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Kenya and the International Criminal Court (ICC): politics, the election and the law

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Kenya's 2013 election was supremely important, but for a reason not normally highlighted or discussed. Uhuru Kenyatta and William Ruto's run for president and deputy president as International Criminal Court (ICC) indictees was a key strategy to deflect the court and to insulate themselves from its power once they won the election. The paper maintains that the strategy entailed a set of delaying tactics and other pressures to ensure that the trials would not take place until after the election when their political power could be used to maximum effect to halt or delay them. However, unlike in 2007–08, the 2013 election did not result in mass violence. The Kenyatta–Ruto alliance united former ethnic antagonists in a defensive reaction to the ICC. The analysis has implications for theories seeking to explain why countries ratify and comply with treaties. It develops an alternative political economy argument to account for outliers like Kenya and has implications for international criminal justice and democracy in Kenya.

Keywords: International Criminal Court (ICC); treaty ratification and compliance; international criminal justice; politics; elections; democracy; Kenya; political economy

Introduction

Why did Kenya initially join the International Criminal Court (ICC) but then attempt to undermine it once the ICC began to investigate the 2007–08 post-election violence (PEV) and its six alleged masterminds? And what does this have to do with Kenya's 2013 election? Political economy theories of treaty ratification offer no adequate answer. Instead, I advance an explanation related to changes in political risk, particularly in systems where the rule of law and institutions are weak and malleable. Kenya is at the 22nd percentile on the World Bank's rule of law index. I argue that as post-ratification political risks for countries and defendants in such situations increase, compliance is likely to be jeopardized.[1] The ICC began to examine the Kenya situation in 2008–09, well before the 2013 election. This constituted a potential risk that continued to increase once the ICC received permission to start a formal investigation and the cases progressed.

The election came into play when two of the ICC indictees – Uhuru Kenyatta, a Kikuyu, and William Ruto, a Kalenjin – decided to run for president and deputy president. It was an opportunistic alliance of convenience as the ICC had accused both individuals of masterminding the 2007–08 ethnically targeted violence against each

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other's communities. Ironically, this union, the negative ethnicity that accompanied it, and the ICC's involvement also may have partly deterred violence in the 2013 election. Winning the election was part of a key defense strategy to undercut the ICC by seizing political power, flexing it to deflect the ICC, and opening up the possibility of not showing up for trial if all else failed. The strategy entailed using a series of delaying tactics to ensure that the ICC trials would not start until after the defendants had won the election and gained power at the highest level. The tactics ranged from mobilizing international organizations against the ICC, making numerous, legal challenges designed to delay the court, and the intimidation of potential witnesses, allegedly by defense sympathizers and go betweens,[2] to keep them from assisting the ICC. The tactics were part of a larger design to undercut the ICC. Demonizing opponents, politicizing ethnicity, and attacking the ICC as a tool of the West both before and during the presidential campaign served this end and victory in the election. Once they won the 2013 election, Kenyatta and Ruto came up with another tactic: asking for concessions based on their political power, including pleas to drop their cases or not be physically present at their trials.

The sequence of events raises serious questions about the fate of international human rights treaties and international criminal justice not only in Kenya, where institutions and the rule of law are weak, but also about the future of democracy there. My argument invokes Douglas North's understanding of how politics works.[3] It suggests that as informal enforcement mechanisms, including sanctions and rewards, jeopardize compliance, formal legal institutions and instruments such as treaties can be undermined. The ICC, in particular, might well be thwarted as member countries and individuals respond to changing political incentives that differ from those of the court and penalize cooperation with it. Changes in political risk and weakness in the rule of law turn out to be more important than legal ratifications in understanding compliance.

I argue that political context matters and question if formal rules are becoming more important in Africa.[4] In Kenya, as elsewhere in Africa, the rule of law is still weak, politicized, and hard to enforce; individuals are often sanctioned for trying. Hathaway convincingly argues that countries in such situations incur low costs in ratifying treaties.[5] This, in turn, invites non-compliance of varying degrees and attempts to ignore or undermine the law and other formal rules. This is business as usual in Kenya. The public is used to politicians acting as if they were the law and not subject to it. The difference here is that the interactions between Kenya and the ICC are playing out on an international stage with different consequences, including the possibility of warrants and sanctions. This may explain the duality of Kenya's and the defendants' nominal cooperation while acting to undermine the court. The defendants have showed up at the ICC as required. The government has allowed the ICC to conduct in-country investigations and set up an office. But the ICC's Chief Prosecutor (since June 2012), Fatou Bensouda, argues that this is the ICC's most difficult case ever, accusing Kenya of spying on its staff, not honoring promises for documents and interviews, interfering with witnesses, politicizing the law, and using frivolous delaying tactics to postpone trial.

My discussion of the Kenya situation contributes to understanding the interplay between law and politics, including changes in political risk. It is a subject lawyers, judges, and many scholars often mistakenly ignore or downplay, to their detriment. Analyses of ratification and compliance using large data sets fail to explain the dynamics of how both work at the country level or the incentives guiding decision-making. My analysis of the Kenya case provides some answers while demonstrating the salience of political power and winning elections to undermine the law.

Background

After the announcement of President Kibaki's electoral victory in December 2007, violence broke out in various parts of Kenya. The Rift Valley was the epicenter of the violence. It largely targeted Kikuyu supporters of Kibaki's Party of National Unity (PNU) in the North Rift. Retaliatory violence by Kikuyus against Luo and other allies of Raila Odinga's Orange Democratic Movement (ODM) then followed in the Central Rift. The result of Kenya's ethnically targeted violence, later termed crimes against humanity, was over 1100 dead, 300,000 injured, and about 600,000 forcibly displaced.

