The intended and unintended effects of the ICC on the domestic politics of the DRC, Sudan, and Kenya

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Abstract

Recent literature on peace operations illustrates how such interventions have multiple effects on the environments in which these take place. Although some of these effects fall within their respective mandates, many go beyond their intended missions and often work to the detriment of these interventions' mandated objectives. Much of the work on the International Criminal Court (ICC) centres on conflict, primarily, on how the prosecution of mass atrocities may affect future levels of violence. This thesis project pushes the debate further by examining the unintended effects of ICC intervention on the domestic politics of countries in question. Through a case study method with three different lines of inquiry (i.e. a primary data analysis, a secondary data analysis, and semi-structured interviews), this study examines in a systematic and comparative fashion both the intended and unintended effects of ICC action in the Democratic Republic of the Congo, Sudan, and Kenya. It finds that in the three cases the ICC has created mixed results in both bringing an end to impunity for perpetrators and contributing to the prevention of mass atrocity crimes. In relation to the unintended effects, ICC intervention has mainly impacted these countries' political dynamics, judicial systems and ethnic relations – often in ways that can potentially undermine the Court's ability to fulfill its mandate. As such, the main messages of this study are: first, a greater understanding of these unintended effects is necessary; and second, the ICC should be aware of these potential effects in order to excel in future interventions.

Résumé

La littérature récente sur les opérations de paix souligne les effets multiples qu'ont ces interventions sur les environnements dans lesquels elles prennent place. Bien que certains de ces effets tombent dans leurs mandats respectifs, beaucoup d'entre eux dépassent leurs missions d'origine et vont souvent à l'encontre des objectifs mandatés de ces interventions. L'essentiel du travail de la Cour Pénale Internationale (CPI) se concentre sur la résolution des conflits, et principalement sur l'impact que des poursuites judiciaires contre les responsables d'atrocités de masse peuvent avoir sur les futurs niveaux de violence. Ce projet de mémoire avance le débat en examinant les effets non intentionnels de l'intervention de la CPI sur la politique domestique des pays en question. Au travers d'une étude de cas avec trois lignes de recherche différentes (une analyse de données primaires, une analyse de données secondaires, et des entretiens semi-directifs), cette étude examine d'une façon systématique et comparative les effets à la fois intentionnels et non intentionnels de l'action de la CPI en République Démocratique du Congo, au Soudan, et au Kenya. Elle conclut que dans les trois cas la CPI a eu des résultats mixtes pour ce qui est de mettre fin à l'impunité des responsables et ainsi de contribuer à la prévention des crimes de masse. En ce qui concerne ces effets non intentionnels, l'intervention de la CPI a principalement affecté les dynamiques politiques de ces pays, leurs systèmes judiciaires et les relations ethniques, et souvent de telle sorte qu'ils pouvaient potentiellement limiter la capacité de la Cour à remplir son mandat. Ainsi, cette étude conclut d'une part qu'une meilleure compréhension de ces effets non intentionnels est nécessaire, et d'autre part, que la Cour devrait prendre conscience de ces effets potentiels afin de pouvoir exceller dans ses interventions futures.

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Abbreviations

AU	African Union
AFDL	Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre
CIPEV	Commission of Inquiry on Post Election Violence
CNDP	Congres National pour la Défense du Peuple
CPA	Comprehensive Peace Agreement
DPA	Darfur Peace Agreement
DRC	Democratic Republic of the Congo
EALA	East Africa Legislative Assembly
EACJ	East Africa Court of Justice
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Forces Démocratiques de Libération du Rwanda
FIDH	International Federation for Human Rights
FNI	Front des Nationalistes et Intégrationnistes
FPLC	Forces Patriotiques pour la Libération du Congo
FRPI	Forces de Résistance Patriotique d'Ituri
GoDRC	Government of the DRC
GoK	Government of Kenya
GoS	Government of Sudan
ICC	International Criminal Court
ICG	International Crisis Group
IDP	Internally Displaced Person
IOs	International Organizations
IRRI	International Refugee Rights Initiative
JEM	Justice Equality Movement
MLC	Mouvement pour la Libération du Congo
MONUC	United Nations Organization Mission in the DRC
NCP	National Congress Party
NGO	Non Governmental Organization
NIF	National Islamic Front
ODM	Orange Democratic Movement
OCHA	Office for the Coordination of Humanitarian Affairs
OTP	Office of the Prosecutor
PEV	Post Election Violence
PNU	Party of National Unity
PTC	Pre-Trial Chamber
PUSIC	Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo
RCD	Rassemblement Congolais pour la Démocratie
ROSV	Reported One-Sided Violence
SAF	Sudanese Armed Forces
SCCED	Special Criminal Court on the Events of Darfur
SLA	Sudanese Liberation Army
SPI	Sudanese People's Initiative
SPLA	Sudanese People's Liberation Army
TRC	Truth and Reconciliation Commission
UCDP	Uppsala Conflict Data Program
UNAMID	African Union/United Nations Hybrid Operation in Darfur
UNSC	United Nations Security Council
UNOHCHR	United Nations Office of the High

Chapter 1: Introduction

1.0 Introduction

On July 17, 1998, 120 states adopted the Rome Statute, which led to the establishment of the International Criminal Court (ICC) on July 1, 2002. The preamble of the Rome Statute calls on the ICC to work alongside states and the United Nations system to address mass atrocity crimes "for the sake of present and future generations."[1] The Court is meant to "be complementary to national criminal jurisdictions in putting an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[2] Specifically, Article 17(a) of the Rome Statute calls on the ICC to intervene *only* in situations where the State of concern is either "unwilling or unable genuinely to carry out the investigation or prosecution."[3]

There is an expansive literature that examines the extent to which the Court has indeed fulfilled its duty in preventing mass atrocity crimes. Studies suggest mixed results. According to Payam Akhavan, in Cote d'Ivoire "the threat of an ICC investigation contributed to preventing the escalation" of mass atrocity crimes by halting the state-sponsored incitement of ethnic hatred.[4] In Darfur, on the other hand, indicate that ICC indictments of Sudanese government officials do not appear to have proven helpful in deterring perpetrators from committing mass atrocities.

There is also growing evidence that ICC actions may also have broader effects on the domestic politics of countries, with potential ramifications well beyond the targeted

[1] "Preamble," *Rome Statute of the International Criminal Court* (1998).
[2] Ibid.
[3] *Rome Statute of the International Criminal Court* (1998).
[4] Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism," in *Human Rights Quarterly* 31 (2009): 625.

conflict or abuses. For example, the ICC's involvement in Sudan and in Kenya led to a split within their respective executive branches. In the case of the Democratic Republic of the Congo (DRC), on the other hand, it has been suggested that President Joseph Kabila's self-referral of the situation in the country was for ulterior motives – to remove Jean-Pierre Bemba, his greatest opposition during the 2006 elections.[5] Although the Rome Statute states that the ICC does not authorize any state interventions "in the internal affairs of any State," these examples demonstrate that ICC involvement in these countries has affected their domestic politics beyond issues of justice for past crimes or deterrence of future mass atrocities.[6] To date, however, there is only limited scholarship on these broader effects, and none that does so in a comparative sense.

This thesis project examines both the **intended effects** of the ICC – that is, its ability to fulfill its intended role of contributing to the prevention of mass atrocities by prosecuting leaders for such crimes; and its **unintended effects** – those well beyond the militarized conflicts in question. It will do so in the context of three case studies – the DRC, Sudan, and Kenya – by asking the following key questions:

- To what extent has the ICC been successful in reducing or deterring mass atrocity crimes, and how?
- What unintended effects has the ICC had in the domestic politics of the countries in question?

In an effort to acquire a holistic account of the ICC's unintended effects, this project examines the Court's impact on actors, domestic institutions, and norms by asking the following derivative questions: first, has the ICC changed the calculations of rational actors by assisting or constraining them in their ability to pursue their interests? Second,

[5] William White-Burke, "Complementarity in Practice: the International Criminal Court as Part of System of Multi-Level Global Governance in the Democratic Republic of the Congo," in the *Leiden Journal of International Law* 18, no3. (2005).
[6] "Preamble," *Rome Statute of the International Criminal Court,*

has the ICC affected domestic political and legal institutions? And lastly, has the ICC challenged and/or changed relevant domestic norms?

2.0 Literature review

2.1 The ICC's role in the prevention of mass atrocities

The ICC emerged from the lack of a well-established international judicial system to adjudicate the heinous crimes of the 20th century. Among the primary objectives of the ICC is "to help end impunity for the perpetrators of the most serious crimes of concern to the international community" – an objective that is supposed to prevent mass atrocity crimes.[7] How can the ICC achieve this objective? The Australian Civil-Military Centre has identified five mechanisms that engender the ICC's preventative capacity: first, *general deterrence* (it raises the cost of atrocities by facilitating the punishment of such acts in an international court); second, *complementary deterrence* (it can enhance the capacity of domestic courts to prosecute perpetrators); third, *incapacitation* (it prevents perpetrators from continuing their criminality by apprehending them or forcing them underground); fourth, *ending cycles of violence* (it provides a legal path towards justice, "making it clear that individuals, rather than broad collectives, were the perpetrators of past crimes, and removing the desire amongst victims to perpetrate 'counter-atrocities' out of vengeance);" and lastly, *general moral influence* (it increases the global commitment against mass atrocity crimes).[8] However, scholars like Mahmood Mamdani maintain that the ICC "ignores the issues that led to the violence [in the first place]" and,

[7] "About the Court." *International Criminal Court.*
[8] Australian Civil-Military Centre, "The Prevention Toolbox: Systematising Policy Tools for the Prevention of Mass Atrocities," *Policy Brief Series No.5,* 1-2.

accordingly, suggest that its ability to address the situations is questionable.[9] As he states: "trials merely put a Band-Aid on the wounds that drive civil conflict within a society, rather than tackling the root causes behind the violence."[10]

Much of the literature examines the extent to which the ICC can actually prevent future mass atrocity crimes by bringing perpetrators to justice. The cases of Uganda, Cote d'Ivoire, and Kenya indicate positive results. According to Akhavan, the actions of the ICC in Uganda and Cote d'Ivoire have been successful. In Uganda, ICC indictments were effective in forcing the Government of Sudan (GoS) to "eliminate a long-standing safe haven for the [Lord's Resistance Army] and [thereby] bringing to an end a devastating civil war."[11] Similarly, in Cote d'Ivoire "the genuine prospect of being held accountable before an international tribunal was an incentive to stabilize a volatile situation, thus serving as a tool in the pursuit of peace."[12]

Other cases, however, present dimmer results. ICC involvement in the DRC, the Central African Republic (CAR), and Sudan has not been as effective in preventing or deterring local actors from committing mass atrocity crimes. In the CAR, for example, Seleka rebel leaders continue to commit mass atrocities against civilians, despite statements made by Prosecutor Bensouda that those responsible for such crimes will be investigated and possibly prosecuted.[13] In a similar vein, evidence suggests that despite ICC involvement in both the DRC and Sudan, these countries continue to be plagued by violence. The case of Darfur is particularly interesting because different sources have noted differing results. Many sources indicate that the ICC has done little to address the

[9] Mahmood Mamdani, "Legal Band-Aid: not for Deep Wounds," *Mail and Guardian* (03 May 2013).
[10] Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa," *Mapungubwe Institute for Strategic Reflection,* 2013 Annual Lecture (18 March 2013): 7.
[11] Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?" 625.
[12] Ibid., 640.
[13] Central African Republic, "Cases and Situations," *Coalition for the International Criminal Court.*

situation in Darfur. For instance, a Security Council report noted that Ali Kushayb (an ICC indictee) alongside the Sudanese Central Reserve Police were behind a recent attack in central Darfur, which resulted in the death of more than 100 civilians and the displacement of more than 30,000 civilians to Chad.[14] Conversely, others argue differently. Akhavan, for instance, maintains that ICC indictments have been effective because they forced Al-Bashir to "announce a ceasefire with the Darfur rebels."[15] Given the lack of consensus on the ICC's ability to prevent mass atrocity crimes, it is pivotal to carry forth this debate by assessing the role of the court in the DRC, Sudan, and Kenya.

2.2 The unintended effects of ICC intervention

Within the literature on civil conflict there is growing recognition of the importance of the unintended consequences of peace operations, humanitarian assistance, and development aid. Chiyuki Aoi and her associates argue that within a complex system, interventions will have multiple consequences. Some of these consequences are intended, as the intervention is "designed to bring about these effects."[16] Others, however, are unintended since these consequences are not expected. Although both intended and unintended consequences form part of peace operations, humanitarian assistance, and development aid, Aoi and her associates argue that the traditional focus of these operations has been primarily on their intended consequences.[17] "Researchers and practitioners" they state, "are typically concerned with improving the ability of peace operations to achieve their intended objectives. However, various incidents have drawn our attention to the fact that peace operations can also generate unintended

[14] "S/PV.6974," *United Nations Security Council 6974th meeting* (Wednesday, 05 June 2013): 3.
[15] Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?" 650.
[16] Chiyuki Aoi, Cedric de Coning, and Ramesh Thakur, *Unintended Consequences of Peacekeeping* (Tokyo: United Nations Univeristy Press, 2007), 6.
[17] Ibid., 3.

consequences."[18] Moreover, given that these operations will generate a variety of effect, "some of which may be negative and even pathological to the mandate of the mission, is thus counterintuitive to many observers under the influence of the liberal assumption that peace operations are inherently 'good'."[19]

International Organizations (IOs) in particular, have been increasingly criticized for the unintended and often damaging effects of their interventions. As previously mentioned, unintended effects refer to "those reactions that fall outside the scope of the response [i.e. the mandate] that was intended."[20] A myriad of literature has emerged around these phenomena. A report by International Alert concluded that humanitarian organizations, "by setting up parallel non-governmental services, can hasten the collapse of already weakened state structures and may, by providing essential services that the state no longer delivers, allow governments to shift resources to military budgets, thus aggravating or prolonging the conflict."[21] A different example is the relationship between peacekeeping operations and sexual exploitation. Studies suggest that post conflict societies exhibit high levels of sexual exploitation towards women and girls, not only by locals but also by peacekeepers. Relatedly, Kathleen M. Jennings finds that peacekeeping economies plant the seed for the development of sex-tourism industries in post-conflict societies, as has been the case in both Haiti and Liberia.[22] The range of events is so wide and the implications so deleterious that initiatives like the *Do No Harm* approach have been developed to address the unintended consequences of humanitarian assistance. This

[18] Aoi, de Coning, and Thakur, *Unintended Consequences of Peacekeeping*, 6.
[19] Ibid., 9.
[20] Chiyuki Aoi, Cedric de Coning, and Ramesh Thakur, "Unintended Consequences of Peacekeeping," *Electronic Briefing Paper,* no. 56 (2007): 2.
[21] Maria Lange and Mick Quinn, "Conflict, Humanitarian Assistance and Peacebulding: Meeting the Challenges," in *International Alert* (December 2003): 10.
[22] Kathleen M. Jennings, "Unintended Consequences of Intimacy: Political Economies of Peacekeeping and Sex Tourism," in *International Peacekeeping* 17, no.2 (2010).

approach refers to the practice of "recognizing and downplaying negative effects while at the same time identifying and encouraging the positive influences of the given program."[23]

According to Michael Barnett and Martha Finnemore, unintended effects can derive from the fact that IOs have power beyond regulation – meaning, the ability to ensure that actors comply with the rules they have established.[24] "IOs," they maintain, "can also constitute the world as they define new categories of problems to be governed and create new norms, interests, actors, and shared social tasks." [25] For example, information about millions of Africans living on less than a dollar a day might have been unworthy of attention "about 80 years ago."[26]. However, nowadays IOs have transformed the meaning of this information into a "development problem" or "poverty crisis" that ought to be addressed.[27]

Specifically, the culture of an IO – meaning the "solutions [it] produces to meet the specific problems that it faces" – can have different effects on the environment in which it operates.[28] Séverine Autesserre's study on MONUC (the UN mission in the DRC) elucidates this point by demonstrating how the culture of the UN affected the mission's success in the country. Her main argument is that "a dominant international peacebuilding culture shaped the intervention in the Congo in a way that precluded action [outside of its bureaucratic culture], ultimately dooming the international efforts."[29] In other words, the culture of the UN delineated the parameters of the mission and the

[23] Aoi, Coning, and Thakur, "Unintended Consequences of Peacekeeping," 11.
[24] Michael Barnett & Martha Finnemore, *Rules for the World* (Ithaca: Cornell Univeristy Press, 2004), 17.
[25] Ibid., 17.
[26] Ibid.
[27] Ibid., 30.
[28] Ibid., 19.
[29] Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (New York: Cambridge University Press, 2005), 10-11.

solutions to the conflict, and thereby excluded any course of action that was inconsistent with its views. In the case of the Congo, interveners focused solely on national and regional tensions, while those at the local level were viewed as a consequence of the state's inefficiency or "Congolese people's inherent propensity to violence."[30] This was, of course, extremely problematic since "local agendas played a decisive role in sustaining local, national, and regional violence."[31] Consequently, MONUC was unable to facilitate an effective and sustainable path towards peace in the DRC.

Similar to the aforementioned example, recent studies have shown that the Rome Statute has led it to affect the domestic politics of host countries in multiple ways with ramifications well beyond the targeted situations. The most evident effect is associated with the Court's principle of complementarity, which states that it can only exercise its jurisdiction over states in which the accused is a national, and the state is either *unable* or *unwilling* to prosecute. William Burke-White notes, "the incentive structure in circumstance [of a potential ICC intervention] is such that national governments seeking to avoid ICC action will endeavor to meet the minimum benchmarks of effectiveness embedded in the complementarity regime. The Court can then be seen as guiding national governments in undertaking 'genuine' prosecutions."[32] This same logic can also lead political actors to embark in judicial reform and thereby contribute to the strengthening of domestic institutions – a factor that has lasting effects in society past the militarized conflict. Another example is how the ICC has been employed by civil society as a way of pushing for political accountability. This has been the case in Kenya, as Christine Bjrok

[30] Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding,* 11.
[31] Séverine Autesserre, "Hobbes and the Congo: Frames, Local Violence, and International Intervention," in *International Organizations* 63, no.2 (2009): 249.
[32] White-Burke, "Complementarity in Practice," 575.

and Juanita Goebertus state: "the ICC has contributed to a process in which NGOs are working to empower communities in their quest to demand accountability, elect their own representatives, and gain a stake in the system."[33] For a more comprehensive list of unintended political effects, refer to Appendix A.

Examining the ICC's unintended effects is particularly interesting since the Rome Statute does not authorize any state intervention in the internal affairs of host states. Nonetheless, there are multiple instances in which ICC involvement, chiefly in non-party states or states that have not called upon the Court, has affected their domestic politics in ways that to a certain degree have challenged their sovereignty. Some critics maintain that the Court is a tool for the neo-colonial pursuits of states that wish to maintain their control over Africa.[34] Others argue that it damages the institutional capacity of the countries in which it is operating. For instance, opponents of the Court's involvement in Kenya have maintained that indictments against President Uhuru Kenyatta and his deputy, William Ruto undermined the country's democracy since these were elected officials. According to Aden Duale, a majority leader of the National Assembly, "the sovereign state of Kenya, with a functioning judiciary, with a vibrant democracy, one of the best democracies in Africa, is under threat [by the ICC and international community more broadly]."[35]

Considering that there is limited scholarship available on the unintended effects of the ICC, and none that does so in a comparative sense, this thesis project fills in this void by examining both the intended and unintended effects of the Court in a comparative

[33] Christine Bjrok and Juanita Goebertus, "Complementarity in Action: the Role of Civil and the ICC in Rule of Law Strengthening," in *Yale Human Rights and Development* 14, no. 204 (2011): 228.
[34] William Muchayi, "African and the International Criminal Court: a Drag Net that Catches Only Small Fish?" *Nehanda Radio: Zimbabwe News and Internet Radio Station,* September 24, 2013.
[35] Nicholas Kulish, "Kenyan Lawmakers Vote to Leave International Court," *New York Times* (05 September 2013).

fashion. Examining the effects of the Court in this manner not only makes an important contribution to the literature on the ICC, but also, can potentially inform practitioners on their future interactions with the Court and countries in question.

3.0 Methodology

3.1 Case selection

This study draws upon three case studies – the DRC, Sudan, and Kenya. It is worth noting *why* these cases are the most compelling for this project, as they have numerous similarities and key differences. First, these three cases were brought to the ICC via different mechanisms. Both Sudan and Kenya were referred by outside parties – the UN Security Council referred the conflict in Darfur and in Kenya former Chief Prosecutor Luis Moreno-Ocampo initiated investigations under the Principle of *Propio Motu*.[36] The violence in Eastern DRC, on the other hand, was a self-referral by President Kabila. This is important given that internal political actors may react differently to the different types of ICC intervention. Second, concerning who has been indicted, in both Sudan and Kenya it has been the heads of state (President Al-Bashir and President Kenyatta) while in the DRC, the individuals indicted are rebel leaders. As such, the unintended political effects in cases where heads of state or government officials are being indicted as opposed to cases where rebels are the only ones being indicted will vary, since this factor forces domestic political actors to treat the Court either as their enemy or their ally. Lastly, and in relation to the African Union (AU), although it has not opposed the ICC's engagement in the DRC, it has been sceptical of the court's decision to take on the situations in Sudan

[36] This principle allows the Prosecutor to open an investigation if there is credible evidence to do so.

and Kenya. This point will illustrate how regional actors react to decisions made by international organizations – in this case the ICC.

Despite the aforementioned similarities there are some underlying divergences between the three cases. First, both the DRC and Kenya are state-parties to the ICC, while Sudan is a non-party state and thus making ICC intervention a bigger threat against its sovereignty. Second, these countries have different regime types. Sudan is highly authoritarian, Kenya is relatively democratic, and the DRC is best described as a decentralized republic. This divergence will shed light on the effects of the Court in three different political arenas; in particular, it will illustrate how in non-authoritarian states different societal actors can affect ICC action. Lastly, the international image of these three countries varies greatly. The DRC is usually regarded as a failed state, with eastern Congo as a site of chaos and anarchy. From many countries' perspectives Sudan is regarded as a rogue state, responsible for the crime of genocide against African groups within Darfur. On the other hand, Kenya has a very positive image, and is often praised for being a stable and prominent country within the region. These different perceptions can shed light on the intentions of different international actors in pushing forth or countering the decisions made by the ICC.

3.2 Conceptual framework

The objective of the conceptual framework is to provide the mechanisms that are employed to examine the intended and unintended effects of the ICC in relation to the three case studies.

Intended effects: as previously mentioned, one of the primary objectives of the ICC is to contribute to the prevention of mass atrocity crimes by putting an end to

impunity of perpetrators who commit such acts. It is challenging, however, to assess the Court's success. In fact, much of the literature on conflict prevention wrestles with these phenomena. According to Peter Wallensteen and Frida Moller, "*conflict prevention* suggests different things to different people and there is no agreed-upon meaning among scholars."[37] Hugh Muall and his associates, for instance, maintain that conflict prevention refers to "actions that prevent armed conflict or mass violence from breaking down."[38] However, both Gabriel Munera and Michael S. Lund associate conflict prevention specifically with diplomatic strategies (i.e. peaceful measures) that aim at settling violent disputes."[39] Gary Goertz and Patrick M. Regan, proposing another definition, posit that successful prevention can be viewed in three ways: first, short term success; second, medium-term effects; and lastly, conflict termination.[40] Although these three accounts offer different approaches to defining conflict prevention, they all define success as the halt or reduction of conflict. In line with these accounts, this project measures the success of the ICC in preventing mass atrocity crimes by focusing on whether levels of such acts have decreased since the Court's involvement in the three respective cases. It is important to acknowledge that it is quite challenging to know exactly just how much the ICC has played a role in reducing the levels of mass atrocity crimes, since reduction in violence can also be attributed to other variables (e.g. resource depletion, presence of a peace keeping force, or the death of a leader) which are beyond the scope of this thesis project.

