# ROSKILDE UNIVERSITET

**Standardforside til projekter og specialer**

| Projekt- eller specialetitel: | | |
|---|---|---|
| The Impact of ICC´s Intervention in the Kenya 2007 Post-Electoral Violence | | |
| **Projektseminar/værkstedsseminar:** | | |
| Internationale Studier | | |
| **Udarbejdet af (Navn(e) og studienr.):** | **Projektets art:** | **Modul:** |
| Anna Refsøe Torndal 51914 | Fagmodulsprojekt | Internationale Studier |
| Christina Nielsen 52621 | Fagmodulsprojekt | Internationale Studier |
| Raneem Benkraiam 52646 | Fagmodulsprojekt | Internationale Studier |
| Rebecca Kate McMillan 55197 | Fagmodulsprojekt | Internationale Studier |
| | | |
| | | |
| **Vejleders navn:** | | |
| Lars Buur | | |
| **Afleveringsdato:** | | |
| 27-05-2015 | | |
| **Antal anslag inkl. mellemrum: (Se næste side)** | | |
| 92.313 anslag | | |
| **Tilladte antal anslag inkl. mellemrum jf. de udfyldende bestemmelser: (Se næste side)** | | |
| Max. 132.000 anslag inkl. mellemrum | | |

## Abstract

This project aim to investigate the International Criminal Court's interference in Kenya after the post-election violence in 2007 and what the outcome of this interfering has been. The project will look into how concepts of sovereignty, legitimacy and civil society can play a vital role in exploring and understanding how the Kenyan nation reacted to the interfering of the international society. The impact of ICC's involvement is relevant because it demonstrates how the ICC takes drastic measures to demonstrate that they are working to safeguard international laws and deliver justice.

To explain the root of the Kenyan (resistance) of international interfering, this project looks further into the historical background and development of Kenya as a state. Even though states, such as Kenya, recognizes the benefits of involving themselves in the international society, Kenya still perceived the interfering of the ICC is as being challenging and undermining of Kenyan sovereignty.

For the ICC to thoroughly investigate a situation effectively as well as bringing justice, they try to prove themselves legitimate with the civil society, which was primarily tried proven through their Outreach program with a wide range of initiatives to include the public.

# The Impact of the ICC's intervention in the Kenya 2007 Post-Electoral Violence
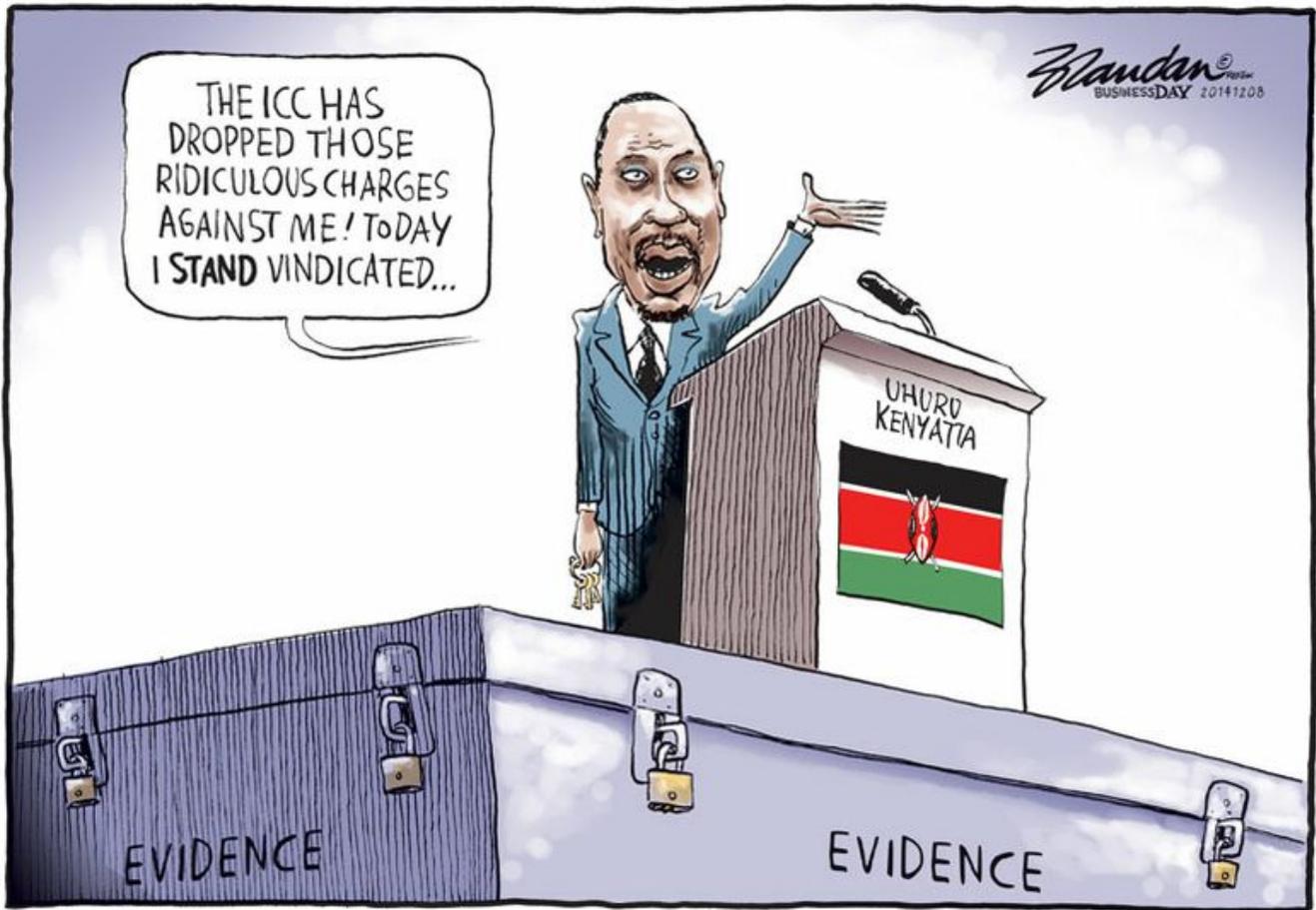
**University of Roskilde,**

**Department of Society and Globalization (ISG)**

**International Politics 2nd and 4th semester, May 2015**

Anna Refsø Torndal
Christina Nielsen
Raneem Benkraiam
Rebecca Mcmillan

**Supervisor:** Lars Buur

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## 1.0 Introduction and Problem area

Global institutions are playing an increasing role in international society in the modern world. The basis for this increasingly interconnected world is more agreements and treaties being signed by states and institutions institutionalising a higher degree of communication and multilateralism between signees. Sovereign states recognize the benefits of involving themselves in the international society so demonstrating their cooperation and involvement in global institutions has become strategic. However, there is a tendency for countries that want the international recognition, but not the restrictions, that sign these agreements also. When it comes time to implement or uphold the agreements signed the true opposition is shown.

Kenya signed the Rome Statute in 1992, that gives the International Criminal Court (ICC) the mandate to investigate in case of crimes against human rights are ever committed.
After president Kibaki was declared winner of the Kenya election in 2007, supporters of the Kibaki opponents ODM and Odinga accused the Kibaki government for manipulating the election. Violence quickly broke out after the election and many citizens were forced to flee from their homes and watch as the number of casualties grew. Both supporters and officials of each party had allegedly taken part of fuelling the dispute and violence. The perpetrators in this violence need to be held accountable for their actions; since Kenya has a history of impunity and there was no indication of an action plan, a higher institution was needed. The ICC used its jurisdiction to begin investigations. The Kenyan government, comprised of people under investigation, tried a variety of tactics to obstruct the trials and stop ICC involvement in their country. Throughout the ICC involvement, the dynamics between ICC, the Kenyan government and Kenyan citizens shifted. Ideals of sovereignty and legitimacy where examined thoroughly and the impact on civil society was telling of the impact an international organization can have. The dynamics changed repeatedly until the trial was finally dropped due to lack of evidence. The Kenyan government has signed and ratified the Rome Statue, which intrinsically means a little sovereignty is given up, because they wanted the recognition from the international community. As soon as they were held accountable to the Treaty though, the government started to complain about the intervention in their sovereignty and question the legitimacy of such an organization. This project tries to find the best way to understand ICC intervention in the Kenyan post-election violence in 2007 and what the outcome has been. The methodology behind the

approach of inductive investigation and how ideas of sovereignty and legitimacy and civil society can be used to analyze the impact of the ICC will be expanded below.

## 1.1 Limitation

In this project limits had to be set in order to place a focus on the information that will be most meaningful in trying to address the problem. We made a geographical limitation by only focusing on The International Court's operation in Kenya and not in other African countries. In order to keep the amount of external factors to a minimum, we decided to focus only on the ICC's role and therefore not on other parts of the international society's role in Kenya. Furthermore, we have decided only to look at the impact during the period of their involvement in the dealings with the 2007 violence. We have decided to stay concentrated on analyzing specifically the ideas of how sovereignty and legitimacy of the ICC impact civil society. Limitations on the chosen perspectives will be explained in our analytical framework in chapter 3.