On 31 March 2010, the ICC's Pre Trial Chamber (PTC) authorized an investigation[6] into six individuals for their alleged role in the PEV. On 23 January 2012, the PTC confirmed charges against Kenyatta; Frances Muthaura, a Meru, Secretary to the Cabinet and one of Kibaki's key confidants; Ruto; and Joshua arap Sang, a Kalenjin vernacular radio presenter with KASS FM. The PTC failed to indict two other suspects: Mohammed Hussein Ali, a Somali, who was head of the police in 2007–08, and Henry Kosgey, a Kalenjin ODM minister and the party's secretary general. Unexpectedly, in March 2013, the ICC dropped charges against Muthaura after a key witness recanted his statement and admitted having received bribes.[7]

The ICC grouped the six individuals into two cases. In the first, the ICC accused Ruto, Kosgey, and Sang, all Kalenjin, of forming a hierarchical network to inflict crimes against humanity, principally against Kikuyu supporters of Kibaki's PNU in the North Rift Valley. They allegedly aimed to use violence to drive the PNU from power after the disputed 2007 election. In the second, the ICC charged Kenyatta, Muthaura, and Ali with creating an organization that hired a Kikuyu militia, the Mungiki, to inflict retaliatory violence against ODM's Luo supporters in Nakuru and Naivasha towns in the central Rift Valley. The ICC claimed they had done so in retribution against ODM's anti-Kikuyu violence, and to keep Odinga from successfully challenging Kibaki's disputed re-election.

The ICC case against the Kenyan defendants is unique in three respects. It was the first time an ICC Prosecutor had charged perpetrators on his own volition ("*in proprio motu"*) as permitted under the *Rome Statute of the International Criminal Court*. Until then, all cases had been referred to the court by the United Nations Security Council (UNSC) or the countries themselves. It was also the first time the ICC had had to withdraw a case. And, most importantly from the standpoint of this article, it was the first time any ICC defendants had run for president and deputy president as part of a strategy to avoid trial. The defendants/running mates simultaneously used conventional legal challenges to dismiss the charges against them while mobilizing voters against the ICC to undercut it. Delaying tactics in The Hague were critical to this strategy. Kenyatta and Ruto sought to ensure that the trials would not be held until after the election, which they hoped to win, and then to use their power to avoid trial.

Before discussing the defendants' strategies to undermine the ICC, I examine conventional theories of ratification. I find they do not account for Kenya's decision to join the ICC or its questionable compliance with the *Rome Statute*. Instead I suggest that changes in political risk and the malleability of the rule of law do. I then explain why Kenyatta and Ruto decided to run for president and deputy president to postpone the ICC's run to trial until they gained political power and discuss the tactics they used to succeed. My conclusion raises the "Northian" question of how much stock should be placed in ratification by countries where sanctions and rewards enforce informal norms that undermine formal laws including treaties. I also question what the electoral win of

two ICC indictees, and the deliberate polarization of ethnicity that propelled it, say about the future of democracy in Kenya.

Theories of treaty ratification

Theories abound as to why countries sign human rights treaties that limit their sovereignty, but they do not help one understand Kenya's behavior. Kenya signed the *Rome Statute* in 1999 under President Moi and then ratified it in 2005 under President Kibaki. I argue that Kenya's changing politics and the weakness of the rule of law explain why Kenya initially was in favor of the ICC and signed on to the *Rome Statute* before political circumstances changed. Kenya then turned against the court and began to undermine it while minimally complying with its directives.

Dutton notes that many human rights treaties are sovereignty limiting but as they have no teeth to enforce them countries sign on.[8] Vreeland counter intuitively argues that strong dictatorships are more likely to support the United Nations Convention Against Torture as they have such a tight grip over the population that they do not need to torture.[9] In examining why countries ratified the European Convention on Human Rights after World War II, Moravcsik argues that they did so in an attempt to "lock in" new democracies like Italy, France, and Germany, to contain internal threats, and to keep them from reverting to fascism.[10]

Unlike the above treaties, the ICC's *Rome Statute* has teeth. High-level perpetrators including presidents are not immune from trial or warrants to arrest them, convicted suspects can be jailed for up to 30 years, and state parties to the statute are required to arrest and hand over fugitives to the ICC, which limits the freedom of movement of the accused. Also, Kenya is not a dictatorship like those described by Vreeland, and Kenya's motive in signing was not to send a "lock in" signal to itself or other nascent democracies.

Simmons and Danner look more specifically at which countries ratify the *Rome Statute* and join the ICC.[11] They argue that member countries tend to be peaceful democracies or autocracies with recent histories of civil war, whereas those that don't sign either are democracies engaged in wars (e.g., the United States, Israel) or unaccountable autocracies (e.g., China, Sudan). They maintain that violent autocracies sign as a form of "credible commitment" to signal to their enemies that they will not revert to force again to keep their antagonists from doing so. Utilizing alternative measures of violence and more refined indicators of governance, Chapman and Chaudoin find that Simmons and Danner's theories do not hold.[12] Instead, they argue that, the worse a country's scores on the rule of law and various governance indices, and the more violent it is, the *less* likely it is to ratify the *Rome Statute*. Ginsburg also contests Simmons and Danner's findings.[13] He maintains that a dictator's commitment is not credible, suggesting that statistical outliers who ratify the *Rome Statute* tend to be countries pursuing "victors' justice" rather than justice.

Neither Simmons and Danner's nor Chapman and Chaudoin's theories explain why Kenya ratified the *Rome Statute*. In terms of both theories, Kenya is an outlier that would not have been expected to join the ICC because of its history of violence in the 1990s, its mixed democratic credentials, not having an independent judiciary, and never having been a violent autocracy engaged in civil war.

The Kenyan case

Instead, to explain why Kenya joined the ICC and then tended to undermine it, one must look to the political context when Kenya signed, ratified, and then began to limit its cooperation with the court. So long as support for the ICC carried little political risk, it was likely that Kenya would ratify and comply with the *Rome Statute*. Conversely, the more politically risky compliance became, the more likely it was that Kenya and its ICC suspects would attempt to defy rather than cooperate with the ICC. This argument speaks to von Stein's discussion of an endogeneity problem: countries with higher scores on governance indicators are more likely to ratify and comply with the *Rome Statute*.[14] It follows that if outliers such as Kenya, with poor governance scores, ratify the *Rome Statute*, they are prone to halt compliance when the political context changes.

