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# UNPACKING THE DETERRENT EFFECT OF THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM KENYA

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## INTRODUCTION

Decades in the making,<sup>1</sup> the International Criminal Court (“ICC”) began operating in The Hague, the Netherlands in 2002.<sup>2</sup> The court’s creation left many commentators “hopeful”—hopeful that the ICC would positively transform international criminal law and reduce atrocities.<sup>3</sup> Those high hopes are reflective of the

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<sup>1</sup> States began discussing the idea of a permanent international criminal court shortly after World War II and the culmination of the Nuremberg trials. Because of the Cold War, however, four decades passed until states again turned their attention to creating an international court with the mandate to prosecute international crimes. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 323–29 (2d ed. 2008).

<sup>2</sup> *About*, *INTERNATIONAL CRIMINAL COURT*, [www.icc-cpi.int/about](http://www.icc-cpi.int/about) (last visited Aug. 8, 2017).

<sup>3</sup> See Leila Nadya Sadat, *The Establishment of the International Criminal Court: From the Hague to Rome and Back Again*, 8 *J. INT’L L. & PRAC.* 97, 117 (1999) (stating that the passage of the Rome Statute raised hopes that “the normative structure being created by international law might influence or even restrain the Hobbesian order established by the politics of States”); John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 *PACE INT’L L. REV.* 361, 361–62 (1999) (describing the cheers and applause that accompanied the passage of the Rome Statute and stating that it reflected the expectation that the ICC “would fundamentally change the application and enforcement of international criminal law”).

Preamble to the Rome Statute, the treaty that created the ICC.<sup>4</sup> According to the Preamble, the court aims to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured . . . .”<sup>5</sup> Further, the Preamble states the determination to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . .”<sup>6</sup> In other words, the ICC aims to produce a deterrent effect<sup>7</sup> through its prosecutions and the threat of prosecutions.

There is, however, a clear divide amongst commentators as to whether the ICC and the ad hoc international criminal tribunals that were established before the permanent court can hinder international crime. Supporters of international criminal justice advocate for international criminal tribunals precisely because they believe that the tribunals can, and do, deter mass atrocities.<sup>8</sup> The ICC is no exception, with supporters emphasizing the court’s role in preventing international crime and ending impunity for mass atrocities.<sup>9</sup> The remarks of then-U.N. Secretary-General Kofi Annan on the day the Rome Statute entered into force are just one example of such support. He said,

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<sup>4</sup> Rome Statute of the International Criminal Court PmbL, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Deterrence theory predicts that the credible threat of legal punishment will cause individuals to refrain from committing crimes in the future. *See, e.g.*, Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 204 (1968).

<sup>8</sup> *See, e.g.*, M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 18 (1996) (stating that international prosecutions send a deterrence message and thus prevent future victimization); Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS & INT’L AFF. 191, 192 (2010) (noting that both the ad hoc tribunal for the former Yugoslavia and the ICC have cited to deterrence as the principle justification for pursuing investigations of international crimes).

<sup>9</sup> Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT’L L. 249, 251 (2001) (concluding that the primary reason states created the ICC was because they believed ensuring punishment of international crimes would also reduce the incidence of such crimes).

“We hope [the ICC] will deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity.”<sup>10</sup>

On the other side of the divide are the skeptics. Critics charge that the people who commit crimes within the ICC’s jurisdiction are not rational actors and, therefore, cannot be deterred.<sup>11</sup> Other critics focus on the court’s institutional design, insisting that discouraging international crime is unlikely because prosecutions are necessarily infrequent, potential punishments are not sufficiently severe, and the path to justice is slow.<sup>12</sup> Some scholars are even more pessimistic, stating that insisting on justice through international prosecutions may actually incentivize some perpetrators to continue human rights violations or war crimes, thereby impeding prospects for peace.<sup>13</sup>

This Article seeks to reframe the debate about the ICC’s deterrent effect by presenting a more nuanced understanding of the particular circumstances under which the ICC is more and less likely to deter. As a starting point, deterrence is a complicated concept. To illustrate the need to “unpack” the ICC’s deterrent effect, this Article takes a deep dive into a narrative-driven case study of Kenya and its relationship with the ICC over time. Unique to this study is that it includes novel data: information obtained during semi-structured interviews conducted in Nairobi, Kenya during 2015 with high-level subjects, including former government officials, journalists, academics, and leaders in civil society, and think tanks.<sup>14</sup>

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<sup>10</sup> James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact*, 54 VILL. L. REV. 1, 10 (2009) (citing Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES (July 1, 2002) <http://www.nytimes.com/2002/07/01/world/without-fanfare-or-cases-international-court-sets-up.html>).

<sup>11</sup> See David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 476 (1999); see also Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, 12 FINNISH Y.B. INT’L L. 193, 203 (2001).

<sup>12</sup> See, e.g., Jack Goldsmith & Steven D. Krasner, *The Limits of Idealism*, 132 DÆDALUS 47, 55 (2003); Wippman, *supra* note 11, at 476.

<sup>13</sup> See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY 5, 20–23 (2004).

<sup>14</sup> We conducted the interviews in Kenya as part of a multi-year project being funded by The Hague Institute for Global Justice and entitled, “The Peace-Justice Nexus: The Potential Impact of the ICC on Conflict, Mass Atrocities, and Human Rights Violations.” In Kenya, the local partner that facilitated the interviews was

Establishing with certainty a *causal* role for the ICC is difficult, if not impossible. Nevertheless, these interviews show how informed actors on the ground perceive the ICC's deterrent effect under varying circumstances and over time. Combined with documentary data about what happened in Kenya before and after it ratified the Rome Statute—with a specific focus on those who have been targeted by the ICC—this Article establishes a new model for evaluating and understanding the ICC's deterrent effect.

For several reasons, Kenya is a good case through which to examine the complexities of the ICC's deterrent effect. First, Kenya joined the ICC in 2005 following a history of poor human rights practices, weak domestic legal institutions, and a culture of impunity.<sup>15</sup> That poor starting record provides an opportunity to seek evidence of improvements as a result of ICC commitment and interaction. Second, in 2007 and 2008, Kenya experienced an unprecedented level of elite-driven election-related violence that left more than 1,000 dead and up to 500,000 displaced.<sup>16</sup> Thereafter, Kenya became one of the first dozen countries where the court intervened to investigate and prosecute.<sup>17</sup>

The ICC's Office of the Prosecutor ("OTP") brought crimes against humanity charges against six high-level and influential Kenyans based on the roles they allegedly played in orchestrating the violence in 2007 and 2008.<sup>18</sup> Among those the OTP charged were Uhuru Kenyatta and William Ruto who, as of March 2013, had become Kenya's President and Deputy

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Nairobi Peace Initiative-Africa (NPI-Africa). In addition to Yvonne Dutton and Tessa Alleblas, Eamon Aloyo, Senior Researcher at The Hague Institute, and Nahashon Kariuki, Researcher at NPI-Africa, conducted the interviews on which this Article draws. Because of the sensitivity of the topics addressed during the interviews, interviews were conducted with the express promise not to identify interviewees by name in any reports or publications.

<sup>15</sup> HUMAN RIGHTS WATCH, KENYA AND THE INTERNATIONAL CRIMINAL COURT: QUESTIONS AND ANSWERS 1 (Jan. 2011), [https://www.hrw.org/sites/default/files/related\\_material/QA%20-%20Kenya%20and%20the%20ICC%2001.25.11.pdf](https://www.hrw.org/sites/default/files/related_material/QA%20-%20Kenya%20and%20the%20ICC%2001.25.11.pdf).

<sup>16</sup> HUMAN RIGHTS WATCH, BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 2 (Mar. 2008), <http://www.unhcr.org/refworld/docid/47de7bd22.html> [hereinafter HUMAN RIGHTS WATCH, BALLOTS TO BULLETS].

<sup>17</sup> *Situations Under Investigation*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/pages/situations.aspx> (last visited Aug. 8, 2017).

<sup>18</sup> *Kenya*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/kenya> (last visited Aug. 8, 2017).

President, respectively.<sup>19</sup> In December 2013 and December 2014, the ICC prosecutor dropped charges against former Secretary to the Cabinet Francis Muthaura and Kenyatta, alleging that the defendants had interfered with witnesses and that Kenya had obstructed the OTP's efforts to gather evidence.<sup>20</sup> For the purposes of this case study seeking to help unpack the ICC's deterrent effects, these facts are useful: They mean that there is an opportunity to obtain evidence of how those in power respond to the ICC's threat of prosecution.

This Article proceeds as follows. Part I begins by explaining deterrence theory in more detail. It follows with an overview of the debate surrounding the ability of international criminal tribunals and the ICC to produce a deterrent effect.

In Part II, we advance our argument regarding the need to reframe the debate about the ICC's potential to deter. We explain the reasons why the ICC's deterrent effect must be unpacked and, in doing so, we describe several factors that influence whether and under what conditions the ICC should or should not be able to deter. In Part III, we describe the methodology for the Kenya case study that serves to both test these hypotheses and illustrate the complexities of gauging the ICC's deterrent power.

Part IV unpacks the ICC's deterrent effect by analyzing the evidence from Kenya of (1) any decrease in mass atrocities or other human rights abuses and (2) any increase in domestic mechanisms available to punish those who commit such abuses. That evidence shows that the ICC's ability to deter can vary depending on the particular political context of the targeted state, the type of actor the ICC pursues, and based on how strongly and well the ICC exercises its institutional powers. For example, case study evidence shows that ratification, the lowest level of ICC intervention, did not prevent incidences of mass atrocities or other human rights abuses. On the other hand, the case study shows some deterrent effect came as a result of a

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<sup>19</sup> *Id.*

<sup>20</sup> See *Statement by ICC Prosecutor on the Notice to Withdraw Charges Against Mr. Muthaura*, INTERNATIONAL CRIMINAL COURT (Mar. 11, 2013), <https://www.icc-cpi.int/legalAidConsultations?name=OTP-statement-11-03-2013>; *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges against Mr. Uhuru Muigai Kenyatta*, INTERNATIONAL CRIMINAL COURT (Dec. 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>.

higher level of ICC intervention, namely, after the ICC prosecutor decided to launch cases against six Kenyans. Nevertheless, the evidence also indicates that during that time period the increased costs associated with the ICC's interventions may have influenced state leaders to commit abuses to help them hold on to or gain power in order to thwart the ICC. Further, while the ICC's interventions seemed to produce some positive effects, the evidence does not confirm any normative changes consistent with a lasting and persistent deterrent effect.

## I. DETERRENCE AND THE ICC

### A. *Deterrence Theory*

According to deterrence theory, a well-designed criminal justice system will deter individuals from committing crimes.<sup>21</sup> There are two types of deterrence: specific and general.<sup>22</sup> The former posits that individuals who have endured punishments because they committed crimes will want to avoid suffering a similar fate again. The latter posits that society at large should be generally deterred from committing crimes to avoid the likelihood of being caught and punished.<sup>23</sup>

Deterrence theory imposes a rational choice economic analysis to the study of criminal law.<sup>24</sup> The theory assumes self-interested, rational actors wish to maximize their utility and choose the course of action that will produce the greatest benefits at the lowest cost.<sup>25</sup> It recognizes that each rational individual may have some unique and different circumstances that inform

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<sup>21</sup> See, e.g., Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 744 (1998) [hereinafter Akhavan, *Justice in the Hague*]; Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 588–89 (2005).

<sup>22</sup> Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 63 (2002).

<sup>23</sup> See, e.g., Paternoster, *supra* note 7, at 769; Wippman, *supra* note 11, at 476.

<sup>24</sup> See, e.g., Paternoster, *supra* note 7, at 777–78 (referencing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 172–76 (1968)); Christopher W. Mullins & Dawn L. Rothe, *The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment*, 10 INT'L CRIM. L. REV. 771, 773 (2010).

<sup>25</sup> Wippman, *supra* note 11, at 476 (noting that arguments about deterrence assume rational actor calculations weighing the benefits of crime against the risks of punishment).

the cost-benefit calculation.<sup>26</sup> Nevertheless deterrence theory assumes individuals will make decisions after rationally weighing benefits against costs.<sup>27</sup> The prediction is that individuals will refrain from committing crimes when the benefits of the criminal behavior are outweighed by the costs associated with being charged, caught, and punished.<sup>28</sup>

The cost side of the question is the primary focus of deterrence theory; those costs come in the form of *legal* sanctions and *social* sanctions. Legal sanctions refer to the potential punishments imposed by the criminal justice system. Social sanctions refer to the complementary costs society may impose on one who is charged with, or convicted of, a crime.<sup>29</sup>

Deterrence theory supposes that individuals will refrain from committing crimes when the potential benefits of criminal behavior are outweighed by the potential for *legal* sanctions that are sufficiently (1) certain, (2) severe, and (3) swift.<sup>30</sup> In other words, “Other things being equal, a legal punishment is more costly when it is more certain (more likely than not to be a consequence of crime), severe (greater in magnitude), and swift (the punishment arrives sooner rather than later after the offense).”<sup>31</sup> The questions of whether a punishment would actually be certain, swift, and severe are not the only considerations: what also matters is how individuals perceive the cost side of the equation. Thus, “the effectiveness of any deterrent depends on the potential offender’s perception of possible sanctions, and on her assessment of her ability to evade law enforcement.”<sup>32</sup>

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<sup>26</sup> See Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 516 (2006) (explaining that the rational actor assumption allows weighing unique circumstances, for example, adding in to the cost-benefit calculus the fact that an individual is poor or was abused).

<sup>27</sup> *Id.* at 515. (explaining that according to the deterrence theory’s rational choice assumption, individuals are forward-looking and behave so as to maximize their utility).

<sup>28</sup> *Id.* at 519; Paternoster, *supra* note 7, at 782–83.

<sup>29</sup> See, e.g., Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 20–21 (1998).

<sup>30</sup> See Paternoster, *supra* note 7, at 783.

<sup>31</sup> *Id.*

<sup>32</sup> Aukerman, *supra* note 22, at 64. See Paternoster, *supra* note 7, at 780 (explaining the evolution of deterrence theory to account for perceptions of objective sanction threats).

Although the cost side of the equation includes several components relevant to the likelihood of punishment, studies suggest the most important component is the certainty of punishment.<sup>33</sup> Empirical research shows that “when offenders do not perceive a punishment as likely to be imposed, then there will be little disincentive toward offending, no matter the celerity or the proportionality of the punishment in question.”<sup>34</sup> For example, Durlauf and Nagin’s review of the empirical studies on deterrence indicates that certainty-based sanctions policies—such as increasing the visibility of police—as opposed to severity-based sanctions policies—such as increasing sentencing ranges—are more effective at reducing crime.<sup>35</sup> Although individuals must perceive that punishment will be relatively certain should they commit criminal acts, the literature suggests that a criminal justice system need not punish all offenders for it to produce a deterrent effect.<sup>36</sup> Exemplary prosecutions may instead be sufficient to send an effective deterrence message.<sup>37</sup>

As to social sanctions, they add to the cost side of the cost-benefit equation because they constitute additional consequences that may flow from a public indictment, arrest, or prosecution; for example, the loss of social or employment prospects.<sup>38</sup> Social sanctions are not part of the cost equation for every individual in every society. In communities where crime is rampant, individuals may face no social stigma or may even find their reputations enhanced upon being publicly exposed as a

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<sup>33</sup> See Mullins & Rothe, *supra* note 24, at 773.

<sup>34</sup> *Id.*

<sup>35</sup> Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POLICY 1, 14, 37 (2011).

<sup>36</sup> See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2601 (1991) (arguing that selective prosecution of some offenders is sufficient for effective deterrence).

<sup>37</sup> See Aukerman, *supra* note 22, at 63–64 (noting that deterrence theory operates on the premise that even exemplary punishments may adequately prevent future crime).

<sup>38</sup> Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & SOC’Y REV. 545, 561 (1986) (referencing the loss of social standing); Keenan, *supra* note 26, at 536 (referencing shame and social censure); Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT’L ORG. 443, 450 (2016) (noting the potential loss of job prospects, not because employment is legally barred, but because many employers do not want to hire criminals).

criminal.<sup>39</sup> Within communities where crime is relatively rare and considered morally unacceptable, individuals should expect that such public exposure as a criminal will also result in the loss of friendships, job opportunities, or social standing.<sup>40</sup>

*B. The Debate About the Deterrent Effect of International Criminal Justice Mechanisms*

Set out above is the theory. In the context of international criminal justice, the theory has both supporters and critics. Supporters typically cite to deterrence and prevention of future crimes<sup>41</sup> to justify the creation of and reliance on international justice mechanisms.<sup>42</sup> Professor Bassiouni, for instance, states that international prosecutions and other accountability measures “serve as deterrence, and thus prevent future victimization.”<sup>43</sup> The ICC’s supporters echo this same sentiment. Non-governmental organizations reference the court’s role in deterring future atrocities when urging universal ratification of the Rome Statute.<sup>44</sup> Kofi Annan, former U.N. Secretary-General,

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<sup>39</sup> See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997).

<sup>40</sup> Williams & Hawkins, *supra* note 38, at 563–66.

<sup>41</sup> While many scholars suggest that the role of formal justice mechanisms is to threaten punishment so as to prevent future atrocities, others justify international criminal justice and punishment based on “expressive theories.” A court’s expressive powers relate to its ability to signal through its prosecution decisions that certain conduct is contrary to acceptable norms. For example, Margaret deGuzman argues that “the ICC may effectively promote important moral norms with a small number of illustrative prosecutions,” thereby also contributing to crime prevention. See Margaret deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 312, 315 (2012).

<sup>42</sup> See, e.g., Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. OF INT’L L. & POL. 583, 605 (2007) (noting that one commonly expressed hope for the ICC is that it will generally deter future criminal activity); Vinjamuri, *supra* note 8, at 192 (referencing deterrence as the rationale for international justice investigations).

<sup>43</sup> Bassiouni, *supra* note 8, at 18.

<sup>44</sup> See, e.g., *About Us*, THE AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <https://www.amicc.org/about-us> (“We share in common the conviction that perpetrators of atrocities must be held accountable by the international community and that victims of these terrible crimes deserve justice.”); *Genocide*, ICC NOW, <http://iccnow.org/documents/FS-ICCandGenocide.pdf> (“The ICC therefore stands as a deterrent against future atrocities, and empowers the international community to react more rapidly through an impartial, international judicial mechanism”); Statement by William R. Pace Convenor, Coalition for the International Criminal Court for the 15th session of the Assembly of States Parties, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/GenDeba/](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/)

emphasized the ICC's hoped-for deterrent effect in his remarks following the adoption of the Rome Statute.<sup>45</sup> The ICC's first prosecutor himself has noted that his mission according to the Rome Statute is to end impunity for mass atrocities "in order to contribute to the prevention of future crimes."<sup>46</sup>

The critics do not dispute that deterrence and prevention of future crimes is an oft-cited rationale for employing international justice. They dispute that international tribunals, including the ICC, can prevent future crimes through its threat of punishment. Some critics focus on the "rational actor" assumption, arguing that the types of people who commit serious international crimes within the ICC's jurisdiction are not rational actors, and therefore, cannot be deterred.<sup>47</sup> In particular, the assumption of rationality may not always be valid where the context is "the chaos of massive violence, incendiary propaganda, and upended social order."<sup>48</sup> The argument is that under such circumstances individuals may give little or no thought to the cost side of the equation: they may be driven by political paranoia, genocidal fanaticism, or swept up in some supremacist euphoria.<sup>49</sup> Mégret's quote is illustrative: "It beggars belief to suggest that

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ICC-ASP15-GenDeba-NGO-CICC-ENG.pdf ("There is an urgent need to both end and deter these most serious crimes of concern to the international community, and to eradicate impunity for the perpetrators of these crimes." "The Court plays a central role in peace-building processes as the only permanent international criminal court within an evolving system of international criminal justice, not least through the Court's contribution to guaranteeing lasting respect for, and the enforcement of, international justice."); Wippman, *supra* note 11, at 473 (stating that the ICC's supporters routinely reference the court's role in deterring future atrocities when urging states to ratify).

<sup>45</sup> See Alexander, *supra* note 10, at 10.

<sup>46</sup> *Pursuing International Justice: A Conversation with Luis Moreno-Ocampo*, COUNCIL ON FOREIGN RELATIONS (Feb. 4, 2010), <http://www.cfr.org/human-rights/pursuing-international-justice-conversation-luis-moreno-ocampo/p34702>.

<sup>47</sup> See, e.g., Mégret, *supra* note 11, at 194; see also Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624, 628 (2009) ("Some would argue that the all-consuming primordial hatreds that motivate genocide defy the simplistic rationalist assumption of cost-benefit calculus by perpetrators upon which modern deterrence theories are based.") [hereinafter Akhavan, *Reconciling*].

<sup>48</sup> Drumbl, *supra* note 21, at 590.

<sup>49</sup> See *id.* at 591 (querying rhetorically whether individuals imbued with political paranoia will be able to view their actions as legally or morally wrong or whether the genocidal fanatics engage in cost-benefit calculations).

the average crazed nationalist purifier . . . will be deterred by the prospect of facing trial.”<sup>50</sup> Therefore, in some contexts, rational choice may not be entirely possible.<sup>51</sup>

Critics reference another alleged problem with assuming rationality in the mass atrocity context. At the time of action, “moral norms may compel commission of crime more than fear can deter them.”<sup>52</sup> Mass atrocities are only possible because a large swath of society participates in killing, raping, arson, or other criminal behavior.<sup>53</sup> In that context, individuals may view their crimes as morally justifiable or necessary.<sup>54</sup> Refusing to commit the criminal act in the context of mass atrocities, as commentators have noted, might even be regarded as socially deviant behavior.<sup>55</sup> Thus, social deterrence may have limited or no relevance. In addition, in such circumstances some individuals are likely to exaggerate the perceived “benefits” of their violent acts.

