Judicial Statecraft in Kenya and Uganda

Explaining Transitional Justice Choices in the Age of the International Criminal Court

Thesis submitted for the degree of Doctor of Philosophy in Politics
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New College
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<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>CPA</td>
<td>Comprehensive Peace Agreement</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<tr>
<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<tr>
<td>FPA</td>
<td>Final Peace Agreement</td>
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<tr>
<td>GoSS</td>
<td>Government of Southern Sudan</td>
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<td>GoU</td>
<td>Government of Uganda</td>
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<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
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<td>ICTJ</td>
<td>International Center for Transitional Justice</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>IOM</td>
<td>International Office of Migration</td>
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<tr>
<td>JLOS</td>
<td>Justice, Law and Order Sector</td>
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<tr>
<td>KANU</td>
<td>Kenya African National Union</td>
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<tr>
<td>KHRC</td>
<td>Kenya Human Rights Commission</td>
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<tr>
<td>KNCHR</td>
<td>Kenya National Commission of Human Rights</td>
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<tr>
<td>KPTJ</td>
<td>Kenyans for Peace, Truth and Justice</td>
</tr>
<tr>
<td>LRA/M</td>
<td>Lords’ Resistance Army/Movement</td>
</tr>
<tr>
<td>NAC</td>
<td>National Alliance for Change</td>
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<td>NAK</td>
<td>National Alliance Party of Kenya</td>
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<tr>
<td>NARC</td>
<td>National Rainbow Coalition</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>NRA/M</td>
<td>National Resistance Army/Movement</td>
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<td>NPWJ</td>
<td>No Peace Without Justice</td>
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<tr>
<td>NTC</td>
<td>National Transitional Council</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<tr>
<td>ODM</td>
<td>Orange Democratic Movement</td>
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<tr>
<td>OLT</td>
<td>Operation Lightning Thunder</td>
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<tr>
<td>OSIEA</td>
<td>Open Society Institute East Africa</td>
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<tr>
<td>OTP</td>
<td>Office of the Prosecutor</td>
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<tr>
<td>PNU</td>
<td>Party of National Unity</td>
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<tr>
<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<td>RC</td>
<td>Resistance Council</td>
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<tr>
<td>SPLA/M</td>
<td>Sudan People’s Liberation Army/Movement</td>
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<tr>
<td>STK</td>
<td>Special Tribunal of Kenya</td>
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<tr>
<td>TJRC</td>
<td>Truth Justice and Reconciliation Commission</td>
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<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
</tr>
<tr>
<td>TJWG</td>
<td>Transitional Justice Working Group</td>
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<tr>
<td>UNLA</td>
<td>Uganda National Liberation Army</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UPDF</td>
<td>Ugandan People Defence Forces</td>
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<tr>
<td>WCD</td>
<td>War Crimes Division</td>
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Abstract

Judicial Statecraft in Kenya and Uganda: Explaining Transitional Justice Choices in the Age of the International Criminal Court

Lydiah Kemunto Bosire
New College
DPhil in Politics
Trinity Term 2012

Transitional justice has undergone tremendous shifts since it was first used in Latin American and Eastern European countries to address post-authoritarian and post-communist legacies of atrocity and repression. In particular, the establishment of the International Criminal Court (ICC) has increased the demand for prosecutions within a field that was previously marked by compromise and non-prosecution. While there are increasing expectations that countries with unresolved claims of human rights abuses should enact transitional justice policies, most of the literature on the subject largely omits to explain how elites from those countries choose among the possible options of transitional justice, and specifically, how they choose among international prosecutions, domestic prosecutions, and truth-seeking. Using case studies of Kenya and Uganda, this dissertation examines this decision-making process to understand how elites choose and reject different transitional justice policies. Theoretically, the research examines how preferences for transitional justice policies are constituted through “judicial statecraft”: the strategic efforts by heterogeneous, interest-pursuing elites to use justice-related policies as carrots and sticks in the overall contestation of power. The research finds that the choices of elites about judicial statecraft depend on three factors: the extent to which the elites are secure that their policy choices cannot be subverted from within; the cost and credibility of transitional justice threats; and the effects, both intended and unintended, of history.
Acknowledgements

I would like to start by thanking my academic community at the University of Oxford. I am grateful to my supervisor, Professor David Anderson, as well as to Dr. Nicholas Cheeseman, and Dr. Ricardo Soares de Oliviera, for the valuable input they gave to different stages of this project. I am also grateful to my college tutor, Professor Elizabeth Frasier, and to Dr. Phil Clark, Professor Leigh Payne, and my many other colleagues at the African Studies Centre and at Oxford Transitional Justice Research who provided valuable intellectual and moral support for this project along the way.

This research is based on nearly 200 interviews conducted between 2007 and 2011 in Gulu, Kampala, Nairobi, New York and The Hague. I am indebted to all those who gave their time and contacts to different aspects of the project, pointing to new literature or to other potential contacts. I am particularly grateful to, in alphabetical order, Roselyn Akombe, Serge Brammertz, Phil Clark, James Latigo, Pascal Kambale, Karine Kaneza, George Kegoro, Gaelle Laroque, Adrienne LeBas, Gabrielle Lynch, Christopher Mahony, Rebecca Maina, Njonjo Mue, Makau Mutua, Moses Chispuess Okello, Ochoro Otunnu, and Silvana Toska. The research also benefited from the insights of many friends and colleagues that are too many to list.

For the funding that enabled different aspects of this research, I thank New College, the African Studies Centre, and the Clarendon Scholarship.

Over the course of this research, I benefited from the hospitality of many. I am grateful to Rosamund and Peter Metcalf, whose Oxford house became home to me and my countless suitcases, Leo who made it possible, and Jess who learned to ignore my shoes. I am grateful as well to Jeremy Solomon and Gann and Dale Herman, whose homes in Kampala were opened to me as I passed through.
I have benefited immensely from a supportive network of friends and family. I would like to express my gratitude to all my friends, including my dear book-club girls, who have had to bear with my erratic schedule. I am grateful for my father, who first started to dream, and my mother, who plants everyone’s feet on the firm earth. I am grateful too, to my brothers Enock and Josh, and my sisters Fenah, Judy, Nancy, and Sabina. Fenah housed and fed me, and patiently juggled her work with driving me around Nairobi for my interviews. Judy and Josh observed in amused detachment. Karl-Gustav and Eivor provided me with a writing refuge, a big screen computer when I needed it, and lots of “fika” when I needed a break. For that I am grateful.

A project of this nature rapidly exhausts the stock of goodwill of those nearest and dearest. This dissertation is dedicated to Oskar Hans Bynke, for his amazing patience and endless support, without which this project would not have been possible.

Lydiah Kemunto Bosire

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Chapter 1—Introduction

On 14-16 August 2003, following the first electoral change in government in Kenya’s history, an international conference was organized at the Safari Park Hotel in Nairobi to discuss what Kenya should do with politicians from the previous regime who had violated human rights. The speakers included the trinity of experts on accountability for human rights violations: Archbishop Desmond Tutu of the South African Truth and Reconciliation Commission (TRC); Alex Boraine, who had served as Tutu’s deputy in the TRC before becoming the founding president of the International Center for Transitional Justice (ICTJ), an organization widely acknowledged as an authority on accountability questions; and Priscilla Hayner, who, in addition to co-founding the ICTJ, was recognized globally as a leading authority on truth-seeking. Organized by the Kenyan Task Force for a Truth, Justice, and Reconciliation Commission (TJRC), the conference concluded that in Kenya, truth-telling was preferable to prosecutions because, “politically, trials get complicated;” they pose a “potential threat to political stability” and are “best avoided.”

Fast forward to 29 September 2009: Maina Kiai, a luminary of the Kenyan human rights community and a key supporter of the 2003 anti-prosecutions position, delivered an address at a different conference that had been organized in New York to discuss the International Criminal Court (ICC). Here, in reference to human rights violations that had been committed following a contested Kenyan election in 2007, Maina Kiai explicitly rejected the TJRC whose creation he had supported in 2003. “Recent crimes deserve criminal prosecutions rather than truth telling and recommendations,” he said. “One compelling reason for the ICC to engage in Kenya...would have to be the extremely strong possibility of

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preventing more killings and human rights violations,” he concluded.³ Thus, the very same actors who had demanded a truth commission in 2003 now demanded international prosecutions through the ICC. The justification remained the same. In 2003, the proposed TJRC would help avoid the instability (and, by extension, the further loss of life) that was associated with prosecutions. In 2009, only prosecutions through the ICC could prevent the loss of more lives.

Kenyan elites⁴ were not alone in changing their mind about what transitional justice policies they wanted or why they wanted them. In late 2003, around the same time that Kenyan elites were formulating their first demands for transitional justice through the Task Force, the Ugandan government was engaged in an “informal” dialogue with the Office of the Prosecutor (OTP) of the ICC about the actions of the Lords’ Resistance Army (LRA) rebel group. This process “led the OTP to believe that the Ugandan authorities might be interested in referring the LRA conflict…to the Court.”⁵ The Government of Uganda (GoU) became the first country to ask the ICC to prosecute the LRA in a self-referral in December 2003. The GoU justified the invitation as part of an effort to bring peace to war-torn Northern Uganda. As it was in Kenya, the preferences of the Ugandan government elites shifted in response to internal political dynamics. Barely a year after the initial referral, the GoU indicated that it could withdraw its request for ICC prosecutions if the LRA wanted to negotiate for peace. According to the GoU, while the initial ICC referral had been legally justified by arguing that Uganda was “unable” to prosecute the LRA, their actual problem had been a physical inability to apprehend the LRA (who were, at that time, based in Sudan).

⁴ By elites, this research refers to competing factions who seek to influence the policies of, and benefit from, the state. The term is defined in greater detail in chapter two.
⁵ Schiff 2008: 198.
That inability could be overcome through peace negotiations.\textsuperscript{6} Thus, the Ugandan government rejected the ICC, and instead established the War Crimes Division within the High Court. In Uganda, both the GoU’s embrace and rejection of the ICC were done in the name of peace.

What was going on? Why do some elites demand international prosecutions, while others demand domestic prosecutions, and others still support “soft” alternatives to prosecutions, such as truth commissions?\textsuperscript{7} What are the political conditions that make the support or rejection of different transitional justice policies likely? If the preferred outcome is the institution of domestic prosecutions that are in accordance to international rules (also known as “complementarity”), when is this outcome likely?\textsuperscript{8} This research argues that we can better explain elite preferences if we understand that the selection of transitional justice policies is constituted through “judicial statecraft”: the strategic efforts of elites, who are facing multiple audiences and multiple rules, to use justice-related policies as carrots and sticks in the overall contestation of power.\textsuperscript{9}

For elites who are involved in judicial statecraft, three key factors matter. First, regime security matters. Regime security is the confidence governing elites have that their decisions cannot be subverted from within. Secondly, the threat level of transitional justice matters. The threat of transitional justice is high if the targeted elites perceive it to be both credible \textit{and} costly. Thirdly, history matters. In varying degrees, all elites reckon with previous choices, even if it is only to find justifications for rejecting them once the context changes. In terms of the tactics of judicial statecraft, international prosecutions are likely to

\textsuperscript{6} Vision Reporter 2004.
\textsuperscript{7} In this research, truth-telling is considered as many actors on the ground perceive it in the age of the ICC: a soft, politically cheap, minimalist option.
\textsuperscript{8} International Criminal Court 1998: Article 17.
\textsuperscript{9} The term borrows from the more common term “economic statecraft”: for example, see Drezner 1999.
be supported by both secure and insecure regime elites who are facing low threats. They can use such prosecutions to achieve political objectives without threatening the core members of their patronage network. Without regime security, government elites who are facing high threats are likely to discredit or reject international prosecution and complementarity, supporting instead the minimalist transitional justice processes whose effect they can control. For both secure and insecure regimes, the initial conditions and unexpected developments can change regime security or the threat of transitional justice, which will lead elites to re-evaluate their interests, change their arguments, and alter their policy preferences.

I. Statement of Purpose: Why Choosing Transitional Justice Policies Matters

Much of the scholarship within the field of transitional justice fails to explain how elite preferences for specific transitional justice policies emerge and shift. By “transitional justice,” this research refers to the practice of establishing processes for prosecutions, truth seeking, reparations, institutional reform, and reconciliation, in order to address human rights abuses. First used in countries in Latin American and Eastern Europe to address post-authoritarian and post-communist legacies of atrocity and repression, transitional justice processes are now an expected standard for all countries that have unresolved claims of human rights abuses. While this research situates its inquiry within the transitional justice field more broadly, it will only consider the choice that is made among three policies: international trials through the ICC, domestic trials as a form of “complementarity,” and truth-seeking. While transitional justice activity is referred to interchangeably in the literature as “policies,” “norms,” and “measures,” the research will also focus on transitional justice

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12 Complementarity, while not a word in the Rome Statute, is thought to be a foundation of the ICC. It provides that the target country is the first avenue for prosecution. See International Criminal Court 1998: Article 17; Brown 1998.
“policy,” in the sense of a proposed or adopted idea, objective, or course of action that is “chosen from among alternatives in light of given conditions to guide and determine present and future decisions.”

Over the past two decades, the transitional justice field has seen tremendous shifts. The story of transitional justice was once a story about moments of political change, where an aggregate social demand for redress was met by an aggregate response from incoming regimes. It was a story about “true believers” in human rights (along with some cynical instrumentalists) who were contributing to victim redress and reconciliation, as well as to democracy and human rights. While transitional justice discussed state obligations, it remained, at its core, a story about the search for imperfect political outcomes through compromise, and it legitimized itself by obtaining the consent of victims. It was not a story where elite demands for redress, formulated exclusively in terms of state obligation, rode roughshod over social resistance to such redress. Nor was it a story about a seemingly random selection of policies in the absence of political change. More importantly, it was not a story about cynical elites (including repressive regimes who were responsible for human rights abuses themselves) demanding prosecutions for their opponents, which led to an entrenchment of their own domestic power while it failed to achieve redress for the victims or reconciliation for the society.

The shift from the former story to the latter one was accelerated by a rapid proliferation of transitional justice practices around the world that occurred as a result of the strengthening of transnational activism on human rights, and by the embrace under the transitional justice umbrella of the “anti-impunity” community following the establishment

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13 Merriam-Webster Dictionary 2011. Policies are further defined in chapter two.
14 For “true believers” see Risse, Ropp, and Sikkink 1999: 16.
15 This ideal-type story is captured in these two reports: United Nations 1996; United Nations 2005.
of the ICC in July 2002.\textsuperscript{17} The anti-impunity community, a loose coalition of actors within transitional justice (ICC officials, a number of human rights NGOs, and other actors), focused their advocacy efforts on ensuring prosecutions for those who were most responsible for war crimes, crimes against humanity, and genocide. Under the ICC, specific responses were demanded from national actors, and these demands were coupled with an enforcement mechanism. In target countries (those with human rights violations under scrutiny), anti-impunity actors demanded domestic prosecutions, the absence of which would trigger international prosecutions, which were presumably undesirable. Thus, with the ICC, transitional justice experienced what Douglass North would term as “discontinuous change,” in the sense of “a radical change in the formal rules.”\textsuperscript{18} The complex regime of transitional justice was effectively subsumed into the regime of complementarity. Whatever else elites did, their first obligation was to ensure domestic prosecutions.

The scholarship, however, has generally been slow in examining this contextual shift, which would surely impact why some transitional justice policies are chosen and others are rejected. The scholarship has made major advances in understanding the effects of policies on a range of outcomes, including democracy and deterrence.\textsuperscript{19} However, with few exceptions, the segment of the literature that considers the selection of transitional justice policy often attributes such selection to big-picture explanations, including normative shifts through the “justice cascade,”\textsuperscript{20} balance of power between incoming and outgoing regimes, coercion, or simply mimicry and acculturation.\textsuperscript{21} While these explanations have many achievements and help us distinguish between the selection and non-selection of transitional

\textsuperscript{17}This research will use the term “impunity” in the way that recent actors use it in the literature, as non-prosecution. All terms are further defined in chapter two.
\textsuperscript{18}North 1990: 89.
\textsuperscript{19}See, for example, Payne et al. 2010; Sikkink 2011; Thoms et al. 2008; Vinjamuri 2010.
\textsuperscript{20}Sikkink 2011.
\textsuperscript{21}For exceptions, see for example, Grodsky 2008a; Peskin 2008; Subotic 2009.
justice, they often do not address the short-term preferences that elites express in selecting among the range of transitional justice policies that are in supply, particularly in the era of the ICC.  

This is an important gap, because the shift in the contexts within which national actors now formulate their preferences and act embraces an important paradox. Currently, the transitional justice field combines, under one umbrella, both the maximalist philosophy of the ICC, which requires prosecutions all the time, and the ethos of compromise, which informed the earlier days of transitional justice, where alternatives to prosecutions were once thought to be superior to prosecutions. National elites have adopted a strategy that exploits the incoherence that is implicit in transitional justice in order to choose and justify those transitional justice policies that are most politically expedient, and to revise their justifications when it suits them. Many actors use transitional justice for their own ends, and explanations in the literature fall increasingly short in explaining the real-world political choices of elites. The scholar-practitioners who imbued the field with its optimistically teleological orientation—those who replaced “ought to be” with “is,” and effectively suggested that the normative reasons for choosing transitional justice policies were the real reasons behind elite preferences—are increasingly facing criticism as having set the field on a journey of faith, rather than one based on evidence.

This research, by examining how elites choose among transitional justice options, provides rich empirical detail of transitional justice as a dependent variable. While it builds

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22 See Akhavan 2009; Lutz and Sikkink 2001. O’Donnell and Schmitter tackle the choice between prosecution and non-prosecution, but they do so in an era before international criminal law became central to transitional justice. See O’Donnell and Schmitter 1993. For recent case studies looking at ICC cases, see Brown and Sriram 2012; Nouwen Werner 2010; Obel Hansen 2013; Sriram and Brown 2012. However, these cases do not provide a theoretical basis from which we can understand elite choices more generally.

23 Ian Martin, Interview, New York, April 7, 2010.

24 For the “ought to be”/“is” distinction, see Carr and Cox 1978: 12. On a foundational critique of transitional justice, see Thoms, Ron, and Paris 2008.
on some of the achievements in the literature, it conducts a foundational, micro-level examination of decision-making processes in order to better understand who chooses or rejects which policies and why. It argues that elites, who are contesting power or seeking to extend their authority and control, engage in judicial statecraft. They choose the tools that best serve their interests and reject them when they cease to do so. While careful to make claims about likelihood rather than causality, this research argues that, subject to history and contingency, regime security and the perception of transitional justice threats are important factors in explaining elite preferences and their shifts.

This research contributes to our understanding of how the choice and rejection of transitional justice measures can be understood as policy choices. This is particularly true for the ICC, where a country’s every act of cooperation or non-cooperation with the Court stems from a policy. With the ICC, support is not limited to ratification or referral. Indeed, ratification is not even necessary for Security Council referrals or for cases of states that recognize the Court’s jurisdiction. Because the Court does not have the equivalent of a state mechanism behind it to execute its decisions, regime elites have to ensure that a law about the ICC is actually functioning in the domestic courts, they have to execute arrest warrants if necessary, they have to freeze the assets of the accused if it is requested, and so on. Consequently, every request of cooperation from the Court (and its supporters) becomes an opportunity for a regime to review its policy to choose or reject the ICC, and an opportunity to use the policy for a particular political goal.

This research significantly advances the literature by demonstrating that the universalist assumptions in much transitional justice literature crumble when they are confronted with the politics of the particular. This is especially true when faced with the

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25 For cooperation, see International Criminal Court 1998: pt. 9.
patronage logic of African politics, where international institutions are easily converted into currency for fighting local or regional political games that are being played by both state and non-state actors. In the contexts this research examines, specific transitional justice policies are picked according to their potential impact in the game for power. The research also advances the literature by using the cases of Kenya and Uganda, which bring the perspectives of the comparative politics of African countries into transitional justice, a field that is often dominated by the perspectives of international law and international relations. It also contributes to the understanding of an emerging phase of African (and global) politics, which is increasingly conducted using the language of justice. In so doing, the research moves the discussion beyond the common quasi-legal narratives that suggest that transitional justice is an undertaking that is, at once, an obligation and a tool, simultaneously holistic and incomplete. The current trends in the literature are addressed briefly below.

II. How Elites Choose: A Pendulum between Obligations and Consequences

The literature on transitional justice is vast, and, therefore, the categorization below is necessarily selective. Two broad categories emerge concerning why actors might choose transitional justice policies at all: 1) for procedural compliance because transitional justice is an obligation, and 2) for the range of practical outcomes to which the transitional justice measures may contribute, chief among them the outcomes of reconciliation and stability. \(^{26}\)

1. Transitional Justice as an Obligation

The first narrative found in the literature is that transitional justice is an obligation, and an end in itself. States adopt different measures because they recognize their duty to prosecute and to ensure truth, reparations, and guarantees of non-repetition, through institutional

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\(^{26}\) A very useful characterization is given by Jack Snyder and Leslie Vinjamuri on the logic of “appropriateness” and “consequences,” as well as a third logic of “emotions.” This research builds on their categorization, while adding to it the fact that the actors in this research are working on a much shorter time horizon and have a primary goal of staying in power. See Snyder and Vinjamuri 2004.
reform. In this narrative, transitional justice is a universal, legitimate regime of rules and practices that states (as an aggregate) subject themselves to. This narrative of obligation is particularly common when discussing the transitional justice choices of ICC member states. If states that have ratified the Rome Statute of the ICC (ratification being seen as indicating an acceptance of subsequent obligations) experience human rights violations, they are expected to undertake actions that will “put an end to impunity for the perpetrators of [war crimes, crimes against humanity, and genocide] and thus to contribute to the prevention of such crimes.”

From this obligation, it would follow that states would institute domestic prosecutions, and that if they were unable or unwilling to do so, they would support the Court’s efforts to prosecute. After all, the implementation of the obligation also accrues desirable outcomes. The Prosecutor of the ICC, Luis Moreno-Ocampo, has interpreted the Court’s mandate to include the promotion of “harmony or at least peaceful co-existence between former enemies [in order to ensure that] a sense of justice and reparation is achieved.” Thus, the narrative concludes, states with human rights abuses would both prosecute and seek broader accountability measures, beyond the courts, for their victims.

Indeed, in some of this literature, evidence is mobilized to show that claims for prosecutions are never lost. Even those societies that initially choose truth-telling or other non-judicial measures eventually return to prosecution.

But this narrative is utopian, universalist, and incomplete. Countries that follow the rules of transitional justice are assumed to have no preferences among the range of possible

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30 For practical application of this view, see, for example, Office of the Prosecutor 2009.
31 See Roht-Arriaza 2006; Sikkink and Walling 2007.
transitional justice policies, yet we know those preferences exist. This narrative cannot explain variation, when actors reject one policy in favour of another. More importantly, while it assumes prosecutions are a universally useful processes, this narrative cannot explain the rejection of prosecutions in general, and of the ICC in particular. For that explanation, we turn to the second narrative, which regards transitional justice as a tool.

2. Transitional Justice as a Tool

If the first narrative focuses on obligation (where transitional justice is an end in itself, but something that incidentally also yields the right consequences), the second narrative of transitional justice focuses on outcomes. Transitional justice is a means, or a tool, for social and political ends. This second narrative contains at least two strands: 1) an idealistic one that sees transitional justice as a holistic and apolitical tool, and 2) a pragmatic one that sees transitional justice as an incomplete and political tool.

In the idealist strand of this consequences-focused narrative, transitional justice is holistic, and it contributes to ends such as reconciliation and healing. Here, transitional justice is conceptualized as a set of interventions that are broader, more creative than, and superior to, the ordinary criminal process. The combination of measures works together in a complementary fashion to advance social trust (as a proxy for reconciliation, the ideal end goal of transitional justice). This strand is as utopian and universalist as the narrative involving state obligation, and it is never possible for these measures to be inappropriate: indeed, the literature suggests that more transitional justice is better. Thus, according to this strand, undefined, disinterested agents, who reflect the wishes of the “society,” implement policies about which they are agnostic (because all transitional justice measures contribute to

32 To some extent, this corresponds to what Synder and Vinjamuri call the “logic of emotions.” See Snyder and Vinjamuri 2004: 15.
33 De Greiff 2008: 125.
a social good that is recognized by all), with the understanding that each additional transitional justice measure moves the country progressively closer toward the desirable end goals. This view is captured well by Pablo de Greiff:

…from the standpoint of victims, especially once a possible moment of satisfaction derived from the punishment of perpetrators has passed, the condemnation of a few perpetrators, without any effective effort to positively redress victims, could be easily seen by victims as a form of more or less inconsequential revanchism. Reparations without any effort to achieve criminal justice may appear to them as nothing more than blood money. (These complex relations obtain not only between reparations and each of the other components of transitional justice but rather among all of them.)\(^\text{34}\)

Thus, according to this view, actors will choose all of the transitional justice measures because of the added value each one of the measures brings to the key goal of reconciliation. To be sure, the narrative recognizes that some policies can be implemented before others, but such selection never constitutes a rejection of the policies that are not chosen in the short term. Even decades later, as it was in the cases of Argentina and Chile, the society (as an aggregate actor) can demand prosecutions.\(^\text{35}\)

With a few exceptions, the ways in which short-term preferences shape the transitional justice approaches that are implemented first is not addressed. This perspective results, in part, because of a disciplinary bias within transitional justice. Much of the literature originates from legal scholars who posit that actions can be explained as a universal response to the law (both laws established in practice or emerging laws) and that the implementation of transitional justice is no different. Questions about the interests behind the choices—the kinds of questions political scientists have grappled with for decades—are left out of the story, and “sequencing” is the technical answer given for why countries might

\(^{34}\) De Greiff 2006: 11.
\(^{35}\) This has been called delayed justice, or “post-transitional justice.” See Olsen, Reiter, and Payne 2010; Collins 2010.
adopt prosecutions decades later.\textsuperscript{36} Yet, those who write within this consequentialist, holistic transitional justice strand often cannot explain why some measures are rejected (even in the long-term), or why different elites will demand different measures at different times, or reject a measure that they had previously selected.

In the pragmatist strand of this consequences-focused literature, transitional justice is necessarily incomplete and political. It is incomplete for a number of reasons. It cannot fully address the violations it is tasked to address within the context of weak institutions that typically follow (or permit) human rights abuses. More importantly, it is incomplete because there may be political reasons why actors might choose not to prosecute, particularly if the actors care for such outcomes as strengthening the rule of law.\textsuperscript{37} This strand was common in the early days of transitional justice, when frequent compromises during moments of political transition led to an agreement that choosing among transitional justice policies was necessary in order to secure the outcome of democratic consolidation.\textsuperscript{38} Later, after the link between democratization and transitional justice was severed, this position drew on empirical evidence to suggest that other ends, such as stability, were critical to political actors, and they were not always compatible with measures such as prosecutions. This narrative can be simplified as one in which the outcome mattered more than the rules. Rules could be bent, and measures could be selected or rejected, as long as the desired outcome was secured.

Counter to the universalism of the other two narratives presented, this pragmatic strain suggests that actors are not, and cannot be, indifferent to the transitional justice policies. Different policies accrue different advantages and costs to different actors within a country, and in the fundamental choice between domestic prosecutions and its alternatives,

\textsuperscript{36} See for example, Roht-Arriaza and Mariezcurrena 2006: 56.
\textsuperscript{37} See, for example, Snyder and Vinjamuri 2004: 14.
\textsuperscript{38} Zalaquett 1991. Also Huyse 1995; Van Zyl 1999.
real political interests are at stake. This view also suggests that trade-offs are real, and that countries do not believe that following technocratically-sound, holistic transitional justice will lead to a perfect world. This strand appeals to particularity. Actors will choose policies that strengthen, rather than undermine, their interests. The law, rather than guiding action, simply provides one more guideline about costs that has to be taken into account. This does not mean the actors cannot implement harsh measures such as prosecutions. On the contrary, if such measures have payoffs that will offset their costs—such as acceptance into particular corridors of power, and international legitimacy—elites can choose them.\(^{39}\) Time is important in this strand, as the establishment of measures at an earlier point can create an enabling environment for other measures later on.

