

Assessing the Acceptance of International Criminal Justice in Kenya

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Assessing the Acceptance of International Criminal Justice in Kenya

Geoffrey Lugano¹

1. Introduction

This chapter assesses the acceptance of international criminal justice (ICJ) in Kenya among victims, civil society activists, political elites and directly affected communities.² In Kenya, ICJ entails the International Criminal Court (ICC), owing to its intervention in the country's 2007/8 post elections violence (PEV). The PEV ensued after the disputed December 2007 presidential elections results involving two antagonistic groups: the then ruling Party of National Unity (PNU) and its main opposition, the Orange Democratic Movement (ODM).

To assess acceptance of ICJ, the actors' positions on the ICC over time, aspects of disagreement with the Court, indications of strategic acceptance and non-acceptance and developments on debates on the ICC over time were scrutinised. Acceptance is defined for the purposes of this chapter as 'the agreement either expressly or by conduct to the principles of ICJ in one or more of its forms: laws, intuitions or processes'³ (Buckley-Zistel et al. 2016, 2). This includes 'a range of active features from recognising to giving consent and expressing outright approval and belief' (ibid).

The ICC's acceptance here will be assessed by analysing the expressions and conduct of different actors in relation to the Court's intervention. The assessment will be premised on the actors' external judgement of the Court vis-à-vis their interests and circumstances and the Court's effectiveness in conducting investigations and protecting witnesses. It focuses on dominant discourses across actor categories, yet there will also be efforts to capture dissenting voices.

This chapter argues that in Kenya, actors express consensus on acceptance that places faith in the ICC as a last resort and belief in its potential to prevent the commission of future atrocities, but that they depart from this consensus given their diversity, competing interests and circumstances.

The arguments on this chapter build on fieldwork conducted in Kenya from February to April 2016. The author conducted 55 interviews with representatives from civil society organisations (CSO), political parties and the Kikuyu and Kalenjin communities. The study also draws on over

¹ Geoffrey Lugano is a PhD candidate at the University of Warwick (United Kingdom).

² This includes the Kikuyu and Kalenjin communities whose leaders were committed to full trials at the ICC and which accounted for a substantial proportion of victims and perpetrators.

³ International Nuremberg Principles Academy. Definition of ICJ acceptance. Accessed 15 May 2016. <http://www.nurembergacademy.org/resources/acceptance-online-platform/research/acceptance-methodology/>.

20 interviews conducted for the 'Acceptance Pilot Study Project' with all actor categories⁴. For primary data on the victims, the author consulted CSOs that worked directly with them (owing to security concerns).⁵ The author also evaluated secondary literature from media reports, the ICC and CSOs, and survey reports from IPSOS Synovate⁶ and South Consulting⁷ to draw conclusions on actor acceptance.

The next part of this chapter analyses the ICC's intervention in Kenya by attending to the Court's history in the country and the scope and forms of crimes under investigations. Thereafter, it documents relevant actors to acceptance: civil society activists, victims, directly affected communities, and the political elites in government and the opposition. It then discusses Kenya's context by identifying other political and historical factors that are relevant to acceptance before turning to an analysis of acceptance by assessing the patterns and dynamics of acceptance. Specifically, this part analyses aspects of ICJ that are relevant to acceptance, forms of acceptance (by conduct and expression), and reasons for acceptance or non-acceptance. The chapter concludes with a summary of the discussions.

2. The 2007/8 post-elections violence and its judicial aftermath

The discussions on the adoption of the Rome Statute in 1998 occurred when Kenya was under the authoritarian rule of Daniel arap Moi's Kenya Africa National Union (KANU) whose performance on the rule of law, protection of human rights, free speech and the economy were at an all-time low. It is this regime that was responsible for the 1992 and 1997 PEV.

Due to pressure from local human rights groups, Kenya signed the Rome Statute in 1998 (Mueller 2014, 29), but its non-retroactivity principle 'meant that 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' (Mueller 2014, 29).

The country eventually ratified the Statute in 2005 (CICC 2005) under Kibaki's National Rainbow Coalition (NARC) that had won the 2002 elections on a platform of institutional reforms, guarantees for human rights, economic growth and redress to historical grievances. As Mueller argues, when Kenya signed and ratified the Statute, 'the ICC was still in its infancy; the political situation in Kenya was improving; it appeared inconceivable, if not preposterous, that any Kenyan would ever be charged by the ICC' (Mueller 2014, 29). Nonetheless, NARC's disintegration (into Odinga's ODM and Kibaki's PNU) and Kibaki reneging on his campaign promises escalated group grievances in the run up to the 2007 elections.

⁴ International Nuremberg Principles Academy. Accessed 20 May 2016. <http://www.nurembergacademy.org/resources/acceptance-online-platform/publications/online-edited-volume/>.

⁵ CSOs mobilised victims into communities of justice and thus this was an easier approach to accessing the victims' views. The victims were scattered across the country and getting individual access was difficult owing to security concerns given the sensitivity of the cases.

⁶ IPSOS Synovate is a private company that periodically conducted surveys on the ICC processes in Kenya besides other governance and social issues.

⁷ South Consulting was contracted by Kenya's mediation team to consistently monitor Kenya's reform frameworks, including the ICC interventions. The company conducted surveys in this regard to assess support for the ICC in Kenya.

Although PEV had been part of Kenya's electoral cycle since the re-introduction of multiparty politics in 1992, the 2007 events were unprecedented. The Commission of Inquiry into Post-Election Violence (CIPEV or Waki commission) documented that approximately 1,300 people were killed, hundreds of thousands were displaced and several victims suffered sexual and gender based violence (SGBV) (Republic of Kenya 2008). The Waki commission also discerned the patterns of violence as spontaneous in some geographic areas, planned and organised in some instances and also state sanctioned (involving security agencies).

