



Special Working Paper Series on ‘Unintended Effects of International Cooperation’

Working Paper No. 2017/3

Exploring the unintended effects of ICC intervention on the domestic politics of the DRC, Sudan, and Kenya

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Abstract

The International Criminal Court (ICC) was established as a court of last resort to put an end to impunity or the perpetrators of mass atrocity crimes and thus contribute to the prevention of such crimes. Many studies have examined the extent to which the Court achieves these objectives. However, there is growing recognition that ICC interventions can impact the domestic politics of countries under investigation beyond putting an end to impunity and contributing to the prevention of mass atrocity crimes. This study builds from the literature on the unintended consequences of international interventions to answer the following question: “what are the unintended effects of ICC intervention on the domestic politics of countries under investigation?” This study defines unintended consequences as responses that go beyond the scope of the Court’s mandate. Through a case study method, this paper examines the unintended effects of ICC intervention on the domestic politics of the Democratic Republic of the Congo, Sudan, and Kenya. It finds that ICC intervention has impacted these countries’ governmental institutions (e.g. democratic processes), political associations (e.g. the breakup of existing political parties or the creation of new political alliances), and ethnic relations (e.g. the marginalization of certain ethnic groups and/or the reconciliation of warring ethnic groups). Although some of these consequences may be unavoidable since the ICC is a judicial institution that must operate outside the bounds of domestic politics, being aware of these potential unintended effects might better inform how the Court approaches future situations, as these effects may inadvertently strengthen or weaken judicial institutions. As researchers continue to document these unintended effects, future research should focus on identifying appropriate responses to these effects.

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This paper has been presented at the ‘Unintended Effects of International Cooperation’ conference on January 16&17, 2017 at the Netherlands Ministry of Foreign Affairs in The Hague. The opinions expressed in this article are the author's own and do not reflect the view of neither the Netherlands Ministry of Foreign Affairs, nor the Radboud University, or any other affiliated institutions.

1.0. Introduction

The preamble of the *Rome Statute* calls on the International Criminal Court (ICC) to work alongside states and the United Nations (UN) 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 to genuinely carry out the investigation or prosecution.”³

Much of the literature on the ICC has sought to assess the extent to which the Court has fulfilled its objective to contribute to the prevention of mass atrocity crimes.⁴ However, there is also growing evidence that ICC action may have broader effects on the domestic politics of countries in question, with ramifications well beyond the pursuit of justice. For example, studies suggest that the involvement of the ICC in Sudan and in Kenya led to a split within their respective executive branches.⁵ Similarly, it has been proposed that Democratic Republic of the Congo (DRC) President Joseph Kabila’s self-referral was for ulterior motives – that is, to remove Jean-Pierre Bemba, his greatest opposition from the 2006 elections.⁶

Literature on international interventions illustrates that they can have a range of effects beyond their mandated objectives on the societies in which they operate. Uncovering and understanding these unintended effects is crucial, since some of these effects can actually work to the detriment of international interventions. This study will build from this literature to answer the following question: *what are the unintended effects of ICC intervention on the domestic politics of countries under investigation?* This study examines this question by exploring ICC intervention in the DRC, Sudan and Kenya.

2.0. Background on the ICC and relevant situations

On 1 July 2002, the ICC was established under the *Rome Statute* to prosecute those responsible for the gravest crimes under international law. The Court’s jurisdiction is limited to crimes of genocide, crimes against humanity, and war crimes, which have been committed after its inception date on 1 July 2002. To date 124 states have ratified the *Rome Statute* and are therefore accountable to the ICC. The Court is currently investigating 10 situations, and is conducting 10 preliminary investigations.⁷ Twenty-three

¹ Mass atrocity crimes refer to those crimes within the jurisdiction of the ICC: genocide, crimes against humanity, and war crimes. “Preamble,” *Rome Statute of the International Criminal Court* (1998).

² “Preamble,” *Rome Statute of the International Criminal Court* (1998).

³ *Rome Statute of the International Criminal Court* (1998).

⁴ Refer to: Payam Akhavan, “Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism,” in *Human Rights Quarterly* 31 (2009); Nicholas Waddell and Phil Clark “Courting Conflict: Justice, Peace, and the ICC in Africa,” in the *Royal African Society* (2009); and Mahmood Mamdani, “Legal Band-Aid: not for Deep Wounds,” *Mail and Guardian* (03 May 2013); and Australian Civil-Military Centre, “The Prevention Toolbox: Systematising Policy Tools for the Prevention of Mass Atrocities,” *Policy Brief Series No.5*.

⁵ For an account of the split of the National Congress Party in Sudan refer to: International Crisis Group, “Sudan: Justice Peace and the ICC,” in *Africa Report*, no.152 (17 July 2009). For an account of the Orange Democratic Party refer to: Thomas Obel Hansen, “Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns,” in *California Western International Law Journal* 42, no.1 (2011): 2-32.

⁶ 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).

⁷ Opened investigations in: the DRC, the Central African Republic (CAR), CAR II, Uganda, Darfur, Kenya, Libya, Cote d’Ivoire, Mali, and Georgia. Preliminary Investigations in: in Afghanistan, Burundi, Colombia, Nigeria, Gabon, Guinea, Iraq/UK, Palestine, Registered Vessel of Comoros, Greece and Cambodia, and Ukraine.

cases have been brought before the Court – six individuals in custody, thirteen individuals at large, four convictions, and one acquittal.