## 1.2 Statement:

> *How can we understand the ICC intervention in the Kenyan post-election violence and what has been the outcome?*

## 1.3 Research questions:

1. *How does the ICC challenge the Kenyan understanding of national sovereignty?*
2. *How does the ICC try to gain legitimacy around its intervention in Kenya?*
3. *How does the Kenyan political system and civil society reacted to the ICC attempt to intervene in the 2007- post electoral violence?*
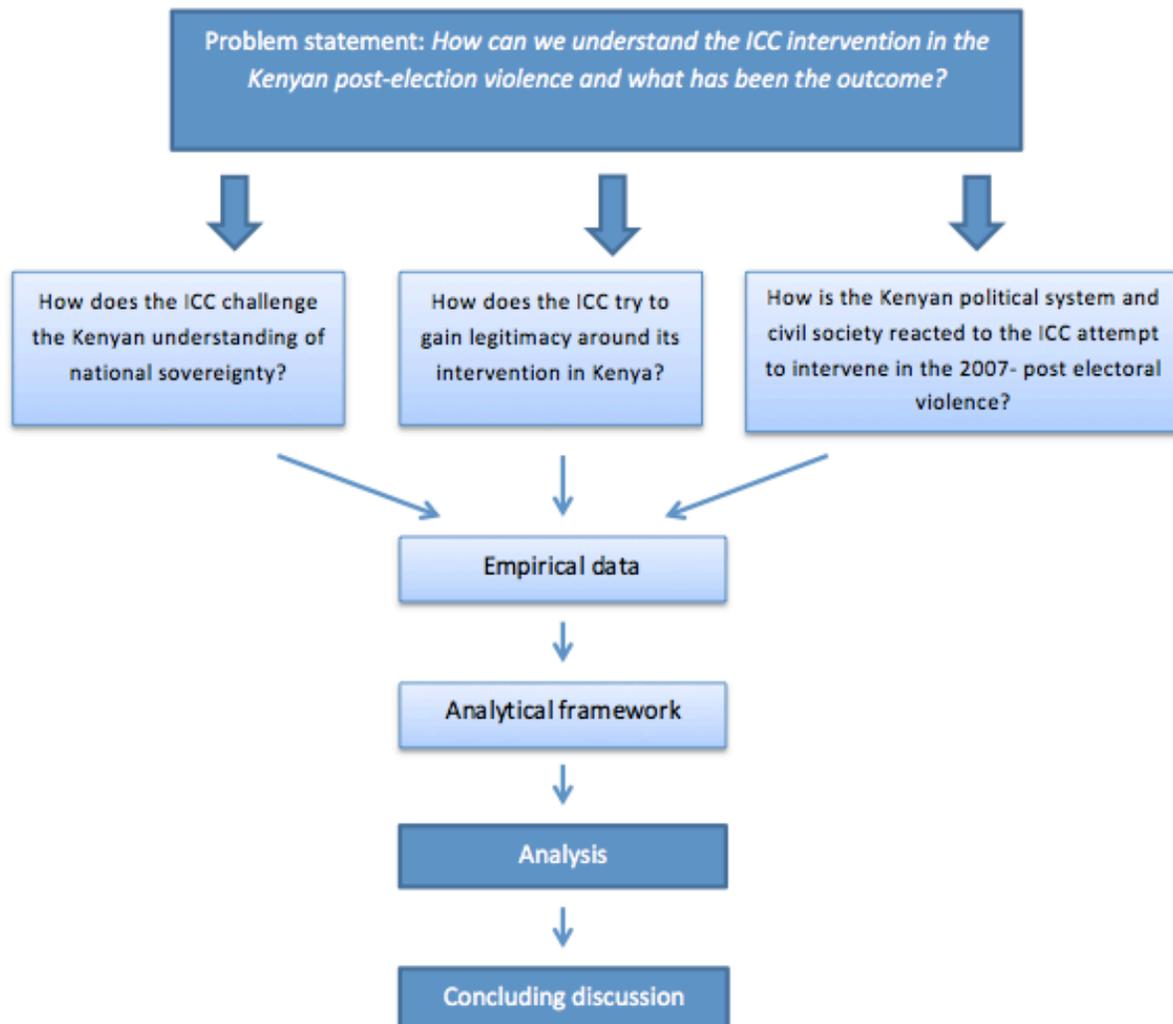
## 1.4 Simple project design:



Problem statement: *How can we understand the ICC intervention in the Kenyan post-election violence and what has been the outcome?*

How does the ICC challenge the Kenyan understanding of national sovereignty?

How does the ICC try to gain legitimacy around its intervention in Kenya?

How is the Kenyan political system and civil society reacted to the ICC attempt to intervene in the 2007- post electoral violence?

Empirical data

Analytical framework

Analysis

Concluding discussion

**Simple project design:** The following simple project design will give you an idea of our project in terms of our introduction as well as methodology. After the methodology section we will further provide you with an extended description of the project.

**Introduction:** This chapter frames the problem area, which forms the foundation of our problem statement involving the International Criminal Courts investigation in the Kenyan 2007 post electoral violence. It introduces our research questions, which will serve as guidelines for our analysis and discussion in order to answer our problem statement thoroughly. The final section

of this chapter will explain how we have chosen to limit us from various elements in order to stay focused on the issue at hand.

**Methodology:** This chapter provides a description of how we have chosen to approach the problem statement methodologically, why we have chosen to implement interview and various documents as well as how we believe it will contribute to our project. Furthermore the chapter provides our social scientifically considerations, which we had throughout the process.

**Empirical data:** This chapter introduces the background of the situation that works as a baseline for our project. This entails a description of the historical and democratic development of Kenya, the institution of ICC and how the ICC has operated in the specific context of Kenya.

## 2.0 Methodology

This chapter explains our methodological approach behind examined our problem statement in terms of case study and interview. We will explain our social science theoretical approach, as well as considerations in terms of gathering of empirical data.

### 2.1 Methodological approach

In this project we have primarily used an inductive approach to answer our problem statement, utilizing a specific case as our reference to conclude on a general matter. It is important to recognize that when working with a social scientific mind frame, the inductive and deductive methods are somewhat interwoven through out the research process (Andersen 2005: 31f).

In this we have also found conclusions for the specific case based on an analysis with theories. Working inductively however, we have based our final understanding of the matter on our research conducted on the case, theory and collected empirical data. The inductive method in our project is therefore reflected in the collected data and from experiences and opinions of our interviewee.

We started out by having a very broad idea of the issue at hand. We knew that the ICC had been investigating in Kenya due to the violence that erupted after the 2007-election. Our original interest as a group was the clash of Western and African ideas of democracy. We saw this as highly relevant to how the international society views the struggles to become developed, as defined by the Western world. As our research went on we ended up wanting to uncover the dynamics between ICC and Kenyan government. We are investigating an anomaly, because we

are investigating a phenomenon that deviates from former examples. The problem area we are working with represents the investigation of an issue playing out differently than what to be expected. The ICC has formerly investigated in African countries where they successfully connected to the civil society and been able to conduct trials for the perpetrators of crimes against humanity. This case deviates from the former cases for several reasons: The ICC initially began investigation once the application from the prosecutor to the Pre-trail Chamber was granted and not by invitation from the host country. Secondly, the trial was hindered by a lack of evidence delivery, and witnesses disappearing or recanting their statements, which eventually led to some cases being dismissed.

As we went deeper into our research, and adding theory and an interview, we sharpened both our direction and also began to truly uncover the issue at hand. Finally, we were able to draw out a general perspective from the analysis and discussion. Since we were not been able to find one theory that covered the full basis of what we are trying to uncover, we have chosen to work with different theories to explain different parts of the problem.

## 2.2 Case study

We have chosen to build our project around a case study because we wanted to identify and analyze the dynamics between the ICC and Kenyan government during the investigation of the 2007 post electoral violence.  We specifically wanted to center the analysis on aspects of sovereignty and legitimacy, but to examine this it is also relevant to take into account the implication of the Kenyan civil society. This emphasizes the fact that the issue is complex and several aspects are put into play. It also helps us recognize that the reaction to ICC involvement can be understood with a variety of interpretations.

We have chosen this particular case based on interest in dynamics between a developing country's government and an international institution. The chosen case is uncommon due to the fact that we are trying to gain information about a unique case that has shown itself to be particularly problematic in a more narrow understanding of the matter (Flyvbjerg 2010: 475).

## 2.3 Qualitative data

Based on our research we find that qualitative empirical data provide the most advantages to our project. It presents us with the opportunity to approach the problem interpretively (Brinkmann & Tanggaard 2010:17). The qualitative empirical data will consist of various literatures, such as

academic writings, as well as official documents, like the International Criminal Court Outreach Programme and The Rome Statue. This will provide a more balanced and broad range of information on our subject. Furthermore, we have chosen to use a qualitative method to gather data through an expert interview.

## 2.4 Interview

The project's primary data consists of our interview and it is a central part of the empirical data. The data collected from the interview will be used to support other collected qualitative data, as well as support the project analysis and discussion. Our interviewee is carefully chosen for his understanding on the Kenyan society and the ICC; his insight can provide information that will help us understand the dynamics between the Kenyan government, its citizens and the ICC. He has professional knowledge due to previous work and experiences with the ICC's involvement after the 2007 Kenyan elections.

Our interviewee was concerned about appearing in a publicly accessible project for security reasons so he decided to remain anonymous. This we are not be able to hold the interviewee accountable for his statements. The interview has been prepared so that our interviewee can provide answers based his work with the ICC's Outreach program after the 2007 violence, and can provide detailed insight into the processes and impressions of ICC involvement.

### 2.4.1 Interview considerations

Though it is an expert interview, it is still too difficult to classify the interviewee as strictly an expert. He is our main informant with experience as a professional in the ICC, but also with a personal connection in the Kenyan civil society.

It has to be taken into account that because the Interviewee has been involved his view on the matter is very subjective and somewhat biased.