Other critiques focus on the cost side of deterrence theory’s cost-benefit calculus. Some commentators argue that international criminal tribunals can produce little or no deterrent effect because they are not capable of sending a signal that those who commit mass atrocities or other human rights abuses will likely be punished.<sup>56</sup> According to Wippman, “Even if we assume that those committing atrocities engage in rational cost-benefit calculations . . . most probably view the risk of

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<sup>50</sup> Mégret, *supra* note 11, at 203.

<sup>51</sup> Drumbl, *supra* note 21, at 591 (suggesting that in “the cataclysm of mass violence,” rational choice may not be possible).

<sup>52</sup> Pádraig McAuliffe, *Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law*, 10 N.Z. J. PUB. & INT’L L. 227, 238 (2012).

<sup>53</sup> See Drumbl, *supra* note 21, at 567 (noting that extraordinary international crimes have “an organic and group component”).

<sup>54</sup> See *id.* at 591; see also *id.* at 569–70 (suggesting that in the context of the Rwandan genocide, the previous normative structure was suspended and replaced by a normative structure whereby killing became a civic duty).

<sup>55</sup> See McAuliffe, *supra* note 52, at 238; Drumbl, *supra* note 21, at 568.

<sup>56</sup> Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 832 (2006) (arguing that international criminal tribunal prosecutions are not likely to produce any meaningful deterrent effect because of the small numbers of persons prosecuted and because the tribunals face constraints in administering sanctions); Drumbl, *supra* note 21, at 590 (arguing that although “the chances of ‘getting caught’ for committing egregious violations of human rights” have increased, they are still “tiny”).

prosecution as slight.”<sup>57</sup> To support this position, he references data from the International Tribunal for the former Yugoslavia (“ICTY”), an institution that in six years issued some ninety-one indictments and sentenced some six individuals.<sup>58</sup> Wippman asserts that these numbers are “minuscule relative to the numbers of persons actually responsible for criminal violations of international humanitarian law.”<sup>59</sup> Other commentators offer more general observations, arguing that in the absence of an international criminal police force, an individual’s chance of being arrested by an international criminal tribunal is less than that of being arrested for a crime in a domestic jurisdiction with a functioning democracy.<sup>60</sup> Referencing that same lack of a police force, Drumbl states that while the chance an individual will be prosecuted for committing egregious violations of human rights are higher now that the international justice paradigm has been institutionalized, the chance “still remains tiny.”<sup>61</sup>

Although the ICC’s institutional design differs from that of the ad hoc international tribunals, critics have specifically challenged its ability to deliver a credible threat of certain punishment. Goldsmith and Krasner argue that it is “wishful thinking” that the ICC will “save many lives” in the future, because, among other things, the ICC lacks a police force to arrest the offenders who will hide behind national borders.<sup>62</sup>

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<sup>57</sup> Wippman, *supra* note 11, at 476; *see also* Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, 16 THIRD WORLD LEGAL STUD. 169, 174 (2003) (stating that lack of resources and political considerations tend to preclude international criminal tribunals from prosecuting more than a few individuals, the result being that the rational individual may not be deterred by the cost side of the cost-benefit calculus).

<sup>58</sup> Wippman, *supra* note 11, at 476; *see also* Greenawalt, *supra* note 42, at 610 (suggesting that the number of individuals prosecuted by the ICTY was small since after thirteen years in operation, the tribunal had prosecuted ninety-four individuals and had indicted another sixty-seven who were either in custody or at large).

<sup>59</sup> Wippman, *supra* note 11, at 476. Now that the ICTY has been operating for over 20 years, the numbers that Wippman cites have grown. As of February 2016, the ICTY has brought 161 indictments and sentenced eighty-three individuals. *See Key Figures of the Cases*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/key-figures-cases> (last visited Aug. 8, 2017).

<sup>60</sup> McAuliffe, *supra* note 52, at 237.

<sup>61</sup> Drumbl, *supra* note 21, at 590.

<sup>62</sup> Goldsmith & Krasner, *supra* note 12, at 55; *see also* Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92–94 (2003) (arguing that since the ICC depends on states to arrest and transfer defendants, the court

Wippman argues that the ICC will at best produce a modest deterrent effect because it will not have sufficient resources or broad enough political support to obtain jurisdiction over suspects.<sup>63</sup> Greenawalt states that the ICC's jurisdictional limits and its dependence on states present impediments to the court's ability to obtain jurisdiction over offenders; as a result of those circumstances, Greenawalt finds that the ICC fails to send an effective deterrence message.<sup>64</sup> Likewise, Mullins and Rothe emphasize that the ICC cannot obtain jurisdiction over non-state parties without a Security Council referral. They argue that states with veto powers or strong allies are guaranteed virtual immunity from ICC prosecution, thereby negating the certainty of punishment at least for actors in some parts of the world and reducing the court's ability to effectively deter.<sup>65</sup>

Finally, some scholars are even more pessimistic about the prospects for deterrence in the context of international criminal justice, arguing that pursuing charges against government or rebel actors while conflicts are ongoing may perversely impede prospects for peace.<sup>66</sup> There is a broad discussion known as the "peace versus justice debate" in the application of international criminal law, conflict resolution, and conflict prevention that postulates there may be a tradeoff between prosecution and the realization of peace and the protection of human rights.<sup>67</sup> In this debate, "peace" refers to ending war and mass atrocities and preventing them from occurring again in the future. "Justice" generally refers to retributive criminal justice.<sup>68</sup>

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lacks the institutional resources to ensure that indicted defendants actually appear in The Hague).

<sup>63</sup> Wippman, *supra* note 11, at 484–85; *see also* Mullins & Rothe, *supra* note 24, at 778 (stating that the certainty of punishment is reduced because the ICC is dependent on state parties and allied organizations to obtain custody over suspects).

<sup>64</sup> Greenawalt, *supra* note 42, at 606.

<sup>65</sup> Mullins & Rothe, *supra* note 24, at 777.

<sup>66</sup> *See, e.g.*, Snyder & Vinjamuri, *supra* note 13, at 5.

<sup>67</sup> *See, e.g.*, MARK KERSTEN, JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTION ON ENDING WARS AND BUILDING PEACE 4 (2016); Akhavan, *Justice in the Hague*, *supra* note 21, at 738 (referring to "peace versus accountability"); Janine Natalya Clark, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, 9 J. INT'L CRIM. JUST. 521, 521–22 (2011); Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFFS. 179, 179 (2007); Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, 34 THIRD WORLD Q. 800, 810 (2013).

<sup>68</sup> Akhavan, *Justice in the Hague*, *supra* note 21, at 740.

On the one hand, an international court or tribunal can have a positive impact on “peace” through prosecutions that potentially marginalize perpetrators, induce parties to enter peace negotiations, or deter others. That same court or tribunal could impede peace processes by creating perverse incentives that encourage perpetrators to continue or resume war or human rights violations.<sup>69</sup> Therefore, insisting on justice can back abusers into a corner and cause them to feel they have little reason to refrain from committing atrocities if their only other viable option is to be arrested and prosecuted—as opposed to, for example, being offered amnesty.<sup>70</sup> To illustrate the point, some commentators argue that U.N. Security Council Resolution 1970, which referred the Libya situation to the ICC in 2011, impeded a political solution of a negotiated exit for Gaddafi and instead forced him to fight to the end.<sup>71</sup>

## II. REFRAMING THE DEBATE ABOUT THE ICC'S DETERRENT EFFECT

We suggest that although the debate about the ICC's likely deterrent effect thus far has been useful, the time has come to reframe the debate. We argue for a broader consideration and greater understanding of how deterrence works and what factors or circumstances will affect the likelihood of deterrence. We begin that reframing below. First, we address the ICC's critics, laying out the reasons why we expect that the ICC can effectively deter at least as to some actors in some situations. Because we are interested in unpacking the ICC's deterrent effect and

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<sup>69</sup> See, e.g., Snyder & Vinjamuri, *supra* note 13, at 12, 20–23; Goldsmith & Krasner, *supra* note 12, at 51; see also KERSTEN, *supra* note 67, at 27 (noting that critics of wars crimes trials argue that instead of marginalizing perpetrators, judicial interventions may instead cause targets to (re)commit to violence).

<sup>70</sup> See Goldsmith & Krasner, *supra* note 12, at 55 (arguing that by seeking to prosecute, the ICC could aggravate conflicts and prolong political instability); Branch, *supra* note 67, at 183–84 (explaining that proponents of the ICC's intervention in Uganda believe the intervention will aid in ending civil war, but that critics argue that arrest warrants will cause rebels to abandon peace talks).

<sup>71</sup> See, e.g., Leslie Vinjamuri & Jack Snyder, *ICC Sheriff Too Quick on the Draw*, DUCK OF MINERVA (May 9, 2011), <http://duckofminerva.com/2011/05/icc-sheriff-too-quick-on-draw.html>; Mark Kersten, *Libya, Peace and Justice: 'Gaddafi Has To Go,' but Peace Must Be Negotiated*, JUSTICE IN CONFLICT (Apr. 18, 2011), <https://justiceinconflict.org/2011/04/18/libya-peace-and-justice-gaddafi-has-to-go-but-peace-must-be-negotiated/> (outlining the peace versus justice arguments advanced with respect to the Libya situation).

embracing nuances, however, we describe some factors that we argue can influence whether the ICC is more or less likely to deter. Those factors include (1) the domestic political context, (2) the type of actor the ICC is targeting, and (3) the level of the ICC's intervention.

A. *The ICC Can Effectively Deter—At Least as to Some Actors in Some Situations*

Notwithstanding the arguments laid out above about the limited ability of international criminal tribunals to deter, we suggest that the ICC can effectively deter at least some actors some of the time. We do not wholly disagree with all of the critiques raised regarding the potential deterrent power of the ICC. Nevertheless the criticisms do not unequivocally require a conclusion that the ICC cannot sometimes effectively deter.

First, regarding the rational actor assumption, no doubt some individuals are irrational sometimes and cannot be deterred by the threat of sanctions. This is true in both the domestic and international criminal justice contexts. For instance, some evidence shows that the threat of punishment does not effectively deter those who commit crimes in the heat of passion.<sup>72</sup>

Yet not all individuals who commit international crimes are necessarily irrational all the time: Not all are megalomaniacs or caught in some frenzy of activity that causes them to believe that their violent acts are nevertheless moral. Aukerman, for example, distinguishes between “manipulators,” such as Slobodan Milosevic, and “fanatics,” such as Hitler. While fanatics may not engage in a rational cost-benefit analysis, manipulators make the rational choice to commit horrific crimes.<sup>73</sup> Mullins and Rothe point out that governments and quasi-governmental systems do commit mass atrocities, with individuals within bureaucracies planning those actions in order to achieve a set of goals. In such circumstances, senior leadership who spend “a great amount of rational energy in

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<sup>72</sup> Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 291 (2006) (“No one doubts that the criminal law, as well as other types of legal sanctions, have deterrent effects, but the evidence suggests that such effects may be confined to risk groups atypical of homicide offenders” who act out of passion).

<sup>73</sup> Aukerman, *supra* note 22, at 68.

plotting and planning such an event” likely also think about “potential criminal responsibility.”<sup>74</sup> In fact, new research by political scientists rejects the “once widely held view that large scale violence against civilian populations was irrational, random, or the result of ancient hatreds between ethnic groups.”<sup>75</sup> Valentino’s survey of political science literature on violence against civilians, including genocide, mass violence, and terrorism shows that “most scholars studying political violence . . . understand it to be primarily, if not exclusively, instrumental and coordinated by powerful actors seeking to achieve tangible political or military objectives.”<sup>76</sup>

Second, as to the cost side of the equation, we recognize that like other international criminal tribunals the ICC will not be able to prosecute every individual who plays a role in committing a crime ostensibly within the court’s jurisdiction. Domestic criminal justice systems similarly cannot arrest and bring to justice every person who commits a crime.<sup>77</sup> Still, the ICC has strong enforcement powers to credibly signal a threat of prosecution.<sup>78</sup> It is a permanent court without temporal or geographical jurisdictional limitations.<sup>79</sup> The court’s permanence alone adds a threat that should translate into greater deterrence.<sup>80</sup> Individuals may believe that states would not

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<sup>74</sup> Mullins & Rothe, *supra* note 24, at 775.

<sup>75</sup> Benjamin Valentino, *Why We Kill: The Political Science of Political Violence Against Civilians*, 17 ANN. REV. POL. SCI. 89, 91 (2014).

<sup>76</sup> *Id.*

<sup>77</sup> In fact, in the domestic context many crimes go unreported which also means that many individuals who commit crimes are not arrested and prosecuted. For example, research reveals that about one-half of violent crimes committed between the period 2006 and 2010 went unreported. See Press Release, Bureau of Just. Stat., Nearly 3.4 Million Violent Crimes Went Unreported to Police from 2006 to 2010, (Aug. 9, 2012), <http://www.bjs.gov/content/pub/press/vnrp0610pr.cfm>.

<sup>78</sup> Jo and Simmons also argue that the ICC’s design features should enable it to produce a deterrent effect. Jo & Simmons, *supra* note 38, at 449 (“ICC investigations, indictments, and convictions or those triggered by complementarity are likely to encourage actual or potential perpetrators to reassess the risks of punishment—relative to the status quo, which is often impunity—and to moderate their behavior.”).

<sup>79</sup> *Id.* at 451.

<sup>80</sup> See, e.g., Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT’L J. TRANSITIONAL JUST. 434, 440–41 (2013) (stating that the ICC, “with its potentially unlimited geographic jurisdiction . . . and prospective temporal jurisdiction” represents a more likely institution than the ad hoc international criminal tribunals “for triggering a deterrent effect”); Akhavan, *Reconciling*, *supra* note 47, at 634

spend the time or money to create a new ad hoc tribunal to address a mass atrocity; but the ICC already exists.<sup>81</sup> The existence of the ICC thus means that the Security Council has a ready-made institution to which to refer situations, and it has done so in the situations of Sudan and Libya.

We suggest that the ICC has been designed with broad legal authority and strong enforcement powers to signal a credible threat of prosecution. By committing to the ICC, states grant the court automatic jurisdiction over the crimes of genocide, crimes against humanity, and war crimes.<sup>82</sup> Moreover, states agree that an independent ICC prosecutor may try a state's own nationals for mass atrocities should the ICC determine that the state is unwilling or unable to do so domestically.<sup>83</sup> These powers are significantly greater than those typically seen in human rights treaties: Those treaties generally only require that states self-report compliance and contain no mechanism to punish non-compliant behavior.<sup>84</sup> The ICC also has more extensive jurisdiction and influence compared to the various international ad hoc criminal tribunals. The ad hoc tribunals do prosecute individuals, but they have geographic and temporal limitations focusing on crimes committed within a specific time frame on a specific territory, that of the former Yugoslavia and Rwanda, respectively.<sup>85</sup> Indeed, as Jo and Simmons note, by ratifying the Rome Statute creating the ICC, states have necessarily increased the possibility that their citizens will face an international criminal prosecution.<sup>86</sup>

Thus, the ICC has the power to investigate crimes, issue arrest warrants, and prosecute and sentence perpetrators of mass atrocities. And the court has exercised these powers during its fifteen years in operation. As of August 2017, the ICC has brought charges against individuals in twenty-five cases based

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("Given the ICC's permanent status, its preventive capacity is at least notionally enhanced because, unlike the ICTY and ICTR, there is no lapse of time between the commission of atrocities and the establishment of its jurisdiction.")

<sup>81</sup> See YVONNE M. DUTTON, *RULES, POLITICS, AND THE INTERNATIONAL CRIMINAL COURT: COMMITTING TO THE COURT 3* (Routledge 2013).

<sup>82</sup> Rome Statute, *supra* note 4, at arts. 5–8, 11, 12(2).

<sup>83</sup> *Id.* at arts. 5–8, 11, 12(2), 13.

<sup>84</sup> DUTTON, *supra* note 81, at 15–17 (detailing the oversight and compliance mechanisms in the various international human rights treaties).

<sup>85</sup> *Id.* at 19–20 (comparing the powers of the ad hoc tribunals to those of the ICC).

<sup>86</sup> Jo and Simmons, *supra* note 38, at 445–46.

on ten “situations.”<sup>87</sup> To date, the ICC has issued about thirty arrest warrants.<sup>88</sup> Two of the individuals charged with committing international crimes have been convicted and sentenced: In 2012, the court sentenced Congolese warlord Thomas Lubanga to fourteen years imprisonment for war crimes based on his role in conscripting child soldiers.<sup>89</sup> In 2014, the court sentenced Germain Katanga to twelve years imprisonment for crimes against humanity and war crimes committed in the Democratic Republic of the Congo.<sup>90</sup>

Critics would argue that these numbers are not significant. Yet the numbers demonstrate that the ICC is using its powers to prosecute. For individuals who were accustomed to the status quo of impunity and considered themselves “untouchable,” the risk of investigation and prosecution has increased.<sup>91</sup>

Critics would likewise argue that the ICC has not obtained custody over every one of the individuals against whom arrest warrants have been issued. Absent a voluntary surrender, the ICC must rely on states to capture and transfer suspects. We make several points in response. First, some suspects have voluntarily surrendered, and states have aided in the capture and transfer of others.<sup>92</sup> Second, the public signal of a legally-

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<sup>87</sup> Those situations include Uganda, the Democratic Republic of the Congo (“DRC”), the Central African Republic, Mali, Sudan, Libya, Kenya, and Côte d’Ivoire, and Central African Republic II. See *Situations Under Investigation*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/Pages/cases.aspx> (last visited Aug. 22, 2017).

<sup>88</sup> See *Office of the Prosecutor*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/Pages/defendants-wip.aspx> (listing the names of defendants against whom the ICC issued arrest warrants).

<sup>89</sup> See Press Release, International Criminal Court, Thomas Lubanga Dyilo Sentenced to 14 Years of Imprisonment (July 10, 2012), <https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf>.

<sup>90</sup> See Press Release, International Criminal Court, Germaine Katanga Sentenced to 12 Years’ Imprisonment (May 23, 2014), <https://www.icc-cpi.int/drc/katanga/Documents/KatangaEng.pdf>.

<sup>91</sup> See Jo & Simmons, *supra* note 38, at 452 (noting that while the absolute risk of being punished by the ICC is small, it “is much higher than was the case when impunity was the default”).

<sup>92</sup> In fact, all six of the original Kenyan suspects voluntarily appeared in The Hague to face charges in April 2011 after receiving summonses to appear. *Cases & Situations: Kenya*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=kenya&idudctp=20&show=all>. For a list of the six individuals over whom states have obtained custody, see *Office of the Prosecutor*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/Pages/defendants-wip.aspx>.

issued warrant for arrest—even if it goes unexecuted—still contributes to the ICC’s ability to send an effective deterrence message. Suspects may escape arrest by staying within their country’s own borders or visiting only friendly states. President Bashir has been able to travel to some “friendly” countries in the past, including Kenya, without being arrested.<sup>93</sup> On the other hand, the evidence demonstrates that the pending arrest warrant has placed limits on Bashir’s freedom. He has not traveled to the United States or Europe. In 2013, Bashir threatened to attend a meeting of the United Nations General Assembly, but he canceled the trip after the United States repeatedly warned that it could not guarantee he would not be arrested.<sup>94</sup> In only June 2015, Bashir visited South Africa, but was forced to flee while a South African court considered whether the country was obligated to arrest him.<sup>95</sup> Indeed, one interviewee, a former government official in Kenya, made a similar point about Bashir’s restrictions because of the ICC in emphasizing that the Sudanese president departed from a South African military base so as to avoid a citizens’ arrest.<sup>96</sup> In short, even unexecuted warrants impose restrictions that some may wish to avoid by not committing crimes that could subject them to the ICC’s jurisdiction.

Another feature of the ICC’s design is also important to the deterrence calculus: The fact that the ICC’s jurisdiction is complementary. The court may only obtain jurisdiction as a last resort if the state does not initiate domestic prosecutions to hold perpetrators of the covered crimes accountable.<sup>97</sup> The complementarity provision necessarily operates to limit the ICC’s exercise of jurisdiction. However, the complementarity principle

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<sup>93</sup> Peter Leftie & Kevin Kelly, *Storm over al-Bashir’s Surprise Visit*, DAILY NATION (Aug. 28, 2010), <http://www.nation.co.ke/Kenya%20Referendum/Storm%20over%20al%20Bashir%20/-/926046/998960/-/69nwjj/-/>.

<sup>94</sup> Colum Lynch, *Sudan’s Omar al-Bashir Cancels U.N. Trip*, FOREIGN POLICY (Sept. 25, 2013, 6:34 PM), <http://foreignpolicy.com/2013/09/25/sudans-omar-al-bashir-cancels-u-n-trip-2/>.

<sup>95</sup> *South Africa Criticised over Sudan’s Omar al-Bashir’s Exit*, BBC NEWS (June 24, 2015), <http://www.bbc.com/news/world-africa-33254003>.

<sup>96</sup> Interview with Subject 898.

