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## What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya

Geoff Dancy, Yvonne Marie Dutton, Tessa Alleblas, and Eamon Aloyo

**Abstract**<sup>1</sup>: Which Kenyans are most likely to believe the International Criminal Court is biased against Africans? Building on pluralistic models of public opinion and psychological studies, we aim to contribute to emerging research on attitudes toward international courts. We expect that group attachments will drive attitudes towards international institutions. Yet we also theorize that exposure to violence makes individuals more likely to support international justice and reject narratives that would have the effect of insulating those who have committed crimes from being held accountable. Using new survey data from 507 Kenyans in the fall of 2015, we find support for our hypotheses.

### 1. Introduction

The International Criminal Court (ICC) depends on the support of member states and their populace to function. This can create a legitimacy challenge for the ICC because it charges individuals with atrocity crimes when domestic governments are unable or unwilling to do so. Often, the push for accountability in situation countries invites a reactionary “us vs. them” narrative. Since 2009, some African leaders have, when confronted with the possibility of criminal accountability, painted the Court as a neo-colonial tool that is biased against Africans (Cole 2013; Verini 2016).

Kenyan leaders Uhuru Kenyatta and William Ruto began stumping against the ICC in 2010 after its prosecutor charged them with instigating attacks following the 2007 presidential elections. Attackers committed numerous sexual assaults, killed 1,100 citizens, and displaced

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more than 600,000 (Amnesty International 2014, 7). Kenyatta and Ruto claimed that they were not responsible for this violence, but were instead victims of a biased ICC. Proposing few policies of redress for the real victims of violence, Kenyatta (a Kikuyu) and Ruto (a Kalenjin) joined together in 2012, forming the Jubilee Coalition to campaign for president and deputy-president. A key campaign strategy was to invoke the ICC as the enemy. Referencing Africans' history of Western domination, they asked citizens to reject another sovereignty intrusion (Corporate Europe Observatory 2015; Mueller 2014).

In this paper, we use evidence collected from 507 face-to-face surveys of Kenyan citizens in fall 2015 to explain why some Kenyans perceived the ICC as biased against Africa. We do not seek to evaluate whether the ICC is *in fact* biased, as others have done (Smeulers, Weerdesteijn, and Hola 2015). Nor do we attempt to explain the outcome of the 2013 or 2017 presidential elections (Ferree, Gibson, and Long 2014).

Much of emerging research on attitudes toward international courts contends that individuals' perceptions are a direct function of group allegiances (Chaudoin 2016; Klarin 2009). According to one theory, people who share an identity with defendants are more likely to view international courts as biased (Chapman and Chaudoin 2017). Building on pluralistic models of public opinion and psychological studies, we theorize that exposure to violence makes individuals less likely to agree that the ICC is biased against Africa.

Kenya is an ideal context for testing this theory, given the presence of extensive ethnic-based clientelist networks. Because the country's leaders conducted a public, derisive campaign against the ICC, group attachments should prove a powerful driver of political attitudes, including toward international institutions. Indeed, our survey data shows that Kenyatta's and Ruto's co-ethnics are more likely than others to agree that the ICC is biased against Africans.

However, one's personal experience with violence exerts the reverse effect. Kenyans who identify as witnesses or victims of violence in 2007 are much less likely to agree that the ICC is biased against Africa. More surprising, this holds even if the respondent identifies as a co-ethnic of Kenyatta or Ruto. On this basis, we argue that exposure to violence is a primary determinant of attitudes toward the Court.

Our original survey data set has advantages that allow us to make a unique contribution to research on perceptions of the ICC. First, the sample includes respondents from poorer regions in the Kenyan countryside that were racked by violence. The data is drawn from randomly assigned face-to-face interviews in regions where Kenya's 2007 post-election violence occurred, as well as areas that were home to violence in the past. Second, the survey is fine-grained. It asked respondents about ICC bias against Africa, and it included other questions designed to sort through potential explanations for respondents' perceptions of the Court. Third, we ran the survey in October and November 2015 while some of the Kenya cases were still pending at the ICC. Thus, the data is recent and also collected from respondents with generally high levels of information about the ICC in Kenya. Other studies of international institutions, by contrast, are troubled by lack of knowledge among respondents (Gibson and Caldeira 1995).

One potential disadvantage of our survey data is that it is specific to Kenya, which could limit its external validity. Nevertheless, our Kenya findings may repeat in other countries. Like Kenya, states most likely to experience an ICC intervention feature violent political conflict defined along ethnic or religious cleavages (Kersten 2016). This set of countries would also count among their domestic populace a number of suffering victims (Cody et al. 2015), as well as a portion of the populace that evinces low trust in governing institutions (Afrobarometer 2014).

In the following section, we elaborate on the anti-ICC narrative that African leaders, including Kenya's, expounded. Next, we examine the existing literature on individuals' political attitudes in the domestic realm and towards foreign groups and institutions. We then introduce our theory about the psychological effects of exposure to violence, showing how it can cut across group identities and collective attitudes and significantly influence individual perceptions of the ICC. After our hypotheses, we present the results. The conclusion discusses the implications from our findings and directions for future research.

## **2. African Leaders Develop and Invoke the Anti-Africa Narrative**

### *2.1. The ICC in Africa: The Narrative Develops and Gains Support*

When the ICC was first created, African leaders were among its most avid supporters. Nearly half (27 of 60) of the first states that ratified the Rome Statute were African. The predecessor organization to the African Union (AU) issued a resolution in May 2002 encouraging its members to join the ICC (OAU 2002). African states now represent the second largest continental bloc of States Parties. Moreover, African states self-referred five situations to the ICC (Maunganidze and Louw 2012).

In recent years, however, some African leaders have reversed their support. The tide turned in March 2009 when the OTP issued the first arrest warrant for a sitting head of state, President al-Bashir of Sudan. Bashir responded to charges of genocide and crimes against humanity by calling the ICC a "colonial court" (Verini 2016). Since then, some African leaders have urged their fellow Africans to reject a Court that they say is biased against Africans.

Other criticisms have been leveled against the ICC. Some argue that prosecution can undermine peace (Akhavan 2009; Clark 2011). Others object that when the Court charges only "one side" to a conflict—as it did in Uganda—it fails to properly dispense justice (Branch 2007).

However, the critique that the ICC is biased is unique for its resonance among African leaders who challenge the Court and its allies. Indeed, in February 2017, at Kenya's urging, the AU issued a non-binding resolution for African states to withdraw *en masse* from the Rome Statute (Dixon 2017). While not adopted unanimously, some leaders supporting the measure invoked the bias narrative (Nantulya 2017).

## *2.2. The ICC in Kenya: The Narrative in Full Force*

The office of the prosecutor (OTP) turned its attention to Kenya after violence erupted following a hotly contested 2007 presidential election between Mwai Kibaki's Party of National Unity (PNU) and Raila Odinga's Orange Democratic Movement (ODM). Kibaki was pronounced the narrow winner after a controversial re-tally by the country's electoral commission. Subsequent Deputy-President Ruto, an ODM supporter, allegedly helped instigate attacks by rallying his Kalenjin supporters to assault Kibaki's Kikuyu supporters. In response, former Deputy Prime Minister and current President Kenyatta allegedly mobilized pro-PNU Kikuyu youth, including members of the Mungiki gang, to terrorize ODM supporters in Nakuru and Naivasha (Office of the Prosecutor 2010).

