in June 2011 reported that 85% of respondents said the media had increased their knowledge of how the ICC operates. Therefore, there is a significantly higher percentage of people who are aware of the trials and operations of the ICC than support the Court. According to the survey data from IPSOS in November 2011, 77% of people surveyed claimed that they watched or followed the ICC process through the media closely. 88% in Central, 85% in Rift Valley, 73% in Nyanza and 93% in Nairobi answered that they followed the investigation and trials closely. Of those who followed the trial 68% said they used television and 66% said they used radio to keep up with the ICC cases. In February 2012, IPSOS asked respondents to identify who had charges confirmed against them by the ICC and 79% of respondents were aware of the ruling. 97% correctly identified Uhuru Kenyatta, 94% William Ruto, 76% Joshua Sang, and 75%

¹⁶⁹ South Consulting, *(October 2012) 3RD Review Report*, KNDR (South Consulting, October 2012), [http://www.dialoguekenya.org/Monitoring/\(October%202012\)%203RD%20Review%20Report.pdf](http://www.dialoguekenya.org/Monitoring/(October%202012)%203RD%20Review%20Report.pdf); IPSOS, *Ipsos Synovate Polls Current Affairs Poll 2013* (Ipsos.co.ke, May 15, 2013), http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls_Current_Affairs_Poll_2013.pdf.

Francis Muthaura. Several months later in November 2012, IPSOS asked the same question and 89% identified Kenyatta, 85% Ruto, 52% Sang, and 45% Muthaura. The people of Kenya know that the ICC is operating in their country, but most of the knowledge of the Court comes from news media which may or may not be accurate.

Profiles: Central Province

Table 2.3	Central Statistics
Literacy Rate	73.3% ¹⁷⁰
Ethnic Majority	Kikuyu ¹⁷¹
Poverty Level	31% Rural, 46% Urban ¹⁷²
Level of Violence in PEV	Low ¹⁷³
ICC Outreach Level	Limited Completely to Indirect Activities
Number of IDPs	After Violence - 46,959 Individuals ¹⁷⁴
News Access	Newspapers, Radio, Television, Internet

Central Province is considered to be the home of the Kikuyu ethnic group who make up the majority of the population in the area. Of those who live in Central around 73.3% are literate, which is lower than the national average of 87%. 31% of those in rural areas and 46% of those who live in urban areas are below the poverty level. Central province does not have large areas where different ethnicities live side by side and it did not see a high level of violence in the PEV of 2007-2008, although many IDPs who were Kikuyu fled to this area from Rift Valley which

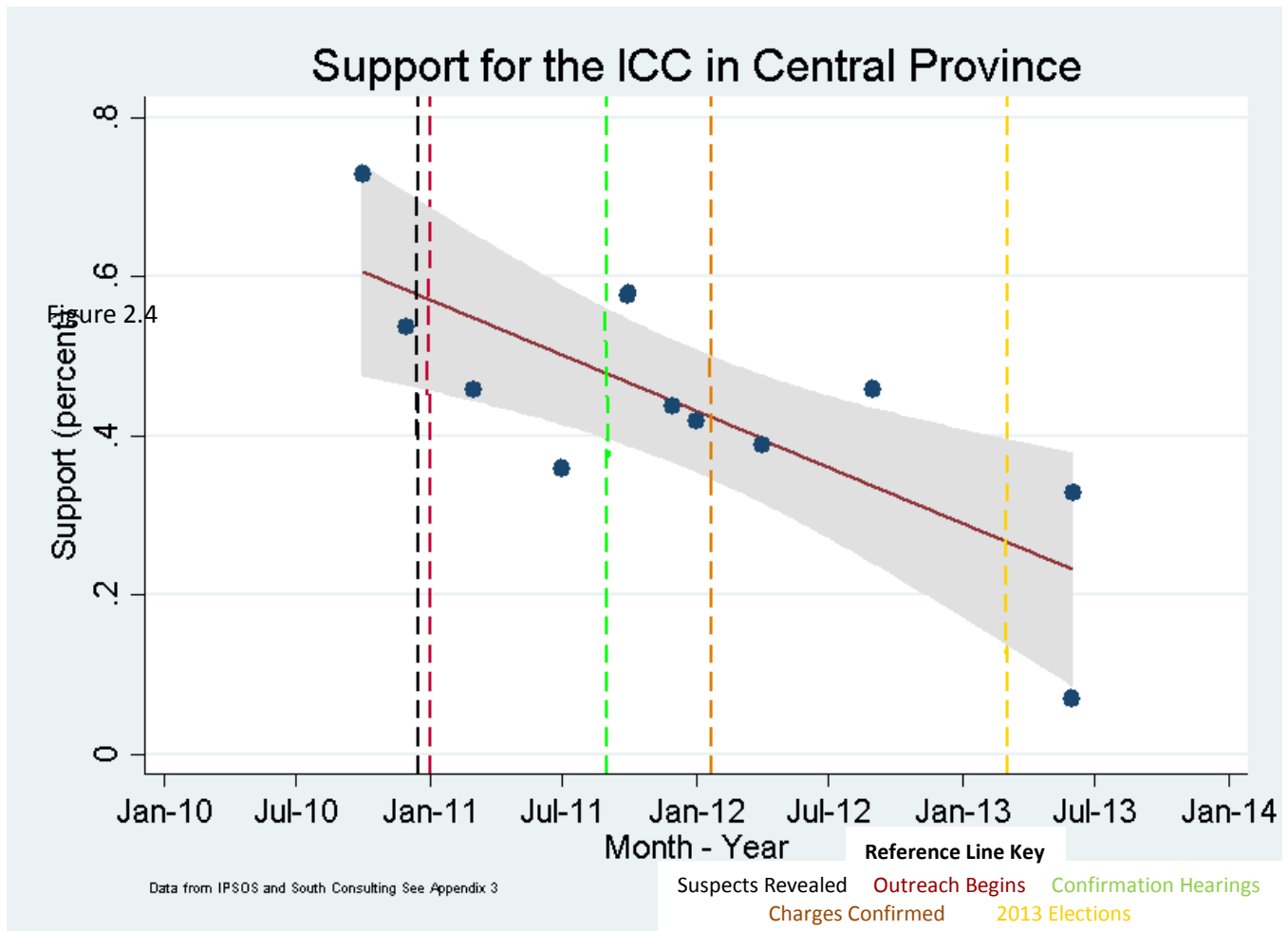
¹⁷⁰ "The Development and State of Art of Adult Learning and Educations (ale)."

¹⁷¹ "Kenya Opposition Wants New Polls."

¹⁷² "Poverty Research - Geographic Dimensions of Well-Being in Kenya: Where Are the Poor? From Districts to Locations (Volume One)."

¹⁷³ Wanyeki, "The International Criminal Court's Cases in Kenya."

¹⁷⁴ "Municipalities and IDPs Outside of Camps," 4.



The graph above shows an even stronger downward trend in support among those who live in Central Province than across the whole nation. Instead of being tightly bound together, this data shows a fairly steady decrease across a wider range of values than the country-wide data. The highest level of support was 73%, yet as soon as Kenyatta and Muthaura were announced as suspects that figure continued to fall all the way down to a minimum of 7% after Kenyatta was elected president. There is a clear decrease between the start and the end of the confirmation hearings as Kenyatta was indicted for crimes against humanity. The charges against Muthaura were dropped only days after Kenyatta was elected and the surveys that followed both of those events resulted in 33% and 7% support for the ICC. Although these measures are

significantly different from one another, they both represent the lowest value over three years no matter which is closer to the truth. This data indicates that Central Province is below the national average in their support of the ICC, which is no surprise as one of the leaders of the Kikuyu is Uhuru Kenyatta.

Profiles: Rift Valley

Table 2.4	Rift Valley Statistics
Literacy Rate	56.5% ¹⁷⁵
Ethnic Majority	Kalenjin; some Kikuyu, Maasai, Luo, etc. ¹⁷⁶
Poverty Level	48% Rural, 53% Urban ¹⁷⁷
Level of Violence in 2008	High - Specifically Eldoret, Kericho, and Nakuru ¹⁷⁸
ICC Outreach Level	Primarily Indirect Activities
Number of IDPs	After Violence - 408,631 Individuals ¹⁷⁹
News Access	Primarily Radio and Newspapers, Television, Limited Internet

In contrast to Central Province, the Rift Valley has an ethnic majority of Kalenjin. The area is mixed and there are also many Kikuyu, Maasai and Luo who live in various areas throughout Rift Valley. Due to this mixed ethnic composition, the Rift Valley was the province that saw the most violence and destruction in the PEV. The highest levels of violence were seen in the towns of Eldoret, Kericho and Nakuru. Eldoret is located close to Western Province on the west side of Rift Valley. It is where William Ruto calls home and was the scene of one of the

¹⁷⁵ "The Development and State of Art of Adult Learning and Educations (ale)."

¹⁷⁶ "Kenya Opposition Wants New Polls."

¹⁷⁷ "Poverty Research - Geographic Dimensions of Well-Being in Kenya: Where Are the Poor? From Districts to Locations (Volume One)."

¹⁷⁸ Wanyeki, "The International Criminal Court's Cases in Kenya," 4.

¹⁷⁹ "Municipalities and IDPs Outside of Camps," 4.

most famous attacks on Kikuyus during the PEV. Around 35 people were burned alive in a church in Eldoret in January of 2008.¹⁸⁰ Kericho is on the border of Nyanza Province and also saw high levels of violence. Nakuru is located close to the border of Central Province. As many as 64 people in Nakuru died over a short time period as violent riots were not contained by the government ordered curfew.¹⁸¹

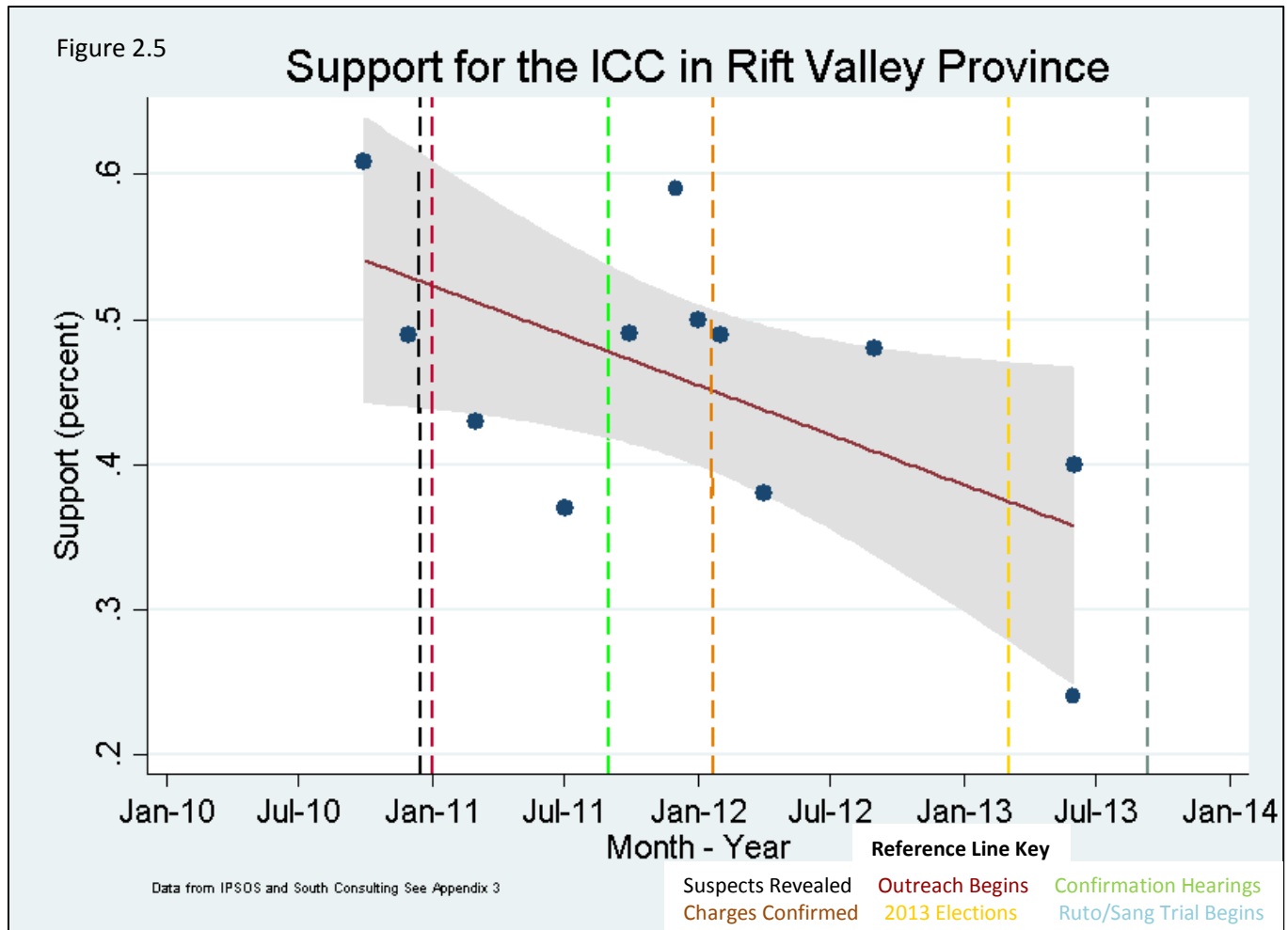
Whether any particular town saw violence during the PEV or not, all parts of the Rift Valley were affected as the highest numbers of IDPs were located in Rift Valley at 408,631 individuals. As the largest province in Kenya, access to internet and print news is not highly available in all parts of Rift Valley, so radio is often the news media of choice. The importance of radio, often broadcast in tribal languages, indicates why Joshua Sang, a former radiobroadcaster, is on trial at The Hague. The ICCOP has also used the importance of radio in the area to try and reach as many listeners as possible through this indirect method of outreach.

The level of support for the ICC in the Rift Valley shown in Figure 2.5 below tells much of the same story as in Central Province. The highest level of support occurred before the names of the Ocampo Six were revealed, at 61% and the lowest level of support occurred after the election of Kenyatta and Ruto to the Presidency at 24%. These values are significantly below the high and low points of the national average. The area with the most victims was one of the least supportive areas of the ICC overtime. The ICCOP began outreach efforts in January of 2011 with various indirect activities. There have been some direct activities held such as the meeting on

¹⁸⁰ Robyn Dixon, "Kenyans Recall the Screams of the Dying in Burning Church," *Los Angeles Times*, January 3, 2008, <http://articles.latimes.com/2008/jan/03/world/fg-church3>.

¹⁸¹ There was also a rumor that the government curfew was a ruse by the government to confine those who were being targeted to areas where it was easy to find and kill them, although this was never proven. "Ethnic Bloodletting Spreads in Kenya - USATODAY.com," January 29, 2008, http://usatoday30.usatoday.com/news/world/2008-01-28-kenya-unrest_N.htm.