Unintended effects: Accounting for the unintended effects may be quite difficult since these can encompass a multiplicity of factors. This project narrows the scope by

[37] Peter Wallensteen and Frida Moller, "Conflict Prevention: Methodology for Knowing the Unknown," in *Uppsala Research Papers,* no.7: 4.
[38] Wallensteen and Moller, "Conflict Prevention: Methodology for Knowing the Unknown," 4.
[39] Ibid., 5.
[40] Ibid., 9.

focusing only on the unintended effects of the ICC *in relation to the domestic politics* of the three respective cases. In order to examine these effects and provide a well-rounded account while doing so, this study focuses on actors, institutions, and norms vis-à-vis the ICC. Various studies indicate that actors – domestic politicians, civil society and regional actors – have employed the ICC to benefit their interests. For instance, Paola Gaeta argues that a state may request for an investigation with the motivation of "exposing internationally the crimes allegedly being perpetrated by the other side."[41] In regards to institutions, for example, the Principle of Complementarity has pushed states to engage in judicial reform as a mechanism to avert ICC intervention. This study recognizes that judicial reform is not fully "unintended," since ICC personnel, including Former Chief Prosecutor Luis Moreno-Ocampo, have emphasized the role that the Court can play in this regard through the promotion of positive complementarity. This refers to the Court's ability "to encourage genuine national proceedings where possible… relying on its various networks of cooperation, but without involving the Office [of the Prosecutor] directly in capacity building or financial or technical assistance."[42] Nonetheless, this type of effect is still considered unintended because positive complementarity does not form part of the *Rome Statute* and is thereby beyond the Court's mandate. As for norms, Tim Allen's study finds that in Northern Uganda the norms of the ICC (i.e. the adherence to punitive justice) have clashed with the Alcholi's norms of justice – a factor that in turn can weaken the Court's effectiveness in regard to the situation. From their perspective: "convictions in criminal trials are not a universally recognized approach to justice. There are other ways of doing things; reconciliation is preferred to retribution, and amnesty and

[41] Paola Gaeta, "Is the Practice of 'Self-Referrals' a Sound Start for the ICC?" in the *Journal of International Criminal Justice* 2, 4 (2004): 951.
[42] "Prosecutorial Strategy," *International Criminal Court* (1 February 2010): 5.

truth telling are much more acceptable than punishment of the guilty."[43] Hence, examining the Court's unintended effects on actors, domestic institutions, and norms offers a more holistic account of these phenomena in relation to the domestic politics of the DRC, Sudan, and Kenya.

3.3 Methods

The general methodology employed is that of a qualitative comparative case study, with a mixture of three different lines of inquiry for each case – a primary data analysis, a secondary data analysis, and semi-structured interviews. The comparative case-study method is appropriate for this project for the following reasons. First, "qualitative research routinely utilizes thick analysis, [as] it places great reliance on a detailed knowledge of cases."[44] This is pivotal for this study because it enables a comprehensive account of each case. Second and relatedly, case studies are context sensitive, which is particularly useful for examining how the effects of the ICC in the domestic politics vary between the different cases, thus enabling a stronger comparison between them. Third, with the in-depth and context based opportunities that case studies provide, new variables and hypotheses that have not yet been considered can be developed.[45] Lastly, the comparative aspect highlights similarities and differences between the case studies as they are affected by the same phenomenon – i.e. ICC intervention.

The development of each case study entails four consecutive steps.[46] The first step

[43] Tim Allen,"The International Criminal Court and the invention of traditional justice in Northern Uganda," in *Politique Africaine* 3, no.107 (2007): 149.
[44] Henry E. Brady and David Collier, *Rethinking Social Inquiry: Diverse Tool, Shared Standards 2nd Ed.* (Lanham: Rowman & Littlefield, 2010), 180.
[45] Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: BCSIA, 2005), 20.
[46] It is worth mentioning that prior to embarking on the cases studies, a documents review will be undertaken to gain a thorough understanding of the ICC. The scope of the review will include all ICC policy and legislative frameworks, relevant ICC reports and publications, and a scan of the ICC website and communications products.

provides a historical overview of the situation in question. The second step delineates the trajectory of the ICC in each respective case. These steps were conducted by employing primary and secondary data analyses. The primary data analysis derives from sources such as local news outlets (e.g. *L'Agence Congolaise de Presse, the Sudan Tribune, and the Kenyan Daily Post*). For the secondary data analysis scholarly articles and books are examined, as well as reports and briefing notes produced by governmental and non-governmental organizations (e.g. the ICC, the United Nations Security Council, and International Committee of the Red Cross).

The third step addresses the first objective: *to demonstrate the extent to which, the ICC has been successful in reducing or deterring mass atrocity crimes and how it has achieved this end.* This step contains three different data sources – a secondary data analysis, a primary data analysis, and semi-structured interviews. The secondary data analysis mainly derives from scholarly books and articles that have assessed the ICC's ability to fulfill its mandate in preventing mass atrocities in each respective case. This information is complemented with primary sources drawn from local news articles, international news articles (e.g. from *BBC Africa, Al-Jazeera, the Guardian* etc.); statements made by key actors (e.g. government officials, ICC officials, and Non-Governmental Organization (NGO) personnel); and relevant blogs (e.g. The Hague Trials Kenya). It is accompanied by semi-structured interviews of individuals from the DRC, Sudan, and Kenya, academics (i.e. experts in the field of international law and/or African politics), ICC personnel, NGO employees, and human rights activists. The purpose of these interviews is to get the interviewees' opinions on the Court's success in this area. A

copy of the questionnaire can be found in Appendix.[47]

The fourth step addresses the second objective: *to illustrate the unintended effects of the ICC in the domestic politics of the countries in question beyond the militarized conflicts.* Firstly, semi-structured interviews are conducted with the purpose of acquiring the interviewees' perspectives on these phenomena. The type of questions that were asked can be found in Appendix A. Since getting access to a high number of interviewees was difficult without doing fieldwork, this information is complemented with secondary and primary data analyses. The former is employed to derive from the literature potential unintended effects of the ICC on the domestic politics of the DRC, Sudan, and Kenya beyond the militarized conflicts. Since this is a relatively new topic most of the sources consist of reports produced by the state's respective governments, as well as reports or briefing notes from NGOs working in the field. A variety of primary sources, such as local news articles and government statements, are used to complement data gathered from the secondary sources. The following three chapters will delve into the case studies, and the concluding chapter will treat these cases together by highlighting patterns and differences between them.

[47] This thesis project has ethics clearance for the semi-structured interviews. The questions are structured around four themes, which seek to address the first and the second objectives. The themes are the following: the impact of the Court on the situations, the effects of the Court on actors, on institutions, and on norms.

Chapter 2: The case of the Democratic Republic of the Congo

1.0 Introduction

This case study brings to bear three key factors vis-à-vis the International Criminal Court's (ICC) impact on the domestic politics of the Democratic Republic of the Congo (DRC). First, the ICC has demonstrated mixed results in terms of fulfilling its mandate in bringing an end to impunity and thus contributing to the prevention of mass atrocity crimes. Second, ICC intervention has affected the domestic politics of the DRC by: challenging the electoral process; mainly failing to initiate judicial system (both at the national and provincial level) as prescribed by the principle of complementarity; and to an extent fuelling ethnic divisions. Third, this case also illustrates the particular nature of self-referrals and how these shape ICC intervention within the country, as these create the expectation that the Court ought to cooperate with the States

This chapter is divided into five sections. The fist section provides a brief overview of conflict in the DRC, including the two Congolese wars, as well as the current state of the country. The second section illustrates the process in which the situation was taken to the ICC. It also provides a summary of the Court's activity since it intervened on 23 June 2004. The third section assesses whether the ICC has been effective in fulfilling its intended effect (or its mandate) vis-à-vis the situation. It also explains why the Court has rendered mixed results in this regard. The fourth section is divided into three sub-sections which explore the unintended effects of ICC intervention on the domestic politics of the DRC: the impact of the ICC in the country's political structure, primarily its electoral politics; the effect of complementarity in catalyzing judicial reform at the national and provincial level; and how ICC has the potential to exacerbate ethnic tensions

in already ethnically fractured societies. The last section will provide a brief conclusion and highlight the key findings and limitations of this research.

2.0 Brief account of the situation in the DRC

The situation in the DRC can be divided into two wars, which have involved at least nine African countries and a multiplicity of domestic, regional, and international actors. The first war began in 1996 as a spill over from the 1994 Rwandan Genocide. After the Genocide, Interhawanme (Hutu extremists) went into exile mainly into UN refugee camps located in Eastern DRC. This greatly destabilized the region since the Interhawanme started to terrorize and raid the local population, particularly Tutsi communities. Accounts suggest that President Mobuto Sese Seko was a Hutu sympathizer and therefore allowed the Interhawanme to operate with impunity. As a result, domestic and regional antagonism against President Mobuto increased. This pushed the Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre (AFDL), with the aid of neighbouring actors – Rwanda, Burundi, Angola, Uganda, and southern Sudanese rebels – to launch an attack against the regime. In May 1997 the AFDL marched into Kinshasa and successfully overthrew Mobuto's regime. This event marked the end of the First Congolese War. The country's name changed from Zaïre to the 'Democratic Republic of the Congo' and Laurent-Desire Kabila, the leader of the AFDL, became president.

Although President Kabila was initially in favour of the Tutsi, once in power he changed his attitude, as he felt threatened by their influence within his regime. He fired his Tutsi advisers, ended Congo's military alliance with Rwanda, and started to incite

ethnic hatred towards Rwandan and Congolese Tutsi.[48] Tutsi populations began to feel extremely threatened and, as they had done in the past, formed a coalition with the support of the Rwandan, Ugandan, and Burundian governments with the goal of ousting Kabila's regime. In 1998 the coalition invaded the DRC, which marked the beginning of the Second Congolese War. This time, however, the coalition failed to overthrow Kabila's regime, since Joseph Kabila quickly took over after his father, Laurent Kabila, was assassinated in 2001.

Joseph Kabila has upheld an antagonistic agenda towards Congolese Tutsi and Rwandans – a factor that has worsened the situation in the country by increasing regional tensions. Congolese of Rwandan decent and Rwandan elites continue to challenge his regime by developing lucrative networks for trafficking resources, and supporting local militias.[49] The Tutsi, in particular, have rallied around General Laurent Nkunda, who refuses to disarm out of fear that opposing forces will threaten Tutsi within the Congo. Despite these threats, Kabila has been successful in protecting his regime, in part because of the support he has received from Angola, Namibia, and Zimbabwe; as well as the strategic alliances he has established with Mai Mai and Hutu militias that have helped him contain the situation to the eastern part of the country. According to Autesserre, these alliances are based on the premise that "[their support for President Kabila] is still the best way for them to consolidate their claims to ancestral land rights and positions of authority."[50]

Conflict between the regime and the Tutsi populations has endured, and has been exacerbated by tensions between other ethnic groups. For example, within the Mai Mai

[48] Severine Autesserre, "Trouble with the Congo," in *Foreign Affairs* 87, no.3 (2008): 5.
[49] Ibid.
[50] Ibid.

forces (a group composed of various ethnic groups) there has been increasing infighting between members from Katanga and the Kivus. This infighting is a result of the discontent that emerged from the highly selective process in which Mai Mai representatives were selected into the transnational assembly that governed the country from 2003 to 2006.[51] Another existing conflict, which has specifically affected the Ituri province, is between the Hema and Lendu populations. Autesserre notes that these groups have been violently asserting themselves, in part as a reaction to their exclusions during the peace process that ended the Second Congolese War in 2003.[52]

The conflict in the Congo has been the deadliest since Word War II. Accounts suggest that an estimated 5.4 million people have been killed since 1996, and thousands continue to die as volatility and violence persist in pockets across the country. Millions of civilians have been displaced, including an estimate of 2.6 million internally displaced populations (IDPs).[53] According to Autesserre, tensions could have been managed through peaceful means. However, the Second Congolese War destroyed many of the existing institutional means, particularly the country's justice and administrative systems.[54] The government has been unable to strengthen rule of law, notably in the eastern region and thereby perpetrators operating in the area have enjoyed full impunity. Likewise, police forces have failed to protect civilians from the violence that pervades the region and, more worrisome, many police officers have joined rebel groups since this is one of the few mechanisms available to access financial resources. The displacement of millions of civilians has also disrupted traditional justice systems, which means that these

[51] Autesserre, "Trouble with the Congo," 5.
[52] Ibid.
[53] ibid.
[54] Ibid.

mechanisms have been inaccessible for the most part. Likewise, the international community, albeit having the largest UN peacekeeping mission (United Nations Organization Stabilization Mission in the DR Congo/ MONUSCO) from all other missions, has been unable to develop strategies that can effectively ameliorate the situation.

3.0 ICC activity in the DRC

The horrible crimes that have been committed in the country as a result of the country's recurrent conflict are what led the ICC to intervene. Initially former Chief Prosecutor Luis Moreno-Ocampo was seeking to open investigations under the principle of *propio muto*; however, in 2004 he received a self-referral from the Congolese government. The referral gave the ICC permission to investigate all crimes within its jurisdiction allegedly committed anywhere within the territory of the DRC since 2002.[55]

There are two major constraints to the ICC process. First, although mass atrocities have been committed all over the country, most of the crimes under ICC jurisdiction were committed before 2002, meaning that the Court cannot investigate these crimes. Second, the ICC initially focused its efforts almost exclusively on crimes committed in Ituri province, even though President Kabila granted it permission to carry out investigations "anywhere in the territory of the DRC."[56] This second constraint is a result of two factors. First, most of the gravest crimes committed between 2002 and 2004 took place in Ituri. According to International Crisis Group (ICG), the situation in province at the time could be described as *pre-genocidal*. Between 2000 and 2003, violence in Ituri was estimated to

[55] "Prosecutor receives referral of the situation in the Democratic Republic of Congo," *ICC-OTP-20040419-50.*
[56] Ibid.

claim the lives of 50,000 Congolese.[57] The ICC's focus on Ituri also bore less political costs than in other provinces, chiefly the Kivus, as crimes committed in Ituri could not be attributed to the government and major armed groups involved in the 2003 peace process. As suggested by Paul Seils and Marieke Wierda, "the potential for derailing the peace process was regarded as unlikely [by focusing in Ituri], compared with the possible political impact of investigations in other provinces of the country." [58] Table 1 summarizes ICC activity within the DRC since July 2001, when the Court was established.

Table 2.0: ICC action in the DRC from 1 July 2002 to the present

Referral Type: Self-referral					
Preliminary Examination: 19 April 2004			Formal Investigation: 23 June 2004		
INDICTMENT OUTCOMES:					
Individual	**Affiliation**	**Indictment**	**Arrest**	**Trial**	**Verdict**
Thomas Lubanga D.	FPLC	10 Feb 2006	16 Mar 2006	26 Jan 2009	14 Mar 2012 (Guilty)
Germain Katanga	FRPI	2 Jul 2007	17 Oct 2007	24 Nov 2009	7 Mar 2014 (Guilty)
Bosco Ntaganda	FPLC	1. 22 Aug 2006 2. 13 Jul 2012	22 Mar 2013	10 Feb 2014	In ICC custody
Callixte Mbarushimana	FDLR	28 Sep 2010	25 Jan 2011	28 Jan 2011	16 Dec 2011 (Charges Declined)
Sylvestre Mudacumura	FDLR	13 Jul 2012	At large		
Mathieu Ngudjolo C.	FNI	6 Jul 2007	6 Feb 2008	11 Feb 2008	21 Dec 2012 (Not Guilty)
Relevant Case: Situation in the CAR					
Jean-Pierre Bemba G.	MLC	10 Jun 2008 (Replacement)	24 May 2008	22 Nov 2010	Trial Ongoing

Source: Situation in Democratic Republic of the Congo, *International Criminal Court;* and Michael Patrick Broache, "Deterrent, Instigator, or Irrelevant? The International Criminal Court and Atrocities in the Democratic Republic of Congo: A Case Study of the RCD-Goma (Nkunda faction)/CNDP/M23 Rebel Group," ISA Paper (2014): 13.

[57] International Crisis Group, "Congo: quatre priorities pour une paix durable en Ituri," (01 May 2008).
[58] Paul Seils and Marieke Wierda, "The International Criminal Court and Conflict Mediation," *the International Center for Transitional Justice,* Occasional Paper Series (2005): 10.

4.0 The intended effects of the ICC in the DRC

4.1 The ICC's ability to fulfill its mandate in the DRC

The extent to which the ICC has fulfilled its intended role of contributing to the prevention of mass atrocities has been widely contested. Several sources indicate that the ICC has been seen in positive light in Ituri for ending the cycle of impunity by bringing several perpetrators to justice. According to a local activist "there has been a change [since the ICC's engagement]. Before we saw that there were those that wanted to restart the war... now they are afraid – leaders do not want to be arrested."[59] The ICC has also played an important role in decreasing the number of child soldiers recruited in Ituri. "Children themselves" an activist stated, [since the ICC's involvement] have been educated about their rights and sensitized to their roles as both victims and perpetrators in a way which may impact their own future behavior."[60]

Successive UN Security Council (UNSC) reports illustrate the evolution of violence both within Ituri and in relation to other regions that were not initially host to ICC involvement. A report published in November 2003, a year predating ICC intervention, noted that the state of violence in Ituri had reached a critical level compared to previous reporting periods. In Bunia, 420 civilians were killed between May and November 2003, as a consequence of infighting between Lendu and Hema militias.[61] Around 380 cases of human rights abuses were also reported, including: killings, forced

[59] IRRI & APROVIDI-ASBL "Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri," in *Just Justice? Civil Society, International Justice and the Search for Accountability in Africa,* Discussion Paper No.2 (January 2012): 10.
[60] Ibid.
[61] "Fourteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo," in *UN Security Council Report,* S/2003/1098 (17 November 2003): 1.

disappearances, mutilations, rape, systematic looting and destruction of poverty.[62] In contrast, reports published in 2004 and 2005 acknowledged a significant security improvement. For example, by November 2004, around 1,000 militia elements had surrendered to United Nations Organization Mission in the Democratic Republic of the Congo/ MONUC (the UN peacekeeping mission at the time) and Forces Armées de la République Démocratique du Congo (FARDC) forces, giving up 223 weapons and ammunition.[63] During this time as well, a joint operation between MONUC and FARDC led to the fleeing of an estimated 200 Congolese Revolutionary Movement (MRC) militias to North Kivu, where they surrendered to FARDC forces.[64]

In other conflict-ridden provinces such as Katanga, North Kivu and South Kivu, the security situation did not improve to the same degree as it did in Ituri, which can, to an extent, demonstrate the effectiveness of the ICC in deterring perpetrators from committing mass atrocities. In the Kivus, for example, albeit the disarmament of 359 Mai Mai elements, approximately 5,000 IDPs from Bulundule, Bulindi and adjoining villages fled to Kanyabayonga, fearing attacks by the FDLR.[65] Similarly, Mai Mai militias were responsible for the looting of villages and atrocious human rights abuses in the areas of Moba and Manono (located in Katanga province). This resulted in the movement of approximately 2,000 civilians.[66] Hence, the discrepancy in security levels between Ituri

[62] Refer to the "Sixteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo," in *UN Security Council Report,* S/2004/1034 (31 December 2004), and "Twentieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo," in *UN Security Council Report,* S/2005/832 (28 December 2005).
[63] The report does not indicate whether 223 weapons and ammunition are a substantial number; therefore this should be taken with a grain of salt. "Twentieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo," 5.
[64] "Twentieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo," 5.
[65] Ibid., 7.
[66] Ibid.

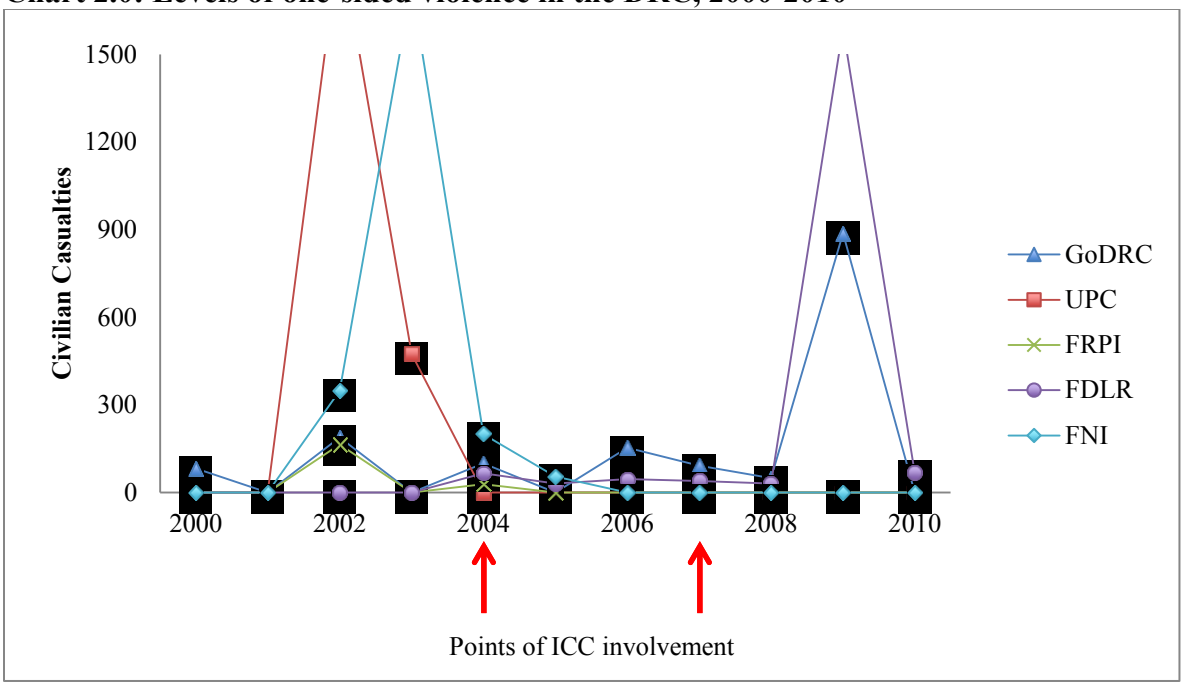
and provinces that did not experience ICC involvement suggests that the Court has to an extent contributed to a reduction in levels of violence.