While this strand, which sees transitional justice as incomplete, is most consistent with political reality, the manner in which most scholars have addressed it is nonetheless unsatisfactory. First, this strand suggests a longer time horizon for politicians than is often the case: politicians seem to care more about deterrence and the next conflict than they do about their short-term electability or retention of power. It also seems to suggest that prosecutions will often not be selected in fragile political contexts. The evidence, particularly in the age of the ICC where the rules are increasingly inflexible and every game is now played with increasing references to prosecutions, demonstrates that fragile countries, even in the absence of coercion, can prosecute. This real-world observation requires an explanation. Furthermore, this literature offers little guidance on how that choice making actually happens at the intra- and inter-elite level, or how what comes to be called a “state” policy actually comes to be. In large part, this is due to the fact that this scholarship is often based on case

\(^{39}\) For more on how elites can choose prosecutions because of more important payoffs, see Subotic 2009.
studies or large-n studies that are frequently seeking to relate policy choice to an outcome, as though the outcome is the reason why a policy is chosen in the first place.

Collectively, while they make tremendous contributions to describing complex issues in transitional justice, many of these strands do not tackle the question of elite preferences, including what motivates actors to “rebel” against the rules. Furthermore, while the universalist strands take domestic politics as an obscure, inconsequential black box, and the consequentialist strands assume that actors care about long-term consequences of deterrence and reconciliation, the reality of most African countries is that domestic politics is critical and immediate, and the actors come from this perspective when they interact with transitional justice.

3. The Implications of These Shortcomings

Why do these shortcomings matter? First, the incompatibility of reality with dominant narratives can lead scholars and practitioners into cul-de-sacs. For instance, the central debate about peace and justice is really a debate about choosing transitional justice policies, and whether they are ends in themselves, or tools for the realization of other goals. Informed, in large part, by the obligations and holistic strands of the transitional justice narrative described earlier, early on in the life of the international tribunals of Rwanda and Former Yugoslavia, the debate quickly ossified into a series of categorical, apolitical truths about how justice is always in, or against, the interests of peace, rather than generating an analysis of the conditions where one is outcome is more likely than another. When David Scheffer declared that “we are finally learning that the pursuit of peace can coexist with the search for justice and that the pursuit of justice is often a prerequisite for lasting peace,”40 he may not have anticipated that scholar-practitioners would spend the better part of fifteen years either

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40 Scheffer 1996: 34.
reiterating this message, or marshalling evidence to show that it was premature to assume the debate was closed.\textsuperscript{41} This interminable debate has replaced a creative search for ways to expand the possibilities for justice. More importantly, for this research that focuses on African politics, it has obscured the fact that other, more immediate, interests may be at play. Furthermore, the field has encouraged what Ian Martin, an authority on post-conflict politics, calls “bad arguments,” where members of the anti-impunity community make arguments about the centrality of consequences and particularities to their transitional justice demands in the particularist and outcomes register, but then they retreat to the obligations and universalist register when the expected outcomes are not forthcoming, or when the compromises required to achieve those outcomes are socially unpalatable.\textsuperscript{42}

Second, at the practical level, the apolitical approach can lead to adverse real-world outcomes. For example, the entire doctrine of positive complementarity is based on the assumption that countries would want to domestically investigate violations in their territories because it is an obligation, and because countries can incur reputational costs.\textsuperscript{43} This assumption has guided the actions of the anti-impunity community so that they expect particular conduct by political elites, even in those cases where an analysis of domestic interests would suggest that the expectation of domestic prosecutions is unrealistic. As will be illustrated in chapters three and four, in the case of prosecutions in Kenya, Ocampo’s escalation of threats to government officials was based on this assumption, even though, in reality, the high threats against an insecure regime resulted in a rejection of prosecutions and the decision to adopt truth-seeking, and effectively, a do-nothing strategy.

\textsuperscript{41} For views about why there are real tensions between peace and justice, see, for example, Branch 2004; Baines 2007; Lomo 2006.
\textsuperscript{42} Ian Martin, Interview, New York, April 7, 2010.
\textsuperscript{43} Burke-White 2008.
Finally, many debates in the transitional justice field take social science back to its teleological past, where all progress had a clear end goal that was variously understood as modernity, democracy, or in the present case, a loosely-understood idea of justice. The approach of judicial statecraft seeks to moderate the ambitions of teleology in the transitional justice field, suggesting that, because regime elites are more interested in short-term payoffs of power, the choice of transitional justice policies may advance, as much as it may subvert, the variety of longer-term goals held by different groups within the anti-impunity community.

4. An Alternative Approach

This research distinguishes itself from many existing approaches to transitional justice in three ways. First, it examines transitional justice from the perspective of social science; with a few exceptions, transitional justice has depended on the narrative that has been told by lawyers. This research argues that the narrative of transitional justice can be hung coherently on a meaningful theoretical framework. The choices of transitional justice policy are anchored in a general context that cannot be seen, but one that must be understood in order for the observed choices to make sense. For a social scientist, this general context is what generates patterns that allow for informed abstraction about observations, from the particular to the general. The theoretical frame of judicial statecraft enables elite action to be legible.

Second, this research centralizes the role of agency in considering an underexplored question concerning the causes, rather than the effects, of transitional justice policies. Within the context of under-institutionalized African politics, where there is “a very great deal of politics concerned with the activities of a very small number of people,”44 and where actors are occupied, above all, with maintaining access to the state, the story about choosing

transitional justice is an elite, agent-driven story. The focus on agents demonstrates that transitional justice does not just happen. Rather, it is a choice made by agents who are operating within political constraints, who care about their domestic interests, and who often understand (however imperfectly) both the external and historic environment in which they operate. Even while they pursue their interests, regime elites understand the weight of moral argumentation that is preferred by the transnational, normative world and its agents in the anti-impunity community. Elites are not isolated actors. They are well connected to transnational networks and arguments. While this research takes agency seriously, it does not ignore the structures within which agents operate. On the contrary, this research illustrates the role structures (especially history and contingency) play, demonstrating how choices about policy are affected by both agency and structure.45

Finally, this research seeks to explain the real-world observations of both the selection and rejection of transitional justice policies. Many explanations, which base the practices of transitional justice on an “emerging consensus,” lose their explanatory power when states, or specific actors within them, make nonconsensual choices and reject, or otherwise refuse to comply and cooperate with, the “consensus.” Often, the explanation for this discrepancy between prediction and observation will be described as a minor setback in the inevitable, teleological march forward towards the full adoption of, or full compliance with, whatever norm or institution is under discussion. Such an explanation is not satisfactory. Rollbacks and rejections require an explanation just as much as advances do. The approach of judicial statecraft offers explanations for both support and rejection.

45 See, for example, March and Olsen 1989.
5. The Argument

This research takes seriously the observations of the consequences-focused narratives concerning the ways that elites choose transitional justice policies for their effects. Unlike many consequentialist accounts in the literature, however, where elites are thought to choose transitional justice policies in the service of long-term reconciliation or stability, this research argues that regime elites appropriate transitional justice as a tool for contesting or consolidating power within a context of strong patronage networks. The research terms as “judicial statecraft” all the strategic efforts by elites to use transitional justice measures as carrots and sticks in the contestation of power.

When conducting judicial statecraft, regime security matters. Under specific domestic conditions—where states are poorly institutionalized, and the rules and vehicles for contesting and accounting for power are weak—secure regimes have internal authority and control, dominate the political culture, and govern over personalized domestic institutions that can be trusted to deliver outcomes that are in the image of regime elites. Regime security stems from a number of factors linked closely with the extent to which regime elites dominate over patronage networks, a factor affecting the strength and influence of potential counter-elites (opposition, NGOs, military). Secure elites also have gatekeepers in bureaucracies and in the judiciary. As a result, secure regimes largely control a country’s internal narrative, and they have confidence that their decisions cannot be subverted from within. Under these conditions, the most secure regimes are totalitarian single-party states, and the most insecure regimes are highly fractured coalition governments. Regime security is scalar, and regimes have more or less of it.

46 Counter elites can act as “veto players,” a term used by George Tsebelis to mean the range of actors that have to agree to a policy change in order for it to take effect. See Tsebelis 2002.
47 Stable democracies with non-personalized, strong institutions are not the subject of this study.
Within a context of existential power contestations, regime elites are unlikely to embrace transitional justice policies that will rupture their security. The elites will not, as Christopher Clapham notes, “acquiesce readily in their own marginalization.”

When a policy stops serving them, they can change it with ease. Since history informs this process, and because policy choices that are made at one point can crystalize into an institution that constrains subsequent choices, regime elites will not always succeed in controlling outcomes. Likewise, unexpected events can change elites’ considerations. However, elites in secure regimes are much more flexible than elites in insecure regimes. They can revise their arguments and policy preferences with little fear of contradiction.

Judicial statecraft is also affected by the threat level of transitional justice. While regime security is about the elites’ ability to control an internal narrative, perceived threat level is a function of the elites’ ability to control an externally-driven narrative. High threats are those perceived by target elites to be credible and costly. A threat is credible when target regime elites perceive the threat-holders to have an inflexible and actionable international consensus and support behind their specific demands. The assessment of credibility therefore depends on the identity of the transmitters of the threat and their backers, the specificity of the threat and the ability of regime elites to respond to it. A threat is more costly if it targets key actors within the network of an elite, if it takes a more damaging form other than naming and shaming, and if it affects the different audiences of the regime elite in irreconcilable ways. More generally, perceptions about threat levels vary depending on what constituency may be deemed most important at a particular time by regime elites, and the information available.

49 The use of internal and external is not total, and neither does it cleanly map onto “national” and “international,” since many of the externally-driven narratives that regime elites grapple with are transmitted by local organizations that have transnational connections. See, for instance, Ferguson 2006: 89–112.
Threat analysis demonstrates how important it is to consider the state not as a unitary actor, but as a group of elites who can be disaggregated into coalitions of competing interests. High threats increase the zero-sum nature of the game of power, because they can potentially reduce the authority and control of the target elite. Both the regime security and the threat level described above are ideal-types that have been isolated for analytical ease. Real political systems and transitional justice demands are somewhere in the middle.

Finally, history informs judicial statecraft. Institutions are “ossified past practices and the power imbalances and bargaining asymmetries embodied in them,” which “introduce and reinforce biases in favor of some interaction and interacting agents and against others,” which constitutes the rules of the games within which choices are made. Thus, past practices provide the institutional context within which regime elites form their identity and interact with the anti-impunity community. Past practice privileges some particular actors, frames, and arenas for action over others and it constrains later choices for both regime elites and transitional justice threat-holders. History also creates path dependence, where initial conditions affect context and where critical junctures can introduce unexpected events that necessitate a different policy path for elites. In contexts involving poor institutionalization, a range of counter-elites becomes the holders of institutional memory. They remind regime elites of previous commitments, including those that regime elites would rather ignore, and demand that present actions conform to that past.

Policy choices are made within a context that is populated with agents (including the ICC prosecutor and regime elites) who have “imperfect foresight of future contingencies.” It is a context where powerful ideas of justice and international law—ideas that often favour

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52 For more on contingency, see Pierson 2004. Also, see David 1985.
53 Shepsle 1989: 140.
experts’ interpretations and have the effect of empowering some actions while disempowering others—are appropriated by those who can appropriate them. Consequently, history affects both regime security and the threats that can be fashioned to encourage particular policy choices. The importance of history means that eventually choices can escape the control of their creators and institutionalize.

Judicial statecraft can be tabulated very generally as follows:

**Figure 1: An Overview of Judicial Statecraft**

The factors of regime security, threats, and history come together to form transitional justice policy preferences (which are explained in greater detail in chapter two). Secure regime elites tend to do what they want. Faced with a high threat, they will tend to choose domestic prosecutions with an interpretation of the rules that is likely to be entirely self-
serving, and one that can be quite different from the interpretation that was intended by the transitional justice community. On the other hand, if transitional justice actors make such high-threat demands of an insecure regime, threatened regime elites are likely to reject prosecutions or any other measures that risk affecting critical nodes in their patronage networks. Instead, they are likely to settle for minimalist measures such as a truth commission (which is a highly discounted threat that, in the age of the ICC, amounts to little in an electoral lifespan). Conversely, if the transitional justice community chooses to make low-threat demands of a secure regime, they are likely to prompt a government to support international prosecutions and other policies that will be framed in a manner that is most beneficial for the regime. If low-threat demands are made of insecure regime elites, the insecure regime elites are likely to support all transitional justice policies while making appeals to international standards.

The process of judicial statecraft demonstrates that, in the age of the ICC, elites do not consider transitional justice to be a legitimate, taken-for-granted regime from which particular policies must flow.54 It is a flexible tool that can be defined as needed and used for the pursuit of power.55 This research notes that, while the anti-impunity community has shaped transitional justice scholarship and practice, its agents are not always aware that the threat level they exert on regime elites is subject to regime security and contingency, and can have varying consequences, including counter-productive ones. If, as they publicly pronounce, their interest is to ensure the long-run development and stability of the institution of transitional justice, the findings of the research suggest that they may be interested in conscious politicization within the outcomes register, where their threats reflect that

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54 On the ways that taking rules for granted is an indicator of institutionalization and legitimacy, see Gorges 2001; Beetham 1991.
55 To be clear, this is not a question of the presence or absence of legitimacy, but rather a question of degree.
compromise and second-best outcomes are acceptable in the short-run, and where the implementation of the perfect rules is relegated in priority. This would suggest that a degree of agnosticism towards target countries’ transitional justice can yield long-term results. Alternatively, threats can be made from a strict legal register, where the demands for maximalist prosecutions are made in all contexts, even if such demands result in a rejection (or discrediting) of complementarity. The anti-impunity community can ensure “smart justice” when they align their stated objectives with the tactics they choose to get there, taking into account how judicial statecraft affects the likelihood of different elites to make different transitional justice choices.56

III. Research Design

This research employs a comparative case study approach in order to explore the complexity of transitional justice choices in Kenya and Uganda. Specifically, in light of the “growing consensus that the strongest means of drawing inferences from case studies is the use of a combination of within-case analysis and cross-case comparisons within a single study,”57 the research compares the transitional justice policy choices of Kenya to those of Uganda, in addition to examining the choices of each country at different moments in time.

Within each case, the research employs “process-tracing,” a method which seeks to “investigate and explain the decision process by which various initial conditions are translated into outcomes,”58 thereby providing a link between the independent and dependent variables.59 As a method of both generating and testing theory, process-tracing:

[56] “Smart justice” refers to targeted, impact-aware transitional justice approaches. This is inspired by the language of “smart sanctions”; see Hufbauer and Schott 1985.
[57] For more on case studies, see George and Bennett 2005:18. Also, Van Evera 1997.
[59] See George and Bennett 2005: 206-207
Accordingly, the current research examines the “anatomy” of decisions in order to understand, in as much as detail as possible, the specific considerations that guided elites towards particular choices in the support for and rejection of specific transitional justice policies. This method:

…forces the investigator to…consider the alternative paths through which the outcome could have occurred, and it offers the possibility of mapping out one or more potential causal paths that are consistent with the outcome and the process-tracing evidence in a single case. With more cases, the investigator can begin to chart the repertoire of causal paths that lead to a given outcome and the conditions under which they occur.\(^61\)

Through a detailed narrative of each of the relevant decision-making moments in Kenya and Uganda, an investigation into the political factors that were relevant in each case (which will demonstrate how micro-actions aggregate to macro-decisions), and a consciousness about the path dependence of processes, where present decisions can be “unable to shake off the effects of past events,”\(^62\) the research broadly outlines how regime security and the threats of transitional justice seem to shape elite preferences, bringing “theory closer to what really goes on in the real world.”\(^63\) At the same time, this research takes into account limitations of the case study methodology, and avoids making overly universalist claims.

1. Case Selection

This research approaches the question concerning why elites demand different transitional justice measures in a consequential manner, meaning it begins the “analysis from the

\(^{60}\) George and McKeown 1985:35 in Falleti 2006.
\(^{61}\) George and Bennett 2005, 207.
\(^{63}\) Checkel 2005:2
consequences and work[s] backwards” to the dynamics that produce them.\textsuperscript{64} This approach guides the case selection. The research begins with cases where different transitional justice policies were chosen by elites, and traces back to the origins of the demands.

In a universe of cases consisting of the countries where the ICC was active as of the end of 2010 (Uganda, the Democratic Republic of Congo (DRC), Central African Republic (CAR), Sudan, and Kenya) Uganda and Kenya have had the most widely differing elite responses to violations for human rights abuses. To be sure, any of the other four cases can be compared to Kenya by virtue of the latter being a case outside the conflict system in the Great Lakes, thereby resulting in different elite considerations.\textsuperscript{65}

At the surface, it would appear that the different transitional justice choices of the two countries would be informed by the difference in the magnitude of human rights abuses in response to which elites craft policies. Uganda has endured a long history of armed insurgencies and massive human rights violations, most recently with over two decades of conflict with the LRA.\textsuperscript{66} The conflict, which was the result of a proxy war between Uganda and Sudan, where each government was supporting the rebels who were attacking the territory of the other, had a strong, violent, ethnic dimension. Up to 1.5 million ethnic AcholIs were displaced from their communities into camps.\textsuperscript{67} Ruhakana Rugunda, the Interior Minister, described the impact of the war in this way: “People have had to be killed, maimed, amputated, their limbs cut, their tongues cut, their ears, nose(s) cut, children grabbed from secondary schools, married at the age of twelve, thirteen, fourteen. These have been terrible things.”\textsuperscript{68} In contrast, as explained in more detail in chapter three, Kenya has

\textsuperscript{64} Tsebelis 2002: 2.
\textsuperscript{65} Thanks to Phil Clark for this point.
\textsuperscript{66} Allen and Vlassenroot 2010; Behrend 1999.
\textsuperscript{67} See, for example, van Acker 2004. Also Annan and Blattman 2009.
\textsuperscript{68} Ruhakana Rugunda, Interview, Kampala, December 14, 2007.
never experienced an insurgency like the kind observed in Uganda. Systematic post-
independence violence in Kenya has often related to the electoral process, particularly multi-
party elections, and it is strongly associated with frustrated land grievances. In 2008,
however, the violence spilled over the land boundaries and threatened to spread more widely.
The violence was linked to both incumbent President Mwai Kibaki’s PNU (Party of National
Unity) and opposition leader Raila Odinga’s ODM (Orange Democratic Movement). It
culminated in over 1000 deaths and approximately 600,000 displacements.

However, while vast violations of human rights occurred in Uganda (as will be
discussed in chapter five), Uganda referred its case to the ICC with the primary objective of
opening a new battlefront in its war against Sudan. In Kenya, the violence prompted
accusations of human rights violations and genocide from both parties, as well as mutual
threats of prosecution before the ICC. Notably, in both cases of Uganda and Kenya, regime
elites proactively changed preferences of what policies they wanted. High levels of violations
notwithstanding, when geopolitical conditions shifted and an agreement was signed between
South Sudan and Sudan, regime elites in Uganda sought to reject the ICC and established a
domestic process. In Kenya, initial support for policies of both truth-seeking and domestic
prosecution from regime elites shifted into rejection of prosecutions when regime allies came
under threat. Nonetheless, despite being characterized as a case of ordinary political violence,
Kenyan NGOs increased the threat level of transitional justice by proposing that domestic
prosecutions had to adhere by rigorous international standards, and triggered the
government’s inability to institute a domestic process, which led to ICC action.

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70 Key Informant 4, Interview, Kampala, November 9, 2009; Richard Todwong, Interview, Kampala, December 12, 2007.  
71 Martha Karua, Interview, Nairobi, January 12, 2011.  
72 On Kenya as a case of ordinary violence, see Pre Trial Chamber II 2011.
Thus, despite Kenya and Uganda’s similarities as two neighbouring, low-income, ICC situation countries with a history of British colonial rule, their differences are significant when it comes to transitional justice. Given the fact that elites in the two countries both demanded and rejected different transitional justice policies, the two cases offer a good background from which to understand judicial statecraft.

2. Data Collection

This dissertation is based on over 300 hours of primary material, including nearly 200 interviews that were conducted with elites through a series of field visits to Kenya and Uganda between December 2007 and January 2011. It also includes interviews that were conducted in New York and The Hague. The elites who were interviewed in Uganda included parliamentarians, cabinet members, the army, the judiciary, and heads of key organizations, including donor representatives in country offices. The author also interviewed the leaders of the LRA negotiation teams, members of the Ugandan army, and heads of various key stakeholder organizations in Gulu and Kampala. In Kenya, in addition to the leaders of the human rights movement, interviewees also included cabinet ministers, parliamentarians, and the judiciary. The author was the first person to interview Justice Philip Waki of the Waki Commission, and Ambassador Nana Apanteng, Kofi Annan’s representative in Nairobi.

The interviews in New York include high-level officials, such as the political advisor of the UN Secretary General, the UN Special Envoy on Sudan, and the head of the ICC office in New York. Interviews in The Hague included current and former high-level officials in the Office of The Prosecutor, the Registry, and the Victims and Witnesses Unit. This dissertation also utilized telephone interviews, email interviews, and conferences in Kenya,

73 See Appendix 1. Some interviews were conducted after this date, but were not used in the core of the dissertation.
Uganda, and Oxford, where issues relevant to this research were discussed. Finally, the research also draws on the author’s personal experience of having worked at the ICTJ, an organization involved in virtually every case of transitional justice to date, between August 2002 and August 2006, and of currently working in the Department of Political Affairs at the United Nations, as a result of which she has participated in meetings with key actors in transitional justice.

The data collected from the interviews was triangulated with information from secondary sources, including media statements, grey literature, and desk research. Likewise, having observed the development of the field over time, the author draws on participant observation. With all the sources of information, the research looks out for consistencies and inconsistencies, silence and emphasis, in order to best understand what led to different choices. The approaches used in data collection, including the challenges encountered in the process, are discussed in greater detail in the Research Notes in Appendix 1.

IV. Organization of Thesis

Chapter two makes a case for the contribution of this research concerning the ways in which actors select a particular form of transitional justice. First, it provides a broad overview of some of the origins of the gaps and tendencies within the practitioner-dominated literature, which explain why the question of choosing transitional justice has been largely omitted in the literature. Subsequently, it reviews the achievements and gaps of five key explanations for transitional justice choices. The chapter demonstrates the strengths of each of these explanations—which serve to inform the approach of “judicial statecraft”—as well as the omissions in the literature that the current research seeks to address. In particular, it points out that, while the literature explains why states choose transitional justice at all, it largely omits (with a few exceptions) an explanation concerning how elites choose among
transitional justice options, as well as the role that the immediate need for contesting power might play within that process. The chapter further develops the framework of “judicial statecraft” to explain why interest-seeking elites will choose different policies based on questions surrounding regime security, the threat of transitional justice, and history. The framework removes transitional justice from its exclusive preserve at the junction between international relations and international law, where it currently resides, and considers it within a comparative politics framework.

Chapter three considers the manner in which insecure regimes react when they are faced with low threats of transitional justice, using the case of Kenya. It proceeds in three steps. First, it gives a historical overview of the nature of regime insecurity that occurred when power in the country changed from the Kenya African National Union (KANU), the party that had ruled the country since its independence in 1963, to the National Rainbow Coalition (NARC), under a new President Kibaki. Second, it describes the emergence of the transitional justice discourse in Kenya after an outbreak of violence in 2007-08, and the manner in which regime elites embraced both truth-seeking and prosecutions, perceiving them to be low-threat transitional justice policies. This choice was enabled by the history of relations between regime elites and NGOs where, as a result of a failed attempt to create a TJRC following the 2002 elections, regime elites viewed the anti-impunity community as a group that was unable to craft a credible threat. Finally, the chapter describes how, immediately following the peace accord that was negotiated in 2008, Kibaki supported prosecutions against ODM “youths” as a way to continue battles that were left unresolved by the electoral contest. In the process, this action discredited calls for reconciliation in favour of prosecution, which set the stage for future transitional justice policy choices, including action by the ICC.
Chapter four examines how the transitional justice policy preferences of insecure elites changed when they faced high threats. It proceeds in three steps. First, it shows how the Waki Commission served as a critical juncture that allowed NGOs to redefine accountability, from meaning a support for reconciliation to meaning a support for prosecutions. This change was facilitated by the structure of Kenyan human rights organizations and the fracture between regime elites and NGO elites that is described in chapter three. The second section traces how the Waki report facilitated the emergence of a prosecutions-for-regime-change agenda among human rights NGOs as a way to fight back against a political class with whom they had lost sympathy. NGO elites were able to transform themselves into a coherent anti-impunity community, which increased both the cost and credibility of transitional justice. The second section also demonstrates how the regime elites’ preferences atomized in the face of the increased threats of transitional justice. Consequently, as the ICC echoed and lent credibility to NGO demands, the narrative escaped the control of government elites. Regime elites rejected independent domestic prosecutions through a special tribunal, and settled only on minimalist truth-seeking through a revived TJRC. The final section of the chapter shows how NGO elites rejected the TJRC, discredited other domestic options for transitional justice, and embarked on a successful advocacy for ICC intervention. In the course of making their demands, the NGO elites’ escalating threats created a political impasse, and precipitated the ICC’s intervention in Kenya. As both the choice and rejection of transitional justice was done by the same actors in the same political space, chapters three and four offer the conditions of a “natural experiment” that helps to pinpoint the factors that are most important in explaining the policy choices of elites.

Chapter five shows how, within the context of high regime security and low-threat transitional justice demands, the GoU elites were able to impose their preferences regarding
ICC action on everyone, including the unwilling victims. The chapter presents evidence that speaks to many of the common assertions about the relationship between the GoU and the ICC by demonstrating how GoU elites demanded, and then later rejected, international prosecutions. In both instances, they did so in the name of ending a long proxy war that the government had conducted with Sudan, using the rebels of the LRA. This chapter proceeds in three steps. First, it gives a historical overview of the Ugandan case, establishing the parameters of regime security. Subsequently, it traces how the ICC came to be a relevant force in Uganda as a tool for addressing a regional conflict, which demonstrates how government elites initiated a political process with the intention of externalizing the GoU’s conflicts with the LRA and Sudan. The chapter then turns to a discussion of the anti-impunity community, which initially refrained from criticizing the GoU in the interest of protecting the ICC, and thus effectively adopted the GoU’s framework for understanding the conflict. Absent credible threats, and once other geopolitical developments triggered an unexpected peace process that provided the GoU with an opportunity to pursue different political interests, the GoU embarked on a pathway of rejecting the ICC. In both the GoU’s initial selection and subsequent rejection of the ICC, the Court was a low-threat tool that was always within the control of the governing elites. Unlike Kenya, where threat-holders reduced the ability of government elites to form a common preference, chapter five investigates the flexibility secure Ugandan elites had as they chose and rejected international prosecutions purely as tools to fit their political needs. GoU elites were unconstrained by institutions and history, and they could drastically revise any justifications for their policy choices to better fit their interests.

Chapter six demonstrates how the secure GoU regime was forced to reckon with the threats of transitional justice, which increased as the international anti-impunity community
awoke to the potential enormity of the precedent that could be set by Museveni’s challenge to the ICC and his wish to extend amnesty to the LRA. The chapter proceeds in three steps. It explains, first, how the GoU’s previously unthreatening policy decision to invite the ICC was transformed, due to unexpected high threats from the ICC Prosecutor and other Court supporters, which discredited the promises the GoU had made to the LRA during the peace process. In response, the LRA did not sign the Final Peace Agreement. Secondly, the chapter describes the emergence of the War Crimes Division (WCD) as a routine GoU procedure that arose as a response to the anti-impunity community’s insistence on the ways that Uganda must meet its complementarity obligations. The establishment of the WCD set in motion a political process that allowed the GoU to eliminate the threat of the external Court and regain authority and control over the narrative regarding the LRA. Finally, the chapter shows how secure regime elites, within a context where they maintained an active amnesty law alongside the WCD, alternately supported policies to support and reject the ICC in order to suit their needs. The chapter concludes that, even in cases where secure regimes cannot avoid high transitional justice threats, they tend to have the flexibility to control outcomes.