In mid-2008, international mediation by former UN Secretary-General Kofi Annan created a coalition government headed by Kibaki and established the Commission of Inquiry to Investigate the Post-Election Violence (CIPEV)—the Waki Commission. Its members concluded that politicians and businesspeople had instigated ethnic violence (CIPEV 2008, 472). The Report recommended a Special Tribunal in Kenya to prosecute those responsible. Should Kenya fail to create that Special Tribunal, the Commission stated that it was prepared to forward “a list containing names of and relevant information on those suspected to bear the greatest responsibility” for the post-election violence to the ICC prosecutor (CIPEV 2008, 473). The

Kenyan government never established the Special Tribunal, though it was given several extensions of the original deadline (Gettleman 2009). Nor did it institute any other domestic proceedings to prosecute any of the high-level officials (Brown and Sriram 2012).

In July 2009, Kofi Annan forwarded the list of names to the ICC prosecutor (ICC Press Release 2009). The ICC's chief Prosecutor, Luis Moreno Ocampo, used *proprio motu* powers for the first time to mount a preliminary examination into Kenya's post-election violence. In December 2010, Ocampo announced the names of the six prominent Kenyans (the "Ocampo Six"), including Kenyatta and Ruto, who would be charged with crimes against humanity (Kariuki and Mathenge 2010).

Kenyatta and Ruto fought the ICC. As Chaudoin argues, one of the ways that international organizations either achieve compliance or noncompliance is by motivating and mobilizing domestic actors to support or undermine the goals of the IOs (Chaudoin 2016). Part of that fight against compliance with the ICC involved two former political enemies teaming up to campaign for the country's top leadership positions. That Ruto and Kenyatta would join forces to wage battle against the ICC was a surprise that hardly anyone predicted. The pair hired BTI Advisors, a British Marketing firm, to craft their message to voters in the 2013 presidential elections. The campaign criticized the ICC, claiming that: (1) the ICC's investigation was marred by bias and a lack of understanding given the ICC's outsider status; (2) the ICC did not charge those most responsible for the violence, noting especially the absence of charges against Raila Odinga; and (3) the West's insistence on prosecution threatened Kenya's future stability (Lynch 2014, 105). By this account, the ICC targeted Kenya for political reasons without any understanding of what had happened or the negative effects that would follow from its external intervention in pursuit of accountability (Corporate Europe Observatory 2015, 34; Lynch 2014;

Mueller 2014; Wolf 2013;). During their campaign, Kenyatta and Ruto used slogans such as “a vote for us is a vote of no confidence in the ICC” (Nowrojee 2013). They explained the absence of charges against Odinga and his support for the Court by branding him a Western puppet who was politically linked to the Court (Lynch 2014; Wolf 2013). Kenyatta and Ruto attacked civil society actors on the same grounds, labelling them tools of imperialism for backing the Court (Hansen and Sriram 2015).

While many Kenyans did not consider the ICC as the most important issue in the 2013 presidential campaign (Ferree, Gibson, and Long 2014, 9),<sup>2</sup> observers contend that this campaign changed many Kenyans’ minds (Lynch 2014; Wolf 2013). This argument appears rooted in facts. In mid-2010, for instance, polls showed that close to 70% of Kenyans wanted the Ocampo Six put on trial in The Hague and did not trust local judicial institutions to handle the cases. By mid-2013, after the anti-ICC campaign was well under way, only 39% of Kenyans said they supported the ICC (Olick 2013). As Wolf (2013) points out, Jubilee operatives erased what was apparently an “unbridgeable lead” over Kenyatta and Ruto for the country’s leadership, essentially transforming their status of suspected heinous criminals into that of maligned victims of an evil and manipulative West. The coalition was at a minimum successful in winning the majority of Kikuyu and Kalenjin votes, notwithstanding the historical rivalry between those ethnic groups, who only 6 years prior, waged campaigns of violence against one another following the 2007 election.

Some observers fault the ICC, not the Jubilee campaign, for the Court’s declining popularity among the Kenyan public. Among other things, the ICC’s failure to conduct significant in-person outreach meant that it did not get its message across to victims and others

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<sup>2</sup> In this study, of 6,000 Kenyans questioned in exit polls after the 2013 election, 3% selected the ICC as the *most* important issue influencing their decision.

(Hansen 2016; Kenyans for Peace with Truth and Justice and Transitional Justice Institute 2017). The ICC cited security concerns to explain its lack of on-the ground presence in Kenya (Dutton 2017). Even so, victims became disillusioned as they realized that the ICC process moved slowly and failed to provide them with immediate benefits (Hansen and Sriram 2015). In December 2014, the ICC suspended charges against Kenyatta, and in April 2016, the ICC suspended the proceeding against Ruto. In retrospect, critics blame this collapse on missteps by an ambitious prosecutor. The OTP counters that it was hindered by a Kenyan government that bribed, intimidated, and even killed witnesses (ICC OTP 2014).

However, this should not close the book on the Kenyan case. Jubilee's anti-ICC narrative did not persuade all voters, and not all Kenyans believe that the project of international criminal justice is wrong. A study based on 2013 polling data showed that, compared to 2007, Kikuyu support for Kenyatta fell by 11% (from 94% to 83%) in 2013 (Ferree, Gibson, and Long 2014, 6–7). This is a break from the past because Kenyans are typically steadfast supporters of their co-ethnics (Jonjo 2003; Wrong 2009). Analysis of our 2015 survey evidence may help shed light on the slow erosion of support for Kenyatta, which continues in 2019 (Opalo 2019). But we can also seek to answer a larger question; particularly, what factors determine whether someone thinks the ICC is biased?

### **3. Existing Literature on Perceptions of International Courts**

Outside of research specific to the International Criminal Tribunal for the Former Yugoslavia (Arzt 2006; Clark 2009; Meernik 2015a; Meernik and King 2014), public attitudes toward international courts remain generally underexplored (Voeten 2013, 412). Our 2015 Kenya survey evidence provides a unique opportunity to assess the relationship between the ICC



and domestic audiences. At play are ethnic loyalties, cross-cutting political coalitions, democratic elections, winner-take-all politics, political violence, problematic domestic rule of law, an outside challenge to national political elites, and a campaign against the ICC.

This research is about individual political attitudes, which are “general and enduring positive or negative feeling about some person, object, or issue” (Glynn et al. 1999, 105). American political scientists identify a number of factors that contribute to political attitudes, including those about international affairs. The “pluralistic model” of public opinion holds that individual attitudes derive from some combination of personality, self-interest, group attitudes, and values (Clawson and Oxley 2012, 153; Kinder 1983). Each of these factors might be conditioned on a person’s socialization, or radically altered by life-changing experiences.