In terms of the relevant situations to this study, the ICC opened the situation in the DRC on 23 June 2004. It issued indictments against six individuals, and two of them have been imprisoned (Thomas Lubanga and Germain Katanga).⁸ The ICC opened the situation in Darfur, Sudan on 6 June 2005, and has issued indictments against six individuals.⁹ In Kenya, former Chief Prosecutor, Luis Moreno-Ocampo, opened the 2007/08 Post Electoral Violence (PEV) situation on 31 March 2010, and since six individuals have been indicted.¹⁰

3.0. Unintended effects of intentional interventions

International interventions such as peace operations, humanitarian relief and international aid often generate a range of outcomes beyond their mandated objectives. Chiyuki Aoi and associates argue that within a complex system, interventions will have multiple consequences.¹¹ Some of these consequences are intended – i.e. in line with the operation's mandate, while others are unintended or unexpected since they fall outside the mandate. However, they make two qualifications for what constitutes an unintended consequence. Firstly, unintended consequences are not the same thing as “failure to achieve the intended consequences.”¹² For example, if the mandate of an intervention were economic recovery, failure to achieve economic growth would not be considered an unintended consequence. Secondly, the “mixed-motive” phenomenon is not considered an unintended consequence. The mixed-motive phenomenon refers to the motives for which political leaders support a given operation. Nonetheless, they do acknowledge that the mixed motive phenomenon can catalyze certain effects that could be regarded as unintended consequences.¹³

There are different types of unintended effects resulting from international interventions. Dirk-Jan Koch and Lau Schuplen's literature review on the unintended effects of international cooperation establishes 6 ways of classifying unintended effects: really unintended (i.e. effects that are completely unforeseen), anticipated (i.e. effects that are foreseen); positive and negative; spill-over (i.e. effects on non-targets); unavoidable (i.e. akin to collateral damage: unintended, anticipated, and negative); drawback (i.e. if the impact of the unintended effect is small compared to that of the intended effect) and perverse effects (i.e. if the impact of the unintended effect is negative and much greater than that of the intended effect).¹⁴

Likewise, Chiyuki and associates hold that unintended consequences can be unforeseen or completely unexpected; or they can be foreseen, especially if such consequences have resulted in the past under similar circumstances.¹⁵ In addition, Chiyuki and associates argue that unintended consequences can also be negative or positive. As they note: “Peace operations do not generate only positive and

⁸ Individuals indicted: Thomas Lubanga D, Germain Katanga, Bosco Ntaganda, Callixte Mbarushimana (Closed), Sylvestre Muducumura, and Mathieu Ngudjolo C (Closed). For a detailed account of ICC action against them refer to: <https://www.icc-cpi.int/drc>

⁹ Individuals indicted: Ahmad Harun, Ali Kushayb, Omar Al-Bashir, Bahr Idriss Abu Garda (Closed), Abdallah Banda Abakaer Nourain, and Abdel Hussein. For a detailed account of ICC action against them refer to: <https://www.icc-cpi.int/darfur>

¹⁰ Individuals Indicted: William Samoei Ruto (Closed), Joshua Arap Sang (Closed), Uhuru Mugai Kenyatta (Closed), Walter Osapiri Barasa, Paul Gicheru and Philip Kipkoech Bett. For a detailed account of ICC action against them refer to: <https://www.icc-cpi.int/kenya>

¹¹ Chiyuki Aoi, Cedric de Coning, and Ramesh Thakur, *Unintended Consequences of Peacekeeping* (Tokyo: United Nations University Press, 2007), 6.

¹² Ibid,

¹³ Aoi, de Coning, and Thakur, *Unintended Consequences of Peacekeeping*, 6.

¹⁴ Dirk-Jan Koch and Lau Schupen, “Draft literature review of unintended effects of international cooperation,” 4.

¹⁵ Aoi, de Coning, and Thakur, *Unintended Consequences of Peacekeeping*, 6.

beneficial outcomes...[they can also] distort the host economy, may cause an increase in sexual violence against women and children, and may add to the spread of HIV/AIDS.”¹⁶

The unintended consequences of international interventions are starting to receive increased attention by academics and practitioners.¹⁷ International Organizations in particular have come under scrutiny for the unintended and often damaging effects of their interventions. 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.”¹⁸ 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. 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.¹⁹ The range of unintended impacts 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.²⁰

3.1. The unintended effects of ICC intervention

Much of the literature on the ICC has assessed its role in the prevention of future mass atrocity crimes by bringing perpetrators to justice.²¹ 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.²² 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.²³

Similarly, Hyeran Jo and Beth A. Simmons hold that the ICC has the power to deter certain governments and rebel groups through “prosecutorial and social deterrence.” Prosecutorial deterrence refers to the ICC directly investigating and prosecuting those most responsible for mass atrocity crimes, while simultaneously encouraging member states to improve their domestic judicial systems to

¹⁶ Aoi, de Coning, and Thakur, *Unintended Consequences of Peacekeeping*, 3.

¹⁷ Some examples include: Aoi, de Coning, and Thakur, *Unintended Consequences of Peacekeeping*; Maria Lange and Mick Quinn, “Conflict, Humanitarian Assistance and Peacebuilding: Meeting the Challenges,” in *International Alert* (December 2003); Kathleen M. Jennings, “Unintended Consequences of Intimacy: Political Economies of Peacekeeping and Sex Tourism,” in *International Peacekeeping* 17, no.2 (2010): 229-243; and Dirk-Jan Koch and Lau Schupen, “Draft literature review of unintended effects of international cooperation,” (provides an overview of different works on the unintended consequences of international interventions).

¹⁸ Maria Lange and Mick Quinn, “Conflict, Humanitarian Assistance and Peacebuilding: Meeting the Challenges,” in *International Alert* (December 2003): 10.

¹⁹ Kathleen M. Jennings, “Unintended Consequences of Intimacy: Political Economies of Peacekeeping and Sex Tourism,” in *International Peacekeeping* 17, no.2 (2010).

²⁰ This 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.” Refer to: Aoi, Coning, and Thakur, *Unintended Consequences of Peacekeeping*, 11.

²¹ Refer to footnote number 4. Other relevant works include: Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities,” in *The American Journal for International Law* 97, no. 1 (2001); and James F. Alexander, “The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact,” in *Villanova Law Review* 54, no.1 (2009). For an assessment of the ICC’s role in Uganda refer to Tim Allen, “The International Criminal Court and the Invention of Traditional Justice in Northern Uganda,” in *Politique Africaine* 3, no. 107 (2007).

²² Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities,” in *The American Journal for International Law* 97, no. 1 (2001): 9.