<sup>97</sup> Rome Statute, *supra* note 4, at art. 17 (providing that the ICC may exercise jurisdiction over the covered crimes if the state is “unwilling or unable genuinely” to proceed domestically).

also arguably increases the ICC's potential deterrent effect by threatening not only an international prosecution, but also domestic prosecutions.<sup>98</sup>

The evidence shows that the ICC is employing its powers to encourage states to investigate and prosecute covered crimes domestically. The OTP is using its powers to conduct preliminary examinations of situations that may give rise to a formal ICC investigation in the event that jurisdictional prerequisites are satisfied—including the absence of genuine national proceedings.<sup>99</sup> According to a Policy Paper issued by the OTP, the goals of the office's preliminary investigation activities include (1) ending impunity, by encouraging genuine national proceedings and (2) the prevention of crimes.<sup>100</sup> The OTP employs different tools and strategies to encourage genuine national proceedings through its preliminary examinations, including sending in-country missions and holding consultations with national authorities and NGOs.<sup>101</sup> As to the "prevention" function, the OTP notes that during preliminary examinations, the office often issues public statements that serve to warn perpetrators of the ICC's interest and the potential for international or domestic prosecutions should perpetrators not cease committing crimes.<sup>102</sup> Between 2004 and 2015, the OTP has commenced a total of twenty-three preliminary examinations: nine were ongoing as of January 2016, nine led to a decision to proceed, and five led to a decision not to proceed.<sup>103</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> See ICC OTP, POLICY PAPER ON PRELIMINARY EXAMINATIONS 8–17 (Nov. 2013), [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) (describing in detail the statutory factors that must be satisfied to commence a formal investigation).

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.* at 24. The OTP has referred to this process of encouraging national prosecutions as its "positive approach to complementarity." ICC OTP, PROSECUTORIAL STRATEGY 2009-2012 5 (Feb. 1, 2010), <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>.

<sup>102</sup> ICC OTP, POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 99, at 24–25 (referencing public statements made in connection with various preliminary examinations).

<sup>103</sup> ICC ASP, REPORT OF THE COURT ON THE BASIC SIZE OF THE OFFICE OF THE PROSECUTOR 28 ICC-ASP/14/21 (Sept. 17, 2015), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-21-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-21-ENG.pdf).

The countries where preliminary examinations were ongoing included Afghanistan, Colombia, Guinea, Iraq, Nigeria, Palestine, and Ukraine.<sup>104</sup>

Further, some evidence shows that the ICC's preliminary examinations do produce some of the hoped-for "complementarity" effects. For example, the OTP began a preliminary examination in Colombia in June 2004.<sup>105</sup> The examination reportedly put pressure on the Colombian courts and prosecutors to pursue accountability for mass atrocities and other human rights abuses.<sup>106</sup> Anecdotal evidence also indicates that the preliminary examination put pressure on state and non-state actors to conform their behavior so they could avoid being prosecuted by the ICC.<sup>107</sup> According to a cable published by Wikileaks, former president Pastrana "voiced concern that the [ICC] could attempt to prosecute him for allegedly creating a safehaven for narcoterrorists through the Caguan process."<sup>108</sup> The preliminary examination apparently played a role in

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<sup>104</sup> See *Preliminary Examinations*, ICC <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx> (last visited Aug. 8, 2017).

<sup>105</sup> ICC OTP, SITUATION IN COLOMBIA: INTERIM REPORT 2 (Nov. 2012), <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>.

<sup>106</sup> See, e.g., Amanda Lyons & Michael Reed-Hurtado, *The Rome Statute Review Conf., Colombia: Impact of the Rome Statute and the International Criminal Court*, INT'L. CTR. FOR TRANSITIONAL JUST. 4 (May 2010), <https://www.ictj.org/sites/default/files/ICTJ-Colombia-Impact-ICC-2010-English.pdf>. (noting that visits and statements of the ICC prosecutor put pressure on judges and prosecutors); Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91 INT'L AFFS. 37, 48–49 (2015) (suggesting that the ICC's threat of prosecution produced positive impact in Colombia in terms of improving domestic protections against impunity for mass atrocities and other human rights abuses).

<sup>107</sup> Nick Grono, *The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders*, CRISIS GROUP (Oct. 6, 2012), <https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimes-government-leaders>.

<sup>108</sup> *Ambassador's November 1 Meeting with Former President Andres Pastrana*, WIKILEAKS (Nov. 14, 2007), [https://www.wikileaks.org/plusd/cables/07BOGOTA8045\\_a.html](https://www.wikileaks.org/plusd/cables/07BOGOTA8045_a.html). To the extent Pastrana was referencing peace talks in Caguan in the late 1990s, he may be incorrect in surmising that the ICC would have jurisdiction over any encompassed crimes. See Darynell Rodriguez Torres, *Colombia's Peace Process: Three Challenges*, OPEN DEMOCRACY (Oct. 15, 2012), <https://www.opendemocracy.net/opensecurity/darynell-rodriguez-torres/colombias-peace-process-three-challenges>. Colombia did not join the ICC until 2002 after those talks had ended, and it also included a reservation exempting Colombia from the ICC's jurisdiction over war crimes. See *Colombia's ICC Declaration a "Prelude to Impunity"*, HUMAN RIGHTS WATCH (Sept. 5, 2002), <https://www.hrw.org/news/2002/09/05/colombias-icc-declaration-prelude-impunity>.

prompting Colombia to pass its 2005 Peace and Justice Law.<sup>109</sup> The Colombian government itself has claimed that as a result of the ICC's preliminary examination (1) some 18,000 weapons have been surrendered and destroyed; (2) the main leaders of rebel groups are behind bars awaiting trials; (3) more than 280,000 people have been registered as victims; and (4) the country has investigated more than 36,000 previously unknown criminal actions.<sup>110</sup>

In addition, the OTP's assessment of the facts on the ground is positive as to the "complementarity" effect in Colombia. In 2009, then-ICC Prosecutor Ocampo stated that "I can say the system is working. They, in their domestic law, have cases against paramilitaries, guerrillas and even against their own military, so much so that other states have opted to use Colombia as an example to do the same. That's why we do not have to intervene."<sup>111</sup> Prosecutor Bensouda has similarly concluded that the facts in Colombia demonstrate a positive complementarity effect. She stated that "the prospect of the ICC attaining jurisdiction was mentioned by prosecutors, courts, legislators and members of the Executive Branch as a reason to make policy choices in implementing the Justice and Peace Law, thus ensuring that the main perpetrators of crimes would be prosecuted."<sup>112</sup>

In other words, what counts towards the ICC's deterrence message about the certainty of prosecution is not only the cases commenced by the ICC. That message is supplemented by the ICC's ability to coerce states to institute domestic proceedings so

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<sup>109</sup> Grono, *supra* note 107; *see also* Lyons & Reed-Hurtado, *supra* note 106, at 5 (quoting the High Commissioner for Peace who said, "The government has proposed a draft law that will block the action of the International Criminal Court"); Luis Carlos Restrepo, *Revelaciones Explosivas*, SEMANA (Sept. 24, 2004), <http://www.semana.com/nacion/articulo/revelaciones-explosivas/68391-3> (quoting the High Commissioner for Peace in Spanish: "Esta no es un peligro. El gobierno ofreció un proyecto de ley que bloquea la acción de la Corte Penal Internacional").

<sup>110</sup> Ainley, *supra* note 106, at 48 n.47.

<sup>111</sup> Bryon Wells, *Colombian Judicial System Works: ICC Official*, COLUMBIA REPORTS (Dec. 9, 2009), <http://colombiareports.com/colombian-judicial-system-is-working-properly-foreign-observer-says/>.

<sup>112</sup> Fatou Bensouda, Deputy Prosecutor, International Criminal Court, Keynote Address at the Africa Legal Aid, Commonwealth Secretariat, and International Legal Assistance Consortium: The International Criminal Court in a Politically Divided World (Oct. 21, 2011), <http://www.internationalallawbureau.com/blog/wp-content/uploads/2012/04/here1.pdf>.

they can avoid having their citizens prosecuted in The Hague. Ratification of the Rome Statute not only increases the possibility of international prosecution, but also the possibility of domestic prosecution.

Based on all of the above, we suggest that the ICC can effectively deter at least some actors some of the time. By joining the ICC, states have necessarily increased the threat of an ICC prosecution. Because of the ICC's complementarity provision, states also increase the threat that their citizens will be prosecuted domestically. Because joining the ICC raises the cost side of the cost-benefit equation, individuals should generally be less likely than before to commit acts that can constitute crimes within the ICC's jurisdiction. In addition, state leaders should value state sovereignty and generally want to avoid having their citizens prosecuted. They should want to discourage individuals from committing acts that can constitute any of the ICC core crimes and also ensure that the state's laws and institutions will permit the state to prosecute its citizens domestically should they commit any of the ICC crimes.<sup>113</sup>

Although there is scant empirical literature examining the question of whether the ICC deters, the few studies to date support our conclusion that the ICC can sometimes produce a deterrent effect. For example, Akhavan examined documentary evidence from Uganda and Ivory Coast and concluded that (1) the ICC led to a decrease in violence in Uganda and compelled Joseph Kony to negotiate and that (2) the mere threat of an ICC prosecution contributed to diffusing a volatile situation in Ivory Coast.<sup>114</sup> Nouwen conducted a qualitative study examining the effect of the ICC's complementarity provision in Uganda and

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<sup>113</sup> Some states have self-referred matters to the ICC for prosecution—behavior which could indicate that states do not want to guard their sovereignty and ward against an ICC intervention. In those self-referrals, however, the OTP has only targeted non-state actors—not the governments against whom those non-state actors were fighting when they committed their crimes. KERSTEN, *supra* note 67, at 164–65. Thus, as some commentators note, governments might at times “use” the court. *Id.* at 167. Recent comments by President Museveni, the person who gave the ICC its first case, support such a conclusion. Museveni has called on all African states to quit the court, charging the court with being anti-African and challenging its decision to charge African leaders with crimes. See Wang Ntui Belle, *African Countries to Quit the International Criminal Court*, THE AFRICAN EXPONENT (Oct. 18, 2016), <https://www.africanexponent.com/post/8063-african-countries-to-quit-the-international-criminal-court>.

<sup>114</sup> Akhavan, *Reconciling*, *supra* note 47, at 640, 640–43.

Sudan, looking for evidence of whether the ICC's intervention had encouraged domestic prosecutions of conflict-related crimes and reform of criminal justice systems. Based on documentary and interview evidence of high-level subjects, she found some law reform. On the other hand, she found little evidence of an increase in prosecutions.<sup>115</sup> In a large-N statistical study on the ICC's deterrent effect, Jo and Simmons found that ICC ratification, as well as an increase in ICC investigations over time, was associated with a reduction in intentional civilian killings, a finding they attribute to both the legal deterrent effect from the possibility of punishment and a complementary social deterrent effect.<sup>116</sup>

The documentary and interview evidence we gathered during this Kenya case study will contribute to this scant literature that empirically examines the ICC's deterrent effect. Through this evidence, however, we also make an important theoretical contribution to the literature debating the deterrent effect of international criminal justice. We illustrate the need to "unpack" the ICC's deterrent effect and thereby establish a new model for evaluating and understanding the circumstances under which deterrence is more or less likely to occur.

#### *B. Nuancing the ICC's Deterrent Effect*

While the ICC is generally designed to deter, we do not expect that it can necessarily deter all actors in all situations all the time. We suggest that several factors will influence the ICC's ability to deter: (1) the domestic political context, (2) the type of actor the ICC is targeting, and (3) the level of the ICC's intervention.

First, as to the domestic political context, we distinguish between democracies and non-democracies—or unconsolidated democracies. For the most part, democracies generally have good human rights practices and should not expect their citizens to commit the kinds of acts that would subject them to an ICC

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<sup>115</sup> See SARAH M. H. NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN 337 (2013).

<sup>116</sup> Jo & Simmons, *supra* note 38, at 460–66 (conducting what appears to be the most sophisticated large-N statistical study to date on the question of the ICC's deterrent effect).

prosecution.<sup>117</sup> Democracies also tend to have developed independent law enforcement institutions that should enable them to prosecute any such abuses in domestic courts.<sup>118</sup> We expect that state and non-state actors in democracies will consider the ICC's threat of prosecution as a cost to be calculated. However, such states may view the threat of an ICC prosecution as miniscule because the state will prosecute citizens in its domestic courts should citizens commit abuses.<sup>119</sup> In terms of a visible ICC deterrent effect, one may not see an improvement in human rights practices, since states with good practices do not expect their citizens to commit mass atrocities or other human rights abuses.<sup>120</sup> The ICC could still produce a legal deterrent effect on democracies. For example, joining the ICC could cause these states to implement the ICC crimes into domestic legislation so that the state has greater assurances that it can prosecute such crimes domestically.<sup>121</sup>

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<sup>117</sup> See Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1839–40, 1840 n.60 (2003) (stating and showing that democracies tend to have better human rights practices than non-democracies).

<sup>118</sup> See, e.g., Wade M. Cole, *Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999*, 70 AM. SOC. REV. 472, 475–76 (2005) (explaining that democratic states generally protect basic human rights, apply the rule of law fairly, and limit state power whereas non-democracies tend not to place legal constraints on their power).

<sup>119</sup> See, e.g., DUTTON, *supra* note 81 (arguing that democracies with good human rights practices will be the type of state most likely to join the ICC because compliance costs are minimal in that they should not expect their citizens to commit mass atrocities); Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225, 231 (2010) (hypothesizing in their article examining state commitment to the ICC that states with good practices and strong institutions of domestic accountability are less likely to view ICC commitment as costly).

<sup>120</sup> Simmons and Danner make the point in their article examining commitment to the ICC that one reason “peaceful” states like those in Scandinavia may have joined the court is because they would not expect their nationals would ever be subjected to its jurisdiction. Simmons & Danner, *supra* note 119, at 231.

<sup>121</sup> For example, Germany implemented the ICC crimes into its domestic legislation in 2002 before joining the ICC. See Andreas Zimmermann, *Main Features of the New German Code of Crimes against International Law (Völkerstrafgesetzbuch)*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES: APPROACHES OF CIVIL AND COMMON LAW COUNTRIES 138–39 (Matthias Neuner ed., 2003).

Non-democracies and unconsolidated democracies<sup>122</sup> differ in important respects from democracies—in respects that also affect our calculus regarding the ICC's potential deterrent effect. In both, the executive is not fully independent from other branches of government and does not fully respect the rule of law.<sup>123</sup> Therefore, we also expect that these states will have poorer human rights practices, weaker domestic legal institutions than democracies, or both.<sup>124</sup> Because they may be more likely targets of an ICC investigation, non-democracies and unconsolidated democracies may also be less likely to join the ICC than states with better practices and policies.<sup>125</sup> To the extent that states with these weaker characteristics do join the court, to avoid the threat of an ICC prosecution and the accompanying loss of sovereignty, they will have to either ensure that their citizens do not commit crimes within the ICC's jurisdiction or ensure that they have the level of domestic law enforcement institutions to enable a domestic prosecution of such crimes should they occur. We expect the evidence of deterrence among member states that joined with weaker policies and practices to be greater because the risk of a prosecution is also greatest in these states.

The second factor identified above—the target of the ICC's investigation—is also relevant to the deterrence calculus. We suggest that the ICC may produce an unintended or perverse effect if it focuses its attention on leaders of non-democracies or

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<sup>122</sup> “Unconsolidated democracies” are those states that have not fully transitioned to a democracy. They are states that do not fully respect the rule of law and where the executive is not fully independent from other branches of government. See JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 3 (1996) (“A democratic transition is complete when sufficient agreement has been reached about political procedures to produce an elected government, when a government comes to power that is the direct result of a free and popular vote, when this government *de facto* has the authority to generate new policies, and when the executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies *de jure*.”).

<sup>123</sup> See *id.*

<sup>124</sup> See Hathaway, *supra* note 117, at 1839–40, 1840 n.60 (stating and showing that democracies tend to have better human rights practices than non-democracies).

<sup>125</sup> See DUTTON, *supra* note 81 (finding from quantitative and qualitative analysis that states with poorer human rights practices and weaker domestic law enforcement institutions were less likely to join the ICC than states with good practices and policies).

unconsolidated democracies.<sup>126</sup> In this political context, where a potential ICC intervention threatens a hold on power or push to gain power, state actors may respond by committing human rights abuses that specifically aid them in holding on to or gaining power. This hypothesis is based on our assessment that state leaders in such a situation may rationally view the benefits of power as being exceptionally high and the risks of prosecution as exceptionally low. As to benefits, state leaders in non-democracies or unconsolidated democracies do not have only political “power” *per se*, but they also frequently have exceptional access to state resources that they can siphon off to themselves or their cohorts.<sup>127</sup> As to costs, domestically these actors may face little risk of prosecution for any crimes they commit since domestic law enforcement mechanisms often do not function fairly and independently from government.<sup>128</sup> Furthermore, they wield power over the citizenry and control government resources, including the resources that could be used to punish themselves

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<sup>126</sup> We group non-democracies and unconsolidated democracies together because both share features important to our hypothesis regarding leader control over government resources. As O’Donnell notes, while many countries have in theory rid themselves of authoritarian regimes, even when they hold elections, their brand of government still may resemble an autocracy more than an established democracy. Guillermo O’Donnell, *Illusions About Consolidation*, 7 J. DEMOC. 34, 34 (1996). Thus, even if a state holds free elections but fails to consolidate and institutionalize checks and balances on executive power and respect for the rule of law, we do not consider it an established or consolidated democracy.

<sup>127</sup> See, e.g., Alina Mungiu-Pippidi, *Controlling Corruption Through Collective Action*, 24 J. DEMOC. 101, 101 (2013) (stating that while the “most egregious examples of ‘state capture’ are found in autocracies,” new democracies increasingly are producing a regime where rulers monopolize power and treat the state as their own, practicing “a similarly nonuniversal allocation of public resources based on patronage, nepotism, and the exchange of favors”); Douglas Marcouiller & Leslie Young, *The Black Hole of Graft: The Predatory State and the Informal Economy*, 85 AM. ECON. REV. 630, 630 (1995) (“[I]n states with inadequate democratic checks and balances, the apparatus of orderly government is all too often hijacked by a predatory oligarchy who siphon the national treasury and transform government bureaus into bribe-collection agencies which impede legitimate business.”); Gary Milante, *A Kleptocrat’s Survival Guide: Autocratic Longevity in the Face of Civil Conflict 2* (World Bank, Washington D.C., Policy Research Working Paper No. 4186, 2007) (referencing the kleptocratic tendencies of authoritarian regimes whereby political elites use state resources to reward their client and patron networks, as opposed to the populace more generally).

<sup>128</sup> See, e.g., Hathaway, *supra* note 117, at 1838–39 (explaining that non-democracies tend to have few internal enforcement mechanisms to hold government accountable); *id.* at 1840 (stating that democracies are more likely than non-democracies to exhibit a commitment to the rule of law).

for abuses. These actors may also underestimate the threat of an ICC action because their positions give them an ability to “manipulate” the international justice system—one that relies heavily on state cooperation.

In short, in some circumstances, we expect that the threat of an ICC prosecution will produce an unintended or perverse effect and cause some individuals targeted by the ICC to commit abuses. We draw on the literature discussing the potential tradeoff between “justice” and “peace” to support this hypothesis.<sup>129</sup> Our focus with this argument is on leaders in non-democracies or unconsolidated democracies. We argue that a threat that the ICC might interfere with a hold on power or effort to gain power may push such leaders “into a corner” and cause them to conclude that there is little reason to refrain from committing abuses that can aid them in their bid for power.

Whether the ICC produces a deterrent or perverse effect on the leaders of non-democracies or unconsolidated democracies may depend on our third identified factor—the level of the ICC’s intervention. A lower level of ICC intervention lowers the cost side of the equation, making it more likely that a rational actor will not be deterred from committing abuses. As the ICC’s level of intervention increases, so too does the cost side of the equation, making it more likely that the ICC can produce a deterrent effect and by its threat dissuade individuals from committing crimes and persuade the government to institute measures of domestic accountability. In such a case, the ICC has demonstrated its power to act. While state leaders will still highly value retaining or gaining positions of power, committing obvious acts that can constitute any of the ICC core crimes could prove very costly since such moves could attract additional attention from the international community and the ICC.<sup>130</sup>

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<sup>129</sup> See, e.g., Akhavan, *Reconciling*, *supra* note 47, at 625 (describing the “peace versus justice” dilemma: “whether, in certain circumstances, the prospect of prosecution creates a disincentive for implicated leaders to end war or surrender power”).

<sup>130</sup> For example, in the case of Libya, in 2011, Gaddafi’s obvious attacks on civilians, which included the government’s use of live fire on peaceful protestors, attracted the attention of the international community. See HUMAN RIGHTS WATCH, *WORLD REPORT 2012: LIBYA EVENTS OF 2011 2* (2012) (noting the international response to Gaddafi’s “crackdown” on peaceful anti-government protestors). In February 2011, the Security Council referred the Libya situation to the ICC, noting, among other things, the government’s widespread and systematic attacks against the civilian population. See S.C. Res. 1970 ¶¶ 4–6 (Feb. 26, 2011).

Nevertheless, a very high level of ICC intervention may cause suspects to believe they have no opportunity for escape. When leaders feel especially threatened, they will have more reason to value gaining power or staying in power: With power, they can manipulate state machinery so that abuses are not uncovered or punished at the domestic or international level. If leaders put such a high value on power, they may also see little reason to refrain from committing crimes that will aid them in their quest to gain power or stay in power.