When Kenya signed and ratified the *Rome Statute*, the ICC was still in its infancy. The political situation in Kenya also was improving; it appeared inconceivable, if not preposterous, that any Kenyan would ever be charged by the ICC. Although the *Rome Statute* was approved in July 1998, the treaty did not become binding until July 2002, following the ratification by 60 member states in April 2002. The ICC elected its first judges in 2003, and did not undertake any investigations until 2004. This followed self-referrals to the ICC by Uganda and the Democratic Republic of the Congo in 2003 and 2004, respectively. The court issued no arrest warrants until July 2005, when it moved against the leader of the Lord's Resistance Army (LRA), and the first PTC hearing did not take place until 2006. Kenya seemed miles away from the guerrilla leaders being prosecuted by the court, and the ICC had no convictions until that of Thomas Lubanga, a Congolese warlord, in 2012.

Kenya signed the *Rome Statute* in 1999 largely due to pressure from local human rights groups. The treaty had no effect until it was ratified in 2005, but even then, Kenya was protected by the Statute's complementarity rule: it made the ICC a court of last resort able to intervene in a state's internal affairs only if that state was "unable or unwilling" to prosecute genocide, war crimes or crimes against humanity.[15] Furthermore, the Statute could not be applied retroactively to times before ratification. Hence there were no worries that the ICC would prosecute Moi and his supporters for instigating the violent "tribal clashes" during the 1992 and 1997 elections.

In 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.[16] Instead, the focus was on delays in ratification and on reconciling the parts of the Kenyan constitution that gave immunity to the president, something the *Rome Statute* prohibited. Furthermore, the ICC until recently had only targeted non-state actors and one side of a conflict, further increasing the perceived non-relevance of the ICC to Kenya's politicians.[17] Thus, ratifying the *Rome Statute* seemed unthreatening to the political elite of the time. Also, Kibaki's election in 2002 appeared to signal a new era in which human rights would be respected, while Kenyan human rights groups and parts of the Government of Kenya (GOK) sought to counter the American Service Members Protection Act of 2002, which threatened countries that ratified the *Rome Statute* with a withdrawal of military and other US aid.[18]

In countries where the rule of law is more entrenched than in Kenya, government lawyers might have asked the "what if" question. Whether this did not happen because of the low perceived risk or because laws and institutions always had been malleable and subject to the machinations of the political elite is an open question. Hathaway argues that

established democracies are more cautious about ratifying treaties, given the likely legal and other costs of non-compliance.[19]

Changes in political risk and Kenya's response to the ICC

As the political context evolved in Kenya and the indictees' risk increased, the response of the government and other political elites to prospective, and eventually actual, ICC involvement in PEV justice and accountability adapted.

Undermining Waki

Kenya's initial response to the PEV was to appoint a Commission of Inquiry into the Post Election Violence (CIPEV) known as the Waki Commission.[20] The recommendations of previous investigative commissions had come to naught.[21] Perpetrators and the politicians who supported them correctly felt they had nothing to fear. The Waki Commission recommended that Kenya set up a hybrid Special Tribunal of domestic and international judges to try high-level perpetrators of the PEV. However, if it failed to do so, the CIPEV had a trigger mechanism: Kofi Annan was to turn over the Waki material that the CIPEV had entrusted to him at the end of 2008 for safekeeping to the ICC. According to the CIPEV's recommendations and the agreement signed by both Kibaki and Odinga to implement them, MPs should have passed a bill to establish the tribunal by the end of January 2009, with the tribunal up and working by the end of February 2009. Instead, MPs defeated the bill on 12 February 2009, failing to get a quorum. Two later attempts to pass the bill failed as well.[22] Many parliamentarians did not want a Special Tribunal at all: some because they thought it would try too many individuals or be used to settle political scores; others because they thought the tribunal would be corrupted politically and unwilling to try high-level perpetrators. The overall goal of many MPs was to use as many delaying tactics as possible to ensure that no one would ever be held accountable for the PEV. Amidst the pretense of establishing a Special Tribunal while doing nothing and attempting to buy time, Annan gave Kenya two extensions to set up the tribunal, one until April and another until August 2009.

In July 2009, the GOK sent a delegation to Annan and signed an agreement with the ICC's Chief Prosecutor Luis Moreno Ocampo (2003–12). The delegation promised to set up a special tribunal, use "another judicial mechanism," or, failing that, to self-refer the Kenya cases to the ICC by September 2009.[23] Signed agreements notwithstanding, Annan finally concluded that Kenya was only buying time and had no intention of doing anything. Subsequently, he handed over the Waki material to the ICC. This included a secret envelope with the CIPEV's names of individuals who should be investigated further. This upped the ante and increased political risk. Using the law to delay had not worked.

Things quickly became more ominous and, in September 2009, thugs broke into MP Gitobu Imanyara's office after he tried to resurrect the Special Tribunal bill.[24] Earlier, in July 2009, just after Annan's handover to the ICC, two high level members of Mungiki, a Kikuyu gang alleged to have organized the PEV in Nakuru and Naivasha towns, were murdered. Ocampo then came to Kenya requesting government itself to refer the Kenya situation to the ICC on 5 November 2009. When it refused, Ocampo asked the PTC for permission to begin an investigation of the Kenyan situation. It was granted on 31 March 2010. From the standpoint of yet unnamed suspects this was a dire moment. The

government still controlled the Kenyan judiciary and political interference often was the order of the day. But it did not control the ICC.

Mobilizing international support

Once the ICC began to investigate the Kenya situation, the political risk factor increased dramatically. Thereafter, Kenya responded by demonizing the ICC, mobilizing support against it both domestically and internationally, and arguing for trials to be held in Kenya. These efforts did not slow down the ICC's pursuit of the Kenya cases as intended. However, they were effective in mobilizing domestic support against the court in advance of the 2013 presidential election, thereby making it acceptable for citizens to vote for two ICC indictees.

On 15 December 2010, in a surprise move, Ocampo named the defendants against whom he sought to have charges confirmed. Immediately afterwards, the GOK went into high gear in spite of the ICC having insisted that it was not targeting communities or Kenya, but six individuals. The Kenyan state saw things differently, likely because most of those charged were high level figures too close to President Kibaki for comfort.[25] A few days later on 22 December, Kenyan MPs passed a motion to withdraw from the ICC, which Kibaki did not sign into law and in any case would not have come into effect for a year. Nevertheless, both Kibaki and the GOK appeared to be shielding their own.[26] The ICC's evidence alleged that meetings organizing retaliatory violence took place at State House, something human rights groups had claimed much earlier. As late as April 2012, Kibaki said he was still considering options to try the ICC suspects locally,[27] raising the question of why, if unfettered justice for the victims was the goal.