An emerging literature applies public opinion research to lesser developed, post-conflict societies subject to intervention by international courts. Thus far, research has yielded four lessons. First, self-interest – or “tangible, relatively immediate, personal or family benefits of a policy” (Chong et al. 2003, 542) – may not be the main driver of attitudes about international justice. For instance, in a study of ten post-conflict countries, Meernik and King (2014, 14) find that individual preferences for international criminal prosecution are statistically unrelated to the material damages those individuals suffered during wartime. While victims of conflict typically seek reparation or restitution (Pham et al. 2007), individuals do not necessarily judge the desirability of international criminal justice based on how it would benefit them directly.

A second lesson is that the work of international tribunals is filtered through rival group attitudes. Research on group attitudes focuses on the ways “prejudice toward, stereotypes about, and identification with social groups” correlate strongly with public opinion (Clawson and Oxley 2012, 166). Especially in contexts where political conflict involves competing identity-based

narratives that lionize in-groups and demonize out-groups, any criminal assignation of blame to an individual will further entrench animosities. Group members will treat convictions of their co-ethnics with scorn, while celebrating convictions of ethnic rivals. Research in the former Yugoslavia has repeatedly demonstrated that individuals interpreted court operations through the prism of ethnic rivalries (Arzt 2006; Clark 2009; Ford 2012; Klarin 2009; Meernik 2015; Milanović 2016; Steflja 2018).

A third lesson from the study of international criminal tribunals is that there is an inverse relationship between trust in domestic government and trust in international bodies in conflict-ridden societies facing judicial interventions. Those skeptical of home governments will support outside intervention. This is not true in developed countries, where a negative valuation of domestic governing institutions correlates with a negative orientation toward international institutions like the United Nations (Torgler 2008) and European courts (Voeten 2013). However, communities that have lived amid social breakdown distrust domestic institutions, which have repeatedly failed to solve internal crises. As a result, they evince greater hope in international involvement because it may alter course, or to reform what is broken (Elcheroth and Spini 2009; Meernik and King 2014). In sum, in countries troubled by extreme violence and low trust in domestic institutions should correlate with higher favorability toward outside institutions.

One caveat to this third lesson is that trust in outside institutions might depend on the availability of good information about a Court's operations. Studies suggest that individuals who possess more specific knowledge about international institutions, or who know more about a court's functions, are more likely to consider facts when forming favorable or unfavorable opinions (Chaudoin and Chapman 2017; Lupu 2013; Meernik 2015a). The Special Court for

Sierra Leone successfully addressed this issue with significant on-the-ground outreach with the domestic public (Dutton 2017). By contrast, scholars have noted that a lag in commencing outreach with far away domestic audiences negatively impacts perceived legitimacy, while allowing politicians and media the space to wage a disinformation campaign against the tribunal (Ellis 2011).

A fourth lesson is that education matters. In the United States, studies show that schooling can produce more civic-minded and politically active citizens (e.g. Andolina et al. 2003). In post-conflict societies, some evidence suggests that formal education is related to more support for international criminal justice. In an analysis of the former Yugoslavia, Meernik (2015a, 584) discovers that “for each year of education an individual completes, she becomes 0.5% more likely to support the ICTY.” The reason is unclear, but this could relate back to knowledge. Data from other studies suggests that fluency in basic international legal obligations alters attitudes. In an experiment, Chilton (2014) finds that familiarity with human rights commitments makes respondents less supportive of solitary confinement, whereas Meernik and King (2014) show that rudimentary knowledge of the laws of war increases support for international justice. Cross-national empirical studies also demonstrate that educated people are more opinionated because they are imbued with an overall sense that their individual attitudes are meaningful (Weakliem 2002).

If we apply the lessons from this literature to the Kenyan case, then the least likely supporters of the ICC should be those who share an ethnicity with members of the ruling coalition, show trust in local governing institutions, possess little information on the Court’s operations, and have little formal education. These expectations inform the conventional wisdom regarding the ICC in Kenya. Analyses of the country – a middle-income semi-democracy with

pronounced ethnic patronage networks – tend to presume that opinions toward the ICC is, as Stuart Ford calls it, a “negative sum game” between rival groups (Ford 2012, 410). That is, members of groups targeted by the Court move in lock-step, defending their own and criticizing the ICC. This makes sense. In Kenya, voters typically support their own ethnic leader’s bid for the presidency because presidents historically have shared the country’s spoils with their co-ethnics (Jonjo 2003; Wrong 2009). If losing one’s leader means losing money and influence to rival groups, then ethnic allegiance should have a doubly powerful influence on political attitudes.

However, in Kenya, the direct link between ethnic identity and attitudes is at once amplified and superseded by coalitional politics. One might expect that, following the formation of Jubilee, Kikuyu and Kalenjin rank and file would overcome their differences and support their joint leaders. As Chapman and Chaudoin (2017, 15) argue, “If a citizen thinks that a court’s action will target the government, and she supports that government, she is more likely to react negatively to an investigation in her country.” Extrapolating to the Kenyan case, those who benefit economically or otherwise under the ruling Jubilee regime should be more likely to follow the party line, trust the government, and advance whatever opinions of the ICC the government propagates.

While this version of events—that Kenya’s leaders exploited the group attitudes of their loyal and uninformed supporters to sway public opinion against the ICC—resonates, it may also omit some critical facts. First, in part because ICC intervention became a salient political issue, most of the respondents in our survey knew the identities of the Ocampo Six, the alleged crimes for which they were being prosecuted, and the general status of the ICC’s Kenya cases. On the other hand, Kenyans did not generally have the benefit of ICC outreach—a source from which

they may have been able to learn more about the Court's operations, including how cases and individual suspects are selected for investigation and prosecution (Hansen 2016; Kenyans for Peace with Truth and Justice and Transitional Justice Institute 2017). Nevertheless, Kenyans' high awareness and specific knowledge about the ICC's Kenya cases makes it difficult to treat Kenyans as low-information subjects. Second, Kenyans are relatively educated. According to World Bank data, in 2016, 81% of Kenyans completed lower secondary education. When compared to neighbors like Uganda, where only 25% of the public completed the same level of schooling, this is high (World Bank, n.d.). Among Kenyans, then, we should expect to observe more individualist and opinionated people.

Most importantly, one final element is largely missing from the literature on perceptions of international courts, and from most accounts of Kenyans' attitudes toward the ICC: the potential influence of one's exposure to violence. Common sense would dictate that a person's outlook on the prospects for international justice might be tied to whether they were previously victimized, or whether they personally witnessed atrocities.

Using the Kenyan case as a crucial test, we offer a theory about attitudes towards international courts that accounts for the complexity of the human psyche. We expect that individuals will incorporate a host of information when forming opinions. In the ICC case, we presume that individuals will be driven in part by self-interest, by group identities, and values. However, we hypothesize that exposure to violence will also play a role. Individuals who suffered violence should be less inclined to accept narratives of ICC bias, even compared to other individuals who belong to the same ethnic group or share the same values.

