

**The International Criminal Court and Conflict Prevention:
Reflections on the Impact of the Court on Deterrence in Kenya**

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Abstract

The 2007 general elections were held against the backdrop of intense political wrangling between the main political parties in Kenya. The campaigns before the elections were extensive and relatively peaceful, but trouble started when the results were announced. The violence that followed the elections resulted in the death of over 3,000 persons. The International Criminal Court (ICC) commenced investigations on the Kenya violence in 2009. In 2013, Kenya held another set of elections, which were relatively peaceful. This article examines how the ICC's involvement in Kenya may have deterred people from committing international crimes during the 2013 elections. Relying on qualitative interviews conducted between 2013 and 2015, observations of the ICC involvement in Kenya, and analysis of relevant literature, it argues that the ICC intervention in Kenya, despite its numerous problems and challenges, contributed to conflict prevention in the country.

Introduction

The Rome Statute established the International Criminal Court (ICC) to prosecute *people* who commit international crimes. One of the justifications of international justice mechanisms such as the ICC is that court intervention in conflict or post-conflict situations can facilitate the peace process through deterrence, incapacitation of the main conflicting parties, promotion of reconciliation, promotion of victims' rights, and strengthening of the rule of law (Turano, 2011, 1069). The main argument in support of the positive impact of the ICC on future gross human right abusers is that, because of the permanent status of the ICC, the possibility of ICC intervention is one factor that future human rights abusers now take into consideration when making decisions. As a permanent international court, the ICC is seen as a constant reminder to all would-be violators of international norms that their conduct can be punished (Gruno, 2012, 2; Roht-Arriaza, 2006, 26). However, the argument that international criminal justice deters crimes has also been described as no more than a plausible assumption (Rosenberg, 2012, 4) because deterrence is a complex phenomenon and its linkages with international justice are questioned since they intertwine with other variables.

In view of these uncertainties, this article aims to analyze the impact of the ICC intervention in Kenya on deterrence. Kenya presents an excellent case study to examine the nexus between international justice and deterrence because the ICC involvement in the country generated enormous local and international attention. The article examines whether the ICC's involvement in Kenya after the 2007-2008 post-election violence (PEV) contributed to the relatively peaceful 2013 elections by deterring people from committing electoral violence. The central issue examined is whether the investigation of the Kenya situation and the prosecution of high profile individuals by the ICC deterred people from committing atrocities in Kenya before, during, and after the 2013 general elections. Relying on the report of field research in Kenya and analysis of relevant literature, it argues that the ICC contributed to the relatively peaceful 2013 general elections by deterring political and business leaders from instigating and financing violence.

Rationale for International Accountability

The prosecution of war crimes dates back to ancient Greece, or even before then. These trials were restricted to the vanquished or to isolated cases of rogue soldiers in the victor's army (Schabas, 2007, 1). The trial of Peter von Hagenbach in 1474 for crimes committed during the occupation of Breisach was probably the first genuine international criminal trial (Cryer, 2005, 9-15; Schabas, 2007, 1). Contemporary international criminal prosecution has its foundations in the 1648 Peace of Westphalia Treaties and the development of international humanitarian law in the mid-nineteenth century. The

establishment of the ICC in 1998 represents the ultimate example of the evolution of international criminal justice in the modern era (Kowalski, 2011, 1).

The 1998 Rome Statute established the ICC. A Diplomatic Conference was held in Rome, Italy in July 1998 to discuss the draft ICC Statute that was prepared by the International Law Commission. On 17 July 1998, the international community reached an historic milestone when 120 states adopted the Rome Statute, the legal basis for establishing the ICC (Williams 2012, 45). The ICC is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. The establishment of the ICC came more than fifty years after the adoption of the Universal Declaration of Human Rights on 10 December 1948 and the 9 December 1948 resolution of the United Nations General Assembly, mandating the International Law Commission to commence work on developing a draft statute of an International Criminal Court. After many years of work, marked by stoppages due to the Cold War, the final version of the draft statute prepared by the International Law Commission was adopted in 1998 (Schabas, 2007, ix). The main objective of the Rome Statute is to establish a permanent international court, complementary to national courts that will prosecute those who commit international crimes (Nouwen, 2013, 39).

The ICC deals primarily with *people, not states*, who commit crimes against humanity, genocide, and war crimes in the context of the Rome Statute. One of the justifications of an international justice mechanism such as the ICC is that such courts, by intervening in conflict or post-conflict situations, could facilitate the peace process through deterrence, which leads to conflict prevention. Prosecution of those who committed grave atrocities could also assist in breaking the cycle of impunity common in some post-conflict countries. According to Mendez and Kelley (2015, 481), breaking the cycle of impunity is important to peace-making because “it is necessary to prevent the repetition of violence and to dismantle the structures that enable violence in the first place.” Zyberi (2015, 366) also argues that international courts, by emphasising individual criminal accountability for mass atrocities, “play a retributive as well as a preventive and deterrent role, which is potentially important for purposes of maintaining or restoring peace”. Garcia-Godos (2015, 322) also thinks accountability “plays an important role in the pursuit of long-term peace because it contributes to rebuilding trust in post-conflict societies.”