²³ Akhavan, “Beyond Impunity,” 12.

investigate and prosecute such crimes; whereas social deterrence refers to the Court's power to mobilize the international community and domestic civil society to demand justice.²⁴

On the other hand, critics argue that ICC intervention has failed to prevent mass atrocity crimes and thus contribute to the cessation of armed-conflict. Mahmood Mamdani, for example, questions the Court's capacity to put an end to mass atrocity crimes, since punitive action tends to ignore the issues that led to the violence in the first place. 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."²⁵ On a different note, Leslie Vinjamuri argues that though justice is inherently valuable, the pursuit of justice – or ICC intervention – should be delayed until peace is secured. The pursuit of justice during on-going conflict, for example, can inhibit the warring parties' ability to employ amnesties to end a conflict and thus increase their likelihood to continue using military force. As Father Carlos Rodriguez (member of the Acholi Religious Leaders' Peace Initiative in Uganda) states: "Obviously, nobody can convince the leaders of a rebel movement to come to the negotiating table and at the same time tell them that they will appear in courts to be prosecuted."²⁶

Despite growing literature examining the Court's ability to contribute to the prevention of mass atrocity crimes, the unintended effects of ICC intervention (i.e. those effects that fall beyond militarized conflict) have not received the same degree of attention. Recent studies show that ICC intervention has inadvertently impacted the host countries' political landscape, namely their judicial system.

The most evident effect is associated with the principle of complementarity, which holds that the Court should be used as a last resort in bringing to justice perpetrators of mass atrocity crimes. In other words, the Court can only exercise jurisdiction over states "[if] the State is unwilling or unable to genuinely carry out the investigation or prosecution."²⁷ 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."²⁸ This same logic can also lead political actors to embark on judicial reform and thereby contribute to the strengthening of domestic institutions – a factor that has lasting effects in society past the militarized conflict.

Sarah Nouwen's work on complementarity illustrates how this principle has catalyzed a number of "unexpected effects" in Uganda and Sudan. These include: states outsourcing the responsibility of investigating and prosecuting mass atrocity crimes to the ICC; mediators removing the topic of accountability from peace-talk agendas, because of ICC involvement in this issue; and the operational space of human rights activist being reduced and therefore "rendering the domestic promotion of human rights norms more difficult."²⁹

On a different note, Geoff Dancy and Florencial Montal find that ICC investigations in some African countries have resulted in a phenomenon that they call "unintended positive complementarity." This refers to an increase in human rights prosecutions, resulting from a conflictual interaction between the ruling coalition "attempting to feign commitment to human rights norms" and reformer coalitions

²⁴ Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?" in *International Organization* 70 (Summer 2016). 469.

²⁵ Mahmood Mamdani, "Perpetrators must be part of a reformed society," in *The New York Times* (8 March 2013).

²⁶ Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," in *Ethics & International Affairs* 21, No. 2 (2007): 183.

²⁷ Rome Statute Article 17, 1(a).

²⁸ White-Burke, "Complementarity in Practice," 575.

²⁹ Sarah M. H. Nouwen *Complementarity from the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2014), 10.

that use ICC involvement to expose the corruption and ills of the state.³⁰ For instance, civil society groups in Kenya have used the ICC as a tool to demand political accountability. According to Christine Bjrok and Juanita Goebertus, “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.”³¹

Other studies show how transitional justice mechanisms, including the ICC, have ramifications broader to realms of justice and human rights. According to Jelena Subotic domestic political elites do not necessarily use transitional justice mechanisms for a desirable social purpose (truth seeking, justice, and reconciliation), but to pursue localized political agendas – a phenomenon that she calls “hijacked justice.”³² For example, states have used transitional justice to get rid of political opponents, appease international coercion, secure international benefits and payoffs, obtain international club membership, or resolve political uncertainty.³³

Examining the unintended effects of ICC intervention in the domestic politics of host countries is particularly interesting since the Court, as a legal entity, is supposed to operate outside the realm of politics. According to former Chief Prosecutor Luis Moreno-Ocampo, “I apply the law without political considerations.”³⁴ Nonetheless, there are multiple instances in which ICC intervention has had political ramifications. Some critics maintain that the ICC is a tool for the neo-colonial pursuits of states that wish to maintain their control over Africa.³⁵ Others argue that it damages the institutional capacity of the countries in which it operates. For instance, opponents of the Court’s involvement in Kenya argue that indictments against President Uhuru Kenyatta and his deputy, William Ruto, undermined the country’s democracy since these were democratically elected officials.³⁶

4.0 Conceptual framework

By building on the literature of unintended consequences of international intervention, particularly Chiyuki and associates’ work on the unintended consequences of peace operations, this study seeks to accomplish two objectives: first, to shed light on the unintended effects of ICC intervention on the domestic politics of the DRC, Sudan, and Kenya; and second, to categorize these effects as positive or negative, depending on their impact on the Court’s ability to fulfill its mandate and preambular aspiration.

Unintended effects refer to those consequences that go beyond the Court’s mandate – i.e. to be complementary to national criminal jurisdictions in putting an end to impunity for the perpetrators of mass atrocity crimes. This study identifies two forms of unintended effects: *positive* and/or *negative*. Positive side effects, in the context of this study, are those that support the Court’s mandate and its preambular aspiration – i.e. to contribute to the prevention of mass atrocity crimes. Negative effects refer to those that undermine the Court’s ability to fulfill these objectives.

³⁰ Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions, 41.

³¹ 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.

³² Jelena Subotic, *Hijacked justice: dealing with the past in the Balkans* (Ithaca: Cornell University Press, 2009), 6.

³³ *Ibid.*, 167.

³⁴ Keynote address Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Council on Foreign Relations, Washington DC (February 4, 2010).

³⁵ 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.

³⁶ Nicholas Kulish, “Kenyan Lawmakers Vote to Leave International Court,” *New York Times* (05 September 2013).

This article focuses on effects that result once the ICC has intervened (or opened an investigation) into a situation.³⁷ Although the ICC becomes involved in a country prior to opening an investigation through the preliminary examination phase, evidence suggest that states are more likely to alter their behavior once the Court has opened an investigation. Dancy and Montal argue that investigations have a range of implications as they: single out individuals as alleged criminals; imply a judgment from a member of the diplomatic community; and compel states to cooperate with the Court on the arrest of indictees.³⁸ Given that states are more likely to react to ICC investigations, since the political costs are greater than during the preliminary examination, this phase is likely to catalyze more effects and thus making for a more interesting phase to study.

4.1. Methodology

This article employs a qualitative case study method. The 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.”³⁹ This is pivotal 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 ICC intervention in the domestic politics vary between the three cases. Although this article looks at three cases, it is not a comparative study. Its focus instead is on how ICC intervention has affected these three countries’ domestic politics, rather than to compare systematically the findings of these three states.