International Women's Day in 2012 with women in Eldoret.¹⁸² Yet, the direct activities that the ICCOP planned and announced did not always occur. This raises the question: is there an adverse reaction to scheduling and then canceling ICCOP activities?



An objective of the ICCOP is to bring justice closer to the victims. In Eldoret, there were plans to mount big screens around the town in order to provide access to the trial of Ruto and Sang. These plans were canceled after the issue of security of the viewers was raised as it was anticipated that people watching the trials might be targeted which would lead to renewed

¹⁸² "The ICC Outreach Programme in Kenya Joins Women in Eldoret, Uasin Gishu County to Mark International Women's Day," accessed June 8, 2014, <http://emailwire.com/release/83969-The-ICC-Outreach-Programme-in-Kenya-joins-women-in-Eldoret-Uasin-Gishu-County-to-mark-International-Womens-Day.html>.

violence. Some viewing was still set up by the ICCOP in remote areas.¹⁸³ In reality, viewers from all tribes crowded cafes and other public spaces to watch the Ruto/Sang trial no matter their tribal affiliation. The general consensus was not anger or disappointment at the ICCOP for failing to post big screens for viewing, but amongst IDPs the ICC was seen as a money sucking operation that prevented or at least did not assist return to normal life. “We are still suffering as IDP’s and we don’t see the need of the ICC other than making our leaders use resources which could have been used to resettle us (*sic*)” said Moses Mwangi, a PEV victim.¹⁸⁴ This opinion exists not just across Rift Valley, but other parts of Kenya as well which can be seen in the political cartoons analyzed later in this chapter. The scheduling and canceling of ICCOP activities is not a wise strategy for winning the support of the masses, but it is not the root of the problem of the lack of support.

¹⁸³ “ICC Cancels Mounting Big Screens in Eldoret during Ruto, Sang Hearing,” *The Star*, accessed June 8, 2014, <http://www.the-star.co.ke/news/article-134921/icc-cancels-mounting-big-screens-eldoret-during-ruto-sang-hearing>.

¹⁸⁴ Ibid.

Profiles: Nyanza

Table 2.5 Nyanza Statistics	
Literacy Rate	66.0% ¹⁸⁵
Ethnic Majority	Luo; some Kisii ¹⁸⁶
Poverty Level	64% Rural, 62% Urban ¹⁸⁷
Level of Violence in 2008	High in Eastern Area, Specifically Kisumu ¹⁸⁸
ICC Outreach Level	Primarily Indirect Activities
Number of IDPs	Following Violence – 118,547 individuals ¹⁸⁹
News Access	Newspapers, Radio, Television, Limited Internet

Nyanza Province is located west of Rift Valley. It is home to the majority of the Luo ethnicity as well as the Kisii tribe. Raila Odinga is a Luo who hails from Kisumu. It is therefore unsurprising that in Kisumu the highest levels of PEV were seen. Although attacks happened on both sides, some Luo who were protesting the election of the Kikuyu Mwai Kibaki were shot to death by police, ostensibly under the control of the Kikuyu-held government which increased tensions.¹⁹⁰ Following the violence, Nyanza province had around 118,547 IDPs. The ICC sought to reach out to this province mostly through indirect activities. The province as a whole is very poor as 64% of those in rural and 62% of those in urban areas live below the poverty line. Only

¹⁸⁵ "The Development and State of Art of Adult Learning and Educations (ale)."

¹⁸⁶ "Nyanza (province, Kenya)," *Encyclopedia Britannica*, accessed June 7, 2014, <http://www.britannica.com/EBchecked/topic/423026/Nyanza>.

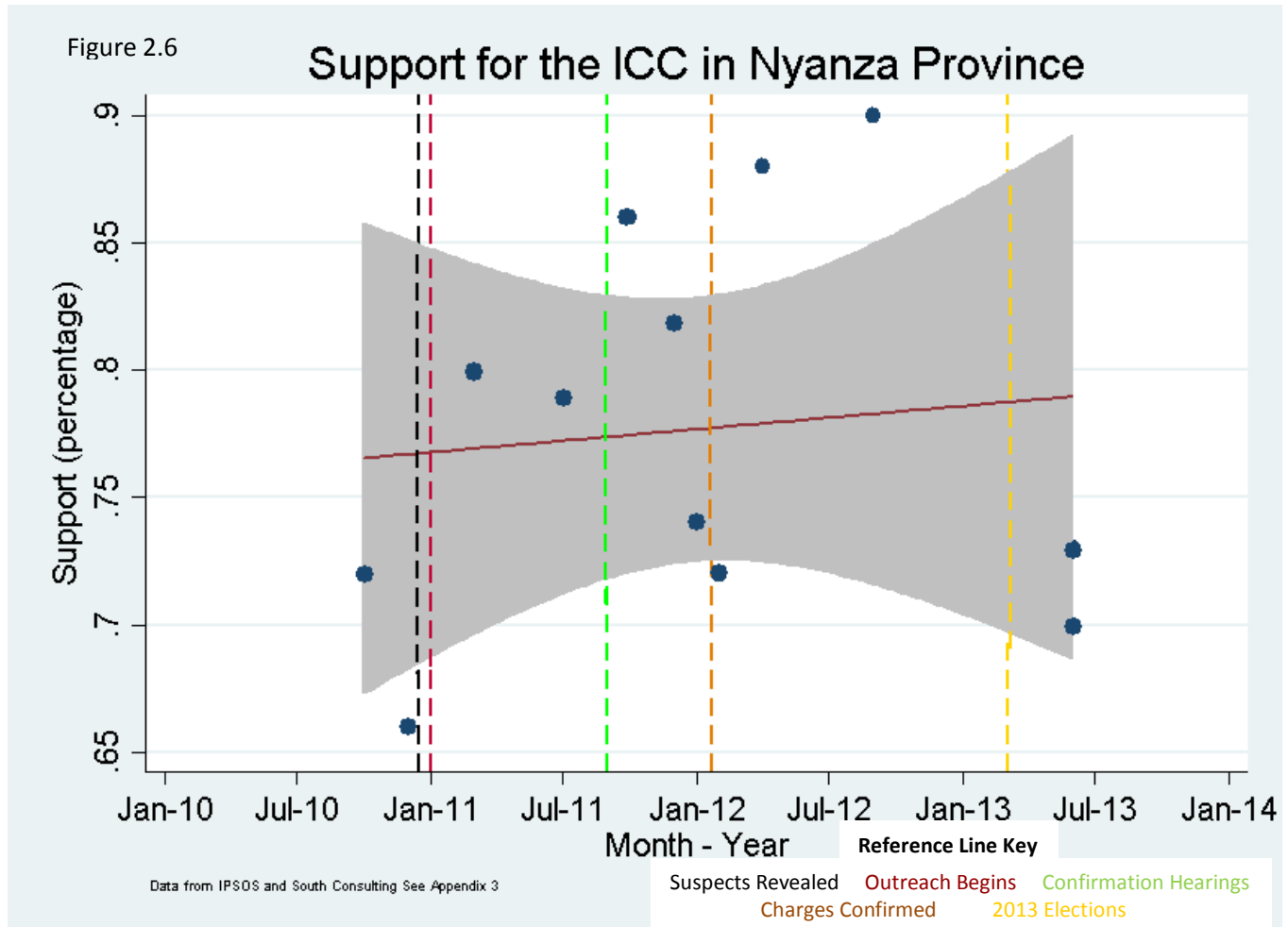
¹⁸⁷ "Poverty Research - Geographic Dimensions of Well-Being in Kenya: Where Are the Poor? From Districts to Locations (Volume One)."

¹⁸⁸ Wanyeki, "The International Criminal Court's Cases in Kenya," 3.

¹⁸⁹ "Municipalities and IDPs Outside of Camps," 4.

¹⁹⁰ Cyrus Ombati, "Kenya: Police Termed Kisumu Shooting Regrettable," *The East African Standard (Nairobi)*, January 19, 2008, <http://allafrica.com/stories/200801180904.html>.

66% of adult residents are literate. The large influx in IDPs did not help the already impoverished province and little has been done to assist the IDPs in this area.¹⁹¹



The support for the ICC has been the highest consistently in Nyanza Province when compared to the national average or any other province. The lowest level of support measured in Nyanza was 66% right at the time that the Ocampo Six were revealed. The highest level of support for the ICC was measured a few months before the 2013 Election at 90%. The lowest level of support in Nyanza is higher than the highest level of support in Rift Valley and nearly higher than the highest level of support in Central. The data reveal that in Nyanza province the

¹⁹¹ South Consulting, "The Kenya National Dialogue and Reconciliation Monitoring Project -Review Report."

trend is not downward, but has increased between 2010 and 2013. This result is not surprising as no member of the Luo tribe is on trial, while both Kikuyu and Kalenjin tribal leaders are. Even after the loss of Raila Odinga to the ICC–indicted team in the 2013 run for the Presidency, the support level for the ICC in Nyanza only “dropped” to 70%. The only other time that there was a visible decrease in support occurred when two of the ICC suspects did not have their charges confirmed, most importantly the Police Commissioner, Mohammed Hussein Ali. The police killings and other violence in Kisumu have gone virtually un-punished.

The ICCOP has scheduled for big screens to be posted in Nyanza, but since the deferral of the Kenyatta case, not much has been accomplished.¹⁹² The lack of direct activities in Nyanza Province has not harmed the high level of support thus far. The trial of Kenyatta has yet to commence, so there is no way to predict whether or not the high level of support will remain in Nyanza Province, especially if he is acquitted or if his trial never begins.

¹⁹² “Big Screens for Kisumu ahead of Uhuru’s Trial,” *The Star*, accessed November 17, 2013, <http://www.the-star.co.ke/news/article-141953/big-screens-kisumu-ahead-uhurus-trial>.

Profiles: Nairobi

Table 2.6 Nairobi Statistics	
Literacy Rate	87.1% ¹⁹³
Ethnic Majority	Mixed ¹⁹⁴
Poverty Level	44% (All urban) ¹⁹⁵
Level of Violence in 2008	High- Specifically the Kibera slum ¹⁹⁶
ICC Outreach Level	Full Program from Nairobi Field Office, Direct and Indirect Activities
Number of IDPs	After Violence - 19,416 Individuals ¹⁹⁷
News Access	Newspapers, Radio, Television, Internet

Nairobi is not a province, but an area which holds the country's capital city and its surrounding area.¹⁹⁸ The literacy rate is highest in Nairobi at 87.1% when compared to the provinces above. Residents who live in the area have full access to all news media despite the fact that 44% of residents live below the poverty line. The area, like many capital cities worldwide, is very diverse and there is no clear ethnic majority. Nairobi is surrounded by slums, or shantytowns that have over 2 million residents living in very close quarters. The largest slum is Kibera, which saw high levels of violence during late 2007 and early 2008. After the violence ebbed there were 19,416 individuals who were internally displaced in the Nairobi area. The

¹⁹³ "The Development and State of Art of Adult Learning and Educations (ale)." P 8.

¹⁹⁴ "Kenya Opposition Wants New Polls."

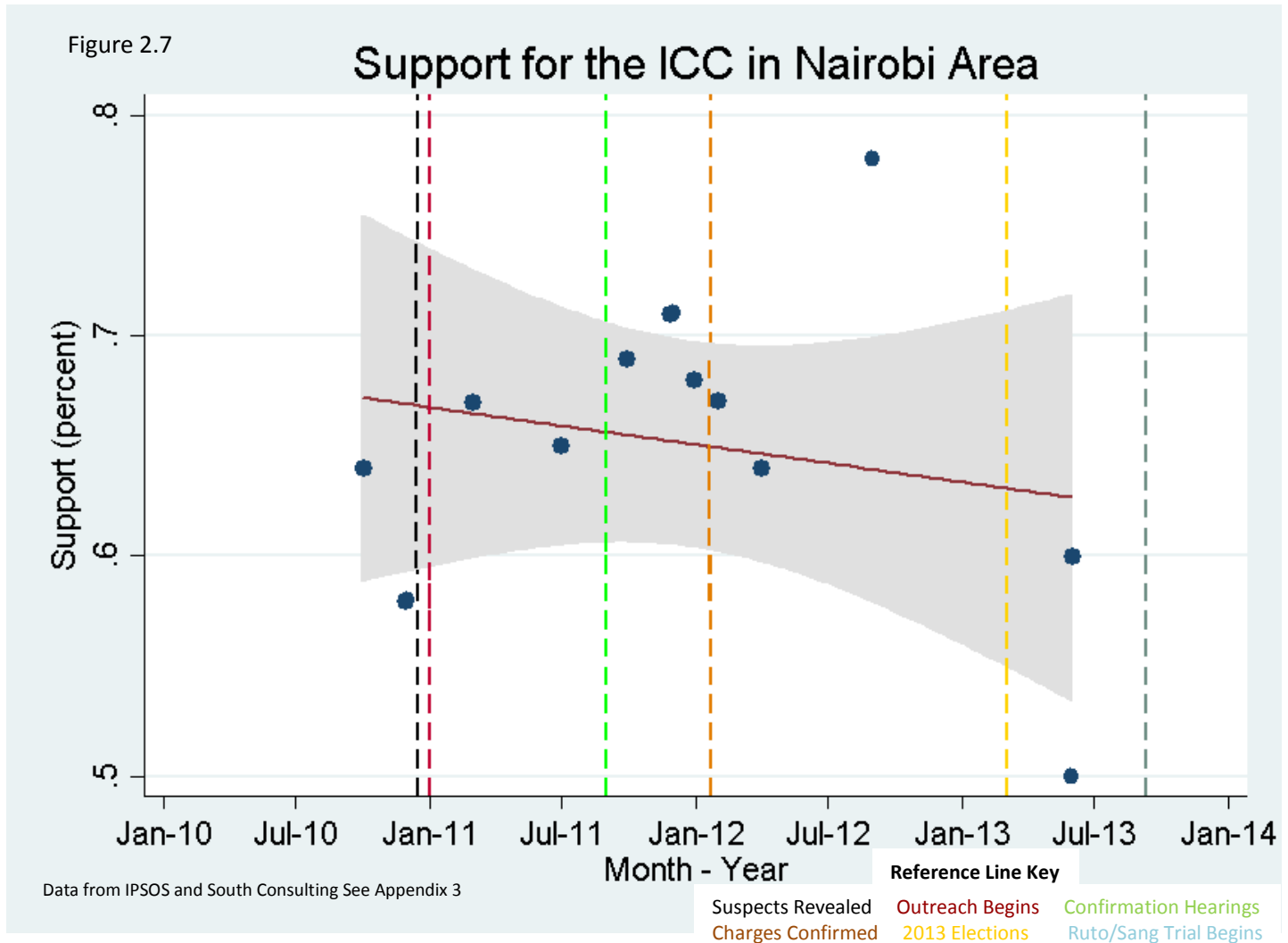
¹⁹⁵ "Poverty Research - Geographic Dimensions of Well-Being in Kenya: Where Are the Poor? From Districts to Locations (Volume One)."

¹⁹⁶ Wanyeki, "The International Criminal Court's Cases in Kenya," 3.