There is a counter argument, however, that the intervention of international justice mechanisms in a conflict or post-conflict country may in fact exacerbate the conflict and lead to its prolongation (Ku and Nzalibe, 2006, 833). For instance, Drumbl (2007, 10) argues that it has not been established that international justice contributes to peace. Similarly, with respect to the impact of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on social peace in the former Yugoslavia, Meernik (2005, 287) argues that there is little evidence to support the notion that “the ICTY had a positive impact on social peace in Bosnia” and that the effect “was the opposite of what was intended.” He submits that “more often than not, ethnic tension responded with increased hostility towards one another after an arrest or judgement.” Clark (2013, 541), however, opines that the negative impacts of the ICC on peace are normally mentioned with respect to northern Uganda, to the extent that the issuance of arrest warrants to five leaders of the Lord’s Resistance Army (LRA), and the refusal of the Office of the Prosecutor (OTP) to withdraw the arrest warrants contributed to the refusal of LRA to sign the peace agreement, and therefore had a negative impact on peace.

These contentions led to the peace and justice debate, which centers on whether or not it is wise to prosecute those who committed atrocities in a conflict situation during the transition period and particularly with the use of criminal prosecution as the sole, or one of, the transitional justice models in a post-conflict country. The debate boils down to three views: those who argue that the justice mechanism should be part of the entire transitional justice process; those who argue that justice should be left out of transitional processes if it will complicate the peace process; and finally, those who argue that there is no conflict between the two, rather that both should be properly integrated. The determination of the peace-justice issue also affects the types of transitional justice mechanisms that could be deployed and the timing of the deployment of the mechanisms. The choice of the type of transitional justice mechanisms to be deployed in post-conflict countries could be problematic as deployment of ill-fitted mechanisms could negatively impact the peace process. Also, the engagement of appropriate types of mechanisms could contribute to promoting the peace process. Thus, post-conflict countries have an onerous task of locating appropriate transitional justice mechanisms that

will not disrupt the fragile peace, but rather contribute towards the process of establishing sustainable peace. The suitability of the ICC as a mechanism for transitional justice mechanism is uncertain because the impact of prosecution as a sole mechanism of transitional justice is suspect (Malu, 2015, 2). There are strong arguments for and against prosecution as a model for transitional justice. Some pro-prosecution arguments are: (a) justice is the foundation for peace and reconciliation; (b) prosecution discharges a country from the pains of collective guilt and pins it on individuals, which is essential for restoration; (c) impunity sets bad examples for the future and undermines the rule of law; and (d) prosecution shares some of the main features of a truth commission, as a mechanism for establishing historical records of the conflict. The major anti-prosecution arguments are: (a) a rigorous criminal prosecution could derail or prolong the entire transition program; (b) the threat of prosecution may stop a dictator or warlord from agreeing to go into exile peacefully; and (c) prosecution could lead to justice but not reconciliation, which is central for successful conflict transformation.

It has been argued that prosecution by a national or international court of those who committed crimes during an armed conflict could promote peace because accountability is seen as essential in cases of massive violations of human rights (Akhavan, 2001, 1). Accountability is also necessary, through deterrence for conflict prevention, and essential for reconciliation through justice, and the establishment of the historical record of the violence (Roht-Arriaza, 2006, 6). Accountability and removal of perpetrators of massive human rights atrocities from positions of power is also important for conflict prevention (Roht-Arriaza 2006, 6). The Trial Chamber of the ICTY in its sentencing decision in *The Prosecutor v. Biljana Plavšić* (IT-00-39 & 40/-S) held, among other things, “that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes”. According to the court, “this, together with acceptance of responsibility for the committed wrongs, will promote reconciliation.”

However, the effectiveness of prosecution as a means of conflict prevention is not well established since determining the law’s effectiveness in conflict prevention is not certain (Amman, 2003, 175; Wippman, 1999, 475; Nouwen, 2012, 186). There are controversies and uncertainties as to how international law impacts on conflicts, how it can be used to transform conflicts and how it can contribute to peace-making (Lincoln, 2011, 5; Meijers and Glasius 2013, 3).

Notwithstanding its numerous problems and weak start, the ICC represents a new world order that fights impunity (du Max, 2010, 5). The establishment of the ICC, after many years of hard negotiations is deemed a success (Rigney, 2014, 6). For the first time in human history, a permanent international institution, with a wide mandate to sanction those who commit the most heinous of crimes, has been established. Thus, the mere existence of the court and its Statute, which articulates complex but innovative procedures, strengthens international criminal law and also represents hope for the victims of international crimes. Through its innovative concepts and practices, “such as complementarity, victims’ participation or ‘the interest of justice’, the ICC actively shapes justice policy, which could be one of its visible traces” (de Vos, Kendall and Carten, 2015, 19).

Applying Deterrence Theory to Conflicts and Post-Conflict Situation

The deterrence theory of punishment is linked to the writings of classical philosophers such as Thomas Hobbes (1588-1678), Cesare Beccaria (1738-1794), and Jeremy Bentham (1748-1832). These classical deterrence philosophers wrote against the legal policies that had dominated European thought for centuries and against the spiritual explanation of crime upon which they were founded. They advocated for a social contract between the government and citizens to create a civil society based on the rule of law, and a criminal justice system founded on deterrence (Onwudiwe, Odo and Oyeozili 2010, 234).