4.2. Data

This study uses a combination of primary data, secondary data and semi-structured interviews to explore the unintended effects of ICC investigation in the domestic politics of the DRC, Sudan, and Kenya. The primary data analysis draws from local news articles, international news articles, statements made by key actors (e.g. government officials, ICC officials, and Non-Governmental Organization (NGO) personnel), and relevant blogs. The secondary data analysis derives from scholarly books and articles on unintended consequences of international interventions and on the ICC and its impact on the domestic politics of the DRC, Sudan, and Kenya beyond the situations in question. These sources are complemented with reports produced by the respective governments, as well as reports and briefing notes from non-governmental organizations (NGOs) working in the field. This study also includes semi-structured interviews with individuals from the DRC, Sudan, and Kenya familiar with the situations, academics (i.e. experts in the field of international law and/or African politics), ICC personnel, international NGO employees, and human rights activists.

4.3. Case Selection

The cases of the DRC, Sudan, and Kenya share certain similarities and key differences that may help shed light on the unintended effects of ICC intervention in different political contexts:

ICC member status and referral mechanisms: First, the DRC and Kenya are state-parties, while Sudan is a non-party state, which could make ICC intervention a bigger threat to its sovereignty. Second, these cases were brought to the ICC through different mechanisms. Both Sudan and Kenya were referred

³⁷ This study treats ICC intervention and investigation interchangeably.

³⁸ Geoff Dancy and Florencia Montal, “Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions,” *University of Minnesota - Twin Cities - Department of Political Science* (2015).

³⁹ Henry E. Brady and David Collier, *Rethinking Social Inquiry: Diverse Tool, Shared Standards 2nd Ed.* (Lanham: Rowman & Littlefield, 2010), 180.

by outside parties; the United Nations Security Council (UNSC) referred the situation in Darfur, while former Chief Prosecutor initiated an investigation *proprio muto* into the situation in Kenya.⁴⁰ The violence in Eastern DRC, on the other hand, was a self-referral by President Kabila. Third, in terms of indictees, in both Sudan and Kenya heads of state were indicted, while in the DRC rebel leaders were indicted. These differences may shed light on how states and other domestic actors may respond to ICC investigations.

Regime type: The countries selected have different regime types. The DRC and Sudan are highly authoritarian, while Kenya is relatively democratic. This divergence will shed light on the effects of the Court in three different political arenas. For example, one could expect that in democratic systems, where individuals enjoy more freedoms, civil society might be more likely to employ the ICC to demand greater accountability and justice than in authoritarian states.

Regional and international influence: Regionally, although the African Union (AU) 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 and Kenya. In addition, the image of these three countries varies greatly at the international level. The DRC is considered a failed state, while many countries' perceive Sudan as a rogue state, responsible for committing genocide. On the other hand, Kenya has a positive image, and is often praised for being a stable and prominent country within the region. These different perceptions could shed light on the intentions of different regional and international actors in pushing forth or opposing the decisions made by the ICC.

5.0. The unintended effects of ICC intervention in the domestic politics of the DRC

5.1. Undermining democratic institutions

Conventionally, self-referrals have been regarded as the most positive way for the ICC to open an investigation. This affords the Court certainty that the host state will cooperate with the Office of the Prosecutor (OTP) to successfully bring cases to trial. In his September 2003 Policy Brief, former Chief Prosecutor Luis Moreno-Ocampo noted:⁴¹

“...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, the case of the DRC illustrates how President Kabila self-referred the situation in the eastern part of the country to advance his political agenda in a way that inadvertently undermined the possibility of competitive elections and served to strengthen his power.

A transitional government was established in 2003, under the leadership of President Kabila and his four vice-presidents who represented a key faction during the Second Congolese War: 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). The transitional government was to stay in office until the 2006 elections, which would determine who would come to power thereafter. According to William W. Burke-White “this produced a situation in which former

⁴⁰ The *Principle of Proprio Muto* allows the Prosecutor to open an investigation if there is credible evidence to do so.

⁴¹ “Annex to the Paper on Some Policy Issues Before the Office of the Prosecutor: Referrals and Communications,” 5.

enemies directly reported one another, often resulting in political maneuvering and dangerous infighting.”⁴² Since key political actors within the transitional government, including three of the vice-presidents, were likely to be implicated for international crimes, international justice mechanisms could be employed to deal with one’s opposition. The mentality was that individuals being indicted by the ICC might not be able to participate in the electoral process, since they could be in The Hague during this time.⁴³ Hence, referring the situation to the ICC became a powerful tool in the hands of Congolese politicians if they were seeking to win the elections by exposing their rivals internationally.

For President Kabila the chances of ICC indictment were low. Most of the crimes attributed to him occurred before the establishment of the Court and therefore were not open to prosecution. 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 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 Ange-Félix Patassé. The prosecutor had also received various reports that implicated Bemba for mass atrocity crimes in the Ituri province. Ruberwa was also accused of serious crimes in the DRC as leader of the RDC-Goma. Lastly, Ndobasi, albeit President Kabila’s ally, posed an electoral threat that could be quelled, since he could be investigated for his role in encouraging the murder of government opposition – i.e. ethnic Tutsi. Moreover, Ndobasi was already being prosecuted in Belgium for breaching International Humanitarian Law. “[Therefore] one would expect President Kabila,” as a MONUC observer stated, “to support a tribunal with jurisdiction over genocide and war crimes.”⁴⁴

It is important to note that ICC intervention in the DRC did not directly get rid of President Kabila’s opposition, specifically for the 2006 elections. However, the ICC did open a case against Bemba in 2008 in relation to the situation in the CAR, which some argue played directly into the interests of President Kabila for the 2011 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 governments 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.”⁴⁵ Thus, the timing of ICC indictments on key individuals undermined the country’s possibility of competitive elections. As Burke-White states, “where the ICC became 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.”⁴⁶

In addition, ICC intervention served to strengthen President Kabila’s power in several ways. He could undermine the support of his political opponents by bringing to bear their crimes domestically and internationally. As a lawyer from Ituri commented, “[the ICC] suited Kabila as a weapon against his adversaries.”⁴⁷ By referring the situation he could strengthen his power vis-à-vis rebel groups, especially since it was unlikely that the ICC would indict him. Lastly, President Kabila could also legitimize his power by demonstrating to his constituents that his regime was committed to ending the violence in the country; and more importantly, to restrain itself from committing future mass atrocity crimes.