Finally, although we do not disagree that social deterrence plays an important role in complementing legal deterrents, we do not envision a significant role for social deterrence as regards leaders in non-democracies or unconsolidated democracies. We note this point specifically because Jo and Simmons' recent quantitative study examining the ICC's deterrent effect advanced an argument about social deterrence. Those scholars argue that the ICC deters *socially* "because it mobilizes the international community as well as domestic civil society to demand justice."<sup>131</sup> Their hypothesis is that state actors, as opposed to rebels, are those most likely to be influenced by complementary social sanctions.<sup>132</sup> State actors should want to be viewed as legitimate by the domestic public or the international community—a community they may depend on for aid or trade.<sup>133</sup> Since they want to be viewed as legitimate, these state actors are also more likely to be responsive to domestic and international pressures to cease committing international crimes.<sup>134</sup>

While we do not disagree with Jo and Simmons that some state actors can be *socially* deterred, we again argue for more nuance and "unpacking." We expect that state actors who are in a position to manipulate the system will either not find such

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<sup>131</sup> Jo & Simmons, *supra* note 38, at 469.

<sup>132</sup> *Id.* at 452–55.

<sup>133</sup> *Id.* at 452–70.

<sup>134</sup> Jo and Simmons tested their deterrence argument on a dependent variable measuring "the number of civilians killed *intentionally* by government forces or rebel groups in a *direct military confrontation*." *Id.* at 456. The study produced evidence that state actors were legally and *socially* deterred. *Id.* at 469–70. In states that ratified the Rome Statute, a larger domestic presence of human rights organizations was associated with a decrease in intentional killings by government actors. *Id.* at 463–64. At the international level of social sanctions, the results also showed that "governments that ratified the ICC Statute were subsequently much more likely to reduce or refrain from intentional civilian violence the more aid they received." *Id.* at 464–65.

pressures compelling or will be able to “hide under the radar” because they control the machinery that would expose their own abuses. This is so even if the state has substantial international financial relationships and a domestic civil society pushing a “justice” agenda. Indeed, for leaders in non-democracies and unconsolidated democracies, the benefit of holding on to power or obtaining power may be so great that it outweighs any potential costs related to legal or social shaming—even if that shaming might result in the country receiving less foreign aid.

The table below sets out our expectations regarding the ICC’s likely deterrent effect taking into account various factors that we argue could make the ICC more or less likely to produce a deterrent effect.

*Table 1: ICC Deterrent Effect Expectations*

	<b>Low Level ICC Intervention (e.g., Ratification)</b>	<b>Higher Level ICC Intervention (e.g., Preliminary Examination)</b>	<b>Highest Level of ICC Intervention (e.g., Prosecution of State Leaders)</b>
<b>Democracy</b>	State ensures it has good human rights practices and institutions to punish violations domestically	State ensures it has good human rights practices and institutions to punish violations domestically	State ensures it has good human rights practices and institutions to punish violations domestically
<b>Non-Democracy or Unconsolidated Democracy</b>	No significant deterrent effect because threat of prosecution seems low	More significant deterrent effect because threat of prosecution has become more real/but also risk of perverse effect if investigations focus on state leaders who may commit human rights abuses to gain or maintain	More significant deterrent effect because threat of prosecution is very real/but also risk of perverse effect if prosecution focuses on state leaders who control state machinery that

		power	could be used to commit human rights abuses to maintain power and avoid ICC prosecution
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### III. THE KENYA CASE STUDY: METHODOLOGY AND SELECTION

#### A. *Methodology*

We test our hypotheses about the various factors that may make the ICC more or less likely to produce a deterrent effect using a case study of Kenya and its relationship with the ICC over time. We also use this opportunity to test the social deterrence theory advanced by Jo and Simmons. The Kenya case study, like all case studies, enables the researcher to produce context-dependent knowledge and experience to lead to a deeper understanding of the subject matter being studied.<sup>135</sup> Through this case study, we trace the behavior of Kenya and particular individuals within the state relevant to whether and under what circumstances the ICC's intervention has produced a positive or negative deterrent effect.

Our study draws on documentary evidence obtained from government, NGO, news, and scholarly sources, among others. Unique to this case study of Kenya is that it also draws on novel data collected during semi-structured interviews conducted in Nairobi, Kenya during July, August and October 2015 with various high-level subjects, including former government officials, media persons, academics, and leaders in civil society, and think-tanks. A local civil society organization with extensive experience working on peace and conflict transformation in Kenya, NPI-Africa,<sup>136</sup> facilitated the interviews and helped us identify individuals who would have significant knowledge about (1) Kenya's history as it relates to human rights abuses and impunity; (2) the 2007 post-election violence; (3) Kenya's interaction with the ICC over time; (4) the facts surrounding

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<sup>135</sup> See BENT FLYVBJERG, FIVE MISUNDERSTANDINGS ABOUT CASE STUDY RESEARCH, in *QUALITATIVE RESEARCH PRACTICE* 391–92 (Clive Seale, Giampietro Gobo, Jaber F. Gubrium, & David Silverman, eds., 2d ed. 2004).

<sup>136</sup> For more information, see NPI-AFRICA, <http://www.npi-africa.org> (last visited Aug. 8, 2017).

Kenya's 2013 election campaign; and (5) the individuals who were named ICC suspects. We did not confine our selection of interviewees to any one specific political or ethnic affiliation. Our interviewees varied as to their political and ethnic allegiances. As such, this study benefits from the unique insights of Kenyans with on-the-ground knowledge and the ability to observe events from within a cultural milieu unfamiliar to foreigners.

We conducted a total of 25 such high-level interviews—18 representatives from civil society and think tanks, 2 from the media, 2 former politicians and 3 from academia—while on location in Kenya. Each interview lasted between one and four hours. Because of the sensitivity of the topics addressed during the interviews, we promised to protect the confidentiality of the interviewees' information by not linking it to any specific person in any reports or publications. Also to protect confidentiality and enable interviewees to speak freely, we agreed to meet interviewees in the location of their choice. To conduct the interviews, we used an interview guide with prepared questions, but the interviews were semi-structured so as to allow the interviewees to narrate without being too constrained.<sup>137</sup>

As noted, isolating cause is a difficult task, made more difficult by the presence of other factors that could also have influenced particular behavioral change. Nevertheless, our interviews show how informed actors on the ground perceive the ICC's deterrent effect under varying circumstances and over time. Combined with documentary data about what happened in Kenya before and after it ratified the Rome Statute, the result is a new model for evaluating and understanding the ICC's deterrent power.

### *B. Case Selection*

We chose Kenya to test our hypotheses and from which to seek evidence of the ICC's deterrent effect—and any unintended or perverse effect—for several reasons. First, the country joined

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<sup>137</sup> We provided all interviewees with an informed consent statement before interviewing them that advised them, among other things, that participation in the interview was voluntary and that they could terminate their participation, or refuse to answer questions, at any time. The informed consent statement also advised interviewees that we would keep their identity confidential and not refer to them by name in any report or publication.

the ICC in 2005 despite a history of poor human rights practices,<sup>138</sup> as well as weak and corrupt domestic legal institutions.<sup>139</sup> In fact, Jomo Kenyatta, the country's first president after independence, and Daniel arap Moi, who ruled the country for 24 years after Kenyatta's death in 1978, have both been accused of using state resources to favor their own people and marginalize other ethnic groups. Both have also been accused of committing human rights abuses to aid them in maintaining power with impunity.<sup>140</sup> Abuses by those in power continued after the country introduced multi-party elections in 1991;<sup>141</sup> leaders instrumentally incited violence between ethnic groups<sup>142</sup> in their quest for power.<sup>143</sup> Moi provoked ethnic violence in order to influence voting patterns so that he could win

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<sup>138</sup> See, e.g., Stephen Brown & Chandra Lekha Sriram, *The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya*, 111 AFR. AFFS. 244, 247–49 (2012) (describing Kenya's outbreaks of election-related violence since 1991 when the country began permitting multi-party elections and the absence of government prosecutions to hold any high-level perpetrators of the ethnic/political violence accountable); Susanne D. Mueller, *The Political Economy of Kenya's Crisis*, 2 J. E. AFR. STUD. 185, 187–93 (2008) (describing how Kenyan politicians have employed violence to aid them in obtaining power and repressing opposition politics).

<sup>139</sup> See Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 23, U.N. Doc. A/HRC/11/2/Add.6 (May 26, 2009).

<sup>140</sup> See, e.g., Marcel Rutten & Sam Owuor, *Weapons of Mass Destruction: Land, Ethnicity and the 2007 Elections in Kenya*, 27 J. CONTEMP. AFR. STUD. 305, 313 (2009) (noting that several influential politicians were detained or killed during Kenyatta's administration); HUMAN RIGHTS WATCH, *KENYA'S UNFINISHED DEMOCRACY: A HUMAN RIGHTS AGENDA FOR THE NEW GOVERNMENT* 1–4, 7–8 (2002) (stating that Moi's 24 years as Kenya's autocratic leader were characterized by endemic corruption, human rights abuses, and excessive use of force by the state) [hereinafter HUMAN RIGHTS WATCH, *KENYA'S UNFINISHED DEMOCRACY*].

<sup>141</sup> Forced by domestic and international pressures, in 1991, Moi finally repealed a controversial clause of the constitution that made his party, KANU (the Kenyan African National Union), the sole political party by law. See Susanne D. Mueller, *Dying To Win: Elections, Political Violence, and Institutional Decay in Kenya*, 29 J. CONTEMP. AFR. STUD. 99, 103 (2011) (noting that Moi decided to accept a multiparty system after international financial and local pressures) [hereinafter Mueller, *Dying to Win*]; HUMAN RIGHTS WATCH, *DIVIDE AND RULE: STATE-SPONSORED ETHNIC VIOLENCE IN KENYA* 9 (1993) (explaining that civil society organizations demanded the end of a one-party state which in turn prompted international donors to suspend foreign aid) [hereinafter HUMAN RIGHTS WATCH, *DIVIDE AND RULE*].

<sup>142</sup> Kenya has over forty different ethnic groups. The three largest are the Kikuyu (20%), the Luhya (14%), and Luo (13%). Smaller groups include Kalenjin (11%), Kamba (11%), Kisii (6%) and the Meru (5.5%). See HUMAN RIGHTS WATCH, *KENYA'S UNFINISHED DEMOCRACY*, *supra* note 140, at 5; see also *The Crisis in Kenya*, INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT,

the presidency in both 1992 and 1997.<sup>144</sup> The 1992 violence resulted in the deaths of some 1,500 people and the displacement of more than 300,000.<sup>145</sup> The 1997 violence resulted in between 70 and 100 people dead and about 200,000 displaced.<sup>146</sup>

The historical record also shows that after election violence damps down in Kenya, impunity is the order of the day. After the 1992 violence, and in response to calls for investigations from opposition and church groups, Moi authorized a parliamentary committee to investigate. Although the committee concluded that politicians associated with Moi were responsible for organizing and funding the violence, no one was ever held accountable.<sup>147</sup> After the 1997 violence, Moi again established a committee. He tasked the Akiwumi Commission of Inquiry to investigate “tribal clashes” that have occurred since 1991, the origins and underlying causes of the clashes, responses of the police and other law enforcement agencies to these incidents, and the “level of preparedness and the effectiveness of law enforcement agencies” in controlling and preventing such clashes.<sup>148</sup> That Commission issued a report in 1999, but because the government objected, the report was not made public until 2002. The Akiwumi Commission concluded that members of Moi’s ruling party had incited violence and later frustrated investigations.<sup>149</sup> As before, however, the government did not

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<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya#1> (last visited Aug. 8, 2017).

<sup>143</sup> See Sabine Höhn, *New Start or False Start? The ICC and Electoral Violence in Kenya*, 45 DEV. AND CHANGE 565, 568 (2014) (noting that election periods became more violent after political liberalization and the introduction of multiparty system); see also HUMAN RIGHTS WATCH, *DIVIDE AND RULE*, *supra* note 141, at 1; Lawrence Gitonga Mwongera, *Making Sense of Political-Related Violence in Kenya*, OPEN SECURITY (Sept. 14, 2012), <https://www.opendemocracy.net/opensecurity/lawrence-gitonga-mwongera/making-sense-of-political-related-violence-in-kenya>.

<sup>144</sup> HUMAN RIGHTS WATCH, *KENYA’S UNFINISHED DEMOCRACY*, *supra* note 140, at 5–6; Mwongera, *supra* note 143.

<sup>145</sup> See Höhn, *supra* note 143, at 568; Brown & Sriram, *supra* note 138, at 247.

<sup>146</sup> See Höhn, *supra* note 143, at 568.

<sup>147</sup> See HUMAN RIGHTS WATCH, *PLAYING THE “COMMUNAL CARD”: COMMUNAL VIOLENCE AND HUMAN RIGHTS*, 106 (1995) [hereinafter HUMAN RIGHTS WATCH, *COMMUNAL CARD*].

<sup>148</sup> JUDICIAL COMMISSION OF INQUIRY INTO TRIBAL CLASHES IN KENYA, *REPORT OF THE JUDICIAL COMMISSION APPOINTED TO INQUIRE INTO TRIBAL CLASHES IN KENYA* iii (2002), [http://www.hrw.org/sites/default/files/related\\_material/Akiwumi%20Report.pdf](http://www.hrw.org/sites/default/files/related_material/Akiwumi%20Report.pdf).

<sup>149</sup> See *id.*

hold any perpetrators accountable for their roles in the violence.<sup>150</sup>

It is true that the 2002 elections that led to Mwai Kibaki assuming the presidency were not accompanied by any significant violence.<sup>151</sup> The promised democratic reforms, however, did not materialize despite Kibaki's campaign promises. Human Rights Watch states that few reforms had been implemented as of 2008.<sup>152</sup> A 2009 Human Rights Council Report characterized Kenya's judicial system as "slow and corrupt."<sup>153</sup> In fact, the evidence suggests that democracy in Kenya was not consolidated by the time of the 2007 post-election violence. Mueller argues that one of the root causes of that violence was that Kenya remained characterized by "deliberately weak institutions, mostly overridden by a highly personalized and centralized presidency, that could and did not exercise the autonomy or checks and balances normally associated with democracies. . . ."<sup>154</sup>

For all of these reasons, Kenya is a country that could improve its human rights practices and protections against such abuses at the time it joined the ICC and thereafter. By joining the court, Kenya committed itself to address mass atrocities and increased the possibility that its citizens would be subjected to an ICC prosecution and increased a risk to its sovereignty—risking that its citizens would be prosecuted in The Hague should they commit mass atrocities or should Kenya fail to prosecute perpetrators on its own. To avoid this fate, Kenya could improve (1) behaviors and practices related to the incidence of mass atrocities or other human rights abuses and (2) its institutional

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<sup>150</sup> See HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS*, *supra* note 16, at 18–19.

<sup>151</sup> One reason for the absence of significant ethnic tensions during the 2002 elections is that both presidential candidates were from the Kikuyu community. Stefan Dercon & Roxana Gutiérrez-Romero, *Triggers and Characteristics of the 2007 Kenyan Electoral Violence*, 40 *WORLD DEV.* 731, 733 (2012).

<sup>152</sup> HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS*, *supra* note 16, at 12.

<sup>153</sup> See Alston, *supra* note 139, ¶ 23, 16–17.

<sup>154</sup> Mueller, *Dying to Win*, *supra* note 141, at 186. Data from the Worldwide Governance Indicators Database shows that Kenya has had low rule of law and control of corruption scores relative to other countries in the world between 1996 and 2013. Rule of law scores hover in the 20th to 30th percentile rank. Control of corruption scores hover within the 10th and 20th percentile rank. See *Worldwide Governance Indicators: Country Data Report for Kenya 1996-2013*, THE WORLD BANK, <http://data.worldbank.org/data-catalog/worldwide-governance-indicators> (last visited Aug. 8, 2017).

mechanisms to enable it to respond to such crimes should they occur. Countries with already good practices and institutions offer less of an opportunity to find evidence of the ICC's deterrent effect because those countries have less room for improvement and less of a reason to fear that their citizens might become the subject of an ICC prosecution.

Second, because the named suspects in the Kenya cases included state actors—including Uhuru Kenyatta, the country's sitting president as of March 2013—this case study provides an opportunity to seek out and analyze evidence of how those in power or those seeking a hold in power respond to an ICC intervention.

Finally, Kenya is one of only a handful of countries where the ICC has specifically intervened by way of a formal ICC investigation and prosecution.<sup>155</sup> This is the ICC's highest level of intervention—higher than the preliminary examination phase that precedes it. According to the OTP, it conducts a “preliminary examination” of all situations that come to its attention to “decide whether there is a reasonable basis to initiate an investigation.”<sup>156</sup> With Kenya, however, the OTP eventually opened a formal investigation, which meant that it had to convince the ICC Pre-Trial Chamber that there was a reasonable basis to initiate a formal investigation.<sup>157</sup> That the ICC has intervened in Kenya with an investigation and prosecution of suspects suggests that there should be more available evidence to aid in making inferences about whether and under what circumstances the ICC is more or less likely to produce a deterrent effect.

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<sup>155</sup> See *Situations Under Investigation*, *supra* note 87, for a list of the 9 different situations in which the ICC has commenced investigations and prosecutions.

<sup>156</sup> The legal criteria the OTP assesses during the preliminary examination phase include (1) if the crimes were committed after the Rome Statute came into effect, (2) if the crimes took place on the territory of a State Party or were committed by nationals of a State Party; (3) whether the crimes committed constitute war crimes, crimes against humanity or genocide; (4) the gravity of these crimes; (5) whether the State Party has commenced any genuine investigations and prosecutions of the same crimes domestically; and (6) whether opening an ICC investigation would serve the interests of justice and of the victims. See *Office of the Prosecutor*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about/otp?ln=en> (last visited Aug. 8, 2017).

<sup>157</sup> See *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 17–69 (Mar. 31, 2010).

## IV. UNPACKING THE ICC'S DETERRENT EFFECT

This section examines documentary and interview evidence in an effort to unpack the ICC's deterrent effect for evidence of whether and in what circumstances the court is more or less likely to deter. The specific objectives are to determine (1) whether the ICC has led to a reduction of mass atrocities or other human rights abuses and (2) whether the ICC has led to an increase in domestic protections available to punish those who commit such crimes. Our analysis proceeds chronologically so as to map the behavior of state actors, in particular those targeted by the ICC over time and in relation to the level of the ICC's intervention in the country. By proceeding chronologically, we can take note of significant events occurring in Kenya relative to mass atrocities, human rights abuses, and domestic law enforcement mechanisms to punish such abuses. We can also take note of the level of the ICC's intervention, which we argue is related to assessing the cost side of the rational cost-benefit calculation.

The case study analysis is divided into several sections, each of which is characterized by a different level of ICC intervention. First, we focus on the period of time when the ICC intervention consists solely of Kenya's ratification.<sup>158</sup> That period runs from when Kenya ratified the Rome Statute in 2005 up to the 2007 post-election violence. The second time period represents an increase in the ICC's level of intervention, when it is conducting a preliminary examination and considering charges. That time period runs from the immediate aftermath of the 2007 post-election violence until March 2010 when an ICC Pre-Trial Chamber authorized the prosecutor to commence a formal investigation into the Kenyan situation. The third period of time corresponds with the ICC's formal investigation and prosecution of the Kenyan suspects. We chose December 2014 as the cut-off date for this period because by that time, the ICC prosecutor announced her decision to suspend the case against President Kenyatta. Arguably after December 2014, the level of the ICC's intervention was not as high—or perceived to be as high—as

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<sup>158</sup> We characterize "ratification" as a level of intervention even though ratification does not involve specific oversight or action by the ICC's OTP. In this case, the intervention exists because by joining, the state has legally committed to the court, thereby putting itself and its citizens at greater risk of an ICC prosecution than those of non-ratifying states.

when it was proceeding against six, or even four, suspects. After all, the prosecutor's stated reason for dropping the case against Kenyatta was because Kenya and its leaders had allegedly succeeded in obstructing the ICC's ability to obtain evidence and convince witnesses to testify at trial.

Finally, we briefly discuss a final time period: after December 2014 when the ICC proceeded only in its case against Deputy President, William Ruto, and radio journalist, Joshua Sang. This discussion is brief because our data collection in Kenya ended in October 2015 when the case against the two defendants was still unfolding. At that time, the facts on-the-ground as between the ICC and Kenya were subject to change, making it exceptionally difficult to make any conclusive statement about deterrent effects or a lack thereof. Further, our interviewees only shared information and opinions they formed on the basis of information available and known up to October 2015.

#### A. *Ratification Until the 2007 Post-Election Violence*

##### 1. Assessing the ICC's Legal Deterrent Effect in Kenya at the Ratification Level of Intervention

Given Kenya's history of poor human rights practices, elite-driven election violence, and impunity, Kenya's decision to join the ICC in 2005 is somewhat surprising. After all, countries with such characteristics are most likely to face the risk that their citizens will be tried in The Hague. To avoid such a fate, Kenya would have to make a break from its past and improve its practices and institutions so as to avoid such a sovereignty loss. The fact of Kenya's ICC treaty ratification, however, does not seem to have produced such a deterrent effect: during this time period, the evidence does not show a (1) reduction in mass atrocities or other human rights abuses or (2) an increase in domestic protections available to hold perpetrators of such crimes accountable.