Chapter seven offers an overview of the research and the findings. It pulls together the new empirical evidence from the research and offers some general conclusions concerning the judicial statecraft involved in the different transitional justice choices of African countries that are operating within the context of the ICC. The chapter proceeds in three steps. First, it draws general conclusions about the importance of regime security and the threat level of transitional justice in shaping the preferences of agents, as well as the way that history informs both. Next, the chapter discusses the cases of judicial statecraft beyond Kenya and Uganda, using examples of the Democratic Republic of Congo and Sudan, as well as the recent cases of Cote d’Ivoire and Libya. The third section concludes that threat-
holders, as agents seeking the institutionalization of transitional justice, should engage in smart justice by understanding how judicial statecraft works.
Chapter 2—Judicial Statecraft: How Elites Choose Transitional Justice

If transitional justice includes a complex set of processes under one umbrella, and the different processes are not perfectly interchangeable, it follows that enacting one process would not be equivalent to enacting another. Evidence demonstrates that elites do not support every possible policy on the transitional justice menu; which policies do they choose and why?

This chapter demonstrates how judicial statecraft contributes to the current understanding on the ways in which elites select a particular form of transitional justice. First, it provides a broad overview of some of the origins of the gaps and tendencies within the practitioner-dominated literature, and explains why the question of choosing among transitional justice policies has been largely omitted in the literature. Subsequently, it considers the achievements and gaps in a segment of the literature that offers five key explanations for transitional justice choices, and makes a case for the approach of judicial statecraft.¹ In particular, the chapter points out that while the literature explains why states choose transitional justice, it largely omits (with a few exceptions) an explanation concerning how elites choose among transitional justice options, as well as the role that the contestation for power might play within that process. Further, the literature on transitional justice rarely considers insights from the separate field of comparative African politics, the latter literature concerned with the acquisition, organization, and consequences of power, and the impact of

¹ This research chooses the location of agency as the entry point into the literature because it most easily speaks to the world-views described in Chapter 1 concerning whether transitional justice is a tool or an obligation. However, one could categorize the literature in a number of valid ways: legal versus social scientific approaches, case studies versus large-n studies, etc.
factors such as neopatrimonialism and identity politics on political outcomes. The chapter further develops the eclectic framework of “judicial statecraft,” which can explain why interest-seeking elites will choose different policies of transitional justice.

I. Definitions

The research locates its inquiry within the field of transitional justice—the umbrella term for mechanisms that have been established to address past human rights abuses—and focuses exclusively on domestic prosecutions, international trials, and non-prosecutions through truth-seeking. It uses the term “judicial statecraft” to describe the strategic efforts of elites to use transitional justice measures as carrots and sticks, in order to contest power. The research considers as judicial statecraft the use of threats, promises, or acts of judicial action, as rewards or sanctions, in the pursuit of power, and builds on insights from the literature to explain the conditions under which elites choose the policies they do. It argues that agents involved in judicial statecraft will appropriate international prosecutions, domestic prosecutions, or soft alternatives to prosecutions such as truth seeking, subject to the constraints of regime security, history, and the threats faced from the anti-impunity community (all terms to be duly defined).

This research employs terms like “justice” and “reconciliation” in the same way that the actors on the ground use them, while being aware that it is the very vagueness of these terms that enables them to be mobilized and used for goals that may have little to do with “justice” and “reconciliation” as intended by those originating these ideas. This study will not presume to resolve the controversy over the terminology used in the field, or to analyse at

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2 For a sample of literature on the political organization of African states, see, for instance, Bayart and Harper 1993; Chabal and Daloz 1999; Mwenda and Tangri 2005; Szeftel 1982. If elites run the state as a personal enterprise, surely this will affect how they understand “state obligations” such as transitional justice.
3 Teitel 2002.
4 The term borrows from “economic statecraft.” See Drezner 1999.
any length the “empty universal” or “essentially contested” nature of these terms.\textsuperscript{5} Rather, it will problematize this terminology when necessary and show, where possible, how the ambiguity inherent to the language of transitional justice facilitates judicial statecraft.

By way of illustration, while some scholars have defined retributive justice, legal justice, and distributive justice as goals of transitional justice, the notion of “justice” within transitional justice practice is more frequently used to refer to prosecutions that are in accordance with international standards: either arresting perpetrators and sending them to the ICC, or trying them through domestic courts in complementarity to the ICC.\textsuperscript{6} This understanding of justice is thought by practitioners to act as antidote to “impunity,” which is itself a term whose meaning has changed over time. Impunity used to mean amnesty or doing nothing, while “fighting” it was undertaken by institutions, including truth commissions and reparations, even in the absence of prosecution. Later, particularly in the era of the ICC, impunity came to mean the absence of prosecutions, whatever else the country chose to do.\textsuperscript{7} Thus, the terms “fighting impunity,” “prosecutions,” and “justice” are often used interchangeably in the literature, although this research will refer more to the specific processes (domestic prosecution, international prosecution, truth commission) rather than to their desired end-states (impunity, justice).

“Reconciliation” is often juxtaposed with justice in the form of “justice and reconciliation,” even though these two words, at least in the ICC era of transitional justice, may mean contradictory end-states. Reconciliation, as it is used in the literature, can refer to

\textsuperscript{5} Empty universals are words that ascribe a value but do not have a fixed meaning, words whose content always shifts to reflect that which its constructors deem most lacking in a polity. See Renner Forthcoming. On essentially contested concepts, see Collier, Hidalgo, and Maciuecanu 2006.

\textsuperscript{6} For a variation in the manner in which the term is used, see Mani 2002; Sen 2009. For the perspective of human rights advocates, see, for example, Human Rights Watch 2005.

\textsuperscript{7} For definitions of impunity, see United Nations 1996. Also, see Roht-Arriaza and Mariezcurrena 2006.
anything from a minimalist co-existence to a maximalist sense of social trust. This research will use it in the latter sense.⁸ These terms and their complexities are explored in greater detail in the next section of this chapter. In acknowledgement of these variations of meanings that can be attributed to different concepts (and of the range of mechanisms that can be proposed to explain observations), the research uses the term “narrative” to capture the manner in which a set of facts are arranged to explain observations, suggesting that another plausible arrangement is possible.

Scholars and practitioners refer to transitional justice processes alternately as “concepts,” “principles,” and “norms.” They are also referred to as “policies,” “measures,” “mechanisms,” and “institutions.” This research will more frequently use the term “policies” when making reference to the manner in which specific actors make political choices, frequently though discourse. Policies can be made, implied, declared, implemented, or changed. They can be long or short term, legislative or executive. This research’s focus on policy will be useful in illustrating the process of choosing, the reality of conflicting obligations, the inescapability of multiple audiences, and the mutability of agent preferences. The research will use the term “norms” and “measures” as scholars use them.⁹ “Institutions” will be used in reference to “the rules of the game in a society”¹⁰ which reduce uncertainty in a particular area of interaction, such as the addressing of human rights violations. However, if institutions constitute “actors, their respective behavioral repertoires (or strategies), the sequence in which the actors choose from them, the information they possess when they make their selections, and the outcome resulting from the combination of actor choices,”¹¹

⁸ For more on reconciliation as social trust, see Bloomfield, Barnes, and Huyse 2003; De Greiff 2008.
⁹ For a general definition of norms, see Legro 1997: 33.
¹⁰ North 1990: 3.
then this research assumes that transitional justice, as an institution, is still an aspiration, and will self-consciously refer to institutions when discussing the broader expectation that the policies will lead to the establishment of outcomes that are autonomous of the control of their creators. While further reasons for this understanding of transitional justice are provided later in the chapter under the historical background of the field, it is useful to point out here that norms and institutions derive from the actual practice of elites, whose policy choices reflect the extent to which transitional justice is taken for granted. One of the contributions of this research is to suggest that understanding judicial statecraft can enable an approach of “smart justice,” where the anti-impunity community recognizes the tendencies of elites, and responds in ways that support the institutionalization of transitional justice.12

The agents of concern in this research are “elites,” a term used in this research to refer to actors who occupy positions of influence in society because of their wealth, education, or position within different government or non-governmental organizations. They are a small group of people who frequently position themselves as “responsible for the realization of major social goals and for the continuity of the social order,”13 and often maintain their position through the manner in which they seek to influence the policies of the state. In this way, elites—whether they are in the government (those in political office), the opposition (including rebels who mobilize against the state), or in civil society (such as NGOs who make money by pointing to the failures of regime elites)—make or shape the main decisions concerning what happens within a country. In contexts of weak institutions where the public and private realm are not distinct, these elites often sit at the top of a patronage network.14

Further, as a group, the elite is frequently not monolithic, but instead consists of entities

12 For more on institutions, see March and Olsen 1989.
13 Keller 1963: 4
14 For more on patronage networks in Africa, see, for example, Bratton and van de Walle 1997.
“which may be engaged in varying degrees of cooperation, competition or conflict with each other.”

The research distinguishes among different factions of elites, using “regime elites” to refer to “those individuals who actually exercise political power in a society at any given time,” and “NGO elites” to refer to the factions that seek to influence the state without holding political office, and using alternatively-channeled, external resources. When the term “elites” is used without a qualifier, it refers to the heterogeneous collective of elites.

In many African countries, the weak institutionalization of politics means that the “state” and the society are poorly differentiated and that there is a blurring between the personal and the official in political life, which gives rise to (varying degrees of) neopatrimonialism. This current research, however, will nonetheless discuss a qualified notion of “state” when it is necessary, while being fully aware of the limits of using that term with reference to Africa. It may sometimes refer to “government,” which itself can be a confusing term that describes rulers as well as their bureaucracies. As rulers, governments “stand at the head of the institutions that determine and implement state policies and regulations affecting a given polity and the state’s provision of collective goods.” As bureaucracies, governments are “a conglomerate of semi-feudal, loosely allied organizations, each with a substantial life of its own…each with a fixed set of standard operating

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15 For a general view on the elites, see Bottomore 1964: 14–15.
16 This corresponds with what Tom Bottomore defines as the “political elite.” See Bottomore 1964: 14–15. In general, when it is difficult to speak of regime elites, the research will define the faction of the regime under discussion in detail.
17 For an example of a view on African elites, see De Oliveira 2007: 124.
19 Bratton and van de Walle 1997; Szeftel 1998: 235-238.
20 The point here is to note the difference between the African state and the Weberian state. Weber defines the state as “that human community which within a defined territory successfully claims for itself the monopoly of legitimate physical force.” Runciman 1978: 39. However, the African state has a range of other characteristics. For different understandings of how the African state works, see Bayart and Harper 1993; Reno 1999; Chabal and Daloz 1999.
procedures and programs.” In contexts where there is weak institutionalization and regime security, the bureaucracy does not act independently of the rulers, and the regime elites, for the purposes of interactions with international institutions and other actors, are effectively “the government.” In these cases, the two words, “elite” and “government,” will be used interchangeably. In contexts where the rulers and the bureaucracy are separate entities, more specificity will be used.

“Civil society” may be used interchangeably with “NGOs” to refer to the collective of all non-state actors. It must be noted, however, that in this research, these agents are not conceived of as independent of politics or sandwiched between the state and the society in what James Ferguson calls a “vertical topography of power.” Rather, they are conceived of as an alternative site for contesting the state, using tools such as the human rights discourse itself. The debate on the extent to which African civil society exists to counter state despotism is beyond the scope of this research, but this research assumes that the weak institutionalization of the state is reflected in the weak institutionalization of civil society, making NGOs largely another avenue for accessing and dispensing patronage. As Ferguson further suggests, NGOs are not necessarily custodians of the “local,” or “authentic” “communities” that exist “below,” but are instead, potentially a “worldly, well connected and opportunistic” set of actors. The agents within these organizations exist alongside the agents of states (and sometimes are one and the same actors) rather than below them, drawing on international symbols (humanity, the international community) in order to claim

23 For more on NGOs in Africa, see, for example, Ferguson 2006: 90.
24 This is not to make a judgment about whether these organizations carry out their mission, but to point out an aspect of political culture. For more on “the illusions of civil society,” see Chabal and Daloz 1999: 17–30. For a similar view, see also Ndegwa 1996.
a superior purpose to the regime elites’ “national interest.” When the research refers to “NGO elites,” it will generally be referencing those elites within human rights NGOs who mostly focus their work on the civil and political entitlements of citizens and the duties of states to fulfill them, as they are the most relevant to the field of transitional justice. Otherwise, the research will clarify when referencing elites within humanitarian NGOs or domestic peace groups.

The focus of elite policy “choice” or “selection” facilitates ease of description, even when it is clear that policy preferences do not emerge from a comprehensive analysis of all the possible options and the selection of the best alternative that meets pre-determined objectives in light of theory and evidence. Indeed, in a policy space where the meaning of terms like “justice” and “reconciliation” is highly mutable, where policy objectives can be many and varied, and where it would be impossible for policy makers to assess the full benefit of each action before undertaking it, what constitutes a choice is a combination of intention and “temporal sorting”—where policy is linked to a problem because both are simultaneously available. Selection is necessarily myopic, and it greatly discounts costs and benefits beyond the electoral horizon. Critically, the space for discretion is further mediated by the fact that much of what is chosen uses the vocabulary that is available in the system, echoing (or reacting against) what NGOs demand, as well as what regime elites think they can get consensus for. The process-tracing methodology used in this research relies on interviews of elites to clarify this confusion. Thus, the choices of regime elites—both secure and insecure—respond to signals from the “anti-impunity community.”

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27 For a broader discussion of the non-systematic manner of policy-making, see Lindblom 1959.
28 For an example of temporal sorting, see March and Olsen 1989: 11–14.
This community includes a web of domestic NGOs, victims, international NGOs, ICC officials, and donors who have various interests but mobilize the same language of demands in the name of humanity. Sometimes they can include in their ranks powerful members of the international system, such as the Security Council. This community, when active, is also referred to as the “threat-holders.” The actors within this community are different in different countries, and in the same country they change over time. While in some countries the regime can be the one to demand prosecutions, this research does not include pro-prosecutions regime elites in target countries in this definition. This community has in common the fact that it draws on international norms and laws, offers expert views on what can and cannot constitute a policy choice, and outlines (and advocates for) different choices under transitional justice. While they are not homogenous, they all arrogate to themselves the right to interpret the nature of human rights violations that require a transitional justice response. They frame their recommendations, and effectively fashion a threat, using universal symbols that demand engagement from regime elites. Their view is particularly important with regard to setting the “international standards” that various transitional justice measures should meet, given that, especially with complementarity, such standards do not objectively exist before the Court issues arrest warrants.

A critical actor in the anti-impunity community is the ICC. When practitioners make references to the ICC, they frequently refer simultaneously to the Prosecutor whose office is in charge of investigations and issuing arrest warrants, the Chambers (where the judges do not often agree with each other or with the Prosecutor), and even to the broader ideas of international law and international justice. This is analytically unhelpful, particularly in a context where observers have described the relationship between different organs of the ICC
as a “civil war.”29 This current research will focus primarily on the Office of the Prosecutor (OTP) or on the Prosecutor himself whenever it makes reference to “the Court.” When the research makes reference to another section of the ICC—such as the Pre-Trial Chamber (PTC)—it will make this clear.30

The next section provides a brief overview of one aspect of the historical background to transitional justice, one that clarifies why the question that this research seeks to answer—why elites prefer some transitional justice policies over others at different times—still remains unanswered.

II. Background: The Perfect Rules or a Better World?

An explanation concerning why elites choose some transitional justice policies over others would have to assume coherence among the activities that constitute transitional justice. Yet such coherence has never been definitively arrived at within the field, particularly among some of the notable practitioners who helped shape the literature of transitional justice and, consequently, its practice. While a fuller historical exploration would be beyond the scope of this research, a quick overview from the perspective of the International Center for Transitional Justice (ICTJ) would be useful.

In October 2002, a discussion paper was drafted in preparation for the first retreat at the ICTJ, an organization that would later greatly influence transitional justice scholarship and practice. The paper asked, in part:

Why do we put so much energy into pursuing justice, during periods of transition or any other time? One respectable answer is that we ought to pursue justice for justice’s sake…A second set of arguments, then, is that in pursuing justice we create a better

29 Author interviews, New York.
30 For an example of the challenges in the division of labour between different organs of the ICC, see Jacobs Forthcoming.
world. In other words there are both non-consequentialist and consequentialist rationales for what we do, and I think both are important.\textsuperscript{31}

The paper draws a distinction between means and ends, a distinction that had already formed part of the early days of the field, and a distinction at the centre of Amartya Sen’s two-fold view of justice. Sen’s first view paints justice as the just rules or the institution to be respected “though the world perish,” (what Sen calls “Niti” in its Sanskrit form). His second view sees justice as the amelioration of visible injustices using a variety of approaches, which may not necessarily be in accordance to rules, much less to perfect rules (what Sen calls “Nyaya”).\textsuperscript{32} This discussion at ICTJ was important in part because it sought to resolve the principles in pursuit of the institutions of transitional justice measures that would work. Would it be Niti or Nyaya, the perfect rules or those imperfect rules that nevertheless lead to a better world?\textsuperscript{33}

This debate about the principles unifying transitional justice sought to find coherence in ICTJ’s emerging approach. It was clear that nothing unified the repertoire of mechanisms of transitional justice under one umbrella other than the fact that they had all been selected by some national actors in countries that were experiencing political change as part of the third wave of democracy.\textsuperscript{34} This attempt to articulate principles was a foundational exercise, for it would have laid the groundwork for setting boundaries around a coherent institution of transitional justice, would have created an agreement upon which common expectations

\textsuperscript{31} International Center for Transitional Justice 2002.
\textsuperscript{32} See Sen 2009: 20–24. For early debates of this genre in the field of transitional justice, see, for example, Mendez 1997; Zalaquett 1991.
\textsuperscript{33} This research will henceforth use these terms without the quotation marks, based on the understanding of their basic definitions established here.
\textsuperscript{34} Arthur 2009: 325–326.
could be set, and it would have determined what would constitute “the rules of the game” when it came to interactions about the subject.\(^{35}\)

A resolution about principles within the ICTJ would have unified the actions done in the name of transitional justice by the organization (and given ICTJ’s large impact on the development of the field, by the actors in the field of transitional justice more broadly). It would have also reduced the importance of asking the question central to this research, which is why we see different transitional justice policies at different times. However, the resolution of the core principles of transitional justice, including whether “justice” could be “defined multi-dimensionally, not reduced to a criminal law paradigm,” was not reached.\(^{36}\)

Why?

Leading up to the discussion paper above, there was an internal conflict between those ICTJ staff who were faithful to the alternatives to justice that motivated the South African founders of the organization, and those who did not want to be seen as the “truth commission organization.”\(^{37}\) Up until the retreat where the paper was presented, different parts of the organization had operated with a semi-feudal autonomy, bringing a vibrancy of academic interrogation to their work, and holding different understandings of what different foundational concepts could mean and how they could be pursued. The debate during the first retreat was a reflection of this internal tension. A year into ICTJ’s life, a consulting group was hired to suggest changes to the organization. In their report, the consultancy group dismissed the debate about the principles of transitional justice as an unhelpful academic exercise. It stated:

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\(^{35}\) North 1990: 3.

\(^{36}\) International Center for Transitional Justice 2002.

\(^{37}\) Author recollections and interviews with organizational members.
An organization cannot effectively manage itself to accomplish its purpose, goals unless it has articulated them in a way that makes them crystal clear to everyone in the organization...certain basic tenets or commitments that, in an organization like ICTJ, cannot be debatable...This is because ICTJ is about achieving social goals, not about preserving academic freedom. The staff of ICTJ needs [sic] to recognize and accept that there are some issues, like reconciliation, on which ICTJ must have alignment and closure.\textsuperscript{38}

The consultancy recommended a close to the debate about principles, focused the attention on the organization on four mechanisms of transitional justice, and in line with the world-views of the South African founders of the organization, placed the achievement of “reconciliation” as a central tenet of the organization’s mandate.\textsuperscript{39} This focus on “mechanisms” rather than the principles that unified them provides one strand of the reason why, as the field strengthened and gained mainstream visibility, it was as a set of technocratic processes (prosecutions, truth commissions, vetting), of which various combinations could, through a variety of undefined pathways, lead to a variety of desirable end-goals (healing, reconciliation, rule of law, democracy). Reconciliation was more likely through the implementation of all transitional justice measures, and was superior to the retribution achievable through prosecutions. Reconciliation itself oscillated somewhere between a fifth mechanism of transitional justice and the end-goal, or outcome, of transitional justice, depending on which official of the organization was talking about it. Even then, its contents varied, contributing to the present-day variety of flexible meanings accorded to terms in transitional justice.

It was this absence of principles that made it easy for the core business of ICTJ and transitional justice to absorb the ICC and the maximalist demands of the anti-impunity movement. Resulting from a post-Nuremberg history whose tracing is outside the scope of

\textsuperscript{38} Confidential Memorandum on Organizational Review, 15 November 2002, on file with the author.  
\textsuperscript{39} Ibid.
this research,\textsuperscript{40} the focus of the anti-impunity community was international criminal prosecutions. While the anti-impunity movement shared the vocabulary of the transitional justice movement (accountability for “massive human rights violations”), some goals (ending impunity by eliminating amnesty, especially for powerful interest groups like the army or the other actors who could be implicated in human rights abuses and who could negotiate guarantees for non-prosecutions), and overlapping actors (Aryeh Neir of Open Society Institute, who advocated for prosecutions as an obligation and later provided grants for ICTJ, and Juan Mendez, another advocate for prosecutions at all costs, who later joined ICTJ as the president), they were a distinct group of actors with uncompromising arguments, who sought a universal application of international law to mass crimes in all contexts. For the anti-impunity community, prosecutions were always a duty of the government, regardless of what other policy a government might want to pursue.\textsuperscript{41} However, when the anti-impunity movement peaked with the adoption of the Rome Statute in 1998 and the ICC’s coming into force in 2002, it encountered a human rights zeitgeist that was dominated by debates over transitions, democracy, and power. The anti-impunity movement offered prosecutions through international justice as precisely the antidote to the compromises that had allowed governments to partake in and get away with human rights violations through the ages due to the relative power concerns that had informed the pre-ICC phase of transitional justice. In the view of the anti-impunity movement, it was the protection of powerful politicians from prosecutions in the name of stability and other goals that had allowed despots everywhere to flourish (and had incidentally generated the dialogues within which transitional justice was born). Henceforth, if a country refused to prosecute because of concerns over the relative

\textsuperscript{40} For an example of this history, see Teitel 2003: 69.
power of the actors involved, it would be deemed either “unwilling” or “unable” to carry out its obligation under the complementarity principle of the ICC. In these cases, the international community, through the ICC, would prosecute on its behalf.\footnote{International Criminal Court 1998: Art 17.}

The critical nature of this marriage between transitional justice and the anti-impunity movement must be clearly understood. Arguably, developments in the anti-impunity community at this point—with the growing power of the ICC and its clear enforcement procedures—could not easily be absorbed into transitional justice as an extension of the domestic prosecutions theme. Doing so would put these developments in conflict with the earlier ethos that had informed the field (transitional justice was, first and foremost, about providing alternatives to prosecutions, when political considerations required them). In the anti-impunity worldview, “not even democracy, functioning or not functioning should be allowed to stand in the way of criminal repression.”\footnote{Megret 2008: 512.} In this community, prosecutions were always in the “interests of victims” and served the “interests of justice.”\footnote{For more on these interests, see International Criminal Court 1998: Article 53.} Advocacy efforts emphasized that prosecutions could not be opted out of, and that prosecution was first among the policies of transitional justice.

As Paige Arthur suggests, the absorption of the anti-impunity movement and the ICC into transitional justice would “announce the dissolution of transitional justice itself.”\footnote{Arthur 2009: 363.} Yet, this absorption is exactly what happened. Despite the fundamental contradiction between the goals of the ICC and those of transitional justice (in part because of the absence of principles described above), the radical change in the rules represented by the ICC was nonetheless embraced under the broad umbrella of transitional justice. In part through ICTJ’s support of

\footnote{International Criminal Court 1998: Art 17.}
this approach, it came to dominate the field. Through ICTJ’s strong connection to the United Nations (UN), the organization was invited to give input into the August 2004 Report of the UN Secretary General on Transitional Justice and Rule of Law, the first ever policy document of the UN on the subject.\textsuperscript{46} The organization also shaped, drafted, or provided language for other key UN documents on the subject, canonizing their approach in primary documents of the field.\textsuperscript{47}

The contradictions of the field were not lost to target regime elites. The background described above has resulted in a situation where transitional justice is understood as a flexible set of rules. It allows elites to choose the most expedient approach; what this research calls judicial statecraft. As described elsewhere, the “multidimensionality of transitional justice, which is not a simple choice between “justice” or “no justice,” opens up political space for new elites facing conflicting justice pressures...[to] substitute one form for another in an attempt to satisfy diverging audiences.”\textsuperscript{48} The next section outlines the achievements and limitations of the scholarship that has emerged from this background to help us understand elite choices, and the gaps filled by the approach of judicial statecraft.

\textbf{III. Choosing Transitional Justice}

While a full exploration of the transitional justice literature is outside the scope of this research, the segment of the scholarship of interest to this research is that which has sought to analyse how actors (sometimes described as aggregate “states”) choose transitional justice policies. This section below elaborates on the five key explanations for transitional justice, and how judicial statecraft builds on them.

\textsuperscript{46} United Nations 2004.
\textsuperscript{47} For example of UN guidance drafted by ICTJ, see Office of the United Nations High Commissioner for Human Rights 2006.
\textsuperscript{48} Grodsky 2009: 691.
1. Relative Power

A key explanation in the literature for why different countries choose different transitional justice policies focuses on the distribution of power between the outgoing and incoming regimes.\textsuperscript{49} It should be remembered that the political change that Samuel Huntington named the “third wave” of democracy\textsuperscript{50} was taking place at the same time as the debates between “transitology” scholars concerning the manner in which the balance of forces between outgoing and incoming regimes affected what was possible in the realm of transitional justice.\textsuperscript{51} Considering cases of Latin America and Eastern Europe, some scholars suggested that the very act of democratic transition could be blocked by actors who would not benefit from the new dispensation. For example, armed forces who were complicit in the worst human rights violations would threaten the new order unless they could be sure that the past would not be revisited. Observers made arguments that would later be foundational in suggesting transitional justice as a “means” to something else:

It is difficult to imagine how a society can return to some degree of...political democracy without somehow coming to terms with the most painful elements of its own past...The “least worst” strategy...is to muster the political and personal courage to impose judgment upon those accused of gross violations of human rights under the previous regime.\textsuperscript{52}

So how were these ideas about relative power thought to affect transitional justice choices? They offer a structural, realist explanation, based on the experiences of Eastern Europe and Latin America. In an important achievement on which the approach of judicial statecraft builds, these views argue that policy decisions concerning which approach of transitional justice to undertake are, in fact, decisions about power. The more complete the

\begin{itemize}
  \item[49] See, for example, Huyse 1995; Zalaquett 1991.
  \item[50] Huntington 1991. For criticism of this notion, see Carothers 2002.
  \item[52] O’Donnell and Schmitter 1995: 59.
\end{itemize}
transfer of power from an outgoing regime to the reformist regime, the more maximalist and confrontational the justice policy is likely to be, which therefore increases the likelihood of prosecutions. Under the theory of relative power, outright winners of power contests can execute prosecutions. Even when a new party wins elections, however, the grip of the old elite on different state structures (the military, the secret police) can limit the push that the new elite could make for harsh measures of justice. Governments that resulted from negotiations are thought to have the least power to institute prosecutions and are therefore thought to be more likely to opt for compromising approaches such as truth commissions. Incidentally, the literature about ending civil wars makes similar findings: that the victor is likely to impose trials on the other side.\textsuperscript{53} Judicial statecraft builds on these views by acknowledging that results of previous power contests (electoral or not) determine the extent to which a regime is secure, security itself being a scalar concept.