While choosing an interview, we put our understanding and interpretation at risk, because of the linguistic and cultural differences that can create misunderstandings. The linguistic barrier that lies with both the interviewer and the interviewee to formulate their ideas in a foreign language challenged the precision and the exact formulations. Furthermore, the differences in understanding could have caused misinterpretations about the exact meaning of questions and answers, which could then lead to misinterpretation or wrongful quoting of the interviewee (Brinkmann & Tanggaard 2010: 33f).

Our goal with our self-representation in the interview was to appear professional while being an interested and sympathetic listener to the interviewee's story. We are aware that there is always an uneven power relation between the interviewer and the informant during an interview (Kvale et al 2009: 51). With this in mind, we tried to create a safe-space where the interviewee felt comfortable telling us about his background and the encounters he faced with his work. In addition, the interview took place at the interviewee's workplace by his suggestion, which may have contributed to make our interviewee more relaxed.

During an interview it is essential that the interviewer is prepared and knows how to use different interview techniques. In order to perform a good interview, the interviewer must guide the interviewee in the desired directions without becoming controlling and going off topic (Kvale at el 2009:188ff). Before the interview we made sure that we were well informed and had a clear vision about what we wanted to get out of the interview. During the preparation of our interview, we were aware that our questions had to be simple and mostly open so there was room for our interviewee's individual interpretation (Ibid.) and thus creating an opening for unexpected information the interviewer could follow up on.

When transcribing we take what is being said and turn it into a written, coherent text. Transcribing provides us with a way to convey what is being said during the interview to the reader. To ensure that the message of the interviewee transcends we have chosen not to include terms like "uh", "hmm", sighs, laughs, pauses etc. nor body language, as this only creates confusion and does not, in this case, support our interviewee's argument. Furthermore, we have chosen to code our transcription in the interview guide, attached in the appendix, with in subjects of our research questions, which we have found relevant for the analysis.

In the transcript interview, the interviewer is called ´C´ for Christina, while the interviewee is respectively called ´I', as he wants to remain anonymous.

**2.4.2 Reliability, validity and limitations**

Since we only have one interview it is important to recognize that through this method we are only able to represent one perspective on the matter. If we would have been able to include an interview with a government official whom was instated during the 2007 elections, it could have given us a much more nuanced perspective on the matter. Instead we have chosen to include quotes and statements from Kenyan officials to compensate this void.

The review of our method increases the reliability of the project, since it is possible for the reader to see how we have uncovered our results, which brings reliability to the project. This is necessary since a change in the methodological approach could lead to different conclusions.

## 2.5. Science theoretical approach

While we are primarily working inductively, the knowledge gained from theories and empirical data help us construct a final understanding of the issue at hand.

Social constructivism believes that the preconceived ideas one has when approaching an issue assists in forming what is perceived to be the truth, as well as what is being looked for in the truth (Juul & Pedersen 2012:188). Preconceived ideas are shaped by historical events, personal experiences, and views, as well as social discourses. Discourses are formed through the way an idea is being verbally framed (Ibid.). What we perceive as being reality is then constructed by a set of ideas and through the interaction with others who have also been disposed to specific discourses, which have formed their perceived ideas (Ibid.).

Epistemologically social constructivists do not acknowledge the possibility of obtaining an objective truth, rather social phenomenons are viewed from a specific perspective. Neither can ´one´ truth to be found, but rather a spectre of truths, depending on the lenses used to look through – this being social constructivist ontology (Juul & Pedersen 2012: 190). Truth is never final then; it is interchangeable, subjective and individual (Juul & Pedersen 2012:180).

Normative questions are determined by negotiations and power games between actors in society (Juul & Pedersen 2012: 189f), and in our case also by actors on a global scale. These questions then rest on a foundation of politics, power, interests, and research of a specific matter, as opposed to on scientific objectivity (Ibid.).

The lens of social constructivism gives the most relevant approach when looking at sovereignty, interests, and preconceived ideas with regards to actors involved in our problem area. Taking the constructivist approach into account it is essential to recognize that the final conclusion of this project is based on ideas obtained through preconceived ideas, but also through our analytical framework approach. This means that what is perceived to be the conclusion is only the result because it has only been looked at through one pair of lenses.

## 3.0 Analytical framework

When reviewing the ICC interference in Kenya in a nuanced manner it is insightful to look at how ideas of sovereignty, legitimacy and civil society can explain the impact of the ICC. With these concepts we will examine how they each influence the dynamics between the ICC and Kenya. First, the concept of sovereignty and the responsibility to protect will provide insights into the tense undercurrents involved in state intervention. Secondly, ideas of legitimacy will generate an idea of how the ICC tried to justify their interference in Kenya. Last, the concept of civil society will be introduced to explain the capacity it has to influence society, which is helpful when trying to explain its reaction, as well as governments, to the trials. These three concepts will set up the framework for our analysis and discussion in chapter 6-8.

## 3.1 Sovereignty

It is relevant to look at the aspects of sovereignty that was contested between the ICC and the Kenyan government during the intervention in the post electoral violence of Kenya in 2007. When taking a closer look at the dynamics between the two institutions, one will find that the ICC was very much contested when wanting to place the people responsible for the initiation and fuelling of the violence on trial. We will use the aspect of sovereignty to analyze the role of sovereignty in the ICC intervention, how it was challenged, and to uncover why the ICC intervention in Kenya was so challenged by the Kenyan government. We include the concepts of sovereignty exercised by institutions and states, as well as take a brief look at the Responsibility to Protect to nuance these aspects for the analysis and discussion.

The concept of sovereignty is understood as the principle of absolute and unlimited power, but can be differentiated between legal sovereignty, political sovereignty, internal sovereignty, and external sovereignty (Heywood 2013:58). The legal authority aspect refers to the right to demand submission, while the political aspect refers to the ability to do so. Internal sovereignty indicates authority of government, while external sovereignty indicates a state's ability and capacity to act as an autonomous state (Heywood 2013:58).

Robert Jackson is a professor of political science, specializing in state sovereignty and international ethics (Jackson 1998: 2). He examines the conflict that arises in international

society regarding state sovereignty in the context of developing countries. He introduces the concept of negative and positive sovereignty:

> "... where as international society can provide governments with negative sovereignty through the act of general recognition, this is not the case with positive sovereignty which depends primarily on the actions and the resources of governments and their populations." (Jackson 1990: 30)

Positive sovereignty is a condition that is relative and changing (Jackson 1990:29). A positively sovereign government possesses the capability to provide politically for its citizens and enjoys the right of non-intervention. It is recognized by both the international society, and by the citizens within that state, as a state; part of being sovereign in this case also means to take responsibility for its citizens (Jackson 1990:28).  This is different from negative sovereignty where non-intervention and sovereignty go hand in hand (Jackson 1990: 26). The state is recognized as sovereign in the international society but does not posses the ability to provide political legitimacy for its citizens. Unfortunately, that means that conditions for intervention depend mainly on the government at hand. Jackson believes that the tolerance of sovereign states is too high, and the right to sovereignty is overriding the need to intervene. Thereby, failing to protect human rights. He thinks that this tendency will go on unless a willingness to ensure human rights increases (Jackson 1990:192f). However, different theorists contest this.

   Thomas Blom Hansen, former professor in anthropology at Yale University and Standford University and Finn Stepputat senior researcher in peace, risk and violence at Danish Institute of International Studies (DIIS), explore other relevant aspects of the concept of sovereignty in their article 'Sovereign bodies' that follow this line of thinking.
They argue that the internal sovereignty is not only about legal sovereignty, but about political sovereignty as well. Meaning that sovereignty is not only about having the right to rule, but it also about the ability to do so: "… sovereignty is an effect of these actions, and that sovereignty needs to be performed and reiterated on a daily basis in order to be effective, and to form basic referent of the state." (Hansen & Stepputat 2005: 7). Hansen and Stepputat describe it as being ´founded on the consent of the people´, meaning that in order for the state to be sovereign, the

people have to accept it as so. Acceptance of this follows the acknowledged ability rule. This means that sovereignty also has to be performed to prove itself as sovereign.

In this regard Hansen and Stepputat reasons that sovereignty resides not only in states, but also in institutions empowered by states (Hansen & Stepputat 2005: 2).

Global institutions like UN or the International Criminal Court when for example having the mandate to intervene.

> "In contrast to this global covenant which emphasises sovereignty and non- intervention, the proclaimed goal of humanitarian intervention, undertaken with increasing frequency during the last decade, is to protect the citizens of the target state from flagrant violations of their fundamental human rights usually by agents of the state." (Ayoob 2010: 81)

The quote above demonstrates how the modern world would rather see human rights protected than recognizing non-intervention procedures. The Responsibility to Protect is another aspect of the concept of sovereignty that is also important to take into account when working with sovereignty. The positive sovereignty indicates the right to non-intervention, but it has become a recognized aspect in international law to overrule this right if the people are being subject to crimes against humanity. The Responsibility to Protect has been implemented by the United Nations (UN) General Assembly 2005 World Summit and provides guidelines for when humanitarian intervention appropriate. According to these guidelines, when governments are unable or unwilling to protect their own citizens then the global society has a responsibility to protect those citizens. The moral justification for intervention becomes the responsibility to protect. Heywood underlines how intervention is viewed by international society as necessary for civilian wellbeing,

"The core theme of the responsibility to protect is that the international community is bound by a humanitarian imperative to intervene to protect civilians…" (Heywood 2013: 414).