#### **4. Exposure to Violence and Kenyan Attitudes Toward the ICC**

Researchers have started interrogating the link between experience of violence and attitudes towards criminal justice. Thus far, they have yielded disparate findings. Some studies argue that war-torn populations are likely to prioritize peace and security and show wariness toward risky strategies for resolving or addressing conflict (Kim and Lee 2014). In their risk-aversion, those exposed to violence prioritize security needs over justice and accountability (Pham et al. 2005) and approach trials of former combatants or atrocity criminals as needlessly dangerous to their fragile peace. For instance, Samii (2013) finds that a great number of Burundians, including some victims of violence, are willing to “forgive and forget,” rather than pursue punishment. In short, populations with a recent experience of mass violence might be more likely to question international criminal interventions.

Other studies, however, find that victims tend to have a psychological pull towards justice that causes them to be more supportive of (international) criminal prosecutions. Meernik and King argue that whether individuals choose punishment as the best strategy for confronting war crimes and other human rights violations depends on “the extent to which the war affected them and their community” (2014, 5). In particular, they theorize that personal “experience with war increases the desire for justice, and in particular, international justice” (2014, 5). Their findings from cross-national survey evidence supports their theory, showing that respondents “who have been most affected by war are those who are most likely to favor punishment for those perceived as the wrongdoers” (2014, 14). These findings are supported also by Meernik’s further analysis of public opinion in the Balkans: “those respondents who experienced traumatic events are more likely to support the Yugoslav Tribunal” (Meernik 2015b, 584).

Elcheroth and Spini (2009) offer and test a similar theory about the positive relationship between the lived experience of violence and the support for international trials using data from

surveys administered in four countries of the former Yugoslavia more than 10 years after the wars in Croatia and Bosnia-Herzegovina. They find support for their theory that communities that have experienced severe violence can become critical of the local authorities that have failed to protect them and more supportive of international courts that prosecute those who abuse human rights. Further, they find that greater levels of experienced violence lead to greater levels of support for prosecution (Elcheroth and Spini 2009, 190, 208)

We take this research one step further, arguing that exposure to violence causes dissonance, interrupting the usual determinants of political attitudes. Psychological research into wartime trauma supports the notion that those exposed to extreme violence may undergo a kind of mental fracture that leads to social dislocation and produces an innate desire for justice. Examination of the stress caused by trauma hinges on the kind of mental state that is formed during a period of widespread human rights violations. Danieli (2005, 1636) characterizes victimization as a “*rupture*, a possible regression, and a state of being ‘stuck’ or ‘frozen’ in this free flow...” called “fixity.” If, after the cataclysm subsides, the post-conflict milieu does not provide for some kind of restoration of order, or “restore a balance of justice between victims and offenders,” then those victims are “at risk of losing their fundamental trust in a (potentially) just and meaningful world” (Elcheroth and Spini 2009, 192). Whole communities that have experienced this kind of loss and “flouting of basic principles” will become “more supportive of international institutions that prosecute human rights violations” (Elcheroth and Spini 2009, 190).

Kenya and Ruto crafted the anti-ICC narrative to appeal to a majority of Kenyans. We hypothesize that, although this narrative apparently resonated with many (Lynch 2014; Wolf 2013), it was relatively weak among those who witnessed or were victimized by post-election

violence. One-sided campaigns like Jubilee's are more likely to succeed when people lack immediate experiences and need to rely on third-party information (e.g. media, politicians, analysts or intellectuals) and social cues to form their own opinions. People who have felt directly harmed by the breakdown of established order, however, will find it easier to dissent from collective narratives. Thus, consistent with the literature discussed above, we expect that an individual's experiences give them first-hand knowledge and information that will shape their opinions about the ICC.

This literature does not suggest that individuals who have experienced or witnessed violence will all act in unison. What it does show, though, is that individuals are affected by their exposure to violence: the impact of that experience can inform – and even change – their political attitudes. Kenyans who were exposed to violence, and who continued to live in communities that were distressed, displaced, or disrupted, should be less willing to adopt a critical stance toward the ICC because the Court aims to provide redress.

- *Hypothesis 1:* Individuals with personal experience of post-election violence (whether as a witness or victim of criminal wrongs) will be less likely to perceive bias of the ICC against Africa.

We expect that Kikuyu and Kalenjin supporters of the ruling Jubilee regime will be more likely to agree that the ICC is biased against Africa as compared with other ethnic groups. However, we depart in one key respect: we expect Kikuyu and Kalenjin who experienced or witnessed post-election violence will be more willing to go against the narrative promoted by their co-ethnic leaders. Members of the ruling ethnic coalition were also victims of violence: 69 of 507 (15.6%) of the respondents in our survey identified either as Kikuyu or Kalenjin and as having been personally exposed to post-election violence.



Research demonstrates that exposure to violence generates greater animosity to outside ethnic groups (Beber et al. 2014; Rohner et al. 2013). Indeed, Kenyans exposed to post-election violence are more likely to demonstrate interethnic distrust (Dercon and Gutiérrez-Romero 2012). This means that victimized Kikuyu and Kalenjin might be less willing to join forces with a former rival ethnic group in bashing the ICC. Furthermore, individuals are sometimes willing to forego material interests to punish those who they think deserve it (Henrich et al. 2006; Herrmann et al. 2008). Those who experienced violence may believe that the ICC could be the only hope of achieving retributive justice. Some of those who are Kalenjin or Kikuyu and experienced violence may be willing to reject their co-ethnic leaders' narrative in order to seek justice. We expect that those exposed to post-election violence will still show more favorable attitudes toward the Court than those insulated from post-election attacks.

- *Hypothesis 2:* Kikuyu and Kalenjin with a personal experience of post-election violence (whether as a witness or victim of criminal wrongs) will be less likely than those without such experience to perceive ICC bias.

While we expect that ethnic identity and exposure to violence will be a powerful determinant of attitudes toward the ICC, we also theorize that other factors are at play. Prior to the propagation of the anti-Africa ICC narrative in Kenya, a vast majority of Kenyans supported the Court's intervention, likely because they did not trust their local institutions to bring perpetrators of the post-election violence to justice (Mwai 2011; Namunane 2010). Because local courts are perceived as corrupt or ineffective, Kenyans put more trust in international institutions. In fact, a researcher found that most ICC victim participants in the Kenyan legal cases preferred ICC investigations because Kenyan courts were "notoriously crooked" and easily ignore victims' grievances (Cody et al. 2015, 56). We argue that the reverse may also be true: those who trust national courts may be more likely to perceive ICC bias against Africa. Those

who identify with Jubilee—and its anti-African ICC message—will need to justify their belief with greater support for national courts. We predict an inverse relationship between trust in Kenyan courts and criticism of the ICC.

- *Hypothesis 3*: Individuals who trust in national courts will be more likely to perceive ICC bias.

A fourth factor that might explain variation in Kenyans' perceptions of the ICC is socialization through formal education. There are two mechanisms through which schooling may alter peoples' opinions. The first is knowledge, and more educated Kenyans may be more likely to know about the ICC. Further, knowledge can translate to support for a court because those with more knowledge arguably less susceptible to responses "triggered by cognitive biases" and are more inclined to consider a court to be impartial (Chaudoin and Chapman 2017, 14).

Nonetheless, we have reason to be suspicious of this explanation, in part because our survey evidence shows a high degree of knowledge about the ICC intervention: we asked two basic, factual questions about the Kenya cases, and only one of 507 respondents answered all of those questions incorrectly.