The GOK's involvement kept increasing. Between 2011 and 2012, Kilonzo Musyoka, Kenya's vice president, engaged in shuttle diplomacy to numerous African countries as well as to the African Union (AU) and UN. He wanted their support for a deferral of the ICC's investigation so that Kenya could try its cases in its own courts, an option it had previously rejected. In January 2011, the AU said it would back Kenya's attempts to defer investigations. The UNSC demurred, instead advising Kenya to initiate any challenges through Article 19 of the *Rome Statute* on admissibility and jurisdiction.[28] The sudden desire for homemade justice where the necessary ingredients were lacking, also unsettled human rights defenders and victims, who protested.

Other attempts to return the cases to Kenya followed, as the defendants' political risk increased when charges were confirmed against four of the six suspects on 23 January 2012. On 26 April 2012, the East African Legislative Assembly asked that the cases be transferred to the East African Court of Justice (EACJ), followed by a request from the East African Community's Summit of 28 April 2012, that the EACJ's mandate be extended to include crimes against humanity.[29] Kenyan human rights lawyers denounced both initiatives. Nevertheless, attempts to get the cases back to the region continued, particularly after Annex D of the confirmation charges was reclassified as public on 28 September 2012, and revised ICC Documents Containing the Charges (DCC) were released on 7 January 2013. Both named names, something the defendants would have preferred to keep under wraps.[30] Hence, as late as October 2012, Kenya's Attorney General Githu Muigai still insisted that the EACJ could be used to try the ICC cases while also making anti-ICC statements in a conference on the ICC in Nuremberg.[31] These were not cooperative noises, especially coming from Kenya's chief legal officer.

More recently, on 12 April 2013, Kenya's UN Ambassador and Deputy Ambassador castigated the ICC at the General Assembly demanding that the cases be referred back to

Kenya.[32] The AU, with 34 ICC member states, then swiftly followed with a near unanimous resolution for an African pullout from the ICC. In mid-August 2013, an AU delegation went to The Hague, asking the ICC to refer back the cases to Kenya, where it was politely rebuffed.[33] Then, in September 2013, following a visit by Kenya's Foreign Minister, the AU convened a special summit in October to discuss a possible mass pullout by African countries.

An intimation of the above recalcitrance had occurred earlier in April 2011, when the six original ICC indictees arrived in The Hague to hear the charges against them. Kenyatta and Ruto brought numerous supporters with them. Dressed with caps in the color of Kenya's flag and in a huge show of disrespect, they danced and sang on the steps of the ICC. This display was openly contemptuous of the ICC and the law. The distain for the court and the implied threats underpinning the rally were seen as precursors to the upcoming presidential run.[34] The message was: we and not the ICC have power and we will use it. It was another example of the defendants' minimal legal cooperation amidst their nominal compliance of showing up to hear the charges.

Buying time in court

Kenya's new 2010 constitution originally scheduled the presidential election for August 2012. Kenya's defendants adopted a two-fold strategy. The first was to use all legal means available to get the cases dismissed under parts of the *Rome Statute* dealing with admissibility and jurisdiction.[35] This was their right as defendants. However, multiple admissibility challenges by the state and individual defendants which repeated the same points and then appealed the rulings, made it appear that the defendants, whose political risk kept increasing, were also trying to buy time to ensure that if the cases went to trial they would not do so until after the presidential election which had been moved to March 2013. Second, the state quite unusually engaged in the legal challenges itself, although the ICC's PTC was charging individual suspects and not the state. In the meantime, the defendants continued to comply with the court nominally, even as they vilified the ICC in political rallies and inflammatory "prayer meetings" and protested their innocence.

The admissibility challenges began on 31 March 2011, just before the ICC laid out its charges against the defendants, lasting until 31 August 2012, when they were rejected by the Appeals Chamber.[36] Under the complementarity rule of the *Rome Statute*, the ICC can only take up a case and deem it admissible if a state is "unable" or "unwilling" "genuinely" to prosecute defendants for crimes under its jurisdiction. The defendants' lawyers argued that their clients were cooperating with the ICC's PTC and that Kenya had reformed its courts. They submitted numerous questionable annexes to prove that Kenya was preparing for trial using a "bottom up" approach, even though the ICC's approach has been to charge "those most responsible." The submissions did not convince the court. They were the same objections that had been rejected earlier at various stages, including in the confirmation of charges and investigations' decisions. The ICC argued that to invoke the complementarity rule the defendants had to demonstrate that there were ongoing trials against the same individuals for the same crimes, which was not the case. Instead, the court said that there was a state of "inactivity." It ruled that the appeals did not show that there were legal problems with the PTC's rulings on admissibility and accused the defense of challenging the evidence, something that could only be done at trial.

The defendants simultaneously mounted another set of challenges this time questioning whether the ICC had jurisdiction over the Kenya cases. The jurisdictional

challenges began in August and September 2011, before the confirmation of charges decision of 23 January 2011, followed by challenges to the ruling that were finally rejected by the ICC's Appeals Court on 24 May 2012. The defendants argued the cases did not meet the threshold for crimes against humanity under the *Rome Statute*, and that violence resulted from ordinary crimes committed spontaneously rather than in pursuit of a "state or organizational policy." Here the defense invoked Judge Hans Peter Kaul's earlier minority opinions in the PTC in which he had objected to the ICC beginning an investigation in Kenya or confirming charges against the suspects. Like Kaul, the defendants' lawyers said that the crimes committed had to be in pursuit of a state or organizational policy that threatened humanity, and that, if it were an organization, it had to be "state-like" (a phrase not used in the Rome Statute) and not just ephemeral "alliances of convenience" or ethnic gangs. The defense also attacked the credibility of the witnesses who had testified that the suspects were part of any organization. Both arguments were rejected. The PTC maintained that the crimes committed were grave enough to be considered crimes against humanity, were organized enough to fall under the *Rome Statute*'s rubric of "organizational policy," and that disputes over evidence and witnesses would have to be resolved at trial. The admissibility and jurisdictional challenges combined bought the defendants over a year's worth of time, from March 2011 until August 2012. As these challenges continued, the defendants simultaneously were engaged in confirmation of charges hearings in September 2011. In January 2012, they were confirmed against four suspects followed by unsuccessful appeals.