It is problematic to attribute the security improvement in Ituri wholly to ICC intervention, since we lack the proper counterfactual of what would have taken place in absence of its involvement. Nonetheless, the Uppsala Conflict Data Program's (UCDP) One-Sided Violence Dataset suggests that the ICC did in fact have an impact on the levels violence committed by the Government of the DRC (GoDRC) and numerous rebel groups operating mostly in Ituri.[67] Chart 1 presents the levels of reported one-sided violence (ROSV) committed by the GoDRC and rebel group whose leader(s) were facing ICC charges between 2000 and 2010. The main conclusion that can be drawn from this data is the substantial decrease of ROSV from 2002 to 2004. Chart 1 also demonstrates that dates of ICC actions – e.g. dates of intervention and issue dates of the indictments – are associated with a decrease in subsequent levels of ROSV committed by each respective party. For example, reported civilian killings committed by the UPC, FNI, FRPI, and the GoDRC fell from a high of 2,594 in 2002 to 329 deaths in 2004. Notably, the ROSV stabilized at zero for the Union des Patriotes Congolais (UPC), Front des Nationalistes et Intégrationnistes (FNI), and the Forces de Résistance Patriotique d'Ituri (FRPI) – three rebel groups whose leaders were issued indictments between 2006 and 2008. Although ROSV peaked between 2008 and 2009 to 887 for the GoDRC and 1590 for the FDLR, these numbers quickly dropped to zero for the GoDRC and 68 for the FDLR.[68] In particular, the decrease of ROSV by the Force Démocratiques de Libération

[67] This data set only focuses on rebel groups, not regions, which is why focused only on leaders facing ICC indictments.
[68] In the fall of 2008, the peace treaty signed in January 2008 failed after Nkunda's rebels seized a military campo to launch attacks against the government.

du Rwanda (FDLR) in 2010 can be partly attributed to the ICC indictment that was issued for Mbarushimana (the Executive Secretary of the FDLR).

Chart 2.0: Levels of one-sided violence in the DRC, 2000-2010



Source: UCDP One-sided Violence, Version 1.4 – August 2013.

4.2 Why ICC efforts have rendered mixed results

Payam Akhavan argues that the threat of punishment, the primary mechanism of the ICC, has a limited impact on altering human behaviour in countries ravaged by violence.[69] Nonetheless, he maintains that punishment can contribute to the prevention of violence. The threat of punishment may deter potential perpetrators by altering their strategic calculus. It can also have a positive long-term effect by changing norms of appropriateness as it "instils unconscious inhibitions against crime" – in this case, against mass atrocity crimes.[70] Another mechanism at the Court's disposal lies in its ability to catalyze judicial reform at the domestic level. It has been suggested that the Principle of

[69] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities," in *The American Journal for International Law* 97, no. 1 (2001): 9.
[70] Ibid., 10.

Complementarity, which gives primacy to the state is supposed to prompt judicial reform, especially when leaders want to avert ICC intervention. Although sources indicate that the security situation has improved in Ituri since the ICC intervened, mass atrocities continue to be reported in the DRC. The following five factors can explain this shortcoming.

First, the ICC's power to end impunity has been put into question by its reliance on the Congolese state. Specifically, the Court's reliance on the GoDRC for the arrest of perpetrators has been a huge obstacle to ending impunity and thereby the ICC's ability to effectively deter leaders from committing future mass atrocities. The case of Ntaganda elucidates how reliance on local authorities undermines ICC efforts, notably when these efforts are in conflict with domestic political agendas. Although Ntaganda was indicted by the ICC as the prime suspect of mass atrocity crimes committed by the UPC during the Second Congolese War, he still enjoys impunity. In fact, in 2005 the transitional government granted him the position of General within the Congolese Army in an effort to bring to an end the conflict in Ituri. Ntaganda turned this offer down since he considered this position a threat to his security, instead becoming the head of the Congres National pour la Défense du Peuple (CNDP) – a political armed militia operating in the Kivus. Nevertheless, the point to emphasize is that political actors are often more willing to seek expedited peace and stability at the expense of justice. The Congolese government maintained that "it would not execute the ICC arrest warrant against him in the interest of maintaining peace, contending that Ntaganda is needed to keep the former CNDP troops integrated in the Congolese army," and therefore warranting peace in

Ituri.[71] Accordingly, the case of Ntaganda can send a signal to perpetrators that ICC indictments can be ignored if they are in conflict with political agendas.

The remaining four factors are closely associated with the ICC's initial decision to focus on Ituri. The second factor is the focus on Ituri, despite mass atrocity crimes being committed in other regions. Given the ICC's limited resources, it can only deal with a few key individuals. However, studies suggest that by restricting itself to Ituri, 'bigger fish,' chiefly government forces cannot be implicated since their crimes are more traceable to other regions. Former Prosecutor Ocampo, in particular, was very cautious of not derailing the peace process that was underway at the time – an event that was likely if key actors were incriminated. According to Phil Clark "investigations and prosecutions in Ituri display the least capacity to destabilize the current government, [as opposed] to the Kivus where government forces and Mai Mai militias backed by Kabila are directly implicated in mass atrocity crimes."[72] Hence, the Court's dependence on Kinshasa has circumscribed it to applying justice *only* to certain individuals – that is, those who are less likely to destabilize the political situation in the country.

Third and relatedly, by restricting its activity to Ituri, the Office of the Prosecutor (OTP) has refused to indict perpetrators for crimes committed in other provinces. Widening the geographical scope for Lubanga's crimes could incriminate regional actors such as top officials within the Rwandan and Ugandan governments (i.e. Salim Saleh, President Museveni's half brother), since these actors have allegedly trained and financed

[71] "DR Congo: ICC-Indicted War Criminal Implicated in Assassinations of Opponents," *Human Rights Watch* (13 October 2010).
[72] Phil Clark, "Chasing Cases: The Politics of State Referrals in the Democratic Republic of the Congo and Uganda," in *The International Criminal Court and Complementarity: From Theory to Practice Volume II,* eds. Carsten Stahn and Mohamed M. El Zeidy (Cambridge: Cambridge Univeristy Press, 2011): 1191.

Lubanga's UPC in other areas.[73] The OTP maintains that making an international link between Lubanga's crimes and international actors would put at risk the success of this case.[74] For one, Former Prosecutor Ocampo holds that the evidence gathered by the OTP is associated *only* with crimes committed domestically.[75] Accounting for the international character of this case could add a burden in terms of time and resources the ICC. On different note, Clark maintains that a key explanation for the OTP's strategy is that the Court "must maintain effective relations with political leaders who might be implicated in crimes elsewhere in the region," especially when pursuing cases with multiple regional actors.[76] The problem, however, is that in relation to the conflict in Ituri, Lubanga is "at best a middle-ranking perpetrator," in comparison to regional actors. Although it is rational for the ICC to seek the success of its cases, its approach in Ituri exempts the Court from investigating individuals who are perhaps more culpable than those currently being investigated.

Fourth, the OTP has selected cases with low risk of failure. This highlights the tension between expeditious justice and representative justice. Lubanga is charged with three counts of war crimes vis-à-vis the use of child soldiers; however, other serious crimes committed under his command (e.g. sexual violence) have been overlooked with the goal of pursuing expeditious justice. According to Clark "this strategy suggests that the OTP wishes to run a rapid, efficient trial for Lubanga and would rather convict him of lesser war crimes more quickly, than charge him with serious crimes and risk a protracted

[73] Clark, "Chasing Cases," 1191.
[74] Luis Moreno-Ocampo, "Decision sut la confirmation des charges," in *The Prosecutor vs. Thomas Lubanga Dyilo,* no. ICC-01/04-01/06-806 (05 February 2007), 11.
[75] Ibid.
[76] Clark, "Chasing Cases," 1191.

trial that could drag on for years with no judicial results."[77] However, this is not wholly illustrative of what locals believe are the crimes that should be prosecuted. A survey carried out in Ituri in 2008 of civilians found that only 16.5% of interviewees identified the recruitment of child soldiers as a priority for prosecutions; whereas, 93.4% identified killings and 68.8% identified rape and sexual violence.[78] Hence, the OTP's focus on expeditious justice appears to be in conflict with its duty to prosecute the most serious crimes of concern to both local actors and the international community.

Lastly, the extent to which the ICC adheres to the Principle of Complementary is debatable given the Court's concentration in Ituri. Under Article 17(a) of the *Rome Statute,* the ICC only has admissibility when "the state is unable or unwilling genuinely to carry out the investigation or prosecution."[79] Nevertheless, Clark argues that Ituri has the most functional judiciary from all other provinces, as it has "proven adept at investigating serious crimes, including those committed by Lubanga, Katanga and Ngudjolo."[80] In fact, compared to other provinces, since 2003 Ituri has received US$40 million from the European Commission to rebuild its local judicial system. A Belgium Non-Governmental Organization (NGO), Reseau de Citoyenz, implemented a project directed at local police forces and judiciary with the goal of improving arrest and detention processes, as well as facilities. MONUC has also provided around the clock protection to all judges in Bunia.[81] These efforts have improved Bunia's judiciary capacity, and thus its ability to carry out successful investigations of low-level crimes and serious human rights violations. For example, in 2006 Chief Mandro Panga Kahwa,

[77] Clark, "Chasing Cases," 1191-1192.
[78] IRRI & APROVIDI-ASBL "Steps Towards Justice, Frustrated Hopes," 22.
[79] *Rome Statute of the International Criminal Court,* 12.
[80] Clark, "Chasing Cases," 1193.
[81] Ibid., 1192.

senior member of the UPC and president of the Parti de l'Unité et la Sauvegarde de l'Intégrité du Congo (PUSIC), was prosecuted for crimes against humanity. He was sentenced to 20 years in prison and ordered to compensate 14 of his victims with sums of up to US$75,000.[82] Similarly, Lubanga and Katanga were in custody before the ICC took over these cases. According to Clark, civilian and military courts alongside MONUC had gathered significant evidence for these cases.[83] The judicial successes in Ituri (particularly in Bunia) in relation to other parts of the country seem to be in conflict with the Court's Principle of Complementarity. As John Penza, a military prosecutor, stated: "the ICC is certainly necessary but it should be handling bigger cases than those ones [it is currently prosecuting],"[84] which can be effectively conducted by local actors.

To conclude, the ICC's strategy in the DRC has been carefully executed to ensure political stability. In particular, the OTP has afforded Kinshasa considerable influence over its intervention in an effort to keep a cooperative relationship with the government. As such, the Court has compromised its ability to successfully fulfill its intended goal to contribute to the prevention of mass atrocity crimes in the country. This strategy has enabled those 'most responsible' for crimes committed within Ituri and in the DRC more broadly to go unpunished. Those individuals who have in fact been indicted such as Lubanga, have not been charged in full for the crimes they have committed. Hence, by failing to bring those most responsible to justice for the crimes committed in the DRC, the ICC's success in fulfilling its intended objective seems unclear.

[82] Clark, "Chasing Cases," 1193.
[83] Ibid.
[84] Ibid.,1195.

5.0 The unintended effects of the ICC on the domestic politics of the DRC

5.1 The instrumentalization of self-referrals for political purposes

Conventionally, self-referrals are regarded as the most positive way in which the ICC should open an investigation. This affords the Court certainty that the host state has the political will to cooperate with the OTP to successfully bring the respective cases to trial. In his September 2003 Policy Brief, former Chief Prosecutor Luis Moreno-Ocampo noted:[85]

> "Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses."

However, scholars like William Schabas and Paola Gaeta caution against self-referrals. Schabas contends that self-referrals are only likely if they fit into the political calculus of state authorities.[86] Similarly, Gaeta maintains that states will refer their respective situations because the Court presents an effective mechanism for exposing internationally their political opponents for mass atrocity crimes.[87] Another issue with this practice is that the government authorities will only be prepared to cooperate with the Court if those being investigated are in the opposing side. In contrast, the government will unlikely be willing to cooperate if the crimes being investigated are committed by state agents.[88]

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[85] "Annex to the Paper on Some Policy Issues Before the Office of the Prosecutor: Referrals and Communications," 5.
[86] William A. Schabas, "Complementarity in Practice: Some Uncomplimentary Thoughts," paper presented at *the 20th Anniversary Conference of the International Society for the Reform of Criminal Law* (June 2007).
[87] Paola Gaeta, "Is the Practice of 'Self-Referrals' a Sound Start for the ICC?" in the *Journal of International Criminal Justice* 2, 4 (2004): 951.
[88] Ibid., 952.

The case of the DRC illustrates the aforementioned concerns. In 2003 a transitional government was established under the leadership of Joseph Kabila and his four vice-presidents, Jean-Pierre Bemba (Mouvement pour la Libération du Congo/MLC), Abdoulaye Yerodia Ndombasi (former government official), Arthur Z'ahdi Ngoma (Rassemblement Congolais pour la Démocratie/RCD), and Azarias Ruberwa (Rassemblement Congolais pour la Démocratie-Goma/RCD-Goma). These individuals represented a key faction during the Second Congolese War. The transitional government was to stay in office until the 2006 elections that would determine who would come to power thereafter. According to William W. Burke-White "this produced a situation in which former enemies directly reported one another, often resulting in political maneuvering and dangerous infighting." [89] Since key political actors within the transitional government, including three of the vice-presidents, were likely to be implicated for international crimes, criminal justice could be instrumentalized to deal with one's opposition. The mentality was that individuals being indicted or prosecuted might not be able to participate in the electoral process, since they could be in The Hague during this time.[90] In other words, referring the situation to the ICC was a powerful tool in the hands of Congolese politicians if they were seeking to win the elections.

For Kabila the chances of getting indicted by the ICC were not probable. Most of the crimes that were attributable to him and his forces occurred before the establishment of the Court. On the other hand, two of his biggest opponents, Jean Pierre Bemba and Azarias Ruberwa, were likely to be subject to ICC investigation. In fact, during this

[89] William White-Burke, "Complementarity in Practice: the International Criminal Court as Part of System of Multi-Level Global Governance in the Democratic Republic of the Congo," in the *Leiden Journal of International Law* 18, no3. (2005): 564.
[90] Ibid., 565.

period Bemba was being investigated for crimes committed in the Central African Republic (CAR) by the MLC in the 2002-03 rebellion, which ousted President Patasse. The prosecutor had also received various reports that implicated Bemba for mass atrocity crimes in the Ituri province. Marc Lacey reports that Bemba's concern of being prosecuted was such that he had "a helicopter strategically parked a short dash from his riverfront office," in case he needed to escape.[91] Ruberwa was also accused of serious crimes in the DRC as leader of the RDC-Goma. Lastly, Ndombasi, albeit being Kabila's ally, posed an electoral threat that Kabila could quell, since he could be investigated for his role in encouraging the murder of government of opposition – i.e. ethnic Tutsi. Moreover, Ndombasi was already being prosecuted in Belgium for breaching International Humanitarian Law. "[Therefore] one would expect Kabila," as a MONUC observer stated, "to support a tribunal with jurisdiction over 'genocide and war crimes."[92]

The concern that political actors instrumentalize self-referrals is evident in the case of the DRC. Kabila could benefit in three ways by referring the situation. First, he could undermine the support of his political opponents by bringing to bear their crimes both domestically and internationally. As a lawyer from Ituri commented, "[the ICC] suited Kabila as a weapon against his adversaries."[93] Second, referring the situation could serve to strengthen his power vis-à-vis rebel groups, especially since it was unlikely for the ICC to target him. Lastly, Kabila could also legitimize his power by demonstrating to his constituents that his regime was both committed to end the violence in the country; and more importantly, to restrain itself from committing future mass atrocities. This latter point is in tandem with Beth A. Simmons and Allison Danner's theory of credible

[91] Marc Lacey, "Hope Glimmering as War Retreats in the DRC," in *The New York Times* (21 October 2003).
[92] White-Burke, "Complementarity in Practice," 565.
[93] "ICC Joins the Congolese Chess Game," in *RNW* (04 July 2004).

commitments. They argue that "the fact that a government cannot at low cost rescind or reverse its commitment [to end the commission of mass atrocities on its behalf] enhances the perception that it is interested in ratcheting down the violence and moving toward a peaceful solution to the conflict."[94] In other words, the fact that a government makes a commitment to put an end to violence on its behalf can encourage other actors to alter their behavior and thereby improve the prospect of reach a peaceful outcome. Echoing Pascal Kambale, a researcher for Human Rights Watch: "for Kabila the ICC could turn out to be [an] extremely profitable political currency."[95]

An evident implication Congo's self-referral to the ICC is its effects on the DRC's democratic process, specifically the ability of the state to consolidate democracy. One of the most fundamental features of a consolidated democracy is the existence of truly competitive elections. According to Adam Przeworski and his associates "contestation occurs when there exists an opposition that has the same chance of winning office as a consequence of elections."[96] The 2006 Congolese Constitution introduced provisions to protect the implementation of competitive elections. Article 7 outlaws the institution of monopartyism within the country, while article 8 recognizes the existence of opposition political parties, as well as the right of Congolese citizens to ascend to power democratically.[97]

Nevertheless, President Kabila has increasingly ignored the Constitution by employing different mechanisms to undermine political opposition, including the ICC. As previously mentioned, evidence suggests that Kabila self-referred the situation in part to

[94] Beth A. Simmons and Allison Danner, "Credible commitments and the International Criminal Court," in *International Organization* 64, no. 2 (2010): 234.
[95] "ICC Joins the Congolese Chess Game."
[96] Adam Przeworski, Michael Alvarez, José Antonio Cheibub, and Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* (New York: Cambridge University Press, 2000), 16.
[97] "The Constitution of the Democratic Republic of the Congo, 2005."

deal with his political opposition during the 2006 elections and future elections. An International Refugee Rights Initiative (IRRI) report notes that many Congolese see Bemba's arrest as evidence that the ICC is being employed by the government to undermine its rivals. "Whether or not this is the case," the report contends, "the Court removed a major player from the scene ahead of the recent 2011 presidential elections, which substantially weakened the challenge to President Kabila."[98] Hence, even if political opposition is constitutionally allowed, ICC indictments of key individuals have inhibited their prospects of effectively participating in the electoral process, which in turn has undermined the country's democratic transition. As such, the self-referral in the DRC should be taken with a grain of salt since this had unintended effects in the broader political arena the country. As Burke-White states, "where the ICC become an implement of a potentially despotic national government whose own hand may not be clean, the prosecutor might well be advised to delay international investigations until his actions are less likely to alter domestic political outcomes."[99]

5.2 Promoting judicial reform?

5.2.1 The state of the Congolese judiciary

Under the Principle of Complementarity the ICC can only intervene in situations where the state in which mass atrocities are taking place is either unwilling or unable to investigate and prosecute perpetrators. The DRC is a case where the state's failing judicial system rendered it 'unable' to address mass atrocity crimes. Article 17 (3) of the *Rome Statute* defines inability as a result of "a total or substantial collapse or

[98] IRRI & APROVIDI-ASBL "Steps Towards Justice, Frustrated Hopes," 24.
[99] White-Burke, "Complementarity in Practice," 568.

unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[100]

In fact, the Congolese judicial system was in a state of collapse by 2004, primarily as a consequence of the Second Congolese War. There were a total of 2,000 magistrates operating in courts of first instance intended to serve a population of 60 million. Two thirds of these judges resided in the three largest cities; consequently, the 46% of Congolese that lived in rural areas lacked immediate access to a judge.[101] In 2008 it was reported that out of an estimated 200 courts, only 50 were functioning in the whole country.[102] This all goes to say that in the DRC justice is mainly administered by any available authority. Another issue is that the separation between military and civilian courts is quite bleak. The former usually supersede the latter, especially in cases involving state security and firearms, regardless of whether defendants come from the military or are civilians. Furthermore, the judicial system is plagued with corruption since most staff is underpaid. Individuals involved in the judicial system are also subject to constant threats. In 2007, for example, two military magistrates were severely beaten by a military commander and cousin of President Kabila because they were seeking to transfer some cases from the military to civilian courts.[103] Another critical issue, especially in the context of the DRC, is that the judicial system has consistently failed to address cases of sexual violence. A report by FIDH documented that in 2005, 14,200 cases of rape were registered by the health services in South Kivu alone. Yet, only one percent (or 287) of

[100] *Rome Statute of the International Criminal Court.*
[101] Marlies Glasius, "A Problem, not a Solution: Complementarity in the Central African Republic and the Democratic Republic of the Congo," in *The International Criminal Court and Complementarity in Volume II,* 1213*;* and "Empowering Local Radios with ICTs," in *UNESCO.*
[102] "2008 Human Rights Report: Democratic Republic of the Congo," in *U.S. State Department Country Reports.*
[103] Ibid., 1213-14.

the cases were actually prosecuted.[104] As reported by UN Office of the High Commissioner for Human Rights (UNOHCHR) "it can be concluded that the resources available to the Congolese justice system in order to end impunity for crimes under international law are in no doubt insufficient."[105] Therefore, the decision of the Prosecutor to open investigations in the DRC is in accordance with the Principle of Complementarity.

5.2.2 Judicial reform and the Principle of Complementarity

It has been suggested that the ICC, through the Principle of Complementarity, is supposed to catalyze judicial reform by encouraging domestic justice systems to operate alongside the Court in ending impunity. The notion of positive complementarity – that is, "[that] the OTP will encourage genuine national proceedings where possible" is meant to play a leading role in this regard.[106] Sarah M. H. Nouwen, however, argues that "[complementarity] is merely a provision in a legal document by itself has not catalyzed anything."[107] Instead, what can in fact catalyze judicial reform are the state and the specific interactions that government actors have with the ICC. Complementarity is more likely to propel reform in situations where the state is interested in other alternatives to the ICC or has emphasized that the Court is not the solution.

This notion can be employed to explain why certain actors in the DRC pushed for judicial reform while others refrained upon ICC intervention. At the national level actors who are in favor of the ICC have not been active in promoting judicial reform. However,

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[104] "Democratic Republic of the Congo: Breaking the Cycle of Impunity," in *International Federation for Human Rights*, no. 490/2 (2008): 11.
[105] Info Note 7, "Climate of Impunity in DRC," in *UN Mapping Report* (1993-2003): 2.
[106] "Prosecutorial Strategy (2009-2012)," Office of the Prosecutor (01 February 2010): 1/18.
[107] Sarah H. M. Nouwen, *Complementarity in the Line of Fire The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge Univeristy Press, 2014), 21.

actors who have sought to halt Court intervention have tried to push for such reform. Since President Kabila was more than willing to refer the situation in the country, embarking on judicial reform to avert ICC intervention was contrary to his interests. On the other hand, his vice-presidents (notably, Bemba and Ruberwa) who were against ICC action have pushed for judicial reform. Numerous political actors have also claimed that the country's judicial system has the capacity to bring perpetrators to justice.

In terms of actual reform, some government officials such as the former Minister of Justice, Kisimba Ngoy, sought to reunify the judiciary, which was divided between east and west as a result of the war.[108] Numerous commissions have been established to address judicial and legislative reform. For instance, a permanent committee within the Ministry of Justice was created to reform domestic law by domesticating the *Rome Statute*.[109] The government has also established a Truth and Reconciliation Commission (TRC). Some argue that the TRC has at least served to prevent the ICC from investigating crimes committed by "small fish."[110] Hence, the case of the DRC highlights how actors who are in support of ICC intervention are less likely to engage in judicial reform, while actors who adamant of the Court's involvement have been at the forefront in this regard. Accordingly, this serves to illustrate Nouwen's claim that the ability of complementarity to catalyze judicial reform is dependent on the preferences of political actors vis-à-vis the ICC.

[108] White-Burke, "Complementarity in Practice," 570.
[109] Ibid.
[110] Ibid., 571.