Thus, we look to a second mechanism linking education level to attitudes: political socialization. Schooling might not change the amount of knowledge that individual Kenyans have of the ICC, but it could alter how they apply their knowledge of the Court. We already noted that Kenya is relatively well educated for the region. But it is hard to know whether school socialization would sway individuals toward a more favorable or a more critical view of the ICC. For this reason, we observe the effect of variations in level of education attainment on attitudes. We predict that more educated Kenyans will perceive less ICC bias, for two reasons: first, these individuals may be less susceptible to claims based on group identity; second, they may also have a more nuanced and factual understanding Kenya's obligations under international law.

- *Hypothesis 4:* Individuals with higher levels of education will be less likely to perceive ICC bias.

## 5. Findings

We test our theory with a face-to-face survey of 507 Kenyans living in five regions: Nairobi/Murang'a, Nakuru/Naivasha, Eldoret, Kisumu, and Mombasa. The regions, organized by the researchers in a multistage cluster sample, span 14 political districts that were chosen because they were hot zones for post-election violence in 2007/8. In conducting the survey, organizers followed sampling methods typically used in the developing world, where conditions are less than ideal (Lupu and Michelitch 2017). Enumerators were sent out in mixed-gender pairs of two, and followed a skip pattern in specifically defined neighborhoods. Though it over-represents males, the sample achieves a fairly accurate representation of other population characteristics, both at the national and regional levels (See Appendix). We employ post-stratification weights to account for over-representation of males.

We use two dependent variables. The first is whether a Kenyan citizen perceives that the ICC is biased against Africa (ICC BIAS). We measure this variable using responses to one of 107 prompts on a face-to-face survey instrument (See Appendix). Each team of two enumerators posed the following statement: "The International Criminal Court, ICC, or The Hague is biased against Africa." Subjects were able to respond in six ways: (1) Strongly agree; (2) Agree; (3) Neutral; (4) Disagree; (5) Strongly disagree or (6) Don't know. The purpose of this question is to tap into "sociotropic" evaluations of each respondent. Sociotropy explains how individuals develop attitudes about an issue based on their perceptions of collective impact, which may be unrelated to their direct experiences (Mansfield and Mutz 2009). Sociotropic evaluations are likely to be tied to collective narrative understandings of an issue.

For the sake of robustness, we also study the same six responses to another related prompt: “The International Criminal Court, the ICC, or The Hague has no right to charge Kenyans with any crimes.”<sup>3</sup> The response options to this prompt, which we call NO RIGHT, are the same as those to ICC BIAS. The wording of NO RIGHT is important for two reasons. The first is that, by mentioning rights, it keys in on the respondent’s sensitivity to issues of sovereignty, but in a way that is non-synonymous with questions about ICC bias against Africa (ICC BIAS and NO RIGHT are correlated at  $R=.24$ ). Second, because Kenya acceded to the Rome Statute, agreeing with this statement means that the respondent is either unfamiliar with the treaty, or prioritizes Kenyan nationalism over the letter of international law. Almost one-quarter of the respondents interviewed – 122 of 507 – agreed with this statement.

Because the responses form six different nominal categories, we use multinomial Logits (MNL) to analyze the data. In essence, the MNL can be thought of as simultaneously estimating binary Logits for all possible comparisons among the outcome categories. A key assumption of multinomial Logits is the independence of irrelevant alternatives (IIA), which “means that, all else being equal, a person’s choice between two alternative outcomes is unaffected by what other choices are available” (Cheng and Long 2007, 583–84). For example, the addition of a “Strongly Agree” category should not affect the choice between “Agree” and “Disagree.” However, we discover that, when all choices are included, the IIA assumption is in fact violated for both variables. We solve this problem by grouping the responses into four categories: (1) Agree; (2) Neutral; (3) Disagree; and (4) Don’t Know. When re-categorized in this fashion, the IIA assumption central to the multinomial Logit holds (See Table 1 for descriptive statistics).

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<sup>3</sup> While not equivalent, if similar individuals have similar answers, it lends additional support to the idea that attitudes about bias are related to attitudes about the legitimacy of the Court’s intervention.

We are interested in how various personal characteristics predict the likelihood that a Kenyan will agree or disagree with ICC BIAS or NO RIGHT. The first critical independent variable for our analysis is EXP VIOLENCE, assigned a value of “1” if the respondent either witnessed or was victimized by post-election violence in 2007/8. Surprisingly, 259 of 507 (51.1%) of respondents reported witnessing election violence. 127 respondents (25% of the sample) considered themselves to be direct victims of violence. Furthermore, victimhood is almost completely subsumed within the witness category. Only 8 respondents reported being victimized without also “witnessing” violence. For this reason, we also combine these two categories into one variable measure, exposure to violence (EXP VIOLENCE), to test Hypothesis 1.

The second independent variable is KIKUYU-KALENJIN, which is “1” if the respondent identified as a member of either the Kikuyu or Kalenjin groups when asked an open-ended question: “To which community do you belong?” 149 identified as Kikuyu, and 32 identified as Kalenjin in the sample, meaning that a total of 35.7 % of the sample receives a score of “1” on this variable – close to the exact percentage of the national population comprised by these two groups. Table 1 shows the frequency of responses to ICC BIAS and NO RIGHT, broken down by ethnic membership. Somewhat surprisingly, the modal answer to each question is “Disagree”; 36.9% of respondents disagree that the ICC is biased against Africans, and 49.3% disagree that the Court has no right to charge Kenyans. This alone is evidence that attitudes toward the ICC are not as hostile as some commentators speculate. Still, the number of respondents who agree with each statement is sizeable. Over 34% agree or strongly agree that the ICC is biased against Africa, and 24% agree that it has no right to charge Kenyans.

**Table 1. Frequency of Answers to ICC Bias and No Right**

	<b>Bias</b>						<b>No Right</b>					
	<i>Kikuyu/ Kalenjin (N=181)</i>		<i>Other Ethnicities (N=326)</i>		<i>Total (N=507)</i>		<i>Kikuyu/ Kalenjin (N=181)</i>		<i>Other Ethnicities (N=326)</i>		<i>Total (N=507)</i>	
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>
Don't Know	18	9.9	29	8.9	47	9.3	1	0.6	4	1.2	5	1
Neutral	24	13.3	28	8.6	52	10.3	20	11	17	5.2	37	7.3
<b>Total</b>	<b>42</b>	<b>23.2</b>	<b>57</b>	<b>17.5</b>	<b>99</b>	<b>19.6</b>	<b>21</b>	<b>11.6</b>	<b>21</b>	<b>6.4</b>	<b>42</b>	<b>8.3</b>
Strongly Disagree	5	2.8	42	12.9	47	9.3	11	6.1	82	25.2	93	18.4
Disagree	38	21	149	45.7	187	36.9	88	48.6	162	49.7	250	49.3
<b>Total</b>	<b>43</b>	<b>23.8</b>	<b>191</b>	<b>58.6</b>	<b>234</b>	<b>46.2</b>	<b>99</b>	<b>54.7</b>	<b>244</b>	<b>74.9</b>	<b>343</b>	<b>67.7</b>
Agree	58	32	46	14.1	104	20.5	48	26.5	51	15.6	99	19.5
Strongly Agree	38	21	32	9.8	70	13.8	13	7.2	10	3.1	23	4.5
<b>Total</b>	<b>96</b>	<b>53</b>	<b>78</b>	<b>23.9</b>	<b>174</b>	<b>34.3</b>	<b>61</b>	<b>33.7</b>	<b>61</b>	<b>18.7</b>	<b>122</b>	<b>24</b>