The ICC concluded that the 2007/8 PEV amounted to crimes against humanity, noting:

'[t]he gravity and scale of the violence, including elements of brutality such as burning victims alive, attacking places sheltering victims, beheadings and using machetes to hack people to death [and that] perpetrators, among other acts, allegedly terrorised communities by installing checkpoints where they would select their victims based on ethnicity, and hack them to death, commonly committed gang rape, genital mutilation and forced circumcision, and often forced family members to watch' (ICC 2016, 1).

The ICC intervened in Kenya's 2007/8 political crisis in December 2010 after two years of domestic inaction. The Court's geographical focus was six of the eight Kenyan Provinces; Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province (ICC 2016, 1).

The Court's investigations resulted in two cases. First, six suspects were charged for their alleged responsibility in the commission of the crimes against humanity. The list of suspects included an equal number of individuals from the two antagonistic parties. They were senior government officials, political actors and a radio journalist (ICC 2011). These were Ambassador Francis Muthaura (Head of Civil Service), Uhuru Kenyatta (Deputy Prime Minister and Minister for Finance) and Hussein Ali (Police Commissioner) from the PNU side, William Samoei Ruto (Minister for Education), Henry Kosgey (Minister for Industrialisation) and KASS FM radio journalist Joshua arap Sang from the ODM side.

By selecting an equal number of suspects from the two warring parties, the ICC sought to have a representative selection, as opposed to earlier self-referral situations (Uganda and Democratic Republic of Congo) in which the Court selectively investigated one party to the conflicts. Nonetheless, charges against Muthaura, Kosgey and Ali were vacated at the pre-trial stage, with Kenyatta, Ruto and Sang proceeding to full trial. The latter sets of cases were later terminated, with Kenyatta's case termination in December 2014 due to insufficient evidence. Ruto and Sang's cases ended in a mistrial ruling in April 2016.

The ICC issued arrest warrants for offences against the administration of justice for three individuals. According to the Court, these suspects were involved in interfering with witnesses in the initial cases. First, the ICC issued an arrest warrant under seal for Walter Osipiri Barasa on 2 August 2013 and unsealed it on 2 October 2013 (ICC 2013, 1). Second, the ICC issued warrants of arrest under seal on 10 March 2015 for Paul Gicheru and Philip Kipkoech Bett, after which they were unsealed on 10 September 2015 (ICC 2015, 1).

Although the Office of the Prosecutor (OTP) engaged state authorities in the course of the investigations and trials, victim groups, governance and human rights civil society organisations (CSOs) were the most notable supporters of the Court's activities in Kenya.⁸ The ICC's outreach office in Nairobi was active at the onset of the Court's investigations, facilitating the participation of the affected communities and victims in the Court processes.⁹ As an ICC outreach official noted, 'there was early outreach intervention in Kenya to manage expectations; show people what the Court can and cannot do; who should be indicted, how many can be indicted and how to address middle level perpetrators'.¹⁰

However, after two of the ICC accused - Kenyatta and Ruto - won the 2013 elections as President and Deputy President respectively under the Jubilee Alliance and subsequently formed the Government, there were mixed perceptions on Kenya's engagement with the ICC. Whereas President Kenyatta, his Deputy and Sang continued appearing for trials and obeying the Court's summons, the OTP consistently complained about Kenya's non-cooperation. Kenyatta's and Ruto's allies also renewed calls for Kenya's withdrawal from the ICC as they had been doing before their elections, despite their compliance with the Court's summons (BBC 2013; Ridgwell 2013).

According to the OTP, Kenya's non-cooperation included not turning over crucial evidence, witness intimidation and interference, as well as political and diplomatic attacks on the Court. Commenting on Kenya's cooperation, the ICC's prosecutor, Fatou Bensouda concluded that:

'Contrary to the Government of Kenya's (GoK) public pronouncements that it has fully complied with its legal obligations [...] it has breached its treaty obligations under the Rome Statute by failing to cooperate with investigations' (ICC 2014, 1).

Kenyan authorities vehemently contested the OTP's assertions. For example, while refuting Bensouda's claims of non-cooperation, Kenya's Attorney General Githu Muigai, stated that they submitted documents to the OTP and instead blamed the case termination on the ICC's incompetence (Murimi 2016). Similarly, President Kenyatta defended Kenya's cooperation, declaring that they 'cooperated because they believe in the rule of law and international justice and it was the reason for his and Ruto's voluntary submission to the Court's processes' (Daily Nation 2015, 1). According to President Kenyatta, 'if Kenya believed in impunity, it would not have submitted to the Courts as it did' (ibid).

Since the ICC's intervention has been the only genuine efforts at criminal accountability for Kenya's 2007/8 PEV, several actors interacted with the Court either directly or indirectly. These include CSOs, victims, political leaders in both Government and the opposition, and the directly affected Kikuyu and Kalenjin communities.

⁸ Interviewees consulted for this research project affirmed the position that victims and CSOs were the most significant support base for the ICC's activities in Kenya.

⁹ Interview with ICC outreach official, Kampala, 2 February 2016.

¹⁰ Ibid.

3. Actor constellation: who accepts and who does not?

The actors relevant to studying acceptance of ICJ in Kenya are those who consistently expressed their positions on the ICC's processes and acted with regard to the Court's intervention over time. These include civil society organisations, victims, political leaders and directly affected Kikuyu and Kalenjin communities.