The principal argument of the deterrence theory of punishment is that people are punished to deter them and others from violating the social contract. It is based on the assumption that people choose to obey or disobey the law after carefully calculating the costs and benefits of their actions. There are two main types of deterrence: general and specific. General deterrence aims at crime prevention in the general public, that is, that punishment of crimes will serve as an example for others who are not yet offenders. The proposition is that, by having a criminal justice regime that can impose sanctions, people will be deterred from committing crime (Hopkins-Burke, 2009, 48). According to

Wood (2012, 633), the goal of general deterrence is for “criminal sanctions to tap into social conditions and social norms to deter criminal activities”. In conflict situations, general deterrence may take place when the threats of criminal prosecution deter a person or group of persons in a particular society from committing crimes or deter others generally from committing crimes based on the awareness of the certainty or likelihood of punishment. General deterrence in the international criminal justice context is achieved through specific legal interventions by an international criminal justice institution, such as by: (1) opening investigations, (2) initiating prosecution, (3) issuing public statements/warnings directed at the main conflicting parties, and (4) issuing arrest warrants. Specific deterrence is tailored to deter only the specific individual from that crime, and from committing other crimes in the future. It is thought that the sanctioned offender will be deterred from committing the same or other offences because it is certain he will be caught and punished. This is based on the assumption that the severity of punishment prevents offenders from committing the same offence again (Hopkins-Burke, 2009, 47; Wood, 2012, 633). A rebel leader, for instance, may be deterred from a criminal action such as enlisting child soldiers after calculating the cost, which could be a likelihood of prosecution by the ICC, and benefits, which could be battlefield gains, of committing the crime, and finding that the cost outweighs the benefits.

The main principles of deterrence theory are severity, certainty, and swiftness (Wright, 2010, 2). The severity of punishment principle portends that the more severe the punishment, the more likely it is for a rational, would-be offender to be deterred from committing the crime. Thus, to prevent crime, the criminal justice system must prescribe severe penalties to deter people from committing crimes, and such sanctions must be deemed necessary, as excessive punishments are unjust. On the other hand, weak punishments will not deter people from committing crimes. The certainty argument posits that punishment will be more effective and has more impact on deterrence if it is certain that punishment will be imposed once an offence is committed. Certainty of sanction is critiqued on the grounds that it is based on the assumption that there is absolute certainty of arrest while, in practice most crimes do not result in arrest (Wright, 2010, 2). The ICC may have met the certainty principle to the extent that it is a permanent court with structures to investigate and prosecute crimes within its jurisdiction. Deterrence theorists also contend that for punishment to deter, it must be swift and speedily applied. The closer the punishment is to the time of committing the offence, the more likely it will deter (Wright, 2010, 2).

In sum, deterrence theorists posit that if punishment is swift, certain, and severe, a rational person will weigh the cost effectiveness of engaging in a crime and will be deterred if the loss is greater than the gain. The ICC may have met the requirements of the principles of swiftness in Libya, Kenya, Sudan, Côte d’Ivoire, and Mali, but it is doubtful if it is so in some other conflicts, such as in the Democratic Republic of Congo, Northern Uganda, and Central Africa Republic. Later deterrence studies suggest that swiftness and likelihood of punishments are more likely to deter than severity of punishment (Hyeran, and Simmon, 201, 4). Major criminological research in different parts of the world seems to have reached a consensus that enhancing the certainty of punishment produces a stronger deterrent effect than increasing the severity of punishment (Hyeran, and Simmons, 2014, 4).

Deterrence theory has remained an important intellectual foundation for domestic and international criminal justice systems. The Western criminal penal system is essentially based on the idea that sanctions deter criminals, with advocates clamouring for the establishment of more prisons, imposition of harsher sanctions, and a more effective justice system that will ensure certainty of conviction and sentencing, with the hope that these policies will reduce recidivism (Hyeran, and Simmons, 2014, 4). Despite its merits and wide acceptance, debates on its impact have continued to engage criminologists. The main area of doubt is in its reliance on the rationality of would-be offenders. It is also not always the case that people will consider the consequences of their actions before committing a crime (Wright, 2010, 2).

The International Criminal Court and Deterrence

The preamble to the Rome Statute of the ICC provides, *inter alia*, that the court is established to end impunity for the perpetrators of international crimes and to contribute to the prevention of international crimes. This provision has been interpreted as meaning that deterrence, as a fundamental principle of international criminal justice, is one of the aims of the ICC (Mendes, 2010, 143). The

chief prosecutor of the ICC restated this during a visit to Guinea in 2015 when she stated that, “it is absolutely crucial to prevent further crimes from being committed, no matter the situation or circumstance” (ICC Press Statement, 2015, 1). Apart from general and specific categorization discussed earlier in this article, deterrence in the ICC context is also discussed in terms of immediate deterrence and long-time deterrence. Immediate deterrence refers to cases when the threat of criminal prosecution will deter a person or group of persons in a particular society from committing a future crime. Long-term deterrence is used to describe the notion that criminal punishment will deter people generally from committing crimes through the awareness of the certainty or likelihood of punishment (Rosenberg, 2012, 2).

Immediate deterrence in the international criminal justice context is achieved through specific legal intervention by an international criminal justice institution, such as issuing public statements and warnings directed at the main conflict parties, opening investigations in the midst of ongoing conflicts, and issuing indictments and arrest warrants. Long-term deterrence is sub-divided into complementarity, which may encourage states to prosecute, and norm-proliferation, which is the creation of a normative situation where extraordinary crimes are no longer accepted (Alkavan, 2001, 10; Rosenberg, 2012, 4). In the expanding field of conflict prevention and international criminal justice, the interrelationship of varying preventive mechanisms, together with greater certainty of prosecution, and reinforced by the establishment of the ICC, give hope that international criminal justice could play a more deterrent function (Alkavan, 2001, 10; Rosenberg, 4).