One can also observe a clear ethnic divide in the descriptive data. Kikuyu and Kalenjin respondents are skeptical of the Court in comparison to other groups: 53% agree or strongly agree that the ICC is biased against Africans, compared to only 23.9% of remaining respondents. The percentages flip when one observes disagree responses: 58.6% of people in other ethnic groups disagree or strongly disagree that the ICC is biased, compared to only 23.8% of Kikuyu and Kalenjin respondents. These differences are also present in the “No Right” data, but they are not as stark. 33.7% of Kikuyu and Kalenjin respondents agree or strongly agree that the ICC has no right to charge Kenyans, compared to only 18.7% of individuals of other ethnicities. However, a sizable portion of Kikuyu and Kalenjin (54.7%) disagree or strongly disagree with this statement. In short, a majority of ruling coalition co-ethnics in Kenya think the ICC has a

right to charge Kenyans, but a majority also thinks that the Court exercises this right in a way that is biased against Africans.

To test Hypotheses 3 and 4, we include measures of trust and education. TRUST records a respondent's answer to the question "How much do you trust Kenya's national courts?" Answers range from (1) None to (4) A lot. This allows us to measure the influence of values. EDUCATION ranges from 0 (none/informal) to 6 (Ph.D.).

It is possible that variation in attitudes is in large part explained by individuals' familiarity with the ICC's operations. To account for this possibility, we include two confounders. KNOWLEDGE is a measure ranging from 1 to 3 of a respondents' reported level of knowledge about the ICC. It would be superior to construct a measure of actual knowledge based on facts attendant to ICC operations. However, when we did so, our sample showed little variation. Of two questions about the progress of the ICC's Kenya cases, 463 of 507 respondents answered both correctly. This supports our suspicion that 2015 Kenya is a relatively high-information and high-knowledge environment with regard to the ICC—at least as to the ICC's Kenya cases. We also include a variable OUTREACH to measure a respondent's direct involvement with the Court. It takes on a value of "1" if the respondent reported hearing about the ICC from its employees, or through any of its direct outreach efforts.

Finally, we include six demographic controls in order to account for other sources of variation in our sample. We include indicators of AGE, FEMALE gender; POVERTY (scored "1" if respondent makes a poverty-level income or below)<sup>4</sup>; and LANGUAGE (an ordinal variable for number of languages the respondent speaks). To account for possible geographical variation, we also include dummy indicators for each of the five regions in which the enumerators carried out

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<sup>4</sup> We define a monthly income of 10,000 Kenyan shillings (100 USD) as poverty-level. This is based on an income prompt in our survey (See Appendix).

the survey.<sup>5</sup> These are NAKURU, KISUMU, ELDORET, and MOMBASA, with NAIROBI as a base category included in the error term. (For more variable descriptions and summaries, see the Appendix). Each model also includes post-stratification weights to account for under-representation of women in the sample.

### *5.1 Model Results*

The two MNL models produce five main findings (See Appendix Table 4 for full model results). First, EXP VIOLENCE is correlated with a decreased propensity to agree either that the ICC is biased or that it has no right to charge Kenyans. In each model, this effect is significant at the .01 level. Substantively, those exposed to election violence are almost three times (2.85) more likely to disagree than agree that the ICC is biased against Africans, and almost four times (3.84) more likely to disagree that the ICC has no right to charge Kenyans (See Appendix Table A5 for odds ratios). Second, KIKUYU-KALENJIN is associated with a decreased likelihood of *disagreeing* with either proposition. In other words, the effect of membership in the ruling ethnic coalition is the inverse of exposure to violence. Kikuyu-Kalenjin membership increases the odds of an agree over a disagree response to ICC BIAS by 165%. EXP VIOLENCE and KIKUYU-KALENJIN are the most consistent and substantively robust findings across the two models. If one were trying to explain attitudes toward the ICC, then these would be the two most important factors to emphasize.

A third finding is that educated individuals are both more likely to agree *and* disagree that the ICC is biased; each one-unit increase in education comes with a 60% increased likelihood of an “Agree,” and an 83% greater likelihood of “Disagree,” than a “Don’t Know”

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<sup>5</sup> We choose to include controls for each region rather than clustering standard errors by region. We do this to treat region as an observable fixed effect parameter. However, in the Appendix, we include the results for models with errors clustered by region. In these models, the results are even more robust.

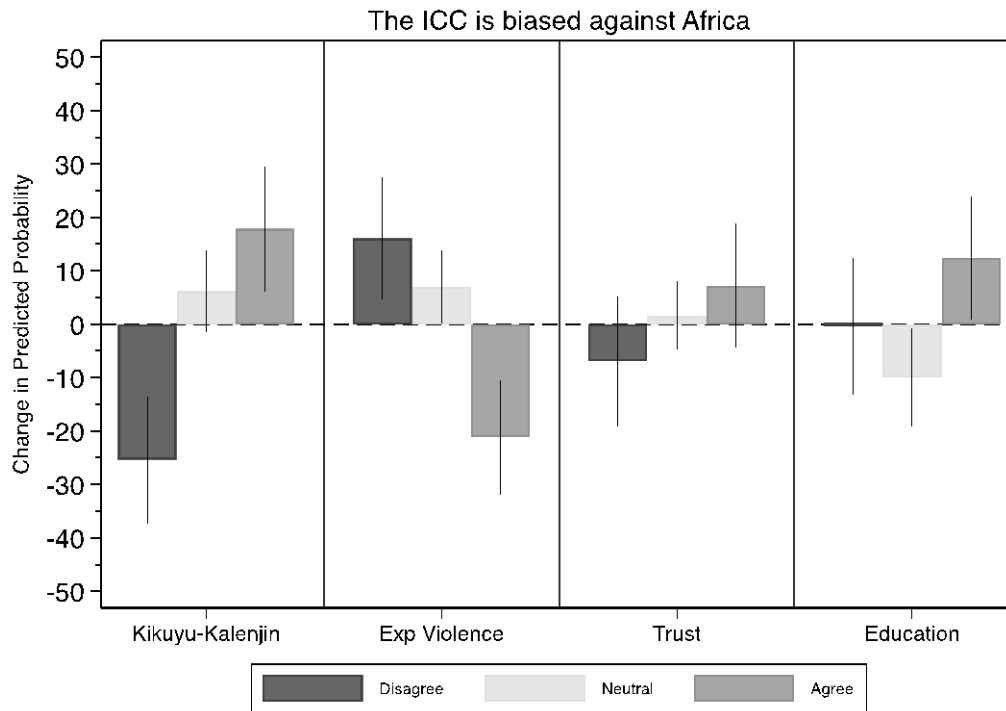


response. However, EDUCATION is not significantly correlated with answers to NO RIGHT. We take this to be evidence that educated respondents are more likely to hold extreme opinions on the Court's orientation toward Africa. They do not, however, hold substantially different attitudes on whether the ICC has a right to charge Kenyans, which is a question that one can answer legally.