Having sketched the relative power approach, the section now turns to the three shortcomings of the argument and the manner in which judicial statecraft addresses them.

The first challenge facing explanations of this variety is that much of the thinking about relative power is based on the idea of “moments” of transition that can be distinguished, along with “incoming” and “outgoing” regimes that are distinct entities. The transitional moment signals to the actors involved the window of opportunity concerning when a dialogue about transitional justice can commence and which measures can be instituted. These ideas reflect the distinct Latin America and Eastern European origins of transitional justice. Developments in transitional justice addressed by judicial statecraft, particularly in Africa, have disputed these foundational claims. If relative power were the only explanation of the policy choices, how do we explain the choices of transitional justice?

\textsuperscript{53} See Binningsbø, Elster, and Gates 2005.
made by countries that were not in transition: Kenya in 2007-08 under the coalition government, or Uganda under Museveni, where there was transitional justice with regime continuity? Judicial statecraft is not dependent on transitional moments. Indeed, the idea of transitional “moments” creates an illusion of a clear distinction between old, “dirty” elites and the new, “clean” elites who are separate from the previous regime. However, what about countries where the identities (and therefore, the loyalties) of the elites are in flux? What if there is no clean or dirty side, no new or old side, but just two sides whose partisans might have to ally again in the future to run another election? Judicial statecraft explains the transitional justice choices of these types of regimes.

The second challenge facing relative power explanations is that they focus on the balance between internal, state-affiliated actors, and do not often account for the power wielded by human rights NGOs that use advocacy in order to paint some cases as requiring particular policies of transitional justice. Judicial statecraft takes into account the story of NGOs, particularly the role they play as members of the anti-impunity community, frequently, although not always, affecting the cost and credibility of transitional justice threats. Indeed, in the era of the ICC, NGOs have had a particularly prominent role in transitional justice, where they have used their name-and-shame platform to demand that various actors carry out various actions, creating or contributing to the creation of a low- or high-threat transitional justice game. Three examples illustrate the important role of NGOs in transitional justice choices. First, international NGOs are an important arm of international prosecutions, using their research and advocacy to flag the locations and contexts where they believe human rights abuses have taken place that are massive enough to meet a threshold requiring the attention of the Prosecutor of the ICC. Indeed, it has been noted that in DRC,  

\[54\] Struett 2008.
Uganda, and possibly elsewhere, NGOs have been influential in determining the very cases that the Prosecutor finally investigates in target countries. In part because the Prosecutor may not have time to examine every possible allegation on his own, NGOs give him the “first cut” of possible avenues of inquiry. Second, absent specific standards of what constitutes a “genuine” proceeding for examining human rights abuses and instituting complementarity, NGOs have assumed the role as the arbiters of these standards that ought to apply for crimes of interest to humanity. Consequently, they can effectively declare whether national responses to human rights violations have been up to par or not, and whether the alternatives to prosecutions are useful or not. Finally, NGOs can have an indirect, yet important, effect on target elites. It must be remembered that many NGOs consist of actors with political ambitions and interests. Transitional justice is a platform for such NGO elites to point out the failures in the state, link with international actors to demand political change, and present themselves as a feasible alternative to the government (for instance, by making a case to receive funds to carry out functions that are best carried out by the state). Thus, an analysis of the choice of transitional justice measures that looks solely at the actors holding political power would be incomplete without considering the actions of NGOs. It would also be incomplete without considering other external actors who are strongly influenced by NGO advocacy, such as powerful states in the international system. With the urging of NGOs, these states can make high-threat demands (by sponsoring a resolution at the UN Security Council in favour of an ICC referral, for example) and force national actors in a target country to seriously think about how they choose different transitional justice measures, and in particular, how they choose or reject prosecutions for human rights violations.

55 Thanks to Chris Mahony for this point.
56 See, for example, the view in Megret Forthcoming.
57 See, generally, Chabal and Daloz 1999. For more on NGOs and the state, see Mutua 2002.
Finally and most importantly, the relative power arguments described above have been discredited in a manner that perhaps the “transitologists” could not have anticipated. The arguments of relative power have been used to fuel the anti-impunity movement’s advocacy for prosecutions under all political conditions, and more precisely, in exactly those countries with conditions within which the relative domestic power would ordinarily weigh against domestic prosecutions. The argument of the anti-impunity movement is that the balance of power that ordinarily advocates against prosecution during the transition is precisely the reason why prosecution must be pursued with international support. Decisions of such importance to the international community must not be left in the hands of domestic partisans who will allow parochial interests into matters of deep interest to humanity. Thus, while relative power arguments were previously an explanation for fewer prosecutions, they are now an explanation for more prosecutions. Judicial statecraft explains how choices are made within this new normative context where powerful external forces such as the ICC are relevant (if only discursively) to government action, and where even weak and unstable governments seek (or wish to be seen) to prosecute. In this normative environment, however, explanations about persuasion have become more common, as explored below.

2. Persuasion

Another significant strand of literature locates the determinants of transitional justice policy choice at the international normative level: choices are shaped by persuasion about shared expectations concerning appropriate behaviour. Persuasion occurs when agents change their “minds, opinions, attitudes about causality and effect…in the absence of…coercion.” The literature about persuasion (and its variants) in transitional justice more generally begins by

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58 Seils and Wierda 2005.
60 Johnston 2001: 496.
establishing that states have a legal duty to prosecute crimes that occur in their territory in order to repair harm committed to their citizens and to institute guarantees for ensuring that such crimes do not occur again.61 In the views of some scholars, particularly those who focus on prosecutions, transitional justice is now seen as a “new law” because it has been so widely adopted that one can speak of a “justice cascade” and a “revolution in accountability.”62 Some observers argue that there has been discussion about truth telling “in virtually every state” in transition,63 while others have demonstrated the proliferation of prosecutions. For instance, a dataset between 1979 and 2004 finds that 49 countries have held at least one human rights trial.64

Those observing this “cascade” generally make their arguments (explicitly or implicitly) within a “logic of appropriateness.”65 That is, the thinking that states will establish the appropriate transitional justice because it is the right thing to do. While many lawyers will make this argument atheoretically, many international relations scholars arguing from the constructivist framework—constructivists believe in the power of international norms and institutions to shape the interests, identities, and behaviours of actors—will also make a similar argument.66 In this view, when a norm (for instance, that people responsible for human rights violations should be prosecuted) gains broad support, domestic NGO actors, who wish to see their home states change to reflect the widely accepted behaviour, link up with transnational networks of norm promoters in order to increase pressure at home. This process of transnational linkage results in pressure at the domestic level, and leads to a

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63 Hayner 2001: 23.
64 Sikkink and Walling 2007: 430.
66 See, for example, Wendt 1999; Keck and Sikkink 1998; Risse, Ropp, and Sikkink 1999.
change in behavior at the policy level in what some call the “boomerang” model.\(^{67}\) In this literature, many adopters are “true believers,” but even when they are not, they later get entrapped when new leaders emerge who believe in the idea.\(^{68}\) This literature is often agnostic concerning the reason why the initial choice of a norm happens, but the eventual outcome is “normative socialization.” Judicial statecraft, to the extent that it acknowledges that elites wants to appear to be rule-following even as they use the language of transitional justice for non-justice purposes, builds on these insights on norms.

The literature on compliance with human rights treaties—with compliance meaning “conformity or identity between an actor’s behaviour and a specified rule”\(^{69}\)—also sheds some light on the reason why states are thought to choose some policies over others, to the extent that choosing an internationally available transitional justice option can be the first act of compliance. In this view, treaty ratifications send a public signal about a state’s credible commitment to the contents of the treaty and the choice to bind the state to those contents in the future, even in the face of incentives to behave differently: “states are bound by international treaties only if they have ratified them, and ratification itself is not obligatory; it is based on consent.”\(^{70}\) Further, as some of the compliance literature suggests, states tend to prefer treaties with the fewest demands for policy compliance, agreements where they have to change very little in order to comply with the treaty. This suggests that the states do not consider the resulting requirements for a policy change as a hurdle. While this literature suggests that in these cases compliance would be an extension of states’ domestic political

\(^{67}\) Risse and Sikkink 1999.  
^{68}\) Risse and Sikkink 1999: 10.  
^{69}\) Raustiala and Slaughter 2002: 539.  
^{70}\) Simmons 2010: 274,276; Fearon 1997.
norms, \(^{71}\) judicial statecraft departs from this view, by suggesting that it is possible for elites to perform a norm they have no belief in, if it serves their short term interests of pursuing power.

Having outlined persuasion and normative socialization, the section now turns to its shortcomings as an explanation for elite choices. Insofar as it seeks to explore transitional justice, the literature on normative socialization assumes that transitional justice is a coherent regime, in the sense that it has a clear “principles, norms, rules, and decision-making procedures around which actor expectations converge.”\(^ {72}\) In order to assess whether a country is responding to its human rights violations out of appropriateness, some judgment has to be made about whether they accept a set of rules as legitimate or not. It should therefore be clear what acceptance and violation of the rules entails, as well as the values that are sought by the rules. Given that the institutions of transitional justice do not co-vary— instituting a truth commission says nothing with respect to the obligation to prosecute—does implementing a truth commission in an ICC member state signal a socialization to the transitional justice norm or not? The answer to this question is not clear. Given the historical perspective described earlier in this chapter, judicial statecraft does not assume coherence or legitimacy. It does not assume, as some of the persuasion literature does, that more transitional justice is better, as if the act of choosing is not necessary.\(^ {73}\) Because choosing actually occurs, the approach of persuasion simply contributes to deepening a legitimacy gap for transitional justice.

Furthermore, the agnosticism of scholars writing about persuasion to the motivation of compliance is not satisfactory. If persuasion relies on actors being convinced by, and

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\(^{71}\) For an example of this, see Bass 2002.

\(^{72}\) Krasner 1983: 1.

\(^{73}\) For the view that more transitional justice is better, see De Greiff 2006: 11.
accepting, the legitimacy of an approach, then one is no longer talking about persuasion when the reason for compliance has little to do with socialization concerning the importance of the approach and more to do with, for example, economic pressure. Judicial statecraft addresses this challenge by assuming that transitional justice policies are inherently instrumental, however normatively justified.

Stemming directly from this challenge of incoherence is the fact that persuasion cannot explain the reality of norm rejection. While normative socialization can explain the increase in the framing of conflicts as the result of impunity and non-prosecution and the conceiving of solutions as legal and human-rights-based, observers cannot explain why actors who recognize the norm (through ratification, for example) may later reject it. The existing explanations are insufficient. Some suggest that rejection (in the short-term, since the actors are simply not yet socialized) results when norms are ambiguous, when their enforcement is weak, when states have no resources for compliance, or when some institutional preconditions for compliance are absent. Others suggest that violations may also occur because the new norm contradicts existing norms, when “transnational communication falls apart, civil society is weak or when a ‘cultural match’ between international and domestic norms” is absent. Other observers seem to agree that while violation can and does occur, it is only a matter of time before everyone chooses prosecutions in particular and transitional justice in general. Rejection, then, is a structural story about inadequate information or incentives.

However, explaining rejection away as a short-term situation is not satisfactory. Judicial statecraft appreciates the “organized hypocrisy” that is common with regimes in

74 See, for example, Goodman and Jinks 2004: 632.
international life, such as examples where abusive states deliberately ratify treaties they intend to violate. Regime elites are often instrumental, and reject policies that do not serve their interests. How else would we understand state elites who call for formal and informal amnesty even when they know it is in direct contradiction with the transitional justice norm? Or elites within a state who seek to violate norms they have previously recognized? Or illiberal states, or rather, agents within them, who seek token prosecutions for human rights violations when they have no obvious commitment to the ideas behind such prosecutions?

These questions require agent-based explanations rather than the structural explanations that are often offered, and the approach of judicial statecraft can help us understand why different transitional justice policies are chosen at certain times and rejected at others. To suggest that actors would support a policy if they had adequate information about it, as some observers who advance persuasion do, is to ignore the agency of actors who may have reasons to reject that policy. And clearly, the rejection of transitional justice does not only manifest itself as outright non-prosecutions. Governments can set about to comply spuriously with the Rome Statute by setting up sham trials, or they can put in place a TRC whose cost is discounted over the electoral cycle. Thus, to understand why actors will choose one measure over another requires explanations beyond those currently offered.

Finally, as alluded to above, understanding choices requires understanding agents, and the agents of normative socialization are unclear. Arguments are often made at the systemic and state levels of analysis, and often the state is not disaggregated in order to

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76 Krasner 1999.
77 Mallinder 2007; Olsen, Reiter, and Payne 2010; Snyder and Vinjamuri 2004.
78 Simmons and Danner 2010; Goodliffe and Hawkins 2006.
79 Subotic 2009: 27.
consider the interests of the actors who actually act in order to bind the state in certain ways. Who in the “state” actually does the choosing? This is not clear. When agents are analysed in the persuasion literature, it is often with respect to the argumentation and framing of trans-nationally connected norm promoters and NGOs in their efforts to persuade the state. While these actors are important—and judicial statecraft relies a great deal on the insights about how the anti-impunity community is organized in order to shape the threat level of transitional justice—the literature does not address how domestic elites (for these self-same NGO actors who mobilize transnationally also have other identities as domestic elites involved in a power struggle) strategise in response to intruding norms and institutions in order to use them to secure their ends. Given the wide recognition of the interdependence of norms and interests, and the fact that “norms do not act by themselves,” agency requires explanation.  

This lack of clarity about agency creates an additional challenge for persuasion, and that is that explanations become both atemporal and apolitical. The literature is apolitical to the extent that normative socialization is most closely aligned with the transitional justice-as-obligation narrative, a narrative that has discursively overcome all political considerations that stymied policy makers of previous decades. When this literature discusses politics, it is as “political will,” an ingredient whose absence stands in the way of implementing an ideal-type, apolitical transitional justice, rather than serving as a core driver of outcomes. Further, the fact that transitional justice has met different fates in different countries—some actors have embraced some policies while others have rejected the same ones—suggests that external factors are insufficient, that domestic political variables in the context in which transitional justice occurs require close consideration. These explanations can also ignore the

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impact of the passage of real-world time. Cases such as Chile and Argentina are used to show how normative socialization works, and how, decades after the truth commissions, actors have come back to choose prosecutions. Agency, however, has a temporal dimension. Judicial statecraft demonstrates how the passage of time creates a new political opportunity for actors, even within the same geographical context, to make new choices, an opportunity within which the political variables of security and threat are important, but of course, one in which history matters in terms of the structures that may exist due to previous choices. If this is true, then choosing prosecutions after having chosen amnesty cannot be thought of as an indicator of the more-is-better, everything-if-possible de Greiff formulation. Instead, choosing is a much more nuanced struggle where some agendas win and others lose, and under some conditions, present actors can capitalize on historical decisions. What Chile’s ability to come back to prosecutions years after the transition demonstrates is the potential transitional justice has to escape the control of those who initially introduce it into a context, as demonstrated by an analysis of history and critical junctures in judicial statecraft.

3. Coercion

Citing these shortcomings in constructivist accounts and the gaps of persuasion in explaining actor choices, some scholars turn to rationalism and the “logic of consequences” to explain why states comply with international institutions. It is important to point out here that while this literature often considers compliance with broad obligations—to human rights, to treaties, and to international organizations in general—it is nonetheless useful in this case to the extent that transitional justice can be thought of as an emerging obligation and that the Rome Statute of the ICC is a treaty.

81 Sikkink and Walling 2007.
82 De Greiff 2008: 132–133.
Coercion focuses on material rewards and sanctions. States are motivated by self-interest, and they will choose policies that are beneficial, regardless of their normative soundness.\textsuperscript{84} If the benefits of a transitional justice policy are higher than its costs, actors can be expected to choose that policy. In states with weak institutions and uncertain, unstable politics that are commonly associated with many post-conflict contexts, it can be expected that prosecutions will be unlikely because they could lead to further instability.\textsuperscript{85} When the cost-benefit analysis stacks up against prosecutions, one is likely to see softer measures of transitional justice, or a rejection of the entire discussion of accountability altogether. If states can receive benefits for doing so, it follows that they will make referrals to the ICC and institute domestic complementary measures of prosecutions. Otherwise, they will resort to alternatives to prosecutions, including doing nothing.

While other forms of coercion are possible for transitional justice, this section will only examine the costs that stem from issue linkage, where aid and other direct material benefits are linked to transitional justice performance (particularly to trials), and where ICC action itself can impose costs on state actors due to expectations of complementarity.\textsuperscript{86} In the first case, states can choose prosecutions because advocates urge donors to tie aid to state behaviour. Judicial statecraft draws on this literature when it proposes that the cost of a threat matters, and that the cost depends in part on the form the threat takes. Much grey literature proposes coercive means to ensure transitional justice measures are implemented. Routinely, organizations like ICTJ, International Crisis Group, Human Rights Watch, and others will recommend that donors condition their aid on a state instituting transitional justice, and

\textsuperscript{84} For a fuller debate on rationalism and constructivism that is beyond the scope of this research, see Fearon and Wendt 2002: 52.
\textsuperscript{85} See, for example, Snyder and Vinjamuri 2004; Branch 2004; Flint and De Waal 2008.
\textsuperscript{86} While the benefits and sanctions can include the reputational, this research focuses mainly on the material.
largely on prosecutions of human rights abuses.\textsuperscript{87} Serbia supported the ICTY partly in response to the fact that aid was conditioned on their cooperation.\textsuperscript{88}

In the second case of direct costs, the ICC can affect the actors who are threatened by investigation or who have had warrants issued against them. Further, for such actors, their assets may be frozen if powerful states decide to carry out their obligations to cooperate with the Court.\textsuperscript{89} ICC engagement in a country, which could affect the country’s rating for activities such as foreign direct investment and tourism, may also accrue other negative externalities. For example, individuals against whom arrest warrants are issued can only travel to some states, for fear of arrest. As in issue linkage above, judicial statecraft builds on this point in its consideration of the cost of threats: naming and shaming is less costly than an arrest warrant from the ICC. What is noteworthy is that the literature on coercion does not consider these measures as being exclusively coercive. Rather, these measures are thought of as part of a continuum of ensuring state adherence to norms, thereby mixing the logic of appropriateness with that of consequences.

Coercion is explicitly treated in some literature on complementarity, which explores the role of the Court in influencing state action when choosing between domestic and international prosecution. Some of this influence is passive-coercive. According to Payam Akhavan, the ICC promotes action through the Court’s “looming presence” and that the mere existence of the Court and its latent threat of coercive action should induce justice-seeking behaviour in states and rebels.\textsuperscript{90} More actively, complementarity can be used as a coercive “trigger” for domestic prosecutions through “positive,” “pro-active complementarity,” where,

\begin{itemize}
  \item \textsuperscript{87} See, for example, Human Rights Watch 2008.
  \item \textsuperscript{88} Subotic 2009.
  \item \textsuperscript{89} International Criminal Court 1998: Article 93 (1)(k).
  \item \textsuperscript{90} Akhavan 2003: 717.
\end{itemize}
“by using the threat of investigation and demonstrating that his Office is actively considering prosecutions, the Prosecutor may be able to catalyze the much desired outcome of domestic prosecution without a large investment of scarce resources.”\(^{91}\) In this view, the prosecutor’s “most powerful tool to encourage national prosecution is the threat of its own investigation, as such an investigation would likely impose significant sovereignty costs.”\(^ {92}\) By bringing its “legal and political influence” to bear on the country, it would “alter the incentives” for the state and lead it to choose domestic prosecution.\(^ {93}\) The assumption here is that sovereignty, in the sense of national autonomy, is important, and the so-called costs to sovereignty stem from the idea that threatening jurisdiction in a zone that was exclusively domestic increases the costs of a do-nothing option or the non-prosecutorial options of transitional justice. In that line of argument, then, case studies, ranging from the State Court of Bosnia to the Ugandan War Crimes Division, are offered to show how international threats affect the choice of domestic prosecutions.\(^ {94}\) Under judicial statecraft, some of these insights about coercion are valuable in the definition of the credibility of the threat of transitional justice, where action from the ICC prosecutor can lend credibility to assertions of threat-holders.\(^ {95}\)

A key criticism of the arguments about the ICC’s coercive force is that such force seems to come from the importance that states are thought to place on sovereignty, a complex notion to which the literature pays inadequate analytic consideration. Sovereignty, if one takes Stephen Krasner’s views, is a multivariate notion, “a basket of goods that do not necessarily go together.”\(^ {96}\) Krasner distinguishes between domestic sovereignty (the exercise

\(^ {91}\) Burke-White 2008a: 73–74.
\(^ {92}\) Burke-White 2008a: 86.
\(^ {93}\) Burke-White 2008a: 68.
\(^ {94}\) Stromseth 2009; Burke-White 2008b.
\(^ {95}\) This research comes to a different conclusion than coercion. Threats matter, but they matter differently in different regimes.
\(^ {96}\) Krasner 1999: 233.
of a legitimate authority structure of a state), international legal sovereignty (the mutual recognition of states as equal juridical entities whose representatives have diplomatic immunity), what he calls Westphalian or Vatellian sovereignty (a non-intervention in the affairs of other states), and interdependence sovereignty (the ability of a state to control its borders). These are related, but they are not the same thing. For that reason, so-called “sovereignty costs” are likely to have different components in different places. Consider Uganda, where the government used its legal sovereignty as a state that can enter into treaties to sign the Rome Statute. It then took a further step to willingly defer its Westphalian sovereignty by inviting the Court to assume jurisdiction in the case of the LRA. This self-determining act by the government opened a process that infringed on Uganda’s domestic sovereignty in the form of, say, deferring to the ICC prosecutor to decide whether the Amnesty Act of 2000, passed by the Ugandan Parliament, would hold for the cases in which the ICC was involved. This act had no impact on Uganda’s interdependence sovereignty beyond the flow of international NGOs, media, and ideas in and out of Uganda that had existed before the referral. As the relevant content of the “sovereignty costs” will vary from country to country, and even in the same country from time to time (Museveni in 2004 and Museveni in 2007), nothing short of a fine-combed assessment of the institutional context within a country can suffice in order to make an assertion about the conditions under which coercion from the Court may or may not work. Judicial statecraft gets around this by analyzing what the interests of decision-making elites actually were, whether or not sovereignty was used to describe them.

A second challenge to the suggestion of coercion as the reason behind transitional justice choices is posed by empirical observation. If the ICC operates by coercive force, for
example, how do we explain cases where there are self-referrals to the Court, the cases where countries have willingly asked the Court to investigate in their countries? Coercion implies an unwillingness on the part of the coerced, and that the removal of the coercion would lead the coerced to make different choices. Judicial statecraft addresses this challenge, which is related to a shortcoming in the literature on transitional justice in general and on the coercive force of the ICC in particular, by bringing to bear the specific political configuration of many African countries where protection from prosecution is a form of patronage. Under judicial statecraft, an ICC trial can externalize the political costs of getting rid of political opponents by criminalizing their enterprise or by having them eliminated outright from the political scene through investigation and arrest, using the moral authority of an internationally sanctioned process. While their subjection to an international process may invite negative publicity about the country, and even risk that the government’s side may come under scrutiny for its past human rights abusing conduct, the threat of any of these potential outcomes is lower than the risk imposed by the continued existence of political opponents as legitimate political actors. Such cases suggest that there may be conditions where the benefits to a government of outsourcing prosecutions will outweigh the costs. This means that external factors are not the only ones relevant in this choice, and that the political conditions under which prosecutions can be chosen is not a simple back-of-the-envelope calculation as some of the scholarship on coercion might suggest. There are often a number of audiences, “nested games” within which actors operate, some of which may not be immediately discernible to the proponents of coercion.  

97 See, for example, Ginsburg and Moustafa 2008.  
98 On nested games, see Tsebelis 1990.
On a general critique of coercion outside the Court itself—including coercion through issue linkage, for instance—this research contends that the literature “fails to grasp the complexity of the social environment within which states act.”

While coercion requires the coercer to have enough incentives to want to coerce, the human rights behaviour of governments rarely offer such incentives:

States have no clear, direct interest in securing human rights protection in other states…good faith participants in such regimes are generally unwilling or unable to shoulder the enforcement costs necessary to coerce recalcitrant states to comply with human rights norms. This “enforcement deficit”…is a political reality of the current international order.

This criticism about incentives points to the nature of the interests of states in the international system, and the erosion of the international system’s coercive possibilities. Because the international system is not interested in coercing states into fulfilling their obligations, or because powerful states themselves are hypocritical about the obligations to prosecute, they cannot be as coercive as they could be in cases that had to do with vital national interests. This weakness has translated into criticisms of the Court and its role as a credible instrument of coercion, where some argue that the Court has biases built into its structures, and that many of its operations rely on the willingness of powerful political actors in the international system to act on its behalf.

Judicial statecraft takes this weak coercive context into account, and shows how the empirical reality of threat levels—rather than the theoretical possibility of a threat—depends on the credibility and cost exerted by the anti-impunity community, including the Court. It explains why, despite the Court’s poor ability to coerce, as well as the weak and unreliable interest of the international system to use coercion, regime elites have continued to choose

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100 Goodman and Jinks 2004: 629.
transitional justice mechanisms, including prosecutions. Elites have also, in what would be a
sub-optimal choice from the perspective of sovereignty-costs arguments, made referrals to
the Court without pressure to do so. These actions demonstrate that coercion is an incomplete
explanation. The next section turns to acculturation, a different pathway that seeks to explain
behavior.

4. Acculturation

New research on the ways actors make choices (in this case, deciding what transitional
justice policy to demand) suggests that the limits of coercion and persuasion require
considering a distinct pathway of “acculturation,” which is defined as “the general process by
which actors adopt the beliefs and behavioral patterns of the surrounding culture.”

Goodman and Jinks offer acculturation as a process that is distinct from persuasion and
coercion, and one that can explain state action with regard to human rights. They add, “the
microprocesses of [coercion and persuasion] are often underspecified, underanalyzed, or, at
best, underexplained.” In this view, while persuasion and coercion may at times be present
(and may have some impact on how governments choose to act), there are also many cases
where governments act without persuasion or external pressure. In these cases, Goodman and
Jinks argue that governments are acculturating; they make choices that respond to their
external environment in order to obtain cognitive and social comfort by acting like everyone
else in the neighbourhood.

In this view, acculturation occurs as a result of social and cognitive pressure (rather
than material pressure). Actors recognize a reference group to which they wish to conform in

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103 Goodman and Jinks 2004: 626, 631.
104 Goodman and Jinks 2004. Likewise, a similar explanation is offered by Subotic for former Yugoslavia:
Subotic 2009.
order to avoid cognitive dissonance. If they do not conform, actors will justify their non-conforming behaviour in terms that affirm the behaviour that is expected of them. Socially, the costs of shaming and the benefits of social approval drive behaviour. Through mimicry and processes that promote structural similarity, actors make choices about policies and institutions that may not be useful for their particular situation, but that conform to the current script of what other actors are doing in similar circumstances. Choices made acculturatively can demonstrate a “public compliance with, but not private acceptance of, social norms.” These are passive, rather than active choices. The effect is a shallow compliance with norms, or a decoupling of the norm from reasons of compliance. Further, costs are not always taken into account, as the coercive position would suggest.

Acculturation is therefore, while related to persuasion, distinct to the extent that target elites do not care about the normative structure of the regime, which is a central question in persuasion. In other words, states do not choose to ratify the ICC, to cooperate with the Court, or to set up domestic prosecutions because they care about their “obligations” as states towards the victims in their population, or because they have assessed these measures and are convinced of the merits and legitimacy of transitional justice. Even absent pressure from a morally inconstant international community, states will choose some policies because everyone else is doing it and states want to assimilate with other states.