Intervention is justified in order to protect humans from genocide, war crimes, crimes against humanity and ethnic cleansing. This principle has been criticized for being an excuse for self-interested behaviour used only when it is convenient for Western powers (Ibid.). Others claim that the concept violates both international law and the principle of state sovereignty (Ibid.). In

other words, interventions on the behalf of human rights seem to overrule state sovereignty by providing a mandate to intervene (Jackson & Sørensen 2013: 149f).

### 3.1.1 Limitation

A limiting aspect of Jackson's theory is that defining a weak or failed state is difficult; there is always room for improvement. Since there can be no linear path to democratization, or even to the state of becoming positively legitimate, estimating if a state is going through this process incorrectly can be considered as a premature assessment. Looking into the concept of sovereignty gives us just one pair of lenses that can help us explain the power dynamics. This concept however may look different in practice since many factors are a part of setting the frame for the actual dynamics.

## 3.2 Legitimacy

The concept of legitimacy has been principally applied to governments and their capacity to manage a country, but not just governments need legitimacy; any institution interfering in a situation needs to justify why they are involved (Douglas 1985: 45). During investigations, the ICC involves itself in sensitive and complex situations that require support for their actions in the host country. To investigate the concept further it is important to look at the theories that explain how legitimacy is obtained, the criticisms, and how it applies to this project.

Prominent authors on the theory demonstrate the long history of using the concept of legitimacy, what it means, and how it varies in interpretations. Legitimacy can provide the essential belief that an institution is acting in a just manner with the wellbeing of its subjects in mind. As with much of political terminology, the concept has varying interpretations. John Locke famously said: "the argument of the [Second] Treatise is that the government is not legitimate unless it is carried on with the consent of the governed" (Ashcraft 1991: 524). Legitimacy is central to democracy and what western society has deemed good governance. German philosopher Dolf Sternberger describes legitimacy as the foundation that allows governmental power to be exercised, with self-awareness from the government that it has a right to govern and with recognition by the governed (Sternberger 1968: 244).

Max Weber is a leading sociologist whose work can be used to help understand the modern definition of legitimacy and authority. Theory of the different types of legitimacy, and where they can be obtained originate from Weber's works *Economy and Society*. He argues that how a state controls its subjects depends on the type of authority it represents. A reliable basis for domination is comprised of relationships induced by calculations of advantage and ideal motives of solidarity, and most importantly, a belief in legitimacy (Weber 1978: 213). The three key ideal type classifications of legitimate domination described by Weber are:

1. *Rational grounds* – resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority)
2. *Traditional grounds* – resting on an established believe in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority); and finally,
3. *Charismatic grounds* – resting on devotion to the exceptional sanctity, heroism, or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic authority) (Weber 1978: 215).

With these types of authority domination is fair to an extent. Governments and institutions, like the International Criminal Court, gain their power from legal-rational authority. This type of authority is derived from accepting the validity of certain ideas, such as a legal norm is made by agreement on the basis of its rational importance with the territorial body's obedience *acceptance*. Every body of law exists in a consistent system of rules that have been deliberately set up. The person in power must be subject to the laws as well as the member. Members only owe obedience to the impersonal order of authority and only obey in their capacity as a "member" (Weber 1978: 217). Weber expands this theory further by outlining that legal-rational authority must have a rule-bound contract of business, the organization of offices follows a hierarchy. The technical rules of conduct require qualified people with specific skills to hold positions (Weber 1978: 218). Obtaining legal-rational authority is important for organizations to achieve their goals and influence change. These forms of domination are not mutually exclusive; they can work in combination with each other to provide maximum legitimacy. Different organizations may utilize the different forms. For example, civil society gains some of its

legitimacy on traditional grounds, or a presidential candidate may use their charismatic legitimacy to enter a position where it he or she will have legal authority. However, legitimacy is composed of more than just a legal authority, it must also be recognized in it's performance.

Anthropologist Mary Douglas can be used to expand on the idea of preformed legitimacy with her writing, "...to acquire legitimacy, every kind of institution needs a formula that founds its rightness in reason and in nature," (Douglas 1986: 45). The recognition of legal-rational authority is a portion of becoming legitimate, but for an institution to become fully legitimized it must be recognized as part of the social order. Cementing their role is as much of an intellectual process as it is a political and economic one (Douglas 1986:45). The general public needs to accept the work the institution is doing, without their consent the social agreement the agency of the organization is restricted.

### 3.2.1 Limitation

When applying theory the criticisms of these theories must be taken into account. Max Weber and Mary Douglas are both European theorists, they have created broad theories based on the political environment which they had been predisposed to. By applying theories that were developed for a Western society on an African context it can neglect crucial points, and also impose a Eurocentric view on things. A criticism of Weber is that he has placed too much significance on forms of authority that are not very prominent in the 21$^{st}$ century. There is a gap between the new types of authority that have emerged and the forms he outlined.

### 3.3 Civil Society

To understand the importance of the civil society and it's connection to the ICC in an Kenyan context, we will begin this section by identifying concept of civil society, as well as its connection to both governmental and global institutions.

Civil society has been a part of sociological and political debates since the concept emerged and remains a subject for debate since it tends to draw on Western ideas.

It is important when working with the concept of civil society to distinguish between what is state and what is civil society. Civil society can be generalized as independent from state and public authority, and organized by individuals pursuing their own interest. These groups include family, ethnic groups, private businesses, clubs, interest groups and NGO´s. Where the

institution of state includes the government, courts, police, army and the social security system. While the institutions of state are responsible for the well being of the civil society, it is also funded by the taxation on the public (Heywood 2013: 5f).

A theoretical approach in this case would be Universalism, which argues that civil society is a key means to building and strengthening democracy and should be applied across cultures and extended to all parts of the world (Dunn & Hann 1996: 18f). The Universalists perception of civil society is that only those organizations that strengthen democracy can be counted as a part of civil society (Ibid.). All organizations and informal groups should therefore be considered as part of civil society.

The government should make or create ´space for other ideas, voices, and interests. However, the civil society's demand for more political space does not match the government's idea of the concept, which is that it is supposed to support the government's policy, not to criticize and challenge it (Whitfield 2003: 390).

> "Civil society contributes to political change through a process whereby organized groups act collectively to redefine their relationship to the state in a way that allows for greater organizational autonomy and participation in national decision-making" (Whitfield 2003: 390).

The quote above demonstrates how civil society can change their relationship with the state to allow more communication of society's interests. Civil society is therefore central to building necessary linkage between state and household in order for the population to participate in policy making. This same concept applies to civil society´s role in the linkage between citizens and an intervening institution, like the ICC. For NGO´s civil society is a way to organize and become legitimate.

It is key for all parties involved to maintain this linkage to secure the most benefits possible. This might cause power or political struggles when differing interests emerge.

### 3.3.1 Limitation

In this project, the term civil society refers to the independent and voluntary relations between the household and state. It is therefore necessary to grasp the importance of the civil society's role in the matter of the dynamics between the ICC and the Kenyan government, but however the

understanding of civil society in its current form fails to represent the importance of essential factors such as the underlying discourses in a society. Applying the Western understanding of civil society in an African context can be inappropriate because of the historical development, culture, and the political system differences. While writing this project, we are aware that we are tainted with preconceived ideas on civil society that might have influenced the manner in which we have approached this subject.

## 4.0 Background

This chapter will introduce the background of our project. This describes background information on Kenya, the ICC and the ICC's involvement in the Kenyan situation to provide a foundation for the analysis.

### 4.1 Historical and democratic development of Kenya

To correctly analyze the situation in Kenya with ideas of sovereignty, legitimacy, and civil society it is important to understand the historical background of the country. The situation that the nation was in when the violence broke out can shed light on underlying issues that lead to the violent outbreak.

When the European powers gathered at the Berlin Conference in 1884 and divided Africa up for themselves they created borders that did not reflect the actual territorial divides in the continent (Hulse 2007: 37). This forced different people with a long history of differences to figure out how to live together under the harsh conditions of colonialism. The British established control in Kenya with an indirect rule approach; it was cheaper and they thought there would be fewer uprisings against colonial power (Makong'o et al 2004: 65). The indirect system gave the responsibility of maintaining control to the local chiefs of certain ethnic groups, the special privileges awarded to some groups and not others created even more tension between groups. During the colonial period it was demonstrated that those in power could do anything, take everything good for them selves and oppress or imprison competitors. This environment, coupled with traditional values, caused drastic measures to be taken to hold onto power.

There are many different ethnic groups dwelling in Kenya, each with unique languages, customs, and territories. The five largest tribes, Kikuyu, Kamba, Luo, Luyia, and Kalenjin people, make

up 75% of the countries population (Dirk Berg-Schlosser 1984: 19) The Kikuyu people believe themselves to be descendants of the goddess Mumbi who lived on Mount. Kenya, therefore they consider the surrounding area of the mountain to be their rightful homeland and are very protective over it (Dirk Berg-Schlosser 1984: 50). Everyone is a member of *moherega,* a mutual self-help group that follows the matrilineal clan name; they are fiercely loyal to one another and have great respect for elders (Amin Mazrui 1977: 35). Kalenjin societies are stratified through rigid age-grades of increasing levels of respect. There is a particular emphasis on effective military organization within this tribe, which demonstrates their need to protect themselves from predators (Amin Mazrui 1977: 40). These prevalent values in both Kikuyu and Kalenjin societies display how dedicated they are to members of their own groups, and how elections in Kenya are completely based on ethnic ties. The motivation is so strong to tamper with election results or coerce people into voting for a particular candidate because they need to be in charge of the national resources to properly take care of their *moherega,* in the case of Kikuyu. Traditional values place importance on staying loyal and defending what is traditionally theirs. So much respect is given to elders that political leaders know the influence they have on the people of their tribe, which causes the population to be guided whichever way the leaders want, to an extent. It can then be understood how violence has been apart of the history of elections in Kenya.