Fourth, those who have directly experienced ICC outreach are far less likely to respond "Don't Know" to either prompt. In fact, OUTREACH perfectly predicts that an individual will not answer "Don't Know." This suggests that, at the very least, those who have made contact with the ICC's agents are far surer of their attitudes about the Court.

Fifth and finally, most other variables, save for some regional controls, are not significantly related to attitudes about the ICC. Previous research by Chaudoin (2016) predicts that the impact of ICC intervention on Kenyan politics is most pronounced in areas with divided allegiances, and weakest in areas where that show strong support for a particular leader or party. Our results support this theory, to some extent. In the Bias model, all of the regional controls are negative for an "Agree" answer. This suggests that subjects in all regions except for Nairobi are less likely to agree that the ICC is biased against Africans. In short, much of the concern for ICC bias is driven by respondents in Nairobi, which was closely divided between Odinga (49.4%) and Kenyatta (47.2%) supporters in 2013 elections. Respondents in rural areas of the Central and Rift Valleys were far less likely to agree that the ICC is biased. This suggests that even in regions where political allegiances are uniformly pro-Kenyatta, rural denizens who were more affected by election violence are less likely to agree that the ICC has an anti-African bias.

**Figure 1. Change in Predicted Probabilities, The ICC is Biased**



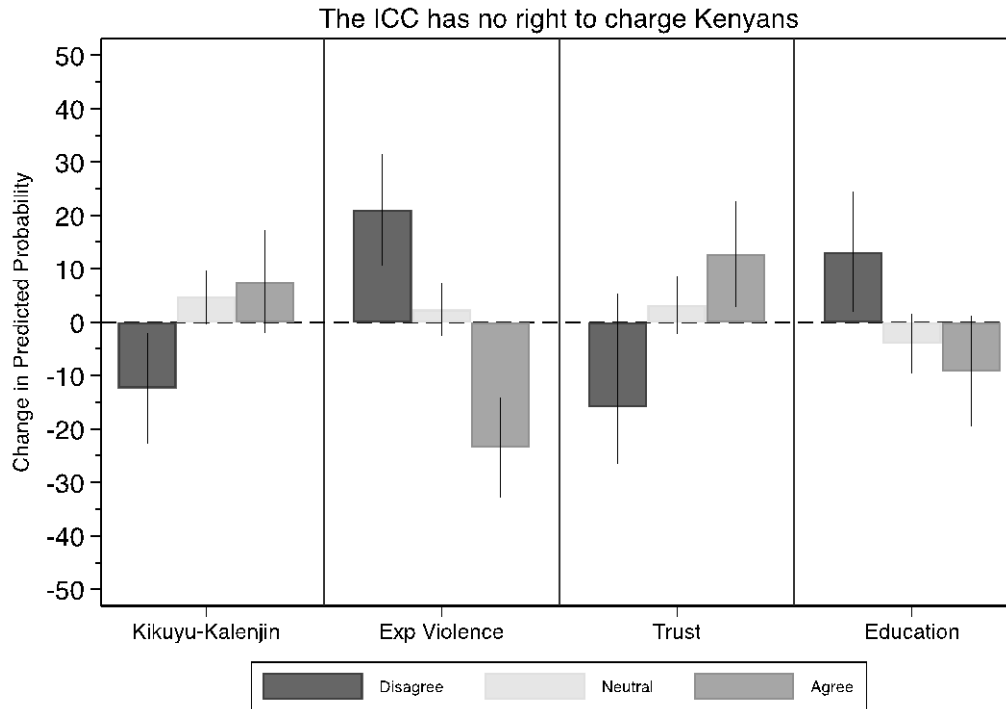
Figures 1 and 2 chart the predicted probabilities of the variables included to test our main fourth hypotheses. Each predicted probability reflects the change in the ratio of a particular response over the total number of observations, conditional on the value of an independent variable. For ease of presentation, we convert TRUST and EDUCATION to binary variables. TRUST is “1” in instances where the respondent answers “Some” or “A lot,” which amounts to one-third of all subjects. EDUCATION takes on a “1” if the respondent has received some secondary education or higher. This is almost 75% of all respondents.

Figure 1 focuses in on probabilities associated with ICC BIAS. KIKUYU-KALENJIN decreases the probability of disagreeing with ICC bias by nearly 25%, but it increases the probability of agreeing by only around 20%. EXP VIOLENCE flips this relationship, decreasing the probability of agreement with the ICC bias narrative by around 22%, and increasing the probability of disagreement by 16%. Those with a secondary education or higher are only 12%

more likely to agree with ICC bias. For TRUST, 95% confidence intervals of the predicted probabilities cross the range from negative to positive values, meaning that changes in probability attributed to these variables are not statistically distinguishable from zero. This further supports the notion that ethnic membership and exposure to violence are the most powerful explanatory variables shaping perceptions of ICC bias, outweighing the effect of other factors.

Figure 2 demonstrates similar relationships with regard to NO RIGHT. Here, the effect of KIKUYU-KALENJIN membership is slightly weaker; co-ethnics are around 12% less likely to disagree, but no more likely to agree that the ICC has no right to charge Kenyans. EXP VIOLENCE is a much stronger predictor of attitudes. Those with exposure to election violence are over 20% more likely to disagree, and over 20% less likely to agree, with NO right. In short, those who have seen or been victimized by violence think that the ICC possesses a right to intervene. Those with greater trust are more almost 10% more likely to agree that the ICC has no right to charge Kenyans, and those with a secondary education are a little more than 10% more likely to disagree.

**Figure 2. Change in Predicted Probabilities, The ICC Has No Right**



The picture that emerges from this presentation supports the main thrust of our theory: on the one hand, ethnic membership is a powerful predictor of respondents' perceptions of ICC bias. On the other hand, a respondent's direct experience of post-election violence dampens her attitudes of ICC bias. If group identity is the more powerful explanation behind belief in the Anti-African ICC story, we would expect little variation *within* the ruling ethnic coalition. However, if exposure to violence intervenes on group attitudes, it should weaken enthusiasm for the narrative even among ruling co-ethnics (Hypothesis 2). The reason is that direct exposure to organized violence will create dissonance with critical elements of the state-sponsored version of events, which holds that Kenyatta and Ruto are the true victims. We test this by studying changes in predicted probabilities among Kikuyu and Kalenjin respondents, compared to all other respondents.