¹⁹⁷ "Municipalities and IDPs Outside of Camps," 4.

¹⁹⁸ It is similar to the District of Columbia in the United States – including the surrounding poor areas and neighborhoods, called slums in Kenya.

ICCOP Field Office is located in Nairobi, but there are few direct activities that are operated inside the Kibera Slum, most are held in city center.¹⁹⁹



The level of support for the ICC in Nairobi is consistently higher than Central or Rift Valley, but is not quite as high as Nyanza. In comparison to the country as a whole, Nairobi has a higher level of support for the ICC across time. The highest level is 78% just as the national survey indicates, but the level of support never falls below 50% in Nairobi between 2010 and 2014. Although the level of support decreased after the 2013 Elections just as all the other

¹⁹⁹ ICC - CPI, "Public Information and Outreach in Kenya Calendar of Activities - January 2012."

provinces' levels did, the average level of support is a high 65%. The Nairobi area is a highly mixed society in which all ethnicities and levels of socio-economic status live. Therefore, it is no surprise that the average level of support for Nairobi is close to that of the country as a whole which is 61%, while the average level in the provinces ranges from 43% to 46% to 77% for Central, Rift Valley and Nyanza, respectively. The ICCOP has held more direct and indirect activities in the Nairobi area than anywhere else. Yet, the area is comparable to Nyanza province, where very few activities were held, in support level.

Summary of Comparison Results

The impact of the ICCOP on opinions is minimal. The information provided by the Outreach Programme may be successful in persuading some people that the Court is not racist, out to attack a certain ethnicity, or is not the plaything of powerful countries; however, the impact upon opinions of the ICC is minimal. Outreach activities conducted by the ICC do bring business to locals in a limited fashion. Information pamphlets and brochures that are handed out are printed at local businesses.²⁰⁰ The radio and TV shows that are broadcast by the Outreach Programme hire many local Kenyans.²⁰¹

The ICCOP has a limited reach with their direct activities, but indirect activities such as radio broadcasts or television interviews are estimated to reach nearly everyone in Kenya. Despite this, the majority of people in Kenya base their opinion of the Court upon current events and ethnicity. The breakdown by region of the percent who support the ICC over time shows how significant increases and decreases in support track with announcements or decisions made by the Court.

²⁰⁰ Chris Tenove, *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*, Research Paper, Africa Portal Research Paper (Africa Portal, September 2013), 23, <http://www.africaportal.org/sites/default/files/Graduate%20Research%20Paper%20No%201.pdf>.

²⁰¹ "ICC - Outreach in Kenya."

In areas where the population is majority Kikuyu or Kalenjin there is a downward trend in support and even the highest levels are low in comparison to areas where community leaders are not on trial. Nyanza has the highest level of support for the Court and an increasing trend, despite the fact that no direct activities have been held by the ICCOP in that area. Raila Odinga is the community's leader and he is not accused by the ICC. The trends of Nairobi and the country as a whole are harder to determine, but either way the variance in support is not large and most surveys resulted in measures of around 63% for both Nairobi and the country as a whole.

Political Cartoon Analysis

The trend of opinion about the International Criminal Court and the Kenya Cases can be measured in Kenya through polls and surveys. However, it can also be measured through an analysis of media reports over time. The major newspapers in Kenya are The Standard, The Daily Nation, and The Star.²⁰² These papers are championed by many in Kenya who believe they are rightly critical of the government. In fact, the Standard was so critical of the government that it was raided in 2006.²⁰³ Although these newspapers are often associated with a slight anti-government bias, they are also viewed as independent and together hold around 98% of the market.²⁰⁴

The specialties and focus of each paper is different and hundreds of articles have been written about the Kenyan Cases. Yet, the trend of opinion can be identified by the various foci of political cartoons that the papers publish. Political cartoons represent comic relief of or outright

²⁰² "Kenya's Vibrant and Critical Media," *BBC*, January 4, 2008, sec. Africa, <http://news.bbc.co.uk/2/hi/africa/7171372.stm>.

"Daily Nation - Kenya," accessed June 6, 2014, <http://www.kenya-advisor.com/daily-nation-kenya.html>.

"About The Star | The Star," accessed June 6, 2014, <http://www.the-star.co.ke/the-star>.

²⁰³ "Kenya's Vibrant and Critical Media."

²⁰⁴ *Ibid.*

confrontation with current issues that the wider public is aware of. The main purpose of a political cartoon is to persuade the viewer to follow the opinion of the artist and they are, therefore, often found in the editorial sections of papers.²⁰⁵ Political cartoons always have bias, but their publication indicates that there are many who support that bias in order for the thought to be created, and many more are likely persuaded by its publication.

For the East African region, the most well-known cartoonist is Godfrey Mwampembwa, commonly known as GADO. GADO has written and submitted pieces for many newspapers in the region and abroad over the past 20 years. He now works for Nation Media Group in Nairobi, of which the Daily Nation is a part. Around 200,000 copies are sold per day.²⁰⁶ He also freelances for other newspapers. GADO has won awards for his support and work in upholding human rights, and it can therefore be assumed that he would be a proponent of the ICC. In fact, over time his political cartoons have demonstrated what many felt in Kenya and elsewhere as the legal and legitimacy challenges of the Kenya Cases increased, the support for the ICC decreased. The following analysis demonstrates the changing perspective and increased exasperation of GADO, and undoubtedly thousands of like-minded viewers. All of the following cartoons are presented with permission of the artist.

2009 – Optimism and Hope

Before the ICC intervened in Kenya, the news media highlighted the call for an end to impunity in Kenya and one in which many hoped the ICC would provide the necessary impetus for trials to begin in either Kenya or The Hague. The following cartoon was released September 21st 2009 before the official list of suspects was revealed. The title “The Clock is Ticking”

²⁰⁵ “About This Activity - It’s No Laughing Matter: Analyzing Political Cartoons- Classroom Activity | Teacher Resources - Library of Congress,” webpage, accessed June 6, 2014, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/activities/political-cartoon/about.html>.

²⁰⁶ “Bio,” *Gado*, accessed June 6, 2014, <http://gadocartoons.com/bio/>.

appropriately indicates the hope that the pressure of the ICC would force the Kenyan Government to act.

Figure 2.8 - The Clock is Ticking



This cartoon depicts the then ICC Prosecutor Luis Moreno Ocampo waiting to go to Nairobi and begin an investigation. He is looking at his watch and casting a long shadow over his well-traveled luggage. The shadow over the suitcases that has been to other conflict areas represents the power of the ICC and its ability to intervene. The locations on the suitcase, such as Bogota, Columbia indicates that the anticipation of Ocampo's arrival is not necessarily going to result in trials, but that an ICC investigation will occur if the Kenyan Government does not take

action. The ICC is represented in a positive light, and the cartoon represents optimism about what an investigation or the threat of one might bring about.

2010 – Criticism of Politicians

The following year, after the ICC revealed the suspects, the Ocampo Six, the criticism continued to focus on the Kenyan Government and politicians, not upon the Court. The cartoon below criticizes William Ruto for using the publicity to further his career. The media storm that the initial ICC intervention caused in Kenya did not really benefit the victims of PEV.

Figure 2.9 - Maybe I Should Go to The Hague too



On November 11th, 2010 the above cartoon was published. Ruto is posing for the media while IDPs are left with nothing. The annoyance of GADO and many others was not at the ICC, but at the failure of the Kenyan Government and politicians to support those in need. The title of

the cartoon and the editorial comment “Maybe I should go to The Hague, too” indicates the power and influence that the ICC still holds in the eyes of many.

2011- Continued Criticism of Kenyan Politicians

In 2011, the Confirmation of Charges Hearings were held for the Ocampo Six. The ICC had lost the support of some who were loyal to their ethnic leaders, but support levels were still high in 2011 as can be seen in the graphs above. The focus of criticism was still upon the Kenyan Government and the accused politicians.

Figure 2.10 - Can you cure ICC?



This cartoon was published on March 26th, 2011, several months before the Confirmation of Charges Hearings, and just before the six suspects were summoned to The Hague for the first time. The scene comments on how the accused are trying “anything and everything” to get out of

the ICC trials. Part of the criticism is that the six suspects are depicted sitting together, while they were bitter adversaries directly following the 2007-2008 elections. In fact, in order from left to right the seated accused are Muthaura, Kenyatta, Ruto, Sang, Kosgey, and Ali. Instead of sitting on opposite sides of the room to depict who is being tried in each case or what the political and ethnic affiliations are, they are mixed together for the common goal of getting out of the trials.

The wise man or rather priest of the Lutheran Faith that they have gone to seek a cure from is Reverend Ambilikile Mwasupile. He is known for giving a miracle cure from a potion he creates that includes a normally poisonous tree. The potion is meant to cure illness such as AIDS, but the Ocampo Six have flown to Tanzania in search of a way to cure their ICC 'sickness.' The cartoon is critical of the politicians, but not of the Court.

2012- Continued Criticism of Politicians

In early 2012, the charges against Kenyatta, Muthaura, Ruto and Sang were confirmed. The mutual support of the suspects between one another grew stronger and Kenyatta and Ruto formed an anti-ICC alliance in the hopes of winning the Presidency and ending their ICC trials. The cartoon below depicts how the public is still more critical of the politicians than the Court.

Figure 2.11 - The Government of Suspects



Published on December 6th, 2012, Kenyatta and Ruto are rejoicing at their decision to join forces to run for the presidency and defeat their ICC charges. The man following them and carrying the weight of their ICC charges is Musalia Mudavadi another politician who joined the Kenyatta-Ruto Jubilee Coalition in the hopes of increasing his political power. His complaint here is that the government is for the ICC suspects. This criticism of why Kenyatta and Ruto ran for the Presidency and what they planned to do with their increased power had been cited continuously since the announcement of the coalition.²⁰⁷

²⁰⁷ See Chapter 1 for a more in depth explanation of the effort to avoid prosecution. Mueller, "Kenya and the International Criminal Court (ICC)," January 22, 2014.

2013- Changing Moods in Kenya

The criticism previously used for politicians began to turn towards the ICC in 2013. Two of the four suspects were elected in March and the case against Muthaura was dropped at the same time. More and more politicians from all ethnic groups were criticizing the ICC for being a ‘racist’ institution, which will be further discussed in Chapter 3. The result of the 2013 election was for many to look at what the ICC was doing more closely than had been scrutinized in the past and the Court was found wanting.

Figure 2.12 - ICC Trials



September 12th, 2013 the publication above indicates a sharp turn in the perspective of the ICC. Much like the cartoon from 2010 above, victims of the PEV who are poor, sickly, and depressed watch from a distance. This time instead of a politician stealing the spotlight, it is a

live broadcast of the trials from The Hague. These people have no home, no money, many are un- or underemployed, but they are given the opportunity to watch the trials on highly expensive television screens. The criticism of the ICC is that they have done nothing to help victims of PEV. The money that politicians and the government are spending on the trials and the money that the ICC is spending on the trials, seems wasted to many who have nothing.²⁰⁸

2014- Criticism of an Inefficient ICC

The opinion of many in Kenya in 2014 had changed completely from focusing criticism on the government to criticizing the Court for being inefficient and ineffective. The following cartoon demonstrates how the failure of new ICC Prosecutor has been viewed by many in Kenya.

Figure 2.13 – Body of Evidence



²⁰⁸ "ICC Cancels Mounting Big Screens in Eldoret during Ruto, Sang Hearing."

The new ICC Prosecutor, Fatou Bensouda, did not escape from criticism. This February 6th 2014 publication demonstrates her effort to rebuild the crumbling cases. Both of these cartoons demonstrate how the power and prestige of the ICC drastically changed over the 5 year span. This change in perspective confirms the need for the ICCOP to include an end goal of increasing Court Legitimacy in its impact theory. The Kenya Cases revealed many weaknesses in the ICC and had a large impact upon the Court and upon International Criminal Law which is the topic of Chapter 3.

Policy Recommendations for the ICC Outreach

The ICCOP operation in Kenya will not be the last Outreach Programme that the ICC operates. There are several lessons to be learned from the ICCOP in Kenya and recommendations that ICC Outreach should consider.

- Gather information on current participants – The ICCOP in Kenya currently gathers information on the number of participants that attend each activity and whether they are male or female. They do not gather information on why the participant attended, whether or not they support the ICC, what they know about the Court before or after the activity, how they heard about the activity, or general feedback about if it was helpful or not. This information would be invaluable to developing an ICCOP that catered to each country or situation. Demographic information would also help determine if direct outreach activities reach the target population or not.
- Work with local leaders before announcing plans– The announcement of posting big screens in Eldoret only to cancel that plan a few weeks later hurt the legitimacy of the Outreach Programme. At that time, many were already critical of the lack of outreach in areas where IDPs had settled. If the ICCOP had consulted with local leaders before making an

announcement, the Outreach Programme could have redirected resources earlier and avoided negative comments about their inefficiency.

- Expand location of direct activities – The limited budget prevents an expansion in the number of direct activities that the ICC can hold. Furthermore, more people can be reached through indirect methods. Yet, direct activities like seminars, meetings and workshops could have a larger impact if they were held in different areas. Instead of increasing the number of activities held, the ICCOP should put effort into holding seminars or workshops outside of Nairobi. In order to run a successful program, target clients, such as the IDPs in Rift Valley must be reached just as those in Nairobi's city center are.
- Increase access to target clients- Holding activities outside of Nairobi would help increase access to ICCOP for many Kenyans, but if security concerns are so severe that activities can only be held in Nairobi, the number of target clients can still be increased. There are many IDPs in and around the Kibera Slum that could be reached more directly. Women are also a target client that is currently underserved. Less than half of those reached are women. The ICCOP should direct more activities toward university students as well. Many students do not come from Nairobi but return home for holidays and can be ambassadors of the ICC message if they are given the tools to do so.
- Improve internet presence and accessibility – The ICCOP in Kenya has increased their use of indirect activities through social media as the program progressed. However, the ICC website is difficult to navigate and not easily accessible, especially for those who do not use the internet often. Creating a more user-friendly website would increase internet traffic and the number of people educated about the Court.

CHAPTER 3: THE IMPACT OF THE KENYA CASES ON THE ICC AND ICL

As Chapter 1 discussed, there are wide and varied impacts of the International Criminal Court upon the country of Kenya. However, the relationship is a reciprocal one. The Kenya Cases may have effects upon the Court and upon international criminal law (ICL) in general.²⁰⁹ The new challenges that the Kenya Cases pose to ICL need to be analyzed and incorporated into future policy decisions. This final chapter will serve to outline the impact of the Kenya Cases on the ICC and provide a policy analysis of the situation and recommendations on progressive action.

The Situation in Kenya has many firsts. It is the first time a case has initiated by the Prosecutor in which power will be prosecuted at the ICC. The first time the accused have increased their power democratically after being charged. The first time a powerful leader in not just a country, but a region will be prosecuted, and the first time that a case will come to an international tribunal based upon political violence, not an armed conflict. The unique situation of numerous firsts has caused the Kenya Cases to hold the media spotlight about ICL for several years.