The International Criminal Court and Deterrence in Kenya

The nexus between the ICC’s intervention in Kenya and deterrence is examined here. Specifically, this section examines the impact of the ICC involvement on the relatively peaceful election in Kenya in 2013. The main issue discussed is whether the investigation of the Kenya situation, the initial laying of charges on six persons by the ICC, and the subsequent trial of four persons contributed to the relatively peaceful election in 2013 by deterring people from committing atrocities.

A History of Election Violence and Impunity

Kenya has a history of election-related violence (Commission of Inquiry into the Post-election Violence (CIPEV) Report, 2008, 7; Human Rights Watch, 2013, 13). Almost all elections held in Kenya since 1991, when multi-party democracy was introduced, have been marred by various types of electoral violence or violence associated with party politics and conduct of elections (CIPEV, 2008, 7; Human Rights Watch, 2013, 13; Kenyan Human Rights Commission, 2008, 3). However, the 2007-2008 PEV was unprecedented because it was by far the most deadly, destructive, and widespread violence ever experienced in Kenya. Also, “unlike previous cycles of election related violence, much of it followed, rather than preceded elections” (CIPEV, 2008, 7). The Kenya National Commission on Human Rights’ account of election violence in Kenya states that election-related violence was recorded in the Rift Valley province in early 1990. The violence targeted opposition supporters from the Luo, Kikuyu, Luhya, and Kisii communities, with an estimated 1,500 deaths and 300,000 internally displaced persons by the time it ended in 1994. The 1997 elections also witnessed election violence, mostly in the Coast province. The main targets were members of ethnic groups perceived to be hostile to Arap Moi and his Kenya African National Union (KANU). Pre-election violence was also recorded in 2006 and early 2007 in several regions, resulting in over 600 deaths (Kenyan Human Rights Commission, 2008, 3).

Kenya also has a reputation for impunity for perpetrators of election violence. No recognizable efforts have been made by the government to try those who finance, mastermind, and participate in the violence. Thus, the culture of impunity has facilitated the recurrence of violence in subsequent elections (International Crises Group, 2012, 2; Human Rights Watch, 2013, 3). Kenya’s past efforts at combating impunity have been through isolated and uncoordinated attempts to prosecute perpetrators and the establishment of Commissions of Inquiries to determine the causes of the violence. However, these Commissions were described as ineffective, and ploys by those in power to “deflect public pressure” as some were disbanded even before they commenced work. Also, the recommendations of others were never implemented (International Crises Group, 2012, 2). What

has become evident through the years is a manifest lack of political will at high levels to genuinely address election violence, as well as fears of prosecuting powerful people that perpetrated or financed election violence. The result has been a culture of impunity and the withering of the rule of law (Jalloh, 2009, 4). The Commission of Inquiry into the 2007-2008 PEV concluded that “elements of systemic and institutional deficiencies, corruption, [and] entrenched negative socio-political culture have... caused and promoted impunity” in Kenya (CIPEV, 2008, 8). The “culture of impunity” encouraged some politicians to use ethnic violence as a political weapon against opponents, certain that their crimes would go unpunished (Dunaiski, 2014, 7).

The 2007 General Elections

The 2007 elections in Kenya were held on 27 December against the backdrop of ethnic tension, intense bitterness, and suspicion between the Orange Democratic Party (ODM) and the Party of National Unity (PNU), the two main parties that contested the elections. Voting was relatively peaceful and uneventful across the country. Initial results gave the ODM the lead but Mwai Kibaki of the PNU was later declared the winner of the presidential election. The results of the elections were disputed by the ODM, which alleged that there were serious discrepancies in the number of votes already counted (International Crises Group, 2012, 2). The ODM rejected the results of the elections and called for a national protest. The violence that followed these events lasted about seven weeks and caused the death of 1,333 persons and 3,561 injuries. There were about 117,216 instances of property destruction (CIPEV, 2008, 7) and about 350,000 displaced persons (Kenya National Commission on Human Rights 2008, 7). Criminal offences that may have been committed under Kenyan and international law include “murder, manslaughter, attempted murder, grievous bodily harm, robbery, arson, malicious damage to property, theft, incitement to violence, illegal loathing, illegal possession of firearms, and sexual crimes” (Kenya National Commission on Human Rights, 2008, 9). The African Union established a Panel of Eminent African Personalities, headed by Kofi Annan, to mediate the conflict. After days of mediation, the panel agreed with the main parties in the violence on the following agenda: (1) immediate action to stop the violence and restore fundamental human rights and liberties, (2) immediate measures to address the humanitarian crisis and promote reconciliation, healing, and restoration, (3) measures to overcome the current political crisis, and (4) long-term issues and solutions. Some of the results of the mediation were the establishment of a grand coalition government of national unity that included the PNU and ODM, the signing of the National Accord on 28 February 2008, and an agreement to establish a Commission of Inquiry into the Post-election Violence (CIPEV) to deal with consequences of the violence and prevent recurrence. Pursuant to the national agreement, the constitution was amended, creating the positions of prime minister and two deputy prime ministers. Under the arrangement, the president and vice president elect retained their positions while ODM leader, Raila Odinga, was appointed the prime minister. The positions of deputy prime ministers went to Uhuru Kenyatta of the PNU and Musalia Mudavadi of the ODM.