First, governance and human rights CSOs came together under Kenyans for Peace with Truth and Justice (KPTJ) for concerted efforts at national and international advocacy on criminal accountability for the 2007/8 PEV and institutional reforms to guarantee non-repetition. Some of KPTJ's members that were vocal in championing for accountability for PEV were the Africa Centre for Open Governance (AfriCOG), the Kenya Human Rights Commission (KHRC), the International Centre for Policy and Conflict (ICPC), the Federation of Women Lawyers (FIDA-Kenya), the International Commission of Jurists (ICJ-Kenya), the Kenya National Commission for Human Rights (KNCHR) and Kituo cha Sheria.¹¹

As a first step, KPTJ documented the atrocities committed, preserved evidence, identified victims and researched long term solutions to Kenya's governance crisis.¹² Thus, recalling on the rise of KPTJ, a CSO activist notes how 'after the ensuing violence in 2007, one of them convened a meeting of Kenyan intellectuals comprising religious groups, CSOs and think tanks to figure out what to do to contain the crisis'.¹³ Accordingly, the activist contends, 'it was obvious that the country was at crossroads with PNU and ODM pulling in different directions'.¹⁴ As such, they realised that the best thing to do was to begin collecting evidence.¹⁵

Next, KPTJ contemplated the potential involvement of the ICC in Kenya's political crisis.¹⁶ As a CSO official reveals, they asked about the Court through proxies and began to gather information concerning the nature of the violence.¹⁷ On the second day of their meeting, KPTJ was unveiled, with a goal of peace and truth with justice.¹⁸ Their recommendations on Kenya's transition to long term peace led to the focus on institutional reforms and criminal accountability for the PEV as envisaged in the Waki report and agenda items in Kenya's 2008 dialogue and mediation process.¹⁹

The second set of actors are the victims who suffered harm and therefore demand for justice. These include Internally Displaced Persons (IDPs), victims of SGBV, relatives of those who were killed, and victims of police brutality. The victims were spread across the country, and more so in the ICC's geographical focus areas of Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province. As less powerful actors in the PEV, victims were

¹¹ For a comprehensive list, see KPTJ, 2016.

¹² Several CSO representatives interviewed for this research expressed their activities during the PEV as such.

¹³ Interview with a CSO activist, Nairobi, 22 September 2015.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

mostly reliant on third parties such as the KPTJ, the government, donors, religious organisations and relatives for psychological and material support and participation in the Court's processes. They participated in the ICC's proceedings with the help of CSOs, the OTP and joint victims' lawyers appointed by the ICC. For their resettlement, victims relied on state institutions that gave land and financial compensation to help them start rebuilding their lives. Some victims resorted to their social networks such as relatives and families who reintegrated them into society.

The third actor category are the directly affected Kikuyu and Kalenjin communities whose political leaders (Kenyatta and Ruto respectively) had their charges on crimes against humanity confirmed at the pre-trial stage. As communities that also fought each other, the Kikuyu and Kalenjin communities accounted for a substantial number of both victims and alleged perpetrators in the 2007 PEV. Given the prevalence of ethnic nationalism in Kenya, the two communities held a critical voice in the discourses on the ICC and the IPSOS Synovate Survey (2011, 3) indicates that among 'ethnic nations', interest in the ICC processes was highest in Central region (88 per cent) and the Rift Valley (85 per cent) which are inhabited by a majority of the Kikuyu and Kalenjin, respectively. The discussions on the Kikuyu and Kalenjin communities will focus on dominant discourses among them.

The final group of actors are the political leaders in both the governing Jubilee Alliance and the main opposition Coalition for Reforms and Democracy (CORD). Formed as a coalition of Kenyatta and Ruto and their allies, the Jubilee Alliance mainly draws its support from the populous Kikuyu and Kalenjin communities²⁰ in conformity to 'Kenya's default politics of ethnicity' (Holmquist and Githinji 2009, 101). As a result, the Jubilee Alliance and the majority members of the Kikuyu and Kalenjin communities share similar concerns over the ICC.

CORD's constituent coalition partners are the Orange Democratic Movement (ODM) led by Raila Odinga (Luo), the Wiper Democratic Movement (WDM) of Kalonzo Musyoka (Kamba), and FORD Kenya of Moses Wetangula (Luhya). None of CORD's members were accused at the ICC, and they articulated opposing opinions on the ICC. In a similar vein, CORD draws its support mainly from the Luo, Luhya, Kisii, Kamba and the coastal communities.

The political actors partly shared concerns for justice as leaders and their representation of victims and the directly affected communities. However, at times, their interests fundamentally departed from these concerns and instead shifted to personal preservation for the accused or political expediency. This led to strategic acceptance or non-acceptance. For the purposes of discussions in this chapter, strategic acceptance denotes agreement either expressly or by conduct with the ICC for ends that are not entirely premised on justice, such as self-preservation and local political calculations.

²⁰ The Kikuyu and Kalenjin are two of the largest ethnic groups in Kenya according to the 2009 census. See Republic of Kenya, 2010.

4. The salience of ethnicity in Kenya's political context

Several accounts of Kenya's governance crisis ultimately identify ethnicity as one of the main challenges for the country (Weber 2009). Thus, the instances of election-related violence in 1992, 1997 and 2007 are attributed to the political leaders' manipulation of ethnicity (Osamba 2001, 40; Oyugi 2000; Brown 2001, 727; Gona 2008).