Once the above legal and delaying tactics were exhausted, trials seemed to be assured, with the only remaining options to defeating the ICC being to avoid trial by running for election to the highest executive offices while continuing to intimidate and attack witnesses. The defense's procrastination nevertheless was effective in ensuring that if trials took place they would be after rather than before the election as originally scheduled. Later, the defendants continued to mount a series of successful petitions to delay the trials further. Having initially been postponed from April until May and July 2013, additional defense appeals were successful in getting Ruto and Sang's trial delayed until September 2013, and Kenyatta's until November 2013 and then until January 2014, and once again until February 2014. Each delay was in part the result of witness intimidation. This occasioned the need for new witnesses, opening up the prospect of more witness intimidation and more delays.

Intimidating witnesses

Indicative of attempts to undermine the ICC process were the plethora of attacks against witnesses. This included intimidating, bribing, and killing them. The message being sent both by the state, which did nothing to protect witnesses and victims as required by the *Rome Statute*, and allegedly by the defendants and their supporters, was that if individuals cooperated with the ICC's investigations, they would pay heavy costs. Many did. As each trial date neared, more witnesses dropped out, thereby forcing the ICC to find others. This compelled the defense to ask for more time to review the new evidence, precipitating a vicious circle of delays and the need for more witnesses and more time. Politics began to trump the law as the defendants' political risk increased.

Early on it appears there was a plan to eliminate, intimidate, and bribe people who knew too much about the PEV, key individuals who were part of it, and civil society activists who were assisting and sheltering potential witnesses. Leaving none to tell the story was an apparent tactic to get rid of key witnesses while simultaneously attacking the

credibility of others. The aim was to get the cases dropped for lack of evidence even before the ICC's investigation began and charges were confirmed. Later, it was to destroy the credibility of other witnesses who remained and to delay or halt the onset of trials both before and after the 2013 presidential election.

The deployment of violence emerged as an early pre-emptive measure even before the Waki Commission or the ICC entered the picture. Shortly after the end of the PEV, on 8 March 2008, Virginia Nyakio was murdered in a particularly bloody slaying. Nyakio was the wife of Mungiki's leader Maina Njenga, and might have known too much about Mungiki's involvement in the retaliatory violence in Nakuru and Naivasha, or have played a part in it herself. Two months later on 6 July 2008, Maina Diambo, Mungiki's Nairobi Coordinator, was murdered.[37] On 5 November 2009, on the same day the ICC's Chief Prosecutor said he would ask the PTC to begin an investigation, Maina Njenga's deputy, Njuguna Gitau, was shot dead on Lithuli Avenue in Nairobi shortly after Njenga left jail.[38] In March 2009, two members of the Oscar Foundation, a human rights organization, were killed a month after speaking to Philip Alston, the UN's Special Representative on Extra-Judicial Killings, about the murder of Mungiki members. In a May 2010 US Government Wikileaks cable, the United States Embassy in Kenya discussed "the steady rise in the number of individuals threatened or killed for apparent political reasons." It said that former Waki Commission witnesses "ha[d] already been threatened." The cable also spoke about the embassy's "multiple sources" who accused Kenyatta and Ruto of "directing a campaign of intimidation against potential witnesses." It also alleged that Njuguna Gitau "may have been the lynchpin to channel funding from Uhuru Kenyatta to the Mungiki."[39] In the confirmation of charges hearings, the prosecutor noted that the above murders sought to eliminate individuals who had led the retaliatory attacks in Nakuru and Naivasha to keep them from implicating the organizers of the violence.[40]

The campaign to silence key potential ICC witnesses intensified immediately after Ocampo asked the PTC for permission to start a formal investigation in Kenya in December 2009, signaling a clear change in political risk.[41] Civil society activists complained of witness intimidation. They cited unexplained disappearances, enticements to study abroad, and harassment by the National Security Intelligence Service (NSIS). They spoke of death threats to them and their families, and menacing telephone calls and text messages.[42] A number of targeted witnesses went to the Kenya National Commission of Human Rights (KNCHR) for protection. The commission's vice chairman, Hassan Omar, attempted to help, but witnesses claimed they were in danger because a former KNCHR official had "leaked their testimonies."[43]

The threats and attacks against potential and actual witnesses made the ICC's work increasingly difficult. Witnesses kept bowing out as each trial date neared and the pressure on them intensified something that continues up to now. In 2011, two individuals sheltered by Hassan Omar claimed he had bribed them and recanted their statements to the KNCHR and to the Waki Commission.[44] Much later in 2013, the ICC's witness no. 8 in the Ruto and Sang case used the same language and made similar allegations. He cited bribery by the ICC and retracted statements he had made both to the court and to the Waki Commission.[45] Earlier, his family in Kenya said they were being harassed.[46] The ICC itself had to drop its witness no. 4 in the Kenyatta case. Bensouda said he had lied and received bribes from Kenyatta's agents.[47] She then dropped the charges against Muthaura, leading his lawyers to accuse the ICC of withholding exculpatory evidence. Bensouda retorted by mentioning other factors: lack of cooperation from the GOK, the intimidation of other potential witnesses who were too afraid to testify, and unnamed

deaths. Kenya's attorney general filed a submission to the ICC's trial chamber rejecting Bensouda's claims.[48]

Since the 2013 election, there has been an increase in witness defection and worries about witness elimination. Witnesses are aware of the massive and powerful security apparatus available to Kenya's executive branch,[49] and more witnesses have dropped out since the election. This includes 93 victims, described as vulnerable by their lawyer.[50] In mid-July 2013, three other ICC witnesses in the Kenyatta case also withdrew, citing security concerns. They included: fear for themselves, their families, "insurmountable security risks" "too great to bear," and worries about attempts to locate them.[51] Following this, Ruto upped the ante by asking the prosecution for "screening notes" of ICC interviewees who were not even witnesses. Bensouda claimed this would jeopardize their safety.[52] The overall intent has been to discourage any communication with the ICC and to strangle the court as the trial dates neared. The tactic is succeeding. Four witnesses in the Ruto Sang case suddenly withdrew in mid-September 2013 one day before they were to testify leading to an unscheduled postponement.[53] A day later another quit before she was to testify in the Kenyatta case, citing fear and lack of security.[54] This followed the outing of the first trial witness in social media. The ICC then called for her testimony to be held in camera and for special protection for witnesses. Bensouda said her office had uncovered evidence of intimidation and bribery by politicians, lawyers and businessmen who were doing to great lengths to cover their tracks and could face charges.[55] Unlike domestic courts in advanced democracies, the ICC cannot effectively counter witness intimidation apart from issuing arrest warrants against the defendants and others.