To the extent that it exists, acculturation can further help explain why, outcomes notwithstanding—or perhaps precisely because outcomes appear inconsequential or ill-defined in much of transitional justice—many countries seem keen to implement transitional justice measures. As Subotic illustrates, the prescriptions of the “transitional justice industry”

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107 Subotic 2009.
have made it easy for actors to choose to implement transitional justice, for it seems to be the thing that every other state does.\textsuperscript{108} What a particular state might actually require in order to address its particular problems of human rights abuse is not subjected to analysis by acculturating states: “rather than correlating with local task demands, structural attributes and official goals of the state correlate in important ways with attributes and goals of other states in the world.”\textsuperscript{109} Further, policy implementation does not matter. While policies might be unrealistic, poorly formulated and underfunded, and enacted within a largely unsupportive political environment, it is the installation of the right policy that matters, not its outcomes. In acculturation, everyone jumps on the bandwagon of transitional justice without coercion, or indeed, sometimes against the will of those in the international system who would naturally coerce. Hence, the isomorphism towards the ratification of the ICC went against the wish of the US and its opposition to ratification. Supporters of acculturation do not worry about motives. For them, the logic of entrapment suggests that once actors establish a policy, even if they establish it for the wrong reasons, the policy, in due course, will have the impact it was intended to serve. In the long run, acculturation is a way station on the road to normative socialization.

This research builds on insights of acculturation in conceiving of the level of threat of transitional justice and linking it to different audiences faced by regime elites. When elites know what particular threat-holders expect in terms of behaviour, they can create policies that are intended at appeasing that audience. In these cases, threats are not credible because they can be managed. When, on the other hand, elites misjudge the expected behaviour because, for example, they have not encountered a particular arena of action before, threats

\textsuperscript{108} See Subotic 2009.
\textsuperscript{109} Goodman and Jinks 2004: 649.
emanating from transitional justice can become credible. Judicial statecraft departs from
acculturation, however, to the extent that it does not assume behavior to be passive, but rather
in pursuit of self-interest.

Much like coercion and persuasion, however, the writing on acculturation remains
incomplete in explaining observations. Like persuasion, it can explain why transitional
justice is implemented at all, but cannot explain why specific forms of transitional justice are
chosen and not others. Unless we assume that prosecutions have the same burden as
apologies or truth telling (which we know intuitively they do not), or that measures are
randomly chosen, there must be more agency injected into acculturative practices in order to
explain what we observe. Judicial statecraft explains why actors routinely choose some
measures and not others. It recognizes that while researchers have demonstrated the effects of
the different sequences of the measures, they have scarcely explained why particular choices
were made at particular times (without imputing post-hoc knowledge that the actors could
not have had at the time of decision-making).

Indeed, acculturation cannot account for the rejection of transitional justice measures.
Acculturating states seem reactive to the circumstances in world society, and, apart from
cognitive comfort, they do not seem to derive any use from the processes they institute.
Absent agency, we can expect that states will establish measures of transitional justice all the
time, even when those measures are not the right solution for the problem at hand. However,
what about the cases where, even with steady pressure, actors still ignore the measures, or
seek to deliberately establish them in terms that fall short of what is internationally
demanded (suggesting that they care about the content of the mechanisms), creating
processes intended to fail? These exceptions suggest that there is more agency among the
actors in the states than the scholarship on acculturation would seem to suggest. Judicial statecraft recognizes that transitional justice is a complex set of measures that do not co-vary collectively, and expands the interests pursued by elites beyond cognitive comfort.

Finally, much like the other two explanations of persuasion and coercion, it is not clear in acculturation which agents choose policies of transitional justice, and whether theories about individual action can be aggregated into theories about state action (whatever state action might mean). If acculturation has agents, then we must account for their interests, which means the passive-adoption perspective acculturation offers is insufficient. Judicial statecraft has active, elite agents in a pursuit of power.

The final section below considers three scholars that address many of the concerns raised by the four explanations given to above, in particular on the question of agency, and offer further building blocks for the approach of the current research.

5. Transitional justice as political tool

The approach of this research starts from the observation that elites do not passively embrace all transitional justice options around them, but instead support those that can serve their short-term political goals of securing power. In particular, the current research builds on the work of three specific scholars.

Jelena Subotic’s description of the processes through which countries in former Yugoslavia chose to comply with transitional justice obligations, including cooperation with the ICTY shows how states increasingly comply with the norm of transitional justice for reasons other than bringing justice and accountability to the victims, or stability and reconciliation to affected communities. In her identification of “hijacked justice,” wherein states are “able to make use of international norms and institutional models while at the same
time rejecting or ignoring their substance,” she centralizes the agents (disaggregated into competing coalitions) and their domestic interests.\(^{110}\) Crucial to her argument is the suggestion that decisions on how to address the past rely on the relative power between coalitions, rather than between wholesale incoming and outgoing regimes. In her view, the transitional justice approaches adopted depend on which coalitions dominate (between norm resistors on one hand, true norm believers who include NGOs on the other, and instrumental adopters in the middle).\(^{111}\) Other important factors for the choice of transitional justice include the strength of spoilers, and the strength of domestic demand for a particular transitional justice approach. Thus, instrumental adopters will comply with transitional justice for legitimacy, norm resistors will comply only under coercion, and true believers will comply under conditions of uncertainty.\(^{112}\)

The insights of Subotic’s work are important in the approach of judicial statecraft. First, she takes into account the short-term political reasons for which transitional justice may be useful. Her observation that justice can be used for purposes such as getting rid of domestic opponents is valuable for the approach of judicial statecraft, where the immediacy of power can trump any long-term considerations in the choice of transitional justice. Second and most importantly, she disaggregates her agents, demonstrating the bargaining that leads to what is eventually labeled a “state” decision. Finally, she recognizes the agency of elites outside the state, including in NGOs, in pushing for particular policy directions. This recognition is borrowed by the approach of judicial statecraft, particularly in the era of the ICC where NGOs are critical actors in shaping the threat level of transitional justice.

However, her approach is significantly different from judicial statecraft in two

\(^{110}\) Subotic 2007: 42.
\(^{111}\) For the most recent and relevant research in this area, see Subotic 2009: 34–35.
\(^{112}\) Subotic 2007: 10.
important respects. First, she seeks to address compliance with international prosecution that is already *chosen for* the countries. Because of the legal structure of the ICTY, countries are obliged to send identified perpetrators to the Tribunal. For this reason, her approach cannot explain rejection of prosecution; indeed, she notes that rejection is not an option in her cases, because it is too costly. For this reason, her approach cannot sufficiently explain many observations in the era of the ICC, where complementarity stipulates that perpetrators should be prosecuted domestically rather than sent to the ICC. Secondly, she is interested in a very particular set of normative circumstances. As she states, she “explores compliance with international norms under conditions of strong international pressure and limited domestic demand for normative change” and does “not discuss cases where international pressures are low or absent.”†113 For this reason, her account does not travel easily, including to the cases under examination in this research. In her view, strength of demand from below (for instance, high demand) combines with a specific elite orientation (norm promoters) to result in a type of hijack (“hijack” due to the resulting uncertainty). What would happen, however, in a country like Kenya, where demand from below (NGOs, public) is high but the elites in power are norm resisters? Why does Uganda, where the domestic popular demand is low and the norm resisters are in power, present an example of willing self-referral, instead of an example of coercion, as Subotic’s typology would lead one to expect? Why would Uganda implement a transitional justice measure by a non-persuaded government without coercion?

Nonetheless, judicial statecraft builds on the achievement of the work of Subotic, and fills some of the gaps in her approach by offering a generalized and systematic analysis of which elites will support (and most importantly, reject), which policies and why, and uses two cases where the ICC is active in order to meaningfully bring to bear the new normative

†113 Subotic 2009: 30.
context.

The second work in which the approach of judicial statecraft builds is that of Victor Peskin, who describes a variation to Subotic’s approach to how countries make decisions concerning the extent to which they cooperate with the tribunals of Rwanda and Former Yugoslavia.114 Peskin finds that the cooperation of governments in tribunal trials does not stem from a passive acceptance of processes in the surrounding society, as acculturation would propose, from any meaningful coercion, and much less from a conviction about the legitimacy of the tribunals and the prosecutions they seek. Dismissing idealised accounts of the cooperation of states with tribunals, he argues that the international community plays into the cooperation process by acting as “surrogate enforcers” of the international institution.115 Thus, as in Subotic’s case, external pressure is important. He describes “virtual trials” which are “trials of cooperation” which must be resolved for the process of a trial (investigations, location of witnesses) to be successful.116 Peskin disputes the common assertion that illiberal states do not support war crimes trials.117 To the extent that the tribunals are useful to them, illiberal states will find ways of cooperating. If the tribunals are not useful, illiberal states will similarly find ways of refusing to cooperate behind a veneer of cooperation.

Peskin’s work provides important insights for the approach of judicial statecraft, in particular the fact that there is a “behind-the-scenes” dimension to transitional justice, and consequently a multiplicity of audiences. One of the ways in which the seeming paradox of rights-abusing elites embracing the ICC can be understood is from this perspective of what happens before public pronouncements are made. Therefore, policy choices of target elites,

114 Peskin 2008.
115 Peskin 2008: 12.
117 For example, see Bass 2002.
as the threat entailed in pronouncements of the anti-impunity community, cannot be understood at face value. Further, his combination of international and tribunal pressure as a key variable for cooperation forms the starting point of what the current research project terms as “threats” of transitional justice.\textsuperscript{118} These insights are taken from Peskin’s specific project of seeking to understand the trial process in international tribunals, and applied to the post-tribunals world where, even long before a trial process begins, policies about trials (and other transitional justice approaches) are made and changed.

The final and most pertinent research that provides particular insights to the approach of judicial statecraft is by Brian Grodsky, whose work is one of the few that considers why countries choose specific transitional justice approaches. In his analysis of post-Soviet Central Asia with a focus on Uzbekistan, Grodsky considers why a country would choose to implement a truth commission without a transition, indeed in a context where transitional justice seems “absurd.”\textsuperscript{119} He offers an explanatory variable which is useful in informing what the current research terms as “regime security”:

Repressive leaders must ensure that the investigations they initiate will generate a degree of legitimacy without threatening their own power base. This can be done in a variety of ways, including limiting the scope of the commission, controlling its activities, and manipulating its conclusions.\textsuperscript{120}

This control emanates from particular features of the state. Grodsky continues:

In states where old elites rule with overwhelming control, where opposition and civil society are precluded from activity, they should be most comfortable launching a carefully controlled process with practically no fear of past events escaping the official domain.\textsuperscript{121}

Building on Grodsky’s perspective, judicial statecraft takes this insight of control,

\textsuperscript{118} Peskin 2008: 10.
\textsuperscript{119} Grodsky 2008a: 287.
\textsuperscript{120} Grodsky 2008a: 287.
\textsuperscript{121} Grodsky 2008a: 287.
expands its content, and generalizes it beyond truth-seeking, and proposes that regimes are secure when they can shape transitional justice in their image. The current research argues that elites who control all aspects of the state—to whatever extent such control is possible—can be more embracing of a range of transitional justice policies, not just truth-seeking. Indeed, in the cases examined in the era of the ICC where truth-seeking is considered to be a minimalist intervention, such elites can also have flexibility about domestic and international prosecution because they have confidence that their decisions (or narratives) cannot be overturned from within. However, the current research departs from Grodsky’s approach to the extent that judicial statecraft also offers a dynamic understanding of regime security, in part because political identities are fluid. Regimes examined in this research tend to make short-term calculations about their security, discounting risks outside the current fight for power. Alliances can change from one electoral season to the next, leading previously secure elite factions to unexpected consequences of past decisions.

In other research comparing Poland and Serbia, Grodsky argues that “a new regime’s will to pursue transitional justice is closely linked with its capacity to provide goods and services expected by its constituency.”122 He disaggregates his actors into primary and secondary actors (those with constitutional power versus those who hold symbolic power), and notes that the ability to choose harsh measures of transitional justice (as opposed to “abortive” measures, such as truth commissions) will depend on the balance of preference among these two types of actors, with the outcome “skewed in favor of the constitutionally powerful.”123 Grodsky makes two important points on which the current research builds. First, he notes that elites face multiple incentives, which affects how they choose. By

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distinguishing between the different pressures faced by constitutional and non-constitutional actors because of existing reward structures, Grodsky informs a key aspect of judicial statecraft, where, in the absence of institutional reward structures, patronage networks create incentive structures for elite choices of transitional justice. However, since patron relations are only satisfied by short-term access to power, their choices made under judicial statecraft are short-term and highly dynamic. Second and related, Grodsky notes that audiences of transitional justice are multiple. Under judicial statecraft, the multiplicity of audiences affects the cost of the threat of transitional justice. Because of poor institutionalization, all preference is personal. This means that meeting the needs of an audience of patrons can frequently trump other audiences, and since action that is optimal in one audience is not necessarily optimal to another, neglected audiences can escalate their advocacy demands and increase the cost of their threats.

The current research departs from Grodsky’s work in two ways. First, Grodsky characterizes his approach as a “more nuanced application of Allion’s bureaucratic model” where the choices of new elites depend on institutional location.124 This distinguishing factor of constitutional status and its associated assumption that governments are accountable to deliver public goods to the electorate do not apply in the cases under examination in the current research, because judicial statecraft is relevant in contexts of weak institutionalization. This means that the elites under examination in this research are likely to behave more closely to what Grodsky describes as constitutionally weak elites, whose behaviour he labels “indeterminate.”125 Second, Grodsky is interested in the actions of new elites, while judicial statecraft realizes that at any one time, alliances can be made and

125 Grodsky 2008b: 358.
unmade, past human rights violations notwithstanding.

This section has demonstrated the various strengths of the arguments in the literature from which the theory of judicial statecraft has built on, as well as some of the omissions in the literature that judicial statecraft sought to fill. In particular, it has focused on the work of Subotic, Peskin and Grodsky, whose research brings insights from Eastern Europe and Central Asia to separately highlight the importance of agency and regime security, demonstrate that elites respond to diverse audiences, show that there can be varying levels of threat from different approaches of transitional justice, and argue that some domestic political conditions can be more favourable for particular transitional justice policies than others. The next section demonstrates how the approach of judicial statecraft in the current research combines these factors and uses them to explain observations in the different context of African states.

**IV. Bringing It All Together: Judicial Statecraft in the African Context**

Judicial statecraft starts from the view from some of the recent literature cited above concerning the ways transitional justice policies can be a means used by elites to serve non-justice related goals. Indeed, the idea that actors (sometimes viewed as undifferentiated states, sometimes as the elite agents within them) use policies for goals other than those for which they were intended has been documented outside the field of transitional justice.\(^\text{126}\) For instance, Mamadou Diof talks of the “vernacularisation of modernity,” the process by which African elites transform universal institutions of foreign historical origin into domestic political resources.\(^\text{127}\)

In transitional justice, this process of using policies for other ends has been captured by

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\(^{126}\) For instance, Claude Ake argues that in some African countries, elites can carry out multi-party elections and gain the legitimacy of “democratic credentials” without reforming their repressive regimes. See Ake 1997: 284.

the term “hijack” as it is used by both Grodsky and Subotic. However, this is a term which has the drawback of sounding reactionary and negative, as though the process of using institutions cannot be premeditated, or that the way in which an institution is used may be of less value than the uses intended by the institution’s designers and supporters. This research uses the term “appropriation” to refer to this process, in order to neutrally capture the active process of the elite use of transitional justice policy as political resources. This process may involve rejection and adoption, as well as a reframing or reinterpretation of the meaning of transitional justice. Appropriation is not a passive adoption of the institutions of the international neighbourhood as Goodman and Jinks would suggest in acculturation. Instead, it is an active, self-interested exercise through which elite agents—who do not always agree, who are not always in government, and whose agendas cannot always be uniformly summed up into a common preference of the “state”—pursue interests through demanding or rejecting particular policies. The components of judicial statecraft are explored in further detail below.

1. The Security of Regime Elites

The focus of this research on elites is borrowed from the literature on African states. Endogenous to the definitions of African elites is the pursuit of securing their access to the state. They can do this by capturing political power if they are outside it, or extending authority and control if they are already in power. If they are NGOs, they secure their access by sharpening their criticism of the governing elites. Doing so allows them to get more resources, to construct themselves as alternative sources of policy, and, at the same time, to

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129 While authors do not make this claim about hierarchies of goals, nonetheless, the choice of the word “hijack” whose dictionary meanings are all negative, conveys a sense of negativity about these alternative goals served by transitional justice.
create space for themselves as a viable alternative to the formal realm. Thus, elites are in constant competition to secure their channels of access to the state. This contest can be as present in armed conflict as it can be in elections, peace negotiations, and in routine calls for international scrutiny into state conduct.

To be sure, one could argue that the pursuit of controlling the state is the goal of elites everywhere. While this may be the case, a second observation from the literature on African states exacerbates this reality, and that is that the African state is poorly institutionalized. As described briefly at the start of this chapter, poor institutionalization means that many African states are highly personalized and undifferentiated from society in the sense that there is frequently “no bureaucracy empowered to accomplish objectives autonomous from those of the elite, the state never slights the interests of its masters.”

In the simplest sense, the absence of a classical Weberian state with a rational-legal bureaucracy creates an information flow problem, which is solved by establishing the most loyal elite from the rulers’ patronage network as gatekeepers in key institutions. Consequently, regime security depends largely on control over the networks of patronage (for material and informational resources). The first determinant of such control is the result of a previous election or power contest, which legitimizes control over the resources of the state. In line with arguments on relative power and their acknowledgement of the importance of power and compromise, a key area of control is the military. Indeed, scholars have described a process of “threat substitution,” where the risk of a “palace coup”—which at heart is about the emergence of an alternative source of patronage—is

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130 De Oliveira 2007: 126.
131 For more on how patronage works, see Chabal and Daloz 1999. For another perspective, see Ferguson 2006; Reno 1999.
132 For an example on how the state can be a resource, see Szeftel 1982.
133 For an example of the role of the military in a context of patronage, see Reno 2000.
actively fought by purging potentially threatening actors, even at the risk of creating civil war.\textsuperscript{134}

Closely connected to the above is the fact that regime security also depends on the control of bureaucratic routines. With no professional options to retreat to, most bureaucrats have little incentive to defect from the political culture that has been cultivated by regime elites. Some elements of bureaucratic organizational routines are useful in understanding how this works:

At any given time, a government consists of existing organizations, each with a fixed set of standard operating procedures and programs. The behavior of these organizations—and consequently of the government—relevant to an issue in any particular instance is, therefore, determined primarily by routines established in these organizations prior to the instance from which a decision emanates.\textsuperscript{135}

In secure regimes, bureaucratic routines—to whatever extent they can be said to exist—exist largely in order to serve the priorities of regime elites. Secure regimes have more control over their judiciaries. In secure regimes, the judiciary can be used, among other things, to vanquish political opponents while still maintaining a patina of legality. Courts are frequently used by illiberal regimes in order to establish what Tom Ginsburg calls a “rule by law.”\textsuperscript{136} The judiciary facilitates a “downward flow of command,”\textsuperscript{137} which is a useful tool to “obfuscate and legitimate abuses of power.”\textsuperscript{138}

Regime security also depends on the nature of political processes. In particular, in the critical processes of political contestation, the stability of the vehicle of contesting power affects regime security. Poor institutionalization means that political parties, in the ordinary sense, frequently do not exist. Instead, contesting power is based on a variety of coalitions of

\begin{footnotes}
\item[134] For a general description of threat substitution, see Roessler 2011.
\item[135] Allison 1969: 698.
\item[137] Shapiro 1979: 643.
\item[138] Leebaw 2008: 97.
\end{footnotes}
convenience rather than on rigid, immutable identities. In the contexts under examination in this research, the allies and enemies of transitional justice can change with the direction of the political wind. In the ordinary conduct of politics in many contexts, temporary coalitions are created to contest elections, reach out to their clients to mobilize votes, vanquish opponents, and maximize their hold on power. Once power is won, the temporary coalition, in a harsh process of choosing losers and beneficiaries, distributes patronage among the gatekeepers of its membership. Soon, elites start a new cycle of coalition building in order to contest the next election.

Non-state elites, such as NGOs, are not neutral in the process of contesting power, since they join the ruling elite or gain favours depending on whether their patrons win. This research does not assume that NGOs (as well as their allies in the opposition and the media on which they publish their views) are an independent wedge between the state and society, but rather a block of interests seeking to solidify a particular relationship with power. A thick network of local NGOs and opposition parties can exist without affecting regime security, as they can be demobilized because of their relationship to government patronage. When their effect is felt, it is often because of their connection to outside actors and the manner in which they can shape the level of threat, a factor to be described later. The fewer coalitions regime elites have to make and unmake in order to capture the state, the more secure they are. However, some political elites face constant contestation, and are therefore more insecure than others.

Constitutionally, regime security can be affected by the manner in which power is shared in the constitution, how the executive is expected to be checked by the legislature, and

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139 This research agrees with the characterization of civil society offered by Chabal and Daloz in Chabal and Daloz 1999.
the extent to which opposition parties have autonomy to act (this is linked to the first point on control of patronage, as the opposition can be coopted by regime elites). More secure regimes have fewer constitutional constrains to their actions. The absence of political parties and the personalization of politics means that the rules regarding the contesting of power are often unclear. Where rules exist, they often serve the interests of the executive, and offer few limits to the private use of state resources. Elites in these countries are not in office to ensure stability, democracy, and reconciliation, even though these values may be emphasized rhetorically. Rather, they are there to achieve short-term goals pertaining to their access to power. The contest for power is total, and even a matter of life and death. Their choice of transitional justice will be in service of these short-term goals.  

All the factors above are closely related with control over patronage networks, which provides a predictability that the regime decisions cannot be subverted from within. The most secure regimes are totalitarian, single-party stages, and the most insecure regimes are highly fractured coalition governments. While regime security is an ideal-type, in reality it is scalar, and regimes that are more secure have internal authority and control, they dominate the political culture, and the country’s domestic institutions can be trusted to deliver outcomes that accord with the world-view of regime elites. This research contends that transitional justice frequently inserts itself in this context where judicial processes are an extension of the patronage logic of the state. However, the purpose of this research is not to seek to explain how regime security comes to be. While it points out how, given a particular electoral outcome and historical context, a particular regime can be secure, its purpose is to show how that security is reflected in elite decisions.

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140 This could be another approach to what Chabal and Daloz call “instrumentalizing disorder.” Chabal and Daloz 1999.
2. The Level of Threat from the Anti-Impunity Community

If regime security refers to a regime’s confidence about and power over the internal response, threat level refers to a regime’s confidence with regard to controlling the external narrative, which is about rules. Building on the achievements of the literature on persuasion and acculturation described before, this research contends that while African elites seek to control the (qualified) state and are more or less secure in their pursuit, the power must be contested within a world of rules. As Ostrom points out about the consistency between rule-respecting and the pursuit of self-interest, “the rational individual must know the rules of the games in which choices are made and how to participate in crafting of rules to constitute better games.” In the world in which elites contest power, even the most secure elites pay homage to the rules and attempt to accommodate them (if they did not, secure regimes would not act differently when facing low or high threats). Thus, according to the rules, virulent ethnocentrism is frowned upon in a fight for power, and it is not the elite strategy of choice, even while it might yield the quickest results. Indeed, any explicit support of violence can bring credible high threats from international NGOs through their reports (and their donors, through their statements and occasional actions). Thus, even when elites engage in human rights abuses in their pursuit of power (hence, the reason why transitional justice discourse becomes invoked in the first place), it is not to the exclusion of rule following. They have a strong sense of ritualism about the right conduct for actors in a particular role, whether it is the opposition, human rights organizations, or the government. They therefore cannot escape the appeal to powerful empty universals like justice, democracy, and reconciliation as

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141 While this research does not attempt to resolve the debate between interests and rules, it operates from the premise that even self-interested actors can have regard for rules of appropriate behaviour.
143 On ritualism, see March and Olsen 1989: 7.
a way of righting wrongs.

One of the rules expected of elites in countries with human rights abuses is that they will respond to the signals about transitional justice from the anti-impunity community. These signals—also termed as “advocacy” in this research—carry threats. Elites do not choose policies in a vacuum; threats frequently place an issue on the agenda for policy makers. According to Jack Walker, “the agenda of the political system includes a set of problems that policy makers are trying to solve.”144 This research argues that one of the ways in which those problems under focus are selected from all possible ones to have solutions crafted for them (with all the caveats about the extent of deliberation in policy preference) can be explained by the level of the threat those problems carry.

The anti-impunity community—or the threat-holders—can make high-threat or low-threat demands to regime elites. Building on the literature on coercion described earlier, this research argues that high threats are credible and costly, and can, if carried out, have the effect of reducing the security of the target elite. Both credibility and cost are perceptions, and therefore are dynamic, depending on information as much as they depend on facts.

Threat *credibility* is the first necessary feature of the level of threat, and it depends on the actors and the ideas involved. Individuals and organization engaged with an issue can determine whether it is seen to be credible or not.145 When the advocacy comes from a strong, cohesive, coordinated community of threat-holders with consistent external (donor) support and respected leadership, it can be thought to be credible.

External support is important, because without it, the web of actors is unlikely to be above cooptation into the regime’s patronage network. Indeed, it is possible for external

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144 See Walker 1974: 112.
145 For an example on how actors influence issue importance in a different sector of health, see generally Shiffman and Smith 2007.
support to the anti-impunity community to be so high as to affect regime security. For example, if the anti-impunity community links with a key trading or donor partner, this can significantly reduce the reach of the patronage of the regime elite, transforming transitional justice from an external issue about rules to an internal issue about the power of the elites. If the anti-impunity community is transmitting the views of powerful members of the international system, such as the UN Security Council, or when the Court itself forms part of a threat through statements of its prosecutor, the threat is also perceived to be more credible. This is because the ICC is an intervening power that brings about, whether it intends to or not, a change in the balance of power (including moral power) by favouring the confrontational strategies of those elites who choose the discourse of international justice.

The identity of threat-holders changes with time, as does their credibility, but in general, more externally connected threat-holders are more credible, and, depending on their alliances, they can create incentives for different factions of the elite to defect from supporting regime elites.

When threat-holders demand specific outcomes from target elites, they effectively wrest interpretation out of the hands of the target elite, and increase the credibility of their threat. Why? As demonstrated by the literature on acculturation, over the years, it could be argued that elites have learned from the international community that it was process that mattered, and that elites, without undergoing any fundamental changes, could go through the motions of accountability. The ability to pass window-dressing measures off as actual reform has lowered any external requirements for policy change. For transitional justice, adherence to anti-impunity rules could mean the set up of complementary transitional justice mechanisms that are designed to get around the requirements of international criminal law, or
the creation of institutions intended to fail. Cooperation with established courts is a continuously negotiated space, and what appears to be cooperation in one instance can change to non-cooperation in the next, or, with further information, it can seem to be self-serving and against the very principles that cooperation is intended to support. Given this background, flexible demands are less threatening than inflexible ones, as the former are fungible and can be transformed into a resource by the target elite. It is for this reason that even the demands of “complementarity” from the anti-impunity community are non-threatening; before the issue of an arrest warrant from the ICC or a summons to appear, there exists no specific criteria of what makes a domestic legal process meet the complementarity threshold, which means targeted regime elites have immense flexibility to shape a policy response.\(^{146}\)

History also matters to threat credibility. A threat is credible if it is unpredictable and elites therefore have no response routines. If a present threat fits an old pattern, as the literature on acculturation notes, regime elites will trigger stock responses. If a new threat (or framing of an old threat) emanates from old threat-holders and does not follow previous patters, it may be considered to be a bluff, and therefore not considered credible. Threats from unknown actors will be more credible. For instance, if violence was previously said by NGOs to require reconciliation, their subsequent demand of prosecution for violence will be less credible. This also applies to the ICC, a key actor in the anti-impunity community: previous patterns of non-prosecution of regime elites of countries in which the Court has cases will mean that any future rhetorical threats to do otherwise will not be perceived as credible, until actual practice changes.