First, the evidence does not indicate that ICC ratification influenced Kenya to reduce the incidence of mass atrocities or other human rights abuses. Instead, it shows that only two years after ratification, the country was immersed in mass violence. Nor was this a different kind of mass violence than Kenya had previously experienced. Once again, political elites incited the

violence and pitted different ethnicities against each other for the purposes of gaining or maintaining power.

In particular, on the evening of December 30, 2007, the Electoral Commission of Kenya announced that Mwai Kibaki had won the presidency, a somewhat surprising result given that pre-election polls had indicated his opponent, Raila Odinga, held a substantial lead.<sup>159</sup> Kibaki hastily had himself sworn in as president, while Odinga urged his supporters to protest against a “stolen election.”<sup>160</sup> Thereafter, Kenya rapidly plunged into inter-ethnic violence. Supporters of Odinga, predominantly Luo and Kalenjin, attacked Kibaki’s Kikuyu supporters. The Kikuyu retaliated. According to a report issued after the violence concluded, politicians and business people planned and orchestrated much of the violence by enlisting the support of criminal gangs, such as the Mungiki, to carry out attacks.<sup>161</sup> The violence left at least 1,000 people dead and approximately 500,000 displaced over a two-month period.<sup>162</sup>

Nor does the evidence show that ICC ratification prompted Kenya to improve its domestic mechanisms available to punish those who commit such crimes. First, Kenya did not implement the ICC crimes into its domestic legislation until January 2009, through the 2008 International Crimes Act.<sup>163</sup> Second, during this time period, the government did not implement any significant democratic reforms that would further independent investigations and prosecutions of mass atrocities or other human rights abuses. According to a Human Rights Watch Report, the Kibaki government’s one notable and positive step was establishing the Kenya National Commission on Human

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<sup>159</sup> Höhn, *supra* note 143, at 567.

<sup>160</sup> See Jeffrey Steeves, *Democracy Unravelling in Kenya: Multi-Party Competition and Ethnic Targeting*, 9 AFR. IDENTITIES 455, 456 (2011); see also HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS*, *supra* note 16, at 21–23 (noting that international observer missions issued statements condemning the tallying results and casting doubt on the conclusion that Kibaki had won the election).

<sup>161</sup> See COMMISSION OF INQUIRY INTO POST ELECTION VIOLENCE, COMMISSION OF INQUIRY INTO THE POST ELECTION VIOLENCE (CIPEV) REPORT 347 (2008), [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf) [hereinafter Waki Commission Report].

<sup>162</sup> HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS*, *supra* note 16, at 21–23.

<sup>163</sup> Kenya began the process of adopting the Act in 2005, but it was only passed in 2009 after the ICC prosecutor threatened to launch his investigation. Antonina Okuta, *National Legislation for Prosecution of International Crimes in Kenya*, 7 J. INT’L CRIM. JUST. 1063, 1065, 1072–73 (2009).

Rights (“KNCHR”) in 2003, a genuinely independent institution to act as a watchdog over the government.<sup>164</sup> Notably, this was before Kenya ratified the ICC. Otherwise, the report states that “[i]n general . . . promises of reform were not fulfilled.”<sup>165</sup> Rather, the facts surrounding Kibaki’s proposed 2005 constitution show Kibaki’s lack of commitment to democratic reform. Voters rejected the 2005 constitution, because it failed to release Kibaki’s stronghold on executive power.<sup>166</sup> Afterwards, Kibaki demonstrated his dissatisfaction with the vote, and his intention to retain his stronghold on power, by dismissing his entire cabinet.<sup>167</sup> He replaced the cabinet with individuals who were mostly “old friends and colleagues.”<sup>168</sup>

In sum, the evidence indicates that ratification—the lowest level of ICC intervention—did not produce a deterrent effect in Kenya. While we cannot know with absolute certainty why this is the case, the evidence shows that during this time, Kenyans greatly discounted the ICC’s threat, and the cost side of any rational cost-benefit calculation.<sup>169</sup> Statements from interviewees support this interpretation. Several interviewees, including former government advisors, said that at the time they ratified the Rome Statute, Kenya’s political leaders did not realize that they could be brought to The Hague.<sup>170</sup> One interviewee indicated that Kenyans expected that the ICC “would just deal with the worst of the worst. Many would not have viewed Kenya

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<sup>164</sup> HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS*, *supra* note 16, at 11–12. The KNCHR website contains additional information about the institution at KENYAN NATIONAL COMMISSION ON HUMAN RIGHTS, <http://www.knchr.org/Aboutus/Establishment.aspx/> (last visited Aug. 8, 2017).

<sup>165</sup> HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS*, *supra* note 16, at 12.

<sup>166</sup> See *Kenya: Country Report* (2006), FREEDOMHOUSE.ORG, <https://freedomhouse.org/report/freedom-world/2006/kenya> (last visited Aug. 8, 2017); see also MICHELA WRONG, *IT’S OUR TURN TO EAT: THE STORY OF A KENYAN WHISTLE-BLOWER* 243 (2009).

<sup>167</sup> See, e.g., WRONG, *supra* note 166, at 243–44; *Kenya’s Entire Cabinet Dismissed*, BBC NEWS (Nov. 23, 2005, 6:34 PM), <http://news.bbc.co.uk/2/hi/africa/4463262.stm>.

<sup>168</sup> *Defiant Kibaki Swears in Cabinet*, PAMBAZUKA NEWS (Dec. 8, 2005), <https://www.pambazuka.org/governance/defiant-kibaki-swears-cabinet>.

<sup>169</sup> Susanne Mueller reaches a similar conclusion. She notes that when Kenya ratified the ICC treaty, the court was still in “its infancy.” Moreover, the political situation in Kenya seemed to be improving, such that many would have thought it inconceivable that any Kenyan would ever be charged by the ICC. Susanne D. Mueller, *Kenya and the International Criminal Court: Politics, the Election, and the Law*, 8 J. E. AFR. STUD. 25, 29 (2014) [hereinafter Mueller, *Kenya and the ICC*].

<sup>170</sup> Interview with Subject 591, 898.

as a candidate for the court at the time as there were far worse things going on in other countries in Africa, and Kenya was at that time optimistic about its future and democracy.”<sup>171</sup> An interviewee from civil society noted that by signing the Rome Statute Kenya would appear to be progressive.<sup>172</sup> The interviewee added that signing certain treaties would not only suggest a strong human rights record in the country, but would also bring other benefits such as donor funding.<sup>173</sup> Another interviewee stated: “Kenya is used to signing international agreements for prestige, rather than content.”<sup>174</sup>

Evidence from parliamentary debates from 2001<sup>175</sup> and 2003<sup>176</sup> supports this same conclusion: The record indicates that Kenyan politicians were not terribly concerned with the risks of ratifying the Rome Statute.<sup>177</sup> Parliamentary discussions in 2001 focused on the issue of ratification and how Kenya might implement the Statute. In fact, in response to the question whether “the Government fears that the ICC may try people amongst its ranks as it has done to Mr. Slobodan Milosevic and General Pinochet,” then-Attorney General, Amos Wako, indicated a lack of concern, stating that Kenya was committed to ratifying the Rome Statute.<sup>178</sup> He elaborated by saying that “the government [of Kenya] has been one of the most active participants at the Preparatory Commission’s meetings in New York.”<sup>179</sup> A review of the 2003 parliamentary debates show that Kenyan leaders were still intent on ratifying, but concerned

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<sup>171</sup> Interview with Subject 333.

<sup>172</sup> Interview with Subject 582.

<sup>173</sup> Interview with Subject 582.

<sup>174</sup> Interview with Subject 444.

<sup>175</sup> National Assembly, KENYA NATIONAL ASSEMBLY OFFICIAL RECORD (HANSARD), 3094 (Nov. 14, 2001) (indicating that the Kenyan government is committed to ratifying the Rome Statute and stressed that Kenya took an active part during the Rome Conference).

<sup>176</sup> National Assembly, KENYA NATIONAL ASSEMBLY OFFICIAL RECORD (HANSARD), 2674 (Oct. 1, 2003) (discussing a request from the U.S. government to sign a bilateral agreement addressing the exclusion of arrest and hand-over of U.S. nationals to the ICC).

<sup>177</sup> See also Mueller, *Kenya and the ICC*, *supra* note 169, at 29 (stating that “[i]n the parliamentary debates of the time and among civil society activists, one finds no concern that any Kenyans would ever be hauled before the ICC,” the focus instead being on, among other things, “reconciling the parts of the Kenyan constitution that gave immunity to the president”).

<sup>178</sup> National Assembly, *supra* note 175, at 3094.

<sup>179</sup> *Id.*

about how to deal with the request from the United States to sign a bilateral immunity agreement promising not to surrender U.S. personnel to the ICC.<sup>180</sup>

These views indicating that Kenya did not believe the ICC posed a great threat at the time make sense when one considers the context. Recall that the ICC was a new institution that had been operating for only a few years when Kenya ratified the Rome Statute. Further, in those years the prosecutor had relied on self-referrals, except for the Security Council's referral of the situation in Darfur, Sudan.<sup>181</sup> Moreover, those cases involved collapsed or transitioning states in the midst of raging civil wars.<sup>182</sup> Finally, Kenya's history as a non-democracy with a culture of impunity also likely figured as part of the calculus in assessing the ICC's threat—and the cost side of the rational cost-benefit calculation. As described above, leaders in Kenya were used to “getting away” with their crimes: They had not faced, and did not expect to face, judicial sanctions. Individuals we interviewed made similar points. For example, one interviewee said: “Moi was an awful president, but now he goes around celebrated.”<sup>183</sup> The interviewee added, “There is no record of justice in Kenya.”<sup>184</sup> Another interviewee noted that prior to the post-election violence in 2007 “there was a lot of impunity” and “anyone could perpetrate anything before the ICC got involved.”<sup>185</sup>

## 2. Assessing the Social Deterrent Effect

Even if the evidence does not suggest evidence of legal deterrence during this time period, we look for evidence of a social deterrent effect in order to test the hypotheses and findings of Jo and Simmons. Based on their quantitative large-N study, they concluded that the ICC produces a social deterrent effect on state actors, more so than rebels, because state actors are most likely to be responsive to international and domestic

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<sup>180</sup> Mueller, *Kenya and the ICC*, *supra* note 169, at 29.

<sup>181</sup> See *Situations Under Investigation*, *supra* note 87.

<sup>182</sup> See Thomas Obel Hansen, *The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice*, 18 AUSTL. J. HUM. RTS. 187, 198 (2012) (referencing the ICC cases in Uganda and the Democratic Republic of the Congo).

<sup>183</sup> Interview with Subject 417.

<sup>184</sup> *Id.*

<sup>185</sup> Interview with Subject 349.

pressures to conform their behavior to acceptable norms. We, however, find little evidence that Kenya's government actors were socially deterred during this time period, despite the fact that Kenya had important relationships with the international community and an increasingly activist civil society.

During this time period, Kenya was integrated into the international community with trade and aid relationships. According to data maintained by the World Bank, between 2005 and 2007 Kenya received a total of approximately US \$3 billion in official aid.<sup>186</sup> Such amounts easily put Kenya amongst the upper echelons of those receiving aid. In fact, in 2005 alone, Kenya gave up US \$9.8 million in military aid when it refused to succumb to United States' pressure to sign a bilateral agreement promising not to transfer any U.S. citizen to the ICC to be prosecuted.<sup>187</sup> Also, after Kibaki came into power, Kenya had a growing civil society sector.<sup>188</sup> That sector played a role in pushing for ICC ratification.<sup>189</sup>

Nevertheless, the evidence demonstrates that the country's leaders once again instrumentally employed violence in their quest for power after the results of the 2007 presidential elections were announced. Nor did Kenya make any remarkable strides in terms of domestic protections against human rights abuses during this time period. While causal inferences always come with disclaimers, the evidence does not suggest that Kenya was significantly influenced during this time period by any international or domestic social shaming to significantly improve its domestic practices to avoid the specter of an ICC prosecution.

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<sup>186</sup> See *Net Official Development Assistance and Official Aid Received*, THE WORLD BANK, <http://data.worldbank.org/indicator/DT.ODA.ALLD.CD?page=1> (last visited Aug. 8, 2017).

<sup>187</sup> See Fred Oluoch, *Kenya: Will Kibaki Succumb to U.S. Pressure?*, NEW AFRICAN, Aug–Sept. 2005, at 27 (noting that Kenya was risking U.S. \$9.8 million in military aid); Press Release, CICC, Global Coalition Voices Support for Kenya's On-Going Resistance to U.S. ICC Immunity Agreement: Kenya's Firm Stand in Defending ICC Integrity is Welcomed by International NGOs (July 20, 2005), [http://archive.iccnw.org/documents/KenyaresistBIA\\_pr.pdf](http://archive.iccnw.org/documents/KenyaresistBIA_pr.pdf) (praising Kenya for refusing to sign the bilateral agreement).

<sup>188</sup> For example, in 2003, Kenya established the Kenya National Commission on Human Rights. *The Human Rights Act*, KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, <http://knchr.org/HumanRights/ThehumanrightsAct.aspx> (last visited Aug. 4, 2017).

<sup>189</sup> See, e.g., DUTTON, *supra* note 81, at 143 (stating that Kenya joined the court in 2005 after an international and civil society campaign encouraging membership).

B. *Immediate Aftermath of the 2007 Post-Election Violence Until the March 2010 Authorization to Commence a Formal Investigation*

1. *Assessing the ICC's Legal Deterrent Effect at the Preliminary Examination Level of Intervention*

After the post-election violence and until the court authorized the prosecutor to commence a formal investigation into the Kenyan situation, Kenya became the subject of an ICC preliminary examination—a higher level of intervention than ratification alone.<sup>190</sup> The evidence, however, is mixed as to whether the ICC's preliminary examination intervention produced a legal deterrent effect. Some evidence suggests (1) a reduction in the incidence of mass atrocities or human rights abuses and (2) an increase in domestic mechanisms for holding perpetrators of such crimes accountable. On the other hand, not all of the evidence on either front is positive.

First, as to Kenya's human rights practices, the post-election violence ended by February 2008, and the country did not experience any repeat of mass violence during the ICC's preliminary examination period. The absence of mass violence is certainly an improvement. However, whether this improvement actually came about through the Kenyan government's commitment to protecting against mass atrocities and human rights abuses can be questioned. Also during this time period, some evidence shows that individuals who could ostensibly be witnesses in any prosecution of perpetrators of the post-election violence were allegedly being killed or disappeared. The ICC prosecutor has charged that during 2008 and 2009, Kenyatta had members of the Mungiki gang killed "in order to cover up his involvement with them and through them in the post-election violence."<sup>191</sup> These allegations have not been proven beyond a reasonable doubt, though Mungiki members have disappeared or been found dead. In March 2008, the wife of one Mungiki leader

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<sup>190</sup> See, e.g., Press Release, ICC OTP, Prosecutor Receives Materials on Post-election Violence in Kenya (July 16, 2009), <https://www.icc-cpi.int/Pages/item.aspx?name=pr438> (noting that Kenya had been the subject of an ICC preliminary examination since February 2008).

<sup>191</sup> Walter Menya, *Shocking: Uhuru 'Killed' All Mungiki Witnesses Says ICC Prosecutor Bensouda*, KENYA TODAY (Aug. 2, 2014), <http://www.kenya-today.com/news/uhuru-kenyatta-killed-mungiki-witnesses-says-icc-prosecutor-bensouda>.

was murdered.<sup>192</sup> A few months later, Mungiki's Nairobi Coordinator was killed. According to the ICC prosecutor, two Mungiki leaders arrested by police in April and June of 2008, respectively, are presumed dead. A Mungiki leader in Naivasha arrested by police in May 2009 is also presumed dead.<sup>193</sup> On the day of the OTP's request to open an investigation into the Kenyan situation, another prominent member of the Mungiki was killed.<sup>194</sup>

What, though, does the evidence suggest may have been the role of the ICC in producing the absence of violence after February 2008? Our analysis indicates that the ICC's role was small as compared to the role of the international and domestic communities. As of February 2008, the ICC had only issued one statement saying it was watching Kenya.<sup>195</sup> The international and domestic communities, by contrast, were actively engaged during February 2008 in taking steps to end the violence. The international community intervened in early February 2008 to establish a mediation process, the Kenyan National Dialogue and Reconciliation ("KNDR") process, led by former Secretary-General of the United Nations, Kofi Annan.<sup>196</sup> The mediation led by Annan concluded on February 28, 2008 with the announcement of a National Accord<sup>197</sup> and an agreement to form

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<sup>192</sup> Cyrus Ombati, *Kenya: Mungiki Leader's Wife Executed*, THE EAST AFRICAN STANDARD (NAIROBI) (Apr. 12, 2008), <http://allafrica.com/stories/200804111177.html>.

<sup>193</sup> *Who Planned Naivasha PEV Murder Attacks of January 2008?*, ALLAFRICA: THE HAGUE TRIALS KENYA (Apr. 16, 2015, 2:04 PM), <http://allafrica.com/stories/201504171235.html>.

<sup>194</sup> Kamore Maina, *Mungiki Witness Reveals Why He Quit Uhuru Case*, THE STAR (KENYA) (Dec. 23, 2013 12:00 AM), [http://www.the-star.co.ke/news/2013/12/23/mungiki-witness-reveals-why-he-quit-uhuru-case\\_c874373](http://www.the-star.co.ke/news/2013/12/23/mungiki-witness-reveals-why-he-quit-uhuru-case_c874373); Caspar Waitaha & John Ngirachu, *Mungiki Leader Killed in Nairobi*, DAILY NATION (Nov. 5, 2009), <http://www.nation.co.ke/news/-/1056/682504/-/4cjm1fz/-/index.html>.

<sup>195</sup> ICC OTP, OTP Statement in Relation to Events in Kenya (Feb. 5, 2008), <https://www.icc-cpi.int/NR/rdonlyres/1BB89202-16AE-4D95-ABBB-4597C416045D/0/ICCOTPST20080205ENG.pdf>

<sup>196</sup> See *Kenya National Dialogue and Reconciliation: One Year Later*, KOFI ANNAN FOUNDATION (Mar. 28, 2009), <http://kofiannanfoundation.org/our-work/kenya-national-dialogue-and-reconciliation>.

<sup>197</sup> The Accord included important agreements on four main agenda items: (1) take immediate action to stop the violence and restore fundamental rights and liberties; (2) resolve the humanitarian crisis, promote reconciliation, heal, and restore calm; (3) overcome the political crisis; (4) and address long-term issues. SOUTH CONSULTING, THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT (2009), <http://katibainstitute.org/Archives/images/>

a coalition government, with Kibaki acting as President and Odinga as Prime Minister.<sup>198</sup> When Annan announced the power-sharing deal in late February 2008, Kibaki and Odinga urged their supporters to stop fighting and respect the arrangement.<sup>199</sup> During February 2008, civil society was also pressing for an end to the violence, having organized themselves under the umbrella group "Concerned Citizens for Peace" ("CCP"). The CCP was active in getting the leadership of the Orange Democratic Movement ("ODM") and Party of National Unity ("PNU") to mediate and was behind invitations to some of the prominent Africans to aid in mediation efforts.<sup>200</sup>

The evidence is similarly mixed regarding any increase in Kenya's domestic protections against human rights abuses. On a positive note, as part of the mediation process following the post-election violence, the Kenyan government agreed to implement institutional reforms, including judicial and constitutional reforms.<sup>201</sup> In July 2009, the government created a task force to make specific recommendations on how to enhance the effectiveness and independence of the judiciary.<sup>202</sup> The government also drafted a new constitution providing for checks and balances on government power.<sup>203</sup> Kenya adopted that new constitution in August 2010.<sup>204</sup> In addition, in 2009 Kenya

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Monitoring%20and%20Evaluation%20Report%20on%20the%20National%20Accord.pdf.

<sup>198</sup> See Agreement on the Principles of Partnership of the Coalition Government (Feb. 28, 2008), [http://peacemaker.un.org/sites/peacemaker.un.org/files/KE\\_080228\\_Acting%20Together%20for%20KenyaAgreement%20on%20the%20Principles%20of%20Partnership%20of%20the%20Coalition%20Government.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080228_Acting%20Together%20for%20KenyaAgreement%20on%20the%20Principles%20of%20Partnership%20of%20the%20Coalition%20Government.pdf).

<sup>199</sup> See Jeffrey Gettleman, *Kenya Rivals Reach Peace Agreement*, N.Y. TIMES (Feb. 29, 2008), <http://www.nytimes.com/2008/02/29/world/africa/29kenya.html>.

<sup>200</sup> L. Muthoni Wanyeki, *The International Criminal Court's Cases in Kenya: Origin and Impact*, INST. SECURITY STUD., no. 237, Aug. 2012, at 5.

<sup>201</sup> *Kenya: Mediation is Making Progress - Kofi Annan*, RELIEFWEB (Feb. 15, 2008), <http://reliefweb.int/report/kenya/kenya-mediation-making-progress-kofi-anna-n>.

<sup>202</sup> NANA EFFAH-APENTENG, ET AL., BACK FROM THE BRINK: THE 2008 MEDIATION PROCESS AND REFORMS IN KENYA 5 (2014), [http://www.knchr.org/Portals/0/GeneralReports/backFromBrink\\_web.pdf](http://www.knchr.org/Portals/0/GeneralReports/backFromBrink_web.pdf).