Most notably, the 2007 elections campaigns reignited ethno-regional rivalries which culminated in the catastrophic PEV among ethnic groups. Ethnic tensions were accentuated by institutionalised impunity; thus, perpetrators were guaranteed protection from domestic prosecution. Consequently, the Waki commission reported that the 2007/8 PEV followed the ethno-regional patterns that demarcated political party mobilisations (Republic of Kenya 2008). In ODM strongholds and in towns, attacks were specifically targeted at perceived PNU supporters, mainly in the Kikuyu community. PNU militias attacked perceived ODM sympathisers from the Luo, Luhya, Kalenjin and Kisii communities in their strongholds and cosmopolitan locations (Kanyinga 2011).

The importance of Kenya's ethnicity accounts for the acceptance of ICJ on two fronts. First, as a space for political mobilisation and competition for political and economic resources, it intensifies ethnic rivalries, and thus the likelihood of violence. This is accentuated by institutionalised domestic impunity for the political leaders. Because of this, ICJ appeals to many as redress for mass atrocities or even belief in its potential to deter future crimes. Second, ICJ is likely to be interpreted from an ethnic perspective in the same way as other national social, economic and political issues. Communities whose leaders are accused of committing mass atrocities are less likely to accept ICJ, owing to collective community justification for and rationalisation of their violence.

5. Acceptance: drivers, patterns and dynamics of acceptance

As a country that was accustomed to PEV and impunity for the perpetrators, the ICC's intervention in Kenya's 2007/8 PEV was a significant change in local discourse on violence and expected conduct. In this regard, criminal accountability for the crimes committed formed a significant part of national discourses on the transition to long term peace.

The ICC's acceptance was to be put to test during the duration of Kenyans' trials at The Hague, and several aspects of the ICC's intervention in Kenya are relevant to its acceptance across actor categories, including: the outcomes of the Court's processes, actors' faith in the Court as a last resort and its potential to deter future crimes and the Court's effectiveness in conducting investigations and protection of witnesses.

5.1 Consensus on acceptance: the International Criminal Court as a last resort and its potential to deter future crimes

Against the backdrop of Kenya's history of PEV and the accompanying impunity, all actor categories express consensus on acceptance of ICJ. They placed faith in the ICC as a last resort and in its potential to deter future crimes. The ICC, unlike local judicial institutions, signifies the will and capacity to investigate and prosecute political leaders as it did in 2010 when impunity was the norm. As Erick Shimoli (2016, 1) reveals, 'a team mandated to clean up the local courts admitted that the judiciary is as corrupt as ever'.

In the aftermath of the 2007/8 PEV, actors across all categories expressed acceptance of the ICC and the South Consulting (2010, 42) survey concluded that support for the ICC was at 75 per cent amongst victims, 55 per cent in the Central region (Kikuyu) and 48 per cent in the Eldoret region (Kalenjin). The survey attributed support for the ICC to the actors' understanding of local impunity for political leaders.

At the same time, there were calls from political actors for a potential ICC intervention. For example, a visibly angry Uhuru Kenyatta while addressing a crowd expressed the need for justice for the atrocities even if it meant at 'The Hague' (KTN 2016). KPTJ also contemplated a potential ICC intervention due to a looming domestic inactivity.²¹ This consensus was altered after the naming of suspects with some actor categories (Kenyatta, Ruto and their allies and their respective Kikuyu and Kalenjin communities) departing because their power position was threatened by the indictments.

Despite these specific reservations, the Court's demonstration on the capacity and willingness to prosecute the heinous crimes in Kenya remained. The Court is accepted across the actor categories not least because it can prosecute political leaders, as is apparent in the following statements. For instance, a Kikuyu youth, who was generally critical of the ICC, remarked 'yes, I accept the ICC because justice is elusive in Kenya'.²² For many Kalenjins, the ongoing ICC cases also demonstrated the Court's will to prosecute perpetrators. A Kalenjin peace activist remarks: 'I remember I was in a workshop and the issue of the ICC among participants came up [...] they wish it to be in place to tame people'.²³ A Jubilee Alliance interviewee revealed that consciously, some leaders believe in the ICC, but they must be seen as if they are fighting it for strategic reasons of preserving the accused.²⁴ Similarly, according to a CORD interviewee, 'local courts can't handle such cases [...] we have more faith in the ICC than local processes'.²⁵

Furthermore, actors across all categories expressed faith in the ICC's potential to deter future crimes due to the interconnectedness of ethnic identity and political affiliation at the heart of political violence. With the fear of ethnic conflagrations during future elections, the ICC enjoys substantial acceptance across actor categories, thus the Court's functional role as a potential

²¹ Several CSO officials who were interviewed for the context of this research articulated this position.

²² Interview with Kikuyu youth, Nairobi, 2 March 2016.

²³ Interview with Kalenjin peace activist, Nakuru, 22 February 2016.

²⁴ Interview with a Jubilee actor, Nairobi, 9 February 2016.

²⁵ Interview with CORD activist, Nairobi, 18 March 2016.

preventive measure. As veteran politician Koigi Wamwere noted, the current political formations of Jubilee Alliance and CORD are driven by dangerous ethnic ideologies, and:

‘Elections are an ethnic battlefield, into which we go, not to elect good leaders for ourselves and everybody else but to defeat enemy ethnic leaders from other communities whom we must vanquish or perish’ (Wamwere 2016, 1).

KPTJ (2015, 3) observes that:

‘As Kenya enters another pre-election season characterised by hate speech, inflamed rallies and vituperation of the ICC, the Court remains the only viable hope for justice and the only credible deterrence’.