The justice cascade theory describes how norms concerning human rights prosecutions have spread around the world. The idea of an independent prosecutor is a new norm, but one that had not been tested until the Kenya Cases.²¹⁰ Luis Moreno-Ocampo, the first prosecutor,

²⁰⁹ International criminal law is a combination of international humanitarian law which comes into effect during times of armed conflict and include many crimes such as war crimes and genocide and national law which defines certain violent activities as “criminal” such as rape and murder, which doesn’t need to occur during war for it to be illegal.

²¹⁰ Proprio motu powers were originally granted to the Prosecutor in order to avoid “victor’s justice” meaning that only those who lose a war are prosecuted. Now it seems that that has not come to pass, but the victors are not necessarily military victor, but economic ones, as no developed country has been targeted by the Prosecutor thus far.

selectively chose to avoid an investigation involving conflicts with the 5 permanent members of the Security Council or their close allies in his selection of Kenya.²¹¹ The choice of the Kenyatta and Ruto/Sang trials means that the ICC and ICL will change as a new norm in ICL is developed. The continuation of Ocampo's vision for *proprio motu* powers has been seen in Prosecutor Bensouda as the Kenya Cases have continued and Bensouda has also selected Côte d'Ivoire as the next *proprio motu* Situation.²¹²

As the first Situation that was brought to the Court under *proprio motu* powers, the Situation in Kenya is pivotal for the ICC and for ICL as it sets the precedent for future cases. The *proprio motu* referral method has caused numerous legal and legitimacy challenges because the Prosecutor chose this situation over other potential situations.²¹³ The Kenya Cases have changed the legal system of the ICC, challenged its legitimacy, and changed the path of international criminal law. Now, the presence of the accused at trial is optional for the powerful, political violence is a viable situation for judicial intervention, and powerful countries may even be less likely to join the ICC. Despite these major changes, the Kenya Cases will not be the end of the Court, as many predict. The Court is financially stable, still has widespread international support, and it can still be considered a relatively new institution that has overcome many challenges.

Legal Challenges

The Situation in Kenya has tested the boundaries of the Rome Statute. The defense lawyers, people of Kenya and involved individuals have all fought to change the application of

²¹¹ The P5 as they are commonly known are the US, UK, France, Russia and China. All have veto power at the UN.

²¹² *Proprio motu* refers to the power of the prosecutor to bring cases to the ICC independently, without oversight as discussed in depth in the introduction to this work.

²¹³ During the same year as the PEV in Kenya, the war in Georgia took as many or more lives, and violence in the Gaza war also raged.

the law to Kenya or to blatantly break the law in an effort to change the outcome of the trials.²¹⁴

In addition to this, legal challenges have been presented by scholars and lawyers worldwide on concepts such as “crimes against humanity,” “complementarity,” evidence, the location of the trials, and the presence of the accused at trial. The legal challenges that the Kenya Cases have brought to the ICC are changing the way that the ICC operates and will help define the future role and success of the ICC.

The major literature debates involving Kenya and the ICC surround the question of whether the ICC should prosecute the cases. Many academics believe that the problems of complementarity, gravity and crimes against humanity have forced the Court to expand its mandate beyond its capabilities. Others support the Court’s decision to intervene in Kenya. These arguments show that the Kenya Cases have impacted the ICC, as the powers of the Court are redefined.

The legal challenges that the ICC has faced with the Kenya Cases involve the jurisdiction of the Court, the location of the trials, evidentiary problems, and the treatment of the accused. There are two main camps of scholars concerned with the Situation in Kenya: those who believe that the ICC was correct in their pursuit of justice in Kenya and those who do not. A leading scholar of international criminal law is Dr. William Schabas who has written extensively on the ICC and international law. He is currently a professor of international law at Middlesex University. Schabas is often critical of the Kenya Cases; he argues that the Kenya Cases were a political decision by the Prosecutor stretching the judicial reasons for such an investigation under *proprio motu* powers. “They [the ICC] have undoubtedly convinced themselves that they have

²¹⁴ Walter Barasa is currently accused of bribing witnesses in an effort to sway the outcome of the Ruto/Sang trial.

found a legalistic formula enabling themselves to do the impossible, namely, to take a political decision while making it look judicial.”²¹⁵

Legal Jurisdiction of the Court

Challenging the legal jurisdiction of the Court created new and expanded definitions of which crimes the ICC can legally try. It has also affected the concepts of gravity, crimes against humanity, and complementarity, as well as the temporal reach of the Court. In an effort to postpone or prevent the Kenya Cases, numerous Kenyan lawyers, leaders and politicians sought to delay the cases by questioning the jurisdiction of the ICC over the PEV in Kenya and seeking international support in their effort to do so.²¹⁶ Many of the first legal petitions were filed in an effort to claim that the ICC did not have jurisdiction over the crimes committed in the PEV specifically in relation to gravity and crimes against humanity. The legal arguments claimed that the violence was not grave enough, and that it was not organized as part of a state-like apparatus.

a. Gravity and Crimes Against Humanity

Gravity refers to the severity of the crimes or violence committed. In the case of Kenya, around 1,200 people died and over 600,000 were forcibly displaced. Many scholars claimed that although this was a major tragedy for the country, the gravity of the situation did not merit an ICC intervention.²¹⁷ The scope of crimes against humanity is the key issue and whether the PEV in Kenya is included under this definition is debated. The Rome Statute requires (i) an attack

²¹⁵ William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 144.

²¹⁶ Susanne D. Mueller, “Kenya and the International Criminal Court (ICC): Politics, the Election and the Law,” *Journal of Eastern African Studies* 8, no. 1 (January 2, 2014): 32–33, doi:10.1080/17531055.2013.874142.

²¹⁷ David L Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, 2014, 149–153. David Bosco argues that in 2008-2009 the ICC Prosecutor could have chosen to pursue cases elsewhere. The estimated death toll for Kenya was between 1,133 and 1,220 people and the ICC had jurisdiction. However, the Court also had jurisdiction over Georgian territory and nations in which 850 people died in the war with Russia. At the end of 2008 the Gaza war took the most lives between 1,387-1,417 and the Palestinian Authority submitted a declaration to grant the ICC jurisdiction. Bosco believes that the ICC made a choice to pursue Kenya over the other conflicts due to the “intense scrutiny” that the other cases were sure to bring.

against civilians (ii) a state or organizational policy (iii) the widespread or systematic nature of the attack (iv) a nexus between the individual act and the attack and (v) knowledge of the attack.²¹⁸

Chandra Sriram and Stephen Brown, professors of international law and politics in the UK and Canada, discuss the problem of gravity, which they believe is caused by the fact that the Rome Statute does not define how heinous the crimes must be to be sufficiently grave. “Specifying what gravity means is essential, as it can determine the admissibility of a case, but it is also elusive in the Rome Statute.”²¹⁹ There are ethical problems to creating such a definition. Instead the judges of the ICC ruled that gravity was decided on a case by case basis and no further decisions on the definition have been made.

Dr. Schabas is critical of the lack of clarity with the definition of gravity and the ‘interest of justice’ which is also a regulation that guides the *proprio motu* powers of the Prosecutor. He claims that by having vague definitions, the ICC Prosecutor is able to choose cases on the basis of politics. The first Prosecutor refused the case of British soldiers murdering civilians in Iraq on the basis of the “sum of these violations” being “of a different order” than other situations.²²⁰ Schabas is critical of this claim because Moreno-Ocampo was “comparing cases to situations” not situations to situations.²²¹ In the case of Kenya, the Court accepted the cases under the ruling of Pre-Trial Chamber II and there was no dissent on the concept of gravity. Without a clear definition, there are many cases that the ICC could try, but only those that the prosecutor chooses result in investigations.

²¹⁸ “Rome Statute of the International Criminal Court,” Article 7.

²¹⁹ Sriram, “Kenya in the Shadow of the ICC,” 235.

²²⁰ Schabas, *Unimaginable Atrocities*, 137.

²²¹ *Ibid.*

“The ‘interests of justice’ is a nebulous and intangible notion, ideally suited to camouflage the real reasons behind choices about whether or not to proceed in situations. The results are ultimately the product of the Prosecutor’s own personal determinations.”²²²

The debate around the definition of crimes against humanity is slightly different from that of gravity, but a vague definition is also the core problem. The other major issue is about the policy requirement ((ii) a state or organizational policy). The policy requirement claims that for the crime to fall under the jurisdiction of the ICC and be a crime against humanity there must be a state or organizational policy calling for such violence. The controversy over this was highlighted by the dissent of Judge Kaul in Pre-Trial Chamber II who claimed that the Kenya Cases were not admissible under the ICC’s jurisdiction because the crimes did not constitute crimes against humanity. Judge Kaul’s opinion was that the crimes committed in Kenya were of “an ordinary nature” and did not involve a “state-like organization” that promoted a violent policy.²²³ Kaul argued that accepting the Prosecutor’s request to open an investigation would blur the lines between national and international jurisdiction and broaden the scope of possible ICC intervention. “A distinction must be upheld between human rights violations on the one side and international crimes on the other.”²²⁴

Schabas supports this argument and furthers it to claim that under this definition non-state actors should not be tried by the ICC because the Court is only meant to try actors with ties to the state or state-like structures. “Non-state actors find themselves more than adequately challenged by various national judicial systems.”²²⁵ The definition of crimes against humanity, according to Schabas, should be specific enough so that the cases the ICC takes on are limited in

²²² Ibid., 141.

²²³ Hans-Peter Kaul, “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,’” *ICC - CPI*, March 15, 2011, 18, <http://www.icc-cpi.int/iccdocs/doc/doc1039485.pdf>.

²²⁴ Ibid., para 12, page 7.

²²⁵ Schabas, *Unimaginable Atrocities*, 239.

number and the ICC “should confine their activity to get the ‘big fish.’”²²⁶ The gravity element is currently part of prosecutorial discretion, which only adds to the issue of which cases to investigate for the ICC. Crimes against humanity are unique in international law because they don't require an armed conflict to occur; they can happen during times of civil turmoil or peace. Now virtually every conflict in Africa could fall under the definition of a crime against humanity, without an armed conflict, because the Kenya cases have set a precedent for political violence to be under the jurisdiction of the ICC. Kenya was the first ICC case to be due to political violence outside the scope of an armed conflict. To follow Schabas' metaphor of catching the ‘big fish,’ the net is now gathering too much garbage and too many sardines.

The definitions of gravity and crimes against humanity are problematic for framing the clear jurisdiction of the ICC. They proved to be a legal challenge in the Kenya Cases, as Judge Kaul dissented claiming that the cases should be suspended based on a more narrow definition of crimes against humanity. Yet, the Cases remain in ICC jurisdiction until resolved. The debates about the scope of crimes against humanity will continue in the field of ICL for years to come. The next case that has questionable gravity or state policy links will undoubtedly be compared to the Situation in Kenya.

b. Temporal Jurisdiction

The legal jurisdiction of the ICC over the Kenya Cases was also questioned in terms of temporal jurisdiction. If the crimes in question occurred at a time when the Court did not have jurisdiction over the accused or the territory of Kenya then the cases would be inadmissible. The Rome Statute came into effect in 2002 and Kenya ratified the treaty in 2005.²²⁷ Therefore, the

²²⁶ Ibid.

²²⁷ Mueller, “Kenya and the International Criminal Court (ICC),” January 2, 2014, 29.

ICC has had jurisdiction over crimes committed in Kenya, as a State Party, since 2005. However, after the Post-Election Violence in 2007-2008 and the ICC intervention, the Parliament of Kenya voted to withdraw from the Rome Statute. On the 22nd of December, 2010, only days after the ICC released the names of the accused, the Government of Kenya passed a motion to withdraw, although President Kibaki did not sign it into law, so it did not impact the ICC legally. On September 5th, 2013, only days before the start of the Ruto/Sang trial, Kenyan Parliament passed a motion to withdraw from the Rome Statute again. The Government of Kenya has not yet submitted a written notification of withdrawal to the Secretary General of the United Nations and withdrawal would begin one year from that date.²²⁸ Therefore, even if the Government of Kenya follows through on all the legal steps necessary to withdraw, the ICC will continue to have temporal (and territorial) jurisdiction over the crimes committed during the 2007-2008 PEV in Kenya. Yet, this does indicate the level of support for the Court amongst Kenyan Politicians and does not bode well for future ICC jurisdiction.

c. Complementarity

The question of jurisdiction also arose in relation to complementarity. The ICC claims that it will only intervene in a country if the national courts are unwilling or unable to prosecute heinous crimes. Kenya was able, but unwilling to prosecute offenders in the PEV of 2007-2008.²²⁹ In previous ad hoc tribunals the problem of complementarity has been solved by the “same person/same conduct” test. The ICC will defer jurisdiction to a national court as long as the national court pursues a case against the same person for substantially the same crime.

²²⁸ Ibid., 39.

²²⁹ For a full explanation of the lack of action by the Government of Kenya see Chapter 1 pages 21-29.

Charles Jalloh from the University of Pittsburgh Law School discusses how the ICC ruled that for the Kenya Cases to be returned to national jurisdiction this test would be applied in a recent article. Jalloh argues that by incorporating a new requirement on national courts the ICC has begun to turn the principle of complementarity into one of primacy where the international court has more power. “The Appeals Chamber has placed extremely high and perhaps even unrealistic demands on States Parties seeking to assert jurisdiction over the international crimes that occur within their territory.”²³⁰ He claims that the new legal definition will open the door for too many international cases as it does not provide a system for “sharing the burden.”²³¹

Basic goals of the ICC are to provide justice and end impunity. While the same conduct test requires that crimes be of the same weight, Schabas does not see a critical difference in terms of bringing justice in a trial for murder at the national level and crimes against humanity at the ICC. There is a substantial legal difference, but if both do “an adequate job of addressing impunity” Schabas believes the ICC should not be against national trials.²³² International tribunals “are over-burdened with cases of perpetrators” as is.²³³ The strict complementarity test will only increase the burden of the Court.

Muthoni Wanyeki, a prominent Kenyan political scientist, also discusses complementarity, but does not take a definitive stand on how it may impact the ICC or law in the future. Instead, Wanyeki simply states what occurred in the case of Kenya and applauds the ICC for stepping in when the Kenyan Government failed to act. “Never before have Kenyans seen such senior public servants and politicians facing formal legal proceedings that have not fizzled

²³⁰ Charles Chernor Jalloh, “FEATURE Online AUGUST 2012 Volume 53,” 2012, 236, http://www.harvardilj.org/wp-content/uploads/2012/09/HILJ-Online_53_Jalloh2.pdf.

²³¹ Ibid.

²³² Schabas, *Unimaginable Atrocities*, 72.

²³³ Ibid.

out or been thwarted.”²³⁴ The debate among these and other scholars demonstrates how the ruling on complementarity in the Kenya Cases has proved to have a significant impact on the ICC and ICL just as have the debates and issues involving gravity, crimes against humanity and temporal jurisdiction.