This study considers these two unintended consequences – i.e. removing political opposition and consolidating Kabila’s hold to power – to be negative. First, ICC intervention in the CAR removed

⁴² White-Burke, “Complementarity in Practice,” 564.

⁴³ Ibid., 565.

⁴⁴ White-Burke, “Complementarity in Practice,” 565.

⁴⁵ 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): 24.

⁴⁶ White-Burke, “Complementarity in Practice,” 568.

⁴⁷ “ICC Joins the Congolese Chess Game,” in *RNW* (04 July 2004).

Bemba, one of President Kabila's main contenders during the 2006 and 2011 elections and thus undermined the possibility of competitive elections. Second, and relatedly, ICC intervention served to strengthen President Kabila's hold to power. This study argues that these unintended effects are negative. For one, they could undermine the DRC's transition to democracy, since one of the most fundamental features of a strong democratic system is the existence of 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."⁴⁸ In addition, non-democratic states tend to have less effective and independent judicial systems, as well as exhibit higher levels of human rights violations than democratic states – two factors that are in direct conflict with the Court's objectives to put an end to the impunity of perpetrators of mass atrocity crimes and thus contribute to the prevention of such crimes.

5.2. *Fuelling ethnic relations?*

In the DRC ethnicity plays an important role in conflict. As an International Non-Governmental Organization (INGO) employee stated: "everything is read in ethnic terms."⁴⁹ The case of the DRC illustrates two instances in which ICC trials of rebel leaders can affect ethnic communities as a whole. The first example is associated with the Court's "uncritical" use of the term Banyamulenge to refer to MLC militias responsible for violent attacks mainly in the CAR.⁵⁰ The Banyamulenge are a pastoralist ethnic community mostly situated in Eastern DRC who have been at the forefront of the Congolese conflict.⁵¹ Their place of origin has been widely contested, which has contributed to their constant marginalization.⁵² Moreover, certain Congolese associate the Banyamulenge with the Rwandan government. As Zachée Muhamiriza, president of the Banyamulenge community in Bukavu (South Kivu), stated:⁵³

"Our plight [worsen] because whenever we are attacked, some of us run to Rwanda for help, confirming the perception that we are foreigners. If there was peace in eastern Congo, Banyamulenge would want to identify with Congo; those who run to Rwanda do so because they think it is the only place which can guarantee their safety."

Felix Mukwiza Ndahinda's study suggests that ICC investigations have reinforced the negative image attributed to the Banyamulenge in the DRC and beyond (namely in the CAR).⁵⁴ ICC personnel have employed this term indiscriminately when referring to the MLC, even though Banyamulenge account for a small fraction of the estimated 20,000 militias.⁵⁵ 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

⁴⁸ 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.

⁴⁹ Anonymous, *Interview by Alejandra Espinosa*, Montreal (Canada), March 2014.

⁵⁰ Felix Mukwiza Ndahinda, "The Bemba-Banyamulenge Case before the ICC: From Individual to Collective Criminal Responsibility," in *the International Journal of Transitional Justice* (2012): 476.

⁵¹ *Ibid.*, 478.

⁵² *Ibid.*

⁵³ Enock Ruberangabo Sebinez, "DRC: Banyamulenge Seeking Political Solutions to Tensions," in *IRIN: Humanitarian News and Analysis* (03 August 2007), URL: <http://www.irinnews.org/printreport.aspx?reportid=73571>

⁵⁴ Ndahinda, "The Bemba-Banyamulenge Case before the ICC," 491.

⁵⁵ *Ibid.*, 487.

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 ‘Banyamulenge’, regardless of their ethnic affiliation.”⁵⁶ Personal testimonies for Bemba’s case illustrate this phenomenon:⁵⁷

- 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.

With regards to the DRC, in particular, an interviewee (an INGO worker) holds that while the aforementioned is accurate for the CAR, this notion has not taken force in the DRC since Congolese are well aware of the difference between the Banyamulenge and the MLC.⁵⁸ 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 in the DRC.⁵⁹ Given 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 aspires to prevent future violence, to be more conscious when referring to MLC rebels, since these over-sweeping generalizations have the potential to incite local tensions. 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.”⁶⁰

A second example of the ICC’s potential impact on ethnic tensions in the DRC relates to the Hema and the Lendu communities. Lubanga, who is Hema, was prosecuted for mass atrocity crimes against Hema, even though he is also responsible for crimes against Lendu communities. Likewise, Ngudjolo Chui, a Lendu, was being prosecuted for crimes against Hema.⁶¹ As such, Lendu complain that the ICC and the international community have created a dynamic in which the perpetrators are people from different groups – i.e. the Hema and the Lendu – but the victims are disproportionately Hema. This is especially evident in the case against Lubanga, where the Lendu have expressed frustrations about not being able to participate as victims of attacks by the *Union des Patriotes Congolais* (Lubanga’s rebel group), given the case’s focus on the recruitment of child soldiers. In a letter to the Chief Prosecutor, the

⁵⁶ “The Case of the Prosecutor and Jean-Pierre Bemba Gombo,” No.: ICC-01/05-01/08 (15 June 2009): 52/186.

⁵⁷ Ibid.

⁵⁸ Anonymous, *Interview by Alejandra Espinosa*, Montreal, Canada (March 2014).

⁵⁹ 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.

⁶⁰ Ndahinda, “The Bemba-Banyamulenge Case before the ICC,” 2.

⁶¹ The case against Chui was closed in 2015.

leaders of the Lendu community expressed their concerns over the focus of the case against Lubanga. As they noted: ⁶²

“[The focus] makes the Lendu community believe that there was no interethnic war in Ituri between the Lendu and Hema peoples. This implies that the children enlisted were Hema subjects, the victims would be the Hema relatives and brothers and the reparations in damages or interests whether individual or collective, would be done in the Hema community. Therefore, these enlisted children were at the side of their Hema brothers and adult relatives to massacre, kill, rape, pillage, burn and destroy in Lendu areas. What does this say about Lendu victims?”