Similarly, a Kikuyu youth opines that given shifting political alliances, the Kikuyu might use the threat of the ICC as a deterrent to violence against their people.²⁶ For CORD’s Senator Hassan Omar, ‘the potential of the ICC has scared off warmongers’ (KTN 2016, 1). And in the wake of Ruto’s case termination and calls for Kenya’s withdrawal from the ICC, a Jubilee Alliance MP differed with his party’s general line and argued that ‘our country was usually torn along tribal lines and it would be inappropriate to withdraw from the Court that could tame any individual out to cause chaos’ (See for example, Wanyoro 2016, 1). Likewise, Jubilee Alliance’s Laikipia East MP rejected calls for withdrawal, affirming that ‘the function of the ICC as a court is important as it acts as a check on authoritarian leadership’ (cited in Wafula, 2016, 1).

Among victims, Amnesty International (2014, 48) shows that some of them expressed fears of more human rights violations if Kenya exits the ICC and expressed faith in the Court’s capability to prevent future crimes. For example, a victim noted how he:

‘Has a lot of hope that the success of the ICC will bring some change on what is happening in Kenya [...] anybody will fear to violate rights if he or she thinks about what the ICC does on these issues’ (Amnesty International 2014, 48).

The most consistent actors on acceptance of the ICC are CSOs (KPTJ) and to some extent victims. On its website, KPTJ contends that ‘there can be no peace without truth and justice - truth and justice for the failed presidential election and the violence that followed’ (KPTJ 2016, 1). Indeed, KPTJ (2010: 6) argued that ‘a preferable outcome would have been for Kenya to investigate and prosecute those responsible for the violence’. In this vein, a former KPTJ official reveals their preference for local judiciary due to their long-term impacts in strengthening local systems and trying a larger number of suspects, and sees the ICC as a last resort.²⁷

KPTJ’s acceptance of ICJ stems from a firm ideological position on the significance of justice for positive peace, which Galtung (1967, 14) defined as ‘the search for conditions that facilitate the presence of positive relations’. As KPTJ’s Ndun’gu Wainaina opines, ‘lasting peace and justice can only be achieved if past crimes are punished’ (Wainaina 2016, 1). With Kenya’s impunity for

²⁶ Interview with Kikuyu youth, Nairobi, 2 March 2016.

²⁷ Interview with former KPTJ official, Nairobi, 13 February 2016.

the 1992 and 1997 violations and the failure to act on Waki's recommendations regarding a local tribunal in 2007, Wainaina suggests that 'the ICC represents what generations of Kenyan leaders have failed to give the country: a check against impunity' (Wainaina 2016, 1). On Kenya's inability and unwillingness to prosecute the power leaders, Wainaina remarks:

'Kenya is facing a deep crisis of impunity. It is increasingly difficult, in fact nearly impossible, for people who have suffered serious violations of their human rights to receive justice and accountability. Victims and survivors do not receive redress and perpetrators are not brought to justice. Kenya typifies the exercise of authority without accountability' (Wainaina 2016, 1).

Since the ICC's intervention in December 2010, a CSO official notes that KPTJ's support for the ICC has been consistent.²⁸ At the national level they continue to harness victims' voices by creating their networks and mobilising them into a community of justice,²⁹ and at both the Assembly of State Party (ASP) meetings and the ICC trials, KPTJ countered the Government's narratives on cooperation and domestic investigative efforts.³⁰

Conversely, the Kenya Citizen Coalition (KCC) does not accept the ICC. In CSO circles, the KCC's convener Ngunjiri Wambugu was co-opted by the Jubilee Alliance to counter KPTJ's support for the ICC. As a human rights activist reveals, 'under the outfit Kikuyus for Change, Wambugu raised his profile by leading the pro-ICC campaign, helping other CSOs to collect one million signatures in support of the Court' (cited in The Hague Trials 2015, 1). Thereafter, Wambugu backtracked, publishing articles that argued the ICC was not a solution for justice, supported two of the ICC accused suspects' political ambitions and countered KPTJ's positions on the Court (ibid, 1). According to the activist, Wambugu 'used the knowledge he gained while working with pro-ICC organisations to relentlessly attack the very groups that let him into the fold and trusted him with their tools of the trade' (ibid, 1).

For their part, victims' preliminary acceptance is expressed in their high expectations at the outset of the ICC interventions.³¹ An Amnesty International (2014, 48) report reveals that most victims had 'high hopes and expectations of the ICC because of increasing disillusionment with Kenya's legacy of impunity'. In the report, only five out of the 49 victims interviewed did not accept the ICC process. They believed in Kenyatta's and Ruto's message that their decision to form a political alliance was a reconciliation process for the country and thus construed the ICC's trials as undermining these efforts (ibid, 50). Similarly, a CSO official interviewed for this project reflected on the victims' acceptance of the ICC that since 'there was nothing happening nationally [...] all focus was on the ICC'.³²

In the trials' timeline, victims' priorities also changed, given that they encountered different circumstances besides the violations they had suffered.³³ First, the trials coincided with

²⁸ Interview with CSO official, Nairobi, 18 February 2016.

²⁹ Interview with CSO official, 8 February 2016.

³⁰ Interview with former KPTJ official, Nairobi, 8 February 2016.

³¹ Interview with CSOs, Nairobi, February - April, 2016.

³² Interview with CSO official, Nairobi, 13 February 2016.

³³ Ibid.

government plans to resettle IDPs.³⁴ Second, some victims, especially in the Rift Valley and Central, the home regions of the accused, felt in danger if they continued to express acceptance of the ICC.³⁵ The Jubilee Alliance was in Government after winning the 2013 elections, and was consequently the Government which rolled out the resettlement programmes and demonstrated hostility to the Court.