\(^{146}\) Key informant 4, Interview, Kampala, November 9, 2009. After the issue of a warrant, a domestic process is supposed to examine the same perpetrator for the same crime in order to be seen to satisfy complementarity.
Cost is another feature that is necessary for a threat to be considered high. A threat is costly if it plausibly targets key nodes of the regime elite or its patronage network (those affecting the power and survival of the elite as opposed to those affecting the public relations and good global citizenship) functions of the target elite. Demands for the prosecution of a head of state are more threatening to the target elite than demands for the prosecution of lower-level officials. Outside the regime itself, some members of its patronage network are more essential than others, and their targeting can be seen as a high threat. However, cost is closely related to credibility: a high-cost move to examine abuses by a head of state can actually constitute a low threat if the target elites are confident that processes can be established that will absolve the targeted person of responsibility, or that the threat is politically implausible. This is the reason why demand by the anti-impunity community for the prosecution of dominant members of the international system—say, Tony Blair, or British soldiers—do not become high threats, because politics makes the demand implausible, and the domestic judicial systems exist that can be relied upon to counter any threat.

Transitional justice policies have multiple audiences, and threats are likely to be costlier for regime elites whose audiences have more divergent needs. For example, a policy with regard to the ICC would have at least five audiences whose needs do not co-vary: 1) the direct victims who are keen to see anti-impunity activity lead to tangible consequences, and who have come to expect that transitional justice will offer more than prosecutions; 2) target-state elites and their patronage network who wish to service of their own interests; 3) the permanent members of the Security Council who want the Court to be part of international-conflict resolution tools; 4) the transnational anti-impunity community who wish to see the
Court simultaneously implement the perfect rules and lead to the perfect outcomes including prevention, deterrence and democratization; and 5) international law itself, whose supporters want the creation of strong precedents, even when such precedents go against the interests of the first three audiences. This idea is best explained by George Tsebelis’ notion of “nested games.”

According to Tsebelis, nested games occur in a context where actors are involved in a network of arenas over and above the “principle arena” (that which is under observation), and an observer may not always know about the different arenas in which the observed party is engaged (or the rules of those arenas). Thus, what sometimes appears to be a “sub-optimal” or self-defeating choice by actors might simply result from a “disagreement between actor and observer” where the observers have incomplete information about the arenas and the possible range of choices decision-makers face. The more divergent the needs of the different audiences, the more likely that privileging of some arenas in a policy response will exact unintended costs in others. Insecure regimes have more divergent audiences than secure ones.

The cost of a threat is also affected by its form. In a world where external pressure is frequently unreliable, shaming or reporting countries that breach their obligations in transitional justice (including their treaty obligations to the Rome Statute) does not consistently trigger a significant negative response from other members of the international system. Unless the threat is accompanied by either credible actions from the ICC in the form of an opening of investigation or sanctions from the international community, their cost is

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147 This is not to suggest that this research considers that all action is calculated or that actors will know in the present what they will want in the future and therefore make choices on that basis, these being some of the failures of rationalist views. See March and Olsen 1989: 6. Rather, within the limits of incomplete information, actors seek their interests, which usually are short-term and focused on access to power.

148 While Tsebelis explores this for democracies, this research contends that nested games are even more dominant in non-democracies, or poorly institutionalized democracies. Tsebelis 1990: 5.

149 Tsebelis 1990: 7.
easily discounted.

In general, the perception of threat is shaped by information. Weak institutionalization means that different actors operate from a different information base. Informational asymmetries can lead to the assumption of a higher credibility and cost of threats than is warranted. Through the better management of information that is achieved with greater control over patronage networks, secure regimes are more able to mobilize responses that reduce external threats, while insecure regimes are unlikely to be able to manage their responses in the same manner. However, all regimes are affected by history and unexpected developments, as will be discussed below.

3. History

History creates institutions and leaves its imprint within them, thus making institutions the “carriers of history.” If institutions in turn become “the rules of the game in a society…the humanly devised constraints that shape human interaction,” then history offers an understanding of the origins of the vocabulary actors use to make present choices and threats; the symbols that resonate and the ones that do not; and the identities that actors wear and the arenas within which they wear them. History defines the international normative space as demonstrated by the literature on persuasion and acculturation, and provides the present policy windows (violence, elections) in which the games of choosing transitional justice policy are played. More importantly, history is the acknowledgement of the importance of path dependence. It is an understanding where future decisions flow from and are affected by past decisions, and where past decisions, including critical junctures or “accidents of history,” can be built upon (including in unintended directions) by other interest-maximizing

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150 David 1994.
151 North 1990: 3.
elites.

Since African elites operate in an institution-poor context, would that mean that such elites are not bound by history in their pursuit of self-interest? This research contends that this is not so. In the absence of formal institutions acting as repositories of these past decisions, NGOs can play this role, drawing attention (sometimes selectively, depending on their interests) to what government elites have committed to, and demanding that action remain consistent or be changed. While all elites are affected by history, it follows that elites with a denser network of NGOs and other counter-elites are more constrained by history than those with fewer network connections.

For regime security, history renders intelligible the nature of the parameters of security and insecurity: What evidence do actors have for their confidence in a system to deliver in their image? How much dominance do they have over networks of patronage, and how stable are the vehicles for contesting power? This background affects the manner in which regime elites can engage with the threat-holders in publicity stunts about good international statesmanship without the worry that such engagement will escape their short-term control and affect their survival.

For the threat level, history matters in three ways. First, it affects the credibility of the threat-holders by clarifying their identity and imbuing them with a context that may include previous relationships with regime elites. Second, it affects the credibility of the ideas of the threat itself and how the threat is framed, making intelligible the vocabulary and symbols that are used and determining how they are received by target elites. Third, it affects how target elites perceive cost. More importantly, history affects the availability of information, which is how both the credibility and the cost of a threat is assessed.
Recognizing the importance of history also means acknowledging that the unexpected can happen, which can create critical junctures and provide different policy options and pathways for political elites. Within a context where the initial selection of a policy is discursive, and where those who can benefit from mobilizing the discourse of transitional justice will do so even when they intend to subvert the principles behind the policy choice, contingency is particularly useful because it suggests that the policy choices that are made, even spuriously, can escape the hands of their creators. Outcomes are not preordained. In a context of dynamic relationships among elites with impermanent alliances, what is initially made as an interest-maximizing decision at one point can serve to constrain future choices, including in ways that would have been undesired or unanticipated.

In examining judicial statecraft, this research will take history as a cross-cutting theme in the description of the institutional context. That policy choices appear to be on a 2x2 matrix of security and threat level is not a relegation of history, but a remark on the ways its central role can change all other factors. While each of the empirical chapters will be different, the tracing of the process through which regime elites interact with threats to choose different policy options will be followed by examining the microprocesses that are relevant to security, threat level, and history.

4. Policy Choices under Judicial Statecraft

Putting all of these factors together means that the choice of transitional justice policy is dynamic.

If the anti-impunity community chooses to make high-threat demands of a secure regime, which, by definition, dominates the political patronage networks, and where the government elites can change the rules of transitional justice to suit their interests and control
the outcomes, regime elites are likely to reject the demands. Secure regimes have little incentive to compromise their authority and control. In the age of complementarity, these regimes can do what they want domestically (especially before the issue of an arrest warrant by the ICC), and no amount of bargaining can change that. Poor institutionalization, coupled with the absence of a thick network of local NGOs and counter-elites (or the demobilization of NGOs when they exist because of their relationship to government patronage), means that regime elites are likely to reject the ICC and choose domestic processes they can control. In these cases, however, the interpretation of transitional justice is likely to be entirely self-serving, and can be quite different from the interpretation intended by the anti-impunity community. Thus, if it suits regime priorities, secure elites can appropriate transitional justice processes and implement policies in the image of the regime. Secure elites can also reject specific transitional justice policies. However, the rejection is strategic because secure regimes have control over the internal narrative, and they can choreograph a performance of transitional justice for an external audience, while maintaining a low risk that different internal audiences will misunderstand the performance for real intent.

If the anti-impunity community make such high-threat demands of an insecure regime, the threatened regime elites are likely to reject prosecutions or any other measures that risk affecting critical nodes in the patronage networks. If they choose anything, it will be a minimalist process such as truth-seeking (as a highly discounted threat that amounts to little in an electoral lifespan). The rejection of insecure elites is different from the rejection of secure elites. It is likely to be more aggressive and categorical, for insecure regime elites face a more acute multiple-arena problem and understand that messages can be given various readings by their external, patronage, and counter-elite audiences. If there is a likelihood that

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152 This is assuming that regime elites care about maintaining international appearances.
their current rivals will be vanquished, some regime elite factions will ally with the international community and support maximalist demands against other regime elites. Because the nature of regime insecurity is such that elites will be unable to craft a domestic institution that at once satisfies all internal elite factions, and the demanding anti-impunity community while keeping their clients out of harm’s way, their policy choices are more likely to be discredited as not genuine, resulting in a political impasse.\footnote{“Genuine” is a term used in the Rome Statute and not interpreted any further. It is generally assumed to mean that the process is not designed to shield the target person from responsibility.} While the resulting stalemate will make a strong case for international action, it is bad for long-term domestic institutional development.

Conversely, if the anti-impunity community chooses to make low-threat demands of a secure regime—for example, through diplomacy that reaches out to the target government and makes it understand that they have something to gain—they are likely to prompt a government to support international prosecutions. The government will support policies that serve its political interests. While this may be the easiest route for the anti-impunity community to get ICC cases underway, since they can rely on the secure regime to execute its promises where it stands to gain, it is bad for the long-term institutionalization of transitional justice for at least three reasons. First, secure government elites, being in a comfortable equilibrium, at least need to receive a guarantee that its clients will not be targeted by the processes, and they will probably need to gain something in exchange for disturbing the status quo.\footnote{Because regime security is scalar, it is always possible that secure governments could gain something by targeting members of the counter-elite patronage network. But it is also possible for the status quo to be sustainable, in which case it may be that abandoning it must promise something in return.} Such promises use up the political capital of the members of the international community who makes them and reduces the credibility of any future threat they may try to make on the government. Second, it is reasonable to imagine that secure
governments that receive low-threat demands are likely to prefer externalizing the political and financial costs of transitional justice, because there may not be obvious incentives to change the status quo and incur the cost of a domestic process. Such a preference means that the elites may not wish to support complementary domestic institutions when they know that an external process can take the blame and the bills, while the government only receives the benefits. Third, the government’s security in making any justification it wishes for its policy choice can affect the institutional legitimacy of transitional justice more broadly. This is due to the fact that norms exist only in so far as states respect and practice them. Secure regimes, however, can draw on norms with justifications that suit them, rather than drawing on the institutional justifications envisioned by the international community.\[155\] The net effect of making a low-threat demand of secure regime elites is that international prosecution is likely to receive support, domestic prosecution is unlikely to receive support (unless this is what is demanded), and a cost is paid by the anti-impunity community in the form of both a lowered credibility for transitional justice and the sacrifice of domestic institutions.

If the low-threat demands are made of insecure regime elites, they are most effective. Because insecure regime elites cannot impose their own understanding and definitions on transitional justice, they have incentives to affirm the standards that are propounded by the transnational norm promoters, thus appeasing all the parties that enter the discussion and affirming the norms as they were intended by the norm creators. Insecure regimes are more open to external legitimating frameworks, which can cast regime elites in a positive light with reference to their opponents, and offer an avenue for exacting a cost from the loser in the power contest (which regime elites have no intention of losing). With no cost to the regime elites in the present electoral season (and with a highly discounted future cost of

\[155\] On legitimacy of norms, see Hurd 2007: 197.
prosecutions, where such a cost will only emerge in the event regime elites lose power), the establishment of transitional justice simply increases the chances that potential rivals can be eliminated from the political game. Regime elites will support the ICC with the right discursive justification. They are likely to support domestic prosecution if required because such processes, which use the name of impartial institutions and the rule of law, can be used to demonstrate the authority and control of ruling elites against others. The regimes can also support a truth-seeking process if it is prompted, embodying whatever mandate the anti-impunity community wants it to hold, as long as it does not threaten key nodes of the patronage network of regime elites. Thus, in this context of conflict, where the government elites are seeking to vanquish their opponents, the low-threat transitional justice demands allow for that to happen, and transitional justice thrives. In the same context, since regime elites adopt the language that is available in the normative environment, the institution of transitional justice is legitimated more broadly.
5. Implications on Transitional Justice

Judicial statecraft can affect the legitimacy of transitional justice itself. Since norms like complementarity only exist within, rather than outside, state practice, secure regime elites present the most significant legitimacy crises to the regime of transitional justice, and to the legitimacy of the ICC, in three ways. First, the ability secure regimes have to reinterpret any
transitional justice institution in their image—whether they are facing high or low threats of transitional justice—calls into question whether anti-impunity norms can be taken for granted as solid norms.\textsuperscript{156} Second, secure regime elites, with little opposition, can appropriate the discourse of transitional justice in a manner that alienates the transitional justice mechanisms from their natural consent-givers, the victims. Finally, secure elites can affect transitional justice by questioning its foundational assumptions, transforming the understanding of (and practice around) the norm. It follows that it is important for transitional justice actors to understand the domestic regime dynamics of countries where they intervene so that they might understand the nature of judicial statecraft rather than pleading for apolitical action. Understanding the country’s political context within which the transitional justice dialogue enters allows norm promoters to have a clear sense about the kind of elite behaviour that is likely, and whether such behaviour will contribute to the long-term goals of the anti-impunity community.

An awareness about judicial statecraft should therefore enable threat-holders, as the key agents of transitional justice, to engage in smart justice. What would this entail? What the strand of history described earlier in this chapter demonstrated is why transitional justice is not considered to be an institution, much less one that is non-negotiable and where no “other alternative, allowed by the rules of procedure, is preferred by all the individuals, structural units, and coalitions that possess distinctive veto or voting power.”\textsuperscript{157} Transitional justice seeks to find institutional stability in a context that is populated with agents (including the ICC Prosecutor and national elites) who have “imperfect foresight of future

\textsuperscript{156} See, generally, Hurd 2007.
\textsuperscript{157} Shepsle 1989: 137.
contingencies;" other agents with incomplete information about the ICC Prosecutor’s discretion and the preferences of other countries and actors in the international system; and a deeply flawed and unequal international system where everything, including a Court seeking to establish its legitimacy as an apolitical organization, becomes fodder for power games. In order to become a “renegotiation proof” institution, transitional justice, within itself, should provide a space for possible changes. This would be similar to the way a constitution provides for the possibilities of amendments. Without such a space, transitional justice is framed as an absolute, and its contradictions will continue to inspire policies that justify the support and rejection of transitional justice, which will reduce the extent to which transitional justice can institutionalize.

Providing space for transitional justice to change requires a consideration of the ultimate objectives of transitional justice. If transitional justice is a means to an end, where what ultimately matters is more national prosecutions, where the logic of entrapment is critical for long-term institutional development, and where deterrence is thought to flow from the existence of national processes that can address human rights abuses, then the anti-impunity community would ensure the widest adoption of prosecutions by coupling their advocacy with a lowering of the threats of transitional justice in insecure regimes, and increasing them in secure regimes. In these cases, anti-impunity supporters must be aware that the only reasonable outcome to measure would be the number of prosecutions, not other desirable consequences such as democracy and reconciliation, or the quality or motivation of the prosecutions.

158 Shesple 1989: 140.
159 Shesple 1989: 141-143.
160 Ibid.
On the other hand, if the transitional justice community approaches transitional justice as an end in itself—a demonstration of the highest procedural standards of law and where deterrence is thought to emerge from the exacting unpredictability of the Court regardless of externalities (or if the desired outcome is for the ICC itself to prosecute, despite the complementarity discourse)—then anti-impunity supporters should increase the threats of transitional justice made in insecure regimes, and more overtly characterize the winners and losers. Increasing the threat increases conflict, and, because prosecutions are a zero-sum game, actors will seek to use transitional justice to vanquish their counterparts. This, however, will be the least fruitful avenue to ensure many prosecutions and a vibrant, transitional-justice affirming debate at the national level.

Put differently, the anti-impunity community should choose between a politically conscious approach that is focused on outcomes (where second-best outcomes can be acceptable in the first instance with a view to the long-run development of institutions), or an apolitical approach that is focused on propagating a particular vision of institutions that meet international standards (even if the chances of elite rejection are higher and the likelihood of domestic institutions is lower) and act consistently with it. In the former, low-threat approach, the anti-impunity community, in an effort to be a reliable political actor, would offer guarantees, tacit or otherwise, to elites, and make prosecutorial intentions known. In the second, high-threat approach, the Court and its supporters become part of a strategy to increase (or, where it does not exist, induce a degree of) regime insecurity by offering incentives for defection to some factions of the elite. However, because this strategy relies on the credibility of the threat-holders, they cannot offer national elites any guarantees and must be unpredictable, so that only true believers will embrace it. While this will be a good
strategy in secure regimes (that most likely will implement complementarity in their image as a result of this kind of pressure), it will create conditions that facilitate international action in insecure regimes. Smart justice entails linking objectives with strategies deployed to meet them.

6. Scholarship Implications

This research makes a number of contributions to the literature. First, it contributes to the literature of transitional justice, which at present has not engaged widely with the literature on African states, even while, incidentally, these constitute the vast majority of states implementing transitional justice measures in the period of this research. Using two natural experiments and taking into account the nature of politics in the African state, it contributes further to our understanding of the conditions under which different transitional justice policies are likely. The findings of the research can be tested further in other cases.

Second, it contributes a perspective to the international relations literature on the ways in which international institutions are domesticated by countries of the Global South. Many international institutions are created in the democratic North and adopted in the illiberal South under the assumption that actors relate to them in the same way. This research brings a new perspective to the literature that assumes that weaker states are a site for the propagation of already established regimes, rather than sites where such regimes either receive consent and prosper, or are challenged, rejected, or distorted.\(^{161}\) By examining the actions of elites engaging in judicial statecraft, this research begins to explore the role peripheral states play in shaping transitional justice itself: they are as fertile and vibrant a location for norm contestation as are the transnational activist spaces.

\(^{161}\) For a general discussion on norms in the global south, see Acharya 2011.
Third, the research adds a new element to the literature on African states by providing a further example of how the agency of African elites matters. As Achile Mbembe points out, from much of the existing literature, where much of African politics is considered irrational, “we feel we know early everything that African states, societies and economies are not, we still know absolutely nothing about what they actually are.” Through this research, we see how African elites act in rational, if constrained, ways, in order to maintain their hold on power while paying attention to rules in the international system.

Finally, the research offers additional reflections to those who think about the anti-impunity community as a social movement, suggesting ways that justice can be smarter and their advocacy more effective and politically aware.

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162 Mbembé 2001: 8.
This chapter considers the manner in which insecure regime elites in Kenya embraced both truth seeking and prosecutions. First, it gives a historical overview of the nature of regime insecurity that occurred when power in the country changed from the Kenya African National Union (KANU), the party that had ruled the country since its independence in 1963, to the National Rainbow Coalition (NARC) under a new President Mwai Kibaki. Second, it describes the emergence of the transitional justice discourse in Kenya after an outbreak of violence in 2007-08, and the manner in which regime elites embraced both truth-seeking and prosecutions, perceiving them to be low-threat transitional justice policies. This choice was enabled by the history of relations between regime elites and NGOs where, as a result of a the failure to create a TJRC following the 2002 elections, regime elites viewed the anti-impunity community as a group that was unable to craft a credible threat.\(^1\) Finally, the chapter describes how, immediately following the peace accord that was negotiated in 2008 to end the violence, Kibaki’s Party of National Unity (PNU) supported prosecutions against opposition “youths” as a way to continue battles that were left unresolved by the controversial electoral contest. This action discredited future calls for reconciliation and truth-seeking, setting the stage for future transitional justice policy choices, including action by the ICC.

\(^1\) When this research refers to NGOs, it means “human rights NGOs.” When a different type of NGO (such as “peace groups” is referenced, the appropriate prefix will be added.
I. Anatomy of Regime Security: A Brief History of Violence, Political Change, and Accountability

On 23 April 2003, only months into the reign of the new NARC government, the new Minister of Justice, Kiraitu Murungi, appointed a Task Force on the Establishment of a TJRC.\(^2\) Established in response to the advocacy efforts of leading human rights activists, the Task Force was led by Makau Mutua, a professor of Law at the State University of New York in Buffalo and the chairman of the Kenya Human Rights Commission (KHRC), Kenya’s most influential NGO. Given the weakness of KANU and the strength of the ties between NARC and leading NGO elites, the Task Force should have led to the creation of a TJRC by 2004, which in turn should have disempowered KANU as planned, thus ushering in a new age of government by reformers. It should have led to a regime with enough authority and control to set the agenda as well as a majority to see it through. Yet this was not to be. Instead, the NARC coalition exacerbated an era of regime insecurity that had begun with the introduction of multi-party elections in 1991, rejected the report of the Task Force, and set the stage for the eventual confirmation of two Kenyan cases for trial before the ICC. As a background to understanding how transitional justice choices were made in this particular context, this section outlines the roots of regime instability and its violent consequences.

1. Routines of Insecure Regimes: Unstable Vehicles for Contesting Power

Multi-party politics in Kenya is characterized by a constant cycle of confrontation and compromise. In terms of the confrontation dynamic, there are rapidly shifting political alliances, an absence of mature political parties, and voting patterns that are characterized by ethnic blocks. This means that political alliances, often rapidly put together for the purposes

\(^2\) As will be explained later, this first proposed TJRC was never established. Later, a second TJRC originated from the Serena process, was established in 2008. See Bosire 2012.
of propelling individuals to power under the loose banner of a party, rapidly atomize into their constituent self-interested ethnic components whenever it becomes expedient. With each new issue that may arise, erstwhile political allies can antagonize each other as everyone seeks advantages for themselves and their immediate constituency. The winners consolidate power, marginalize losers, and bring the fruits of victory back to their ethnic home base. New alliances are forged, and patronage networks are re-arranged. As the next cycle of elections nears, the elites return once again to forming alliances and consolidating power. Former mortal enemies meet and craft alliances that will allow them to be meaningful players on the political stage. At the same time, powerful ethnic blocks negotiate important kickbacks in the form of ministries and other appointments. In exchange for votes, past sins are forgiven, and the prize of power becomes the key motivator for action. While these cycles of confrontation and compromise may be characteristic of many states without well-developed political parties, in Kenya, they have become acute during the multi-party era. They have also grown so close to one another as to become constant. The result has been chronic regime insecurity.

This dynamic was triggered by the introduction of multi-party politics in 1991. Multi-party politics ruptured decades of post-independence domination by KANU. Emerging counter elites shaped their political parties as ethnic vehicles for contesting power. In the elections of both 1991 and 1997, opposition parties won more aggregate votes than the KANU government. They were too fractured, however, to oust KANU and President Moi.

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3 For a historic view of the workings of the party system in Kenya, see, for example, Cheeseman 2006.
4 For more on patronage politics, see, for example, Chabal and Daloz 1999. For the ethnic nature of the struggle for state power, see Lonsdale 1994; Berman 1998. Also Orvis 2001.
5 For an overview of the constant changes in political alliances, see, for example, Elischer 2008.
According to one report, there were, at one point, 221 parties set to contest the 2002 elections. It is worth noting that during the early multi-party period, NGOs had been working seamlessly with a range of independent experts, public intellectuals, media commentators and editors, public interest lawyers, and the opposition. As a result, the line between the political opposition and NGOs seemed to be non-existent. It is also worth noting that a discussion about NGOs in Kenya is frequently a discussion about individual agents who create vehicles through which to pursue their agendas. For example, the KHRC was formed by individuals like Makau Mutua and Kiraitu Murungi (the opposition movement’s shadow attorney general who later became the Minister of Justice under Kibaki), who collaborated with Maina Kiai (later the first chairman of the government’s Kenya National Commission on Human Rights under NARC) and Mutua to create the Task Force.

In order to address the fractured political landscape, NGOs crafted a multi-ethnic coalition, the National Alliance for Change (NAC), whose members committed to putting forward a single political candidate. They also made a commitment that if the single candidate won, constitutional reform would be undertaken upon his taking office. NAC was led by Willy Mutungu, a civil society luminary and, at the time, the executive director of the KHRC. NAC later transformed into the National Alliance Party of Kenya (NAK), a political coalition headed by Mwai Kibaki, a former KANU vice-president. On 22 October 2002, in order to further increase its chances of ousting Moi from power, NAK linked with the voting blocs under Raila Odinga by signing a Memorandum of Understanding (MOU) with

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7 Home Office 2002: para. 3.4.
8 For some of the cleavages within NGOs, see Murunga and Nasong’o 2006.
Odinga’s Liberal Democratic Party (LDP). The NAK-LDP coalition, under the leadership of Kibaki, was renamed the National Rainbow Coalition of Kenya (NARC). Effectively, NARC became a coalition of everyone but KANU, a move that would have made holding the KANU regime accountable through transitional justice measures an easy process.\textsuperscript{11} The new party received strong NGO support, including the first-ever formal endorsement of a political party from the KHRC, through its chairman, Makau Mutua.\textsuperscript{12}

NARC succeeded in taking power from KANU in the 2002 election, and the succession saw many progressive actors from NGOs transition into the government. As a vehicle for maintaining power, however, NARC was inherently insecure. During this time, fragile coalitions were the order of Kenyan politics. The personalized nature of political parties (and the fact that political parties were only formalities, as Kenyans routinely voted for ethnic leaders and not along party lines) meant that alliances shifted as rapidly as promises of personal political gain could be made. For instance, only months before Odinga and the LDP joined NAK to form NARC, Odinga had merged his National Democratic Party (NDP) with KANU. This was done in anticipation of Odinga stepping into the shoes of Moi as the head of KANU once Moi retired due to constitutional demands. When Moi chose Uhuru Kenyatta as his successor instead, Odinga led an exodus of KANU politicians from KANU to the LDP, and later into the NARC coalition.

NARC’s instability manifested itself immediately following the 2002 election. The NARC coalition was held together by the pre-election MOU, which had been signed by the NAK of Kibaki and the LDP of Odinga. Among other things, the MOU stipulated that once NARC won the elections, Odinga would receive the position of Prime Minister, and other

\textsuperscript{11} Thanks to Adrienne le Bas for this point.
\textsuperscript{12} Mutua 2008: 83.
ethnic leaders within NARC, who were affiliated with Odinga, would receive prominent cabinet positions. Kibaki, however, breached the power-sharing terms immediately upon taking office, which effectively factionalised NARC into its constituent parties.

At this time, the pre-election promises of constitutional reform shifted to the centre of the political struggle. In April 2003, a National Constitutional Conference opened, and the Odinga faction of NARC campaigned that the constitution should include an office of a strong Prime Minister, in accordance with the breached MOU. The constitution, then, would be the vehicle through which the broken promise would be fulfilled. The Kibaki government rejected the suggestion, and advocated instead to keep a strong presidency.\(^\text{13}\)

Of critical importance was the fact that, with the death of the coalition and the focus on the constitution, the reform agenda that had been championed by NGO elites—including transitional justice—came to an end. This was important, because it would later shape how the anti-impunity community formulated the transitional justice threat in Kenya, as well as how regime elites understood the cost and credibility of transitional justice. As will be explained later in this chapter, while both Kibaki and Murungi had agreed to a truth-seeking process before they came into power, such a process now appeared to be too much to contemplate for the coalition of interests that had emerged around the constitution battles. NARC elites rejected the recommendations of Task Force on the TJRC as a concession to the KANU elites who NARC now had to embrace in order to have a fighting chance in the 2005 constitutional referendum. As Mutua explained, “with the constitutional review process, there was a political pact that was struck. Kibaki was trying to fend off Odinga, Odinga was

\(^\text{13}\) Yash Ghai, Interview, Nairobi, October 23, 2009.
trying to fend off Kibaki, that was the process in which they sold us [the Task Force]...to protect KANU.”

