

## **The effect of Human Security Law & International Criminal Court (ICC) or Regional Equivalents on Government Performance**

**Effect:** Moderate (Block suggests an overall positive systemic impact on Kenya's governance framework and reduction of large-scale political violence, while acknowledging failures in prosecuting lower offenders and protecting witnesses. On the other hand, Hillebrecht reports the negative performance of implicated governments in actively resisting, non-cooperating with, and undermining the international justice process, particularly when accused individuals hold power.)

Confidence in study findings: Low (two studies, low confidence)

### **Short summary**

The enforcement of human security law through international criminal accountability mechanisms like the International Criminal Court (ICC) can paradoxically influence government performance by creating opportunities for indicted individuals to exploit domestic political resistance for electoral gain. The threat of prosecution, particularly when perceived as targeting specific political groups, can lead to the strengthening or formation of political alliances. International criminal tribunals (ICTs) can inadvertently empower political elites facing indictment. The effect on government performance, as evidenced by the sources, presents a mixed picture. On one hand, the ICC's intervention in Kenya (Block, 2014) appears to have indirectly fostered positive systemic changes, such as a more robust legal framework and a reduction in widespread political violence. However, this positive influence is tempered by the government's failure to prosecute lower-level offenders and adequately protect witnesses. On the other hand (Hillebrecht, 2020), there is clear evidence of negative government performance characterized by active resistance, non-cooperation, and deliberate undermining of international justice processes, particularly when implicated individuals hold positions of power. Therefore, the overall effect on government performance is a complex interplay of institutional improvements alongside executive obstruction.

### **Long summary**

#### *The intervention*

The ICC in Kenya was initiated following the Post-Election Violence (PEV) that occurred in 2007-2008. The court became involved because the Kenyan national judiciary was unwilling or unable to pursue justice itself, having failed to progress towards prosecutions in the six years following the violence. Investigations into the atrocities were prompted by the Commission of Inquiry on Post-Election Violence, also known as the Waki Commission. Following the recommendations of the Waki Commission, a deadline was set for action, and when the government failed to act, Kofi Annan, a key leader in negotiating peace during the PEV, handed over information to the ICC Prosecutor in July 2009. The ICC Prosecutor then used their proprio motu powers to open an investigation into the violence, which began in November 2009. This investigation led to the indictment of several prominent figures, known as the 'Ocampo Six', including Uhuru Kenyatta and William Ruto, who were charged with committing crimes against humanity. The cases against Kenyatta and Ruto involved their alleged involvement in the PEV. The involvement of ICTs, such as the ICC or the Special Tribunal for Lebanon (STL), in the domestic political affairs of countries where they are conducting investigations and prosecutions has significant implications. This refers to the multifaceted ways in which ICTs, by their very nature and actions, become enmeshed in the domestic political processes of the countries they are engaged with. Thus influencing

political stability, electoral outcomes, coalitional dynamics, public perceptions, and the broader pursuit of justice and accountability

#### *How is the intervention expected to work*

- 1) The primary expectation was that the ICC would investigate and prosecute the highest-level individuals responsible for the 2007-2008 post-election violence, aiming to deliver justice to victims, end impunity, and uphold humanitarian principles, acting under the principle of complementarity due to the perceived inaction of the Kenyan judiciary. The ICC's involvement was anticipated to have a broader deterrent effect, preventing future atrocities and influencing the behavior of political figures by discouraging violent actions and promoting accountability (Block, 2014). ICTs, through their investigations and indictments of political figures, become deeply entangled in the domestic political landscape of the countries in question. This involvement itself constitutes a form of intervention, as it directly impacts political dynamics, power struggles, and electoral processes (Hillebrecht, 2020, p.457, 461)
- 2) The "shadow" of the ICC, or the threat of prosecution, was expected to exert influence on Kenya's domestic systems, potentially contributing to the drafting of the 2010 Constitution, the establishment of an independent judiciary, and the integration of international legal norms into Kenyan law, ultimately strengthening the rule of law and democracy.
- 3) Through Outreach Programmes, the ICC aimed to educate the public about its work, address misconceptions, build support, and contribute to long-term peace, justice, and reconciliation within affected communities.
- 4) The intervention was expected to reinforce the norm that even heads of state are not immune from prosecution for atrocity crimes, to act as a standard for acceptable behavior, and to potentially remove indicted individuals from positions of power, signalling that impunity would not be tolerated.
- 5) These can deepen existing political and social cleavages, especially when the tribunals are perceived as targeting only one side of a conflict. This selective focus can fuel resentment, bolster anti-ICT sentiment, and create a "rally-round-the-flag" (Hillebrecht, 2020, p.464) effect that benefits those under investigation