The CIPEV, which was composed of national and international personalities, was established on 3 June 2008 to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters. Among other things, the CIPEV recommended the creation of a special tribunal with the mandate to prosecute crimes committed as a result of the PEV. The Special Tribunal for Kenya (STK) was meant to prosecute those who bore the greatest responsibilities for the violence, particularly crimes against humanity, and to apply Kenyan laws and international criminal law. The CIPEV further recommended that, if either an agreement for the establishment of the SPK was not signed, or the Statute for the SPK not enacted, or the SPK fails to commence functioning, or if its purposes are subverted, a list of suspects should be forwarded to the prosecutor of the ICC (CIPEV, 2009, 473). Following the recommendation of CIPEV on prosecuting those who were allegedly responsible for the PEV and the failure of Kenya to establish a STK, the sealed envelope containing the names of the suspects was handed over to the chief prosecutor of the ICC by the lead mediator on 9 July, 2009 (Alai and Mue, 2010, 2). The ICC chief prosecutor, after analysing the information contained in the report of the CIPEV, commenced a preliminary examination of the situation in Kenya in November 2009 (Lynch and Zgonec-Roze, 2013, 6). On 31 March 2010, Pre-Trial Chamber

11, upon the chief prosecutor's application and pursuant to Article 15 of the Rome Statute, authorized the commencement of an investigation into the situation in Kenya. This was in relation to crimes against humanity committed within the jurisdiction of the court between 1 June 2005 and 26 November 2009. The court held, among other things, that cases from Kenya would be admissible before the ICC because Kenya was not investigating or prosecuting those who allegedly bore the greatest responsibilities for crimes against humanity committed during the PEV (Decision Pre-trial Chamber II of the ICC, pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya).

In December 2010, the chief prosecutor identified six persons as being responsible for committing crimes against humanity during the PEV. The charges were grouped into two cases. In January 2012, Pre-Trial Chamber II confirmed the charges against four of the original six persons. The defendants appealed against the decisions of Pre-trial Chamber II on the grounds that the alleged crimes did not qualify as crimes against humanity as defined by the Rome Statute. On 24 May 2012, the Appeals Chamber unanimously rejected the appeal and affirmed the decisions of Pre-trial Chamber II (Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, No. ICC-01/09-01/11 OA3 OA4). Also on 31 March 2011, Kenya challenged the admissibility of the cases before the ICC, arguing that the adoption of the new constitution and other legal reforms had opened the way for Kenya to prosecute those responsible for the PEV. The application, which was supported by some accused persons and opposed by the OTP and victims, was unanimously rejected by the Pre-trial Chamber II on 30 May 2011 on the grounds that the state had not commenced investigation and prosecution in any of the cases before the ICC (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, No.: ICC-01/09-01/11). On appeal, the Appeal Chamber on 30 August 2011 confirmed the decision of the Pre-Trial Chamber II on admissibility (Decision on the Application by the Government of Kenya Challenging the Admissibility Of the Case Pursuant to Article 19 (2)(b) of the Statute (ICC-01/09-02/11 OA)).

The four originally indicted persons were William Samoei Ruto, Joshua Arap Sang, Uhuru Muigai Kenyatta, and Francis Muthaura. The charges against Francis Muthaura and Uhuru Muigai Kenyatta were dropped by the OTP in December 2014 (Decision on the withdrawal of charges against Mr Kenyatta, No.: ICC-01/09-02/11), while the charges against William Ruto and Joshua Sang were vacated in April 2016. In separate cases, warrants of arrest were also issued against Walter Osapiri Barasa, Paul Gicheru, and Philip Kipkoech Bett. The two cases in the Kenya situation are *The Prosecutor v Walter Osapiri Barasa* (ICC-01/09-01/13) and *The Prosecutor v Paul Gicheru and Philip Kipkoech Bett* (ICC-01/09-01/15). In both cases, the accused were charged for offences against the administration of justice, consisting in corruptly or attempting to corruptly influence ICC witnesses.

The 2013 General Elections in Kenya.

The 2013 general elections took place on 4 March. The elections were generally peaceful, with very few reports of violence throughout the country. The success of the elections has been attributed to many factors, such as the determination of Kenyans to avoid the mistakes of the past elections, the large number of judicial and political reforms embarked upon by the Government of Kenya (GoK) to strengthen governance institutions responsible for conducting elections in Kenya, and the improved security situation during the elections. Also cited as contributory factors to the relatively successful elections were adequate policing and the involvement of the ICC in the situation.

The ICC has been identified as the single factor that had the most influence on the 2013 elections. Some of the influences attributed to the ICC included raising the stake of the elections, re-ethicizing Kenya politics, shaping the political alliance that was formed to contest the elections, influencing the result of the elections, and deterring election violence. The ICC has also been attributed with being responsible for the emergence of issued-based politicians at national and county levels outside the three main coalitions (Wamai, 2013, 2). The ICC's intervention in Kenya helped to shape political alliances, bringing together two hitherto political foes into a coalition. Kenyatta and Ruto, then co-accused in the cases before the ICC, became the presidential candidate and running mate of the Jubilee Coalition. This alliance also brought together two rival ethnic groups-- Kikuyu

and Kalenjin-- in a coalition, which is believed to have helped to ensure that there was limited violence between the two rival political groups (Lynch and Zgonec-Roze, 2013, 10). The ICC is also seen to have raised the political stakes of winning and losing the elections, and contributed to dividing Kenya voters into two opposing groups, based on ethnic colouration and influenced by support or opposition for the indictment of the political figures. The ICC is also perceived to have deterred people from resorting to violence during the election. It is alleged that, mainly due to the fear of being prosecuted by the ICC, many politicians, citizens, and media practitioners acted more responsibly in both public and private spheres by avoiding actions that could be construed as capable of causing tension in the country (Wamai, 2012, 2).