5.2.3 Undermining judicial reform? The case of Ituri

Another interesting dynamic in relation to judicial reform has to do with the unproductive relation between the ICC and the judicial system in Bunia. International and local actors have worked to improve the judicial system in Ituri, specifically in Bunia. As previously mentioned, the region has received a lot of funding and training from international organizations, as well as protection from MONUC forces.[111] Locally, various initiatives have been undertaken to address mass atrocity crimes, particularly in regards to sexual violence. In a statement made by Mr. Zenon Mukongo (the legal adviser to the Permanent Mission of the DRC to the UN) to Sang-Hyun Song, the President of the ICC, Mr. Zenon argued that the Bunia military court has directly applied the Rome Statute, and the DRC more broadly has introduced Article 15 to the Constitution to address sexual violence "when used to destabilize a community."[112]

Commentators suggest that Bunia's judiciary has improved. Numerous prosecutions have taken place for different kinds of crimes, including mass atrocities. For example, the Bunia garrison court made the decision to sentence Blaise Bungimasaba (FARDC Captain) to life imprisonment for war crimes, including looting and murder.[113] Furthermore, the same military tribunal that convicted the founder of PUSIC for crimes against humanity, in 2008 convicted a Military Lieutenant and Sergeant for crimes of rape and violent threats against civilian populations in Fataki and Nioka.[114] Another

[111] Clark, "Chasing Cases," 1192.
[112] Zenon Mukongo, "Assembly of States Parties to the Rome Statute of the International Criminal Court," in the *Seminar on the ICC Review Conference: Key Challenges for International Criminal Justice* (30 April 2010): 49. Article 15 states: "The public authorities are responsible for the elimination of sexual violence used as an instrument in the destabilization and displacement of families. International treaties and agreements notwithstanding, any sexual violence committed against any person with the intention to destabilize or to displace a family and to make a whole people disappear is established as a crime against humanity punishable by law." In "The Constitution of the Democratic Republic of the Congo, 2005."
[113] Zenon Mukongo, "Assembly of States Parties to the Rome Statute of the International Criminal Court," 50.
[114] Clark, "Chasing Cases," 1193.

example that indicates some success in the judicial system is the increasing level of confidence that has been reported. According to Chris Aberi, the State Prosecutor in Bunia, "we have a different working spirit in Ituri now because of the EC's involvement here. MONUC's protection has helped greatly as well. Judges feel now they can do their job without fear of intimidation. We have a different philosophy and energy for justice…"[115]

Despite the reported successes in the Ituri region, the OTP still decided to intervene. Ironically, this has to an extent undermined domestic efforts, contradicting the notion of positive complementarity. ICC intervention in Ituri has produced a conflict between regional and national actors in regards to the Court's admissibility to operate in the province. The former maintain that Ituri's legal institutions have both the willingness and ability to try perpetrators for mass atrocity crimes. According to John Penza, a military prosecutor, "you only have to look at our record here to know what we are capable of. With MONUC's help, we prosecuted Kahwa [in Bunia] – MONUC detained him and we prosecuted him." He also points to the fact that they found the mass graves at Bavi, which enabled them to gather the evidence necessary to prosecute Francois Mulesa (a Congolese army captain) and his men.[116]

Nevertheless, President Kabila and his allies have expressed opposing views regarding Ituri's willingness and ability to prosecute those responsible for mass atrocity crimes, such as Lubanga and Katanga. For example, Katanga's defense contested the ICC's decision to take on his case, arguing that it was already underway. However, the Director of the Immediate Office of the Chief Prosecutor sent a letter to the ICC

[115] Clark, "Chasing Cases," 1195.
[116] Ibid.

Prosecutor, "stating that the Military Prosecuting Authority had not initiated the proceedings against Katanga."[117] In a similar vein, Congolese representatives produced a statement on June 4th, 2009, which maintained that:[118]

> "[The Congolese authorities] consider that the ICC must reject the challenge to admissibility made by the Defense for Germain Katanga so that Mr. Katanga may effectively be prosecuted before the ICC. In rejecting this challenge, the ICC will be doing justice to the DRC, a country devastated by the countless number of victims of atrocities, regarding which his Excellency Mr. Joseph Kabila Kabange, President of the DRC, has demonstrated to the world his determination to fight resolutely against impunity by making the DRC to date an unequalled model for cooperation with the ICC. This is the official position of the DRC regarding the challenge to admissibility."

This suggests that even though regional authorities have demonstrated to an extent a commitment to undertake the investigations and prosecutions of perpetrators, government officials in Kinshasa have undermined these efforts by giving the ICC jurisdiction over to Ituri.

Another way in which the ICC has potentially undermined local efforts is by employing a limited scope in regards to the crimes committed by individuals who were already being investigated domestically – i.e. Lubanga and Katanga. Domestically, Lubanga was being tried for genocide and crimes against humanity. However, once the ICC took over the case these charges where dropped, and instead he was only charged with the recruitment of child soldiers. "Lubanga himself," Schabas states, "must be delighted to find himself in The Hague facing prosecution for relatively less important offences concerning child soldiers rather than genocide and crimes against humanity."[119] Sources also indicate that Katanga, as leader of the FPRI, was responsible for numerous mass atrocity crimes against civilians in Ituri between January and March 2003, including

[117] Clark, "Chasing Cases," 1195.
[118] Ibid., 1196.
[119] "What is Thomas Lubanga Charged With?" *African Arguments* (27 January 2009), URL: http://africanarguments.org/2009/01/27/what-is-thomas-lubanga-charged-with/

sexual violence. The ICC indictment, however, acquitted him of this crime. Although it is uncertain what his charges in the DRC were for, many Congolese have criticized his acquittal. According to Sheila Muwanga, vice-president of FIDH, cases which "fail to prosecute crimes of sexual violence, failed the victims of these crimes and women's rights organizations."[120]

Although ICC involvement in the DRC is necessary and in accordance with Article 17 (2), its decision to intervene mainly in Ituri has inadvertently undermined local judicial reform. The fact that the ICC took over cases that were already being investigated domestically signaled to local judicial actors that despite their efforts and reforms they would not be able to prosecute perpetrators for mass atrocity crimes.[121] Also, though it is possible that these reforms are merely 'cosmetic', the fact that the ICC is taking cases that are already being investigated and prosecuting these individuals for less serious crimes raises some issues. For one, perpetrators are being freed from the most serious crimes in international law, as was the case with Lubanga. The other issue is that justice is not being granted to victims who have suffered from crimes that have been cleared as illustrated with the case of Katanga. As Susana SaCouto and Katherine Cleary argue, "where the ICC prosecutes a case that is narrower in scope than the domestic case that is interrupted, large numbers of victims may be denied the benefits associated with a trial of the crimes committed against them."[122] Hence, contrary to the notion that complementarity is supposed to enable domestic reform; the case of Ituri exhibits a

[120] "DRC: Germain Katanga before the International Criminal Court, A Mixed Verdict," FIDH (07 March 2004).
[121] Anonymous, *Interview by Alejandra Espinosa*, Montreal (Canada), March 2014.
[122] Susana SaCouto and Katherine Cleary, "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court," in *Journal of Gender, Social Policy & the Law* 17, no.2 (2009): 9.

different outcome. That is, a situation in which the ICC appears to have compromised local efforts.

5.3 Fuelling ethnic divisions?

One of the main motives behind the individualization of mass atrocity crimes is to take the fault away from the group to place it on the individual(s) orchestrating such crimes. In the DRC ethnicity has played an important role in conflict, as an International NGO (INGO) worker stated: "everything is read in ethnic terms."[123] The case of the DRC, however, illustrates two instances in which ICC trials of individuals rebel leaders are affecting the ethnic communities as a whole. The first example is the ICC's indiscriminate use of the term "Banyamulenge" to refer to MLC militias. The Banyamulenge are a pastoralist ethnic community mostly situated in Eastern DRC who have been "at the heart of the Congolese conflict."[124] Their place of origin has been widely contested. Many argue that they are Tutsi migrants largely from Rwanda, as well as Burundi and Tanzania. Other accounts suggest that they migrated into the DRC during the 16th and 18th centuries. Regardless of where the Banyamulenge came from, they are regarded "as non-authentic Congolese/Zairians, people of dubious nationality or simply foreigners."[125] Moreover, since their ancestry has not been traced and available evidence suggests they are foreigners, they have constantly been marginalized. For example, during the colonial period they were denied a territorial entity of their own. Presently, the Banyamulenge's association with Rwanda has further tarnished their image. According to Enock Ruberangabo Sebineza, a former parliamentarian, "Kagame's struggle caused

[123] Anonymous, *Interview by Alejandra Espinosa*, Montreal (Canada), March 2014.
[124] Felix Mukwiza Ndahinda, "The Bemba-Banyamulenge Case before the ICC: From Individual to Collective Criminal Responsibility," in *the International Journal of Transitional Justice* (2012): 3.
[125] Ibid., 5.

problems for the Banyamulenge in Congo because of our perceived support for his rebellion."[126]

Felix Mukwiza Ndahinda's study suggests that ICC has further tainted the image of the Banyamulenge. It has employed this term indiscriminately when referring to the MLC, even though Banyamulenge account for roughly 175 out of an estimated 20,000 militias.[127] Why has the ICC adopted this denonym to refer to MLC soldiers, especially when this can further incite local conflict? It appears that the main explanation for this is that most locals, specifically within the CAR do in fact refer to MLC militias as Banyamulenge. The Pre-Trial Chamber recognizes that not all MLC are Banyamulenge, as they note "several witnesses [identified their attackers as] MLC soldiers, [who are] commonly called by the CAR population 'Banyamulengue', regardless of their ethnic affiliation."[128] Personal testimonies for Bemba's case illustrate this phenomenon:[129]

- Witness 22: her aunt's son was killed by a gunshot fired by an MLC soldier in Bossangoa because he resisted the theft of goats as the "Banyamulenge" looted his uncle's farm. The witness goes further to state: "[according to the local population] many many many people were killed by the "Banyamulenge" in the Bossangoa attack."

- Witness 87: saw her brother with the Banyamulenge after hearing three gunshots. During this this she also heard her brother say to his killers: "thank you, thank you, you have already killed me, you can go."

These accounts and many others employ discourse that the Banyamulenge are the perpetrators, when in reality the violence is being committed by MLC militias that come from various ethnic groups.

An interviewee (an INGO worker) had a different stance on this issue. They argued that while the aforementioned is accurate for the CAR, this notion has not taken

[126] Enock Ruberangabo Sebineza, "DRC: Banyamulenge Seeking Political Solutions to Tensions," in *IRIN: Humanitrian News and Analysis* (03 August 2007), URL: http://www.irinnews.org/printreport.aspx?reportid=73571
[127] Ndahinda, "The Bemba-Banyamulenge Case before the ICC," 12.
[128] "The Case of the Prosecutor and Jean-Pierre Bemba Gombo," No.: ICC-01/05-01/08 (15 June 2009): 52/186.
[129] Ibid.

force in the DRC since Congolese are well aware of the difference between the Banyamulenge and the MLC.[130] Furthermore, the interviewee maintains that from their experience, the ICC's indiscriminate use of the term has not increased local tensions between the other groups and the Banyamulenge.[131] From these divergent views and the lack of sources available on this phenomenon, it is difficult to ascertain the extent to which the indiscriminate use of the term Banyamulenge has increased tensions. Nonetheless, it is crucial for the ICC, which aims to avert future tensions, to be more conscious when referring to MLC rebels, since these over-sweeping generalizations have the potential to further damage the image of this ethnic group. As Ndahinda states, "the inherently negative images and stereotypes associated with the Banyamulenge label in the ICC proceedings are likely to have a lasting, stigmatizing impact on those who identify themselves, or are identified by others, as Banyamulenge."[132]

The other example in which the ICC has to an extent contributed to ethnic tension is in relation to the Hema and the Lendu. Lubanga, who is Hema, is being prosecuted for mass atrocity crimes against Hema, even though he is also responsible for crimes against Lendu communities. Likewise, Ngudjolo Chui, a Lendu, is being prosecuted for crimes against Hema. As such, Lendu complain that the ICC and the international community more broadly have created a dynamic in which the perpetrators are people from different groups – e.g. the Hema and the Lendu – but the victims are *only* Hema. An interviewee maintains that individuals who wish to promote ethnic division point to this dynamic, claiming that the "ICC is unfair and biased."[133] Similarly, locals argue that "[this

[130] Anonymous, *Interview by Alejandra Espinosa*, Montreal, Canada (March 2014).
[131] The interviewee cautions against her claim that the ICC has not exactly increased tensions, since she has not explore this topic in depth. Her account is mainly based on her observations in the Ituri province. Ibid.
[132] Ndahinda, "The Bemba-Banyamulenge Case before the ICC," 2.
[133] Anonymous, *Interview by Alejandra Espinosa*, Montreal (Canada), March 2014.

dynamic] is evidence of how the Hema have pulled the wool over the eyes of the international community and dubbed [people] into thinking that they are the only victims when clearly they are not."[134] Although this to an extent can fuel ethnic tensions, the interviewee cautions that these claims need to be read against the scope of decreasing tensions in Ituri since the ICC intervened in 2004.[135] Regardless of whether the indiscriminate use of the term Banyamulenge or the victimization of Lendu have in fact increased ethnic tensions, it is important for the ICC to consider these dynamics. In a country where ethnicity plays such a central role especially in conflict, factors that can fuel divisions need to be treated with caution since these can be easily be manipulated by local actors.

6.0 Conclusion

The case study of the DRC highlights three important factors. First, ICCs efforts in the DRC have been mixed. In regards to bringing an end to impunity, the Court has been effective in putting certain individuals in jail – i.e. Lubanga and Katanga. However, one of the biggest complaints in this regard is that these men are "small fish" and thus the ICC should be going after real orchestrators of the violence – primarily, the government, as well as government officials in Rwanda and Uganda. As for the prevention of mass atrocities, the ICC has been somewhat effective, especially in Ituri where it initially intervened. Nonetheless, it is difficult to precisely determine the ICC's contribution to peace in this regard. It is impossible to test the counterfactual on the levels of violence that would occur in absence of ICC intervention. Also, to my knowledge there is not an available database that looks at the levels of violence in different provinces/regions on a

[134] Anonymous, *Interview by Alejandra Espinosa,* Montreal (Canada), March 2014.
[135] Ibid.

longitudinal basis. This would be helpful since it would show the different levels of violence between Ituri (ICC involvement) and other provinces (non-ICC initial involvement) in relation to the dates (or years) of ICC activity. The UCDP data set only focuses on rebel groups, which makes it difficult to ascertain provincial levels despite having some groups that do in fact operate solely in Ituri.

Second, the ICC has affected the domestic politics of the DRC in three distinct ways. Political actors have employed the Court to weaken their political opposition during the 2006 and future elections. This has inadvertently undermined the country's democratic transition, since competitive elections are crucial for a consolidated democracy. Also, the ICC has to an extent catalyzed judicial reform, albeit unevenly and with mixed results. Certain individuals have pushed for judicial reform seeking to avert ICC action, as illustrated by Bemba's actions. However, the ICC as also undermined judicial efforts, as demonstrated by its involvement in Ituri, by creating a conflict between national and local actors; and by taking on cases that were already opened and trying them for lesser crimes. Moreover, the Court's discourse of and relation with certain ethnic groups, notably the Banyamulenge and the Hema, has the potential to exacerbate tensions by widening ethnic divisions, although insufficient evidence exists to assert this claim. Nevertheless, the ICC should be cautious when dealing with ethnicity, a key source of conflict in the region.

Third, ICC intervention in the DRC has been shaped by its relationship with the Government and the Court, since the situation was opened on the basis of a self-referral. From this case it is evident that the ICC has tried to maintain a cooperative relationship with the state and vice versa. This has in part determined who has been indicted (e.g.

Kabila's biggest opposition or those with little connection to him), as well as the extent of judicial reform – the two main unintended effects in this study. To conclude, the evidence presented here strongly suggests that ICC action in the DRC has affected its domestic politics in ways well beyond the Court's mandate.

Chapter 3: The case of Darfur, Sudan

1.0 Introduction

Three major factors are brought to light in the case of Darfur, Sudan in relation to the International Criminal Court's (ICC) impacts on the country's domestic politics. First, the ICC has largely failed to fulfill its mandate in bringing an end to the impunity of perpetrators in Darfur and Sudan more broadly. Second, ICC intervention in Sudan has resulted in two unintended effects: first, the Court has become politicized by different actors; and second, the intervention has to an extent catalyzed judicial reform and the adoption of domestic mechanisms by state actors, with the objective of undermining ICC efforts. Lastly, this case illustrates the domestic and international political challenges that may arise when the UN Security Council (UNSC) refers situations to the ICC in states *not* party to the *Rome Statute.*

This chapter is divided into six sections. The first section provides a brief account of the conflict in Darfur and discusses the main factors that led to the violence that broke out in 2003. The second section outlines the process of how the ICC became involved in the situation, as well as the Court's activity since it intervened on June 6th, 2005. The third section assesses the ICC's ability to fulfill its intended objective in bringing perpetrators to justice. The fourth section examines the unintended effects of ICC intervention on the domestic politics of Darfur and Sudan more broadly – these are, the politicization of the Court by different domestic and international actors; as well as, the Government of Sudan's (GoS) move towards judicial reform and attraction to traditional methods of justice. The final section concludes the chapter by highlighting the main factors presented in this case study.

2.0 Brief account of the situation in Darfur, Sudan

The GoS has marginalized Darfur, the western region of Sudan, since its incorporation into Sudan in 1916 by the British colonial administration. Tensions between Darfuri rebel groups and the state reached a critical point in 2003, when the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) launched an anti-government attack in El Fasher, Darfur. The goal of the SLA and the JEM was to obtain more political and economic parity with Khartoum, since their previous non-violent efforts had been largely ignored. The government of Sudan (GoS) responded fiercely to the attack by arming 'Arab' militias (Janjaweed) in an effort to quell the opposition. This event set the precedent for what evolved into a violent campaign of ethnic cleansing against the 'African' groups within the region. This atrocious campaign involved widespread abductions and kidnapping of civilians, rape, the burning and looting of villages and livestock, the poisoning of wells, and a colossal number of killings. In 2005, the GoS and the SLA signed the Darfur Peace Agreement (DPA); however, this was unsuccessful, since Darfuri rebel factions, chiefly the JEM, have not signed it. Moreover, the substantive steps towards the implementation of the DPA seem highly unlikely. Violence is still occurring in Darfur and mass atrocities continue to be reported. According to the UN, the conflict is among "the worst humanitarian crises in the 21st Century."[136] Estimates indicate that around 2.71 million civilians have been displaced and over 400,000 people have been killed.[137]

What is behind this atrocious conflict? This conflict can be explained by three sets of situational factors that threatened the power of the GoS and its exclusionary

[136] In Depth, "Crisis in Darfur: a Timeline," CBC News, last modified in Jun 14, 2008,
[137] Dale C. Tatum, *Genocide at the Dawn of the 21st Century: Rwanda, Bosnia, and Darfur* (New York: Palgrave Macmillan, 2010), 137-38.

ideological platform. The first situational factor is the social insecurity that resulted from the droughts in 1973 and 1984, as well as the spill-over effects of the Chadian-Libyan conflict in the region. In 1973, the northern part of Darfur experienced a severe drought, and as a result various nomadic groups were forced to migrate southwards. The mass migration resulted in fierce competition over resources in southern regions of Darfur, severely affecting the relationship between the sedentary and the incoming nomadic groups.[138] Likewise, in 1984, another drought affected the region. This had detrimental repercussions, as famine became pervasive throughout and the competition for fewer resources became more marked.[139]

The Chadian-Libyan conflict, which resulted from a struggle between Hissene Habre and Colonel Qaddafi, also had direct implications in Darfur. Qaddafi's racist ideologies permeated Darfur through his support for the Arab Union – a "military racist and Pan-Arabist organization that stressed the Arab character [of the Sahara]."[140] The spread of these racist ideologies aggravated the relationship between the Arab nomads and sedentary African groups in Darfur. Qaddafi recruited Arab nomads, destitute as a result of the drought, to fight on the Darfuri front. Mahmood Mamdani notes that the conflict and the drought combined resulted in more than 200,000 Chadian refugees in the southern part of Darfur.[141] These three crises had dire implications for the relationship between the incoming nomad groups and the sedentary groups in southern Darfur, only amplified by the apathetic and often obstructive attitude of the GoS.

The second situational factor is the various political crises that have threatened the

[138] Labels such as natives, famers, settlers, and sedentary have been prescribed to the African identity, whereas nomad and migrant are usually attributed to the Arab identity.
[139] Gérard Prunier, *Darfur: The Ambiguous Genocide (Revised and Updated Edition* (New York: Cornell Univeristy Press, 2007), 51.
[140] Ibid., 45.
[141] Mahmood Mamdani, *Saviours and Survivors* (New York: Pantheon Books, 2009), 217.

power of the GoS. Among these crises are the two rounds of civil wars between Khartoum and the southern movements: first, against the Anya Nya, and later against the Sudan People's Liberation Army (SPLA). Other regions, including Darfur, the Nubian north, the Eastern region, and the southern Blue Nile, marginalized by the state, violently expressed anti-government sentiments. As Khalid Mustafa Medani states, "the root causes of Sudan's multiple regional conflicts has been a commonly shared grievance that too much power has been concentrated in Khartoum and its immediate environs."[142] The split within the National Islamic Front (NIF) between Al-Turabi and Al-Bashir also had grave implications for the Al-Bashir's regime. After being purged from the NIF, Al-Turabi capitalized on the aforementioned grievances against the regime by trying to unite both non-Arab and Arab groups on the basis of a common faith – Islam.[143]

The third situational factor and the most pertinent to the outbreak of the conflict is the emergence of the SLA and the JEM – two rebel groups that formed with the objective of redressing the marginalization of the region and the GoSs' preferential attitude towards the Arab groups in Darfur. Mika Vehnämäki contends "the main argument and justification for rebel armies to sprout in Darfur, in addition to resisting the Arab-initiated violence and ethnic cleansing, is the age-long political, economic and social marginalization of the region."[144] The SLA and the JEM have posed two fundamental challenges to Al-Bashir's regime. These movements have united with groups or individuals that have been identified as enemies of the state, such as the SPLA and Al-Turabi. Also, their joint attack in 2003 greatly challenged the power of the regime, which

[142] Khalid Mustafa Medani, "Strife and Secession in Sudan," in *Journal of Democracy* 22, no. 3 (2011): 147.
[143] Jok Madut Jok, *Sudan: Race, Religion, and Violence* (Oxford: Oneworld, 2007),
[144] Mika Vehnämäki, "Darfur: Scorched: looming genocide in Western Sudan," in *Journal of Genocide Research* 8, no.1 (2006): 60.

responded fiercely by sponsoring the Janjaweed in order to supress any further efforts made by these rebel movements.

The intervening variable that turned this conflict into an ethnic one is the GoS concurrent ideology of Arab supremacy. This ideology refers to the "notion that Arab beliefs and ways of life are superior to all others… [While perceiving] all those who are non-Arabs as inferior."[145] Throughout the post-colonial period the GoS has empowered many Arab groups, while African groups have largely been marginalized. Al-Bashir's regime, in particular, has exploited the idea of Arab superiority as a mechanism to retain power when it has been severely threatened. "The rulers in Khartoum," Atta El-Bhattani states, "have mastered a technique of divide and rule [between ethnic] regional elites."[146]

3.0 ICC activity in Darfur, Sudan

In light of this atrocious conflict, on September 18, 2004 the UNSC adopted resolution 1564, requesting the establishment of a commission of inquiry to investigate the mass atrocity crimes being committed in Darfur. The commission concluded that referring the situation to the ICC was the best course of action. This was likely to contribute to the peace and stability of the region, as it would presumably remove obstacles to the national reconciliation process.[147] From the perspective of the international community, ICC intervention was also a less costly form of intervention.[148] After much discussion on how to proceed and following a five month deadlock, on March 31, 2005, resolution 1593 was passed referring the situation to the ICC, with China, Algeria, Brazil and the US

[145] Samuel Totten, *An Oral and Documentary History of the Darfur Genocide, Vol. 1* (Santa Barbara: PRAEGER, 2011), 7.
[146] Atta El-Bhattahani, "Towards a Typology and Periodization Schema in Conflict in Darfur Region of Sudan," in *Understanding the Crisis in Darfur: Listening to Sudanese Voices,* ed. by A.G.M Ahmed and L. Manger (Bergen, Norway: Center for Development Studies, 2006), 38.
[147] William A. Schabas, "The International Criminal Court," in *The International Politics of Mass Atrocities: the Case of Darfur,* eds. David R. Black and Paul D. Williams (New York: Routledge, 2010): 137.
[148] Ibid.,

abstaining. Algeria's abstention was based on the UNSC's refusal to employ a regional initiative – i.e. proposal made by the African Union (AU).[149] China abstained on the basis that it believed ICC intervention would be counter-productive without support from the GoS.[150] Brazil's abstention was based on "unpalatable compromises" that had been made to the final text of the resolution.[151] Finally, the US, rather than vetoing, decided to abstain thanks to the injections that were made to the resolution.