Location of the Trials

Another challenge that the Kenya Cases confronted was the question of where the trials should be held, because many requested that justice be accessible to victims. Legally, there is no requirement that all ICC cases be held in The Hague, The Netherlands. In fact, Article 3(3) of the Rome Statute (1998) claims that “[t]he Court may sit elsewhere [than in The Hague], whenever it considers it desirable, as provided in this Statute.” Many human rights groups continually pushed to relocate the trials or at least portions of them to Kenya or to the now empty seat of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. These human rights groups, such as No Peace Without Justice, argued that bringing justice to victims would be best accomplished with trials easily accessed by the victims. The requests were lightly supported by public opinion polls. An IPSOS opinion poll conducted as late as June 2013 showed that 32% of respondents wanted the defendants to be tried locally with another 29% requesting trials not be held at all.²³⁵ Even more interesting was that 41% of respondents thought that the African Union should withdraw from the Rome Statute, if the cases weren’t returned to East African jurisdiction.²³⁶

²³⁴ Wanyeki, “The International Criminal Court’s Cases in Kenya,” 16. This comment may have been a little before its time as it remains to be seen whether the Kenyatta trial will proceed, but the progress of the Ruto trial does represent a unique situation for victims in Kenya.

²³⁵ IPSOS, “Ipsos Synovate Polls_SPEC_Barometer_July_2013,” 48.

²³⁶ *Ibid.*, 51.

A major argument of those who wished to see the trials tried locally was that the defendants were not at risk of escaping custody, but rather needed in Kenya to fulfill official duties. The defendants were not rebel leaders as in other ICC cases, but public figures who would not seek to avoid prosecution by hiding from authorities. On 24th January 2013, the defense teams for Ruto and Sang, who were originally against holding the trials locally, filed a joint request to hold the trials in East Africa. They claimed that it would “minimise the disruption to the public and private lives of the defendants, facilitate investigations and bring justice closer to the Kenyan population (*sic*).”²³⁷

The issue of the location of the trials seemed to be solved when Trial Chamber V(a) recommended that portions of the Ruto/Sang case be held in Kenya or Tanzania to the plenary of judges at the ICC. Trial Chamber V (a) recommended holding portions of the Ruto/Sang trial in Nairobi or Arusha after hearing the arguments for and against proposed by the Prosecutor, victims, *amicus curiae*, and Defense.²³⁸ The Chamber “notifies the Presidency . . . it may be desirable to hold the commencement and other portions thereof, to be determined at a later stage, in Kenya, or alternatively, in Tanzania.”²³⁹ Yet, in July 2013, the Presidency rejected this recommendation and the plenary voted, mostly due to cost and safety concerns, to hold all portions of the trial in Europe.²⁴⁰ No appeal was successful, and the trial has thus far been held in The Hague, as has the Kenyatta Trial although it is still in preliminary stages. The legal

²³⁷ Coalition for the International Criminal Court, “Ruto and Sang Case,” *Coalition for the ICC*, 2014, <http://www.coalitionfortheicc.org/?mod=rutosang&idudctp=21&show=all&order=authorasc>. Charles Chernor Jalloh, “FEATURE Online AUGUST 2012 Volume 53,” 2012, 236, http://www.harvardilj.org/wp-content/uploads/2012/09/HILJ-Online_53_Jalloh2.pdf.

²³⁸ *Amicus curiae* refers to anyone or group that is not a direct party to a case, but who offers information without solicitation that affects or could affect the case. In the decision on the location of trials, *amicus curiae* such as No Peace Without Justice filed testimony and wrote open letters.

²³⁹ ICC Chambers, *Recommendation to the Presidency on Where the Court Shall Sit for Trial* (The Hague: ICC - CPI, 2013), 8, <http://www.springerlink.com/index/KDNP9YJXE67R7FMV.pdf>.

²⁴⁰ Coalition for the International Criminal Court, “Ruto and Sang Case.”

challenge of the location of the trials quickly turned into a legitimacy challenge for the Court. The failure to move the cases closer to victims was seen by many as confirmation that the ICC is a foreign court controlled by the powerful that is not pursuing cases for justice, but for political ends.²⁴¹ Although this opinion has been called radical, the failure to move the cases to the East African region did encourage many in the African Union to accuse the Court of ‘race hunting,’ which will be discussed in the legitimacy challenges section below.

Evidentiary Problems

The purpose of the ICC is to hold fair trials for countries that are unwilling or unable to do so themselves. Unfortunately, the Kenya Cases have been littered with legal problems pertaining to evidence and witnesses since the investigations began. The Prosecution has had to deal with witness tampering and threats, lying witnesses, and challenges to the acquisition of evidence. The Defense has accused the Prosecution of bribing witnesses to lie and claims that the defendants have been fully cooperative with the Court. Either way, the Kenya Cases began with six defendants and there are only 3 left, marking the first time that the ICC has had to drop charges against an accused. The evidence management by the Prosecution was poor in both cases, largely due to legal or rather illegal challenges.

Witness tampering is often rumored to occur in ICC cases; however, for the first time the ICC has accused a third party of witness tampering. Walter Osapiri Barasa is charged by the Prosecution with three counts of offence against the administration of justice consisting of corruptly or attempting to corruptly influence three ICC witnesses in the case against Deputy President William Ruto and Joshua Arap Sang.²⁴² He is not yet arrested or extradited from Kenya

²⁴¹ Al Jazeera, “African Leaders Accuse ICC of ‘Race Hunt,’” May 28, 2013, <http://www.aljazeera.com/news/africa/2013/05/201352722331270466.html>.

²⁴² “Situations and Cases.”

to The Hague to stand trial, although there is a warrant out for his arrest.²⁴³ Mr. Barasa may be the only one accused of witness tampering through bribery or intimidation, but many believe he should not be the only one.

The Prosecutor has stated numerous times that witnesses were being withdrawn from the Kenya Cases (both of them) because the witness was afraid for their own security or had otherwise changed their mind about testifying. The Kenya National Dialogue and Reconciliation Monitoring Project (KNDR) found that as early as April 2010, witnesses and potential witnesses were being intimidated into silence. “Deaths, threats, and intimidation of potential witnesses have forced many witnesses into hiding locally or abroad. The absence of a functional witness protection programme has made it difficult for some of the witnesses to remain in the country (*sic*).”²⁴⁴ A KNDR October 2010 report confirmed that the investigation begun by the ICC had escalated reports of witness and potential witness intimidation, although the ICC had by then begun to protect their own witnesses.²⁴⁵ The dangerous situation that witnesses or those thought to be witnesses found themselves in in 2010 and 2011 prompted human rights organizations to step in and seek to protect these people.

According to KNDR, the Government of Kenya did not provide adequate security for witnesses, and after the election of the accused, witnesses had reason to be wary of seeking government protection.²⁴⁶ Mueller believes that the murder, threatening and bribing of witnesses was a key strategy for halting or slowing the cases by those in power.²⁴⁷ The ICC could not

²⁴³ BBC News, “ICC Orders Kenyan Journalist Arrest,” *BBC News*, October 2, 2013, <http://www.bbc.co.uk/news/world-africa-24364778>.

²⁴⁴ South Consulting, “The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project Status of Implementation,” v.

²⁴⁵ South Consulting, “The Kenya National Dialogue and Reconciliation Monitoring Project -Review Report,” 10.

²⁴⁶ South Consulting, “The KNDR Monitoring Project (April 2011) 9TH Review Report,” *KNDR*, April 2011, 8, [http://www.dialoguekenya.org/Monitoring/\(April%202011\)%209TH%20Review%20Report.pdf](http://www.dialoguekenya.org/Monitoring/(April%202011)%209TH%20Review%20Report.pdf).

²⁴⁷ Mueller, “Kenya and the International Criminal Court (ICC),” January 2, 2014, 25.

protect those who were not yet witnesses or those who would not become witnesses. The lack of security led to the Defense accusing the Prosecution of coaching witnesses and providing false evidence and witness testimony and vice-versa.

The Defense for the Ruto/Sang trial argued that the Prosecution under Moreno- Ocampo had collected evidence through NGOs and other organizations or ‘filtered evidence.’ They claimed that witnesses were bribed and coached by third party organizations before coming to testify at the ICC, and that the ICC was also involved.²⁴⁸ One man, David Kibe claimed that the ICC and USAID had promised to pay him millions of Kenyan Shillings to testify against Ruto and Sang and that he withdrew from the arrangement due to his “conscience.”²⁴⁹

The withdrawal of significant witnesses for both the Ruto/Sang and Kenyatta trials has been due to a combination of intimidation and recanting testimony as several key witnesses have dropped out saying that they had lied.²⁵⁰ There are currently 21 witnesses in the Ruto/Sang trial down from the original 40.²⁵¹ The Kenyatta Trial has not started yet, and the exact original number of witnesses has not been reported, but in the last year alone 7 were removed and there are 27 witnesses left as of June 2014.²⁵² Most of the witnesses who are no longer testifying are the key witnesses in both cases that ensured that the cases would be confirmed by the ICC Pre-Trial Chamber. While none of these accusations against the ICC Prosecution and Investigation teams have been proven the combination of witness tampering and witness lying has

²⁴⁸ South Consulting, “The Kenya National Dialogue and Reconciliation Monitoring Project -Review Report,” 11.

²⁴⁹ Karanja Njoroge, “Standard Digital News : : The Counties - Man Claims He Was Witness in William Ruto ICC Case but Has Opted out,” *Standard Digital News*, February 11, 2014, <http://www.standardmedia.co.ke/thecounties/article/2000104400/man-claims-he-was-witness-in-william-ruto-icc-case-but-has-opted-out?pageNo=1>.

²⁵⁰ Maliti, “Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year.”

²⁵¹ ICC-CPI, “Frequently Asked Questions.”

²⁵² Maliti, “Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year.”

significantly hurt the Prosecution's cases and the handling of witnesses will need to be changed in the future to prevent a humiliating and devastating repeat of the Kenya Cases.²⁵³

Another legal challenge that the ICC faced in the Kenya Cases is the acquisition of evidence. There have been significant security problems that hampered data and information collection as well as state interference that prevented the ICC investigators from acquiring the necessary evidence.²⁵⁴ The failure of the Government of Kenya to cooperate has been claimed continually. In fact, in a panel discussion held by Chatham House, George Kegoro, the Executive Director of the International Commission of Jurists, Kenya, claimed that not only was the Government of Kenya not cooperative, but that "significant state resources" were being spent to avoid the ICC prosecutions.²⁵⁵ Kegoro believes that any deferral in the cases would mean disaster for the ICC as the resources that the Kenyan Government is pouring into postponing the cases is causing witnesses to withdraw and powerful figures to side with Kenyatta and Ruto.²⁵⁶

A recent example of confrontation between the Prosecutor and the Government of Kenya is the claim by the Prosecution that the Government of Kenya has not been forthcoming about Uhuru Kenyatta's financial statements, which are believed to show that he helped finance the PEV. The Attorney General of Kenya claims that only the Court can force the Government to provide such evidence, not the Prosecutor. Conversely, the Defense claims that the Prosecution is

²⁵³ A witness for the Prosecution in the Ruto/Sang Case, number 323, removed themselves from the case after admitting to a conspiracy in which he was to be paid to lie in Court. "Standard Digital News - Kenya : Man Claims He Was Witness in William Ruto ICC Case but Has Opted out," accessed April 20, 2014, https://www.standardmedia.co.ke/?articleID=2000104400&story_title=man-claims-he-was-witness-in-ruto-icc-case-but-has-opted-out/.

²⁵⁴ Security problems have potentially been caused by those opposed to the trials, but also due to the creeping extremism that is overtaking parts of Kenya and was recently manifested in the Westgate Mall attack.

²⁵⁵ George Kegoro and L. Muthoni Wanyeki, "Justice in Kenya: Impacts of The African Union's ICC Decision," (Panel Discussion, October 29, 2013), 3, http://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/291013Kenya.pdf.

²⁵⁶ Ibid.

reaching for evidence and that the charges should be dismissed. March 31, 2014 Trial Chamber V(b) ruled that the charges would not be dismissed, that the Government had to comply with the requests of the Prosecution, even without the “Court’s” or Bench’s oversight, and that the Prosecution must resubmit its request for Kenyatta’s financial information while postponing the trial (again) to October 7th, 2014.²⁵⁷

The acquisition of evidence has proved a daunting task for the Court after the election, but even before that time the resistance to trials by Kenyan politicians and elites was widespread. Security concerns for ICC investigators are an issue that may continue in the future; however, the cooperation of State Parties is a legal challenge that the ICC faced in the Kenya Cases. In future cases, governments of accused will find it difficult to claim that they do not need to fulfill the request of the Prosecutor, because the judges of the Kenyatta trial ruled on that issue. Although rulings of the Trial Chamber are not “precedent” in a legal sense, the ruling should support ICC investigations in future cases.

The Treatment of the Accused

The final major legal challenge that the ICC faced in the prosecution of the Kenya Cases thus far deals with the treatment of the accused. The Court prides itself on protecting the rights of defendants; however, the ICC has never had defendants with such political power. The presence of the accused at trial became a controversy as Ruto and Kenyatta both requested continued absence from their trials due to the requirement of official duties. The current ruling on the presence of the accused is that Ruto must be present during most of his trial and will be excused

²⁵⁷ Trial Chamber V(b), *Decision on Prosecution’s Applications for a Finding of Non-Compliance pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date* (The Hague: ICC - CPI, 2014), 46, <http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf>.

on a case by case basis.²⁵⁸ The Kenyatta trial has been postponed multiple times due to procedural issues and the need for extended preparation from both the Defense and the Prosecution sides, although reporting has rumored that delays were due to the need for the President to deal with the terrorist attack on Westgate Mall.²⁵⁹

Both Defense teams challenged the idea that figures with important official responsibilities must be present at their trial and won several victories. First, Ruto, Sang, and Kenyatta are not in detention during their trial, but free to travel home to Kenya or to other countries on state business.²⁶⁰ More importantly, the judges of the Ruto/Sang trial have ruled that the accused can be absent from trial, although it is on a case by case basis. The controversy over whether powerful elites should be allowed to miss trials to fulfill official duties spread outside of the courtroom to a not-so-heated debate amongst State Parties to the Rome Statute during the 12th Plenary in November 2013.

France and Britain led the Plenary to adopt a number of changes to the Rules of Procedure and Evidence which support the Rome Statute, based upon the legal challenges presented in the Kenya Cases. Although the Rules of Procedure and Evidence do not override the Rome Statute, they are the law that the judges of the ICC must take into account. The Plenary adopted new rules clarifying how the Court and Chamber may sit in a location other than The Hague and when prior recorded testimony may be used if a witness is not present to testify.²⁶¹

²⁵⁸ Judgment 1669852, "Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(A) of 18 June 2013 Entitled 'Decision on Mr. Ruto's Request For Excusal from Continuous Presence at Trial.'"

²⁵⁹ Howden, "Terror in Westgate Mall: The Full Story of the Attacks That Devastated Kenya | World News | The Guardian."