#### *The evidence base*

There are two qualitative studies assessing the effect of **Human Security Law & International Criminal Court (ICC) or Regional Equivalents on Government Performance**. These studies are by C. Hillebrecht (2020). *International Criminal Accountability and the Domestic Politics of Resistance*. *Law & Society Review*, 54(2), 453-486; and N. M. Block (2014). *The ICC and the Situation in Kenya: Impact and Analysis of the Kenyatta and Ruto/Sang Trials* (Doctoral dissertation). All references are from these two studies

#### *The evidence*

- 1) ICTs acted as catalysts for political upheaval as evinced in both regions (Hillebrecht, 2020):
  - Lebanon: The establishment of the STL, was mandated to investigate the assassination of the Prime Minister and triggered the formation of the March 8th Alliance, a coalition spearheaded by Hezbollah. This alliance actively campaigned against the STL, framing it as a tool of Western interference. The STLs indictment of Hezbollah members further intensified political tensions, leading to the collapse of the

government and the subsequent election of a Hezbollah-backed Prime Minister. This demonstrates how the STLs actions directly impacted the balance of power and electoral outcomes in Lebanon (Hillebrecht, 2020, p.468-469)

- Kenya: The ICC's investigation into the 2007-2008 post-election violence, which included indictments against prominent political figures like Uhuru Kenyatta and William Ruto, significantly altered the Kenyan political landscape. The indictments led to the disintegration of existing political alliances and fueled uncertainty about the future of Kenyan politics. The subsequent alliance between Kenyatta and Ruto, two former rivals who united under the banner of opposing the ICC, illustrates how the tribunal's actions became a pivotal factor in shaping political coalitions (Hillebrecht, 2020, p.473-475)
- 2) Both the Lebanese and Kenyan cases provide evidence of political actors strategically utilizing the threat of ICT prosecution to bolster their electoral prospects. They achieved this by framing the tribunals as instruments of neo-colonialism and Western dominance, tapping into existing anti-Western sentiment within their respective populations. For instance, in Kenya, Kenyatta and Ruto, during their 2013 presidential campaign, effectively turned the ICC indictments into a rallying cry, accusing foreign powers of trying to manipulate the election. Their rhetoric resonated with a segment of the Kenyan population, leading to a decline in public support for the ICC and solidifying their electoral victory (p.476). Hezbollah, capitalized on the tribunal's actions to consolidate its political power (p.469). They portrayed the STL as an attack on Lebanon's sovereignty, strengthening their position within the March 8th Alliance and ultimately influencing the selection of a sympathetic Prime Minister (p.472)
- 3) The ICC's intervention in Kenya indirectly spurred significant positive changes in the legal system, notably influencing the 2010 Constitution which established an independent judiciary and embedded international legal norms. This structural strengthening of the rule of law, driven by the "shadow" of the ICC, provided the capacity for domestic prosecution of PEV-related crimes. However, the Kenyan government demonstrated an unwillingness to fully utilize this new capacity, and the ICC's influence did not extend to the prosecution of lower-level offenders (Block, 2014, p.36-38)
- 4) While the ICC's presence, facilitated by the new constitution, may have curbed the executive's power and contributed to a decrease in overall violence and a more peaceful 2013 election, it also created negative consequences such as increased risks to witnesses due to intimidation and tampering. This highlights a complex and sometimes contradictory impact on government performance in ensuring human rights and the integrity of legal processes.
- 5) Individuals who attain positions of power after being indicted by ICTs can leverage their influence to obstruct justice and manipulate the tribunal's operations (p.453). This "tribunal capture" (p.480) can undermine the ICCs effectiveness and erode public trust in the pursuit of international criminal justice
  - In Kenya, Kenyatta and Ruto, following their election, employed various tactics to hinder the ICC's investigation, including non-cooperation, witness intimidation, and challenges to the court's jurisdiction.<sup>19</sup> Their actions ultimately contributed to the collapse of the cases against them, showcasing how political power can be utilized to thwart international justice mechanisms (p.477)
  - While the STLs mandate was narrower in Lebanon than the ICCs, Hezbollah's influence over the Lebanese government raised concerns about

potential obstruction of justice. The debate surrounding Lebanon's financial contributions to the STL highlights how political considerations can impact the tribunal's functioning and its ability to pursue its mandate effectively (p.472)

- 6) The ICC's direct pursuit of justice inadvertently led to the formation of the Kenyatta/Ruto alliance, a significant political development that ultimately secured electoral victory. While this alliance contributed to a peaceful election, it also coincided with a sharp decline in public support for the ICC, suggesting a challenge to the government's ability to foster public trust in international accountability mechanisms, potentially prioritizing political expediency over justice in the eyes of a segment of the population.

#### *Confidence assessment*

Overall confidence: Low Confidence Qualitative Study (It is unclear whether the small n approach was used; the sample/case selection strategy is neither explained nor justified; triangulation was not done; potential sources of bias are not addressed)