On June 6th, 2005, Former Prosecutor Ocampo initiated investigations, determining that Sudan lacked both the judicial capacity and willingness to investigate and prosecute those responsible for mass atrocity crimes. Table 1 provides a detailed account of ICC action in Darfur from July 1, 2003 to the Present.

Table 3.0: ICC action in the Darfur, Sudan from 1 July 2002 to the present

Referral Type: UN Security Council Referral			
Preliminary Examination: 31 March 2005			Formal Investigation: 06 June 2005
INDICTMENT OUTCOMES:			
Individual	**Position and Affiliation**	**Indictment**	**Arrest**
Ahmad Harun	Former Minister of State, GoS	27 Apr 2007	At large
Ali Kushayb	Leader, Janjaweed	27 Apr 2007	At large
Omar Al-Bashir	President of Sudan	1. 4 Mar 2009 2. 12 Jul 2010	At large
Bahr Idriss Abu Garda	Chairman and General Coordinator of Military Operations, United Resistance Front	ICC refused to confirm the charges against him	
Abdallah Banda Abakaer Nourain	Commander in Chief, JEM	Terminated	
Abdel Hussein	Minister of Deference, GoS	1 Mar 2012	Execution of the arrest warrant is pending

Source: Situation in Democratic Republic of the Congo, *International Criminal Court.*

[149] Schabas, "The International Criminal Court," 139.
[150] Ibid.
[151] Ibid.

4.0 The intended effects of the ICC in Darfur, Sudan

4.1 The ICC's ability to fulfill its mandate in Darfur, Sudan

The involvement of the ICC in Darfur has not been successful in bringing an end to the impunity of perpetrators; and, as a result, it's effectiveness in contributing to the prevention of mass atrocity crimes in the situation is questionable. Although the ICC has tried to make those *most* responsible accountable for the mass atrocities committed in Darfur, the GoS has done very little to cooperate with the Court's decisions. "[The GoS] reasserted that the ICC had no jurisdiction over any alleged crimes in Sudan and stated that under no circumstance would Sudanese officials be handed over for trial to an international court."[152] And although the GoS stated that it would take the necessary measures to address the situation domestically, it has failed to establish reliable judicial proceedings against those alleged to be responsible for mass atrocity crimes in Darfur.[153]

The regime has failed to bring to justice those identified by the ICC. The regime appointed Harun – who has been indicted with crimes against humanity and war crimes in Darfur – as the State Minister for Humanitarian Affairs. Ironically, following his indictment the GoS appointed him head of the committee responsible for investigating the human rights violations committed in Darfur, as well as overseeing the AU/UN Hybrid Operation in Darfur (UNAMID). According to International Crisis Group (ICG) "he has been put in a position to control the livelihood and security of those people he displaced."[154] In regards to Kushayb, the GoS claimed that Ali Kushayb had been detained; however, there are recurring rumors that he was released. According to ICC

[152] International Crisis Group, "Sudan: Justice, Peace, and the ICC," in *Africa Report,* no. 152 (July 2009): 5.
[153] Ibid., 6.
[154] Ibid.

officials, "Kushayb was released from custody and was seen participating in a public event in Sudan in 2010."[155] ICG suggests that the GoS has been hesitant of reprehending him, since there is fear that doing so will turn the Janjaweed against the government and thus further weaken the government's power.[156]Meanwhile, President Al-Bashir is still in power, and is still orchestrating violence indirectly through starvation and by cutting off humanitarian aid. Moreover, he has been protected by friendly states (even states party to the ICC) and the African Union. Nevertheless, the indictment has placed obstacles to his regime. His international travel has been severely restricted to only a handful of states; and when he does travel, there is enormous pressure placed on the welcoming state for his arrests by the International community. Despite the effects of the indictments on these individuals, the ICC has to this day been unable to end the impunity of those responsible for mass atrocity crimes in the situation in Darfur.

The ICC's effect on the levels of mass atrocities being committed in Darfur and in the whole of Sudan is, at best, mixed. Some sources argue that after the peak of the crisis between 2003 and 2004, violence decreased, and that deaths after this period can be mostly attributed to environmental issues. According to Mamdani "[it is an] error to assume that excess deaths in Darfur are the result of a single cause: violence. But the fact is that there have been two separate if interconnected causes, drought and desertification on the one hand, and direct violence on the other."[157] Similarly, a report produced by the US Government Accountability Office concluded that the region's high mortality rate could be mostly attributed to diarrhea, while "violence or injury" they noted "accounted

[155] Sigall Horovitz, "Sudan: Interaction Between International and National Judicial Reponses to the Mass Atrocities in Darfur," in *DOMAC/ 19* (April 2013): 22.
[156] International Crisis Group, "Sudan," 12.
[157] Mahmood Mamdani, "Beware of human rights fundamentalism," in *Pambazuka,* Issue 425 (26 March 2009).

for a smaller percentage of deaths ranging from 10 to 12 percent."[158] It is important to note at this point that the decrease in violence after 2004 cannot be directly attributed to the ICC, since it only intervened in 2005.

In contrast, other sources suggest that violence has and continues to be a principal factor in the number of casualties. A report published by UN Office for the Coordination of Humanitarian Affairs (UNOCHA) in 2005 noted that government forces in cooperation with Janjaweed militias carried out several armed attacks between September and November 2005 (two months after the ICC opened investigations in the country). These attacks took place in IDP camps or villages, in which many civilians were killed and injured. In 2007, the year when the ICC issued indictments against Harun and Kushayb, Darfur also experienced high levels of violence. A UNSC report indicates that from January to May 2007 the government carried out numerous aerial bombardments and attacks in villages throughout Darfur. In addition, multiple cases of sexual violence against women and girls were registered. In 2009, the year when Al-Bashir was first indicted, UNOCHA recorded and investigated 61 cases of human rights violations (including mass atrocity crimes). These violations involved 94 victims, including: "72 cases of sexual and gender-based violence, including 10 minors between the ages of 6 and 17; 36 cases of killings; 12 cases of injury by shooting; and three cases of assaults of UNAMID national staff."[159] Al-Bashir's second indictment also did little to ameliorate the human rights crisis. A report by the Secretary General published on 18 October 2010 noted, "[that] humanitarian operations have been hampered throughout the reporting

[158] United States Government Accountability Office, "Darfur Crisis: Death Estimates Demonstrate Severity of Crisis, but Their Accuracy and Credibility Could Be Enhanced," in a *Report to Congressional Requesters* (November 2006): 13.
[159] "Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur (UNAMID)," S/2009/592, *United Nations Security Council* (16 November 2009): 11.

period due to ongoing fighting between Government forces and armed movements in part of the region, as well as carjacking and continuing threats of abductions of humanitarian workers and United Nations staff."[160]

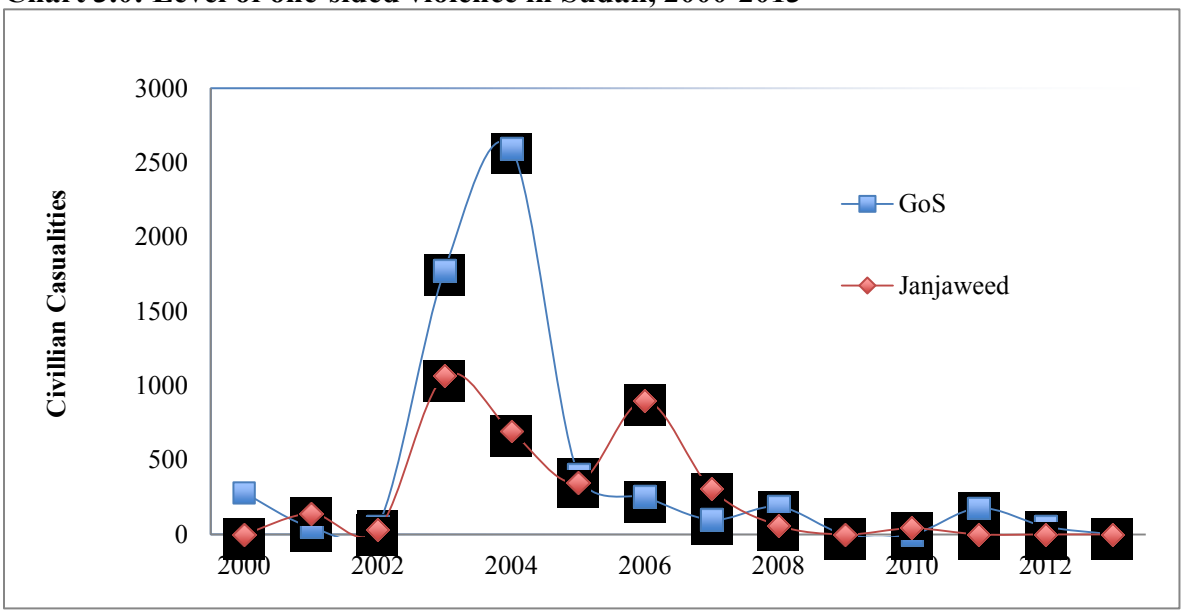
More recent reports continue to document violence in the region. OCHA estimates that the renewed conflict between Sudan Armed Forces (SAF) and rebel groups in Darfur in 2012 has resulted in the displacement of 90,000 civilians.[161]. The latest report from OCHA, published in March 2014, documented increasing clashes between government forces and rebel groups, resulting in civilian deaths, large-scale scale destruction of property and more than 200,000 newly displaced people.[162] Hence, these accounts suggest that despite the ICC's involvement in the region and indictments of key government actors, mass atrocity crimes are still being committed.

Nevertheless, data gathered by Uppsala Conflict Data Program (UCDP) provides a more positive account in relation to levels of violence. Chart 1 illustrates the levels of reported one-sided violence (ROSV) by the Janjaweed and the GoS – the main actors behind the conflict in 2003/04, for the period 2000 to 2013.[163] The chart indicates that levels of ROSV decreased substantially from a total of 6,126 reported civilians deaths from 2003 to 2004 (the peak years) to 753 in 2005. More specifically, ROSV by the GoS has decreased over time, with the exception of peaks in 2008 (184 casualties) and 2011 (176 casualties). This data suggests that ICC intervention seems to have rendered the

[160] "Report of the Secretary-General on the African Union- United Nations Hybrid Operation in Darfur (UNAMID)," S/2010/543*, United Nations Security Council* (18 October 2010): 8.
[161] " Sudan: Humanitarian Update," OCHA (January – June 2013): 1.
[162] OCHA, "Darfur: New displacement – first quarter 2014," in *Situation Report No. 1* (24 March 2014): 1.
[163] Reported one-sided violence refers to: "One-sided violence is the use of armed force by the government of a state or by a formally organized group against civilians which results in at least 25 deaths. Extrajudicial killings in custody are excluded." Please refer to: "UCDP One-sided Violence Codebook," in *Uppsala Conflict Data Program*, Version 1.4 (December 2013): 2.

most positive results for the Janjaweed since the levels of reported one-sided violence attributed to them has decreased from 886 civilian deaths in 2006 to 41 in 2010 (the last year of available data for this faction). Even though mass atrocity crimes are still being committed in Darfur and the whole of Sudan both by the GoS and other rebel groups, this shows that reductions in ROSV by both parties can be partly attributed to the ICC, since violence has not reached the 2003/04 levels since the Court has been involved.[164]

Chart 3.0: Level of one-sided violence in Sudan, 2000-2013



Source: UCDP One-sided Violence, Version 1.4 – August 2013.

4.1 Why ICC efforts have rendered such results

The success of the ICC's intervention in Darfur and Sudan more broadly has been largely questioned. Some argue that ICC involvement has in fact been beneficial despite the GoS's attitude towards the Court. "In Darfur, where there has been little willingness by the United Nations to support the ICC," Akhavan states, "the diplomatic maneuverings and internal political divisions in Sudan indicate that arrest warrants have at the very least

[164] It is worth mentioning that a multiplicity of other factors could explain the decreases in the levels of violence.

made the continuation of atrocities more costly than before."[165] Similarly, Human Rights Watch opines that even if the ICC lacks the means to arrest those indicted in Sudan, "the warrant can marginalize Al-Bashir and loosen his grip on power, which could help prevent further crimes."[166]

Nonetheless, many critics maintain that ICC intervention has been to an extent counterproductive. Al-Bashir has not only failed to cooperate with the ICC, but has also employed several mechanisms to undermine the Court's efforts. During the initial period of the Court's intervention, the GoS was willing to cooperate with ICC officials by granting them access to affected areas. The government also sought to reform its judicial system, by domesticating the *Rome Statute* under the Armed Forces Act of 2007. In 2007, however, when the ICC issued an indictment for Harun and one for Kushayb, the government changed its attitude.

The government's antagonistic stance towards the ICC has posed numerous challenges to its efforts. First, the GoS has denied investigators access to affected populations within Darfur. As a result, investigators have been unable to gather the evidence required for proper investigations. Second, the GoS has punished and/or threatened local and international actors who have demonstrated a willingness to cooperate with the ICC. Third, in response to Al-Bashir's indictments, the GoS expelled over 13 international NGOs from the country. According to the UN, these organizations were pivotal for humanitarian efforts in the country, since they were supplying food and water to an estimated 1.1 million people and medical care to 1.5 million people in an

[165] Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism," in *Human Rights Quarterly* 31 (2009): 625.
[166] "Darfur and the ICC: Myths versus Reality," *Human Rights Watch* (27 March 2009).

insecure, and physically challenging environment.[167] Moreover, those humanitarian organizations still allowed to operate in the country have been unable to fill the gap left behind– a factor that is detrimental since many people depend on international efforts for their survival. Lastly, the Court's inability to bring perpetrators to justice has sent a message to those responsible that they have little to fear.

International actors, notably regional actors, have also hindered ICC efforts in Darfur. The African Union (AU) opposed the Court's decision to open investigations on the basis that this is a breach of Sudan's sovereignty. The AU has pushed member states to refuse to cooperate with the Court in regards to this situation. It also called on the UNSC to defer resolution 1953 – a request that has been largely ignored. Moreover, African states, including party states to the *Rome Statute,* continue to support Al-Bashir and have attempted to shield him from the Court. According to Moses Phooko, "this is one of the most unfortunate cases in the African continent where leaders shield perpetrators regardless of the nature of the crimes committed. Indeed, birds of a feather flock together."[168] Some contend that since many of President Al-Bashir's allies are also responsible for a share of international crimes, they fear that cooperating with the ICC will haunt them in the future.[169] Hence, the ability of the ICC to fulfill its goal ending the impunity of leaders and thus preventing further mass atrocities in Darfur and the whole of Sudan seems bleak.

[167] "Darfur and the ICC: Myths versus Reality."
[168] Moses Retselisitsoe Phooko, "How Effective the International Criminal Court has Been: Evaluating the Work and Progress of the ICC," in *Notre Dame Journal of International, Comparative, Human Rights Law* (2011): 188.
[169] Ibid.

5.0 The unintended effects of the ICC on the domestic politics of Sudan

5.1 Making friends (and enemies)

The ICC prides itself on being an apolitical institution, a feature pivotal to its effectiveness. Both the Court's Former President and Former Prosecutor have voiced this view. According to President Philippe Kirsch, "[t]here's not a shred of evidence after three-and-a-half years that the court has done anything political. The court is operating purely judicially."[170] Likewise, former Chief Prosecutor Luis Moreno-Ocampo has stated: "I apply the law without political considerations."[171] However, studies suggest that despite the Court's apolitical aspirations, it is in fact a political institution and should be treated as such. Sarah M. H. Nouwen and Wouter G. Werner argue that the work of the ICC is "inherently political" – that is, the ICC by definition engages in "the act of distinguishing between enemies and friends."[172] This view derives from Carl Schmitt, who argues that political actors have friends (or allies) and enemies. Friends are important because they provide both the support and legitimacy the actor needs to achieve its goals, while enemies are the "other, which the actor will potentially fight."[173] Although the theory does not presume armed conflict between a party and its enemies, it describes the "mode of behaviour" for how a party will relate with two types of actors – its friends and enemies.[174]

Nouwen's notion of the political can be employed to explain how both the ICC

[170] "Japan Expected to Support the International Criminal Court," in *VOA News* (31 October 2009), URL: http://www.voanews.com/content/a-13-2006-12-06-voa14/311910.html
[171] Luis Manuel Moreno-Ocampo, "Council on Foreign Relations: Keynote Address," *International Criminal Court* (04 February 2008): 6.
[172] Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," in *The European Journal of International Law* 21, no. 4 (2011): 945.
[173] Ibid.
[174] Ibid.

and the GoS respectively made friends and enemies vis-à-vis the Court's intervention in Sudan. To successfully carry out its investigations, the ICC requires a certain level of support from domestic actors, who in turn become its "friends." As a result of the ICC's dependence on the support of certain actors, one should question whether the Court could be truly impartial in its investigative efforts, especially given that some of its newfound friends may or may not be innocent. Hence, this suggests that ICC action is by nature asymmetrical in relation to the actors it depends on to pursue its investigative efforts (friends), and actors the ICC may prosecute freely (enemies). This notion of friends and enemies can also be said for the GoS. Its friends are those who have allied with the regime and thus refuse to cooperate with the Court, while its enemies are those actors who have been, at least to some extent, willing to assist the Court. This phenomenon is evident at the societal, the state, and the international level, which I describe in the following sub-sections.

5.1.1 Divisions with the societal level

The societal level refers to the relationship between the GoS and rebel groups in Darfur, particularly the JEM. The Court's intervention in Darfur has reinforced the notion that the GoS and the Janjaweed are the only perpetrators, whereas anti-government rebel groups are victims in this conflict. According to Former Chief Prosecutor Luis Moreno-Ocampo, "[w]hat happened in Darfur is a consequence of Al-Bashir's will."[175] However, Mahmood Mamdani maintains that it is erroneous to place the whole of the blame on Al-Bashir, since the conflict in Darfur began as a civil war in 1987 – two years prior to Al-Bashir's

[175] Mahmood Mamdani, "Beware of human rights fundamentalism," in *Pambazuka,* Issue 425 (26 March 2009): 2.

rise to power.[176] Rebel groups, including the JEM and the SLA, are also responsible for a share of mass atrocity crimes. A 2008 UNAMID report, for example, notes that the JEM's attack on Omdurman targeted several civilian buildings, including a local government office and a bank.[177] Evidence also suggests that JEM militias executed numerous during an attack in a brick factory.[178] Even though the ICC did investigate Abu Garda and Abakaer Nourain (two individuals associated with the JEM), their cases were later dropped. It is worth mentioning that it has been suggested that Nourain was killed. Nevertheless, it appears that the ICC has focused its investigative efforts mainly on the GoS and the Janjaweed, despite overwhelming evidence that Darfuri rebels groups have also engaged in violence.

The ICC's decision to indict some actors and not others delineated the boundaries between the friends (the JEM) and the enemies (Al-Bashir and his regime) of the ICC. The indictments against Al-Bashir directly challenged his regime, since successful prosecutions of state actors automatically necessitate regime change. Hence, the charges against Al-Bashir, albeit seeking to retain the notion of individuality, "essentially render the entire Sudanese state criminal by arguing that the Sudanese President committed crimes by using the state apparatus."[179] Nafie Ali Nafie, a presidential assistant to Al-Bashir, echoed this point by arguing that, "the ICC proceedings are… a conspiracy to weaken [Al-Bashir's regime] and prepare [his] removal from power."[180] As such, Al-Bashir has mobilized his supporters against the ICC by employing the notion that the Court's intervention in Sudan is a breach to state sovereignty.

[176] Mamdani, "Beware of human rights fundamentalism," 2.
[177] "Report of the Secretary-General on the Sudan," S/2008/485, *United Nations Security Council* (23 July 2008): 12.
[178] Ibid.
[179] Nouwen and Werner, "Doing Justice to the Political," 956.
[180] International Crisis Group, "Sudan: Justice Peace and the ICC," in *Africa Report,* no.152 (17 July 2009): 7.

The ICC's position towards, and relationship with, rebel leaders, on the other hand, is relatively peaceful and cooperative. The Prosecutor, in his report to the UNSC, contrasted the Sudanese government's recalcitrant position with the rebel leaders' willingness to cooperate. The JEM in particular have welcomed the ICC and its actions within Sudan. According to one of its leaders "[w]e admir[e] the ICC, we fully support the ICC. We are ready to go to the ICC, including myself and we are ready to work as tool [for the] ICC to capture anybody."[181] Some members of the JEM have been willing to testify at The Hague. And even though two individuals associated with the group (Abu Garda and Abdallah Nourain) have or were going to be investigated by the Court, the JEM is still comparatively receptive towards the ICC. In fact they have expressed that they "don't fear at all" the ICC."[182]

Although maintaining a cooperative relationship with a key faction such as the JEM can be beneficial to the ICC, this relationship has generated numerous unintended effects on the domestic politics of Darfur and Sudan more broadly. The JEM maintain that if the GoS does not cooperate with the ICC through peaceful means, the war will intensify. Thus, the JEM does not appear to fear the possibility of repercussions for its violence. In a different vein, some rebel groups have refused to enter negotiations with Al-Bashir and his regime, since they are now "war criminals" vis-à-vis the indictments – that is, Al-Bashir and his regime are enemies of the ICC and its friends. Mahmood Mamdani suggests that the words *war criminals* or *genocidaries* "[are labels] to be stuck on your worst enemy, a perverse version of the Nobel Prize, part of a rhetorical arsenal

[181] Darfur Rebel Vow Full Cooperation with the ICC Ahead of Ruling on Bashir Case," in *The Sudan Tribune* (March 2, 2009), URL: http://www.sudantribune.com/spip.php?article3033.
[182] Ibid.

that helps you vilify your adversaries while ensuring impunity for your allies."[183] According to Nouwen and Werner, this plays directly into the strategic calculus of rebel groups, allowing them to abstain from entering negotiations as they did with the DPA in 2005, until the GoS is weak enough that they can obtain an agreement that is in accordance with their interests.[184]

This account indicates that all domestic parties involved have instrumentalized the ICC to pursue their respective interests. Al-Bashir and his regime have become the enemies of the ICC, which in turn has made all parties that cooperate with the Court into the enemies of the state. In contrast, rebel groups, chiefly the JEM, have become the allies of the ICC. This cooperative relationship has played directly into the rebels' interests by legitimizing their struggle against the GoS, who as a result of the indictments have become *enemies of humanity*.[185]

5.1.2 Divisions at the state level

The state level refers to divisions internal to the Sudanese government. ICC indictments for Al-Bashir, Harun, and Kushayb, in particular, led to a split within the National Congress Party (NCP) between hardliners and moderates. ICG notes that since the 2008 indictments, "disagreement between the [hardliners] who [control] the security establishment, and party members favoring political engagement as the solution to Sudan's problems, has increased."[186] According to a member of the NCP, divisions within the party became evident when members of the political bureau from Darfur,

[183] Mahmood Mamdani, "The Politics of Naming: Genocide, Civil War and Insurgency," in *London Review of Book* 29, no.5 (08 March 2007), URL: http://www.lrb.co.uk/v29/n05/mahmood-mamdani/the-politics-of-naming-genocide-civil-war-insurgency.
[184] Nouwen and Werner, "Doing Justice to the Political," 957.
[185] Ibid., 962.
[186] International Crisis Group, "Sudan," 8.