²⁶⁰ Ironically, Kenyatta on a recent trip to Russia was snubbed by President Putin due to the latter's ICC indictment for human rights violations, when Russia has one of the worst human rights scores among developed countries (Daily Post, 2013).

²⁶¹ Assembly of States Parties, "Resolution ICC-ASP-12-Res.7," *ICC - CPI*, November 27, 2013, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf.

Both of these new rules were adopted due to the legal challenges that the ICC faced during the start of the Kenya Cases.

The 12th Plenary also redefined the rules for the presence of the accused at trial. It granted accused the right to attend trial by video link. The States Parties also confirmed what Trial Chamber V (a) had decided for the Ruto/Sang trial – that absence would be assessed on a case-by-case basis. Yet, the States Parties added a clause claiming that a reason for excusal could be political power.

“An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.”²⁶²

This rule is different than ICC decisions and previous bylaws because it does not specify that absence must be determined on a case-by-case basis. Additionally, all of these changes to the Rules of Procedure and Evidence were not voted upon by the Assembly of States Parties, but simply approved *by consent*.²⁶³ Due to the Kenya Cases, the bylaws of the ICC have been changed by the State Parties to allow more flexibility for those in power. The new rules established after the Kenya Cases seem to allow for a different set of laws to apply to the rich and powerful than to those that are powerless. This may further erode the legitimacy of the Court, a topic that is covered later in this section.

The treatment of the accused also found legal challenges in relation to the time length and docket schedule of trials. The Defense teams for Ruto and Kenyatta pushed for absence from trial first and when that was not fully successful, they sought long delays in the trial to allow the defendants to return home and to work in between sessions.

²⁶² Ibid., 3.

²⁶³ Ibid., 1. The ICC does not require a vote in order to adopt new or change old rules and procedures; however, passing this particular rule by consent prevented any hope of debate or resistance to the issue.

The Kenyatta trial has been continually postponed due to many reasons, but lawyers and academics now argue that (among other reasons) the case should be dropped because justice was not dispensed in a timely manner. Despite this, the Chamber ruled that due to the unique circumstances of the accused being President, they would allow one more adjournment of the case.²⁶⁴ The Defense teams in the Ruto/Sang trial requested a specific sitting schedule in order to allow Ruto to fulfill his constitutional obligations in August 2013, but the judges of Trial Chamber V(a) ruled that the Ruto/Sang trial would not take long breaks but run straight through. “The imperatives of a speedy trial . . . command the dominant consideration.”²⁶⁵ A speedy trial not only protects the rights of an accused but prevents justice from being denied to the victims. The treatment of the accused was a unique legal challenge that the ICC faced due to the Kenya Cases and the result was that numerous decisions were made by judges and new rules and procedures were created by the Assembly of States Parties.

The jurisdictional, locational, evidentiary, and treatment issues that have occurred thus far in the Kenya Cases have had a large impact on the ICC and on international criminal law. The legal challenges that the ICC faced due to the Kenya Cases have forever changed the way that the Court will operate and even changed the rules by which the Court’s judges make their decisions. The long term impact of the changes is yet to be determined, but the legal challenges and changes also created legitimacy challenges to which we turn next.

Legitimacy Challenges

The Court has struggled for legitimacy since its inception with the lack of “P5” support. The most powerful countries in the world are arguably the permanent five members of the

²⁶⁴ Trial Chamber V(b), *Decision on Prosecution’s Applications for a Finding of Non-Compliance pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date*, 39.

²⁶⁵ Trial Chamber V(a), *Document 1637596 - Decision on the Ruto Defence Application to Vary Court Sitting Schedule* (The Hague: ICC - CPI, 2013), 5, <http://www.icc-cpi.int/iccdocs/doc/doc1637596.pdf>.

United Nations Security Council: France, Britain, China, Russia, and the United States. Of these nations, only Britain and France are State Parties of the Rome Statute. China, Russia, and the U.S. have alternated between outright resistance to the Court to passive ignorance or passive support. The U.S. under President G.W. Bush actually mobilized a significant campaign against of the ICC, threatening trade sanctions.²⁶⁶ The major concern of resistant countries is the *proprio motu* powers of the Prosecutor. Leaders of most powerful countries will consistently resist jurisdiction of outside courts over themselves or their citizens. Thus far, no international court or tribunal has sought to prosecute the soldiers or leaders of powerful countries. In fact, the Kenya Cases arguably represent the international prosecution of the most powerful people in the history of ICL thus far. The Kenya Cases have therefore served as an example of what the ICC Prosecutor is capable of and this has caused significant challenges to the Court's legitimacy. The legitimacy of the ICC rests largely upon the opinion and action of key states and organizations. This section will include an analysis of the Kenya Cases impact upon key states and organizations as well as their decisions in relation to the Rome Statute and support or opposition of the Kenya Cases.

Britain and France

Pressure from Kenya and many African Union states brought the question of deferring the cases of Ruto and Kenyatta for one year before the Security Council in November 2013. The resolution failed, but “would have requested the International Criminal Court, under Chapter VII of the United Nations Charter, to defer the investigation and prosecution of President Uhuru

²⁶⁶ Sikkink, *The Justice Cascade*, 238.

Muigai Kenyatta and Deputy President William Samoei Ruto for 12 months, in accordance with Article 16 of the Rome Statute, which established the Court.”²⁶⁷

The resolution made no mention of the trial of Sang or Barasa. Both France and the U.K. abstained from voting. France claimed “the vote had been unnecessary when the Council was in the midst of consultations with African States.”²⁶⁸ The British representative “stressed that the sponsors had failed to establish the Charter VII threshold beyond which the Court’s proceedings against the Kenyan leaders would pose a threat to international peace and security.”²⁶⁹

Although these comments do not seem to support the efforts of Kenyatta and Ruto to avoid prosecution, the UK and France did introduce legislation suggestive of their position to the Assembly of States Parties only a few days after the Resolution failed. The clarifications and changes that were made to the Rules of Procedure and Evidence regarding the presence of the accused and witness testimony were introduced by France and the U.K. to the Assembly of States Parties, and ensured that leaders who were on trial at the ICC had the option of not only video conferencing, but being absent during trial. Although, these two powerful countries did not support the postponement of the Kenya Cases, they were supportive of the defendants and their official responsibilities in other ways. This ambivalent distanced attitude was reflected by the receptions Kenyatta received in the U.K. after being indicted by the ICC.

The warm welcome that Kenyatta had hoped to find on his first visit to the United Kingdom after being elected President of Kenya and being indicted by the ICC did not come to pass. Although the leader was included in all the high level talks and meetings that took place on

²⁶⁷ Security Council, *Security Council Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining* (New York: United Nations, 2013), <http://www.un.org/News/Press/docs/2013/sc11176.doc.htm>.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

the Somalia Conference in May 2013, he was not photographed with Prime Minister Cameron of the U.K. This was unusual in comparison to the other leaders who were all photographed with the leader of the United Kingdom upon arrival.²⁷⁰ By contrast, upon Kenyatta's election only a few months earlier, Cameron was the first world leader to congratulate Kenyatta on his political victory, followed shortly by the United States and France. President Francois Hollande wished Kenyatta success in "serving the Kenyan people."²⁷¹ The mixed attitude towards the Kenya Cases at the ICC was also adopted by Russia, although in a different form.

Russia and China

In the recent UNSC vote on the deferral of the Kenya Cases for one year, Russia and its close allies voted in favor of postponing the cases. This may not be surprising since the Russian Federation is not a party to the Rome Statute and has no legal or diplomatic obligation to recognize the legitimacy of the organization. However, the leader of Russia, Vladimir Putin was not always supportive of the desires of the leaders of Kenya. The welcoming of Kenyatta in London may have been unorthodox, but the reception that he received on his first visit to Russia was even more disrespectful. In August 2013, President Kenyatta was flown into a remote area and welcomed with an intense luggage search courtesy of the KGB. Kenyatta had an appointment to meet with the Russian premier, but the Kremlin called to cancel claiming that Putin would not meet with Kenyatta, although the reason is not confirmed.²⁷² The human rights violations that have occurred in Russia and in the Crimea region are often attributed to Putin, yet he refused to meet with Kenyatta. This demonstrates the effort of Russia to remain passively

²⁷⁰ Joe Adama, "Baptism Of Fire: Uhuru Was Not Treated Fairly In The UK," *The Star*, May 11, 2013, <http://www.the-star.co.ke/news/article-119969/baptism-fire-uhuru-was-not-treated-fairly-uk>.

²⁷¹ Sahan Journal, "US, UK, France Congratulate Uhuru Kenyatta On Election Victory," *The Sahan Journal - Reuters*, March 30, 2013, <http://sahanjournal.com/uhuru-kenyatta-kenya/#.U1SgmFca28c>.

²⁷² The Kenyan Daily Post, "National Shame as Putin Snubs President Uhuru Kenyatta due to ICC Cases Just like Obama," August 18, 2013, <http://www.kenyan-post.com/2013/08/national-shame-as-putin-snubs-president.html>.

supportive of the Court. In fact, the Russian representative to the UN Security Council claimed that Russia voted in favor of the deferral because “the application of Article 16 would have increased the credibility of the international system of justice among African countries, showing its readiness to address ‘complicated and ambiguous’ situations.”²⁷³ However, the track record of human rights in Russia does not indicate the desire of Russia to join the ICC as a State Party.

China was the second P5 member to vote for a deferral of the Kenya Cases. The PRC has not ratified the Rome Statute. “Council President Liu Jieyi (China), speaking in his national capacity, said Africa’s request was a matter of interest to the entire continent. It was well grounded and based on the principles of the Charter.”²⁷⁴ The Chinese representative also commented that China would continue to support African nations.

USA

Although the U.S. is the most powerful country that is not a party to the Rome Statute, the U.S. has taken some actions that recognize the legitimacy of the Court. The U.S. representative abstained from voting claiming that the true avenue and venue for this decision lay with the Court and the Assembly of States Parties who would meet next week. “The Court and the Assembly were the proper venues for addressing the concerns of Kenya and the African Union, the United States ha[s] abstained rather than voting against the draft resolution.”²⁷⁵ While the United States has made no effort to further the ratification of the Rome Statute and it is unlikely to do so in the near future, the U.S. does provide a significant amount of financial support to the Court indirectly through the United Nations. The Obama Administration also sent

²⁷³ Security Council, *Security Council Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining*.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

a representative to the Assembly of States Parties in 2009.²⁷⁶ This support is a significant change from the initial attitude of the U.S. towards the ICC. According to Sikkink the U.S. resisted the creation of the ICC in its current form, since it opposed the *proprio motu* powers given to the Prosecutor. The U.S. under President G.W. Bush originally threatened smaller countries with trade penalties, or economic sanctions, if they ratified the Statute.²⁷⁷ The US also threatened to deny military and other assistance to countries unless they signed special agreements under Article 198 of the Statute. Now the U.S. is more supportive of the Court, but the trial of a democratically elected leader could make the U.S. more wary of joining in the jurisdiction of the ICC.

President Obama is half Kenyan and has been careful to distance himself from the Kenyatta Administration after their election due to the ICC indictments, similar to the U.K.'s strategy. On President Obama's tour of Africa in 2013, he did not make an effort to visit President Kenyatta. Many Kenyan's felt that this was a humiliating snub considering the importance of the country in the region and the President's personal ties to its people.²⁷⁸ However, President Obama did invite Kenyatta to participate in the US-Africa meeting in August of 2014 after his trial was extended indefinitely. Obama was also pictured shaking hands with

²⁷⁶ American Non-Governmental Organizations Coalition for the ICC, "AMICC: Assembly of States Parties," *AMICC - Columbia University*, May 31, 2009, <http://www.amicc.org/icc/asp>.

²⁷⁷ Sikkink, *The Justice Cascade*, 238. The Bush Administration led a campaign against the ICC which threatened economic sanctions against any country that signed and ratified the Rome Statute. Despite the economic power of the U.S., the Statute received widespread support and no drastic economic measures were taken by the U.S. against any particular country.

²⁷⁸ Gregory Warner, "To The Dismay Of Kenyans, President Obama Will Just Fly By," *NPR.org*, July 1, 2013, <http://www.npr.org/blogs/parallels/2013/06/26/195951813/to-the-dismay-of-kenyans-president-obama-will-just-fly-by>.

Kenyatta. A summit invitation was not extended to President Robert Mugabe of Zimbabwe, and several other countries that are lacking democracy or human rights protections.²⁷⁹

Security Council

The rest of the Security Council also voted on the deferral of the Kenya Cases and the Resolution nearly passed as seven of the 9 votes needed were received from Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo. None of these countries is known for having an outstanding human rights record. In fact, many of these countries are controlled by strong men who commit or have committed human rights violations in the past and therefore had no incentive to see democratically elected leaders prosecuted. Of those who voted in favor of deferring the trials, no country is a party to the Rome Statute. The eight countries who abstained were Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, and the United States. All of these countries have close ties with the United States or U.K. or France and were therefore likely to adopt the vacillating attitude that their powerful trade partners held. Of those who abstained, only the United States is not a party to the Rome Statute.

Other Leaders and Individuals

The success that Uhuru Kenyatta has had at avoiding and delaying his trial is significant. Most believe that Kenyatta and Ruto had a deliberate strategy to avoid prosecution. Susanne Mueller believes that numerous delaying tactics were used to prevent the trials from occurring before the 2013 Election, which the accused hoped to win in order to use that power to avoid prosecution.²⁸⁰ The delaying tactics used, according to Mueller, included undermining the Waki

²⁷⁹ Kevin Kelley, "Kenya President Lands Obama Africa Summit Invite," *Nation Media*, January 22, 2014, <http://www.africareview.com/News/Uhuru-Kenyatta-lands-Obama-Africa-summit-invite/-/979180/2155442/-/t6ato8z/-/index.html>.

²⁸⁰ Mueller, "Kenya and the International Criminal Court (ICC)," January 22, 2014, 3.

Commission in their effort to find the truth, mobilizing international support especially through the African Union, stalling the Court with legal challenges such as admissibility, the location of the trial, and witness intimidation. These actions slowed down the process of the Court and allowed for the accused to run for and win the Presidential Election. The power that came with the election was used to “gather concessions” from the Court and the States Parties and “undermine the trials” even more.²⁸¹

Whether all of these actions were deliberate or not, they certainly lay out a road map for how to avoid prosecution for future suspects, and highlighted the challenges of successfully prosecuting those in power. The case against Kenyatta fell apart when key witnesses dropped out of the Prosecution’s case. Simon Allison from the Daily Maverick reported that Kenyatta had shown others how to avoid prosecution. “Even if Kenyatta did not deliberately set out to create a climate of fear, one exists purely by virtue of his position.”²⁸² In a situation where one man controls the police, courts, and parts of the media, it is not a wise move to try and incriminate him.

The strategy of gaining power to avoid the ICC is an ominous one for human rights worldwide and for the justice cascade theory. Although there is little to no evidence that human rights violations increased, that conflict was prolonged, that democracy was destabilized, or that the rule of law was undermined by the Kenya Cases that does not mean that these conditions will not occur in the future. In fact, it seems more likely that all of these negative outcomes of prosecutions will come to pass, since Kenyatta has shown warlords and rebel leaders worldwide how to undermine the legitimacy of the ICC and avoid prosecution – increase one’s power. Yet,

²⁸¹ Ibid., 14.