A worker from an INGO that operates in the DRC maintains that individuals who wish to promote ethnic division point to this dynamic, claiming that the “ICC is unfair and biased.”⁶³ According to a report by IRRI this imbalance between the Lendu and the Hema as victims of crimes under the ICC may have increased tensions between the two groups, especially among communities that see the Court as “unfair and trying to remove the guilt of [the Hema].”⁶⁴

ICC intervention had unintended effects on the ethnic relations in the DRC and the CAR. The Court’s investigation in the DRC and the CAR could have contributed to the existing marginalization of the Banyamulenge, albeit to a lesser extent in the DRC. Moreover, failure to recognize the Lendu (along with the Hema) as victims of crimes committed by Lubanga and the UPC could increase existing tensions between these ethnic groups. Hence, these unintended effects are negative, since they could have the potential to incite ethnic violence, which runs contrary to the Court’s aspiration of contributing to the prevention of mass atrocity crimes.

6.0. The unintended effects of ICC intervention in the domestic politics of Sudan

6.1. Division within the National Congress Party

ICC indictments for President Omar Al-Bashir, Ahmad Harun, and Ali Kushayb caused a split within the National Congress Party (NCP) between hardliners and moderates. The International Crisis Group (ICG) notes that since the 2008 indictments, disagreements between hardliners, who refuse to find a peaceful solution to Sudan’s problems, and moderates in favor of this has increased.⁶⁵ According to a member of the NCP, divisions within the party became evident when members of the political bureau from central regions called on the party to make concessions to Darfur.⁶⁶ These concessions included the removal of land usurpers, granting the NCP’s vice-presidency to a Darfuri, and the reunification of the three Darfur states into one with the establishment of a legitimate regional authority.⁶⁷ Moderates argued that 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 maintain that such concessions could undermine the party and thereby weaken its grip on the country’s political and economic power. President 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.

⁶² IRRI & APROVIDI-ASBL, “Steps Towards Justice, Frustrated Hopes,” 14.

⁶³ Anonymous, *Interview by Alejandra Espinosa*, Montreal (Canada), March 2014.

⁶⁴ IRRI & APROVIDI-ASBL, “Steps Towards Justice, Frustrated Hopes,” 14.

⁶⁵ International Crisis Group, “Sudan,” 8.

⁶⁶ Ibid.

⁶⁷ Ibid.

Moreover, two NCP leaders interviewed by ICG mentioned that there had been talk within the party, for a brief period of removing President Al-Bashir from the presidency.⁶⁸ However, his supporters, especially those within the army, quickly rebutted this proposition since letting go of President Al-Bashir would mean letting go of the aforementioned benefits.⁶⁹ Instead, the Government's policy, as a result of Court intervention, has been to prevent and disrupt its work in Sudan.

The party-split also has a regional dimension between riverine party leaders and members from other regions. The riverine elite continues to oppose all concessions proposed on Darfur.⁷⁰ As a non-riverine party leader within the NCP holds, "a handful of brothers who made fortunes from Sudan's wealth have thrown our Islamic Movement principles and values to the wall."⁷¹ 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 Movement. Moreover, President Al-Bashir solidified his power by creating a situation in which dissent is equated to treason.⁷² Meanwhile, those who support President Al-Bashir continue to receive political and economic favors. This evidence illustrates how ICC intervention divided Sudan's ruling 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.

ICC investigation has contributed to the split of the NCP along ideological and regional lines. This unintended effect is both positive and negative. It is positive in that the moderate wing within the party used ICC intervention to advocate for reforms in Darfur aiming at a peaceful resolution between the Government of Sudan (GoS) and rebel groups. This of course is positive in that it is in line with the Court's aspiration of contributing to the prevention of mass atrocity crimes in Darfur. However, the division along regional lines can also be considered as negative, since the competition for political (and economic power) could result in increased repression by the GoS to hold on to power.

6.2. Alliances at the regional level

The AU and the Arab League have also mobilized behind the GoS, arguing that 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."⁷³ 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."⁷⁴ 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 Prosecutor in reference to Darfur was unbalanced and lacked objectivity.⁷⁵

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

⁶⁸ International Crisis Group, "Sudan," 8.

⁶⁹ Ibid.,

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid., 9.

⁷³ Kurt Mills, "'Bashir is Diving Us': Africa and the International Criminal Court," in *Human Rights Quarterly* 34, no. 2 (2012): 436.

⁷⁴ Mills, "'Bashir is Diving Us," 420.

⁷⁵ International Crisis Group, "Sudan," 15.

the domestic affairs of another are still core principles of the AU.”⁷⁶ 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. The adoption of this article, which is analogous to the *Responsibility to Protect* principle, is meant to signal Africa’s commitment to human rights.⁷⁷

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 *Rome Statute*. As a government official stated “the Security Council had no legal right to refer alleged atrocity crimes committed in Sudan to the [ICC].”⁷⁸ 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.”⁷⁹

Nonetheless, 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.⁸⁰ Furthermore, 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 ICC’s principle of complementarity, and therefore to bring those responsible for mass atrocity crimes to justice. It has also established a commission responsible for examining the nature of the crimes and creating measures that can effectively address the situation.⁸¹ Hence, the involvement of the ICC in Sudan has placed the AU in a situation where it must wrestle 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.⁸²

ICC investigation into the situation in Darfur resulted in the AU and the Arab League siding with the GoS and seeking to challenge the Court, especially the case against President Al-Bashir. This unintended effect is both positive and negative. This is an example of positive complementarity since regional organizations have pushed domestic actors to prosecute those responsible for mass atrocity crimes, and sought to establish parallel accountability mechanisms (i.e. to the ICC) at the regional level. Nevertheless, this alliance could be negative since it has sought to undermine the role of the ICC in both Sudan and the region, by portraying Court interventions in the continent as neo-colonialist endeavors.

7.0. The unintended effects of ICC intervention in the domestic politics of Kenya

7.1. Demanding political accountability

Studies suggest that civil society groups have employed the ICC to demand for political accountability. A study conducted by Christine Bjork 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

⁷⁶ Mills, “Bashir is Diving Us,” 412-413.