The ICC, and by extension justice, was not of immediate concern to some victims whose interests shifted to meeting immediate needs of shelter and social safety.³⁶ However, support for the ICC was solid among victims who lived far from the strongholds of the Jubilee Alliance, and hence felt less endangered (mostly ethnic Kisii, Luo, and Luhya).³⁷ They did not expect too much of IDP support, given their framing as 'integrated IDPs' and the concentration of resettlement programmes in the Rift Valley and Central regions.³⁸

With the mistrial ruling in April 2016 that signified the end of the initial six cases, victims expressed different opinions of the ICC, based on their prevailing interests and circumstances. In the Rift Valley, for example, a victim remarked, 'my heart is now at peace now that the cases have been withdrawn [...] it is all history and we should now preach peace and reconciliation' (Nation 2016, 1). Similarly, an IDP chairperson expressed 'satisfaction with the ICC decision and appealed to the Government to embark on compensation' (ibid, 1). By contrast, a victim in Kisumu expressed disappointment with the ICC, asserting that 'the dismissal of the case is a delay for justice to the victims of the violence' (ibid).

5.2 Non-acceptance amongst directly affected Kikuyu and Kalenjin communities

Despite the drive and demand for justice, in the trials' timeline there were moments of non-acceptance as expressed in sentiments amongst the majority Kikuyus and Kalenjins. This was attributed to their reinterpretation of the Court's intervention against the backdrop of local conflict narratives and political realities.

Critical in the communities' discourses were arguments such as that their leaders were facing trials in a foreign land on behalf of their entire communities. Their rejection of the Court was partly demonstrated in their 2013 majority vote for Kenyatta and Ruto in a joint Jubilee Alliance ticket despite their ICC cases.³⁹ A Kikuyu youth notes how 'when they heard that Uhuru Kenyatta was in the ICC's list of suspects, they did not believe in it [...] they supported the Court initially because they knew Kenyatta was not in the list'.⁴⁰ A Kalenjin youth remarks that 'the community did not accept the ICC process because their sons [Ruto and Sang] were being prosecuted by the Court'.⁴¹ Furthermore, as a Kikuyu youth narrates, whenever the ICC topic

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Interview with Kalenjins, Kikuyus in the Rift Valley, Central, Nairobi, February - April 2016.

⁴⁰ Interview with Kikuyu Youth, Nairobi, 2 March 2016.

⁴¹ Interview with a Kalenjin youth and parliamentary aspirant, Nairobi, 17 February 2016.

came up in social media platforms, a majority of Kikuyu and Kalenjins expressed hostile sentiments on the ICC.⁴²

Several Kikuyu and Kalenjin interviewees also revealed that, given the widespread nature of the PEV, the ICC's indictment of their leaders and exclusion of those from rival communities (such as the Luo) was an injustice. The indictment of their key political actors produced narratives of complicity to violence and undue political leverage to rivals.⁴³ For example, a Kalenjin youth observes that the ICC was not accepted in the community for the mere coincidence that half of the six suspects came from this community, even though Kenya has 42 tribes.⁴⁴ Although the Rift Valley was the epicentre of the violence, he argued that it was unfair for their leaders to bear almost the whole blame for the PEV,⁴⁵ and that it was argued by the Kikuyu and Kalenjin that the ICC targeted wrong suspects - Kenyatta and Ruto - who were merely foot soldiers for Mwai Kibaki (PNU) and Raila Odinga (ODM) respectively. To them, because Kibaki and Odinga were the two protagonists in the 2007 elections, they bore the greatest responsibility for the violence in the spirit of the Rome Statute.

Individual community narratives of the conflict contradicted the ICC's mission of justice. Among the Kalenjin, the violence was spontaneous,⁴⁶ thus Ruto's and Sang's indictments were unfounded and based on a witch hunt. For the Kikuyu, the community was under attack and retaliation was justified to protect it,⁴⁷ and later efforts at prosecuting Kikuyu leadership on the basis of the crimes committed in self-defence was itself an injustice.⁴⁸ Therefore, the Kikuyu celebrated Kenyatta's case termination in December 2014⁴⁹ as the Kalenjin celebrated the final collapse of Sang's and Ruto's cases in April 2016 (Kamau 2016; Kipkemoi 2016).

5.3 Strategic acceptance and non-acceptance among political leaders

Although the political leaders partly shared concerns for justice with the victims and CSOs, at times their interests in self-preservation and political manoeuvres fundamentally departed from these concerns. Tom Maliti, Kenya's International Justice Trial monitor, argues that 'political actors' expressions and actions should not be seen purely as good faith actions, but protection of their interests'.⁵⁰ While the Jubilee Alliance demonstrated both strategic acceptance and strategic non-acceptance, CORD expressed only strategic acceptance of ICJ.

Kenyatta and Ruto initially demonstrated strategic acceptance in their preference for ICJ at the expense of a local hybrid process (Government of Kenya 2010). Their initial acceptance of ICJ was premised on self-preservation since the ICC was a distant reality, but the local hybrid was not. The ICC was less active at the time,⁵¹ but a local hybrid tribunal was perceived to be feasible

⁴² Interview with Kikuyu Youth, Kiambu, 2 March 2016

⁴³ Interview with Kikuyu elder, Kigumo, 29 February 2016.

⁴⁴ Interview Kalenjin youth, Nairobi, 23 February 2016.

⁴⁵ Ibid.

⁴⁶ Nearly all the Kalenjin interviewees articulated this position.

⁴⁷ Nearly all Kikuyu interviewees advanced this argument for non-acceptance.

⁴⁸ Interview with Kikuyu Lawyer, Nairobi, 9 February 2016.

⁴⁹ Interview with Kikuyu youth, Kigumo, 29 February 2016.

⁵⁰ Interview with Tom Maliti, Nairobi, 16 February 2016.