The International Criminal Court Can Deter Humanitarian Atrocities in Kenya

The ICC commenced investigations in Kenya in 2009. By 2010, it had issued summons to six leaders in Kenya to appear before the court, who were accused of masterminding, facilitating, and funding the 2007-2008 PEV. These attempts to prosecute key personalities involved with the violence were described as sending a strong message that the era of impunity was over (Interview, March 20, 2015). The ICC has shown through these investigations and prosecutions that it has the capacity to impose sanctions and that people would no longer rely on a weak internal system to escape culpability (Interview, 20 March 2015). Against the backdrop that those who planned and participated in previous election violence were not prosecuted, the ICC's prosecutions were invaluable for the country's quest to promote accountability and to end impunity (Interview, 12 December 2013). The prosecution of those who allegedly bear the greatest responsibility for the violence is therefore a clear departure from the past, and a strong indication that those who were masterminds or participants in violence could be made to face trial at The Hague (Interview, 23 May 2014). By prosecuting high profile personalities, the ICC has clearly demonstrated its capacity to call into account anyone who is suspected of committing crime and so leaders are forced to keep the peace (Interview, 13 March 2015). The central point canvassed by several respondents is that the ICC, despite its shortcomings, has already established itself as an international court with the capacity to prosecute people who might commit international crimes by investigating some of the crimes committed in Kenya and by attempting to sanction individual leaders. Thus, it could be said that the ICC has shown through its work that it cannot be pushed aside (Interview, 23 May 2014).

The argument in support of the deterrence impact of the ICC during the 2013 elections is that the fear of investigation and possible prosecution by the ICC made many politicians, citizens, and media practitioners act responsibly by avoiding hate speeches, refraining from actions that could cause tension, and by avoiding outright violence before, during, and after the elections (Dunaiski, 2014, 5). Most of those who opine that the ICC can deter also agreed that the ICC played significant roles in the relatively successful elections in 2013. The ICC is seen as one element that contributed to deterrence in Kenya during the 2013 elections (Interview, 4 June 2014). It was also averred that, were it not for the ICC, Kenya "would have been on the brink of another episode of violence during the 2013 general elections" (Interview, 21 December 2014). Generally, several respondents argued that because of the interventions of the ICC in Kenya and the credible threat of sanctions from the court, politicians were more restrained in their actions, which led to a reduction in the number of violent incidents before, during, and after the 2013 general elections. However, the inability of the ICC to convict makes the ICC appear weak and ineffective, which may reduce its potential to deter in the long run (Interview, 15 December 2013).

The International Criminal Court may only Deter Political/Business Leaders

People who are concerned with their legitimacy in the eyes of the domestic public and/or the international community are much more likely to be deterred by the possibility of ICC prosecution than those who are not. The ICC is perceived to have the potential to deter leaders, especially Kenyan political and business leaders, from instigating people to commit electoral violence because the ICC has established through its prosecutions that it has the capacity to prosecute this class of people who hitherto enjoy unofficial immunity from prosecution (Collecchio, 2011, 2; Namiti, 2014, 2). The ICC has the potential to lessen the risk of future conflict by raising the cost of instigating violence and

by challenging the widespread conviction that Kenyan political and business leaders are “above the law” (Collevocchio, 2011, 2). Some respondents agree that the prosecutions by ICC are capable of deterring political leaders from committing international crimes in the country because these leaders may be afraid of the ICC sanctions and may not want ICC’s investigations and prosecutions to dent their political career (Interview, 5 June 2014). However, it is doubtful if the same can be said for the followers and youth who participated in the 2007-2008 PEV (Interview, 14 June 2014). It is also doubtful if the same can be said of the many rank-and-file security officers who were overtly involved in the 2007-2008 PEV. Thus, the ICC may have influenced political and business leaders in Kenya but not the many youth, followers, and low-level security officers who were involved in the PEV, since “these followers are not being prosecuted by the ICC” (Interview, 14 June 2014). Therefore, it is argued that the ICC reduced the tendency to commit international crimes in Kenya, but the ICC may not have deterred all persons from committing international crimes during the 2013 elections, especially non-leaders and the rank-and-file security officers” (Interview, 12 November 2013). A peace and conflict specialist in Kenya supports this view, arguing that since the ICC is only focused on those who bear the greatest responsibility for the crimes committed during the violence, and national courts are not prosecuting many of the followers and rank-and-file security officers, it thus appears that these followers and security officers were not in any way threatened and may not have been deterred” (Interview, 12 December 2013).