If the 2002 election demonstrated the necessity of coalitions in the quest for power, the 2005 constitutional referendum suggested that principles and past rivalries could not stand in the way of accessing power. As President Kibaki and Raila Odinga courted and allied with many of their previous rivals in KANU in the bitter contest for constitutional reform, patronage networks were fractured and reformed. Ultimately, Odinga won the referendum through a multi-ethnic vehicle whose composition would impact the violence of 2007 in important ways. In turn, as the section below shows, the violence would usher in a new era of Kenyan politics, shutting the revolving door between regime elites and NGO elites, allowing the latter to unify and rediscover their common purpose in denouncing state despotism.

2. Institutionalising Regime Insecurity: Violence as a Critical Juncture

The 2007 elections pitted Odinga’s Orange Democratic Party (ODM) against the Party for National Unity (PNU), under incumbent president Kibaki. Both parties contained elements of the former KANU regime. For instance, Uhuru Kenyatta, who had been appointed by Moi to lead KANU (and on whose account, Odinga left KANU and joined NARC), was now in the PNU with Kibaki. William Ruto, who had supported Kenyatta against Odinga during Odinga’s KANU period, was now a key supporter of the ODM. The election campaign was ethnically charged, pitting the PNU, a largely Kikuyu ethnic party, against the ODM, which

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was thought to present all the other non-Kikuyu ethnicities, a so-called “41 against 1” strategy.15

The violence after the 2007 election stemmed, in part, from the pre-election strategies that had been undertaken in the existential fight to control the state. While the PNU appeared to have the advantage of an incumbent with the state apparatus on their side, the ODM had to appeal to at least two different types of voters. The first group was the anti-Kibaki progressive voters, including many NGOs that had been marginalized by their erstwhile allies in the Kibaki government when NARC courted KANU ahead of the constitutional referendum. The second group was the former KANU radicalized fringe that had been kicked out of power in the 2002 election and was looking to regain it.

In order to appeal to the first group, the ODM hired electoral consultants to differentiate its message from the PNU’s, and to appeal to the values of the progressives as much as they could.16 Many progressive voters were disappointed by the fact that NARC, under Kibaki, had turned out to be indistinguishable from the KANU government it had replaced. Furthermore, NARC had led a flawed and ultimately inconclusive constitutional reform process, which had created deep ethnic divisions within the country. From the perspective of the agenda-setting NGO elites in this group, then, the years of the first Kibaki regime had been wasted ones. This was why many NGOs supported a change, which led to their support of the ODM and Odinga.17 This meant that they were also viewed as a group

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15 Of Kenya’s 42 ethnic groups, 41 were to gang up against the Kikuyu. For an example of the anti-Kikuyu strategy, see, for example, Republic of Kenya 2008b: 69–70.
16 Dismas Mokua, Interview, Nairobi, October 19, 2009.
17 Gladwell Otieno, Interview, Nairobi, December 2, 2009; Muthoni Wanyeki, Interview, Nairobi, November 17, 2009.
opposing the PNU’s Kikuyu base, sympathizing instead with the ODM ethnic base, which was predominately Kalenjin and Luo.\textsuperscript{18}

Simpler messages were called for when appealing to the second group, the former KANU radicalized fringe. Odinga’s partnership with William Ruto, the leading politician from the Rift Valley province, delivered that vote. Ruto was a previous member of the KANU government who had challenged Moi’s leadership over the Kalenjin. Ruto campaigned on the platform of \textit{majimbo}, which was locally interpreted to mean that the ODM would restore land in the Rift Valley to the indigenous groups by removing the non-indigenous groups.\textsuperscript{19} This was a continuation of the Moi message that had prompted ethnic cleansing in the Rift Valley in 1992 and 1997. By cultivating these two fronts, the ODM was everything that the PNU was not, at once progressive and radically conservative.

As will be described in more detail later in the chapter, violence broke out in 2007 to protest what many saw as a stolen election. While election reports initially seemed to show Odinga’s ODM in the lead, the numbers for Kibaki and the PNU soon caught up and exceeded Odinga’s. On 30 December 2008, Kibaki was declared the winner by a narrow margin and he was immediately sworn in as president.\textsuperscript{20} With the declaration of victory, the second ODM constituency (the affiliates of William Ruto) engaged in violent mobilization.\textsuperscript{21} The violence was framed by the ODM as a spontaneous, understandable act by an angry public, a justified (albeit confrontational) process of seeking justice when the proper avenues for doing so, such as the judiciary, were perceived to be systematically biased.

\textsuperscript{18}For a dimension of ethnic politics, see Lynch 2008.
\textsuperscript{19}For more on land and violence, see Anderson and Lochery 2008. For the place of Ruto in Kalenjin politics, see Lynch 2008.
\textsuperscript{20}For more on the election, see Kenya National Commission on Human Rights 2008b; Throup 2008; Republic of Kenya 2008a; Cheeseman 2008.
\textsuperscript{21}For an overview of the violence based on data collected as the violence was going on, see Kenya National Commission on Human Rights 2008b.

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In the view of the PNU, however, the violence was organized to increase the likelihood of the ODM’s political survival by making the country “ungovernable.” In response, PNU’s party elites deployed policemen to affected areas, while a number of other PNU actors organized retaliatory violence against ODM co-ethnics and their sympathizers. When it was over, it was estimated that 1,000 people had been killed and over 300,000 people had been displaced.

The violence had two enduring effects on transitional justice choices. First, it resulted in the establishment of a highly insecure political arrangement between the ODM and the PNU. Former UN Secretary General Kofi Annan worked with a group called the Panel of Eminent African Personalities to launch a high-profile mediation process. He succeeded in brokering the National Accord between the PNU and the ODM on 28 February 2008. It was through this arrangement that Odinga became Prime Minister and Kibaki remained president in a government of national unity. The resulting arrangement institutionalized regime insecurity, because though the ODM had the preponderance of power in parliament—out of the 210 seats in parliament, the ODM had won 99 to the PNU’s 43—it was still a junior partner in the government. ODM was junior because, by the time ODM ministers were added to the cabinet, PNU ministers had already been given the lucrative ministries with more access to patronage opportunities. This unequal settlement kept tensions high and created constant incentives for non-cooperation between the two parties. The ODM constantly sought to renegotiate its position to gain more strength, which included forming an alliance with NGO elites specifically on issues of transitional justice.

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22 Martha Karua, Interview, Nairobi, January 12, 2011.
23 Ambassador Nana Apenteng, Interview, Nairobi, December 16, 2009.
Having secured the presidency, the PNU expected to be the agenda-setter within the coalition, the elites who “present ‘take it or leave it’ proposals” to others.\(^{24}\) Put differently, given the historic power of the presidency, the PNU expected, with or without ODM consent, to be able to bulldoze its way forward according to its own world-view. However, with the National Accord settlement, the ODM was now designated as a party whose consent was required in order for any policy changes to the status quo to take effect. The ODM was able to use their veto power to stymie PNU choices, including about transitional justice policies.\(^{25}\) This institutionalization of insecurity would become critical in making Kenya “unable and unwilling” to institute domestic processes to try the perpetrators of election-related violence, and hence trigger an intervention by the ICC, as the next chapter will show.

Most critically, for future transitional justice policies, the violence had a second, game-changing effect by transforming the human rights NGOs into threat-holders. This firmly established them outside the influence of political networks of patronage, and set the stage for them to make maximalist demands of governing elites, including demands of transitional justice. For the first time, the violence created boundaries between those elites who held political office and those who did not. It allowed the latter group to find their moral voice, as the next section will show. But how did this happen?

History is important here. Given that human rights NGOs and the remnants of the NARC opposition developed their identity together against the KANU regime,\(^{26}\) NARC’s victory in 2002 also meant that an NGO’s capacity for criticism was blunted in at least three ways. First, absent a common enemy in power, the NGOs fragmented. Some, even while they were unhappy with the Kibaki government’s reneging on reforms, were unwilling to

\(^{24}\) For more on veto players, see Tsebelis 2002.
\(^{25}\) Karuti Kanyinga, Interview, Nairobi, December 16, 2009.
\(^{26}\) Kanyinga 2009: 192.
work with the new opposition (their erstwhile enemy, KANU). Others were unwilling to
criticise their “friends” in the government due to ethnic, or other, reasons. The comfort level
between civil society and the government was such that “in some instances, the government
was seen as a civil society government, while in other [instances] civil society elites were
seen as government errand officers or government officials in waiting.”

Second, former pro-democracy advocates were now running ministries and bureaucracies, and were routinely
appropriating the language and approaches of civil society to justify self-serving decisions.
NGOs found themselves demobilized, discredited, and beaten at their own game. Besides, in
the early days, NARC could do no wrong in the public eye, so how could NGOs criticise
them?

Third, the new members of government, having once served in civil society
themselves, understood that the NGOs were not the principled group they wanted to present
themselves as being. Instead, they operated more like interest groups, seeking to undermine
the government in order to position themselves as a feasible alternative for the channelling of
donor resources. Government elites also understood that the NGOs did not have a popular
constituency, whatever impression they might have wished to make otherwise. Some
observers recall routine “open outbursts” from the government against civil society in the
NARC administration.

For these reasons, the ascent of former activists into the government
did not usher in an age of cooperation, but an age of tension, where many government
officials lacked respect for, and could easily dismiss, NGOs. In this context, the role that civil
society had come to play as a unified force that could name and shame state despotism was
diminished. NGO elites felt betrayed, and they were unable to recover their credibility over
the course of the first Kibaki administration.

29 Kanyinga 2009: 199.
The violence of 2008 compounded the historic feelings of betrayal among human rights NGOs. For the NGO elites who had been part of the democratization movement from the early days, their deepest disappointment was about the audacity of the political elite in rolling back institutional developments in democratization by refusing to concede electoral defeat. With the contested election, the Kibaki faction of NARC—now the PNU—seemed to have reneged on a tacit, yet foundational, elite contract that had been in place for the previous two decades. Kenyans had gained confidence in their institutions, and imagined that they could use their vote to defeat a government they disfavoured. Most notably, when KANU lost in 2002, even Moi allowed power to change hands to the opposition NARC coalition. The “stolen” elections of 2007 changed this. From this point forward, why would anyone leave power when they could instigate just enough chaos and precipitate a power-sharing agreement?

The bitterness of NGO elites against their erstwhile NARC allies was palpable. For instance, Maina Kiai reacted harshly against the brazen nature of this move against institutional development, stating that it was shocking “when you try and affect the vote in front of us! At least Moi used to steal the election at night. And we’d wake up and we are told, there is a result, Daniel Moi is the winner.” NGO elites expressed anger at the subversion of all the institutional processes that were ordinarily used to remedy complaints. The Electoral Commission of Kenya (ECK) could not address complaints, as it was seen as part of the “well orchestrated plan to ensure a pre-determined result.” Further, in the view of many activists, the courts were no longer seen as neutral arbiters of the conflict. The possibility that institutional developments could be rolled back, without consequence, by the

30 George Kegoro, Interview, Nairobi, November 16, 2009.
31 School of International Public Affairs (SIPA), Columbia University 2008.
Kibaki administration signaled the possibility of a resurgence of state despotism that they imagined belonged to another age. On their part, PNU was also outraged by the institutional setbacks of the conflict, due to the ODM taking the law into their own hands instead of going to the Courts.33

If the factors above created part of the tension between political and non-political (NGO) elites who had a longer historical engagement with democratization, what created a chasm between the political elites and the NGOs was the vulnerability of many newer NGO elites who had taken over the leadership of organizations in the era of multi-party politics. For many of these individuals, 2007 was the first time that they had personally encountered the naked brutality of the struggle for control of the Kenyan state. How did this happen? By the 2007 election, human rights had taken what Mutua calls an “us-and-them,” “parroting” quality, where NGO elites were disconnected from the people in whose name they legitimated their enterprise.34 The most prominent organizations were now led by younger professionals whose connection to the struggles for human rights was increasingly blunted by their “media driven visibility and a lifestyle to match.”35 These younger professionals were located in Nairobi. They conferenced in five-star hotels, and they were often separated from the violence and other human rights violations frequently visited upon their rural kinsfolk.36

Thus, when in the course of the violence these members of civil society were stopped at checkpoints and threatened by armed youth, many of them experienced, perhaps for the first time, the vulnerability of the ordinary, marginalized citizen in whose name they

33 Martha Karua, Interview, Nairobi, January 12, 2011.
34 Mutua 2009: Introduction.
36 In November and December 2009, the author was invited to four all-expenses paid meetings in five-star hotels.
legitimized their work. One NGO head of office said the violence was “too close, physically. It was in Naivasha.” In their proximity to the violence, NGO elites realised that in this life and death struggle for control of the state, the starkest distinction was the one between the “political elite” and everyone else in the country. The politicians did not and could not protect the interests of NGO elites.

In addition to creating a common identity between NGO elites and their erstwhile subjects, the violence was also thought to be exceptional in two other respects that would affect the ways in which transitional justice options would be understood. First, while ordinarily electoral violence had occurred in previous elections, the violence of 2007 seemed to escape the control of the state elites. In places like Nairobi, it was not clear if the violence could be contained in the informal settlements or whether it would spill over into the property of the elite—both those in and out of government—who lived in close proximity to the poor. Second, the performance of the violence was different from its earlier variants. It was more aggressive. It was also more visible in both the national and international media, much to the embarrassment of the internationally connected elites. Its widespread nature caught the attention of the social classes who would otherwise have ignored previous fights among rural, illiterate peoples that had been documented in distant commissions of inquiry. In the view of many NGO elites, this particular instance of violence demanded an exceptional response.

With the violence, identities that were formerly fluid—between NGO elites and government elites, with a revolving door between them—seemed, at least in the short term, to freeze. In its place was a new, confrontational, “us and them” tone in civil society

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37 George Kegoro, Interview, Nairobi, November 16, 2009.
38 Njonjo Mue, Interview, Nairobi, May 23, 2009.
39 See for example, Republic of Kenya 1999.
discourse. NGO elites described ODM and PNU as “two giant militia groups.” They advocated across the world for the punishment of political elites. As Maina Kiai, a leading human rights advocate, who was still employed by the government at this time, stated when distinguishing between political and non-political elites, “These guys are purely selfish…We have a callous group of political elite…we have to hit them where it hurts them, their families, and their wallets.” At last, for the first time since 2002, human rights NGOs found their moral voice, one that could demand international attention to those who had broken all the rules in order to capture power. As shown in the section below, NGO elites set about to dissociate themselves from the ruling elite and condemn them in the strongest terms, including by formulating high threats of transitional justice.

3. Mobilization against Impunity: The Genesis of High Threats

The story of the rise of the threat of transitional justice in Kenya is a story of political agents. It emerges largely from the interactions of a number of individuals with transnational reach, individuals whose connections gave them authority to direct choices at home and sow seeds for prosecutions abroad, including through the ICC. Who were the NGO elites, and what were their interests?

Makau Mutua has criticized the Kenyan NGO community as a context where “the high public visibility of a few vocal NGOs deceptively gives the impression of a well-established, ubiquitous and formidable human rights movement. Nothing could be further

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41 School of International Public Affairs (SIPA), Columbia University 2008.
42 For more on how domestic actors are able to influence domestic agendas by virtue of their transnational linkages, see Keck and Sikkink 1998.
from the truth.”

He outlines how these organizations have become legitimizing structures for individual agendas.

This weakness was apparent both during and after the violence, as a tight knit community of well-respected and well-connected human rights personalities worked closely together, shared strategies, and generally exuded a coherence that allowed them to shape preferences for others to follow. It is useful to point out, at this stage, that the outlining of these relationships is simply intended to be descriptive rather than carrying a value judgment. Many of these organizations and the individuals within them have been critical actors in pushing the boundaries for human rights in Kenya and they have earned their positions. Nonetheless, when the violence of 2008 created a stark distinction between the approaches of “human rights” and “peace” groups, a conflict emerged among NGO elites, where peace groups characterized the human rights colleagues as bullying figures, the “big boys” of human rights in Kenya, and a group who considered their endorsement essential for the success of any human rights agenda. Others have criticized the faith placed in NGO perspectives in general, stating, “civil society are not god, they are composed of individuals.”

While a full examination of the nature of the relationships between different Kenyan NGO actors is beyond the scope of this research, a quick examination of the key actors illustrates Mutua’s point of an individual-driven human rights community. More importantly, it helps to make intelligible how transitional justice threats emerged and changed. As

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44 See Mutua 2009. To be sure, during the author’s interviews, it seemed that many NGO actors likewise seemed to think that Kenya has a vibrant NGO sector. Author interviews, Nairobi.
45 Key Informant 7, Interview, Nairobi, January 11, 2011. Peace groups eventually supported the TJRC while human rights groups largely did not.
46 Martha Karua, Interview, Nairobi, January 12, 2011.
explained before, Mutua was himself one of the founders of the KHRC alongside Maina Kiai and Willy Mutunga. The three of them were prominent supporters of the 2003 Task Force in Kenya’s first experimentation with transitional justice. In 2007, Mutua was still the Chair of the KHRC and just as influential as he was in 2003. Mutua withdrew KHRC’s support from the 2008 TJRC (discussed later in this chapter) when Bethuel Kiplagat, a controversial ambassador, was placed at its head. Mutua urged the deputy chair of the TJRC, Betty Murungi, another KHRC board member, to resign from the TJRC. She did, which increased the crisis of confidence the TJRC was facing.

The election of 2002 saw Maina Kiai move into government in order to head the newly formed Kenya National Commission of Human Rights (KNCHR). This organization would later oversee the main documentation of human rights abuses that would eventually feed into the Waki Commission and foster the idea that the international criminal liability of politicians was possible. Maina’s associate, Anthony Kuria, persuaded Maina to document the human rights abuses as they were going on. Kuria brought in No Peace Without Justice (NPWJ) to provide technical support to the process before going to work on the Waki Commission as an assistant to Pascal Kambale, one of the Commission’s three commissioners. Kambale had also been a staff member of the Open Society Institute (OSI) when he was appointed a commissioner on the Waki Commission. In the meantime, Mugambi Kiai, Maina’s brother, who had drafted the Task Force report back in 2003, joined Open Society Institute East Africa (OSIEA). Once at the Waki Commission, Kambale consulted with Mugambi Kiai and Binaifer Nowrojee (the head of OSIEA) about his proposal that the Waki Commission should establish a Special Tribunal on Kenya with an ICC safeguard (this will be described in chapter four). Kambale also consulted Maina about
this recommendation. Binaifer’s father, Pheroze Nowrojee, was one of the lawyers consulted by the ODM about whether or not to worry about the ICC threat. Mutunga, who was the director of the KHRC when NARC came into power, subsequently took a job at the Ford Foundation, funding human rights activities of Kenyan NGOs, and he would later become Chief Justice. A second tier of newer organizations with major stakes in the human rights movement included the International Commission of Jurists (ICJ-Kenya) whose CEO, George Kegoro, was the Secretary of the Waki Commission. His engagement introduced the ICC demand into the Waki Commission (which will be described later) through the presentation of Alfred Nderitu. This category of institutions also included ICTJ’s Kenya office and Njonjo Mue, its head.

At the start of the violence, these elites established the Kenyans for Peace, Truth and Justice (KPTJ), the advocacy umbrella for the NGOs. They did so with a secretariat of Muthoni Wanyeki, the then-leader of KHRC, and Gladwell Otieno, another second-generation activist. KPTJ itself had a core group of NGO actors who shaped the agenda—those will be the focus of most of this research—and secondary or peripheral NGOs, who mostly followed the agenda, including interpreting it in a manner contradictory with the core group. The latter group will be more important in chapter four. It is also useful to note that KPTJ contained many disgruntled NGO elites who were against the PNU because their progressive reform and transitional justice agenda had been defanged since 2002. This does not mean to suggest that all of the NGO elites had a benign, anti-violence, and socially progressive agenda. In a country as diverse as Kenya, elites, and the NGOs on behalf of which they spoke, were bound to be diverse as well. Nonetheless, within this context,

47 The ODM was advised not to worry about the ICC. Key Informant 8, Interview, Nairobi, November 11, 2009.
48 For a view of the different roles of NGOs, see Ndegwa 1996. See also Chabal and Daloz 1999.
where the advocacy community no longer identified with the political class that they had
fully supported only five years previously, and where the politicians seemed to care little for
the fate of the country, the human rights elites severed their largely accommodating
approaches to the political class. Instead, they threw their lot in with the Kenyans, thinking of
themselves as much as victims of the politicians as the women and children who had been
displaced. They extricated themselves from the social fractures that were reflected in the
electoral battlefield, and made a point about their integrity.

Through KPTJ, NGO elites crafted an independent identity, which was critical for
their role as threat-holders. They also deployed the language of justice. In the first instance,
they spoke of electoral justice. They wanted to find the rightful winner of the elections, or,
failing that, put in place processes that would only create an interim coalition government.
Later, and more importantly, in the second instance, they spoke of prosecutions (finding
evidence and creating a process) for those most responsible. While they were accused of
supporting the ODM by PNU supporters, they criticised the ODM and the PNU in equal
measure.

For individuals like Maina who worked for the government (albeit in a new,
independent entity) the violence became an opportunity for them to demonstrate the
independence of their work. As someone with international credentials— for a while, Maina
was thought to be a possible African replacement for Louise Arbour on the UN High
Commission for Human Rights
\[49\]— he was keen to publicly pronounce his disapproval of and
distance from the government. Maina publicly severed his personal relationship with the
president:

\[49\] The government declined to put his name forward after the violence. Godfrey Musila, Interview, Nairobi,
January 14, 2011.
Kibaki and I come from the same village. And there is a sense in many parts of Kenya that if you come from the same village as the president you must support him unreservedly and sycophantically. I said I have a job to do and I must look at every side…And I got heckled by a crowd of about 5000 people.50

Maina emphasized an us-them framework between everyone else and the politicians. In the interim report of the KNCHR documenting the violence, Maina (and the commissioners under his leadership) stated, “we have allowed violence to become institutionalized as a political/electoral tactic, for which we will continue paying dearly until we make it costly for perpetrators of violence.”51 As Maina was considered the chief of strategy in KPTJ, as well as the “moving spirit” behind the human rights core group, this view of exacting a high cost for perpetrators of violence became central to the strategy of the NGO elites.52

During the violence, in a testimony before the US Congress in early February 2008, Maina noted the foundational nature of the violence, and how it could be turned into an opportunity for political regeneration:

In a deeply painful and costly manner—in terms of lives lost and destruction wrought—the crisis in Kenya has given the country a unique opportunity to move forward in a way that we have been advocating for the last 20 years. In a sense, Kenya is at its “civil war” moment that the US was at in 1861. Just as that war was pivotal in establishing and solidifying the democratic credentials of the US, this moment could lead Kenya to much greater heights if properly handled both domestically and internationally.53

While Maina did not indicate exactly how violence could be “properly handled,” this view reflected the mindset of the NGO elites. They needed to use the violence as an opportunity to enact “a political strategy to get the political class to regenerate itself,”

50 School of International Public Affairs (SIPA), Columbia University 2008.
52 As will be discussed later in chapter four, there was not a seamless orchestration where the strategies of Maina and the KPTJ core team were faithfully reflected in the actions of human rights actors on the periphery.
53 Maina Kiai 2008: para. 2. Author emphasis.
because without it, “nothing else can work for the [direct] victims” of the violence.\(^5\) Key elites in the human rights movement had agreed broadly that, as a nation, Kenya was a victim, and the urgency of the direct victims could be used to address the grievances of the victim-nation. In the long-run, the decision of framing the violence as a foundational moment and privileging the victim-nation over the direct victim of violence was critical in future transitional justice choices, as chapter four will show, after the Waki Commission changed the possibilities. In the short term, however, the principled, foundational-moment-seeking position of NGO elites served to exacerbate an already insecure arrangement within the coalition government. NGOs did not have to moderate their views; due to the fact that almost every politician was in the government, NGO elites were the opposition. They fashioned themselves as a principled player whose consent was required for policy creation or change.

Despite their unprecedented unity of purpose, the policies coming from NGO elites that demanded a shift in the status quo remained unthreatening to regime elites. As the next section shows, politicians gave in to all the transitional justice demands of NGO elites and supported policies for truth-seeking and prosecutions. This was due to the fact that the government perceived NGO elites as unable to fashion a credible, costly threat.

**II. The First Appropriation: Let Transitional Justice Bloom**

The first appropriation of transitional justice took place within the context of negotiating the settlement that followed the violence (the negotiation is commonly referred to as the “Serena” process, named after the Hotel where the talks were located). In a context where there was not one dominant elite faction that could impose its institutional preferences on others, the political elites in Serena accepted a range of institutions that was suggested to them. The proposals for transitional justice came from NGO elites.

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\(^5\) Mugambi Kiai, Interview, Nairobi, January 13, 2011.
While the research has so far spoken of “NGO elites” as a block, at this point it is useful to point out that the reality is more complicated. Kenyan NGOs see themselves as falling into at least two large groups: the “peace groups” and the “human rights groups.” They each have their own approach to and niche within the market of human rights ideas. They choose different approaches from the spectrum of transitional justice policies that are largely informed by their understanding of the causes of violence.

Within the peace groups, many elites have a reconciliation focus, and violence is often assumed to have a popular dimension. The agency of violence is diffuse, and its victimhood is widespread. In this view, transitional justice deters future violence by building robust institutions that are based on a common memory and history. If there is not a consensus around memory, then the root causes of the conflict and violations will remain unaddressed, which means violence can recur. Kenyan churches belong to the peace groups. Until the establishment of the TJRC in 2008 under the contested “ownership” of peace groups, these groups did not have a high-profile role on the human rights scene.

On the other hand, elites in the human rights groups have a legalistic, prosecutions-centered focus. For them, the agency of victimization of violence can be individualized, and violence originates from the absence of credible threats of punishment. Accountability is important, and it comes from documenting and reporting, naming and shaming perpetrators, calling international attention to domestic issues, and where possible, advocating for prosecution. In this scenario, the average person has no agency and is simply a pawn in a game that is controlled by power brokers. These groups include most of the dominant and

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55 James Gondi, Interview, Mombasa, November 19, 2009; Gladwell Otieno, Interview, Nairobi, December 2, 2009.
57 This is the entire justification of transitional justice. See, for example, Hayner 2001.
visible human rights actors described previously. Indeed, this research deals mostly with human rights groups (and uses the term “NGO elites” to describe elites from human rights NGOs, adding the appropriate qualifier when elites from peace groups are described). While these views have been simplified above for clarity, they nonetheless informed the approach of these two groups of NGOs.

During and after the 2007 violence in Kenya, both groups set out to advocate for peace and contribute to the prevention of future violations in a manner that fundamentally shaped the country’s future transitional justice choices. The peace groups called for reconciliation and co-existence. The human rights groups documented violations of human rights as they were going on. The demands of the peace groups were included in the National Accord in the form of the TJRC. This was the “mother” commission, the main commission that would look at historical antecedents of the violence and make recommendations for prosecutions, reparations, and institutional reform. The two demands of the human rights groups seeking justice (for elections and for human rights violations) were also included in the National Accord. The first was in the form of the Kriegler Commission, which was charged with making findings about who actually won the elections. The second was in the formation of an interim, “baby” commission. This was the Commission of Inquiry into Post-Election Violence (popularly known as the Waki Commission). It was tasked with making a quick assessment of the extent of the violations of human rights and the ways that political parties, state security forces, and prominent business leaders were implicated. Their findings

58 The research draws attention to peace groups in this section about the Serena talks, as well as in a later section on the 2008 TJRC. The rest of the dissertation is focused on human rights groups.
59 The research deals mostly with human rights groups. Peace groups are only dealt with in this section.
would feed into the TJRC. The result was “two and a half” commissions to follow up on the violence and the elections. Both the ODM and the PNU saw political value in the different commissions. The ODM hoped the Kriegler Commission would show that it had won. The PNU hoped the Waki Commission would show that the ODM caused violence. By instituting both of them, they would sow the seeds of unintended consequences that they would be unable to escape. However, in the short term, and within the political timeframe where politicians could reasonably assess their risks, the ODM and PNU elites saw no contradiction in the simultaneous agendas for prosecution and reconciliation. History had taught them that transitional justice was to be understood as a low-threat game, as described below.