On December 12, 1962 independence was officially granted and the road to democratization was underway. The violence after the 2007 election was not the first post-election uprising that Kenya had seen, however it was the most extreme. The history of impunity also contains rioting after the 1997 elections, which was never explained. The presidential elections in 2002 saw Mwai Kibaki elected over Uhuru Kenyatta, resulting in a Kenya African National Union loss for the first time in 40 years. The National Rainbow Coalition gained power by uniting ethnic communities to end the unstable regime before them (Hornsby, 2013: 694). However, the combination of all the ethnic leaders working together did not last long, in 2005 Raila Odinga split away from Kibaki on the issue of a constitutional referendum. Odinga created the Orange Democratic Movement (ODM) and Kibaki formed the Party of National Unity. This set the political stage for the 2007 election.

In 2007 the outbreak of violence started right after Kibaki was declared victorious and sworn in at a ceremony in the night. Immediately Odinga accused the government of fraud and encouraged supporters to protest, the government ignored him and since Kibaki was in charge of the courts there was no legal action he could take at that moment (Ndegwa 2007). There were violent protests initially, but then it escalated into targeted ethnic violence (Elhawary 2008) Initially the attacks had been against Kikuyus, but in reaction Kikuyu gangs and government supporters retaliated equally vicious against Luo and Kalinjin populations. Women were raped and houses burned. The areas of the Rift Valley, Mombasa, and Nairobi slums were some epicenters of the violence fuelled by outrage at the election, disputes over traditional land claim, and extreme poverty. Politicians have also been accused of encouraging ethnic gang violence. After the violence the death toll was around 1300, with the highest estimate of people displaced being 600 000(BBC, Jan 7, 2008) (Al Jazeera 2008).

The nature of the violence was very complex and was encouraged by various actors so there is no way to pinpoint one element responsible. There were disputed election processes that the electoral commission claimed was the responsibilities of the court. While the mayhem was occurring in some instances the police did nothing to stop the violence, and the journalists increased the violence by reporting false information or government propaganda.

It was not until the United Nations established the power sharing agreement called the National Accord and Reconciliation Act, which created a coalition government with Odinga as Prime Minister and ended the violence (BBC News 03.03.2008).

## 4.2 International Criminal Court (ICC)

The ICC is an independent and permanent institution that serves as a court of last resort. It has the power to exercise its jurisdiction over people accused of crimes against humanity, of genocide, and war crimes – crimes of serious character and of concern to international society (ICC 2011: 9). The court only takes action when the persons are not persecuted or investigated nationally, or if these are not genuine (ICC webpage 04.05.2015).
The jurisdiction and functioning is governed by the Rome Statute, which is adopted by 123 countries in the international society. Only through agreement with the host country as well as

through the Rome Statute can the ICC conduct an investigation (ICC 2011:9). While their investigations take place in the country of investigation, the trials take place in The Hague. The International Criminal Court's prosecutor has the capability to open an investigation in three circumstances: if a situation is recommended by the government of the state where the investigation occurs, if it is recommended by the UN Security Council, or under the prosecutor's judgment with authorization from a Pre-Trial Chamber. Article 15 (1) of the Rome Statue:

> "The prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the court." (ICC 2011:12)

The court and its activities are financed through states and voluntary contributions from governments, international organisations, or other third parties (ICC 2006:12).
The ICC has activities of outreach, which is a way to promote understanding through communication between the ICC and the communities involved in investigations. The outreach aims to prevent misunderstandings of the ICC for the local actors and public involved, though they must be objective and don't seek to influence strategies developed by involved actors (ICC 2006:5ff). They seek to communicate information to governments, civil society, and targeted groups like women, youth and children, as well as to civil society representatives (ICC 2006: 8). They seek to reach those who are influencing or being influenced by the situation investigated, through media, leaflets or by workshops with civil society representatives or NGO´s (ICC 2006: 12f).

Different factors are taken into account before initiating an outreach program. These factors are a matter of security, staff, logistics, etc. (ICC 2006:5).
The ICC judicial process involves six stages: analysis, investigation, pre-trial, trial, appeal and implementation.
Outreach activities initially begin with the issuance of an arrest warrant. In the analysis phase information is gathered and potential challenges and opportunities are identified, along with potential partners and groups at risk (ICC 2006: 9).
In the investigation and pre-trial phases outreach is initiated by spreading information about the purpose of the ICC to the civil society and address potential misinformation and concerns about the investigated situation.

During the trial the prosecutor, defence, and victims will be able to share their point of view after confirmation of charges. ICC emphasizes the importance of making the judicial proceedings accessible for the public, as well as ensuring publicity of trials in the affected community through the ICC webpage, local media, printed materials and local civil society groups (ICC 2006: 10). This includes radio programs public seminars (ICC 2006:10). The outreach program differentiates for each context in which it operates. But one thing is consistent: the purpose to engage local partners and inform the civil society of the objectives and the situation related strategies of the ICC.

## 4.3 ICC operation in Kenya

The violence that broke out after the 2007 elections was determined by the ICC to have broken international laws, classified as crimes against humanity and disturbing the peace.  While the violence was occurring, the leaders of the ODM and the leaders of the PNU both started collecting and sending evidence to the ICC that would implicate the other party (Interview 01:14:48). The ICC ignored this evidence to remain impartial. Looking at how the ICC tried to persecute the perpetrators demonstrates how the tactics they use affect the country. Lionel Nichols breaks down the ICC's involvement in Kenya between 2008 and 2013 into four stages:

- The first stage, from February 2008 to July 2009 was the preliminary examinations monitoring the government's response to the post-election violence without any apparent pressure.
- The second stage, July 2009 to November 2009, was the time with the most pressure for the government to conduct their prosecutions. Once it was clear the government would not cooperate the next stage would begin.
- The third stage started December 2009 - December 2010 and saw the Office of the Prosecutor begin its own investigations.
- The fourth stage started in December 2010 to March 2013, when it was still apparent no progress in Kenyan prosecutions was made the OTP proceeded with trials in The Hague (Nichols, 2015: 70).

By February 28, 2008 The United Nations set up The National Accord and Reconciliation process, which allowed negotiators to agree on a commission that would investigate the violence and recommend further measures of action. Kenyan judge, Philip Waki, headed this commission,

after his investigations he handed a list containing the names of six people he believed contributed to the violence over to the United Nations Secretary-General, Kofi Annan. The recommendation was that Kenya set up hybrid tribunals by January 30, 2009 to prosecute those responsible or the evidence would go the ICC (Brown & Sriram 2012: 144-60). A hybrid tribunal is one that included Kenyan judges, with other international judges to help limit the amounts of bribery and coercion that could take place.  Legislation to create these hybrid tribunals went through parliament three times, and each time was voted down. The legislation had a difficult time going through because boycotting Members of Parliament (MP) prevented quorum whenever the bill was supposed to be discussed, and some MPs opposed it because they viewed it as being imposed on them without sufficient time for debate (Musila 2009: 452). Secretary-General of the UN, Kofi Annan, extended to the deadline in order to improve and pass the legislation, but by July he was tired of the stalling tactics and eventually handed over the report from the Waki commission to ICC prosecutor Luis Moreno-Ocampo on July 16, 2009 (Brown & Sriram 2012: 144-60).

Once the sealed envelope naming those alleged to be responsible for the violence identified by the Waki commission was handed over to the ICC, the Office of the Prosecutor went though the evidence. The prosecutor decided that there was enough to go forward with the trial and used his 'proprio motu' power to appeal to the Pre-Trial Chamber II.

This is the first time in the International Criminal Courts history that the investigator received pre-trial chamber authorization for a case in this way (Brown & Sriram 2014: 144-60).

On 15 December 2010 Prosecutor named the six people he suspected to have committed the crimes: Major General Mohammed Hussein Ali, Uhuru Muigai Kenyatta, Francis Kirimi Muthaura, Henry Kiprono Kosgey, William Samoei Ruto, and Joshua Arap Sang.

When the charges were presented to the Pre-Trial Chamber II, it was done as two separate cases. The first was against Ruto, a member of the ODM, Sang, a journalist, and Kosgey, chairman of the ODM. They were found with four charges; murder, forcible transfer of a population, torture, and persecution (ICC 2010 a: 14-18). During the Pre-Trial Chamber II phase it was established that Ruto and Kosgey were perpetrators of the crimes outlined, except for torture. Sang's involvement was then deemed as not essential to the crimes, but was still charged with contributing otherwise.

The second case was Ali, the commissioner of the Kenya police at the time of the violence, Kenyatta, leader of the PNU, and Muthaura, head of public service and Cabinet Secretary were charged with five accounts of crimes against humanity in areas including Kisumu, Kibera, Nakuru and Naivasha: First murder, then deportation or forcible transfer of a population, rape, persecution, and inhumane acts.  At the Pre-Trial Chamber II it ruled Ali's contribution was not essential and was only charged with having otherwise contributed (ICC 2010 b: 13-16).

The initial hearings took place April 7-8, 2011. In June 2011, it was requested that the confirmation of charges would occur in Kenya rather than at The Hague with hopes it would bring the justice process closer to the victims, but concerns that it might delay the hearings further prevented it from happening. Everyone accused filed applications that questioned the jurisdiction of the court, but they were all rejected (ICC 20xx: 8f, 138). Since the current president and prime minister, Kenyatta and Ruto were two main culprits identified, they made the Kenyan state very uncooperative with the Office of the Prosecutor, which complicated the trials greatly (Nichols 2015: 69).