Kordofan, and other central regions called on the party to make concessions to Darfur.[187] These concessions included "giving the NCP's vice-presidency to a Darfurian, reunifying the three Darfur states into one with a proper regional authority and removing land usurpers". [188] According to these political actors, such concessions could lead to a peaceful settlement between the government and the rebel groups. However, these requests have been largely rejected by hardliners, who argue that such concessions could undermine the party and thereby weaken its grip on the country's political and economic power. Al-Bashir's closest associates directly or indirectly own significant shares of the country's wealth, and some are closely linked to security and military corporations. As such, letting go of Al-Bashir would mean to an extent letting go of these benefits. Accounts suggest that for a brief period there was talk of removing Al-Bashir from the presidency. [189] However, his supporters, especially those within the army, quickly rebutted this proposition. Instead, the GoS's priority has been to prevent and disrupt ICC action in Sudan.

The party-split has a regional dimension, since the split is between riverine party leaders and party members from elsewhere. The riverine elites continue to oppose all concessions proposed to Darfur as this endangers their interests.[190] According to a critic within the NCP (a party leader from elsewhere), "a handful of brothers who made fortunes from Sudan's wealth have thrown our Islamic Movement principles and values to the wall."[191] As a result, party leaders from Darfur and Kordofan, in particular, have contemplated the idea of splitting from the NCP and forming a separate Islamic

[187] International Crisis Group, "Sudan," 8
[188] Ibid.
[189] Ibid., 9.
[190] Ibid.
[191] Ibid., 8.

Movement, though no substantive action has taken place. Moreover, President Al-Bashir has solidified his power by creating a situation in which dissent is equated to treason.[192] Meanwhile, those who support Al-Bashir continue to receive political and economic favors. This evidence illustrates how party actors who remain behind President Al-Bashir, notably the hardliners, can be seen as his loyal friends, while those seeking to alter the status quo to appease the ICC have become the enemies of the NCP. Thus, ICC intervention divided Sudan's ruling party – a factor that can potentially weaken Al-Bashir's legitimacy and thereby hold on power.

5.1.3 Dynamics at the international level

The AU and the Arab League have also mobilized behind the GoS, arguing that the ICC involvement in Sudan undermines its sovereignty. As the former president of Malawi, Bingu wa Mutharika, stated "to subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years."[193] Although this view is not widely held within the AU, there is a common consensus within the organization that indicting Al-Bashir can severely undermine peace efforts and weaken Sudan's national institutions. According to the AU Peace and Security Council, ICC action could "affect the rule of law, stability, and the development of national institutions in Africa."[194] As such, the Council called on the UNSC several times to defer the ICC processes – a request the UNSC declined. Similarly, the Arab League denounced the ICC's involvement in Sudan, as it argued that the position of the

[192] International Crisis Group, "Sudan," 9.
[193] Kurt Mills, "'Bashir is Diving Us': Africa and the International Criminal Court," in *Human Rights Quarterly* 34, no. 2 (2012): 436.
[194] Ibid., 420.

Prosecutor in reference to Darfur was unbalanced and lacked objectivity.[195] It is important to note that despite their opposition to ICC intervention in Darfur, both the AU and the Arab League have sought to end impunity in Sudan by seeking to establish a mechanism that they both can oversee. For instance, the Secretary General of the Arab League, Amr Musa, proposed the establishment of a special court, in which both the AU and the Arab League can monitor the situation in Darfur. [196]

The case of Darfur has brought a very interesting normative debate to the forefront within the African community – competing notions of sovereignty and the respect for human rights (i.e. an end to the impunity). According to Kurt Mills "sovereign equality and non-interference by one member state in the domestic affairs of another are still core principles of the AU."[197] Nevertheless, African states are seeking to become integrated into an international world order at a time when the respect for human rights has become a central component of the right to sovereignty. In fact, Thabo Mbeki introduced Article 4(h) in the Constitutive Act of the African Union, which grants the AU the right to intervene in member states in light of mass atrocity crimes.[198] The adoption of this article, which is analogous to the Responsibility to Protect principle, is meant to signal Africa's commitment to human rights.

Despite the clear evidence that mass atrocity crimes are being committed in Darfur, the GoS and others argue that the ICC's involvement is illegitimate, since Sudan has not ratified the Roman Statute. As a government official stated "the Security Council had no legal right to refer alleged atrocity crimes committed in Sudan to the [ICC]."[199]

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[195] International Crisis Group, "Sudan," 15.
[196] Ibid.
[197] Mills, "'Bashir is Diving Us," 412-413.
[198] "The Constitutive Act," *African Union.*
[199] International Crisis Group, "Sudan," 10.

The AU is also skeptical about the ICC in Sudan, on the grounds that such involvement can threaten the prospects for peace in Darfur and cause further instability. In a similar vein, many African countries see the ICC as biased and holding a double standard towards the continent. As Mills notes, "the very development of a united Africa [is] being put in jeopardy by rogue magistrates and prosecutors."[200]

Nevertheless, the AU has taken several measures to uphold its commitment to the protection of human rights. The AU has mounted pressure on the GoS to adhere to the principle of complementarity of the ICC, and therefore to bring those responsible for mass atrocity crimes to justice. The AU has also established a commission responsible for examining the nature of the crimes and creating measures that can effectively address the situation.[201] Hence, the involvement of the ICC in Sudan has placed the AU in a situation where it must wrestles with two contradictory norms. According to Mills the AU has been pushed "[into] a period of cognitive dissonance as African states attempt to come to grips with evolving and contradictory pressures on their identities" – a regional identity which highlights the importance of sovereignty versus a global identity that emphasizes the respect for human rights.

On a different note, it has been suggested in an era where states have the responsibility to act in the face of mass atrocities, the ICC has been employed by its signatories to avoid military intervention. "In contrast to the prevention of mass atrocities through military intervention or peacekeeping economic assistance and rehabilitation," Akhavan states, "resort[ing] to international tribunals incurs a rather modest economic

[200] Mills, "'Bashir is Diving Us," 420.
[201] Ibid., 421.

and political cost."[202] Hence tribunals have become very appealing to international actors: they allow states to fulfill their moral duty in acting on the face of mass atrocities, while incurring low costs and few responsibilities.

The case of Darfur illustrates this phenomenon. On September 9th, 2004, Secretary Collin Powell stated: "genocide has been committed in Darfur, and the government of Sudan and the Janjaweed bear responsibility" – a claim that was later reiterated by President Bush.[203] That same year, Secretary General Kofi Annan compared Darfur to the Rwandan genocide and urged the intentional community to prepare itself for military action if necessary.[204] In accordance with the 1948 Genocide Convention, the international community has the obligation to prevent and/or punish the crime of genocide. By describing the crisis in Darfur as genocide, it was expected that the US take substantive measures against the GoS. As a result, the Bush administration employed the ICC by allowing the passage of Resolution 1953 affirming the US government's commitment to the prevention of mass atrocities. The US government's decision to resort to the court suggests that the international community can employ the ICC to simultaneously signal its commitment to the norm of human rights, while not putting any "skin in the game." To conclude, this section illustrates how ICC action in Sudan has inadvertently divided actors between friends and enemies of the Court and the GoS respectively.

5.2 Judicial reform?

The relationship between the GoS and the ICC has been mostly contentious, though it has

[202] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities," in *The American Journal for International Law* 97, no. 1 (2001): 30.
[203] Eric Heinze, "The Rhetoric of Genocide in U.S. Foreign Policy: Rwanda and Darfur Compared," in *Political Science Quarterly* 122, no.3 (2007): 369.
[204] Heinze, "The Rhetoric of Genocide in U.S. Foreign Policy," 367.

worsened since the indictments against Harun and Kushayb were issued in 2007. The GoS has maintained that the country's judicial system has a record of professional independence and integrity, and thus ICC involvement is not necessary.[205] The Khartoum Centre for Human Rights and Environmental Development has echoed this sentiment, arguing that the "referral of the Sudan case to the ICC will considerably affect the judicial system of the country and its integrity for generations to come."[206]

Nevertheless, evidence indicates that the Sudanese judicial system lacks both the ability and willingness to conduct effective trials. First, restrictive laws allow the executive branch to undermine the effectiveness of the judicial system, and "many of the laws in force domestically contravene basic human rights standards."[207] Second, until 2005 Sudanese law did not consider mass atrocity crimes. Accordingly, perpetrators could not be prosecuted for crimes under the Rome Statute. Third, Sudanese courts are highly ineffective. Many victims informed the UN commission of inquiry that the Sudanese justice system was not seen as impartial, and they feared reprisals if they decided to resort to the national justice system.[208] Moreover, many questioned the system's ability to fairly and consistently analyze the crimes committed in Darfur, since the GoS played a leading role in the conflict. Lastly, even though the GoS established the Special Criminal Court on the Events in Darfur (SCCED), few cases have been taken on and those cases that are open for investigation usually concern low-ranking perpetrators who were previously being prosecuted for lesser crimes (e.g. theft, possession of stolen

[205] "Sudan," *International Crisis Group*, 11.
[206] Khartoum Centre for Human Rights and Environmental Development, "The International Criminal Court and Sudan: Access to Justice and Victim's Rights," *International Criminal Court Programme: Sudan* (October 2005): 44.
[207] Nouwen, *Complementarity in the Line of Fire The Catalysing Effect of the International Criminal Court in Uganda and Sudan,* 258.
[208] Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, *S/2005/60*, *United Nations Security Council* (01 February 2005): 6.

goods or individual murders unrelated to larger attacks). The single high-ranking official that was charged by the SCCED was later acquitted.[209]

The Darfuri judicial system is in dire shape. Although GoS officials maintain that the system has not collapsed completely, critics argue that it is highly inept, lacking impartiality, efficiency, and credibility. The infrastructure of both the judicial and the enforcement systems are in poor conditions.[210] Judicial personnel also lack the resources to conduct effective proceedings. Relatedly, those working for the judicial system are prone to harassment if they act contrary to the interests of powerful state actors. In the words of Nidal Nabil Jurdi, "[the judicial system] suffers from a number of deficiencies caused by political interference, mismanagement, corruption, and the negative impact of the conflict in Darfur."[211] These conditions appear to render the situation in Darfur admissible under Article 17 of the *Rome Statute,* since the judicial system lacks both the willingness and ability to investigate and prosecute those responsible for mass atrocity crimes.

The GoS has tried to appeal the UNSC's decision to refer the situation in Darfur to the ICC. The GoS initially wanted the UNSC to withdraw the referral, suspend ICC action, or as a second best, defer the proceedings. According to Nouwen, the GoS's strategy "was [based on a] desire to obtain goodwill in the Security Council, more than complementarity, that catalyzed all kinds of GoS action."[212] In other words, the GoS has implemented reforms and employed domestic mechanisms to push the ICC out of the country via the UNSC. I describe several of the more prominent factors in the following

[209] Horovitz, "Sudan,"18.
[210] Nidal Nabil Jurdi, *The International Criminal Court and National Courts: a Contentious Relationship* (Farmhand: Ashgate Publishing House, 2011), 224.
[211] Ibid.
[212] Nouwen, *Complementarity in the Line of Fire The Catalysing Effect of the International Criminal Court in Uganda and Sudan,* 253.

paragraphs.

First, the GoS has taken steps to constrain the media and other sources of information in an attempt protect its public image domestically. According to Nouwen, ICC proceedings have increased domestic awareness of the conflict in Darfur. As a result, the government has tried to contain peoples' access to information about this issue. In 2007, after the warrants against Harun and Kushayb, media sources were banned from reporting on any domestic trials associated with the crisis in Darfur. In 2009, with Al-Bashir's indictment, the National Intelligence and Security Services started to censor domestic newspapers. On the other hand, human rights activists and other individuals who have sought to raise awareness or cooperate with the Court have been prosecuted or tortured. For example, students were shot by government militias for organizing an event in support of the arrest warrant against the President.[213] Although Sudanese have become more aware of the situation in Darfur they lack the ability to speak out against such atrocities – a factor that affects the success of judicial proceedings in general.

Second, ICC intervention led the GoS to enact several judicial reforms, at least superficially. In addition to the SCCED, the GoS announced the creation of several additional courts and committees in Darfur, including the Judicial Investigations Committee, the Special Prosecutions Commissions, the Committees Against Rape, the Unit for Combating Violence Against Women and Children of the Ministry of Justice, and the Committee on Compensations.[214] It is worth noting that the OTP was initially allowed to communicate with these bodies as a mechanism to ensure accountability. The GoS also established new legal norms within the Armed Forces Act of 2007 and the

[213] Nouwen, *Complementarity in the Line of Fire The Catalysing Effect of the International Criminal Court in Uganda and Sudan,* 275.
[214] Horovitz, "Sudan,"18.

Criminal Act of 1991, which enabled the prosecution of mass atrocity crimes. According to Sigall Horovitz, "these developments are significant in that they allow Sudanese national courts to prosecute atrocities as international crimes."[215] Lastly, in 2008, the GoS appointed a special prosecutor to investigate war crimes committed in Darfur.[216] These efforts suggest that the ICC's involvement in the country has pushed the GoS to strengthen its judicial system, albeit superficially, in an effort to push the ICC out of Sudan. As Horovitz notes, "despite putting in place special courts and a prosecutor to handle the Darfur atrocities, evidence suggests that Sudan is not establishing accountability for the atrocities."[217] Sudanese also echo this sentiment, a local judge "when asked about the reason for the creation of the SCCED, replied that it was 'to fool us, and the Americans."[218]

Third, ICC intervention has led President Al-Bashir and his allies to seek and leverage traditional justice mechanisms to address the situation in Darfur. Nouwen posits that government efforts to rely on traditional mechanisms are an attempt to influence the UNSC by demonstrating that the country has the capacity to address the situation in Darfur. Traditional mechanisms, unlike punitive justice, promote and prioritize peace and stability. Traditional justice invokes "forgiveness and amnesty, with compensation paid not only to make [it up materially to the victims] but also to symbolize a recognition of guilt."[219] As such, the Sudanese People's Initiative – a meeting that involved members from various ethnic groups to discuss solutions to the situation in Darfur – recommended

[215] Horovitz, "Sudan," 14
[216] Mills, "'Bashir is Diving Us'," 412.
[217] , "Sudan," 19.
[218] Nouwen, *Complementarity in the Line of Fire The Catalysing Effect of the International Criminal Court in Uganda and Sudan,*
[219] Jérôme Tubiana, Victor Tanner, Musa Adam Abdul-Jalil, "Traditional Authorities' Peacemaking Role in Darfur," *Peaceworks Report* (2012): 86.

the use of traditional mechanisms, such as the establishment of a national fund for the payment of blood money and rehabilitation of the native administration.[220] Similarly, the Heidelberg Darfur Dialogue Outcome Document recommended the Ajaweed, a traditional conflict resolution procedure, "[to] be institutionalized and assume the functions of a truth and reconciliation commission."[221] Moreover, Jérôme Tubiana and his associates suggest that the GoS has been sponsoring tribal conferences that allow warring factions to negotiate amongst themselves.[222]

On a different note, it has been suggested that the ICC, if used alongside traditional justice, could have the ability to transform certain traditional practices that are at odds with the Court's normative framework. This includes practices such as the death penalty, flogging, stoning and amputation.[223]According to Horovitz, "although there are currently no [visible impacts on traditional sentencing norms] of the ICC in Sudan, international norms may [have the potential] to influence sentencing norms in Sudan."[224] To conclude, this subsection illustrates how the GoS has employed different mechanisms, particularly judicial reform, to halt ICC efforts by demonstrating to the UNSC that the country has the capacity to address the situation in Darfur without the Court's interference.

6.0 Conclusion

The case study of Darfur, Sudan has three major findings. First, ICC intervention in Sudan has largely failed to fulfill its intended objective. Those who have been indicted by

[220] The native administration is a type of governance system in which the government decentralizes power to local chiefs.
[221] Tubiana, Tanner, and Abdul-Jalil, "Traditional Authorities' Peacemaking Role in Darfur," 86
[222] Ibid., 87
[223] Horovitz, "Sudan," 40.
[224] Ibid.

the ICC still enjoy impunity; and some have even been promoted to better positions within the government, as has been the case with Harun. Moreover, mass atrocity crimes committed by actors who have either been investigated or indicted by the Court continue to be documented within Darfur and in the whole of Sudan. In regards to violence, most evidence suggests that the decrease in violence that took place after 2004 was not a result of ICC intervention, since violence had in fact decreased before the Court intervened in June 2005. Nonetheless, it is important to recognize that although violence is still very much present in Darfur, it has not reached the same levels as it did between 2003/04 – a fact that can be partly attributed to the ICC and its efforts in Sudan.[225]

Second, ICC intervention has resulted in two overarching unintended effects on the domestic politics of Sudan. First, the Court's reliance on domestic actors to support its mandate (i.e. Its friends) has, on the one hand, reduced the Court's ability to *consistently and fairly prosecute those responsible.* On the other hand, it has allowed actors to politicized the Court. Second, ICC intervention pushed the GoS to enact certain judicial reforms, although these were largely cosmetic, and also to employ alternative domestic judicial mechanisms (i.e. traditional justice methods). These undertakings were largely done in an effort to convince the UNSC that the GoS had the capacity to deal with the situation in Darfur without ICC intervention.

Lastly, the fact that the situation in Darfur was referred to the ICC by the UNSC, has made the Court's intervention particularly challenging. The referral type has led to a highly antagonistic relationship between the GoS and the ICC, which one could argue has

[225] However, it is important to keep in mind that the drop in the levels for violence since 2003/2004 can are a result of many other factors (e.g. the longevity of the conflict, the presence of UNAMID forces, the GoS' lost of legitimacy in all of Sudan).

been the underlying obstacle for the Court's success in the situation in Darfur. Likewise, most of the unintended effects of the ICC illustrated in this chapter can be at least in part attributed to this antagonistic relationship. To conclude, the evidence presented in this case demonstrates that ICC action in Darfur has affected Sudanese politics well beyond the Court's mandate.

Chapter 4: The case of Kenya

1.0 Introduction

This case study highlights three key points in relation to the International Criminal Court's (ICC) impact on the domestic politics of Kenya. First, the ICC played a pivotal role in quelling ethnic violence during the 2013 elections. Second, ICC intervention has resulted in three unintended consequences on the domestic politics of Kenya beyond the situation: ICC intervention has been instrumentalized by different actors to push forth their respective political agendas; the Court has to an extent catalyzed judicial reform through the changes in that were made in the 2010 Constitution; and the norm of individualizing mass atrocity crimes may have the potential to reconcile ethnic relations in Kenyan society. Third, this case illustrates how the Prosecutor's decision to open investigations under the Principle of *Propio Muto* has adversely impacted the Court's intervention efforts.

This chapter is divided into five sections. The first section provides a brief account of the situation during the 2007/08 elections and the violence that erupted thereafter. The second section traces the ICC's intervention in the country and provides a brief summary of the Court's activity. The third section assesses the Court's ability to fulfill its mandate in bringing the perpetrators of the 2007/08 post-election violence (PEV) to justice. The fourth section considers the unintended effects of the Court's intervention on the domestic politics of Kenya – i.e. the changes in the political system; a push for judicial reform; and reconciliatory effects in the country's ethnic relations. The final section concludes the chapter highlights the main findings of this case study.

2.0 Brief account of the 2007/08 PEV

The 2007/08 elections in Kenya were a source of great frustration since they were largely manipulated. Many expected the Orange Democratic Movement (ODM), a party headed by Raila Odinga, to win the elections since it had the widespread support of three of Kenya's largest ethnic groups.[226] While the ODM won the parliamentary elections, incumbent president Mwai Kibaki (leader of the Party of National Unity) refused to relinquish the presidency – a factor that proved to be a catalyst for the violence that emerged in the months following the election.

Pre and post electoral violence in Kenya have been a common phenomenon; however, the post-election violence that took place between December 2007 and February 2008 was particularly violent. According to Abraham K. Sing'Oei "more than 1300 people were killed, an estimated 300,000 others were displaced, more than 900 women were raped, and large amounts of private and public property were destroyed."[227] This violence was mainly directed against the Kikuyu, given their relation to Odinga; and the Kalenji and Luo, due to their association with incumbent President, Kibaki.

3.0 ICC activity in Kenya

The severity of the violence prompted intervention from the international community, which responded by putting in place a power-sharing agreement between the ODM and the Party of National Unity (PNU), and establishing a Commission of Inquiry into Post-Election Violence (CIPEV) "answerable to the African Union (AU) Panel of Eminent

[226] Mba Chidi Nmaju, "Violence in Kenya: Any Role for the ICC in the Quest for Accountability?" in *African Journal of Legal Studies* 2 (2009): 79.
[227] Abraham Koror Sing'Oei, "The ICC as Arbiter in Kenya's Post-Electoral Violence," in *Minnesota Journal of International Law Online* 19 (2009): 9.

African Personalities."[228] After much investigation CIPEV drew two major conclusions in regards to the violence: First, although the violence started as a spontaneous reaction to the rigged 2007 elections, it later evolved into "well-organized and coordinated attacks."[229] And second, Kenya's security system failed to halt the violence; and more importantly, individuals within the system were also guilty of committing violent acts during the post-electoral period.[230] CIPEV recommended the establishment of a special tribunal monitored by international actors, since it concluded that Kenya's judicial system lacked the credibility and independence to conduct effective trials for those responsible of mass atrocity crimes. The commission also compiled a list of names of those "most" responsible, which it gave to Kofi Annan, who was tasked to hand it over to the Office of the Prosecutor (OTP) if the government failed to establish the special tribunal.

Since the government failed to carry out any substantive action in this direction, the commission passed on the list to the ICC and requested its intervention. On November 26, 2009, after reviewing the evidence and CIPEV's request, former Chief Prosecutor Luis Moreno-Ocampo initiated the investigations in Kenya under the Principle of *Propio Muto*.[231] Since the ICC's intervention, the Pre-Trial Chamber (PTC) has issued charges against four Kenyan politicians, listed in Table 1 below.

Table 4.0: ICC action in Kenya from 1 July 2002 to the present

Referral Type: Decision of the Prosecutor to open investigations under the Principle of *Propio Muto*			
Authorization to open an investigation: 31 March 2010			
OUTCOMES:			
Individual	**Position and Affiliation**	**Charges**	**Trial**
William Samoei Ruto	Current Deputy President of	Crimes Against	10 September 2013

[228] Gabrielle Lynch and Misa Zgonec-Rozej, "The ICC Intervention in Kenya," *African/International Law* (February 2013): 4.
[229] Sing'Oei, "The ICC as Arbiter in Kenya's Post-Electoral Violence," 9.
[230] Ibid.
[231] This principle allows the Prosecutor to open an investigation if there is credible evidence to do so.