⁵¹ Interview with Kikuyu politician, Nairobi, 29 February 2016.

given recent experiences in neighbouring Rwanda and Sierra Leone. Thus, with the ICC demonstrating unprecedented activity, Kenyatta, Ruto and their allies resorted to strategic non-acceptance, again for self-preservation.

For the ICC accused, access to state power proved the best way to overcome their predicaments, thus partly informing the creation of political alliances that culminated in the Jubilee Alliance in the run up to the 2013 elections. For most of the Kenyan trials at The Hague, the Jubilee Alliance expressed non-acceptance of ICJ in a series of anti-ICC prayer rallies. For example, in one of the prayer rallies in Kericho, the Jubilee Alliance's Senate majority leader Kithure Kindiki declared Ruto's case termination their main 2016 agenda (KTN 2016). While echoing other speakers at the rally, Kindiki reprimanded 'the ICC and its collaborators that the case is the biggest threat to Kenya's security, stability and prosperity' (KTN 2016). For the Jubilee Alliance and its supporters the trials of President Kenyatta and his Deputy's in a foreign jurisdiction posed diplomatic and sovereignty dilemmas (Kagwanja 2014).

After the final collapse of the six original Kenyan cases with Sang's and Ruto's mistrial ruling in April 2016, President Kenyatta declared 'the end of Kenya's cooperation with the ICC' in a largely publicised and well attended prayer rally in Nakuru (NTV 2016; KTN 2016). For his part, Ruto reiterated that 'the ICC and Hague issue is permanently closed' (NTV 2016). These pronouncements undermined Kenya's obligations under the Rome Statute, given the ICC's arrest warrants for three Kenyans on crimes against the administration of justice.⁵²

The Jubilee Alliance also reignited debates on Kenya's withdrawal from the ICC. For instance, President Kenyatta formally asked Parliament to fast track two pending resolutions that asked his Government to suspend any 'links, cooperation and assistance' (Shiundu 2016, 1). Likewise, in an interdenominational prayer rally in Uasin Gishu, some Jubilee Alliance leaders from the Rift Valley declared that they would continue pursuing Kenya's withdrawal from the ICC and block extradition of suspects wanted for witness interfering (Kimuge 2016).

In sum, as strategic acceptance turned counterproductive in evading accountability for Kenyatta and Ruto due to the ICC's unexpected activity, their efforts shifted to acquiring state power under which they would have leverage on circumventing justice. Subsequently, the Jubilee Alliance opted for strategic non-acceptance to frustrate the ICC's prosecution efforts.

By contrast, CORD's political leaders expressed their acceptance of ICJ in public statements in support of the ICC and rejected the Jubilee Alliance's withdrawal proposals. For example, in a statement posted on his website, social media platforms and newsrooms, CORD's leader, Raila Odinga, chided the Jubilee Alliance's Nakuru prayer rally as 'Uhuru and Ruto's dance on the grave of PEV victims' (Odinga 2016, 1). He also expressed his disappointment with the collapse of the ICC trials for 'denying Kenya the only chance it had to end the culture of impunity' (Odinga 2016, 1). Concerned with the plight of victims, he lamented, 'we must moan [sic] the continued lack of justice for those who were killed, the helpless women who were raped and the multitude of persons who were displaced' (Odinga 2016, 1). Similarly, in CORD's Nairobi rally

⁵² See ICC, 2016.

held in parallel to the Jubilee Alliance's Nakuru rally, politicians urged attendees 'to push for justice for [the] 2007 victims' (Ongiri 2016, 1), and asked why the Jubilee Alliance had never prayed for them before (Ogina 2016).

Nevertheless, the actions of political actors in CORD over time reveal hints of strategic acceptance. First, in the immediate aftermath of PEV, Odinga (while Prime Minister in the transitional Government) called for a blanket amnesty for the Rift Valley youth who were in custody for their alleged roles in the violence (Cawthorne 2008). His firm stance on international justice emerged after ICC suspects were made public, although he had also supported calls for a local tribunal. Second, the other two CORD principals, Kalonzo Musyoka and Moses Wetangula (Vice President and Foreign Affairs Minister respectively) were part of shuttle diplomacy to end the Kenyan cases.⁵³ In the Nairobi rally, CORD also questioned their opponents' sincerity while they also staged prayers for the victims for the first time since 2008.

A CORD official also admits to their acceptance of the Court for political ends,⁵⁴ and that its motives were premised on projecting a liberal front; championing international norms and victims' needs. This is against the backdrop of the Jubilee Alliance's chequered record on public international relations (with the ICC cases) and accusations of neglecting victims. A CSO official opines that the opposition strategically accepted the ICC as it elevated their status as people who adhere to international law and fight impunity.⁵⁵ Besides, she argues, this resonates well with the people and attracts Western sympathy.

Second, CORD's strategic acceptance stems from the Court's potential role in eliminating political opponents;⁵⁶ as a CORD official remarks, 'people in CORD were hanging on the ICC to bar Kenyatta and Ruto from vying, so we could celebrate an easy win'.⁵⁷

In summary, the political leaders in Kenya deviated from the ICC's justice dividends and strategically accepted or rejected it, depending on their prevailing interests and circumstances. The Jubilee Alliance strategically accepted the Court to evade a local tribunal, after which they strategically rejected it to circumvent justice after the ICC's unprecedented activity. For CORD, some leaders accepted the ICC after it named political opponents, while some of its actors embraced the Court after shifting political positions that contradicted their previous allies in the Jubilee Alliance.