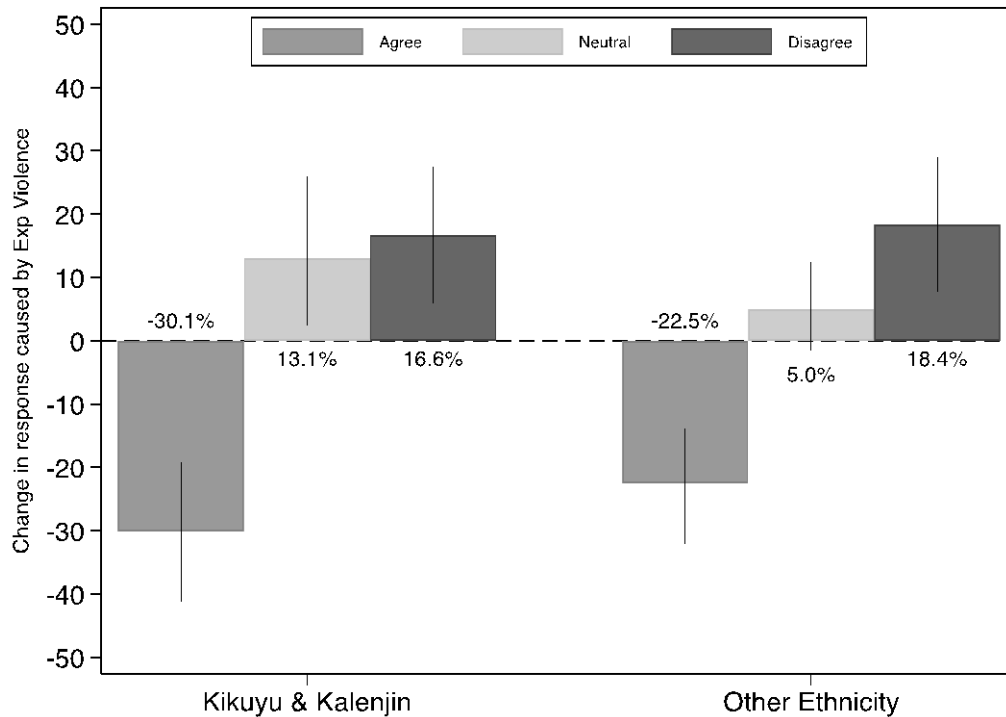
We conduct 10,000 simulations of the original MNL model on ICC BIAS to analyze the interaction between ethnicity and exposure to violence.<sup>6</sup> The results are charted in Figure 3, which depicts the predicted change in probability caused by exposure to post-election violence, conditioned on membership in particular groups. Surprisingly, members of the Kikuyu and Kalenjin groups who saw violence were 30.0 % less likely to agree that the ICC is biased against Africa. This is greater than the predicted change among all other respondents. Members of other ethnic groups who were exposed to violence are only 22.5% less likely to agree with ICC bias. One can also see the potential cognitive effects of the fracture between one's direct experience and one's group identity. Though, in general, Kikuyu and Kalenjin individuals are more susceptible to the ICC's anti-Africa narrative, those who were exposed to violence are more likely than other ethnic group members to avoid agreeing with a direct statement that the Court is biased against Africa.

These findings demonstrate that respondents who personally observed violence or were victimized following elections do not move in unison with the co-ethnics in the ruling coalition. They are more hesitant to buy the ICC bias story, even less so than members of other ethnic groups that saw violence. This suggests that co-ethnics are not merely rent-seekers. As our psychological theory predicts, they are complex processors of experience.

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<sup>6</sup> This was implemented using the *estsimp*, *set x*, and *simqi* command in STATA's Clarify package.

**Figure 3: Change in Predicted Probabilities Attributed to Experience of Violence**



While useful, these analyses cannot speak to the personal stories of individuals exposed to violence. They also cannot answer one additional question: why do some victims also agree that the ICC is biased against Africans? Though their numbers are few, and on average those exposed to violence are far less likely to support the notion that the ICC is biased, 11 victims still agree with this narrative. What does this sub-group have in common? To investigate, we reviewed the profiles of those 11 respondents. Only two were women. The group were more educated than the average Kenyan; seven of the 11 reported completing at least some university-level education, and three had at least some post-graduate education. Six of the 11 said they voted for ODM in 2013; three reported voting for the Jubilee Coalition (the rest did not answer). All but one respondent indicated they did not hear about the ICC from any outreach efforts by the court itself. Instead, most said that they heard of the court via Kenyan politicians. Five of the

11 emphasized the importance of Kenyan sovereignty when answering that either they agree or strongly agree that ICC had no right to try any Kenyan. But five also strongly disagreed with the claim, and an additional one agreed somewhat. This suggests that these victims are a heterogeneous group, and that one possible reason they perceive bias is that they think the ICC is not charging the correct individuals. In fact, seven of the 11 agreed or strongly agreed that the ICC “did not bring cases against the right individuals since it did not charge those most responsible for the violence surrounding the 2007 presidential elections.” All but one of the 11 strongly agreed or agree with the statement that “The International Criminal Court the ICC, or The Hague has shown bias in selecting the individuals to prosecute.”

One respondent presented a sophisticated alternative argument and wanted both to agree strongly and disagree strongly that the ICC is biased against Africa. In an open-ended follow-up question, the respondent mentioned that the ICC was not prosecuting those responsible for atrocities in Syria and Iraq and was therefore biased. But the respondent wanted to strongly disagree too because all of the cases in Africa involved human rights violations. This raises the interesting interpretation of the question: that the ICC is biased not because its Chief Prosecutor is biased, but rather because the ICC lacks jurisdiction over situations in countries like Syria and Iraq that are not Parties to the Rome Statute (except with UN Security Council referral). In short, belief in Kenyan sovereignty may be driving victims’ notions of bias, but it cannot likely explain the whole group’s views.

## **6. Conclusion**

This article explored the question of how individuals in countries whose nationals the ICC is investigating form their impressions of the Court—especially when they are faced with a

domestic narrative advanced by their own leaders painting the Court as biased. Specifically, which Kenyans agree or disagree that the ICC is biased against Africa? Our findings both depart from and add nuance to other extant theories seeking to explain political attitudes of domestic and international issues and institutions. The survey data provides support for our psychological theory and shows that an individual's perception of the ICC is constructed by a complex equation involving group attitudes and exposure to violence, foremost, but also education and trust in local institutions.

Most interesting, those who are victims of violence consider that profound experience and draw on it to shape their opinions about the ICC. This has two implications. First, after years of consistent anti-ICC campaigning on the part of Kenya's elected leadership, and little or no ICC on-the-ground outreach, those who were exposed to violence still do not buy that the ICC is biased against Africans. Even in a place where it has struggled mightily, the ICC likely still has allies on the ground. Additionally, to the extent that our findings travel, anti-ICC bias narratives are more likely to succeed in countries where smaller percentages of the population suffered from mass atrocity violence, and less likely to succeed in places where large percentages of the populations were victimized or witnessed such violence. This evidence shows that victims' lived experiences make them less susceptible to rhetoric: they suffered injury and saw first-hand the violence that led to that injury. When denied justice locally, they may be willing to support the ICC's quest to deliver justice and accountability.

Second, additional research would be useful to explore how Kenyans' attitudes would interact with their willingness to support the court in active ways, such as testifying and giving evidence. Given the dangers Kenyans faced participating in the ICC's proceedings, this is major step, one that would not necessarily follow from simply supporting the ICC. Further exploring



whether these findings hold in other countries where the ICC operates is essential. In the constant back and forth between elite supporters and critics of the ICC project, often lost is the voice of ordinary people who are most affected by the prospect of international criminal justice. It is worth knowing what they think.

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