To summarize and clarify, charges against Ruto, Sang, Muthaura, and Kenyatta were all confirmed in January 2012. The charges were dropped from Ali and Kosgey, and later Muthaura, because the witnesses were declared unreliable and there was a lack of cooperation from the Kenyan government. Then December 5, 2014, the OTP withdrew charges against Kenyatta citing similar reasons. However, if the chamber received new evidence the termination may be retracted (IJ.Monitor 10.05.2015). The International Criminal Court's website has not been updated recently, which makes it difficult for us to find information about the current situation.

## 5.0 Extended project design
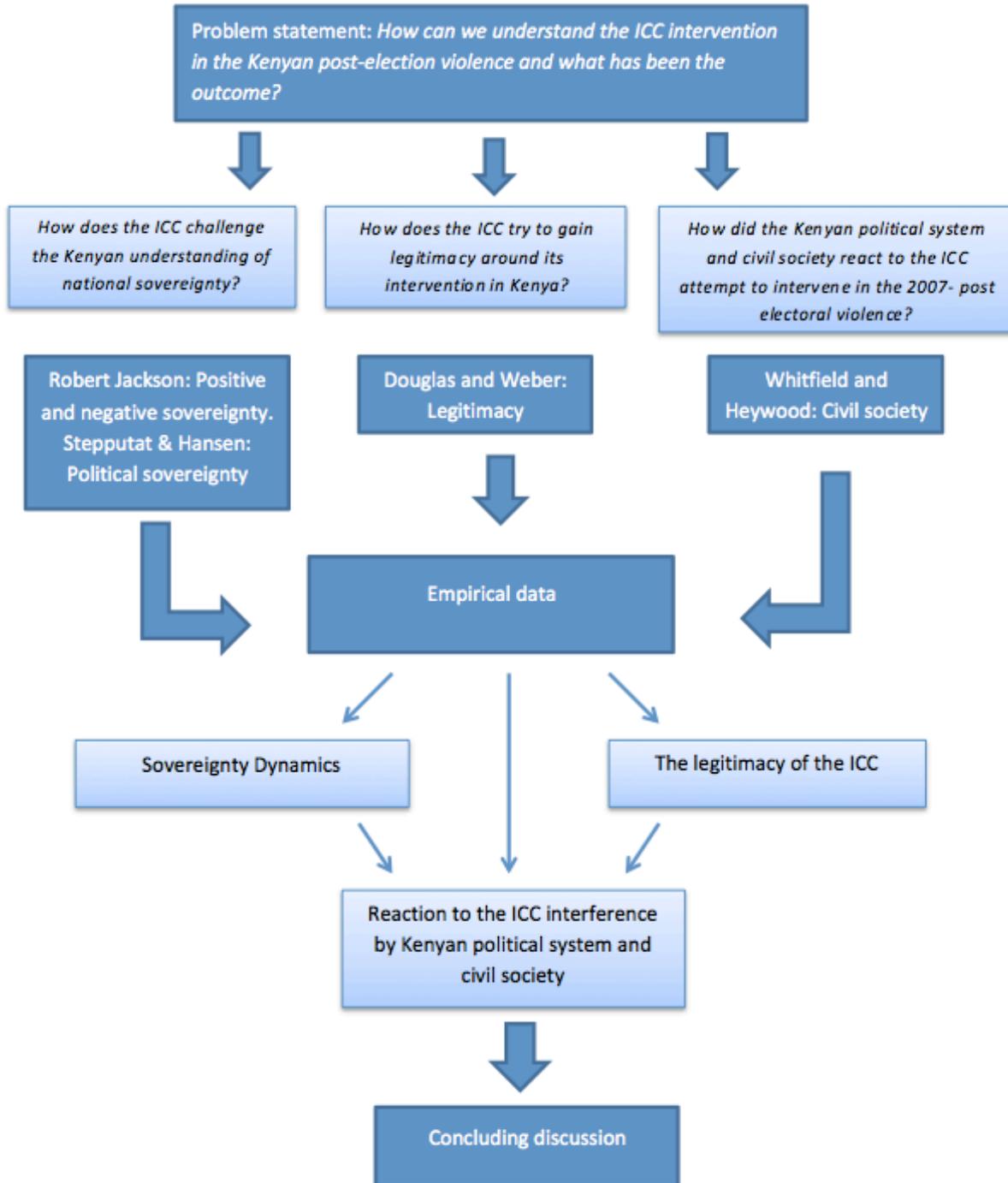
**5.1 Description of extended project design**

**Introduction:** You have now been introduced to our project and provided with our problem statement, as well as our research questions and limitations.

**Methodology:** Further, we have explained our approach to the problem statement methodologically, as well as why we have chosen to implement the interview and various documents. You have at this point been presented with our social scientifically considerations.

**Analytical framework:** This chapter consists of our choice of theories and concepts used to provide our analysis with a nuanced view. We explain the concepts and use of sovereignty, legitimacy and civil society, as well as their role in the context of the ICC intervention in Kenya.

**Empirical data:** This chapter introduced the background of the situation that works as a baseline for our project. This entails a description of the historical and democratic development of Kenya, the institution of ICC and how the ICC has operated in the specific context of Kenya.

**Analysis:** Chapter 6.1 and 6.2 outlines our analysis. They will provide the foundation for the analysis and initiated discussion of chapter 6.3. Chapter 6.1 will provide an analysis of the sovereignty dynamics between the ICC and Kenya. In the following chapter 6.2, we will explore how ICC tries to obtain legitimacy around its intervention in Kenya. Chapter 6.3 starts by analyzing the reaction of the Kenyan political system and the civil society.

**Concluding discussion:** Chapter 6.3 will lead into the concluding discussion of how we finally can understand the interference of the ICC in Kenya as well as the outcome.


## 6.0 Analysis and discussion

Chapter 6.1-6.2 will serve as our analytical section, as well as leading into the discussion in chapter 6.3. The chapters will encompass our three sub questions to answer our problem statement in the best way. In the first part of the analysis we will begin by looking into how the ICC is sovereign and how the Kenyan government understands their own sovereignty. This will further lead us to uncover the sovereignty dynamics between the ICC and Kenya. Additionally, concepts of sovereignty and the responsibility to protect will provide us with insights into the tense undercurrents involved in state intervention.

In chapter 6.2 we explore the International Criminal Court's investigations in the 2007 post-election violence and how it is relevant to use ideas of legitimacy to explain the measures taken by the ICC to gain support in Kenya.

Chapter 6.3, which is also discursive, will introduce the concepts of civil society and explain the ability it has to influence society, will help us try to explain the reaction of political and civil society sectors in Kenya with regards to all the theories used.

## 6.1 Sovereignty Dynamics

The concept of sovereignty resonates differently between a state and a global institution. The benchmark for each of them is set by different components, yet they are both still considered sovereign. So how does the ICC challenge the Kenyan understanding of its national sovereignty? In this first part of the analysis we will start by looking into how the ICC is sovereign and how the Kenyan government understands their own sovereignty. This will lead us to uncover the sovereignty dynamics between the ICC and Kenya.

Kenya has the legal grounds to sovereignty, to govern its country and make demands for compliance of laws by its citizens. The Kenyan government has both internal and legal sovereignty with the authority as a government. Hansen and Stepputat argue that internal sovereignty is about political sovereignty as well. The government was not able to control the situation of post-election violence that broke out in 2007, government officials are even suspect to involvement. This ended up diminishing the internal political sovereignty of Kenya, as it revealed the lack of ability to regulate its people. In addition to diminishing the legitimacy of the government it also proved itself not to be politically sovereign in this case.

Externally, Kenya is principally sovereign. Rousseau explains that it is an autonomous state, with the freedom to be its own master (Heywood 2013: 456). Ideally the matter would be dealt with internally, no outside institutions interfering with decision making and having crimes judged by its internal court system.

When Kenya signed the Rome statute they gave up some of their external sovereignty. This ensures the ICC has the jurisdiction to interfere in case of severe crimes against humanity. The ICC is a recognized global institution and has legal sovereignty in the sense that members give them permission to intervene by signing the Rome Statute. The ICC needs legislation saying that it has the right to interfere. When Kenya became a member of the ICC, the ICC then gained the legal sovereignty to intervene in Kenya.

In 2007 when the post electoral violence broke out, state officials were suspected of both initiating, and fuelling this violence. Though Kenya had signed onto the Rome Statute, which

allowed the ICC to intervene, the Kenyan government still contested the interference. In a press statement Onyango Oloo, Secretary General of The National Alliance (A) in affiliation with the Jubilee Alliance, commented on the ICC intervention, he underlines that with the mandate comes a responsibility to perform tasks in all sectors of society. He then criticizes the ICC for compelling the charged members of government to attend in the trial:

"This is an honourable task that requires the two gentlemen to be in this country to perform diligently and deliver on the promises that the Jubilee Coalition had issued as a collision. To require them to attend to an ICC trial, which takes place in Hague, is to undermine the sovereignty of […] Kenya." (KTN News Kenya 11.09.2013).

Bringing out active members of government is done at the cost of the responsibilities they have in Kenya, and can imply an infringement on their political sovereignty.

This statement reflects a broad range of similar ideas suggesting the dissatisfaction with the ICC interference in Kenyan internal affairs. As the Kenyan government tried to fight the disruption of sovereignty, the proposition to pull the country out of the Rome Statute on the grounds that the Court is oppressive to the African continent, was voted pro (E-News Channel Africa (ENCA) 10.09.2013). This led to a domino effect on several counties in the African Union wanting to pull out of the Rome Statute, claiming the same critique of the ICC only targeting African countries (NTV News Uganda 11.10.2014). According to the ICC webpage however, Kenya is still an ICC member.