5.4 The ICC's effectiveness in conducting investigations and witness protection

The ICC's methods in conducting investigations and protecting its witnesses had an impact on its acceptance across all actor categories in Kenya. With its international stature and position as a court of last resort, the Court is uniquely positioned to demonstrate a capacity that might be absent in local jurisdictions. However, in a key note address at Salzburg Law School, a former

⁵³ On Kenya's shuttle diplomacy to terminate the ICC cases, see for example, Nation, 2011.

⁵⁴ Interview with CORD official, Nairobi, 15 February 2016.

⁵⁵ Interview with CSO official, Nairobi, 13 February 2016.

⁵⁶ This position was articulated by several interviewees across all the actor categories.

⁵⁷ Interview with CORD Official, Nairobi, 28 September 2015.

ICC judge, Hans-Peter Kaul (2011) highlighted some key challenges facing the Court. First, it relies entirely on state cooperation as it does not have executive power and a police force of its own. Second, it faces logistical challenges in carrying out investigations in dangerous and inaccessible places, given that it is a nascent institution with a small budget and few staff or judges.

In Kenya, there were arguments that the ICC's investigations were not properly conducted, resulting in weak cases and their eventual collapse. As Macharia Gaitho (2016) points out, several Pre-Trial Chamber and Trial Chamber rulings in the cases revealed weaknesses in the prosecution case that were otherwise accommodated because of OTP's complaints about lack of state cooperation. Similarly, Joyce Nyairo (2014, 1) opines, 'the OTP had a moral and statutory obligation to investigate these cases while the Court had oversight responsibility in respect of the prosecutor [...] both of them failed to carry out these duties'. Nyairo also claims that hopes were raised but a remarkable opportunity to deliver justice for the victims was squandered by inept investigations (Nyairo 2014).

At least for poor investigations, several interviewees across all actor categories, including those with consistency and high levels of acceptance, contend that the ICC did not conduct proper investigations. Notably important in KPTJ's statement after the mistrial ruling was to partially blame it on the OTP for poor investigations:

'The OTP must share part of the responsibility for under-investing in documentary and forensic evidence and over-relying on witnesses who could be tampered with, bribed, threatened or disappeared' (KPTJ 2016, 1).

In the same vein, Odinga suggested that 'we all agree that our leaders got caught up in a mixture of botched investigations and subversion of the administration of justice' (Odinga 2016, 1). A victim also expressed disappointment with the ICC investigations, remarking '[w]e have been following The Hague process keenly and we realised the prosecution did not carry out enough investigations' (Daily Nation 2016, 1). Kenyatta, Ruto and their supporters also cited rushed Kenyan cases that also lacked proper investigation or preparation (Kinyanjui 2016).

Several interviewees across all categories also cited the ICC's dismal performance in witness protection, and the OTP claimed that some witnesses were subjected to intimidation while others were bribed to recant their testimonies. The OTP consistently mentioned interference with the prosecution witnesses as a reason for the collapse of the Kenyan cases. In this regard, Nyairo (2014) argues that the ICC's witness management programme deserves audit to investigate allegations that witnesses were sought, bought, coached, in hiding, or had disappeared. Arguing on what the ICC should learn from witness messes, Gabrielle Lynch (2014, 2) opines that:

'The ICC needs to reconsider whether and how to use witnesses when it is extremely difficult, if not impossible, to provide adequate witness protection to people whose identities are already known'.

The ICC's inability to conduct proper investigations and protect its witnesses also lowered its acceptance across all actor categories. Indeed, the Presiding Judge in Joshua Sang's and William

Ruto's case cited witness interference alongside political meddling as justifications for the mistrial ruling in the last case in the situation of Kenya.

6. Conclusion

In Kenya, the actors expressed consensus on acceptance that places faith on the ICC as a last resort and believe in its potential to prevent the commission of future atrocities. This is a result of the significance of Kenya's ethnicity that predisposes electoral processes to violent conflicts between groups. It has also demonstrated institutionalised impunity for the leaders who orchestrate such violence. Thus, there is no greater impetus to acceptance of ICJ in Kenya than its negative ethnicity that pervades everyday social, political and economic life and assurances of local impunity.

They departed on this consensus given their diversity, competing interests and circumstances, and each category reacted to the ICC in relation to its specific interests and circumstances. Human rights and governance CSOs such as KPTJ demonstrated consistent acceptance of ICJ, seeing the Court as a complementary judicial response in their efforts to improve Kenya's governance and break the cycle of violence and impunity. For victims, though their acceptance of ICJ was consistent with their overall aim of justice for the harm suffered, this vision was distracted by intervening circumstances such as a need to secure basic needs such as shelter, personal safety and compensation, thus they might at times place justice as secondary. For the directly affected Kikuyu and Kalenjin communities, there were moments of non-acceptance that accrued from their interpretation of ICJ vis-à-vis local conflict narratives and political realities. For their part, the political leaders in the Jubilee Alliance and CORD either strategically accepted ICJ for local political manoeuvres or self-preservation, or strategically rejected it.

The ICC's effectiveness in conducting investigations and witness protection has also had implications on its acceptance across all actor categories. In the Kenyan situation, themes of poor investigations and witness protection recurred and were cited for reservations on acceptance.

As the Kenyan experience has shown, the ICC has great promise for acceptance in local spaces due to its demonstrable capacity to intervene in intractable group conflicts and prosecute powerful leaders. However, for broad acceptance, the Court has to carefully interrogate social tensions that result in conflicts, assess the powers of alleged perpetrators, and conduct proper investigations and protect witnesses. Although in the short term the Court might experience challenges in addressing these concerns and thus low levels of acceptance, the long-term effects of peace dividends that come with the Court's interventions could potentially boost its acceptance levels.

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