²⁸² Simon Allison, “Analysis: Kenyatta Escapes the ICC, and Shows Others How It’s Done,” *The Daily Maverick*, February 6, 2014, http://www.dailymaverick.co.za/article/2014-02-06-analysis-kenyatta-escapes-the-icc-and-shows-others-how-its-done/#.UvPQ_LSPXRA.

this negative outlook on how international criminal law is perceived only applies to those with significant power, or the means to achieve it.

The trial of Joshua Arap Sang, a local radio broadcaster has also had an impact on how the ICC is viewed. In the 2013 Elections the shadow of Sang's trial had a restraining effect upon the media in Kenya and hate speech was subdued.²⁸³ It is evident that Sang's trial will have an impact upon future ICL cases because he is the first media representative to be prosecuted by the ICC. Although it is not certain that Sang will be found guilty of crimes against humanity by Trial Chamber V (a), the case may have a positive impact if it deters hate speech and media induced political violence.

African Union

The final challenge to the legitimacy of the Court was not brought by any one state, but a union of states that influenced the opinions of many others. The African Union (AU) has fought aggressively for the ICC to stop the Kenya Cases, or at least to halt the prosecutions against the President and Deputy President of Kenya. The African Union was the force behind the UN Security Council resolution seeking a deferral, which was nearly won. The AU has threatened to have all the African States pull out of the Rome Statute on numerous occasions. The rallying cry of the African States against the ICC is that the Court is not legitimate, but simply an extension of imperialism. Accusations of the ICC 'race hunting' and targeting only African countries and defendants are widespread and championed fiercely by Kenya and Ethiopia.²⁸⁴

The ICC does only have trials involving African countries at the current time, but it was not until the leaders of Kenya were targeted that the threats to withdraw from the ICC began. The

²⁸³ "A Kenyatta Is Back in Charge," *The Economist*, March 16, 2013, <http://www.economist.com/news/middle-east-and-africa/21573592-coalition-led-kikuyu-countrys-richest-and-biggest-ethnic-group-has>.

²⁸⁴ Al Jazeera, "African Leaders Accuse ICC of 'Race Hunt.'"

AU statement was a result of “previous tension” over the treatment of Rwandan and Sudanese leaders by international courts.²⁸⁵ The African Union’s anti-ICC stance has been building over time. Only African defendants are present at The Hague, yet the Kenya Cases pushed this resentment into open confrontation between the AU and the ICC.²⁸⁶

The African Union is comprised of all the African States except for Morocco. The ICC currently has 34 member states from Africa. If all 34 African nations were to withdraw from supporting the ICC, the number of States Parties would fall below one hundred and dangerously close to the minimum number of states required for its operation. The legitimacy of the Court would be significantly damaged, as the Court would then be prosecuting cases and spending millions of dollars in countries that no longer supported the ICC. The withdrawal of all the African Union states from the ICC has not occurred yet, but it has come close.

In October 2013, the AU convened a special summit in Addis Ababa, Ethiopia to discuss whether the organization would withdraw from the ICC.²⁸⁷ The countries did not vote to withdraw from the ICC at the summit, as several African countries were resistant to the idea and two-thirds would have had to agree for the withdrawal to occur.²⁸⁸ Yet, the summit did produce a unanimous resolution that no sitting African president should be tried in international courts, and a letter was written to the ICC Presidency in the hopes of ending or postponing the cases.²⁸⁹ The letter and resolution have no legal ramifications for the ICC, but they do undermine the

²⁸⁵ George Kegoro and L. Muthoni Wanyeki, “Justice in Kenya: Impacts of the African Union’s ICC Decision.”

²⁸⁶ Ibid.

²⁸⁷ Faith Karimi, “African Union Accuses ICC of Bias, Seeks Delay of Leaders’ Cases,” *CNN.com*, October 12, 2013, <http://www.cnn.com/2013/10/12/world/africa/ethiopia-au-icc-summit/>.

²⁸⁸ “MFA AU Handbook - Text v10b Interactive.pdf,” accessed May 14, 2014, <http://summits.au.int/en/sites/default/files/MFA%20AU%20Handbook%20-%20Text%20v10b%20interactive.pdf>. According to the bylaws of the African Union a two-thirds majority is required for a quorum in the Assembly and required to many any decisions.

²⁸⁹ James Bullock, “AU and the ICC – How They Voted,” *Think Africa Press*, October 15, 2013, <http://thinkafricapress.com/legal/au-and-icc-how-they-voted>.

legitimacy of the Court that is meant to be apolitical, unbiased, and serving all those who seek justice for heinous crimes. The Kenya Cases have had a significant legal impact on the ICC as well as challenged the Court's legitimacy, but if the AU does decide to withdraw what would the financial impact be?

Financial Condition Analysis

The ICC will continue even if the Kenya Cases fail and major powers continue to ignore or refuse to support the Court. However, the ICC's survival is also dependent upon its financial stability because it is funded by States Parties. If the African Union states did pull out due to the continued prosecutions in the Situation in Kenya, would the Court be financially stable? The most currently released financial statements for the ICC are those of 2012.²⁹⁰

The ICC appears liquid and solvent. Measures of liquidity test whether the ICC has enough cash and other liquid assets in order to survive in the short-term. The ICC has approximately 143 days of cash on hand, meaning that they could cover all of their liabilities for the next six months just with the cash they have. The current ratio measures how current assets compare to current liabilities. The ICC had a current ratio of 2.4 as of December 31st 2012, which indicates that the ICC has about twice the amount of assets they need to cover the cost of their liabilities. Their quick ration also looks promising as the ICC has a 1.99 when standard accounting aims for a ratio of at least 1. In fact, the ICC is very liquid in all aspects and could serve to improve their financial stability if they invested more of their cash, although this would increase their financial risk.

²⁹⁰ ICC - CPI, *Assembly of States Parties to the Rome Statute of the International Criminal Court - Eleventh Session*, Financial Statements (The Hague: ICC - CPI, November 22, 2012), http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/OR/ICC-ASP-11-20-VolIII-ENG.pdf.

The financial concept of solvency tests whether an organization is financially stable in the long-term. The ICC is solvent with a debt to assets ratio of 0.418. This ratio could indicate that an organization has more debt than assets if it approaches or exceeds 1; however, this is not the case. In addition, the Court's debt-equity ratio is also sound for 2012 at 0.718 where many organizations measure far above 1. As of December 31, 2012, the ICC was a stable financial institution; however, its funding comes from State Parties and the long term picture is therefore uncertain. According to the 2011 and 2012 collection data, all of the AU states together supply less than 1% of the funding for the budget of the ICC. The AU states in 2012 contributed around 824 million euros of their promised one billion euros across the 34 States Parties. South Africa and Nigeria provided the bulk of the funding from AU members – around 91%. This information was recorded before the start of the Ruto/Sang trial and before the election of Kenyatta and Ruto to the Presidency. The financial data for 2013 is not yet released. However, even if none of the African States provided contributions to the ICC in 2013 or 2014, the Court would remain financially stable. No institution can be certain about long term financial stability, but although the ICC is investing millions in building a new headquarters building, they have been able to successfully balance their debt with their assets.

Policy Recommendations for the ICC

Whether the Kenyatta Case is ever completed, the Kenya Cases will not be the end of the ICC. Countries outside of Africa, and many in Africa, still believe in protecting human rights and doing so through necessary prosecutions. However, the Kenya Cases have significantly challenged and changed the ICC and the Court must respond by embracing change, improving its legitimacy, and improving its modes of operation. The following highlight the most important

policy recommendations that the ICC and those that support it should seek to begin immediately. The ICC and the NGOs that support it have work to do.

- A full evaluation of the Outreach Programme is critical as the last known overview was in 2010. If the Court wishes to make the most of its limited funding for outreach, it is important to know exactly which activities produce the greatest knowledge and understanding. TV and radio programs seemed to reach the most people in Kenya; however, a full evaluation would produce concrete analysis on what the most successful activities are.
- The “Campaign to Ratify” should be continued by the CICC. The Coalition for the International Criminal Court is currently promoting a “Campaign to Ratify” to increase the number of States Parties.²⁹¹ Although the African Union has not yet voted to withdraw, they have created a media storm against the ICC that must be combatted with positive coverage. An increase in new members will not only increase the financial stability of the organization, but also its legitimacy.
- Effort should be put forward to continue investigations in countries around the world, but especially outside of Africa and such actions should be publicized. Now that the Katanga case has finished and those resources (monetary and physical) are freed up, more effort should be put into investigating cases. While the ICC claims to be an apolitical court, it is not.²⁹² The decision to investigate and pursue the Kenya Cases was in part a result of the political atmosphere surrounding the PEV and the Waki Commission. While there is no proof that the Court is in any way racist or controlled by imperial powers, the Court must acknowledge that it operates in the political sphere. In order to increase the legitimacy of the

²⁹¹ The Coalition for the International Criminal Court is an international non-profit organization that is dedicated to supporting the Court and expanding its reach around the world.

²⁹² Schabas, *Unimaginable Atrocities*, 144.

Court it is essential that cases outside of Africa that are already under investigation are fully pursued before taking on another case from the African continent – specifically taking on another case using *proprio motu* powers.²⁹³

- The ICC should increase its standards for hiring investigators, lawyers and others on the prosecutorial staff. Hiring only the best and properly training employees working for the Office of the Prosecutor will help to avoid problems in evidence collection, and other legal challenges.²⁹⁴ One way to increase interest in working for the ICC could be to create a paid internship program to attract the young talented lawyers and investigators that cannot currently apply to an unpaid internship.

These are only a few examples of rather inexpensive ways that the ICC could positively change the way that it operates and the way that it is perceived by the world. The challenges faced in the Kenya Cases can create opportunities and lead to positive steps for the ICC and for International Criminal Law.

Implications for International Criminal Law and Justice

The International Criminal Court will soon be the only international tribunal that upholds international criminal law. The ad hoc tribunals for Rwanda and Yugoslavia are finished or are winding down. The hybrid tribunals in Sierra Leone, East Timor, and Cambodia, as well as the

²⁹³ *Ibid.*

²⁹⁴ The Office of the Prosecutor has had significant challenges in prosecuting the Kenya Cases, however, this is a recurring problem even when the accused are not in power. The Lubanga trial, the first case at the ICC struggled with witnesses and evidence and the OTP relied heavily on evidence gathering from intermediaries which provided fodder for the defense and opponents and left those providing evidence without protection in many cases. Mallesons Stephen Jaques, "The OTP v Thomas Lubanga Dyila: The Challenges of Using Intermediaries in the International Criminal Court," *Humanitarian Law Perspectives* 2011, July 7, 2011, 14.

Special Tribunal for Lebanon are on their last cases, finished, or stalled indefinitely.²⁹⁵ The ICC is the only permanent court that deals with major human rights violations at an international level. Therefore, any changes or effects the Kenya Cases have had on the ICC also impact international criminal law and justice.

The Kenya Cases have had a major impact on ICL and challenged the concept of the “justice cascade.” The successful undermining of the Court has provided fodder for ICL opponents and a roadmap for how to avoid prosecution. The bylaws of the Court have been changed, those in power no longer need to be present at their trials, which has shown that they can be changed in the future in even more drastic ways simply by consent in the Assembly of States Parties. The future of crimes against humanity is uncertain. The gravity and policy requirements for a crime to qualify as a crime against humanity are still debated. The uncertainty that surrounds the definition of crimes against humanity also affects the implementation of crimes of aggression which will soon be under the jurisdiction of the ICC.²⁹⁶ The ICC has suffered from a lack of support from powerful nations and a lack of enforcement power which is reminiscent of the failures of the League of Nations. In addition to these downfalls, the Court has failed to adequately prosecute cases. The Kenya Cases confirm the fears of powerful states and actors about the dangers to national sovereignty, and national leaders, of an independent prosecutor.

²⁹⁵ The Special Tribunal for Lebanon is a special tribunal in which the defendants are being tried for terrorism, a crime which is not found in the other courts’ jurisdictions. The defendants are also being tried in absentia – without their presence at trial.

²⁹⁶ See Schabas, *Unimaginable Atrocities* for more information on the crime of aggression. In 2012, the resolution for creating the crime of aggression under the ICC’s jurisdiction was created by the Assembly of States Parties defining the crime as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations” (ICC Resolution 6, June 2010).

The justice cascade has been both advanced and hampered by the Kenya Cases. The Ruto/Sang trial is progressing and despite its legal challenges has proven that it is possible to try a powerful political figure. Yet, Kenyatta's case will likely be dismissed. This would be a blow to human rights advocates worldwide because it would only strengthen the position of other leaders who are accused of major crimes and human rights violations such as Omar Al-Bashir of Sudan. The Kenya Cases have also created a divide among countries as the AU joined together to fight against what they saw as imperialism, despite the fact that the development of human rights prosecutions, was originally created, designed to benefit, and championed by the "South."²⁹⁷

The implications of the Kenya Cases reach beyond the justice cascade and the ICC in their effect upon international justice. International justice concerns the duties of states and the rights of individuals under international human rights law and international criminal law. As the justice cascade theory discusses, international criminal law applies most often where transitional justice is occurring.²⁹⁸

There are four main mechanisms of transitional justice: trials, truth seeking, reparations, and justice reforms.²⁹⁹ All of these mechanisms were used or sought in The Situation in Kenya. The 2010 Constitution introduced many justice reforms, while victims have sought reparations through the ICC as is discussed in Chapter 1. As of now, trials are being held only at an

²⁹⁷ Kathryn Sikkink, the author of *The Justice Cascade*, explains in detail how the individuals who fought for the first human rights prosecutions were not first world leaders, but those from developing countries who had been victims themselves. "Norm cascades don't only begin in the wealthy North, but can also be initiated by innovative countries in the global South [like Argentina]." Sikkink, *The Justice Cascade*, 89–90.

²⁹⁸ Transitional justice occurs when a nation or society moves from one era to the next typically in relation to its style of government. For example, the justice cascade theory uses case studies from Argentina and Uruguay as evidence that the move from an authoritarian government to a democracy requires dealing with the past in some form of justice.

²⁹⁹ Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge: Cambridge University Press, 2012), 11–13, 27.

international level. Truth seeking is an objective of the ICC, but it is not the focus of that process of justice. Justice, according to the UN Security Council, is

“an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the wellbeing of society at large. It is a concept rooted in all national cultures and traditions, and while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.”³⁰⁰

The concept of justice allows for truth commissions to play an important part in providing justice for victims through truth seeking. Kenya did not pursue criminal trials, but a truth commission was established with the help of the international community.

The Kenyan Truth Commission and the ICC

Truth commissions were originally created out of a compromise between pursuing individual trials and inaction, which has given them a negative reputation in justice-seeking circles; however, commissions have developed significantly over the last 30 years and have been used in almost all situations where the ICC has intervened.³⁰¹ Truth commissions and international criminal trials have not always worked well together despite their similar goals.