Though Kenya is both legally, internally and somewhat externally sovereign, the ICC does have the mandate to interfere against the will of Kenyan government on basis of the Rome Statute. The indications above clearly demonstrate how Kenya understands the interference in Kenyan internal affairs as undermining and a challenge of Kenyan sovereignty.


## 6.2 The legitimacy of the International Criminal Court

When analysing the International Criminal Court's investigations in the 2007 post election violence, it is relevant to use ideas of legitimacy to help explain the measures taken by the ICC to gain recognition and support. In this section of the analysis we will explore how the ICC tries to gain legitimacy around its intervention in Kenya.

Kenya became a unique case at The Hague as it was the first instance of the prosecutor using his *proprio motu* power, and the first time an international criminal court investigated violence pertaining to the democratic process (Höhn 2014: 565). Establishing that the ICC's involvement occurred justifiably was necessary to ensure the inquiries and investigations could go on with the least amount of resistance. The hypothesis of legal-rational authority, combined with performed legitimacy, is important for the analysis of International Criminal Court because it explains the acceptance of their involvement, and ICC strategies to gain that acceptance. According to Max Weber's ideas, legitimacy stems from its legal foundation allowing for binding penalties to be given, but Mary Douglas argues it must also prove that they are acting with worthy intentions to be completely accepted by the Kenyan public. Having the holistic meaning of legitimacy allows the ICC to work most effectively. This section will first analyse the way ICC procures legal legitimacy, and then recognized legitimacy. Accusations of illegitimacy will be looked at, and how the level of legitimacy the Kenyan government has impacts the situation. Having legitimacy is the only way that the International Criminal Court can fully serve justice to the perpetrators who contributed to the 2007 post-election violence.

The significance of the International Criminal Court in the Kenyan situation is that there has been a large amount of deaths and displaced people as a result of violence and the perpetrators must be held responsible. If those blameable people have the protection of government and there is doubt a genuine investigation will be conducted, then having an impartial organization with the jurisdiction to intervene can provide the justice required for proper reconciliation. The ICC needs legitimacy to properly conduct their activities because it does not have any physical means to force accused individuals to appear before court (Spangler 2014). Being seen as legitimate in the international arena is important because the support of powerful actors, such as the United States, helps to pressure Kenya into releasing information and cooperating. Even the states that chose not to sign the Rome Statute have not challenged the court's legitimacy because, in principle, they stand for international accountability mechanisms (Cassese 2012: 495). The main reason having legitimacy is important is so the criminal investigation in Kenya can be conducted thoroughly enough to get answers without obstruction and sentencing is properly carried out. Now that we know why having legitimacy is imperative for a fair trail is recognized, the methods the ICC took to solidify their legitimacy can be analysed.

The application of Max Weber's types of legitimate domination in ideal form explains how the ICC has gained the legal component to legitimately investigate Kenya. The Rome Statute is a legal document with member signatures that binds them to the laws of the International Criminal Court. Those who are employed at the ICC are highly qualified and work within a consistent system of rules that apply to every situation. Each investigation or trial that is undertaken follows the same procedures and is subject to the objective rule of law. These characteristics satisfy the outlined requirements for Weber's legal authority. This legal power is recognized in the international community and the significance of signing the treaty has prevented some states from joining; the enactment of the legislation alone has prevented mass atrocities (Dutton 2013: 159f). Typically, states that have little intention of actually respecting the rules do not sign, which can be interpreted as the legitimate authority of the ICC is respected to the extent where superficial participation is negated. The case in Kenya has become a warning to other states that may join the ICC but then chose to not comply with the terms; it shows that there are penalties for the state and its citizens (Ibid.). It was article 15 of the Rome Statue that allowed the prosecutor Luis Moreno-Ocampo the power to request the six people he believed to be instigators in the violence to be summoned to The Hague (ICC 2011: 12). For example, Ruto, Kosgey, and Sang were accused of breaking articles 7(1)(a), 7(1)(d), 7(1)(f), and 7(1)(h); respectively, murder, forcible transport, torture, and persecution based on political affiliation (ICC 2010 a: 10). The fact that there specific articles that have been agreed upon as laws when Kenya signed, that now are being investigated highlights the legality of the ICC's proceedings. Ocampo claimed that since prosecution is a technical response by international courts to political violence if domestic prosecution is not happening, the ICC became part of Kenya's judiciary system. (Ocampo 2009)  The legal backing is nearly indisputable which, according to Weber, means that they have successfully gained the authority to legitimately dominate.

Mary Douglas outlines another component needed to acquire legitimacy, which is having the institution be accepted as legitimate outside it self.  While involved in the Kenya situation the ICC also needs to prove that they have practiced legitimacy. Scholar Antonio Cassese stresses the importance of knowing that legality and legitimacy are not synonymous, extending on Douglas's ideas he describes legitimacy as a moral and psychological acceptance, to be specific,

of the ICC by the Kenyan population (Cassese 2012: 492). There are instances where an institution that initially does not have all forms of legitimacy can show that it is independent of any state or political grouping and adhering to the fundamental principles of international justice, allowing it to make up for the part it was initially lacking through performance legitimacy (Cassese 2012: 498). The main method of communication that the ICC uses to try and gain performance legitimacy is the Outreach program, which provides information about the ICC involvement to targeted groups through workshops, media, leaflets, public meetings and NGO´s (ICC 2006: 12f). The ICC has reported, "…the outreach unit conducted its third mission to Kenya in order to explain the courts decision, discuss further steps of the judicial process and address the concerns of the population." (ICC webpage 21.05.2015). This opened conversation demonstrates the ICC's desire to work closely with the affected areas and minimize misunderstandings. The ICC is involved in the Kenya situation because it wants protect people from crimes that break international law, not infringe on the governments sovereignty for no reason. An informed interviewee for this project was involved in these outreach programs and he explained that the approach they had:

> "I worked with the ICC Outreach Office … so we used to work with the lady in charge of the ICC, she is called Maria Kamara, and we used to mobilize meetings for her. Nakuru and the other towns in The Rift Valley, those were the places most affected and the most of the evidence currently with the ICC is based from those areas. So we had to go to these communities to tell people what the ICC is. Just to counter some of the propaganda that was advocated by the Kenyan people." (Interviewee, 0:04:02)

This exchange provided a first hand retelling of the technique the ICC had to try and gain more legitimacy on the ground during the investigation process. The areas that experienced a lot of violence need to be focused on by the Outreach program so it is properly explained what the ICC is looking to gain by being involved.  Collecting evidence for the trails is important to be able to prosecute the guilty, those affected need to understand the ICC has the intentions of being open and including the opinions of the victims.  The Outreach program tries to incorporate a broad range of people in order to hear concerns and spread accurate information as widely as possible, as explained by the interviewee:

"We used to work together with a network of CSO's, so we used to work with around three CSO's and we also had a network of people we would work with, but we would work with the internally displaced persons and leaders of the organizations and we would also work with the local administrators. If you are organizing a meeting for Outreach and for sensitization then you have to work with the community leaders at the ground, local level, so it is a whole team of different people and a lot of organizations." (Interviewee, 00:05:39)

The Outreach program is a successful way of bringing different groups together to work toward spreading accurate information on the ICC's involvement. It is understood how important including the vernacular is when trying to gain the belief on the ground of legitimacy. If recognition of the validity of preformed legitimacy is followed, the ICC's outreach program is a way to achieve that need. By including the citizens of Kenya in the process it lessens the distance between The Hague and the victims of the crimes, which helps cement the ICC's involvement in rightness and nature. The program demonstrates the ICC's desire to show the Kenyan population they are working with internationally recognized values to end impunity and prevent future mass atrocities. They have faced many different problems while trying to achieve this. The task of gaining legitimacy in the minds of the people is increasingly difficult when there is another force with legitimacy pushing against the ICC. Encouragement from the government to not accept ICC legitimacy has created pushback from government supporters.

The ICC has achieved legitimacy legally through the Rome Statute, and has worked toward achieving the belief of it in the population through the Outreach program, but other actors in opposition to the Hague proceeding have tried to asphyxiate ICC credibility. There has been a lot of discussion on if the ICC has met the requirements of surpassing legality and actually become legitimate. The legitimacy of the Kenyan government increases and decreases, to an extent, in correlation with the ICC's. If there is a strong belief in the government's legitimacy, then their accusations of the ICC being a western tool of imperialism are respected and ICC legitimacy goes down. On the other hand, if it is recognized that the Kenyan government has broken international law, and not properly done its job of protecting citizens from violence, then they lose legitimacy and ICC involvement gains support. The ICC investigations require maximum

assistance from the government to ensure those responsible in the violence are prosecuted; however, in the Kenyan situation it is the government that is being accused, so they do not want to cooperate and condemn themselves. Academic Steven C. Roach explains the problem with this conflict of interests, "it is this dependence that has raised concern that the lack of reliable enforcement at the international level will continue to enable and encourage state leaders and authorities to either ignore the court's requests or to use the ICC's legitimacy for political purposes." (Roach 2012: 507) She is saying that because the ICC relies on government support it cannot be entirely affective.