<sup>203</sup> See Mike Sunderland, *Kofi Annan Warns of Return to Violence in Kenya*, VOA NEWS (Dec. 9, 2009, 4:58 AM), <http://www.voanews.com/content/kofi-annan-violence-kenya-08dec09--78874397/416289.html> (noting that the Kenyan government released a draft of a new constitution to the public in November 2009).

<sup>204</sup> Jeffrey Gettleman, *Kenans Approve New Constitution*, N.Y. TIMES (Aug. 5, 2010), <http://www.nytimes.com/2010/08/06/world/africa/06kenya.html>. For a copy of Kenya's 2010 constitution, see *Constitution of Kenya, 2010*, KENYA LAW,

passed the International Crimes Act, which incorporated the definition of international crimes from the ICC into its domestic laws.<sup>205</sup> This development is positive, as it means that Kenya can then prosecute domestically any individuals who commit genocide, crimes against humanity, or war crimes.

As above, the question then is what role, if any, did the ICC play in producing these positive reforms? According to some of our interviewees, the answer is that the 2010 constitution can, in part, be attributed to ICC involvement. Interviewees stated that government leaders may have pushed more for a new constitution because they believed that it would help them persuade the ICC to go away.<sup>206</sup> One interviewee even argued that the government rushed the constitution through in an attempt to protect itself and its close allies from ICC prosecution.<sup>207</sup> And as discussed in more detail below, Kenya has argued that the Kenyan cases were not admissible before the ICC because the country had improved its own courts and was able to try the suspects under the new International Crimes Act.<sup>208</sup>

On the negative side, although Kenya implemented some institutional reforms on paper, the country did not alter its previous practice of allowing impunity for mass atrocities. As part of the mediation process following the post-election violence, the Kenyan government established the Commission of Inquiry to Investigate the Post-Election Violence (“CIPEV”), also known as the Waki Commission.<sup>209</sup> The Waki Commission released its report in October 2008, wherein it recommended establishing a Special Tribunal in Kenya with judges from Kenya and from the international community to investigate and prosecute

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<http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> (last visited Aug. 8, 2017).

<sup>205</sup> Okuta, *supra* note 163, at 1072–73.

<sup>206</sup> Interview with Subject 692, 951.

<sup>207</sup> Interview with Subject 234.

<sup>208</sup> See *Prosecutor v. Ruto*, Case Nos. ICC-01/09-01/11, ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ¶ 25 (Mar. 31, 2011).

<sup>209</sup> The Waki Commission got its name after its Chair, Justice Philip Waki, a judge on Kenya’s Court of Appeals. The Waki Commission included two other commissioners: Mr. Gavin McFadyen from New Zealand and Mr. Pascal Kambale from the Democratic Republic of the Congo. Additionally, “[t]wo Kenyans, Mr. David Majanja and Mr. George Kegoro, were appointed the Counsel Assisting the Commission and Commission Secretary,” respectively. Waki Commission Report, *supra* note 161, at 1.

responsible individuals.<sup>210</sup> The Kenyan government, however, did not implement the Commission's recommendations.<sup>211</sup> It never established a Special Tribunal, even though it was given several extensions of the original deadline to do so.<sup>212</sup> Nor did it institute any other domestic proceedings to bring perpetrators to justice.<sup>213</sup> Finally, in late July 2009, the Kenyan government issued a statement saying that the cabinet had rejected the idea of setting up a Special Tribunal and decided instead to permit the Truth Justice and Reconciliation Commission ("TJRC") to deal with perpetrators of the post-election violence.<sup>214</sup>

Kenya created the TJRC in 2008 as part of the process immediately following the post-election violence. The Commission's mandate, though, was to investigate abuses from 1963 onward. The TJRC has taken witness statements. As of December 2014, the government had not implemented any of the TJRC's recommendations.<sup>215</sup>

Accordingly, during this preliminary examination phase, the evidence still suggests that Kenya was not committed to holding anyone accountable for the post-election violence. The evidence also indicates that the country did not fear the ICC enough to actually implement domestic processes to try those responsible

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<sup>210</sup> *See id.* at 472.

<sup>211</sup> *See* Brown & Sriram, *supra* note 138, at 250 ("It is only a small exaggeration to claim that no commission of inquiry in Kenya has ever led to anything beyond a report.").

<sup>212</sup> *See, e.g.*, Jeffrey Gettleman, *Under Wraps, Kenya's Bill for Bloodshed Nears Payment*, N.Y. TIMES (July 16, 2009), <http://www.nytimes.com/2009/07/16/world/africa/16kenya.html> (describing Parliament's July 2009 rejection of a bill to establish a Special Tribunal); Hansen, *supra* note 182, at 193 (noting that the Kenyan Parliament failed several times to create the Special Tribunal).

<sup>213</sup> *See* Prosecutor v. Ruto, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), ¶¶ 183–86, <https://www.icc-cpi.int/pages/record.aspx?uri=854287> (concluding that Kenya had not commenced any investigations or prosecutions of those most responsible for the violence).

<sup>214</sup> HUMAN RIGHTS WATCH, "TURNING PEBBLES": EVADING ACCOUNTABILITY FOR POST-ELECTION VIOLENCE IN KENYA 23 (Dec. 2011), [https://www.hrw.org/sites/default/files/reports/kenya1211webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf). The government, however, said confusingly that the cabinet's decision did not "reduce its desire to punish impunity." Government of Kenya, *Kenya: Cabinet Decides on TJRC*, RELIEFWEB (July 30, 2009), [reliefweb.int/report/kenya/kenya-cabinet-decides-tjrc](http://reliefweb.int/report/kenya/kenya-cabinet-decides-tjrc).

<sup>215</sup> INTERNATIONAL FEDERATION FOR HUMAN RIGHTS & KENYA HUMAN RIGHTS COMMISSION, ONE YEAR IN OFFICE FOR UHURU KENYATTA AND WILLIAM RUTO 15 (Feb. 2014), <https://www.fidh.org/IMG/pdf/kenya631a2014bassdef.pdf> [hereinafter ONE YEAR IN OFFICE].

for the violence in 2007 or 2008. This conclusion is consistent with the views shared by some of our interviewees. Several stated that before the ICC published the names of the suspects, people saw the ICC as an empty threat and a court with no teeth,<sup>216</sup> referring to Ruto's comment that "the court would take some 90 years or more before it does anything."<sup>217</sup>

In fact, the evidence shows that Kenya's leaders may have believed they could endlessly stall the ICC so that it would not act. The ICC prosecutor repeatedly warned Kenyan leaders during 2009 that impunity was not an option and that the ICC would intervene if Kenya did not establish a Special Tribunal.<sup>218</sup> The Kenyan government responded by repeatedly failing to create the tribunal. Kenyan leaders also made promises that they did not keep. In July 2009, Kenyan leaders told the ICC prosecutor that they would self-refer the situation to the ICC in the event that the Special Tribunal was not created.<sup>219</sup> They never did so, and the prosecutor instead used his *proprio motu* powers—the prosecutor's power in the Rome Statute to commence cases on his own motion to the court without referral from a State Party or the U.N. Security Council—to mount the Kenya cases.<sup>220</sup> Kibaki and Odinga also reportedly agreed that any individuals named as ICC suspects would be expelled from government. Yet they never forced any of the suspects out.<sup>221</sup>

On the other hand, Kenyan leaders may have viewed creating a Special Tribunal as a move that could prove extremely threatening to themselves and their allies. As Brown and Sriram

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<sup>216</sup> Interview with Subject 338, 349, 475.

<sup>217</sup> Interview with Subject 391, 444.

<sup>218</sup> See ICC OTP, *ICC Prosecutor Reaffirms That the Situation in Kenya is Monitored By His Office* (Feb. 11, 2009), <http://www.icc-cpi.int/NR/rdonlyres/06455318-783E-403B-8C9F-8E2056720C15/279793/KenyaOTPubliccommunication20090211.pdf> (stating that the Office of the Prosecutor is monitoring the Kenya situation while the Kenyan Parliament debates potentially establishing a Special Tribunal); see also Press Release, ICC OTP, ICC-Kenya High-Level Delegation meets ICC Prosecutor (July 3, 2009), <https://www.icc-cpi.int/Pages/item.aspx?name=pr431>.

<sup>219</sup> See Press Release, ICC OTP, ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya (Sept. 30, 2009), <https://www.icc-cpi.int/Pages/item.aspx?name=pr456>.

<sup>220</sup> See, e.g., ICC OTP, *The Post-Election Violence and Mediation* ¶ 10, <https://www.icc-cpi.int/NR/rdonlyres/26D853E3-83A6-45F1-BEE9-8B64E3723C55/0/BackgroundNoteKenyaJanuary2012.pdf> (last visited Aug. 8, 2017); *Prosecutor to Ask for ICC Investigation*, RFI (Nov. 5, 2009), [http://www1.rfi.fr/actuen/articles/119/article\\_5766.asp](http://www1.rfi.fr/actuen/articles/119/article_5766.asp).

<sup>221</sup> Interview with Subject 391.

state, “[W]hereas the Special Tribunal could prosecute hundreds of suspects, the ICC could only pursue a half-dozen perpetrators at the highest level.”<sup>222</sup> Thus, before the ICC prosecutor named suspects, some parliamentarians could reasonably believe the ICC would not target them because they were not “big fish.”<sup>223</sup> In other words, the ICC might pose a threat to some individuals in Kenya, but not to all of the parliamentarians who had to vote for a bill to establish the Special Tribunal. Brown and Sriram argue that some parliamentarians might have believed at that time before names were revealed that the ICC could be “useful in removing [their] political rivals.”<sup>224</sup> A former executive director of the Kenyan Human Rights Commission makes a similar point, stating that parliamentarians voted down the Special Tribunal because they only wanted accountability for their opponents, not for members of their own political party.<sup>225</sup>

## 2. Assessing the Social Deterrent Effect

During the ICC’s preliminary examination phase, the facts show that both the international and domestic community were calling for Kenya to end the post-election violence and introduce reforms and other processes to ensure that perpetrators of the violence were held accountable. As described above, the mediation process led by Kofi Annan and backed by the international and domestic communities seems to have contributed to the cessation of the violence and some institutional reforms.

Still, Kenyan leaders ignored the numerous calls to end the country’s cycle of impunity. In December 2008, the U.S. Ambassador to Kenya said that his government would welcome a request to provide investigative experts for a Special Tribunal.<sup>226</sup> In December 2009, Kofi Annan publicly complained about the slow pace of reforms in Kenya to address the post-election violence.<sup>227</sup> Kenya’s section of the International Commission of Jurists issued a letter in July 2009 urging Kenya to establish a

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<sup>222</sup> Brown & Sriram, *supra* note 138, at 253.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Wanyeki, *supra* note 200, at 9.

<sup>226</sup> *US To Support Kenya’s Post-election Violence Special Tribunal*, AFRIK NEWS (Dec. 10, 2008), <http://www.afrik-news.com/article15021.html>.

<sup>227</sup> *See* Sunderland, *supra* note 203.

Special Tribunal that would be beyond the reach of Kenya's Attorney General, who the jurists alleged uses his powers to keep his political friends from being brought to justice in Kenya's domestic courts.<sup>228</sup> In August 2009, Human Rights Watch called for Kenya to immediately establish a Special Tribunal.<sup>229</sup> The Kenyan Civil Society has also complained about the cabinet's decision to abandon the process towards creating a Special Tribunal.<sup>230</sup>

On the whole, then, there is a lack of evidence to support a social deterrent effect during this time period because ultimately Kenya did not embrace any of the proposed structural changes or normative changes, such as new and more independent institutions designed to enable it to hold perpetrators of the violence accountable. Kenyan leaders refused to establish the Special Tribunal. Moreover, Kenyan leaders did not embrace an international accountability process; although Kenya agreed to refer the situation to the ICC, its leaders did not do so.

*C. Naming of Suspects Until the ICC Prosecutor Suspends the Case Against Kenyatta*

1. Assessing the ICC's Legal Deterrent Effect at the Prosecution Level of Intervention

In December 2010, the ICC again increased its level of intervention in Kenya: It began investigating and prosecuting specific suspects. In December 2010, the then-ICC prosecutor shared with the press the names of the six prominent Kenyans who he said would be charged with crimes against humanity because they bore the greatest responsibility for the violence.<sup>231</sup>

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<sup>228</sup> Press Release, Wilfred Nderitu, Chairman, ICJ Kenya, Press Statement by the ICJ Kenya on the Establishment of the Special Tribunal for Kenya, ICJ Kenya (July 10, 2009), [https://www.iccnw.org/documents/ICJ\\_Press\\_Statement.\\_STK.\\_Mombasa.pdf](https://www.iccnw.org/documents/ICJ_Press_Statement._STK._Mombasa.pdf).

<sup>229</sup> Noor Khamis, *Kenya: Deliver Justice for Victims of Post-Election Violence*, HUM. RTS. WATCH (Aug. 3, 2009, 4:01 AM), <https://www.hrw.org/news/2009/08/03/kenya-deliver-justice-victims-post-election-violence>.

<sup>230</sup> Kenyans for Peace with Truth and Justice, *KPTJ Statement on Cabinet Calls for Special Tribunal* (Dec. 15, 2010), <https://kenyastockholm.com/2010/12/15/kptj-statement-on-cabinet-calls-for-special-tribunal>.

<sup>231</sup> See Kariuki & Mathenge, *supra* note 19.

In March 2011, the ICC issued summonses for six prominent Kenyans—three each from Kibaki's and Odinga's political parties.<sup>232</sup>

According to the ICC prosecutor's charges filed in 2010, William Ruto, the former Minister of Higher Education, Science and Technology and current Deputy President, Henry Kosgey, Minister of Industrialization, and Joshua arap Sang, Head of Operations at Kass FM, allegedly worked together to prepare a criminal plan to attack members of the PNU. The charges state they implemented the plan immediately after the announcement of the election results declaring Kibaki president. Specifically, they mobilized perpetrators to attack PNU supporters, which the perpetrators did by burning homes and buildings and killing civilians. The prosecutor charged that Uhuru Kenyatta, former Deputy Prime Minister, Francis Muthaura, former Secretary to the Cabinet, and Mohammad Ali, former Commissioner of the Kenyan Police, responded to the attacks on PNU supporters by developing and executing a plan to attack perceived ODM supporters in order to keep the PNU in power. Among other things, the charges state that Kenyatta facilitated a plan whereby pro-PNU youth, including members of the Mungiki, were employed to attack ODM civilian supporters in the Nakuru and Naivasha districts of Kenya—attacks that left some 150 ODM supporters dead.<sup>233</sup> On January 23, 2012, the Pre-Trial Chamber confirmed charges against four out of the six individuals, but it refused to confirm charges against Kosgey and Ali because the prosecutor had not met the necessary evidentiary threshold for proceeding.<sup>234</sup>

Above, we set out our reasons for expecting that an increased level of intervention by the ICC should generally produce a deterrent effect. We argued that increasing the ICC's level of intervention increases the costs, making it more likely that the

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<sup>232</sup> See Press Release, ICC OTP, Kenya's Post Election Violence: ICC Prosecutor Presents Cases against Six Individuals for Crimes against Humanity (Dec. 15, 2010), <https://www.icc-cpi.int/legalAidConsultations?name=pr615>.

<sup>233</sup> See *Prosecutor v. Ruto*, Case No. ICC-01/09, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, ¶¶ 1–3 (Dec. 15, 2010).

<sup>234</sup> *Id.* ¶¶ 110, 138, 152; see also Tom Maliti, *ICC Confirms Charges Against Four Out of Six Kenyan Suspects*, INT'L JUST. MONITOR (Jan. 23, 2012), <http://www.ijmonitor.org/2012/01/icc-confirms-charges-against-four-out-of-six-kenyan-suspects>.

ICC can legally dissuade individuals from committing crimes and persuade the government to institute measures of domestic accountability. In such cases, the ICC has demonstrated an ability to act, and the rational actor should refrain from committing any obvious bad acts that might attract additional attention from the ICC. At the same time, we also hypothesized that a very high level of ICC intervention may also produce an unintended or perverse effect when it directly threatens leaders seeking to hold or gain power. Under these circumstances, state leaders in non-democracies or unconsolidated democracies may conclude that there is little reason to refrain from committing abuses that can aid them in their bid for power.

a. *Evidence Regarding Mass Atrocities and Other Human Rights Abuses*

During this investigation phase, the evidence does show a reduction in mass atrocities in that Kenya's 2013 presidential elections were relatively peaceful.<sup>235</sup> Further, the evidence indicates that the ICC's intervention likely played a role in producing this outcome in two ways. First, in an effort to discredit the ICC and defeat opponent Raila Odinga,<sup>236</sup> ICC suspects and former political and ethnical rivals, Kenyatta and Ruto, created the Jubilee Coalition so that they could run for president and deputy president, respectively, in Kenya's 2013 elections.<sup>237</sup> This may have mitigated tensions between different ethnic groups. Numerous interviewees confirmed that the ICC was the impetus for this unusual alliance. Others said that the ICC involvement triggered the Jubilee Coalition, which in turn may have contributed to more peaceful elections.<sup>238</sup> Some interviewees even argued that the ICC provided inspiration for the coalition: "[Kenyatta and Ruto] were coming together to defeat ICC"<sup>239</sup> and "[t]he ICC was the glue."<sup>240</sup>

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<sup>235</sup> See Mueller, *Kenya and the ICC*, *supra* note 169, at 25.

<sup>236</sup> See, e.g., Sara Kendall, 'UhuRuto' and Other Leviathans: *The International Criminal Court and the Kenyan Political Order*, 7 AFR. J. LEG. STUD. 399, 409 (2014).

<sup>237</sup> See Mueller, *Kenya and the ICC*, *supra* note 169, at 35 (suggesting that the Jubilee Coalition understood that political power was important to avoid ICC prosecution).

<sup>238</sup> Interview with Subject 462, 582, 859.

<sup>239</sup> Interview with Subject 618, 582, 338.

<sup>240</sup> Interview with Subject 692.

A review of the Jubilee Coalition's campaign rhetoric further confirms that the ICC cases pushed Kenyatta and Ruto together. Kenyatta and Ruto turned the election into a referendum against the ICC by using slogans such as (1) "[a] vote for us is a vote of no confidence in the ICC," used by Kenyatta and (2) "[p]residential victory for the Jubilee Alliance may indicate there is something wrong with the charges its two leaders are facing at The Hague," used by Ruto.<sup>241</sup> Other campaign messages cast the ICC in a negative light: the court was biased against Africa, it did not investigate thoroughly, and it constituted an act of neo-colonialism.<sup>242</sup> Their anti-ICC rhetoric did not stop there. They also focused their sights on their political opponent for the presidency, Raila Odinga. According to statements of the Jubilee Coalition, Odinga was actually guilty of committing crimes during the 2007 post-election violence and was only voicing support for the ICC in his campaign because he wanted to get rid of Kenyatta and Ruto as political opponents, not because he actually believed in the ICC and its norms.<sup>243</sup>

In addition, the ICC apparently played a role in causing Kenyatta and Ruto to campaign in a way that did not incite ethnic violence. In fact, in 2011, an ICC presiding judge told the two ICC suspects during a court appearance that she had read "newspaper reports to the effect that some of the suspects are engaging in hate speech which could occasion fresh chaos" and that such speeches "could be interpreted as inducement to violate the conditions set by the court and which include that the suspects should not commit fresh crimes within the jurisdiction of the court."<sup>244</sup> The court warned that it was prepared to issue new arrest warrants if the evidence showed that candidates were preaching hatred. While direct causation is difficult to establish, the candidates did begin preaching peace and reconciliation after

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<sup>241</sup> Pheroze Nowrojee, *The March 4 Polls and the ICC Cases*, THE STAR (KENYA) (Feb. 6, 2013, 12:00 AM), [http://www.the-star.co.ke/news/2013/02/06/the-march-4-polls-and-the-icc-cases\\_c734975](http://www.the-star.co.ke/news/2013/02/06/the-march-4-polls-and-the-icc-cases_c734975).

<sup>242</sup> Gabrielle Lynch, *Electing the 'Alliance of the Accused': The Success of the Jubilee Alliance in Kenya's Rift Valley*, 8 J. E. AFR. STUD. 93, 105 (2014).

<sup>243</sup> See Mueller, *Kenya and the ICC*, *supra* note 169, at 35.

<sup>244</sup> Nzau Musau, *Kenya: ICC Warns Ocampo 6 Over Hate Speech*, THE STAR (NAIROBI) (Apr. 8, 2011), <http://allafrica.com/stories/201104080928.html>.

this warning.<sup>245</sup> The week before the 2013 elections, Kenyatta and Ruto even joined together with opponent Odinga to hold a prayer rally to promote non-violent elections.<sup>246</sup>

Preaching peace, instead of inter-ethnic violence, during presidential election campaigns was a rather new phenomenon. Kenya has a winner-takes-all system that gives winning candidates unchallenged access to public office and ability to control the distribution of state resources.<sup>247</sup> The benefits associated with obtaining a leadership position in Kenya's government are so high that politicians and their constituencies have been willing to resort to violence to win.<sup>248</sup> Additionally, Kenya's political leaders represent and advance the interests of their ethnic group because the country's political parties are based on ethnicity.<sup>249</sup> This means that the ethnic groups whose leaders lose the elections will most likely be denied full access to important resources, jobs, income, and healthcare until the next political transition.<sup>250</sup> In Kenya, electing a new president becomes a highly charged competition for ethnic supremacy.<sup>251</sup>

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<sup>245</sup> Peter Leftie, *Uhuru and Ruto Vow to Preach Peace*, DAILY NATION (Apr. 11, 2011), <http://www.nation.co.ke/news/politics/Uhuru-and-Ruto-vow-to-preach-peace/-/1064/1142960/-/7hklm3/-/index.html> (noting that the leaders' message of peace was a strong break from the combative statements the two had made before their initial appearance in The Hague the week before).