The Rome Statute does not discuss how national truth commissions are to be coordinated with the Court. Truth commissions can require testimony to be confidential in order to ensure that those testifying are not at risk of self-incrimination and have little reason to lie. If the ICC were to use the testimony acquired by truth commissions as evidence, the status of the

³⁰⁰ UN Security Council, *Report of the Secretary-General : The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (United Nations, August 23, 2004), 4, para 7, <http://www.unrol.org/files/2004%20report.pdf>.

³⁰¹ The definition of a truth commission is not agreed upon as each country sets up its own variation. According to Freeman truth commissions are: “an ad hoc autonomous and victim-centered commission of inquiry set up in and authorized by a State for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the State during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.” Freeman, *Truth Commissions and Procedural Fairness*, 12-18.

commission could be compromised.³⁰² There has been little interaction and cooperation between the two bodies thus far; however, the Prosecutor has the legal power to require the truth commission to supply the Court with testimony and evidence the commission has collected.

The Situation in Kenya is the first time that the ICC assumed jurisdiction when the crimes were already being investigated by a truth commission. The OTP and the ICC have made numerous statements indicating that various forms of amnesty and truth commissions will not be a substitute for prosecutions, but rather a complement to them.³⁰³ In the Situation in Kenya, the OTP conducted their own investigations and relied more on NGOs than on the Truth Justice and Reconciliation Commission of Kenya. This may have been related to the fact that the Commission was widely criticized.³⁰⁴

The Kenya Truth Justice and Reconciliation Commission (TJRC) was established by an act of Parliament in 2008 in the wake of the PEV. The Commission's mandate required it to investigate gross human rights violations between 1963 and 2008 – roughly independence from Britain to the end of the PEV in 2008. The Commission interviewed and recorded testimony from all parts of the country over four years to create a two thousand page report detailing the violations that have occurred in Kenya and recommending courses for redress and future prevention.³⁰⁵ The TJRC was given the power to grant amnesties as long as the Commission believed the perpetrator had fully disclosed all the facts.

³⁰² The most well-known truth commissions have been South Africa's Commission which was not accompanied by prosecutions and that of Sierra Leone, which was complemented by a hybrid tribunal which prosecuted cases in Sierra Leone and in The Hague. Both commissions were given amnesty power and a rule of confidentiality.

³⁰³ Bisset, *Truth Commissions and Criminal Courts*, 112.

³⁰⁴ Political resistance and financial difficulties plagued the TJRC even after Commissioners accused of human rights violations resigned. Stephen Makabila, "Standard Digital News - Kenya : TJRC Pledges to Push on despite Criticism," February 8, 2011, <http://www.standardmedia.co.ke/?id=2000028523&cid=289&articleID=2000028523>.

³⁰⁵ TJRC Kenya, *Truth Justice and Reconciliation Commission Final Report*, May 26, 2013.

The TJRC recorded the same story of the PEV that the ICC investigated and came out with a similar outcome. The Truth Commission found that political leaders had organized the violence after the 2007-2008 elections and both Kenyatta and Ruto were named. The TJRC also faced significant legitimacy challenges similar to the ICC. The Commissioners were a combination of men and women, Kenyan nationals and foreigners. Many of the commissioners resigned, threatened resignation, or were pressured to step down. The controversy stemmed from the alleged involvement of Chairman Bethuel Kiplagat in human rights violations that occurred under President Moi's reign which resulted in the resignation of some commissioners and threats of resignation from others.³⁰⁶

The TJRC also faced challenges in terms of time limits that further undermined their legitimacy. They were given 2 years and six months to complete their work, but the full report was not published until after four years from the beginning of their efforts. There were also widespread accusations about interference from the Kenyatta Administration as the final report was being released, especially with the land section. The international commissioners from America, Zambia, and Ethiopia all published dissenting opinions on the land chapter that differed from the report that was given to and published by the President.³⁰⁷ American Commissioner Ronald Slye announced that he had lost hope of the Commission's recommendations being implemented due to the inaction of the government six months after the

³⁰⁶ Kiplagat was accused of land grabbing under President Moi's reign as well as involvement or knowledge of the Wagalla Massacre. The Wagalla Massacre occurred in 1984 in which Kenyan Armed Forces killed ethnic Somalias. The TJRC was tasked with investigating the massacre. Due to Kiplagat's appointment as Chairman, Betty Murungi was the first to resign and then Ronald Slye submitted his resignation, but after Kiplagat resigned, Slye returned. "Standard Digital News - Kenya : TJRC: Mutula Disowns Commissioner Slye," December 10, 2010, <http://www.standardmedia.co.ke/?id=2000024361&cid=37&articleID=2000024361>.

³⁰⁷ Nzau Musau, "Commissioner Loses Hope over Final TJRC Report | The Star," January 14, 2014, <http://www.the-star.co.ke/news/article-150534/commissioner-loses-hope-over-final-tjrc-report>.

publishing of the report: “My sense is that the government seems to have no interest in taking it seriously - barely discussing, much less debating or implementing, our recommendations.”³⁰⁸

Despite all of the legitimacy challenges, the TJRC did publish a report documenting the human rights violations that Kenyans have faced for over forty years and was able to gather testimony and reach all parts of the country. In contrast, the ICC has failed to reach remote areas and is trying only 3 suspects on another continent. The question of which form of justice better serves the peace and healing processes remains. The impact of the TJRC of Kenya on the International Criminal Court has been minimal. The fact that there has been little coordination between the two bodies confirms what the Rome Statute declares. The ICC will not recognize a truth commission as a substitute for criminal prosecutions. The dominance of trials as a mechanism for justice places even more importance on the ICC and on the changes and challenges that the Kenya Cases have created for the only international permanent court.

Conclusion

The Kenya Cases have had a significant impact on the International Criminal Court thus far. The numerous legal and legitimacy challenges have changed the way that the Court operates and deeply affected the way that justice is perceived worldwide. The animosity of the African Union towards the Court has certainly increased since the election of Kenyatta and Ruto to the Presidency. The ICC will survive these challenges, but not without substantial changes to its perceived legal capacity and public image. The long-term survival of the ICC is dependent upon its ability to adapt to these changes. As the only permanent international court the ICC has significant power in determining the future of global human rights protections and international justice. The justice cascade theory predicts that a new global norm upholding human rights has formed to begin to overcome the power of individual leaders. The Kenya Cases have shown that

³⁰⁸ Ibid.

while this may still be possible, it is highly unlikely that those in power will be brought to justice under the current system. Even the independent prosecutor has chosen to use *proprio motu* powers to avoid political conflict with the *most* powerful States. British soldiers may not be on trial, but the prosecution of the powerful in Kenya has created unanticipated political conflict for the ICC.

Possible Outcomes for Kenya and the ICC

The outcome of the Kenya Cases before the ICC is still uncertain. Yet, there are some probable scenarios. The Kenyatta trial is likely to be dismissed and the ICC won't collapse, but will be weakened in the eyes of many. The failure to prosecute Kenyatta could lead to increased ethnic violence in the future in Kenya, especially if Ruto and Sang remain on trial and are convicted in The Hague. It could certainly increase violence elsewhere as those accused struggle for power to avoid prosecution. If Ruto is found guilty, Kenyatta may drop him from the re-election ticket, or may refuse to allow Ruto to serve his sentence keeping him in Kenya. The culture of impunity will continue in Kenya, but there will always be a known threat of prosecution lurking in the minds of politicians – whether Kenya is a State Party or not.

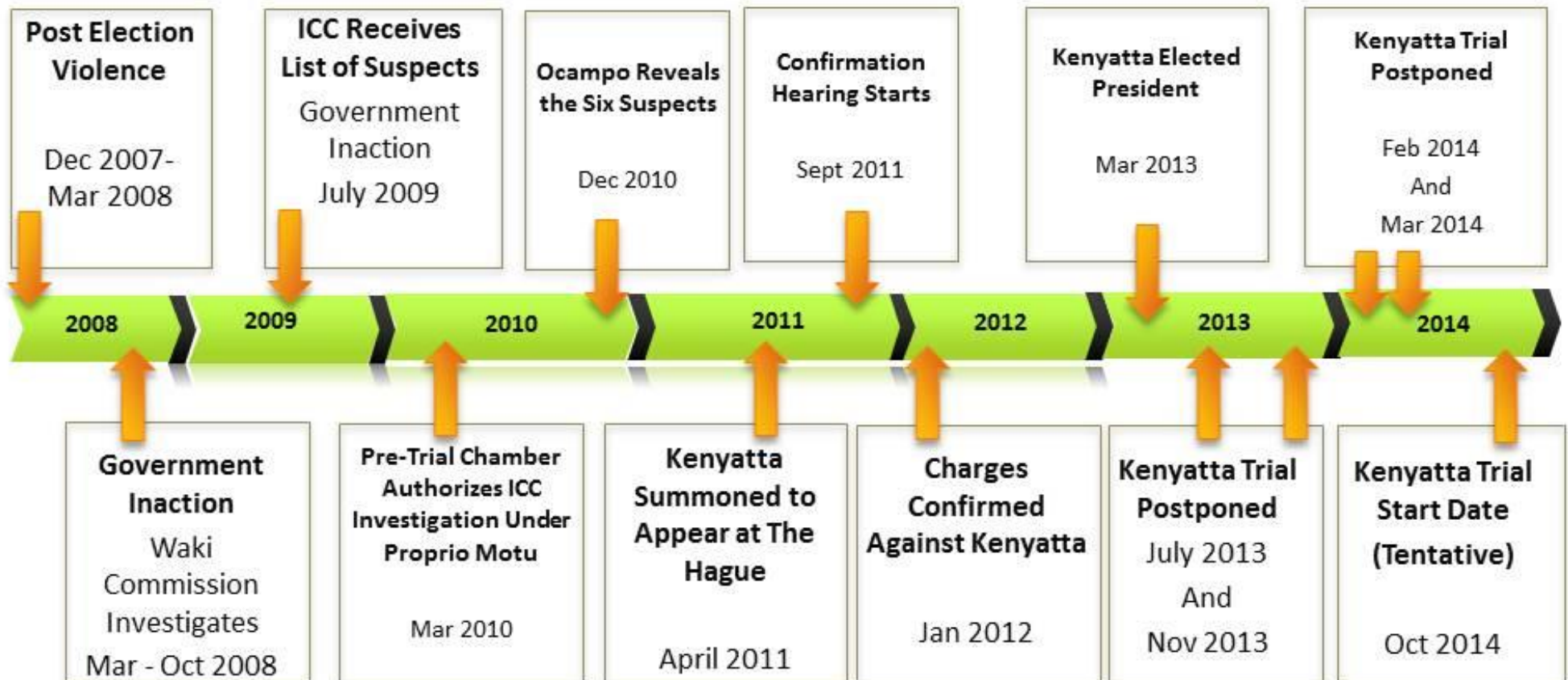
What does this mean for the justice cascade, the spread of new international norms about human rights? It could be a major setback in the latest chapter of ICL for prosecutions that do not occur during transition periods. However, amidst all the challenges of the Kenya Cases, the ICC has continued to work on its other cases and as recently as March 2014, Germain Katanga, a Congolese rebel leader was found guilty.³⁰⁹ The ICC can still be a positive force for upholding human rights worldwide, despite the difficulties and changes the Kenya Cases have brought to the Court and the country of Kenya.

³⁰⁹ "Congo Warlord Sentenced to 12 Years," *BBC News*, May 23, 2014, <http://www.bbc.com/news/world-africa-27531534>.

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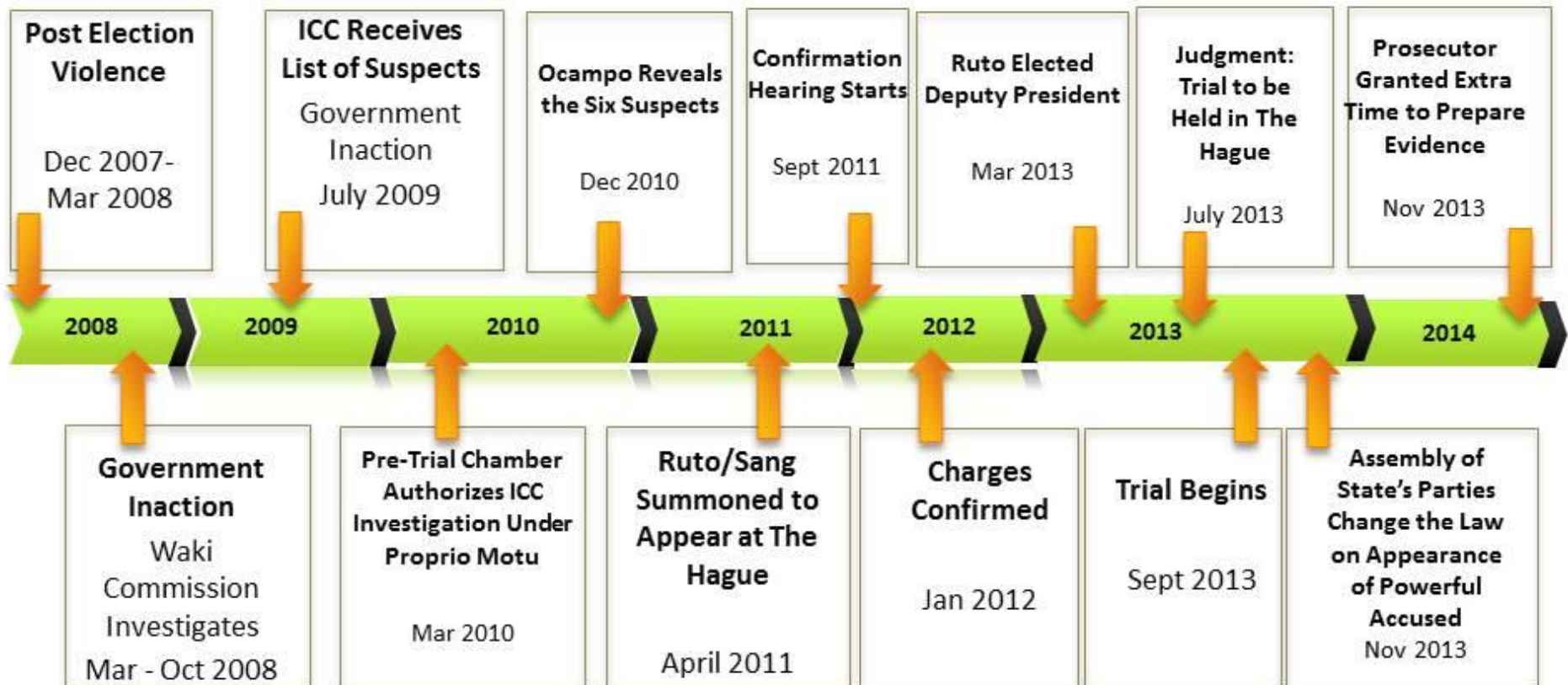
Witnesses and Victims Withdraw



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