On 1 October 2013, the ICC issued its first warrant against Walter Baraza, a Kenyan journalist charged with bribing three witnesses in the Ruto Sang case. Bensouda claimed Baraza was "acting in furtherance of a criminal scheme devised by a circle of officials within the Kenyan administration," and that the warrant was "an opportunity for the Kenyan government to demonstrate the cooperation they say they have been giving to the ICC."[56] In response, the attorney general asked Kenya's High Court to make a determination on the request. Legal experts called this evasive and said Kenya was legally obliged to hand over Baraza. Furthermore, continued intimidation amidst inadequate witness protection invites more dropouts and could be the death knell of the trials.[57] On 19 December 2013, Bensouda asked the TC to postpone Kenyatta's trial until May 2014 after losing two key witnesses: one who refused to testify and another who lied. She said the case no longer "satisfy[ied] the high evidentiary standards required".[58]

The mega-strategy: winning the election

Kenyatta and Ruto understood that political power mattered and acted to win it. They used Kenya's ethnic polarization to fuel internal ethnic solidarity among their Kikuyu and Kalenjin co-ethnics against Odinga, their Luo presidential opponent and Ruto's former political ally in 2007. They also attacked the ICC as an anti-African, colonial, western institution, and painted themselves as its victims.[59] They claimed Odinga was behind the PEV, had deserted the Kalenjin, and was supporting the ICC to eliminate them as political competitors.[60] They accused the ICC and the West of unfairly going after their communities, after them personally, and of interfering in Kenya's elections.[61] Hence, demonizing the ICC became a way of solidifying ethnic polarization, thereby turning the 2013 election into another zero sum ethnic contest. The result was another display of "exclusionary ethnicity": voting against the other, in part out of fear, more than for one's own.[62]

The ICC initially received strong support, but this soon changed. Once the ICC named, summoned, and charged suspects, the approval ratings dropped, particularly in Central Province and in the Rift Valley, the heartlands of the accused. In October 2010, before the names of the defendants came out, 68% of the country wanted the ICC to prosecute the suspects, including 73% in Central Province and 61% in the Rift Valley.[63] By February 2012 total support fell to 60% overall and to only 42% in Central Province and 50% in the Rift Valley. This compared unfavorably with support for the ICC in Odinga strongholds of 75% and 74% in Coast and Nyanza provinces.[64] To capture more votes, Odinga also changed his stance on the ICC and promised to bring the Kenyan cases home.[65] Kenyatta, in turn, said that if he won the election it would be a referendum against the ICC and the process that had brought him there.[66] By mid-July 2013, only 39% of those polled wanted trials to take place in The Hague, falling to only 7% in Central Province and 24% in Rift Valley Province, compared to 70% in Nyanza.[67]

Winning the presidential election thus was the final solution to keeping the ICC at bay. Ruto's and Kenyatta's strategy and their various time buying tactics worked. They managed to gain power before the ICC trials began. Their tactics solidified domestic and regional support, putting more pressure on witnesses, and on the ICC itself. Once Kenyatta and Ruto won the election they added another tactic to insulate themselves from the court; they argued for exceptional accommodation based on their newly acquired political powers as president and deputy president.

Using political power to gain concessions from the ICC

Since the election, the defendants have used their political victory to gain more delays and other concessions from the court. They have proved adept at using the law to undermine the law not only domestically, as Hathaway might have predicted, but also internationally. The Trial Chamber (TC) agreed to postpone the cases against Kenyatta and Ruto until September and November 2013. Then, in a contentious decision in mid-June 2013, based on an April plea, the TC ruled that Ruto did not need to be physically present at trial continuously, as required by the *Rome Statute* and instead could attend only at key points.[68] The judgment conceded that Ruto's position as deputy president justified his not being present in court full time. It vindicated the defendants' belief that political power mattered and that their strategy was working.

The decision also diluted the *Rome Statute*'s definition of exceptional and temporary circumstances when defendants might be excused from being physically present in court. A week earlier, the TC unexpectedly recommended that, subject to a vote of all judges, parts of the Ruto trial should be held in Arusha or in Nairobi, even though this would compromise the safety of witnesses.[69] On 15 July 2013 a plenary vote by ICC judges overruled the TC, concluding that the Ruto and Sang trials must be held in The Hague. On 20 August 2013, the Appeals Chamber issued a suspensive order compelling Ruto to attend the trials continuously until it made its final ruling.[70] On 30 September 2013, Ruto asked for the ruling be reconsidered, and once again to be excused from attending his trial. Both pleas failed.[71] However, TC's willingness to entertain these requests at all appeared to accommodate political power. It also bought the defense months to unsettle witnesses, victims, and human rights activists.[72] It now is unclear who is on trial: the ICC or the indictees accused of crimes against humanity.

Ultimately in late October 2013, the Appeals Chamber, overturned the TC's decision that Ruto would not be required to be physically present at trial continuously and only at key points. It argued that physical presence was the rule, but in contrast to the prosecution

it stated that the TC had the discretion to make limited and strictly necessary exceptions on a case by case basis.[73] This challenged a stricter interpretation of the *Rome Statute* and thereby in effect opened up a plethora of other potential political pleas by the defendants. Furthermore, similar requests by Kenyatta still were pending. This included a late plea to exempt him from attending his own trial. The grounds were presidential power. The prosecutor said the request was "disrespectful" and that failure to attend could generate an arrest warrant.[74] On 13 October 2013 Kenyatta's TC made a partial concession. In a two-to-one decision, it conditionally excused him from being physically present in court except at key sessions, a decision it later overturned.[75] Jointly, these pleas to and initial decisions of the TCs, and their consideration of other frivolous defense requests for trials by video conferencing, reinforced the view that the defendants and the Kenyan state were gaining traction and that political power mattered more than the law. This includes a ruling that the trials would not take place simultaneously, but in block of four weeks on and off for each, opening up the option of not returning.