The International Criminal Court and Global Norms

International criminal justice could also be justified on its expressive role (Meijers and Glasius, 2013, 6). Publicly asserting human rights norms and shaming criminal leaders may contribute to conflict prevention through the power of moral persuasion, which may transform behaviour. Such impact may be subtle and long-term (Alkavan, 2001, 8). Expressive theorists contend that law provides a platform for “enunciating societal condemnation of atrocities... and for making a historical record of conflicts” (Amman, 2003, 170). It is what the court expresses, through its actions that will over time lead to general deterrence of those considering committing crimes (Rosenberg, 2012, 4; Meijers and Glasius, 2013, 7). The assumption is that the “expression of social disapproval through legal processes may influence moral conception so that illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught” (Alkavan, 2001, 13). Therefore, the ICC, by investigating the PEV and indicting and prosecuting some leaders in Kenya, is expressing social disapproval of atrocities committed during the violence through the legal process, which could lead to self-control among the wider public, and “stiffen the resistance to... leaders seeking to exploit ethnic enormity and thereby reduce the prospect of renewed violence” (Alkavan, 2001, 13).

In line with these arguments, the ICC intervention in Kenya was seen as capable of deterring future political leaders, elites, and warlords in Kenya and other countries because the ICC, by its very actions, is expressing global norms of international criminal law. The central message is that impunity is no longer acceptable and that those who commit international crimes will be prosecuted. Many justice experts in Kenya believe that, despite the many challenges of prosecuting Kenya’s leaders, the ICC’s intervention will have a lasting impact in the country. The ICC is also seen to “represent the primary threat of international accountability” and the “elevation of Kenyan actions to this level does alert the country to the fact that large scale mass violations will prompt international actions” (Interview, 16 June 2014). The power of the ICC to name and shame is important for deterrence of political leaders, as most of them may not want to be shamed by the ICC since such action could negatively impact their political profile in the country and globally (Interview, 12 January 2014).

The International Criminal Court Cannot Deter

The ability of the ICC to deter, and in fact its deterrence role during the 2013 elections, was doubtful to some. Those who argue against the impact of the ICC deterrence in Kenya submit that there is nothing to suggest that the ICC deterred people from committing electoral violence, and also nothing to suggest that people will be deterred from committing international crimes in Kenya because of the ICC (Interview, 10 November 2014). The relative success of the 2013 election was thus attributed to

many reforms the country has undertaken since the 2007-2008 PEV and the trust Kenyans have on the new institutions (Interview, 17 June 2014). Also, it has been suggested that since the ICC is prosecuting only top politicians and will not prosecute ordinary Kenyans and low-level security officers who played significant roles during the PEV, the deterrent impact of the ICC on these significant groups may have been minimal (Interview, 14 June 2015). The inability of the OTP to successfully prosecute any of the key leaders in Kenya is seen as reducing the deterrent impact of the ICC, and has “exposed serious flaws in the way the court operates, which dwarf any positive legacy” (Olick, 2013, 2). The ICC lack of mechanisms to enforce its decisions and judgments is also perceived as a fundamental flaw that makes it difficult for it to deter (Interview, 10 June 2014).

Applying Deterrence Theory to Kenya

The main principles of deterrence theory, which are severity, certainty, and swiftness, were highlighted in this article. Against the old belief that severity of punishment will more likely lead to deterrence, there seems to be consensus in recent literature on deterrence that likelihood and swiftness of punishment is more likely to deter crimes than severity of punishment (Sikkink, 2011, 26). Thus, measures such as increased policing, increased efficiency of law enforcement agencies, and increasing the risk of apprehension are thought to have reduced crimes (Hyeran and Simmons, 2014, 5). In Africa, higher conviction rates have also been found to have the tendency to reduce crimes, indicating that the best measure to reduce crimes in Africa is to increase the likelihood of punishment rather than the severity of punishment (Hyeran and Simmons, 2014, 5). In Kenya, the ICC investigations of the PEV and prosecution of key political leaders have clearly demonstrated that punishment is likely for those who commit international crimes. Given the high level of impunity for crimes committed by political leaders in Kenya before the ICC intervention, it is plausible to assume that the ICC has increased the likelihood of sanctions despite the failure to convict any of the persons indicted so far. This increased likelihood of sanctions, evidenced by the existence of the ICC as an institution of international crime justice, the ratification of the Rome Statute by Kenya, the investigation of some of the crimes committed during the PEV by the ICC, and the prosecutions of some high profile persons contributed in deterring people from committing international crimes before, during, and after the 2013 elections. This is in consonance with general deterrence theory, which implies that investigations, indictments, and prosecution should trigger a likelihood of punishment and increase deterrence.

Additionally, it was argued in this article that international criminal justice institutions may in the long-term contribute to deterrence through complementarity, which may encourage states to prosecute and norm proliferation, which is the creation of a normative situation where extraordinary crimes are no longer accepted (Rosenberg, 2012, 4). The ICC involvement in Kenya may have contributed to the establishment of rule of law institutions. It has been argued that the Kenyan government’s admissibility challenge against the jurisdiction of the ICC and the desire of the government to strengthen the rule of law and good governance agencies may have partially prompted important judicial reforms (Dunaiski, 2014, 10). The main institutions in this regard include law enforcement agencies, mainly police, prosecution, judiciary, and probation institutions. The ICC involvement in Kenya may have also influenced the establishment of good governance institutions, such as the new Independent Electoral Commission and the National Cohesion and Integration Commission. The ICC involvement influenced the amendment and enactment of laws that promote accountability to the law, such as the 2010 constitution, which expanded the democratic space in Kenya. Other laws enacted or amended since the ICC involvement in Kenya are the Vetting of Judges and Magistrate Act (No. 2 of 2012), the Witness Protection Act of 2006 (as amended in 2012), the International Criminal Act of 2008, which domesticates the Rome Statute, and the Supreme Court of Kenya Act (No. 7 of 2011). Therefore, the ICC involvement in Kenya may have created favorable conditions for good governance, internal monitoring, and law enforcement, which has improved prosecutorial deterrence (Hyeran and Simmons, 2014, 5). The ICC involvement has led to more eagerness by Kenya judicial institutions to deal with cases effectively (Interview, 30 May 2014). It has also contributed to the following pro-rule of law initiatives: the moves by the Judiciary to constitute an international crimes division; the general sensitisation of the public (as they have followed the ICC cases) about the types of crimes related to violence and the potential for