⁷⁷ “The Constitutive Act,” *African Union*.

⁷⁸ International Crisis Group, “Sudan,” 10.

⁷⁹ Mills, “Bashir is Diving Us,” 420.

⁸⁰ International Crisis Group, “Sudan,” 15.

⁸¹ Mills, “Bashir is Diving Us,” 420.

⁸² *Ibid.*, 406.

limited or contentious relationship with the state.⁸³ 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.⁸⁴

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 in power."⁸⁵

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. This can be regarded as a positive unintended effect, since it is in line with the Court's mandate and preambular aspiration, by potentially pushing politicians to engage in institutional reform (namely within the justice system), as well as deterring them from committing future human rights violations.

7.2. Divisions within the Orange Democratic Movement

ICC intervention has affected party cohesion within the Orange Democratic Movement (ODM). Thomas O. Hansen notes several events that indicate ODM fractionalization as a result of the ICC's involvement in the country. In mid-March 2011, in response to ODM Secretary General Nyong'o's request to the UNSC to defer of ICC investigations, 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 condemning the requested deferral of ICC investigations.⁸⁶ Another source of contention has been whether the party should provide its members with legal assistance for ICC investigations. Some members such as Parliamentary Secretary, Ababu Namwamba, initially held that members of the ODM who are indicted by the Court should receive legal aid from the party. However, Namwamba later contradicted this claim and argued that the ODM would not provide legal aid to any of the accused of mass atrocity crimes.⁸⁷ According to Hansen, Ruto later on addressed this confusion by making it clear that he was not interested in obtaining legal assistance from the ODM. As he famously stated: "[such assistance], would resemble a hyena promising defense to goats."⁸⁸

The fractionalization within the ODM can be regarded as both a positive and a negative unintended effect. ICC intervention pushed certain party members to demand for greater accountability vis-à-vis Court investigations and thus in line with its mandate. However, fractionalization within the ODM could also be seen as negative in that it could result in political instability, which could be troubling given past incidents of political violence.

7.3. The formation of the Jubilee Alliance

⁸³ 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.

⁸⁴ *Ibid.*, 217.

⁸⁵ *Ibid.*, 225.

⁸⁶ Thomas Obel Hansen, "Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns," in *California Western International Law Journal* 42, no.1 (2011): 18.

⁸⁷ Hansen, "Transitional Justice in Kenya?" 18.

⁸⁸ *Ibid.*

Various studies suggest that Kenyatta and Ruto's decision to form the Jubilee Alliance and run for presidency during the 2013 elections was to insulate themselves from ICC investigations. In Kenya's multiethnic society no single 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 do so.

Three factors explain why the Kalenjin and the Kikuyu came together in January 2013, albeit their deep-seeded tensions. First, antagonism against former Prime Minister Raila Odinga and his policies pushed Ruto and Kalenjin supporters to seek alternative avenues outside the ODM. Odinga was increasingly being seen as a corrupt political figure, while the party's integrity was suffering from allegations of rigged electoral behavior and vote tampering.⁸⁹ 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..."⁹⁰ Lastly, the notion that the ICC was unfairly targeting Kenyatta and Ruto wielded considerable power in Kenya. This rhetoric became even more popular as politicians strategically positioned their individual victimization by the ICC as equivalent to the victimization of their whole ethnic community. For example, the following message was frequently used during their campaign:⁹¹

"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."

Even though many Kenyans saw the charges against Ruto as legitimate for his role in inciting and organizing the PEV, many Kikuyu saw Kenyatta as being innocent.⁹² As noted by one of Gabrielle Lynch's interviewees, "[many] did not think Kenyatta should be facing charges at the Hague, [however] many did think that Ruto was responsible for inciting and organizing attacks against Kikuyu."⁹³

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."⁹⁴ This idea was palatable among many 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 ICG echoed this sentiment as it noted, "[that] conspiracy theories abound that Western governments had a strategic plan to have the ICC

⁸⁹ International Crisis Group, "Kenya after the Elections," 8.

⁹⁰ Malik, "Mobilizing a Defensive Kikuyu-Kalenjin Alliance," 11.

⁹¹ Ibid.

⁹² Lynch, "Electing the 'alliance of the accused,'" 99.

⁹³ Ibid.

⁹⁴ Ibid., 106.

detain Kenyatta and Ruto, paving the way for Odinga to win the elections.”⁹⁵ Hence, despite the deep antagonism that existed between the Kalenjin and the Kikuyu, evidence shows that the ICC played a key role in cementing the Jubilee Alliance, granting Kenyatta and Ruto a strong enough platform to win the 2013 elections.

The formation of the Jubilee Alliance is both a positive and negative unintended effect. It is positive since it brought the Kalenjin and the Kikuyu together, despite their deep-seated tensions in previous years – a factor that is in line with the Court’s aspiration to contribute to the prevention of mass atrocity crimes. Nevertheless, the formation of the Jubilee Alliance is also negative in that evidence shows that the motives behind this union were largely intended to undermine ICC investigations in the country.

7.4. Alliances in the international realm

At the regional level, Ruto and Kenyatta alongside the AU have mobilized against ICC involvement, not just in Kenya, but also in the continent at large. According to Abraham Koror Sing’Oei “ICC 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.”⁹⁶ 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 had, until recently, only opened investigations in Africa. In fact, in recent months South Africa, Burundi, and Gambia have stated their intentions to withdraw from the ICC.⁹⁷

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 ICC involvement 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.”⁹⁸ Therefore, the alliance between Government of Kenya and the AU can be seen as a negative unintended effect, in that they have sought to undermine the Court by portraying it as a “neo-colonial tool” used by western powers to advance their interests in the region.

7.5. Alleviating ethnic tensions

The case of Kenya illustrates how the individualization of mass atrocity crimes vis-à-vis the ICC’s goal of prosecuting only ‘Big Fish,’ has positively affected ethnic relations in the country.⁹⁹ 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.¹⁰⁰ 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

⁹⁵ International Crisis Group, “Kenya after the Elections,” 9.

⁹⁶ Abraham Koror Sing’Oei, “The ICC as Arbiter in Kenya’s Post-Electoral Violence,” in *Minnesota Journal of International Law Online* 19 (2009): 17.