As his trial date has neared, Kenyatta increasingly has used his political authority to insulate himself from the law. This supports the argument of this paper about the importance of the 2013 election and about how attempts to undermine the ICC and to manipulate the law have worked in tandem with heightened political risk. After the terrorist attack on the Westgate Mall in Nairobi, Kenyatta called the ICC a "toy of declining imperial powers" engaged in "race-hunting"[76] – implying that he might not show up for trial. He enlisted the AU to call a special summit to engineer a mass pullout from the ICC on 11–12 October 2013, just a month before his upcoming trial. This failed with only 14 out of 54 heads of state attending and disinterest by most countries in North, West, and Southern Africa. Instead, the AU passed motions saying African heads of state should be given immunity from the ICC and the UNSC should defer the Kenyatta case. The grounds for the proposal were that Kenyatta's absence would constitute a threat to international peace and security, with possible adverse implications for the West in gaining Kenya's cooperation in joint anti-terrorist activities in the wake of the Westgate attacks. However, the AU's 15 November 2013 resolution to the UNSC failed. Archbishop Desmond Tutu's response to the AU was that "African leaders behind the move to extract the continent from the jurisdiction of the [ICC] [w]ere … seeking a licence to kill, maim and oppress their people without consequence."[77] Nevertheless, in late November the ICC's member states amended its rules and procedures to permit trials by video conferencing and high level officials to be represented by counsel. Both contradict the *Rome Statute*'s requirement for physical presence and equality before the law thereby inviting more litigation and delays.

Conclusion

Kenya's relations with the ICC have followed a predictable path. As political risk increased, so did Kenya's and its defendants' attempts to undermine the ICC and the *Rome Statute* which it had ratified in less perilous times. Winning the 2013 presidential election and using the tactics outlined above were key to that end. The inapplicability of many theories dealing with ratification and compliance suggests that both might be better understood by invoking North and Hathaway. North clarifies how informal norms and enforcement mechanisms often trump adherence to formal rules.[78] Hathaway explains why the low cost of commitment in systems where the rule of law is not entrenched encourages treaty ratification and jeopardizes compliance.[79] Both imply that politics can and does intrude on the law. Politics and political risk change. Hence, unlike ratification, compliance is a process, a point made above but not acknowledged in the literature.

The Kenyan cases make this and the resilience of the past increasingly clear. Kenya's politically powerful defendants are still attempting to use their might to insulate themselves from the ICC and the law. On 5 September 2013, just five days before the beginning of the Ruto and Sang trials, Kenya's parliament passed a motion to withdraw from The Hague as they had done in 2010. Although this does not affect Kenya's ongoing cases, parliament also threatened to repeal the International Crimes Act of 2008, which domesticated the *Rome Statute* in Kenya.[80] Once again, this illustrates the perceived malleability of the rule of law and the belief that politicians are above it rather than subject to it.

The paper has advanced a number of important arguments about the interplay between politics and the law, including the role of elections. The ICC insists, like other judiciaries, that it is not influenced by politics, but by the law. In the Kenya cases, however, both the state and the defendants' responses to the ICC led to politics intruding upon the law. The defendants have used strategies of delay, mobilization of regional support, and alleged intimidation by supporters successfully to win the presidential election and to postpone their trials until after they gained power. Since then, the ICC has had to deal with this "fait accompli" and attempts to frustrate the court with more delays and defendant pleas for exceptional privileges based on their status. One result is that some of the TC's recent decisions seemed to accommodate the political power of individuals accused of grave crimes.[81] This suggests a divided court under siege by its defendants and under pressure. It highlights the ICC's limited enforcement powers when political power and non-compliance combine to threaten the law. It raises questions about the efficacy of international criminal law and some of the ICC's own decisions and procedures. Kenya's 2007–8 victims feel a "growing loss of faith in the ICC" and that "justice is slowly fading away."[82]

Otherwise, Kenyatta and Ruto's need to win power to stave off the ICC increased the saliency of Kenya's presidency, and has reduced Kenya's democratic space. Kenya's chief justice received threats before a Supreme Court decision on whether the two indicted defendants would be allowed to run for president.[83] He also has said his email accounts were being hacked.[84] Civil society activists who defend the ICC and try to protect its witnesses are routinely hounded, and journalists are more cautious than before.[85] Kenya, like a number of other African countries, continues to display an impressive ability to reinvent the status quo: operating within the architecture of a multi-party system while behaving in ways that are often reminiscent of a one party state. Presidential power and winning elections in Kenya are as critical as ever. Northian-like enforcement mechanisms punish rather than reward attempts to support the law and assist the ICC. This reinforces Hathaway's argument that where basic freedoms are not "well protected," enforcement suffers, and non-compliance "can be relatively cost-free."[86] This correctly implies what North terms "path dependence":[87] the resilience and repetition of the past in the face of informal norms and enforcement mechanisms that guide decision makers and undermine formal changes. This explains both Kenya's response to the ICC, its internal political dynamics, and the unusual salience of the 2013 election. Business as usual is still at work. It also may be that where defendants gain high-level political power and control the arms of government, treaties such as the *Rome Statute* are condemned to follow and not supersede the diplomatic dictum, "to the victor go the spoils."