<sup>246</sup> Simon Ndonga, *Kenyan Presidential Candidates Promise Peaceful Election*, AFRICA – NEWS AND ANALYSIS (Feb. 25, 2013), <http://africajournalismtheworld.com/tag/kenyatta-promises-peaceful-election/>.

<sup>247</sup> See Mueller, *Dying to Win*, *supra* note 141, at 105 (stating that electing a fellow ethnic politician as president who controls the state would allow the ethnic group to gain access to state resources and positions); Fred Jonyo, *The Centrality of Ethnicity in Kenya's Political Transition*, in *THE POLITICS OF TRANSITION IN KENYA: FROM KANU TO NARC* 166 (Walter O. Oyugi, et al. eds., 2003) (stating that the ethnic groups whose leaders lose the elections will be discriminated against and denied access to resources); JAMES NDUNG'U & MANASSEH WEPUNDI, *TRANSITION AND REFORM: PEOPLE'S PEACEMAKING PERSPECTIVES ON KENYA'S POST-2008 POLITICAL CRISIS AND LESSONS FOR THE FUTURE* 1 (Mar. 2012) (stating that one factor that explains the violence in Kenya is the skewed allocation of state positions and resources by political leaders).

<sup>248</sup> Mueller, *Dying to Win*, *supra* note 141, at 105.

<sup>249</sup> See Steeves, *supra* note 160, at 462; Mueller, *Dying to Win*, *supra* note 141, at 104.

<sup>250</sup> Jonyo, *supra* note 247, at 166. This pattern of behavior is well entrenched. Jomo Kenyatta favored his own people, the Kikuyu, and allowed family and allies to acquire extensive land in the fertile Rift Valley. His successor, Moi, gave members of his ethnic community, the Kalenjin, positions in the army, police and civil service. Mwai Kibaki, who took office in 2002, followed in his predecessors' footsteps and excluded ethnic groups other than Kikuyu from the distribution of benefits. See

But 2013 was different, and numerous interviewees noted the break with the past. One interviewee stated that Kenyatta, Ruto, and other politicians chose their words more carefully than in the past since they knew the ICC was watching; they did not want to be accused of saying anything that seemed to incite violence. Several mentioned that in the 2013 presidential campaign, unlike the campaigns of the past, the candidates were careful not to be seen with any military gangs—apparently in the past, candidates gave speeches with military gangs carrying weapons in the background as a show of force.<sup>252</sup> According to a member of a non-governmental organization, Kenyan civil society used the fact of the ICC's presence to remind candidates that if they said anything that incited violence, it would put them at greater risk with the ICC.<sup>253</sup> Another interviewee even argued that Kenyatta and Ruto refrained from inciting violence during the 2013 elections as this could provide evidence for them to suggest that they also did not incite violence during the 2007 elections.<sup>254</sup>

Consistent with our expectations, the ICC's increased level of intervention seems to have produced some deterrent effect in the form of more peaceful elections in 2013. That result makes sense from a rational cost-benefit standpoint. Kenyan leaders knew that the ICC was watching them, and interview evidence indicates that leaders had altered their views about the threat posed by the ICC. Kenyan politicians could no longer "play the games" they did with the domestic justice system and "could not unduly influence the ICC prosecutor or the ICC judges to rule in their favors."<sup>255</sup> Indeed, the ICC's powers were sufficient to convince the Kenyan suspects to voluntarily appear in The Hague in 2011 to answer the charges against them.<sup>256</sup> And

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Thomas G. Weiss, *Halting Atrocities in Kenya*, GREAT DECISIONS 17 (Dec. 21, 2010), <http://www.globalr2p.org/media/files/kenya-fpa-weiss.pdf>.

<sup>251</sup> See Steeves, *supra* note 160, at 455.

<sup>252</sup> Interview with Subject 582, 391, 859.

<sup>253</sup> Interview with Subject 333 (stating that civil society also embraced the ICC as a tool to keep Kenyan politicians in check).

<sup>254</sup> Interview with Subject 417.

<sup>255</sup> Interview with Subject 568, 724.

<sup>256</sup> CNN Wire Staff, *Kenyans at The Hague on 'Crimes Against Humanity' Charges*, CNN (Apr. 8, 2011, 6:15 AM), <http://www.cnn.com/2011/WORLD/africa/0-4/07/kenya.international.court/index.html> (noting that three suspects were in The Hague for their first appearance and that the other three would be appearing shortly thereafter); *see also* interview with Subject 724.

individuals we interviewed did say having their leaders summoned to The Hague sent a powerful message about the accountability of their leaders. The ICC reportedly contributed to the “demystification” of the power of a sitting president.<sup>257</sup> One interviewee said that the moment that the ICC prosecutor announced the names of the suspects was a “game changer”.<sup>258</sup> Another interviewee argued that up until this point people thought it would just be “business as usual,”<sup>259</sup> however, when the names were presented, Kenyans changed their perceptions about justice since the “untouchables could now be touched.”<sup>260</sup>

On the other hand, the evidence shows that the ICC’s increased level of intervention has also produced an unintended or perverse effect. While the threat increased the cost side of the equation, it also seems to have caused influential state actors to even more highly value power and to take steps to ensure they could obtain or hold on to power. They did not commit obvious crimes: Kenyatta and Ruto were careful to preach peace after the ICC judge warned that additional charges would be forthcoming if the evidence showed the leaders were preaching hate. But as the trials grew nearer, so too did reports that state leaders were interfering with the ICC’s witnesses.

The OTP dropped its case against Muthaura in March 2013 after one key witness against that defendant admitted to receiving bribes and lying to the court.<sup>261</sup> In May 2013, the ICC prosecutor informed the ICC judges that prosecution witnesses in the Kenyatta and Ruto cases had reported being targeted by Kenyan government officials seeking to influence their testimony.<sup>262</sup> Although the suspects in the Kenya cases deny that they have played any part in having witnesses bribed, the ICC

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<sup>257</sup> Interview with Subject 576.

<sup>258</sup> Interview with Subject 234, 568, 475.

<sup>259</sup> Interview with Subject 568.

<sup>260</sup> Interview with Subject 859, 591.

<sup>261</sup> See, e.g., ALL BARK NO BITE? STATE COOPERATION AND THE INTERNATIONAL CRIMINAL COURT, KENYANS FOR PEACE WITH TRUTH AND JUSTICE 11 (Dec. 2014) [hereinafter ALL BARK NO BITE?]; Bernard Momanyi & Simon Jennings, *Kenya Witnesses Face Harassment*, GLOBAL VOICES AFRICA (June 5, 2013), <https://iwpr.net/global-voices/kenya-witnesses-face-harassment>.

<sup>262</sup> See Momanyi & Jennings, *supra* note 261.

did issue an arrest warrant for Kenyan journalist, Walter Barasa, for allegedly furthering a bribery scheme devised by a circle of officials within the Kenyan administration.<sup>263</sup>

Witness interference has gone beyond offering bribes. In 2013, twelve witnesses who were scheduled to testify in the trial against Ruto and Sang said they had received persistent threats to their safety warning them of participating in the trial.<sup>264</sup> In early 2014, the OTP withdrew from its witness list several witnesses against Kenyatta who were “concerned that testifying against Mr. Kenyatta would expose them or their families to retaliation.”<sup>265</sup> According to the OTP, the Kenyan government led by Kenyatta and Ruto was not doing its part to put an end to the pervasive practice of witness tampering.<sup>266</sup> Ultimately, so many witnesses backed out from testifying at the ICC because of witness interference<sup>267</sup> that the OTP dropped its cases against Muthaura and Kenyatta.<sup>268</sup>

Individuals we interviewed said they believed the OTP's claims that the Kenyan government had interfered with witnesses. One said that it is to be expected that a government would not turn over evidence against itself.<sup>269</sup> Another said that some portion of the Kenyan public thinks that Kenyatta, Ruto,

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<sup>263</sup> *ICC Seeks Walter Barasa Arrest for Kenya 'Witness Tampering'*, BBC NEWS (Oct. 2, 2013), <http://www.bbc.com/news/world-africa-24364778>.

<sup>264</sup> See IWPR Contributors, *Further Threats to ICC's Kenya Witnesses*, GLOBAL VOICES AFRICA (Aug. 29, 2013), <https://iwpr.net/global-voices/further-threats-iccs-kenya-witnesses>.

<sup>265</sup> See ALL BARK NO BITE?, *supra* note 261, at 11–12; see also IWPR Contributors, *Further Threats to ICC's Kenya Witnesses*, *supra* note 264 (reporting that two witnesses had retracted their agreements to testify against Kenyatta and that other witnesses in the ICC cases are now dead).

<sup>266</sup> See IWPR Contributors, *Further Threats to ICC's Kenya Witnesses*, *supra* note 264.

<sup>267</sup> See Natalia Ojewski, *Uhuru Kenyatta's Trial: A Case Study in What's Wrong with the ICC*, GLOBAL POST (Feb. 6, 2014, 6:46 PM), <http://www.globalpost.com/dispatch/news/regions/africa/kenya/140206/uhuru-kenyattas-trial-case-study-whats-wrong-the-icc> (quoting the ICC Prosecutor as saying that the scale of witness interference in the Kenya cases was unprecedented).

<sup>268</sup> Marlise Simons & Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest*, N.Y. TIMES (Dec. 5, 2014), <https://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html> [hereinafter Simons & Gettleman, *International Court*]; Press Release, ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta (Dec. 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>.

<sup>269</sup> Interview with Subject 417.

and their supporters have been involved in threatening witnesses.<sup>270</sup> Finally, one interviewee said that although the Kenyan government is supposed to ensure that witnesses are protected, “no rational man would really want to testify against the president.”<sup>271</sup>

b. *Evidence Regarding Domestic Mechanisms To Punish Human Rights Abuses*

Despite its new constitution and judicial reforms, between 2010 and December 2014, the facts show that Kenya has made little or no effort to hold individuals accountable for the post-election violence.<sup>272</sup> As of early 2014, apparently only twenty-four suspects had been convicted in the more than 6,000 cases that had been pending for potential domestic prosecution.<sup>273</sup> Further, in February 2014, the Office of the Director of Public Prosecutions declared that it was dropping 4,000 cases because they were impossible to prosecute.<sup>274</sup> Likewise, many interviewees stated that the Kenyatta government had made it clear that it would not be seeking to prosecute perpetrators of the violence.<sup>275</sup> President Kenyatta’s State of the Nation address in early 2015 supports that conclusion. There, Kenyatta indicated that successful prosecutions would face difficulties due to “inadequate evidence, inability to identify perpetrators, witnesses [sic] fear of reprisals, and the general lack of technical and forensic capacity.”<sup>276</sup> He also confirmed as much, stating that national efforts would be restorative in nature, not retributive.<sup>277</sup>

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<sup>270</sup> Interview with Subject 582, 568.

<sup>271</sup> Interview with Subject 568.

<sup>272</sup> ONE YEAR IN OFFICE, *supra* note 215, at 14.

<sup>273</sup> *Id.*

<sup>274</sup> See Luke Moffett, *After the Collapse of the Kenyatta Case, How is the ICC Supposed To Help Victims?*, THE CONVERSATION (Dec. 10, 2014, 6:38 AM), <http://theconversation.com/after-the-collapse-of-the-kenyatta-case-how-is-the-icc-supposed-to-help-victims-34991>.U.N.

<sup>275</sup> Interview with Subject 333.

<sup>276</sup> Victor Tinto, *Full State of the Nation Address by President Uhuru Kenyatta*, NEWS24 KENYA (Mar. 26, 2015, 6:30 PM), <http://m.news24.com/Kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326>.

<sup>277</sup> *Id.*

During this same time period, Kenya's leaders have also refused to embrace the ICC processes as a mechanism to redress the harms suffered by the many victims of the violence.<sup>278</sup> Instead, Kenyan leaders have made numerous attempts to rid themselves of the ICC. Only a few days after the announcement of the names of the suspects in December 2010, the Kenyan government passed a motion to withdraw from the ICC<sup>279</sup>—even though polls at that time showed that most ordinary Kenyans supported having the cases tried in the ICC so that perpetrators of the violence would not enjoy impunity.<sup>280</sup> The Kenyan Parliament again voted to withdraw from the court in September 2013.<sup>281</sup> Further, a member of parliament submitted a resolution to repeal the 2008 International Crimes Act.<sup>282</sup>

In addition, Kenya has lobbied the international community and the ICC in an effort to have the cases halted.<sup>283</sup> In early 2011, Kenya was successful in its bid to get the African Union to back a request to have the ICC cases deferred so that Kenya could try the cases locally.<sup>284</sup> Kenya took that same request to the U.N. Security Council in 2011, but it was denied.<sup>285</sup> In 2013, the U.N. Security Council again rejected Kenya's bid to have it

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<sup>278</sup> See *Kenya President: International Criminal Court Not Impartial*, VOA NEWS (Dec. 12, 2016, 9:21 AM), <http://www.voanews.com/a/kenya-president-international-criminal-court-not-impartial/3632789.html>.

<sup>279</sup> Michael Onyiego, *Kenya's Politicians Look To Withdraw from ICC as Suspects Named*, VOA NEWS (Dec. 16, 2010), <http://www.voanews.com/a/kenyas-politicians-look-to-withdraw-from-icc-as-suspects-named-111998579/157058.html>; see *Kenya President: International Criminal Court Not Impartial*, supra note 278.

<sup>280</sup> James Verini, *The Prosecutor and the President*, N.Y. TIMES MAG. (June 22, 2016), <http://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html>.

<sup>281</sup> MG Zimeta, *What Kenya's Withdrawal Means for the International Criminal Court*, THE GUARDIAN (Sept. 6, 2013, 11:41 AM), <https://www.theguardian.com/commentisfree/2013/sep/06/kenya-withdrawal-icc-credibility>.

<sup>282</sup> See Mark Kersten, *The ICC and Kenya Parting Ways? What It Means and What It Doesn't*, JUSTICE IN CONFLICT (Sept. 5, 2013), <http://justiceinconflict.org/2013/09/05/icc-and-kenya-parting-ways-what-it-means-and-what-it-doesnt/> (referencing a motion to repeal the International Crimes Act).

<sup>283</sup> Michael Onyiego, *Kenya Seeks Another Way To Stall Hague Proceedings*, VOA NEWS (Mar. 20, 2011, 8:00 PM), <http://www.voanews.com/content/kenya-seeks-another-way-to-stall-hague-proceedings-118352894/136823>. [hereinafter Onyiego, *Kenya Seeks Another Way*].

<sup>284</sup> Michael Onyiego, *Criticism as Kenya Lobbies U.N. for ICC Deferral*, VOA NEWS (Mar. 6, 2011, 7:00 PM), <http://www.voanews.com/content/criticism-as-kenya-lobbies-un-for-icc-deferral-117527313/157598.html>.

<sup>285</sup> See *id.* (noting the AU's approval to seek deferral); Onyiego, *Kenya Seeks Another Way*, supra note 283.

intervene to halt the ICC cases.<sup>286</sup> In proceedings before the ICC itself, the Kenyan defendants challenged the ICC's jurisdiction claiming that Kenya should be permitted to try any cases domestically.<sup>287</sup> The ICC denied that motion on the grounds that there were no national proceedings involving the same crimes and the crimes met the threshold of gravity to fall within the court's jurisdiction.<sup>288</sup>

After Kenyatta and Ruto assumed their positions as president and deputy president, the evidence arguably supports a conclusion that the ICC's demonstrated threat to prosecute may have produced a perverse effect: It pushed the country's leaders into a corner, and they responded by taking actions to ensure that they would not be held accountable for any human rights abuses.<sup>289</sup> After gaining power in March 2013, Kenyatta and Ruto continued their campaign against the ICC.<sup>290</sup> They also used their position as leaders to assist those lobbying efforts.<sup>291</sup> They lobbied the African Union to urge the ICC against prosecuting heads of state. At the time the ICC brought its cases against Kenyatta and Ruto, they were not heads of state. Nevertheless, the African Union was persuaded, and in October 2013, it issued a call to halt the ICC case against Kenyatta and any sitting presidents going forward.<sup>292</sup>

Further, in a report that Kenyatta submitted to parliament together with his State of the Nation address in early 2015, he requested the parliament to act upon the resolution that was passed several years ago to break with the ICC:

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<sup>286</sup> See Michelle Nichols, *Africa Fails To Get Kenya ICC Trials Deferred at United Nations*, REUTERS (Nov. 15, 2013, 4:01 PM), <http://www.reuters.com/article/2013/11/15/us-kenya-icc-un-idUSBRE9AE0S420131115>.

<sup>287</sup> Onyiego, *Kenya Seeks Another Way*, *supra* note 283.

<sup>288</sup> Prosecutor v. Ruto, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 187, 198–00 (Mar. 31, 2010).

<sup>289</sup> See Verini, *supra* note 280.

<sup>290</sup> See Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya's William Ruto*, N.Y. TIMES (April 5, 2016), <http://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html> [hereinafter Simons & Gettleman, *ICC Drops Case*].

<sup>291</sup> See *id.*

<sup>292</sup> See *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC NEWS (Oct. 12, 2013), <http://www.bbc.com/news/world-africa-24506006>.

The National Executive is aware that the National Assembly of the 10th Parliament approved a resolution "To Suspend Any Links, Cooperation and Assistance" with the ICC. This position was subsequently affirmed by a Resolution of the National Assembly on 5th September, 2013 and by the Senate on 11th September, 2013 respectively. Parliament is urged to take such necessary measures to ensure the actualization of this resolution but to do so in a manner that respects our Constitutional Order.<sup>293</sup>

Finally, our interviews indicate that while the new constitution remains in place, the Kenyan government is nevertheless rolling back reforms contemplated by that document.<sup>294</sup> Kenyatta, for example, allegedly replaced individuals from the judiciary with those friendly to the establishment.<sup>295</sup> Documentary data and statements during interviews also indicate that Kenyatta is working to silence civil society.<sup>296</sup> According to Human Rights Watch, in 2011, Ruto told local NGOs to stop asking their foreign donors to support the ICC intervention and compiling reports about the post-election violence.<sup>297</sup> In addition, Kenyatta and Ruto branded all of Kenya's civil society as their enemies and as the pawns of foreigners<sup>298</sup> in response to a lawsuit brought by several local non-profits that argued the two should not be able to run for office because the ICC indictments showed that they did not meet new Constitutional requirements calling for public officials to have integrity.<sup>299</sup>

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<sup>293</sup> Tom Maliti, *Kenyan President and Attorney General Make Contradictory Statements on ICC*, INT'L JUST. MONITOR (May 13, 2015), <http://www.ijmonitor.org/2015/05/kenyan-president-and-attorney-general-make-contradictory-statements-on-icc/>.

<sup>294</sup> Interview with Subject 475.

<sup>295</sup> Interview with Subject 591.

<sup>296</sup> See Sara Bessell, *Kenyan Civil Society Under Threat*, HUMAN RIGHTS FIRST (Nov. 15, 2013), <http://www.humanrightsfirst.org/2013/11/15/kenyan-civil-society-under-threat>.

<sup>297</sup> See *Kenya: Rights Defenders Under Attack*, HUMAN RIGHTS WATCH (Oct. 4, 2013, 4:34 AM), <https://www.hrw.org/news/2013/10/04/kenya-rights-defenders-under-attack>.

<sup>298</sup> See *id.*

<sup>299</sup> See Jeffrey Gettleman, *Kenyan Court Rejects Suit Against Presidential Candidate*, N.Y. TIMES (Feb. 15, 2013), <http://www.nytimes.com/2013/02/16/world/africa/kenyan-court-rejects-suit-against-kenyattas-candidacy.html>.

The Kenyatta government also put forward a bill to limit foreign funding for NGOs in Kenya—which would mean that many could not continue to exist.<sup>300</sup> The bill was defeated, but the government has still deregistered some organizations, claiming, for example, that they were linked to terrorism.<sup>301</sup> Civil society is even under attack at the ICC. Kenyatta's and Ruto's lawyers have claimed that the ICC witnesses against them have been coached to lie by human rights activists in Kenya who receive backing from foreign donors.<sup>302</sup>

## 2. Assessing the Social Deterrent Effect

The evidence of a social deterrent effect during this time period again seems weak. The international community put significant pressure on Kenya leading up to the presidential elections. The United Kingdom, France, and the United States were all arguing against having Kenyatta and Ruto run for office and seemed to be backing Odinga.<sup>303</sup> Those countries stated publicly that they would cut off diplomatic relations with Kenya if the ICC indictees succeeded in their election campaign.<sup>304</sup> Johnnie Carson, a senior official in the U.S. State Department, went on record opposing the duo's campaign, stating "choices have consequences."<sup>305</sup> But all of the West's warnings seem to have fallen on deaf ears: Kenyatta and Ruto ran for office and

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<sup>300</sup> See Maina Kiai, *In Kenya, Averting a Move to Strangle Civil Society with the Financial Noose*, OPEN DEMOCRACY (Dec. 18, 2013), <https://www.opendemocracy.net/openglobalrights/maina-kiai/in-kenya-averting-move-to-strangle-civil-society-with-financial-noose>; see also interview with Subject 582.