⁹⁷ Refer to: “South Africa to quit international criminal court,” in *The Guardian* (21 October 2016). URL: <https://www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-document-shows> ; and “Gambia withdraws from International Criminal Court,” in *Aljazeera* (26 October 2016). URL: <http://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html>.

⁹⁸ Brown and Sriram, “Big Fish Can’t Fry Themselves,” 257.

⁹⁹ Big-Fish refers to high-level individuals.

¹⁰⁰ Hansen, “Transitional Justice in Kenya?” 25.

than fifty percent of Kenyans expect community members to support ICC trials even if they target leaders of their own ethnic group.”¹⁰¹ In other words, the group sometimes appears willing to disassociate it self from the individual in the pursuit of justice.

This is a positive unintended effect, since the individualization mechanism of the ICC has brought to bear the understanding that communities should not be blamed for the acts of a few politicians, despite rulers’ trying to conflate their indictment with their ethnicity. This can serve to quell ethnic tensions in a country where such views might be widespread and thereby in accordance with the Court’s aspiration to contribute to the prevention of mass atrocity crimes.

8.0. Discussion

While there is substantial literature and a vibrant debate on the impact of the ICC in the realms of justice and human rights, relatively few studies ask questions about its broader effects on the countries and regions in which it operates. Nevertheless, there is growing evidence that ICC intervention 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 and preambular aspiration, but might also force us to think deeper about the breadth of the Court’s impact as an institution.

Based on the evidence collected in this study, ICC investigations affected the domestic politics of the DRC, Sudan, and Kenya beyond the situations in question in a number of ways. First, ICC investigations impacted these countries’ democratic institutions. For example, President Kabila’s self-referral to the ICC was employed as a mechanism to consolidate his power and undermine the possibility of competitive elections – two factors that can undermine the country’s effective transition to democracy. While in both Sudan and Kenya, ICC intervention caused government officials and civil society to push for greater political accountability. Second, ICC investigations have affected political associations by contributing to the fractionalization of the NCP and the ODM, and by facilitating the alliances between domestic (i.e. the Jubilee Alliance) and regional (i.e. between Sudan, Kenya and the AU) coalitions. Lastly, ICC investigations might have impacted these countries’ ethnic relations either by contributing to the marginalization of certain ethnic groups as in the case of the DRC with the Banyamulenge, or the reconciliation between warring ethnic groups as in the case of Kenya, where through the ICC, people have become aware that ethnic violence is the result of a few politicians. Hence, examining these effects can shed light on factors that can potentially facilitate and/or undermine the Court’s ability to fulfill its objectives.

8.1. Limitations

This study has two primary limitations. First, it only *explores* the extent to which the identified unintended effects are ‘positive’ and/or ‘negative.’ There may be other ways of understanding and categorizing unintended effects. For example, as previously noted, Chiyuki and associates hold that unintended effects can also be *anticipated* and *unanticipated*.¹⁰² Anticipated unintended effects refer to consequences in which the agent had thought of or could foresee at the moment of carrying out the act. This is best explained by Frank de Zwarts’ example of medicine: a doctor who prescribes a drug does not intend to produce the drug’s side effects but can anticipate them; instead, the doctor’s objective is to cure

¹⁰¹ Ibid.

¹⁰² Aoi, de Coning, and Thakur, *Unintended Consequences of Peacekeeping*.

the disease or relieve the pain. On the other hand, unanticipated unintended effects refer to consequences in which the agent had not thought of or could not foresee when carrying out the act.¹⁰³

This study, for instance, could have considered whether the unintended effects listed in the previous section were anticipated or unanticipated by ICC officials. However, this would require a deep understanding of how ICC officials made the decisions that they did about these cases, for example by interviewing those responsible for opening the situations in the three countries or having access to internal ICC documents. This was not feasible for this study.

Second, this study does not theorize as to what caused these unintended effects – the study only documents them. There are a number of existing theories that could serve to explain the aforementioned effects of ICC intervention. Subotic's theory of "hijacked justice", meaning that political elites have employed transitional justice mechanisms to advance a political agenda, can help explain some of the aforementioned unintended effects.¹⁰⁴ For example, the fact that ICC intervention served to consolidate President Kabila's power and reduce the potential of competitive elections could be an example of "hijacked justice", since evidence suggests that President Kabila referred the situation in the eastern DRC to advance his political agenda.

Nouwen and Wouter G. Werner's framework of "friends" and "enemies" could also serve to explain the dynamics behind some of these unintended effects. They argue that the ICC by definition engages in "the act of distinguishing between enemies and friends."¹⁰⁵ 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."¹⁰⁶ For example, this notion of the ICC engaging in the act of making friends and enemies could explain the antagonistic reactions domestically and regionally against President Al-Bashir's indictment in Sudan. According to Nouwen and Werner, "the [GoS] considers the UNSC referral to the ICC just as a political instrument against it, in other words... an instrument to brand it as an enemy of the international community."¹⁰⁷

Similarly, Dancy and Montal's work on unintended positive complementarity could also be fruitful in explaining some of the unintended effects. They find that ICC intervention has led to an increase in human rights trials in certain African countries. This is the result of conflictual interactions between different coalitions seeking to pursue their own agendas – ruling coalitions "attempting to feign commitment to human rights norms" versus reformer coalitions that use ICC intervention to expose the ills of the state and demand change.¹⁰⁸ This theory, specifically the notion of reformer coalitions, could serve to explain the fact that civil society in Kenya, for example, has used ICC intervention as a mechanism to demand for reform and political accountability.

Although at first glance these theories appear to hold some explanatory power, this study did not assess their validity in explaining the documented effects. As such, future studies should seek to strengthen our understanding of both: the types of unintended effects beyond positive or negative; and the causes of the unintended effects of ICC intervention in the domestic politics of countries in question.

¹⁰³ Frank de Zwarts, "Unintended but not unanticipated consequences," in *Theor Soc* 44 (2015).

¹⁰⁴ Subotic, *Hijacked justice*.

¹⁰⁵ 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.

¹⁰⁶ "Nouwen and Werner, "Doing Justice to the Political," 945.

¹⁰⁷ Ibid. 955.

¹⁰⁸ Dancy and Florencia Montal, "Unintended Positive Complementarity," 1.

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