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Notes

1. For a fuller discussion see Mueller, "Kenya and the International Criminal Court".
2. ICC-CPI-20131002-PR 948, 2 October 2013; ICC-01/09-02/11-848-Red, 11 November 2013.
3. North, "Economic Change through Time," 359–68.
4. Cf. Posner and Young, "Institutionalization of Political Power".
5. Hathaway, "Cost of Commitment," 15–18.
6. ICC-01/09-19, 31 March 2010.
7. ICC-01/09-02/11-687, 11 March 2013; ICC-01/09-02/11-692, 13 March 2013.
8. Dutton, "Commitment to the International Criminal Court."
9. Vreeland, 'Political Institutions and Human Rights," 65–101.
10. Moravcsik, "Origin of Human Rights Regimes," 220.
11. Simmons and Dammer, "Credible Commitment and the International Criminal Court," 227, 231–6.
12. Chapman and Chaudoin, "Ratification Patterns and the International Criminal Court," 400–9.
13. Ginsburg, "Clash of Commitments," 505–6.
14. Von Stein, "Engines of Compliance."
15. *Rome Statute of the International Criminal Court*, Articles 17, 18.
16. Republic of Kenya, *National Assembly Debates*, 4 November 2001, 3093–4; 20 November 2001, 3198; 1 October 2003, 2703–5.
17. Hansen, "International Criminal Court in Kenya," 187.
18. Mokaya, "Kenya: Ratify Hague Court Treaty."
19. Hathaway, "Cost of Commitment," 15–18.
20. Republic of Kenya, *Report of the Commission of Inquiry.*
21. Republic of Kenya, *Report of the Judicial Commission*.
22. See Brown, "The Big Fish", and Mueller, "Dying to Win".
23. ICC-OTP-20090930-PR456, 30 September 2009.
24. Ombati, "Gang Breaks into Imanyara's Office."
25. Gekara, "Why President's Men are Wary."
26. Kegoro, "On the Brink," 18–22.
27. Mureithi, "Local Trials for ICC Suspects."
28. United Nations Security Council (UNSC), *Kenya and the ICC*.
29. Menya, "Kenya: Fresh Shuttle Diplomacy."
30. ICC-01/09-02/11-496, 28 September 2012; ICC-01/09-01-11-522; ICC-01/09-02/11-591 Annex B, 7 January 2013.
31. Olick, "AG Hints at Bid."
32. Kelley, "Newly-Appointed Envoy Leads Bid."
33. The ICC president said if Kenya wanted the cases back it should mount another admissibility challenge; *Daily Nation*, "Kenya Launches Fresh Attempt."
34. Odula, "Hero's Welcome for Kenya's."
35. *Rome Statute*, Articles 17–19.
36. Due to space restrictions it is not possible to list the multiple pleas on admissibility and jurisdiction available on the ICC's website (http://www.icc-cpi.int/kenya). For the final admissibility judgment, see ICC-01/09-02/11 OA, 30 August 2011.
37. Allen, "Claims of Witnesses in Kenya."
38. The ICC reported that Gitau had said he wanted to meet Ocampo who was in town; ICC-01/09/02/11-248-Red, 11 November 2013, 5.
39. Wikileaks Cable, "Kenya: Inadequate Witness Protection Program."
40. Mayabi, "Mungiki Leaders Who Lead."
41. *The Star*, "Kenya: Ocampo Witnesses Escape Death."
42. Ibid.
43. Makau Mutua claims there was a mole inside the KNCHR. See note 46.
44. Rajab, "I Am Ready to Set the Record Straight."
45. "ICC Statement," 23 March 2013. Accessed 26 March 2013. http://www.dennisitumbi.com/.
46. Ndanyi, "ICC Witness Family Flee."
47. Mutua, "How they Tampered."
48. ICC-01/09-02/1173, 9 April 2013; ICC-01/09-02/11-687, 11 March 2013. The GOK's points were then denied in a submission by the prosecution; ICC-01/09-01/11-670; ICC-01/09-01/11-730-Red, 10 May 2013.

49. Olick, "Three More ICC Witnesses."
50. Lucheli, "Ninety Three Post Election."
51. ICC-01/09-02/11-733-Red, 18 July 2013; also Mathenge, "Three More Witnesses Quit."
52. ICC-01/09-011-810-Red, 11 July 2013.
53. Wabala, "Four More Witnesses Against Ruto."
54. *Daily Nation*, "Fresh Blow for Bensouda."
55. Teyie, "Witnesses Tell of Cartel."
56. Olick and Jennings, "Kenya: Lawyers Say Kenya."
57. Kegoro, "Moves by EA States."
58. Statement of the Prosecutor," ICC Public Affairs Unit, 19/12/2013.
59. Warah, "How the ICC Helped."
60. Opiyo, "Kibaki, Raila Should Be."
61. Donors put pressure on Kenya not to elect the indictees and warned of consequences and minimal contact if they did. Reactions to this include Leftie, "Keep Off Kenya Elections."
62. Mueller, "Political Economy of Kenya's Crisis"; also Lynch, "Electing the 'Alliance of the Accused.'"
63. Ipsos-Synovate Poll, "Confirmation Hearings Boost Support for ICC Process." 4 November 2011. http://www.ipsos.co.ke/home/index.php/downloads/.
64. Ibid.
65. *The Star*, "Raila Pledges to Return."
66. Mathenge, "I Can Run Kenya."
67. Ipsos Synovate Political Barometer Survey, 10 July 2013. http://www.ipsos.co.ke/home/index.php/.
68. ICC-01/09-01/11, 18 June 2013; ICC-01/09-01/11-783, 24 June 2013.
69. ICC-01/09-01/11-763, 3 June 2013. A similar request is pending in the Kenyatta case. Also see Wafula, "ICC Cases Must Never Be Referred."
70. ICC-01/09-01/11-862, 20 August 2013,
71. ICC-01/09-01-01/11OA 5, 27 September 2013.
72. Kegoro, "ICC Seen Leaning Heavily."
73. ICC-01/09-01/11 Qa 5; ICC-01/09-01/11-1066-Anx, 25 October 2013.
74. *Daily Nation*, "Suggest Trial Venue, Uhuru Lawyers Told."
75. ICC-01/09-02/11-830 and 830-Anx 2, 18 October 2013, para. 122; ICC-01/09-02/11-863, 26 November 2013.
76. Gekara, "President Kenyatta's Stinging Attack."
77. Ghana Web, "Pulling Out of the ICC."
78. North, "Economic Change through Time."
79. Hathaway, "Cost of Commitment."
80. Musau and Mathenge, "Transfer Uhuru, Ruto ICC Cases."
81. Olick and Jennings, "Kenya Concern as ICC."
82. ICC-01/09-02/11-752, 6 June 2013, 6.
83. Lucheli, "CJ Got Threats."
84. Matata, "Kenya: CJ Mutunga says Email."
85. Githongo, "Whither Civil Society?"
86. Hathaway, "Cost of Commitment," 17.
87. North, "Economic Change through Time," 364–5.

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