	Kenya	Humanity	
Joshua Arap Sang	Head of Operations at KASS FM	Crimes Against Humanity	10 September 2013
Uhuru Mugai Kenyatta	President of the Republic of Kenya	Crimes Against Humanity	7 October 214
Walter Osapiri Barasa	Kenyan Journalist	Trying to Influence Witnesses	**Warrant of Arrest:** 2 October 2013

Source: Situation in Kenya, *International Criminal Court.*

4.0 The intended effects of the ICC in Kenya

Many have argued that ICC involvement in Kenya has been a success, not because it has been effective in bringing perpetrators of the PEV to justice, but rather because it appears to have been successful in preventing future mass atrocities, chiefly in the 2013 elections. In the period preceding the 2013 elections both Kenyans and the international community were expecting these elections to be somewhat comparable to those in 2007 since violence has been recurrent during Kenyan elections; however, this was not the case. Flora Igoki-Terah opined: "had we not been [under ICC investigation] in 2013, last year when we were going through elections then we would had have worse than what we had in 2007."[232] Why is it that, despite the ICC's inability to bring those responsible for the 2007/08 PEV to justice, the ICC has been attributed with deterring violence during and after the 2013 elections? [233] The following sub-sections will address this apparent paradox.

[232] Flora Igoki-Terah, *Interview by Alejandra Espinosa*, Tape recording, Toronto (Canada), 05 March 2014.
[233] It is important to note that although the situation in Kenya has only been opened since 2010, nothing substantive has taken place with those being investigated since no one has yet been indicted.

4.1 Putting an end to impunity of the perpetrators

The ICC's failure to bring perpetrators to justice thus far can be mainly attributed to the unwillingness of the Kenyan government to genuinely cooperate with the Court. Initially Kenyan authorities were quite supportive of establishment of the ICC, signing the *Rome Statute* in 1999 and ratified it in 2005. The Government of Kenya (GoK), initially hesitant due to the potential loss of sovereignty, was willing to ratify the Statute since it felt protected by the Principle Complementarity rule – that is, the ICC being a "court of last resort. Further, the Statute could not be applied retroactively – meaning that the Court could not "prosecute Moi and his supporters for instigating the violent 'tribal clashes' during the 1992 and 1997 elections."[234]

Nonetheless, when the ICC exhibited signs that it had the potential to threaten the interests of political actors, the amicable relationship between the ICC and the GOK started to sour. Ever since top Kenyan officials have been charged, the government has sought to demonize the ICC and its role in Kenya, as well as whole of Africa. Chief Prosecutor Fatou Bensouda argues "that this is the ICC's most difficult case ever, accusing Kenya of spying on its staff, not honoring promises for documents and interviews, interfering with witnesses, politicizing the law, and using frivolous delaying tactics to postpone trial."[235]The GoK and their defendants have used numerous strategies to insulate themselves from ICC action, such as challenging the ICC on the basis of the principle of complementarity, mobilizing local and international actors against the Court, and prolonging the proceedings until the elections in 2013. I describe each of these attempts below.

[234] Susanne D. Mueller, "Kenya and the International Criminal Court (ICC): politics, the election and the law," in *the Journal of Eastern African Studies* 8, no.1 (2014): 29.
[235] Ibid., 26.

The GoK referred to the Principle of Complementarity to demonstrate that ICC intervention was illegal since they argued that Kenya had both the willingness and ability to genuinely investigate and prosecute those responsible for the PEV.[236] The GoK pointed to its appointment of the Special Commission (or the Waki Commission) responsible to look into those responsible for the violence. Although the Waki Commission was effective in gathering evidence of the PEV and drafting valuable recommendations such as the establishment of a special tribunal, these recommendations were largely ignored. Certain Members of Parliament (MPs) were against establishing a special tribunal. As Mueller notes "some [MPs] thought it would try too many individuals or be used to settle political scores; others thought the tribunal would be corrupted politically and [inefficient]. The overall goal… [was] to ensure that no one would ever be held accountable for the PEV."[237]

Kenyatta and Ruto have also tried to prolong ICC procedures. To do this, they have relied on numerous mechanisms. Initially, the defendants challenged the Prosecutor's decision to open investigations in Kenya on the basis of admissibility. The GoK argued that Kenya's judicial system had the capacity and willingness to "genuinely" carry out domestic investigations. According to the defendants' lawyers, "their clients were cooperating with the ICC's PTC and that Kenya had reformed its courts."[238] The GoK also maintained that they were not taking matters into their own hands, but were instead using a bottom up approach to bring to justice those individuals who actually committed the violence.[239] Likewise, the defendants made an argument against the ICC

[236] *Rome Statute of The International Criminal Court* (1998).
[237] Mueller, "Kenya and the International Criminal Court (ICC)," 30.
[238] Ibid., 32.
[239] Ibid.

on the basis of the Rome Statute's jurisdiction, which confines it to mass atrocity crimes. According to the defendants the PEV did not meet the threshold of crimes against humanity, since "[the] violence resulted from ordinary crimes committed spontaneously rather than in pursuit of a state policy."[240]

The defendants have also questioned the credibility of witnesses. Witness credibility has been a recurrent issue with the investigations. There are numerous accounts which suggested that witnesses were bribed by different organizations and the ICC to testify against certain individuals. For instance, in 2010 there were allegations of bribe against Hassan Omar, former chairman of the Kenyan National Commission on Human Rights (KNCHR). He has allegedly bribed witnesses in some instances or requested them to testify before the ICC against Kenyatta and Ruto.[241] In 2013, witness no.8 for the Ruto and Sang cases made allegations that the ICC was bribing individuals to testify against those being indicted and retracted his statements from the ICC and the Waki Commission.[242] Chief Prosecutor Fatou Bensouda also had to drop witness no.4 from the Kenyatta case on the basis that his testimony lacked credibility.

Moreover, witnesses are frequently intimidated. A few witnesses associated with Mungiki – the radical organization associated with much of the PEV – were murdered. On July 6, 2008, Mungiki's Nairobi Coordinator, Maina Diambo was killed. On November 5, 2009, the same day when former Chief Prosecutor Luis Moreno-Ocampo requested PTC to open investigations in Kenya, Njuguna Gitau (Maina Njenga's deputy) was also murdered. It has been suggested that these individuals were killed because they

[240] Mueller, "Kenya and the International Criminal Court (ICC)," 34.
[241] Ibid.
[242] Felix Olick, "Three More ICC Witnesses Refuse to Testify Against Uhuru," in *Standard Digital* (05 April 2013), URL: http://www.standardmedia.co.ke/?articleID=2000080873.

had extensive knowledge of Mungiki.[243] Two members of the Oscar Foundation, a Kenyan Human Rights Non-Governmental Organization (NGO), were also killed for sharing their opinions regarding the murder of Mungiki members with Philip Alston (the UN's Special Representative on Extra-Judicial Killings).[244] These and many other similar events have been recorded; as such, many victims have been scared and unwilling to testify against the defendants out of fear of reprisal. And even individuals who initially agreed to stand in Court have often pulled out. According to Muller "as each trial date neared, more witnesses dropped out, thereby forcing the ICC to find others."[245] Consequently, the inability of the ICC to guarantee the safety of its witnesses has been detrimental to the pace and effectiveness of judicial proceedings.

The GoK has also undermined the ICC by mobilizing domestic and international actors against it. One of President Kenyatta and Deputy Ruto's strategies has been to leverage the notion that the ICC is a tool for neo-imperialist pursuits. Accordingly, Kenyatta and Ruto have been able to exploit the view that they are victims of the Court – a move that has allowed them to garner support from their population. In fact, when the six original indictees went to The Hague to hear their charges, their supporters protested their disdain with the ICC on the steps of the Court. According to Mueller "the message was: we [Kenyan politicians] and not the ICC have power and we will use it."[246]

Similarly, the GoK has worked through regional actors to halt ICC intervention, particularly the AU. The AU played a leading role in the National Dialogue and Reconciliation Process that resulted in the establishment of both the coalition government

[243] Aaron Bady, "Reading the ICC Witness Project: (un)Witness #20, #22, #34," in *The New Inquiry* (03 April 2013), URL: http://thenewinquiry.com/blogs/zunguzungu/reading-the-icc-witness-project-unwitness-20-22-34
[244] Ibid.
[245] Mueller, "Kenya and the International Criminal Court (ICC)," 34.
[246] Ibid., 32.

between the PNU, ODM and CIPEV (which initially referred the violence indirectly to the ICC). However, in recent years the AU has worked against in Kenya and in the continent more broadly. First, the AU joined the government in its campaign to get a UNSC deferral. In January 2011, the AU supported the GoK's request to the UNSC for putting a temporary stop to ICC activity in the country. This request was rejected and thus in mid-August 2013 the AU sent a delegation to The Hague, with the objective of getting the ICC to defer the cases back to Kenya – again, that was rejected.[247] According to Thomas Obel Hansen:[248]

> "Though this support from the African Union should be understood in light of how the regional body increasingly views ICC involvement on the continent as a threat to the sovereignty of African states, it also reveals that the Kenyan government used considerable resources to foster and mobilize support from other countries to halt the accountability process."

Second, the AU has granted the GoK the political space to halt ICC interference in the Continent. Between September and October 2013 Kenyan authorities tried to pass a resolution within the AU requesting for the 34 African party-states to pull out of the ICC. Although the aforementioned resolution failed, on October 12, 2013, leaders within the AU passed a resolution stating, "sitting African heads of state shall not appear before any international court during their term in office."[249]

The government has also garnered support from the East African Legislative Assembly (EALA), which has led to two unintended effects at the regional level. First, the EALA has triggered a push for judicial reform of the East Africa Court of Justice (EACJ). During the East African Community Summit of April 28, 2012, member states

[247] Mueller, "Kenya and the International Criminal Court (ICC)," 32.
[248] Thomas Obel Hansen, "Transitional Justice in Kenya: As Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns," in the *California Western International Law Journal* 42, no.1 (2011): 12.
[249] "African nations say sitting head of state immune from ICC charges," in *Forum on China-Africa Cooperation* (13 October 2013), URL: http://www.focac.org/eng/zxxx/t1088747.htm

requested for the extension of the EACJ mandate to include mass atrocity crimes.[250] Second, both the EALA and the GoK have asked for the cases under ICC jurisdiction to be transferred to the EACJ. On April 26, 2012, the EALA made a request to the ICC to transfer the situation in Kenyan to the EACJ.[251] Later that year in October, Kenya's Attorney General Githu Muigai insisted that the cases could be executed at the EACJ and thus should be transferred.[252] Even though these efforts have been largely futile, they illustrate how the GoK has been successful in mobilizing regional actors against the ICC. The different actions made by regional actors also suggest that ICC intervention in Kenya has prompted African actors to establish mechanisms that can potentially address mass atrocity crimes at the regional level.

Hence, the Gok has challenged the ability of the ICC in bringing to impunity the perpetrators behind the PEV. The defendants have adopted several strategies to prolong the ICC's judicial process – e.g. questioning the Court's legality in the Country and intimidating key witnesses. Moreover, the GoK has successfully mobilized domestic and regional actors against ICC efforts in the country and the continent more broadly.

4.2 Contributing to the prevention of mass atrocity crimes

Despite the ICC's inability yet to end impunity in Kenya, evidence suggests the Court did contribute to the prevention of electoral violence during the 2013 elections. Although there were some reports of violence during the electoral period, such as sporadic and small-scale clashes in areas around the Tana River Delta; for the most part the elections

[250] Mueller, "Kenya and the International Criminal Court (ICC)," 31.
[251] Ibid.
[252] Ibid.

were considered to be peaceful, free, and fair.[253] A report by International Crisis Group noted:[254]

> The 2013 elections were the most peaceful since the reintroduction of multiparty politics in 1992. Some presidential candidates held multiple prayer rallies, youth groups participated in widespread peace campaigns, and the media collaborated with security agencies and peace committees to resolve simmering tensions. Consistent international pressure, a robust civil society preaching non-violence and a determined citizenry intent on avoiding a repeat of 2007-2008 all promoted a peace-at-all-cost message.

It is challenging to establish whether the ICC played a direct or indirect role in averting high levels of violence during the 2013 elections. Some maintain that ICC action was crucial in deterring political actors from orchestrating violence. As Terah states, "seeing that ICC cases are real and that they are not taking a longer time, prevented election violence last year [or 2013]."[255]

Others make an indirect link between the ICC and the relatively peaceful elections of 2013. Much of the literature attributes the Court's capacity to contribute to the prevention of mass atrocity crimes on its ability to deter, stigmatize, or marginalize perpetrators.[256] Interestingly, in the case of Kenya the ICC has worked somewhat differently. Rather than preventing violence through the aforementioned mechanisms, some suggest that the relatively 2013 peaceful elections were a result of the coalition of the Kikuyu and the Kalenjin through the Jubilee Alliance between Uhru Kenyatta and William Ruto. This alliance was quite significant, in that these two ethnic communities have a history of conflict, especially during elections in which they are competing for

[253] The 2013 elections did not entail the large-scale violence witnessed in 2007-2008; however, they were preceded by inter-communal clashes, which as of February 2013, had claimed more than 477 lives and displaced another 118,000 people. "Perceptions and Realities: Kenya and the ICC," *Human Rights Watch* (November 15, 2013).
[254] International Crisis Group, "Kenya after the Elections," Africa Briefing no.94 (Nairobi/Brussels: 15 May 2013), 3.
[255] Flora Igoki-Terah, *Interview by Alejandra Espinosa*, Tape recording, Toronto (Canada), 05 March 2014.
[256] Please refer to: Australian Civil-Military Centre, "The Prevention Toolbox: Systematising Policy Tools for the Prevention of Mass Atrocities," *Policy Brief Series No.5,* 1-2; and Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities," in *The American Journal for International Law* 97, no. 1 (2001).

office. During the 1992 elections, the contestation for power between these two groups resulted in high levels of violence. The Kikuyu were particularly targeted for being outright supporters of Mwai Kibaki, since he was the largest opposition leader at the time. As Kenya's Human Rights Commission maintains " [violence against the Kikuyu] was a means to ensure the political survival of the ruling party and its leaders."[257] Similarly, the atrocious PEV of the 2007/2008 elections was also attributed primarily to the rift between the Kikuyu and the Kalenjin (and the Luo). Accordingly, the Jubilee Alliance has been interpreted as one of the main contributors to the relative lack of violence in the 2013 elections for uniting, at least superficially, these two ethnic communities.

The Jubilee Alliance is relevant because it has been frequently argued that ICC involvement in Kenya and, more pertinently, the indictments on Kenyatta and Ruto formed the basis of their coalition. Kenyatta and Ruto were able to unite under the auspices that they were both victims of the West, which was trying to undermine Kenyan elections through the ICC – an anti-African, neo-colonial, and Western institution.[258] Makau Mutua, one of the most outspoken advocates against the Alliance wrote in an op-ed "Misery loves company. That's why Mr. Ruto and Mr. Kenyatta are locked in an uncomfortable embrace... They've formed a pact [to come together] because the ICC accuses them of masterminding the violence targeting 'each other's people' in 2008."[259] Likewise, Aditi Maliki's demonstrates that this view is quite popular among many of the individuals she interviewed for her study. For instance, a politician affiliated with the

[257] Kenya Human Rights Commission 1998: i.
[258] Mueller, "Kenya and the International Criminal Court (ICC)," 35.
[259] Aditi Malik, "Mobilizing a Defensive Kikuyu-Kalenjin Alliance: The Politicization of the International Criminal Court in Kenya's 2013 Elections," *ISA 2014 Convention Paper* (April 2014): 13.

Wipe Democratic Party argued, "Ruto looks at Uhuru and he feels 'we're Siamese twins… If he dies, I die. If he goes to jail, I go to jail'. That's why the Ruto-Uhuru alliance became very attractive to them personally. The ICC factor is what brought them together."[260] This narrative demonstrates how ICC involvement was pivotal in the establishment of the Jubilee Alliance – a factor that greatly contributed to the peaceful 2013 elections. Hence, irrespective of the ICC's direct or indirect effect, it can be argued that they Court played a crucial role in preventing mass atrocity crimes during the 2013 elections and thus has, to an extent, been successful in fulfilling its mandate.

5.0 The unintended effects of the ICC on the domestic politics of Kenya

5.1. Effects of the ICC on Kenya's political system

The ICC has had numerous effects on Kenya's political system: firs, the Court's intervention led to divisions between the coalition government and a split within the ODM; second, the intervention also catalyzed a political alliance between the Kikuyu and the Kalenjin, giving them the numbers to win the 2013 elections; third, civil society has employed the ICC to demand accountability from the GoK; and lastly, the GoK and the AU used the Court's involvement in Kenya to rally other African actors around efforts to undermine ICC activity in the continent. The following sub-sections will expand on these effects.

5.1.1 Divisions within the coalition government

ICC intervention intensified the tensions within the coalition government, a power-sharing agreement between the ODM and the PNU that was established after the 2007/08

[260] Malik, "Mobilizing a Defensive Kikuyu-Kalenjin Alliance," 13.

elections, by dividing government leaders into three camps. Some ministers saw ICC intervention as the only viable option to hold those responsible to account. In fact, Ruto in the early days argued, that Kofi Anan should hand over the envelope with the names of suspects to the ICC since this would allow for proper investigation to start.[261] Others adhered to a local solution, the establishment of local tribunals. Odinga initially sought local action, though he later changed his stance, becoming an advocate of ICC intervention. A third group preferred a process of national healing through the establishment of a Truth, Justice and Reconciliation Commission (TJRC). This divergence is best described by Godfrey M. Musila who states: "[p]olitical elites, in particular those reported to be on the list of accused prepared by the Commission, have vacillated between the various options, unsure which would safeguard their own agendas: trials in The Hague or local trials; trials before the Special Tribunal or national courts; and/or the TJRC."[262]

The government opted for the third option and enacted a policy that proposed the establishment of a TJRC. The idea was that perpetrators of ethnic clashes should not be prosecuted but instead should be forgiven for past injustices.[263] As a result, in early 2011 the coalition, under the leadership of Vice-President Musyoka, asked the UNSC to defer the situation. Some members within the ODM party rejected the government's position to defer the investigations in Kenya. They urged the UN Security Council (UNSC) to ignore such request. These different views in regards to ICC activity in Kenya demonstrate how the Court played a role in dividing the coalition government between the PNU and the

[261] Thomas Obel Hansen, "Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestics Politics and Security Concerns," in *California Western International Law Journal* 42, no.1 (2011): 8.
[262] Ibid., 9.
[263] "Kibaki, Raila find Truth Commission an easy way out," *Nairobi Chronicle* (26 July 2009).

ODM in regards to the issue of justice for the 2007/08 PEV.

The ICC has also affected party cohesion within the ODM. Thomas O. Hansen notes several events that indicate ODM fractionalization as a result of the ICC's involvement in Kenya. For instance, in mid-March 2011, several ODM leaders; among them Aden Bare Duale (Vice Chair), Benjamin Langat (Deputy Organizing Secretary), and Mohamed Mohamud (Deputy Secretary General); sent the UNSC a letter explaining that they were against deferring ICC investigations. This was in reaction to the letter sent by ODM Secretary General Nyong'o to the UNSC, which requested the deferral.[264] Another source of contention is whether the party should provide its members with legal assistance for ICC investigations. Some members such as Parliamentary Secretary, Ababu Namwamba, among others initially held that members of the ODM who are indicted by the Court should receive legal aid on account of the party. However, Namwamba later contradicted this claim and argued that the ODM would not provide legal aid to any of the perpetrators of mass atrocity crimes.[265] According to Hansen, Ruto later on addressed this confusion, as he made it clear that he was not at all interested in obtaining legal assistance from the ODM. As he famously stated: "[such assistance], would resemble a hyena promising defense to goats."[266] Hence, ICC intervention produced divisions within the coalition government since different actors held differing views on the role the ICC should play in addressing the PEV.

5.1.2 Uniting rivals under the Jubilee Alliance

Various studies suggest that Kenyatta and Ruto's decision to form the Jubilee Alliance

[264] Hansen, "Transitional Justice in Kenya?" 18.
[265] Ibid.
[266] Ibid.

and run for presidency during the 2013 elections was to insulate themselves from ICC investigations. In Kenya's multiethnic society no single ethnic group is big enough to form a government; however, a coalition between the Kikuyu and the Kalenjin, the largest ethnic groups, has the numbers to form a government. Three factors explain why the Kalenjin and the Kikuju came together in January 2013, albeit their deep-seeded tensions.

First, antagonism against Odinga and his policies pushed Ruto and Kalenjin supporters to seek alternative avenues outside the ODM. For one, Odinga was increasingly seen as a corrupt political figure that was known for acts such as granting promotions to his siblings. The ODM's integrity further suffered from allegations of rigged electoral behavior and vote tampering. According to a party official in Kisumu "the [primaries] undermined the party campaign and tainted Odinga and his party."[267]

Furthermore, the divisions between Odinga and Ruto became apparent at the outset of the formation of the coalition government. It became evident that Ruto would separate from the ODM, given his divergent views on key issues: the planned evictions of Kalenjin from the Mau forest and; the "land issue" in the Rift Valley. In August 2009, Ruto alongside twenty-two Kalenjin MPs advised Odinga to protect the welfare of the Kalenjin in his handling of the May Forest evictions.[268] This worked in favor of Ruto, since he was able to disassociate himself from the ODM and capture the votes of those individuals who were dissatisfied with Odinga. With regards to the "land issue" in the Rift Valley, Ruto and Odinga held divergent views on how to address this issue. In the eyes of Ruto, Odinga's solution to tackling the issue of irregular and illegal land

[267] International Crisis Group, "Kenya after the Elections," 8.
[268] Malik, "Mobilizing a Defensive Kikuyu-Kalenjin Alliance," 7.

allocation was irresponsible and a potential threat to the security of Kalenjin and Kikuyu residents.[269] Other actors, chiefly the Jubilee Alliance, provided a more moderate solution. They sought to deal with this issue via the new constitution and a National Land Commission that could potentially resolve the matter through bureaucratic and hence *peaceful* means.[270]

Second, various elder leaders saw the alliance between Kenyatta and Ruto as pivotal to the success of peaceful ethnic relations in Kenya. According to an elder interviewed by Aditi Maliki: "we thought that if we wanted to create a peaceful environment, then we had to devise a method where the two warring people [the Kikuyu and the Kalenjin] could rally together so that they could actually begin to see the direction they are going in from the same standpoint."[271]

Lastly, the notion that the ICC was unfairly targeting Kenyatta and Ruto wielded considerable power in Kenya. The message of the Jubilee Alliance during the electoral campaign was: "we are being sacrificed by Raila and Kibaki. We are being sacrificed. So vote us in."[272] This rhetoric became even more popular as they strategically positioned their individual victimization by the ICC as equivalent to the victimization of their whole ethnic community. For example, consider the following message that was frequently used during their campaign:[273]

> "It's the tribes that are on trial. It is not the individuals. It is the Kalenjins who fought so they are on trial. It is the Kikuyus who defended themselves so they are on trial'...So what happened is that the Kalenjins were not voting for Uhuru; they were voting for Ruto to save him as their leader from the ICC and vice-versa for Kikuyus."

[269] Gabrielle Lynch, "Electing the 'alliance of the accused': the success of the Jubilee Alliance in Kenya's Rift Valley," in the *Journal of East African Studies* 8, no.1 (2013): 109.
[270] Ibid.
[271] Malik, "Mobilizing a Defensive Kikuyu-Kalenjin Alliance," 11.
[272] Ibid., 18.
[273] Ibid.