consequences that stretch beyond the country; and the sensitisation of the state about the potential for international bodies to take over the investigation and prosecution of certain crimes where the state fails to do so (Interview 5 March 2015). All these changes in the legal, judiciary, policing, and law enforcement fields may become known to the average person in Kenya and became part of their calculations. However, it is doubtful that the ICC involvement has led to more prosecution of people who committed crimes during the 2007-2008 PEV by national justice institutions, though there seems to be more attempts to investigate and prosecute than in previous elections.

The results of the qualitative evidence presented and discussed in this section support the conclusion that the ICC deterred people from committing electoral crimes before, during, and after the 2013 elections in Kenya. These findings are in line with deterrence theories that an increase in the likelihood of the imposition of sanctions will lead to a decrease in violation. Before the intervention of the ICC, a system of impunity for leaders enveloped the criminal justice system in Kenya. Political and business leaders were hardly prosecuted for political crimes. Since the ICC's intervention, prosecution of political and business leaders who commit international crime became more likely. The cost of committing international crimes, such as crimes against humanity, has increased and the benefits have remained relatively constant. The ICC has, through its investigations and prosecution, contributed and continues to contribute to emerging international criminal norms that act to limit future gross violation of human rights by making them "more costly in terms of a rational public policy choice analysis and by establishing such crimes as firmly outside the status quo of behaviour accepted on the international scale" (Grono, 2012, 4). In the same way, the ICC involvement in Kenya has contributed to the relatively peaceful election by deterring people from committing international crimes before, during, and after the 2013 general elections since sanctions from the court became probable.

Deterrence and Conflict Prevention

In view of the difficulties of measuring deterrence, the claim of deterrence can best be substantiated through specific examples (Mendez and Kelly, 2015, 489). A practical result of deterrence is conflict prevention, which is primarily concerned with preventing conflicts from becoming violent. Corradetti argued that the ICC contributed to conflict prevention through deterrence during the 2013 elections in Kenya, and that "the significant decrease of violence in the aftermath of the contested electoral turn-outs of 2013 has been accompanied by a general popular trust in the actions of the ICC (social deterrence)" (2015, 270). There are two main aspects of conflict prevention. One is establishing measures for the prevention of violent conflicts, which involves developing short, medium, and long term measures for conflict prevention. The second aspect of conflict prevention involves preventing relapses into wars or violent conflicts after peace agreements have been fully executed by the parties. The ICC contributes to conflict prevention in Kenya through deterrence in these two senses. In the first sense, the ICC involvement in Kenya contributed to the establishment of rule of law institutions and influenced the amendment and enactment of new laws that promote accountability to the law. These developments have created favorable conditions for good governance, internal monitoring, and law enforcement, which have improved prosecutorial deterrence (Hyeran and Simmons, 2014, 4) and to more eagerness by Kenyan judicial institutions to deal with cases effectively. In the second sense, the ICC contributed to conflict prevention through deterrence, and the practical impact has been an avoidance of relapse to conflict and the de-escalation of conflict in Kenya. Evidence shows that violent conflict in the country has been de-escalating. This is not to suggest that the ICC intervention directly led to the gradual de-escalation of conflict, but rather that the ICC intervention contributed to this development. Since 2009, Kenya has been witnessing a gradual de-escalation of conflict and the country has almost returned to its state before the 2007 elections. The 2013 general elections was a litmus test, and it has been acknowledged by some writers that the ICC intervention is one factor that contributed to the relatively peaceful general elections in 2013 (Lynch and Zgonec-Roze, 2013, 10; Wamai, 2013, 2). Thus, it is plausible to argue, based on the opinions of a majority of the respondents and the situations on ground that the ICC is contributing to conflict prevention through deterrence by its various activities. Such actions include, but are not limited to, the prosecution of top-level politicians, its numerous public comments on the situation, its investigations of the violent conflict, and the issue of arrest warrants.

Conclusion

The ICC investigations and prosecutions have had a profound impact on what people think of the law and have created some sort of fear, or even respect, for the law, especially among political and business leaders in Kenya. This contributed to conflict prevention through general deterrence during the 2013 general elections, as sanctions by the ICC were likely. Thus, the increase in the likelihood of imposition of sanctions led to a decrease in violation. The cost of inciting or causing violence increased and the benefit has remained relatively constant. However, the inability of the ICC to convict any of the high profile persons has diminished the respect that most Kenyans had for the ICC in the early years of the court in Kenya. This diminishing stature of the ICC may have negative effects on its deterrent impact in Kenya. However, there is good evidence to conclude that the ICC contributed to the relatively peacefully 2013 elections by deterring political and business leaders in Kenya from funding, instigating, and participating in violence before, during, and after the 2013 general elections. There is also optimism that this trend may continue, because it is now established that the ICC can indeed prosecute culprits, unlike national courts.

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