<sup>301</sup> Interview with Subject 582, 822.

<sup>302</sup> See Walter Menya, *State Targeting US over Support for Hague Cases, Civil Society Protests*, DAILY NATION (Oct. 24, 2014), <http://www.nation.co.ke/news/politics/Civil-Society-ICC-Hague-Cases-Jubilee-Government/-/1064/2499628/-/kylkb4z/-/index.html>.

<sup>303</sup> Interview with Subject 338.

<sup>304</sup> See Stephen Brown & Rosalind Raddatz, *Dire Consequences or Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya*, 8 J. E. AFR. STUD. 43, 51, 53 (2014); see also Alex Perry, *Kenya's Election: What Uhuru Kenyatta's Victory Means for Africa*, TIME (March 9, 2013), <http://world.time.com/2013/03/09/kenyas-election-what-uhuru-kenyattas-victory-means-for-africa/>; Joint Report, *ICC: Are Kenya's Allies Ready To Abandon their Strategic Interests?*, THE EAST AFRICAN (Feb. 16, 2013, 6:08 PM), <http://www.theeastafrican.co.ke/news/Will-Kenya-Western-allies-abandon-strategic-interest/-/2558/1696134/-/jrnu0h/-/index.html>.

<sup>305</sup> See Gabe Joselow, *US Official Says Kenya's Elections Have 'Consequences'*, VOA NEWS (Feb. 7, 2013, 10:42 AM), <http://www.voanews.com/content/us-official-says-kenya-elections-have-consequences/1599063.html>.

won using a campaign strategy that billed the ICC as anti-African and a tool of the neo-colonialist West “to limit the control wielded by Kenya’s political elites.”<sup>306</sup> And they turned Carson’s statement against him, reportedly responding to this “Western interference” by stating “they said choices have consequences: we will show them.”<sup>307</sup> Not only did the international community’s “shaming” have no apparent effect, but also the West did not hold long to its threats about cutting off contact with Kenyan leaders. Notwithstanding that Kenyatta was still facing ICC charges, in 2013 and 2014, respectively, then-UK Prime Minister David Cameron and then-President Barack Obama welcomed Kenyatta to their countries.<sup>308</sup>

On the domestic side, the evidence also shows a push for accountability. The civil society organization, Kenyans for Peace with Truth and Justice, urged Kenyan leaders to bring to justice the perpetrators of the post-election violence.<sup>309</sup> Initially, the Kenyan public was pushing for trials in The Hague. In October 2010, before the ICC prosecutor released the names of the suspects, 68% of Kenyans supported the ICC. But Kenyan leaders opted for obstruction, rather than accountability,<sup>310</sup> and they reaped rewards for doing so: In March 2013, the populace chose Kenyatta and Ruto to govern. Further, it seems that the anti-ICC campaign strategy also worked. By mid-2013, support for the ICC had dropped to 39%—with only 7% of those polled in the Central Province and 24% of those polled in the Rift Valley supporting trials in The Hague.<sup>311</sup>

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<sup>306</sup> Interview with Subject 333; see Lynch, *supra* note 242, at 105.

<sup>307</sup> Interview with Subject 333.

<sup>308</sup> *Kenya's Uhuru Kenyatta To Meet UK's David Cameron*, BBC NEWS (May 6, 2013), <http://www.bbc.com/news/world-africa-22425869>; Jibril Adan, *President Obama Meets Kenyatta at White House Dinner, Says He is Proud of His African Roots*, THE STAR (KENYA) (Aug. 6, 2014, 12:00 AM), [http://www.the-star.co.ke/news/2014/08/06/president-obama-meets-kenyatta-at-white-house-dinner-says-he-is-proud\\_c983653](http://www.the-star.co.ke/news/2014/08/06/president-obama-meets-kenyatta-at-white-house-dinner-says-he-is-proud_c983653).

<sup>309</sup> TJRC FINAL REPORT – VERSION IV, TRUTH, JUSTICE AND RECONCILIATION COMMISSION 36 (2013), <http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1006&context=tjrc>.

<sup>310</sup> Ipsos Synovate *Confirmation Hearings Boost Support for ICC Process*, 2 (Nov. 4, 2011)

<sup>311</sup> *Id.*

*D. The Aftermath: Post-December 2014*

After the OTP withdrew the charges against Kenyatta, the Kenya cases included only Ruto and Sang.<sup>312</sup> After several delays, the ICC trial against the two defendants began on September 10, 2013.<sup>313</sup> The trial was suspended at the end of September 2013 to allow Ruto time to address a terrorist attack in Nairobi.<sup>314</sup> Proceedings against Ruto subsequently continued, but he successfully convinced the court to permit him to be absent. In early 2014, the Trial Chamber ruled that Ruto's presence would not be required except for key hearings, provided that a waiver is filed.<sup>315</sup>

As it had in the Kenyatta case, the ICC prosecutor also argued that it was facing problems with witness intimidation in its case against Ruto.<sup>316</sup> In late June 2015, ICC prosecutors reported that they had tapes of conversations indicating that persons purporting to act on behalf of Ruto were bribing and intimidating witnesses.<sup>317</sup> Although Ruto's lawyers denied the charges, the Trial Chamber was persuaded that the prosecutor's allegations of witness intimidation had some merit. The Trial

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<sup>312</sup> The OTP has issued arrest warrants for Walter Osapiri Barasa, a journalist, Philip Kipkoech Bett, and Paul Gicheru, a lawyer. See *Prosecutor v. Barasa*, Case No. ICC-01/09-01/13, Warrant of Arrest (Aug. 2, 2013), [https://www.icc-cpi.int/courtrecords/cr2013\\_06445.pdf](https://www.icc-cpi.int/courtrecords/cr2013_06445.pdf); see also *Prosecutor v. Gicheru*, Case No. ICC-01/09-01/15, Order Unsealing the Warrant of Arrest and Other Documents (Sept. 10, 2015).

<sup>313</sup> See Mike Corder, *Trial Starts for Kenya Deputy President Ruto*, YAHOO NEWS (Sept. 10, 2013), <http://news.yahoo.com/trial-starts-kenya-deputy-president-ruto-074906970.html>.

<sup>314</sup> *ICC Allows William Ruto To Leave Hague over Westgate Attack*, Daily Nation (Sept. 23, 2013), <http://www.nation.co.ke/news/politics/ICC-allows-William-Ruto-to-leave-Hague-over-Westgate-attack/1064-2003820-nchne3/index.html>.

<sup>315</sup> Press Release, ICC, Trial Chamber V(A) Conditionally Excuses William Samoei Ruto from Continuous Presence at the Trial Starting on 10 September 2013 (June 18, 2013), <https://www.icc-cpi.int/Pages/item.aspx?name=pr920&ln=en>.

<sup>316</sup> In fact, in March 2015, the ICC Pre-Trial Chamber II granted the ICC prosecutor's request to issue arrest warrants for two individuals for their alleged roles in corruptly inducing prosecution witnesses to withdraw as witnesses or recant their prior statements to the prosecutor. See Statement, ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Unsealing of Arrest Warrants in the Kenya Situation (Sep. 10, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>; see also *Prosecutor v. Gicheru*, Case No. ICC-01/09-01/15, Order Unsealing the Warrant of Arrest and Other Documents (Sept. 10, 2015).

<sup>317</sup> Judie Kaberia, *Prosecution Says it Has Evidence of Ruto ICC Witness Bribery*, CAPITAL NEWS (June 25, 2015, 4:09 PM), <http://www.capitalfm.co.ke/news/2015/06/prosecution-says-it-has-evidence-of-ruto-icc-witness-bribery/>.

Chamber ruled that the prosecutor would be permitted to admit the prior recorded testimonies of witnesses against Ruto in the trial inasmuch as the “element of systematicity of the interference of several witnesses in this case which gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings.”<sup>318</sup>

The OTP's case against Ruto was weakened in February 2016 when the ICC's Appeals Chamber reversed the Trial Court's decision on witness statements.<sup>319</sup> The Appeals Chamber concluded that the Trial Chamber incorrectly relied on Rule 68 of Rules of Procedure and Evidence to permit previously recorded witness statements to be introduced for the truth of their contents.<sup>320</sup> However, the Appeals Chamber noted that the relied-upon provisions in Rule 68 only came into force in November 2013—after the trial against Ruto and Sang had commenced.<sup>321</sup> The Appeals Chamber stated that applying that rule retroactively to the detriment of the accused would be improper.<sup>322</sup> Because of this decision, the ICC Trial Chamber would not be able to consider the recorded witness statements in making their determination on the Ruto and Sang case. Shortly after the Appeals Chamber's decision, in April 2016 an ICC Trial Chamber vacated the OTP's cases against both Ruto and Sang.<sup>323</sup>

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<sup>318</sup> Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony ¶ 60 (Aug. 19, 2015).

<sup>319</sup> See Walter Menya, *Big Win for Ruto as Judges Reject Recanted Evidence*, DAILY NATION (Feb. 13, 2016), <http://www.nation.co.ke/news/Big-win-for-Ruto-as-judges-reject-recanted-evidence/-/1056/3074470/-/eoydu0z/-/index.html> (“Deputy President William Ruto and Joshua arap Sang made a giant step towards acquittal of crimes against humanity charges after the International Criminal Court Appeals Chamber reversed the earlier decision that allowed the use of unsworn witness statements.”).

<sup>320</sup> Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Judgment on the Appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang Against the Decision of Trial Chamber v. (A) of 19 August 2015 Entitled Decision on Prosecution Request for Admission of Prior Recorded Testimony ¶ 3 (Feb. 12, 2016) (Rule 68 allows witness statements to be admitted in evidence against the accused where there is a finding of witness interference.).

<sup>321</sup> *Id.* ¶ 81.

<sup>322</sup> *Id.* ¶ 96; see also Tom Maliti, *Appeals Chamber Reverses Decision on Witness Statements*, INT'L JUST. MONITOR (Feb. 12, 2016), <http://www.ijmonitor.org/2016/02/appeals-chamber-reverses-decision-on-witness-statements/>.

<sup>323</sup> Simons & Gettleman, *ICC Drops Case*, *supra* note 290.

Characterizing the ICC's level of intervention up until late 2015 when our interviews in Kenya concluded presents an initial challenge before discussing any evidence of a deterrent effect or lack thereof. In one sense, the level of intervention is quite high as the ICC was proceeding with prosecutions against Ruto and Sang. It was demonstrating its willingness and ability to carry out the threat of prosecution that is relevant to the cost side of the deterrence calculus. Other evidence, though, shows a somewhat weakened ICC threat because of defeats the OTP suffered. The OTP was forced to drop its cases against Muthaura and Kenyatta—forced because Kenya allegedly obstructed the court's ability to gather evidence and convince witnesses to testify. Further, and related to the case against Ruto and Sang, although a trial court concluded that Ruto himself tampered with witnesses, the OTP then lost a legal battle. The outcome was that the OTP could not use recanted, but previously recorded witness statements, in its trial against Ruto and Sang.

Reaching definitive conclusions about whether the ICC produced a deterrent effect during this time period also poses a challenge given the fact that our interviews with high-level subjects in Kenya ended in October 2015. Our tentative conclusion is that even after the OTP suspended its case against Kenyatta, the ICC still had some power to deter.<sup>324</sup> After all, as stipulated by interviewees, the case against Kenyatta was only *suspended*, which technically means that the OTP can reopen it with new evidence.<sup>325</sup> In addition, interviewees said that the fact that the charges were still pending against Ruto in late 2015 played a role in keeping elites from orchestrating any ethnic violence. One interviewee specifically stated that the fact that the ICC was still pursuing Deputy President Ruto was “holding back political violence.”<sup>326</sup> Others said that the pending ICC cases continued to instill some level of fear in Kenyans and the notion that no one is above the law.<sup>327</sup> Yet, the interviewees did not necessarily view this absence of violence as permanent. Other interviewees hypothesized that “tensions may increase when people realize that perpetrators can just do whatever they want” and seem to be able “to go back and forth to The Hague”

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<sup>324</sup> Interview with Subject 568, 951.

<sup>325</sup> Interview with Subject 822, 859.

<sup>326</sup> Interview with Subject 576.

<sup>327</sup> Interview with Subject 568, 234, 219.

without any repercussions.<sup>328</sup> Another interviewee argued that the fact that “people [in Kenya] are praying for the suspects, and not for the victims” suggests that the ICC’s presence has not produced a lasting change in how people in Kenya view violence.<sup>329</sup>

Further, a number of interviewees said that they were not certain that the 2017 elections would be peaceful like the elections in 2013.<sup>330</sup> Many expressed the view that the outcome of the Ruto case could significantly impact the security situation in Kenya. Some believed that a Ruto conviction would harm the Jubilee Coalition, a coalition that was able to bring together two different ethnic groups that had previously done battle during elections.<sup>331</sup> Others went even further and cautiously predicted that a Ruto conviction could trigger ethnic violence.<sup>332</sup> An opinion poll echoes this sentiment, revealing that the majority of the population expected ethnic violence if the ICC did convict Ruto.<sup>333</sup> We heard reports of celebrations amongst the Kikuyu people when the ICC dropped its case against Kenyatta.<sup>334</sup> Ruto’s Kalenjin followers apparently believed that the ICC case against him should also be dropped. One interviewee recommended this way forward—dropping the Ruto case—so as to avoid any tensions.<sup>335</sup> Ruto’s supporters, in fact, have alleged that Kenyatta has abandoned Ruto, making him fight against the ICC on his own.<sup>336</sup> A quote by one governor in September 2015 is

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<sup>328</sup> Interview with Subject 234, 417.

<sup>329</sup> Prayer rallies were organized to support Ruto and Sang, with some controversy, as the Kenyan government allegedly has paid members of parliament to attend such rallies. Citizen Reporter, *Gov’t Paying MPs To Attend ICC Prayer Rallies - Wetangula*, CITIZEN DIGITAL (Oct. 21, 2015), <https://citizentv.co.ke/news/govt-paying-mps-to-attend-icc-prayer-rallies-wetangula-103690/>.

<sup>330</sup> Interview with Subject 475.

<sup>331</sup> Interview with Subject 349, 576, 475, 219, 951.

<sup>332</sup> Interview with Subject 719, 859, 444, 219.

<sup>333</sup> Kipchumba Some, *Survey: Kenyans Foresee ICC Conviction*, IPSOS (May 31, 2015) [http://www.ipsos.co.ke/NEWBASE\\_EXPORTS/Synovate/150531\\_The%20Standard%20on%20Sunday\\_6\\_99aae.pdf](http://www.ipsos.co.ke/NEWBASE_EXPORTS/Synovate/150531_The%20Standard%20on%20Sunday_6_99aae.pdf).

<sup>334</sup> Interview with Subject 333; see also Simons & Gettleman, *International Court*, *supra* note 268; see also Fredrick Nzwili, *Kenyans Rejoice at Collapse of ICC Case Against President Kenyatta*, CHRISTIAN SCIENCE MONITOR (Dec. 5, 2014) <http://www.csmonitor.com/World/Africa/2014/1205/Kenyans-rejoice-at-collapse-of-ICC-case-against-President-Kenyatta-video>.

<sup>335</sup> Interview with Subject 234.

<sup>336</sup> Silas Apollo, *Kalenjins To Weigh Support for Uhuru over Ruto ICC Case, Says Ruto*, DAILY NATION (Sept. 19, 2015), <http://www.nation.co.ke/news/politics/Uhuru-has-abandoned-his-deputy/-/1064/2877410/-/sel3bm/-/index.html>

illustrative: “We are still seeking answers as to why the deputy president still has a case at the ICC yet the President is a free man.”<sup>337</sup> Some allegations go further and accuse Kenyatta of “fixing” the evidence so that Ruto was brought before the ICC in the first place.<sup>338</sup> According to one submission: “We have no option to conclude that Uhuru Kenyatta did everything to get Ruto to The Hague and has done nothing to get Ruto out of The Hague.”<sup>339</sup> In other words, elites seem to be setting the stage for pitting one ethnicity against the other as they have done in the past when the stakes are high.

In sum, the evidence suggests some “at the moment” legal deterrent effect in that Kenya is not currently experiencing any ethnic violence. However, the evidence does not unequivocally show that the ICC’s intervention has caused people in Kenya to forever renounce violence or the threat of violence.

Finally, there is also little evidence suggesting any social deterrent effect during this time period. Telling is the fact that President Barack Obama visited Kenya in July 2015, meeting with President Kenyatta who had only recently been the subject of an ICC indictment for allegedly committing crimes against humanity.<sup>340</sup> George Kegoro, Executive Director of the Kenyan Section of the International Commission of Jurists, stated that Obama’s visit departs from the “choices have consequences” warning. It suggests that in fact “no choices have consequences.”<sup>341</sup> Kegoro further opined that the visit helped Kenya regain acceptance by the international community and move away from its pariah status.<sup>342</sup> Our interviewees made

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(quoting the governor Ruto saying that his people feel cheated by what they see as a lack of commitment by Kenyatta to help end the ICC case against Deputy President Ruto).

<sup>337</sup> *Id.*

<sup>338</sup> ODM, *The Ten Reasons ODM Believes Uhuru ‘Fixed’ Ruto at the ICC*, THE STAR (KENYA) (Oct. 9, 2015, 12:00 AM), [http://www.the-star.co.ke/news/2015/10/09/the-10-reasons-odm-believes-uhuru-fixed-ruto-at-icc\\_c1220865](http://www.the-star.co.ke/news/2015/10/09/the-10-reasons-odm-believes-uhuru-fixed-ruto-at-icc_c1220865).

<sup>339</sup> *Id.*

<sup>340</sup> *See Kenya—Kenyatta’s Agenda for Obama Visit*, THE NATION (July 22, 2015), <http://africajournalismtheworld.com/2015/07/22/kenya-kenyattas-agenda-for-obama-visit/> (noting the plan to have Obama meet with Deputy President Ruto as well).

<sup>341</sup> Interview with Subject 444; George Kegoro, *Presidents’ Circumstances Created Need That Made Visit Possible*, DAILY NATION (July 25, 2015), <http://www.nation.co.ke/oped/Opinion/Barack-Obama-Visit-Uhuru-Kenyatta-William-Ruto-ICC/-/440808/2808378/-/dmt8p2/-/index.html>.

<sup>342</sup> Kegoro, *supra* note 341.

similar points. They believed that Obama's visit to Kenya helped the Kenyan leadership to rehabilitate the country's image. The visit thus has had a "legitimizing force."<sup>343</sup>

#### CONCLUSION

This case study of Kenya's interactions with the ICC over time reveals the complexities of gauging the ICC's deterrent power and the need to have a greater understanding of how deterrence works and what factors influence whether and under what conditions the ICC should or should not be able to deter. We used a deep dive narrative with on-the-ground evidence from Kenya to "unpack" the ICC's deterrent effect. The Kenya case study has demonstrated that deterrence, or lack thereof, varies over time and as regards different actors in different situations. The evidence shows that ratification alone did not produce a deterrent effect, nor did it lead to a decrease in mass atrocities or an increase in domestic mechanisms available to punish abuses. On the other hand, the evidence showed that higher levels of ICC intervention, investigations and prosecutions, seem to have led to a decrease in mass atrocities.

Nonetheless, the evidence does not thus far show that the ICC has produced a lasting deterrent effect in Kenya: The evidence does not confirm normative change with respect to instrumentally inciting violence or permitting impunity. Kenyan leaders allegedly committed human rights abuses in order to make the ICC evidence against them go away. Moreover, interviewees did not say that large-scale violence was now something of the past. Nor did they indicate that a new era has begun in Kenya where elites would be held accountable for their role in committing mass violence. Several interviewees noted that Kenya seems to be back to "business as usual," as democratic reforms envisioned by the 2010 constitution have been reversed,<sup>344</sup> and ethnicity is again front and center in the election campaigns dividing the country and fueling tensions.<sup>345</sup>

The evidence gathered in this Kenya case study also reveals an issue for the ICC going forward regarding its ability to deter criminal behavior when its interventions focus on state leaders of

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<sup>343</sup> Interview with Subject 444.

<sup>344</sup> Interview with Subject 576.

<sup>345</sup> Interview with Subject 475, 219.

non-democracies or unconsolidated democracies. Often these are the very people who are able to control the state machinery and as a result are not only able to frustrate the domestic criminal process, but also the ICC process that relies heavily on state cooperation. This analysis is only a first step towards a greater understanding of the ICC's deterrent effect. Additional studies could help flesh out conditions that make it more likely that the ICC deters and produces the desired normative change and lasting deterrent effect, rather than an unintended or perverse effect. Since some of the Kenya cases were dropped due to lack of evidence, future research could focus on how the ICC may best collect evidence at the outset of a case and when government leaders may not expect that they would be indicted, and thus, be more cooperative. The use of plea agreements with cooperation provisions deserves further examination in this respect as well. In fact, the OTP has stated that it may start investigating some lower level perpetrators "in order to ultimately have a reasonable chance to convict the most responsible."<sup>346</sup> If the OTP has cooperating witnesses, then it should not have the same problems it has experienced in the Kenya cases with witnesses disappearing or recanting.

Reframing the debate by unpacking the deterrent effect of the court allows for a more nuanced understanding that is necessary to ensure that the ICC carries out its mandate in a way that makes it most likely to produce the desired norm change and lasting deterrent effect envisaged by the drafters of the Rome Statute.

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<sup>346</sup> ICC OTP, STRATEGIC PLAN JUNE 2012–2015 14 (Oct. 11, 2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>.