Those who were under investigation of the court, in this case, held a lot of power and had the capacity to threaten and murder witnesses who would speak against them or provide information that would implicate them. The lack of evidence that surfaced and caused the proceedings to be ineffective is partially because of the danger of acting in opposition to the government. Another reason is because the government's legitimacy was so esteemed by some people that the government's act of antagonizing the ICC dissuaded cooperation with the organization. The level of authority that the government has greatly affects the trials, not just in public support for them but also in the actual process. According the Weber, an institute can only have authority on legal grounds if the people in power are subject to the same laws as everyone else, by avoiding The Hague the Kenyan government is demonstrating its lack of legal legitimacy. The tactics to maintain practical legitimacy include releasing excessive propaganda to discredit the ICC. The relationship between ICC legitimacy and Kenyan government legitimacy impacts the procedure of delivering justice, which is why the ICC must work to gain their legitimacy from Rome Statute and the Outreach program.

This section tried to provide information that would help answer the question of How the ICC try to gain legitimacy around its intervention in Kenya. The ICC recognizes the importance of having, and being recognized, as a legitimate actor. It gets rational-legal authority from the treaty that states have agreed to sign. Since legitimacy cannot just be validated through a treaty, it also must engage in an Outreach program to properly inform the Kenyan public what it is doing. Hopefully by explaining the ICC process to the public they would understand and support the trials at The Hague; that support would then help apply pressure for the government to cooperate. During the process of trying to bring justice to the victims of the 2007 violence there was

problems with the ICC proving that their involvement was legitimate. These problems stemmed from different places, but a key problem was the propaganda it had to combat from the government of Kenya. Legitimacy is very important for the prosecutions to be completed effectively; it needs to be proved continuously and in different ways. The ICC is aware of the complicated situation it becomes involved in, and that is why it has different tactics ready to prove their authentic intentions. The reactions to these tactics are often varied and also analysing those will provide insight to the impact of the International Criminal Court in Kenya.

## 6.3 Reaction to the ICC interference by Kenyan political system and civil society

The reaction of the Kenyan political system and civil society can be attributed partially to their perceptions of their own sovereignty and ICC legitimacy in the involvement. An international organization must be aware of the impact they have on a population so they can maneuverer themselves in the most effectual way.  The ICC investigations to convict the perpetrators can be intrusive, so the reaction of the political system has a sizeable affect on their success. Being prosecuted at The Hague has serious consequences, because the government contained Kenyatta and Ruto they could use their power to avoid those consequences. Parts of parliament and civil society were frustrated by the continued reign of guilty parties and wanted the ICC's help to create an honest government. The ethnic divisions in Kenyan society can be accredited with some of the different reactions to the involvement and demonstrates the variety of perceptions of the ICC in Kenyan society.

The political system and civil society had both positive and negative reactions, analysing them provides insight to how the intervention increased, or reduced, the ICC's ability to end impunity. Recognizing how ideas of sovereignty, legitimacy, and civil society impact the reactions from Kenya can provide knowledge on what ICC interventions need to consider for the future.

Before the International Criminal Court became involved, the Kenyan government had been given the option to set up domestic hybrid tribunals or to go to The Hague. The legislation that would have created the tribunals was voted down in parliament three times, which gave the impression to international society that no initiatives were going to be taken to see justice served. The reasons behind the legislation not passing are vast, some members of parliament felt there was not enough time to properly debate it and others felt that the only way justice could be

served would be by an impartial court. At the time being people in favour of taking the trial to the criminal court had the catchy phrase: "Don't be vague – go to the Hague!" (Interviewee, 46:07).

When the ICC eventually opened the case there was opposition from those who wanted Kenya to establish their own courts, and support from those who thought the only way to see meaningful sentencing was at The Hague. The government had reacted to the involvement by being disagreeable and it became clear that acting in opposition to the powerful people in government was dangerous and futile. Throughout the trials the Kenyan government has been accused of being uncooperative. There has been suspicion the government is preventing key witnesses to testify, as well as not handing in required evidential records and documents.

"The state (the seated people in the government) refused to submit some documents – very crucial documents that could have helped the case." (Interviewee 31:03)."They were supposed to[1], but they didn't." (Interviewee, 32:49) "…as much as they are saying that they are cooperating, but if you look at it, they don't." (Interviewee, 33:05). The interviewee´s experience after working in the ICC, leaves us with a strong impression that the government did not wish to cooperate with the ICC. Further more, the oppositional stance the Kenyan government took towards the ICC led them to try and influence the opinion of civil society to also contest the investigations. Government perpetrators will obviously have an interest in using their power to discredit ICC involvement. With the desire to avoid prosecution and taking into account the previous historical events of colonialism, there are reasonable grounds to thwart international interference. According to Whitfield the society has the ability to influence political change (Whitfield 2003: 319) civil. The Kenyan government recognizes their capability, and has tried to guide their reaction to be inline with the governments. Through propaganda, government has denounced the ICC and tried to portray them as illegitimate. Propaganda was spread about the ICC to turn the population against the ICC and to stop their participation in ICC initiated meetings and workshops. The propaganda was spread through media sources. Furthermore Sang was accused of fuelling the violence through the radio station he worked at (ICC: September 2013). According to our informant, different medias had a tendency to project the ICC processes

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[1] *Because of the Rome treaty the Kenyan government are required to submit all documents requested.*

wrongfully and give the Kenyans incorrect information. This would lead parts of the population to misunderstanding the intentions of the ICC.

"… But at some point in the TV-stations they were hosting lawyers and people that had information about the international law and so when the TV-stations did that, it turned out good. […] The newspapers were a whole other thing, because they started writing things that ended up giving people the wrong impression about the situation, which was what the ICC was trying to prevent." (Interviewee, 12:07). Papers critical of the government have been known to meet challenges when expressing their critical opinions. The Standard was an example of how authorities in some way have tried to limit the civil society. The police raided The Standard newspaper offices, after it claiming that the Kibaki office would weaken the power of civil society in order to get re-elected and remain in office (BBC 03.03.2006). Examples like these have been a contributing factor to why people have become discouraged in standing up to the government, because they are aware of the repercussions. While the ICC is trying to demonstrate their intentions, it is key that they are proving themselves as legitimate to gain a positive reaction by the civil society.

In certain areas these government initiatives were more successful and caused the people to dispute ICC investigations. The ICC needed the support of the civil society to help be received positively. In order to get the support of the civil society, the ICC used their outreach program to communicate the objectives of their involvement and why the prosecuted where put on trial. It is in this context especially important to remember how Kenya is ethnically divided in politics, which is why different areas had different reactions to the impact of the ICC. The interviewee emphasizes this point by saying, "…the civil society […] are trying to pull in different directions. And […] some are finding it really hard to operate in Kenya." (Interviewee,1:00:27). Some parts of civil society are trying to fulfil their role of making political space for citizen's interests, in this case proper facts on the role of ICC, when the government is trying to smother out contrary attitudes.

How the government, and thereby ethnic leaders, project their impression of the ICC interference has a tremendous influence on how the population and civil society react to the ICC initiatives. Kenyatta had a heavy influence of areas mainly populated by the Kikuyus, where the amount of propaganda that was released created a generally negative response to the ICC initiatives.  Civil society challenges the government in order to create a more democratic

environment that respects rule of law. Our informant demonstrated this inclination by describing civil society's reaction to the deputy president being exempt from attending some cases at The Hague just because he was the vice president:

> "…civil sector are not happy with that, because they say that amounted to perforation treatment, because ideally if you are a suspect of The Hague you should be tried in an individual capacity, not in an official capacity, so you are supposed to be treated just like any other person." (Interviewee, 00:59:04).

In this dissent, parts of civil society have shown they wish the ICC to do an honest job in the trials to hold the government accountable for their actions. The actions of the civil society are aiming to promote the common good. Thus, it is extremely necessary for the civil society to hold a position of significance in the promotion of its interests. It is important that they are in a position where they are heard and taken seriously. Parts of civil society have reacted to the involvement of the ICC very well. They are trying to confront the misinformation and bullying practices of the government and encourage people to help the ICC conduct the trials fairly. Other sectors of civil society that are closely related to government by ethical ties are trying to dissuade ICC involvement by obstructing their initiatives and spreading propaganda.

The government's reaction to ICC involvement has been to discredit it and try to gain support of civil society and the public. The way they do this is by claiming the ICC has illegitimately breached sovereignty and is a western imperialist agent interfering in Kenya's development. It can be argued that when the Kenyan government did not properly protect its citizens during the 2007 post election violence they became illegitimate in dominating and lost sovereignty. Therefore when the ICC opened the investigation they were doing so justly. For the ICC to conduct the trials meaningfully it is important for Kenyan society to recognize not just their legal legitimacy but also their practical legitimacy, so they employed means like the Outreach program to gain support from civil society.

## 7.0 Conclusion

The job of civil society is to strengthen democracy and challenge government, even though government tries to use it to support their policy. Both the government and the ICC recognize the necessity of having civil society support them to further their goals. The Kenyan government has tried to control civil society's opinion by calling upon ethnic ties and spreading propaganda. The political game in Kenya is based so heavily on ethnics that there is always conflicting opinions in the country. All over the country though there is a desire to end impunity and move towards a more peaceful future, the way to get there is disputed. The impact of ICC involvement is relevant to the international arena because it demonstrates that while some parties do not wish to have outside interference, other parties recognize the failings of their government. Concepts of legitimacy, sovereignty, and the influence civil society are pertinent to understanding the ICC investigation of government officials in Kenya. When taking the liberty to breach country´s sovereignty it is important to make efficient and meaningful usage of the involvement, the ICC has taken measures to demonstrate that they are working to safeguard international laws and deliver justice to gain support from the Kenyan population.

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