Even though many Kenyans saw the charges against Ruto as legitimate for his role in inciting and organizing the PEV, Kenyatta has usually been thought of as being innocent. As noted by one of Gabrielle Lynch's interviewees: "[many] did not think Kenyatta should be facing charges at the Hague, many did think that Ruto was responsible for inciting and organizing attacks against Kikuyu."[274]

Kenyatta and Ruto also increased their popularity among the electorate by making a case that a vote for them was a vote for the protection of Kenya's sovereignty from neo-colonial forces, notably the West. Lynch suggests "[that] Kenyatta and Ruto presented themselves as defenders of Kenya's sovereignty and independence [since] everything was cast as a competition between patriotic Kenyans and a patronizing international community."[275] This idea was palatable among Kenyans, given their experiences with a colonial past. At the time there was also the popular perception that Odinga was a puppet of the West who did not have Kenya's interests at heart. The idea was that the US in particular vis-à-vis the indictments against Kenyatta and Ruto, was aiding Odinga to come to power since he was considered to be Obama's closest ally in the country. In fact, there was a rumor among Kenyans that Odinga was working through his 'Western allies' to get rid of his political opposition. A report by International Crisis Group echoed this sentiment as it noted, "[that] conspiracy theories abound that Western governments had a strategic plan to have the ICC detain Kenyatta and Ruto, paving the way for Odinga to win the elections."[276]

To conclude, the previous account suggests that despite the deep antagonism that existed between the Kalenjin and the Kikuyu, the ICC played a key role in cementing the

[274] Lynch, "Electing the 'alliance of the accused," 99.
[275] Ibid., 106.
[276] International Crisis Group, "Kenya after the Elections," 9.

Jubilee Alliance, granting Kenyatta and Ruto a strong enough platform to win the 2013 elections. As it has been suggested, they were able to win the election by politicizing their indictments and consequently garnering sympathy from their ethnic constituencies. Accordingly, the case of Kenya suggests that political actors have instrumentalized anti-ICC rhetoric to form powerful alliances and thereby come to power.

5.1.3 Employing the ICC for different political objectives

Different actors (i.e. civil society groups, domestic politicians, and regional actors) have employed the ICC to meet their respective ends. A study conducted by Christine Bjrok and Juanita Goebertus illustrates how at the societal level, domestic NGOs have played a key role in calling for the ICC to intervene, particularly NGOs that have a limited or contentious relationship with the state.[277] For example, a Kenyan NGO screened a documentary from the victims' perspective to locals, in which the ICC is introduced as the principal option to achieve justice and to hold accountable those responsible for mass atrocities.[278] Other NGOs have also commented on their skepticism towards the country's judicial system since the executive branch is thought to have complete control over it. National proceedings are seen as fruitless thereby making the ICC and international proceedings the only viable options, not only to bring justice upon those responsible, but also as a deterrence mechanism. Bjrok and Goebertus note "if the ICC prosecutes the main political leaders of the country, the whole world will know about it, and therefore politicians will realize that they cannot get away with orchestrating mass violence to stay

[277] Christine Bjrok and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya," in *Yale Human Rights & Development L.J.* 14, no.205 (2011): 205-230.
[278] Ibid., 217.

in power."[279] As such, NGOs in Kenya have relied on the ICC as the most effective mechanism to demand for political accountability in regards to the events following the 2007/08 elections.

The ICC has played into the interests of Kenyan politicians. The fact that the ICC has jurisdiction *only* over 'Big Fish' has effectively granted 'Smaller Fish' immunity, given that domestic courts are largely ineffective. Chandra L. Sriram and Stephen Brown argue that since the ICC can only pursue a few cases at the highest level, MPs who were implicated in the violence but are not considered 'Big Fish' have little to fear from the Court.[280] This is not only problematic since only very few of those responsible for the PEV can be brought to justice, but it also provides the space for the use of violence in the future given that impunity is still present for many perpetrators. Some political leaders have also supported ICC intervention, largely in bids to get rid of political opponents within higher ranks – or "Big Fish." They can also strategically call on the ICC if they are certain that they will not fall under the court's jurisdiction. The case of President Kenyatta and Deputy President Ruto elucidates this point. Initially they strongly pushed for the ICC to intervene in Kenya, as they argued that the court was the only avenue to ensure accountability. However, their stance towards the ICC changed drastically when they were indicted. Brown and Sriram argue that when Prosecutor Ocampo identified them as key suspects of the PEV, they started to do everything in their power to undermine the ICC.[281]

At the regional level, Ruto and Kenyatta alongside the AU have mobilized against

[279] Bjrok and Goebertus, "Complementarity in Action," 255.
[280] Stephen Brown and Chandra L. Sriram, "Big Fish Can't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya," in *African Affairs* 111, no. 443 (2012): 253.
[281] Ibid.

the ICC's involvement, not just in Kenya, but also in the continent at large. According to Abraham Koror Sing'Oei "the ICC's involvement in Kenya is taking place within the context of heightened suspicion on the part of African governments against what it perceives as the capture of the ICC by Western interests and its utilization as a tool of domination."[282] Both Kenyans and regional actors have shown deep discontent against the ICC because of its presumed biases against the continent, pointing to the fact that the Court has only opened investigations in Africa. Although African states and their leaders are well represented in the ICC, and many Africans hold key posts within the court, African leaders (i.e. Kenyatta, Ruto, and Al-Bashir) have been able to capitalize on these negative sentiments to undermine the involvement of the ICC in Kenya. Accused of crimes against humanity and other serious charges," Brown and Sriram state, "they have cast themselves as political victims of national and international plots against them and retain a significant public support in their own ethno-regional communities."[283] Thus, the case of Kenya illustrates how ICC intervention has affected Kenya's political system well beyond the situation in question.

5.2 Facilitating judicial reform?

In regards to the judicial branch, the ICC has not rendered substantive reform to Kenya's judicial system. Proponents of the ICC maintain that the Court's involvement in states with weak or ineffective judicial systems has the ability to produce positive complementarity – that is, "the expectation that scrutiny by and advice from the ICC can enable or compel states to pursue accountability themselves, and where necessary to

[282] Abraham Koror Sing'Oei, "The ICC as Arbiter in Kenya's Post-Electoral Violence," in *Minnesota Journal of International Law Online* 19 (2009): 17.
[283] Brown and Sriram, "Big Fish Can't Fry Themselves,"

undertake legislative and judicial reform to enable that accountability."[284] In the case of Kenya, the former Chief Prosecutor Ocampo proposed a 'three-pronged' strategy to working with local courts. The strategy entailed: prosecuting high-ranking perpetrators in the ICC, prosecuting middle-level perpetrators in a hybrid tribunal, and having a truth commission to address violations more generally.[285] The GoK has failed to meet the requirements of this strategy – it never established the special tribunal it proposed; the promise to reform the judiciary and hold domestic trials never materialized; and lastly, although the TRJC was established, it was filled with controversies.[286]

It is worth noting, however, that in 2011 Parliament passed several bills to reform its judiciary. For instance, the government instituted penalties "for electoral officials who manipulate poll results or who are likely to tinker with boundaries," such as putting them in jail for a three year period, giving them a fine of Sh1 million (US$11,550), and banning them from holding public office for a period of 10 years.[287] However, these reforms should not be overemphasized. Even though the ICC has propelled judicial reform, the Kenyan government has failed to produce any substantive measures in terms of dealing with the PEV.

5.3 Reconciling ethnic tensions?

The case of Kenya illustrates how the notion of individualizing mass atrocity crimes vis-à-vis its goal of prosecuting only 'Big Fish,' can potentially affect ethnic relations in the

[284] Chandra L. Sriram and Stephen Brown, "Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact," *International Criminal Law Review* 12 (2012): 221.
[285] Sriram and Brown, "Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact," 232.
[286] Stephen Brown and Chandra L. Sriram, "A Breakthrough in Justice? Accountability for Post-Election Violence in Kenya," Centre on Human Rights in Conflict, Policy Paper, no.4 (2010): 3.
[287] Alphonce Shiundu, "MPs wok overtime to pass crucial bills," *Daily Nation,* June 1, 2011.

country.[288] This principle can result in two negative consequences. First, by prosecuting only a small number of individuals responsible for violence, victims are likely to be dissatisfied with ICC proceedings, especially if those individuals responsible for crimes against them are not brought to justice.[289] Second, diverting the fault onto an individual can potentially lead to the stigmatization of the perpetrator's ethnic group, since the actions of leaders are often thought to be representative of the larger community.[290]

In contrast to the latter critique, studies suggests that in Kenya, a country with a widely held view that the actions of leaders embody the ideals and views of their respective ethnic communities, the individualization of mass atrocity crimes has rendered positive results.[291] By individualizing mass atrocity crimes, Kenyans have become more aware that the 2007/08 PEV was not an attack orchestrated by ethnic communities, but rather an attack organized by power-hungry individuals. A survey conducted by Hansen supports this point by revealing, "that more than fifty percent of Kenyans expect community members to support ICC trials even if they target leaders of their own ethnic group."[292] In other words, the group is sometimes willing to disassociate it self from the individual in the pursuit of justice. Hence, the individualization mechanism of the ICC has brought to bear the understanding that communities should not be blamed for the acts of a few individuals – a factor that can serve to quell ethnic tensions in a country where these tend to be pervasive, particularly during election.

[288] Big-Fish refers to high-level individuals.
[289] Felix Mukwiza Ndahinda, "The Bemba-Banyamulenge Case before the ICC: From Individual to Collective Criminal Responsibility," in *the International Journal of Transitional Justice* (2012): 20
[290] Ibid.
[291] Hansen, "Transitional Justice in Kenya?" 25.
[292] Ibid.

6.0 Conclusion

This case study demonstrates how ICC intervention has affected Kenya's domestic politics in several ways. First, compared to ICC interventions in the DRC and Sudan, the ICC has been quite successful in fulfilling its mandate of mitigating violence. Although those responsible for the 2007/08 PEV have not been brought to justice, evidence shows that the Court did in fact deter leaders from committing mass atrocity crimes during the 2013 elections.

Second, the Court's intervention in Kenya has resulted in various unintended effects that go well beyond the situation in question. For one, political and societal actors have employed the ICC to achieve several ends, such as dissolving particular alliances, forming coalitions, or demanding accountability. On a different note, the Court has to an extent catalyzed judicial reform. However, it is worth mentioning that these reforms are not meant to bring those responsible for the PEV to justice; rather the reforms served to ensure the fairness and representativeness of future elections. Lastly, despite the notion that individualizing mass atrocity crimes can increase ethnic tensions, the case of Kenya illustrates how this norm can actually be quite positive in fostering amicable relations between ethnic communities. By individualizing the events that occurred during the 2007/08 elections, many Kenyans saw the crimes for what they were – acts of violence led by particular individuals, and not reflective of the broader ethnic community.

Third, this case illustrates how the Prosecutor's decision to open investigations under the Principle of *Propio Muto* has obstructed the Court's intervention. Although the GoK has allowed the ICC to operate in the country, it continues to undermine the Court's intervention. The GoK has been active in employing different strategies to insulate

themselves from further ICC action. For example, witnesses are constantly intimidated and thereby continue to detract any statements that could allow the development of the cases. The GoK has also mobilized domestic and international actors against the ICC, not only in Kenya, but also in Africa more broadly. Hence, this case study illustrates how the ICC has affected Kenya's domestic politics well beyond the situation in question.

Chapter 5: Conclusion

The International Criminal Court (ICC) has become one of the central mechanisms to address instances of mass atrocity crimes. The Preamble of the *Rome Statute* calls on the ICC to work along side other international institutions to hold accountable perpetrators of mass atrocity crimes and thus contribute to the prevention of such crimes. Most studies have assessed the Court's ability to fulfill its mandate. Some argue that the ICC plays a pivotal role in ending conflict, since peace and justice are mutually dependent and therefore sustainable peace will only be attained once justice has been made. Others, however, maintain that ICC intervention cannot end conflict. According to Thabo Mbeki and Mahmood Mamdani "mass violence is more a political than a criminal matter. Unlike criminal violence, political violence has a constituency and is driven by issues, not just perpetrators."[293]

While there is substantial literature and a vibrant debate on the impact of the ICC on the prevention of mass atrocity crimes, relatively few studies ask questions about its broader effects on the countries and regions in which it operates. Although the *Rome Statute* does not authorize ICC intervention in the internal affairs of any state, there is growing evidence that ICC actions may have unintended consequences on the domestic politics of countries under investigation. Thus, it is crucial to recognize these consequences, since they may not only affect the ability of the Court to fulfill its mandate, but might also force us to think deeper about the breadth of the Court's impact as an institution. This thesis project explored both phenomena by analyzing the intended and

[293] Thabo Mbeki and Mahmood Mamdani, "Courts Can't End Civil Wars," in *The New York Times* (5 Feburary 2014).

unintended effects of the ICC on the domestic politics of the DRC, Sudan, and Kenya (refer to Table 1).

Table 5.0: The intended and unintended effects of the ICC in the DRC, Sudan and Kenya

		The DRC (Self- Referral)	Sudan (UNSC)	Kenya (*Propio Muto*)
Intended Effects	**Impunity**	**Mixed Results:** • Two imprisonments (Lubanga and Katanga) • Ongoing trials (Ntaganda and Bemba) • Cases dropped (Mbarushimana and Muducumura)	**Failed Results:** • At large (Harun, Kushayb, and Al-Bashir) • Arrest warrant pending (Hussein) • Cases dropped (Abu Garda and Abakaer Nourain)	**Uncertain Results:** • Three out of six original cases remain (Ruto, Kenyatta, and Arap Sang) • New case (Barasa)
	MAC Prevention	**Mixed Results:** • Ituri (brought relative peace) • Other eastern regions (levels of violence have remained constant)	**Mixed Results:** • Darfur (levels of violence have largely improved, with few exceptions 2008, 2011) • Other regions: violence continues in S. Kordofan, Blue Nile, and Abeyi	**Successful Results:** • Violence was largely averted during the 2013 elections
Unintended Effects	**Political Dynamics**	• Affected the Democratization Process since Kabila employed the ICC to weaken his political opposition	• Divided pertinent actors (rebels, GoS, and regional actors) between supporters of the ICC and supporters of Al-Bashir	• Led to fractures within the Coalition Government and the ODM • Facilitated the formation of the Jubilee Alliance • Instrumentalized by differ actors for various political goals
	Judicial Realm	• National level: has pushed certain actors to engage in judicial reform • Ituri: undermined local judicial	• Pushed the GoS to embark on judicial reform and employ domestic mechanisms	• The GoK introduced reforms in the 2010 constitution

		efforts		
	Ethnic Relations	• Interaction with the Banyamulenge and the Hema has the potential of increasing ethnic tensions	• Lack of data on this issue area.	• Individualizing MACs has positively affected ethnic relations

Source: Alejandra Espinosa, "The Intended and Unintended Effects of the ICC on the Domestic Politics of the DRC, Sudan, and Kenya," (Master's diss., McGill University, 2014).

This study examines the intended effects of the ICC and explores how ICC intervention generates unintended consequences on the domestic politics of countries in which it operates. Although the ICC has not been as successful in bringing an end to the impunity of perpetrators, evidence suggests that Court intervention has in part contributed to a decrease in the levels of violence. The ICC has been most effective in ending the impunity of perpetrators in the case of the DRC as it completed two cases (Lubanga and Katanga's). In contrast, the ICC has been unable to complete any cases in Sudan and Kenya, and those cases that are currently being investigated face many challenges. Nevertheless, it is important to acknowledge that the relative success in the DRC can be attributed to both the fact that the ICC has operated in the country for a longer period, and the cooperative relationship between the Court and President Kabila.

With respect to mass atrocity crimes, though the ICC has been most effective in Kenya as it did indeed play a significant role in preventing high levels of post-electoral violence in 2013, the other cases also illustrate positive results in this regard. In the DRC, for example, the security situation in Ituri has improved since the Court intervened. "Although it is difficult to determine causality between decreased crime and the particular efforts of the Court," a report by International Refugee Rights Initiative states, "nearly everyone interviewed [in Ituri has] noted an improvement in the security situation

over the past several years."[294] In Sudan, parts of the country continue to be plagued by violence; however; sources do indicate that the security situation in Darfur has improved since 2004. According to Niemat Ahmadi, "when the ICC first issued the arrests warrants, government officials were so fearful, which in turn impacted their behavior."[295] The evident success in Kenya as opposed to the DRC and Sudan can partly be explained by the fact that ICC intervention led to the formation of the Jubilee Alliance – a coalition between the Kikuyu and the Kalenjin (the main actors during the 2007/08 PEV).

Intervention by the ICC has also affected the domestic politics of the DRC, Sudan, and Kenya beyond the situations in question. The ICC has impacted the political dynamics of these three countries, as actors have manipulated the Court to suit their interests. President Kabila's self-referral has been described as a mechanism employed to consolidate his power by weakening his opposition during both the 2006 and 2011 elections – a factor that has, in turn, undermined the country's democratization process. In Sudan, the Court polarized actors between friends and enemies of Al-Bashir at the societal, the state, and the international level. Accordingly, anyone who has been somewhat supportive of ICC intervention has automatically become an enemy of the state. Similarly, in Kenya the Court had a dividing effect. ICC intervention caused fractures within the coalition government between the Orange Democratic Movement (ODM) and the Party of National Unity (PNU). It also affected the party cohesion of the ODM as it brought to bear the differences between Odinga and Ruto on how the party should interact with the ICC and party members that had been indicted. Interestingly however,

[294] IRRI & APROVIDI-ASBL, "Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri," in *Just Justice? Civil Society, International Justice and the Search for Accountability in Africa,* Discussion Paper No.2 (January 2012): 10.
[295] Niemat Ahmadi, *Interview by Alejandra Espinosa*, Telephone Conversation, Montreal (Canada), 28 April 2014.

ICC intervention also had a unifying effect in Kenya, since the establishment of the Jubilee Alliance was a direct result of the threat of the Court. It has been widely argued that Kenyatta and Ruto saw their union as pivotal in their quest to shield themselves from ICC action. Hence, these political effects suggest that political actors have devised various mechanisms to manipulate ICC action. In the case of the DRC, President Kabila directly employed the Court to deal with his political opposition; whereas, the GoS and the GoK have manipulated the threat of the Court to mobilize their populations and regional actors against further ICC action.

In the three case studies the Principle of Complementarity – that is, the fact that the ICC can only intervene when the state is either unwilling or unable to investigate and prosecute perpetrators – has to an extent initialized judicial reform, particularly by actors who are seeking to avert completely or halt further Court action. In the DRC, while there was not a big push towards judicial reform, those political actors at the national level (i.e. Bemba and Ruberwa) who were likely to be indicted, were active in calling for reform. On a separate note, ICC intervention inadvertently undermined domestic judicial efforts in Ituri by taking over cases that were already being investigated by domestic courts (i.e. Lubanga's and Katanga's) and by charging them of lesser crimes than they were being investigated for. In both Sudan and Kenya, the ICC catalyzed a move towards judicial reform. However, in both cases these efforts have been largely 'cosmetic,' since no substantive action has been taken to ensure that these countries' respective judicial systems can hold accountable those responsible for mass atrocity crimes. Hence, the fact that the Principle of Complementarity has mainly catalyzed judicial reform in situations where the ICC intervened through external actors (i.e. Sudan and Kenya), indicates that

complementarity is most likely to produce positive effects in cases where actors want to prevent further action from the Court.

Lastly, in both the DRC and Kenya, ICC intervention has affected ethnic relations, albeit these effects being quite opposite. In the DRC, ICC intervention has the potential of increasing ethnic tensions in relation to the Banyamulenge and the Hema communities. The indiscriminate use of the word Banyamulenge by ICC personnel to refer to MLC militias has the potential to further marginalize an already-marginalized ethnic group, as the crimes of the MLC are being unintentionally placed on the whole Banyamulenge ethnic community. It is worth noting that it is extremely challenging, albeit extremely important, for the ICC to apply the term Banyamulenge accordingly since most locals in the Central African Republic refer to all Mouvement pour la Libération du Congo (MLC) militias as Banyamulenge, regardless of their actual ethnic identity. On a different note, the fact that both Lubanga (a Hema) and Katanga (a Lendu) were indicted for crimes committed only against the Hema, despite the Lendu also being victims of atrocity crimes, has led the Lendu to question the partiality of the ICC. This is problematic not only as it undermines the Court, but also because it may exacerbate the antagonistic relationship between these two ethnic groups. In contrast, ICC intervention in Kenya rendered positive effects in this regard. Studies indicate that by individualizing the atrocities that were committed during the 2007/08 PEV, Kenyans have come to disassociate such crimes from the respective ethnic communities. It is also important to mention that ICC intervention in Sudan has not affected the country's ethnic relations, in part because the Court has not penetrated the societal level as it has in the DRC and Kenya.

To conclude, this study illustrates both the intended and unintended effects of ICC intervention on the domestic politics of the DRC, Sudan, and Kenya. It demonstrates that ICC intervention not only affects the situations in question by ending impunity and thus contributing to the prevention of mass atrocity crimes, but it also has broader effects on the domestic politics of the countries where the Court operates. The comparative component of this study also highlights how the effects of ICC intervention vary depending on several factors: *how* the Court becomes involved in the respective situations – via self-referral, UNSC referral, or under the Principle of *Propio Muto*; *who* has been indicted (i.e. state actors or rebel leaders); the countries' *regime type* (e.g. authoritarian or democratic); and the position of the AU in relation the conflict.

By examining the unintended effects of the ICC on the domestic politics of countries in question, this study makes two key contributions. First, it explores the unintended effects of ICC intervention, a major gap in the current debate on the impact of the Court in countries in question. Second, and more importantly, shedding light on these unintended effects may be beneficial for the ICC and individuals in the field of Mass Atrocity Prevention. On the one hand, it highlights factors that can facilitate the Court's ability to fulfill its mandate. For example, the Principle of Complementarity can potentially catalyze judicial reform, primarily when local actors are seeking to avert ICC intervention. Although actual and substantive judicial reform might halt ICC intervention, a reformed judicial system can have a greater chance of putting an end to impunity on a larger scale and in a more sustainable fashion. On the other hand, examining the unintended effects of ICC intervention may also bring to bare factors that can potentially undermine the Court's success. For instance, certain autocratic leaders have employed the

ICC to weaken their political opposition and thereby consolidate their power – a factor that negates the establishment of sustainable democratic institutions. As such, focusing on the ICC's capacity to fulfill its mandate requires a thorough understanding of the Court's unintended effects on the domestic politics of countries in question, since these can potentially facilitate or undermine this endeavor.

Appendix

Sample of the questionnaire

Note: These are examples of the kinds of questions I will be asking during the interviews.

1) Has the ICC been helpful/unhelpful at addressing the situations in the DRC, Sudan, or Kenya? Why?

2) Has the ICC played a role in alleviating/exacerbating local tensions (e.g. ethnic tensions)?

3) Do you think the ICC has the capacity to prevent mass atrocity crimes? If so, what warrants the Court its ability to deter actors from committing mass atrocities? If not, what causes the Court to be unsuccessful?

4) From your experience, how do local communities view the ICC as an institution? And the work it has done within their respective environments?

5) To what extent is the ICC cognizant or takes into account the possible unintended effects of its acts?

6) Do you think the ICC can facilitate the reform of political and/or legal structures? If not, should the ICC have the capacity to do so?

7) Does the ICC compliment or undermine domestic institutions? Why?

8) Has the ICC clashed with local norms? How?

9) How do the norms of the ICC (e.g. individualizing mass atrocity crimes, dealing only with "Big Fish") interact with local mechanisms of justice?

10) If you have been in the field (i.e. the DRC, Sudan, or Kenya), do locals view the ICC as a legitimate actor? Why? Does this vary between different groups of people (e.g. laymen, NGO workers, etc.)?

11) Do you think the ICC is neutral as an international institution?

12) Do you know of cases in which domestic actors have used the ICC to push forth a personal (or political) agenda?

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Chapter 5: Conclusion

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