1. History Matters: Political Elites Perceive Transitional Justice as a Non-Credible Threat

That both the ODM and PNU elites considered transitional justice a low-threat demand was a result of the previous strategies of human rights NGOs. Based on what political elites understood from the 2002 election season, when NARC had flirted briefly with the idea of the TJRC as proposed by the Task Force, transitional justice was another name for the perfect inquiry commission. It was the technical solution with no popular base. It solved nothing but checked every box. It was a low-threat demand they could agree to at no cost to their clients.

Why was transitional justice perceived as a low threat? There were two historic reasons that shaped the perceptions of regime elites. First, given their past relations with each other, the politicians knew the threat-holders and their tactics. Second, transitional justice itself was understood to be flexible.

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60 The Serena team referred to the TJRC as the “mother” commission, and Waki as the “baby” commission. Justice Philip Waki, Interview, Nairobi, December 4, 2009.
62 Thanks to Nic Cheeseman for this point. Also Ambassador Nana Apenteng, Interview, Nairobi, December 16, 2009.
It should be recalled that, following the 2003 exodus of human rights actors into the NARC government, those left behind in NGOs believed that the pre-existing collaboration would continue. NGO elites operated in, and relied on, the existing patronage logic of Kenyan political institutions. They saw themselves as sharing a close bond with the new government, a bond forged by the fact that they had both developed their identities in opposition to KANU and the Moi government. Now that NGOs has “some of their own” in government, this bond could pay off in terms of advancing a number of reform agendas. Consequently, instead of waiting for consensus to emerge in the human rights community about what to do with the KANU regime, a handful of people effectively acted on behalf of others. NGO elites transmitted to the Kenyan public the then-undisputed promises of the transitional justice mechanism of choice: a truth commission.

The transitional justice agenda’s first source of weakness was that it “belonged” only to a handful of people. As a scholar, Mutua had outlined how organizations are legitimizing structures for individual agendas. However, as a practitioner, Mutua partook in the very conduct he had criticized. He formed part of the small team of political entrepreneurs that sought to advance their political reforms through the Task Force. “KHRC is the one that spearheaded the call for a truth commission, and when Kiraitu [Murungi] came into office, we used him as a conduit to realize that campaign that we had been conducting,” Mutua said.

NGO elites set out to extol the virtues of truth-seeking, highlighting to the public only the positive benefits that could come out of such an exercise. They argued that its benefits would include democratized accountability as well as historical clarification, healing, and

63 General Daniel Opende, Interview, Nairobi, December 8, 2009.
64 Makau Mutua, Telephone Interview, February 3, 2010.
reconciliation. The timing, they argued, was perfect. “You always have a window…of about a year,” Mutua said, citing the classic transitional justice logic. Now that a leader had been voted out of office for the first time in Kenya’s history, democratization was ostensibly completed. The transitional “moment” was at hand, and transitional justice was the next task of the human rights community.\textsuperscript{65}

As the key agents of the Task Force, the Kenyan NGO elites—under the leadership of the actors described above—sought to further secure their own privileged and personalized access to the state by acting as gatekeepers of the transitional justice agenda. They were so confident in the NARC government’s interest in using the proposed TJRC to vanquish KANU that they did not expand the TJRC’s ownership beyond their elite circle, even as they went through the motions of obtaining a public endorsement of the Task Force agenda.\textsuperscript{66} Indeed, they resisted internationalizing the Task Force process because they felt that the NARC did not need external pressure to institute the recommended TJRC. For instance, when ICTJ reached out to them and offered support during this period, Mutua rebuffed their interest: “I rejected [the ICTJ’s] intervention in Kenya. We didn’t need them—we could do it on our own. There is nothing they brought to the table that we couldn’t muster ourselves,”\textsuperscript{67} Mutua said. In a context where NGO activists across the world reached out for ICTJ support, this was unprecedented.

The Task Force’s official role was to consult with Kenyans in order to find out if they thought a truth commission was necessary, and if so, the form it should take and the scope it should have. Many of the Task Force’s views, however, were in fact the views of Mutua and

\textsuperscript{65} On this classic view of transition as a window, see Kritz 1995. Also Makau Mutua, Telephone interview with author, February 3, 2010.
\textsuperscript{66} Key Informant 7, Interview, Nairobi, January 11, 2011.
\textsuperscript{67} Makau Mutua, Email Interview, June 22, 2011.
the other KHRC-affiliated elites. Nonetheless, the narrative of demand by victims “from below” was woven into the legitimizing framework of the proposed TJRC. The report from the Task Force was designed to present the TJRC not as an idea that was forged by elites linking into the zeitgeist, but as a project that Kenyans somehow naturally understood to be the solution to their problems and that they had demanded organically. Many observers were sceptical:

I was alarmed when I looked at the Makau Mutua report. Look at the number of people they interviewed, or met, and then came back and told us that an overwhelming number of Kenyans, would want a TJRC. I think that across the country they did not meet more than 1000 people.68

Reality did not matter. As the Task Force concluded, “perhaps the most compelling reason why the road of a Truth Commission should be trod is that the people ask for or demand it.”69 This narrow ownership meant that later, when NARC elites close to Kibaki changed their mind about the proposed TJRC after absorbing KANU into their patronage fold, the NGOs would have no deep constituency—either domestically or internationally—with which to pressure the government to act. Indeed, it was this lack of a constituency that led PNU elites, in 2008, to see no threat in transitional justice. It was, after all, the very invention they had come up with to threaten KANU.

The second historic reason why transitional justice was a low threat in 2008 was due to the fact that it was understood to be a flexible demand that could exclude prosecutions. To be sure, within the public arena, the Task Force had been highly optimistic and ambitious. For the public, the proposed TJRC was portrayed as an “instrument for the reform of the state, and for creating a more perfect nation. It must heal the wounds of our citizens and reconcile the nation…dig into the past, recognize victims, provide justice, and promote

68 Key Informant 7, Interview, Nairobi, January 11, 2011.
national unity and reconciliation.”

For the benefit of the public audience, Mutua “expressed the anger of the public about Kenya’s sordid history,” and he was determined to let it be known that “reconciliation could not be possible without retribution of some sort.”

His experience in the hearings of the Task Force demanded nothing less:

One of the first questions the public would ask us was: what is this Task Force going to do? Is it going to be like the rest of them that have come in the past? To promise heaven and deliver nothing? I had to spend a good twenty minutes, literally, of every public appearance, defending the fact that we were, you know, [not] a whitewash. We would assure people that... people must be held to account.

In response to this audience, Mutua’s preference for a maximalist transitional justice approach was evident. He stated that heads of state were not immune to prosecutions. To the public, then, messaging about the proposed TJRC approximated the intentions of the NGO elites, who were hoping to use the TJRC as a “a stealth vehicle to open the war on impunity.”

In the political arena, however, transitional justice was portrayed as a compromise for the benefit of the KANU elites who were increasingly close to the NARC politicians. For this audience, the Task Force Report argued:

Transitional justice calls for deep concessions on either side of the divide, between victims and perpetrators. No single party or faction can be fully satisfied. Non-concessionary demands or non-conciliatory denials can only foil the truce that is essential for national reconstruction...a balance must be struck between, on the one hand, justice for the victims and some form of retribution against some of the offenders, and on the other hand, a measure of magnanimity and forgiveness on the part of victims. This is the plausible path if reconciliation is to become a reality.

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71 Makau Mutua, Telephone Interview, February 3, 2010.
72 Makau Mutua, Telephone Interview, February 3, 2010.
74 Makau Mutua, Telephone Interview, February 3, 2010.
The clear choice by advocates (on behalf of Kenyans) to select a TJRC from the range of all possible transitional justice institutions removed, at least in the medium term, all complexity from the table, including the threat of prosecutions. The Task Force was clear that the proposed TJRC could recommend prosecutions.\textsuperscript{76} As the report stated, prosecutions were a measure “on one extreme” and they were not recommended for Kenya.\textsuperscript{77} To put the issue to rest, the prestigious closing conference of the Task Force saw the luminaries of the transitional justice community dismiss prosecutions as “a potential threat to political stability.”\textsuperscript{78}

In the elite narrative, people were not being asked to choose between a truth process and prosecutions. Rather, they were told they would get justice through truth. It was further clarified that the proposed commission could recommend conditional amnesty for non-international crimes. More importantly, it could grant amnesty for economic crimes within limited parameters, arguably a key area of concern for KANU officials. At a time when the understanding of international criminal justice was still very limited, and people did not see Kenya as having the same class of human rights violations as the DRC or Northern Uganda, the sum total of the proposals about the TJRC—and the transitional justice equated to it—amounted to non-prosecution.

This contradiction—messaging a maximalist possibility to the public and a minimalist possibility to the KANU elites—was one that was familiar to the Kibaki NARC-faction, the latter-day PNU. For them, since prosecutions could always be replaced with truth-telling in the name of reconciliation, it was not possible for transitional justice to be threatening. After all, Desmond Tutu, Alex Boraine, and other leaders of transitional justice had supported the

\textsuperscript{76} Republic of Kenya 2003: 12.
case for non-prosecution in a meeting convened during the last days of the Task Force in August 2003. This, coupled with the fact that transitional justice was a demand that had been manufactured by human rights NGO elites (rather than emerging from below as NGOs claimed, in order to legitimate their project), meant that transitional justice, as a threat, had a low credibility. Consequently, as shown below, both the PNU and ODM elites embraced all of the transitional justice proposals that were placed on the table during the Serena talks. None of them were likely to pose any risk to the networks of patronage. If transitional justice threatened to slip out of the elites’ grasp, the lesson from the NARC era was that transitional justice could be dismissed when it became inconvenient. Having established that transitional justice, in all its forms, was non-threatening because of the history of the concept in Kenya, the section below shows how truth-seeking and prosecutions emerged as the policy choices of regime elites.

2. Games of Good Global Citizenship: Insecure Elites Embrace a Broad Transitional Justice Agenda

In 2008, the first acts involving the appropriation of transitional justice by regime elites came during the violence, when agents of both the PNU and ODM sent documents to the ICC making genocide claims and counter-claims. For them, the ICC was not a court that was seeking prosecutions of the worst crimes, but rather a means of political intervention that could add moral weight to their side, possibly changing the balance of power during the extended fight for control of the state. NGOs joined the debate, and, with their dearth of international lawyers, were “tied in knots” about definitions of genocide. Within this

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80 Martha Karua, Interview, Nairobi, January 12, 2011.
81 Gladwell Otieno, Interview, Nairobi, December 2, 2009.
context, two agendas emerged for transitional justice, each championed by a different faction of the NGOs: 1) reconciliation through a TJRC, and 2) prosecutions through a court.

The 2008 discussion about the TJRC emerged as a transitional justice policy option in large part because of peace groups, NGO elites who had not been engaged in the 2003 TJRC Task Force. During the violence, the peace groups were led by three internationally-known mediators who had also worked with Kofi Annan in mediating other African conflicts: General Daniel Opande, who led peacekeeping in Sierra Leone; General Lazaro Sumbweiywo, who led the mediation team in Southern Sudan; and Ambassador Bethuel Kiplagat, who had been involved in mediation in Somalia. The three men spent every day at the Serena Hotel, the location of the mediation talks, and started a network called Concerned Citizens for Peace. Their objective was to assist the process and represent the views of Kenyans to Annan’s National Dialogue.\(^\text{82}\)

The first step in the National Dialogue process involved drafting an agenda that parties could agree to. Annan reached out to Opande, Sumbweiywo, and Kiplagat for this task. Here, the discourse of “reconciliation” was resurrected.\(^\text{83}\) For the peace groups, reconciliation was not a tainted, minimalist agenda. Given the narrow ownership cultivated by the 2003 Task Force agenda, peace groups had not engaged as closely with it as the human rights groups had. For the former, the language of reconciliation (given their past experiences mediating other conflicts where, incidentally, questions of prosecutions were not pursued) gave them a comparative advantage and influence.\(^\text{84}\) Thus, reconciliation became a prominent term in the title of the agenda they drafted for the talks: Kenya National Dialogue

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\(^{82}\) General Daniel Opande, Interview, Nairobi, December 8, 2009; Ambassador Bethuel Kiplagat, Interview, Nairobi, January 6, 2010; General Lazaro Sumbweiywo, Interview, Nairobi, January 13, 2010.

\(^{83}\) General Lazaro Sumbweiywo, Interview, Nairobi, January 13, 2010.

\(^{84}\) Ibid.
and Reconciliation. The mediation agenda explicitly included reconciliation as part of the proposed, long-term national reforms (the so-called “Agenda 4” items). The agenda was signed on 1 February 2008. Priscilla Hayner of ICTJ, a world expert on truth commissions, was invited to Kenya by the Serena team, and she drafted some principles for a TJRC.\(^{85}\) When Agenda 4 items came up for discussion on 4 March 2010 during the negotiations, the TJRC received the agreement of the parties to the negotiation. And in a break from past commissions, the TJRC was empowered to look at all past commission reports in order to decide what actions would be required. In some ways, then, reconciliation in the National Accord was a triumph of the interests of peace groups and, given their relative insulation from the politics of the failed 2003 Task Force, an optimistic sign. As previously explained, for the ODM and PNU elites, the TJRC was an easy buy. After all, as they had learnt from the transitional justice industry, a TJRC was an institutional form that constituted an easy technical fix with few costs.

The 2008 TJRC was shaped based on the human rights NGOs’ demands of 2003: Ministry of Justice officials simply took the previous draft document from the Task Force and set about implementing it as a policy solution that did not require the further consent of those whose rights it was attempting to restore. In their view, the support of 2003 was given in perpetuity. Moreover, the government was confident that it stood on technically sound ground: it had received input from Priscilla Hayner. The government put forward a draft TJRC Bill for debate with the expectation that civil society would accept it.\(^{86}\)

If peace groups demanded the TJRC, human rights groups—those previously allied with the NARC government in shaping the 2003 Task Force—demanded prosecutions. For

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85 Priscilla Hayner, Telephone Interview, October 9, 2009.
86 Gichara Kibara, Interview, Nairobi, November 26, 2009.
human rights groups, the violence served as a *critical juncture*, a process that ended their accommodating stance toward government elites and ushered in a new season of maximalist, high-threat transitional justice demands. These actors demanded prosecutions of the perpetrators of human rights violations.\(^87\)

Why did human rights groups not support the TJRC in 2008? To some extent, this decision was contingent on a number of factors. During the violence, human rights groups embarked on two strategies. Both demonstrated the nature of the growing separation between NGO and government elites.

The first strategy involved building political pressure from international sources in order to expose the election rigging and to portray the Kenyan government as illegitimate. If violence resulted from anger about stolen elections, righting that wrong would address the violence.

The second strategy of human rights groups was executed out of the sight of the ODM and PNU elites, and it proved to be more enduring. Unconvinced that electoral matters would be the future headline story when the violent season was remembered, this second strategy focused more intently on the resonant issue of human rights violations and started documenting the crimes as they were taking place. As will be discussed in the next chapter, the human rights groups cited their evidence as they went along, suggesting that the violence was supported by “people pretty high up in the government structures…Kenya cannot move as it has done in the last 44 years without accountability.”\(^88\)

Faced with the combination of human rights and peace group demands through the Annan team, the ODM and PNU elites rejected only to those demands that had a self-evident

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\(^87\) Muthoni Wanyeki, Interview, Nairobi, November 17, 2009.
\(^88\) School of International Public Affairs (SIPA), Columbia University 2008.
impact on power. They rejected the suggestion by civil society that the government be interim rather than full term. A review of the election was also rejected. Instead, a commission was instituted to establish the facts surrounding the irregularities of the election.89 The suggestions of transitional justice, which posed no danger to the game of power, were discounted by the expected action deadline. To review the violence, the Waki Commission was established, and mandated to feed its findings to the TJRC. The coalition also endorsed a number of the other reforms demanded by human rights groups with regard to police and constitutional reforms. They understood these demands to be perfunctory, and they saw no harm in endorsing them.90

PNU elites, through their support of prosecutions, truth seeking, and institutional reform, checked all the right technocratic boxes for transitional justice, which left the NGOs with no avenue for protest. Having used the 2003 Task Force to push for an agenda, human rights NGOs were effectively demobilized when PNU elites continued the fiction and pushed for the 2008 TJRC by legitimizing it to the Kenyans as a representation of their views as they had been collected by the NGOs back in 2003. In addition to supporting the Waki Commission, insecure PNU elites also appropriated the language of prosecutions, using it so as to appear internationally compliant. ODM and PNU elites were not aware of the meticulous data collection exercise occurring behind the scenes, a process that would make the case for a prosecutions-based solution to Kenya’s violence. More importantly, it was a process that would lay the foundation for a future rejection of the TJRC.

In the meantime, the PNU, who had “won” in the peace settlement as the stronger partner in the coalition government, sought to consolidate their position over the ODM while

89 See Republic of Kenya 2008a. This is also known as the “Kriegler Report.”
90 Honourable Paul Muite, Interview, Nairobi, November 27, 2009.
projecting authority and control. As the next section shows, having supported policies for both reconciliation and prosecutions, PNU elites continued the theatre and demanded prosecutions against ODM supporters.

III. Path Dependence: Insecure Regimes and Their “Rule by Law”

Following the formation of the government of National Unity, justice became a tool for continuing the battle that had not been resolved by the ballot. Indeed, in a return to what Tom Ginsburg calls the political culture of “rule by law”—using the law as a tool for politics, a practice that was common in the Moi era—the PNU sought to weaken the ODM using judicial means.91 The judicial statecraft of the PNU had two enduring effects with impacts on transitional justice choices. The first is that it created a rift within the leadership of ODM. Odinga realised that he could win in the court of public opinion (as well as with ODM’s progressive wing) by alienating William Ruto, the leader of the ethno-nationalist faction. The second is that it taught the ODM about the unquestioned benefits of anti-impunity language, a lesson that would later affect how the coalition government engaged with transitional justice. This section describes the PNU’s judicial statecraft and its unintended effects.

1. Insecure Elites Create History: Prosecution of Opponents Is the Rule of Law

Following Serena, the PNU saw prosecutions as a low-threat tool that could be used to vanquish their ODM opponents with very little risk to the PNU itself. Using a cue from the human rights NGOs, PNU elites framed the violence as a breakdown of law and order, rather than a response to a stolen election, as the ODM wanted to frame it. They allegedly rounded up countless “youths” who were engaged in the protests and violence and jailed them in the

91 See Ginsburg and Moustafa 2008.
name of enforcing the rule of law. The number of youths jailed was unclear; one report put it at 12,000.92

For example, following a speech in which Odinga had sought to placate ODM’s supporters by suggesting that the issue of the arrests of “youths” would be “solved,” Kibaki’s national address on Madaraka Day of 1 June 2008, transformed the emerging “prosecutions versus amnesty” question into a continuation of the power struggle between the two parties through principled means. Kibaki asserted that there would not be amnesty for the violence:

The government will not spare those who organized the gangs that caused the mayhem. Nevertheless, those who took part in wanton acts of violence by engaging in senseless murder of innocent citizens, destruction of property, or rape will face the full force of the law. The Government is also implementing several measures to promote reconciliation, national healing, and cohesion.93

The president was categorical in his position: “Haitawezakana kuhurumia watu wa fitina na hawataweza kuenda mbali na uchochezi” (“There will be no mercy for people thriving on malice and propaganda”). “No normal person will encourage that,” he added.94 In the same forum, Kibaki expressed support for both the Waki Commission, whose work was ongoing, and for the TJRC, whose Bill had been published. The PNU framed the debate by linking prosecutions for wrongdoing to “morality,” “rule of law,” and even “normalcy” in the conduct of state affairs. This position suggested the ODM was in opposition to these values. Martha Karua, then Minister of Justice, stated that she wanted the judiciary to be the institution that could “separate the guilty from the innocent,” suggesting that the ODM did not think of the judiciary in the same way.95 In her view, the TJRC, when it was eventually

92 Barasa 2008.
93 The State House 2008.
94 Barasa 2008.
95 Ochola, Ombati, and Ratemo 2008.
instituted, would be the one to recommend amnesty for the arrested youth in the name of reconciliation, not the president. Karua further pointed out in an opinion editorial:

Our law does not recognise executive amnesty for criminal offences before trial nor does it contemplate blanket amnesty. The prerogative of mercy under Section 27 of the Constitution can only be exercised by the President after the accused person has been convicted...Calls for the Executive to determine criminal liability clearly undermine our constitutional order, which is predicated on the doctrine of separation of powers in which the Judiciary is vested with the sole authority to determine criminal liability.⁹⁶

The PNU was playing a game with two audiences. The first audience consisted of his hardline core who calculated that a harsh insistence on the law would give the PNU an advantage, given Kibaki’s judicial appointments during the previous term. The second audience consisted of his ODM foes who found themselves painted into a corner where they appeared to be disregarding the rule of law. The message to them was that numerous seats in parliament would not protect them. With the PNU’s framing of the issue, the ODM risked losing their natural allies in civil society and the international community.

Many observers, even those who were not natural PNU supporters, generally agreed with the principled PNU position, even while understanding it to be instrumental. Lucy Oriang of the *Daily Nation* newspaper, to counter the suggestion that political protests that ended in violence should be treated differently from ordinary crimes, pointed out that “killing is a crime, not just another campaign tool.”⁹⁷ Gibson Kamau Kuria, a leading Kenyan lawyer, was critical of the arguments by all the senior ODM officials, including Odinga:

[The argument] that it was through the crimes committed by suspects in custody that ODM created the present Government is politically and morally outrageous. It destroys the credibility of ODM as a political party committed to the rule of law in a democracy. The claim means that ODM believes in the use of force in changing or constituting government...All these ODM arguments are both wrong and dangerous. They are dangerous because of their negative implications for the economy, rule of

⁹⁶ Karua 2008.
⁹⁷ Oriang 2008.
law and democracy...What is the conception of government and rule of law they [ODM] have which has escaped the attention of political thinkers and statesmen of the world over the centuries?98

Thus, while the president pointed out that the law must apply, he was simultaneously exerting his position as the ultimate determinant of *when* it must apply. The violent misbehaviour of his opponents was one such occasion. As Mutula Kilonzo, the Minister of Justice who succeeded Karua, would later assert, “The power to punish is perhaps the single greatest power that any state has. And when that power disappears, you are losing control…you become suspect as to whether you actually have a state.”99 This position of the president, as the ultimate sovereign who could decide the application of law or amnesty, was reinforced when the ODM made appeals to it. The PNU refused to exercise discretion in these cases by occupying a moral high ground from which to use prosecution as a convenient, low-threat language which could be use to exert power. PNU actors, including former Moi stalwart, George Saitoti, spoke the language of ending impunity, and seemed to be on the right side by using domestic institutions, while the ODM, including luminaries of the rule of law, such as James Orengo, were portrayed as people who were asking the government to act against the law.

To be sure, observers understood the PNU was taking a hypocritical moral high ground by choosing to support prosecutions and to reject (indeed, vilify), all suggestions of amnesty and reconciliation. Nevertheless, the PNU succeeded in shaping the political story to its advantage. No one in the international community, the NGO community, or any other opposition sources could disagree with them. Without a shift in the facts on the ground, the

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98 Kuria 2008.
ODM was in a position where they could not win. This shift in facts would constitute another critical juncture, as shown below.

2. Unintended Consequences of History: Setting the Stage for Future Transitional Justice Choices

To understand why the choice of prosecutions by the PNU elites in the early days of the coalition government caused a fracture in the ODM and set the stage for future transitional justice choices including an intervention by the ICC, it is helpful to take stock of the nature of the ODM’s political composition. As mentioned previously, ODM faced two constituencies: 1) the NGOs and anti-PNU progressives, and 2) the ethno-nationalists. The latter group formed the initial principle arena that informed ODM elite action to protect the “youths,” as described above.

The ethno-nationalist wing was also important for another reason. As explained before, in the Rift Valley, which was the site of most of the post-election violence, the ODM had campaigned on a message of majimboism, or devolution. For many local Kalenjin, majimbo meant that they would control much of their land by removing alien settlers, especially the Kikuyu.\(^\text{100}\) With this message, the ODM won solidly in the Rift Valley, a vote guaranteed by Ruto, who took over political leadership of this part of the country from former president Moi.\(^\text{101}\)

Affirming the winning ODM alliance was Odinga’s first priority. When the election results were contested, an unequal Accord signed, and speculations were circulating about the arrests of thousands of young ODM protesters, Odinga rose to their defense and sought

\(^{101}\) Lynch 2008.
their release. After all, he had helped Kibaki win in 2002 only to witness Kibaki renege on his pre-election promises of power distribution. Ruto and the Rift valley were under Odinga’s patronage, and he sought to protect them. ODM did not frame the men as having been violent, or responsible for international crimes (this language was already used by both the ODM and the PNU in their communications with the ICC, and submitted to the Waki Commission, which at the time was continuing its investigations). In this view, those who were protesting the election results were acting within their rights. These crimes were political, and they deserved a political solution. According to Odinga:

I don’t think we should be talking about giving amnesty to these young men because they committed no crime. Is it a crime to fight for your democratic rights? Or is it a crime to stand and say that last year’s elections were rigged?

It was this position that brought together William Ruto and Henry Kosgey (from the Kalenjin wing of the ODM) into the uncomfortable company of James Orengo, Anyang Nyong’o, and the rest of the key members of the ODM team. They were all asking for appropriate consideration of their supporters—“vijana wetu” (“our boys”)—who had manned the roadblocks during the violence. They called for amnesty.

This pro-amnesty camp initially ignored the human rights activists who, armed with charts from their ongoing data analysis showing different types of violence, seemed to wholeheartedly be criminalizing the violent strategy of the ODM, “their” party. Prosecutions and the application of the rule of law became the new battleground between the ODM and the PNU. Supporters of the ODM discourse ignored the suggestion that violence was anything but noble. They asked: “He [Kibaki] may have the power to prosecute these youths,

102 Nation Team 2008.
103 Nation Team 2008.
but is that the best way to make us forget about his own crimes?”

It soon emerged that the arrested youths, who had been at the heart of this acrimonious debate, numbered about 100 instead of the thousands that had been previously imagined. While this calmed this first debate about justice, it was critical to the future positions that the parties would take toward transitional justice in three ways.

First, and most importantly, the ODM learned the tactics of judicial statecraft. The fact that everyone seemed to understand the PNU pro-prosecutions policy as a hollow principle, and yet supported it because it was principled, was the most vital, game-changing lesson for the ODM. It was a lesson that would resonate in all of the ODM’s engagements with transitional justice going forward, and, as the next chapter will show, it would inform its position with regard to prosecution after the Waki Report. The lesson for Odinga was that if one could be seen as supporting the “fight against impunity”—however one chose to define that vague expression—it was a favourable position. Standing for principles guaranteed that one would have powerful friends, and this was important for a weak coalition partner. In the future, the lessons learned from the PNU’s appropriation of prosecutions during this stage would provide incentives for the ODM’s defection from coalition decisions that might be seen as going against principle. Consequently, in the future, notwithstanding any evidence about ODM crimes, Odinga would support prosecutions.

Second, the amnesty debate and the ODM’s initial rejection of prosecutions in favour of amnesty created a temporary wedge between the ODM and its second base of progressive supporters who had been critical of the amnesty position. To be sure, some were tentatively supportive of the ODM, decrying what they saw as a selective application of the law by the PNU, a group who was happy to proclaim its support for the rule of law even while it ignored

105 Kumekucha 2008.
the constitutional rights of those detained. Nonetheless, the dominant view was that violence, for whatever reason, was unacceptable. In this separation, the ODM came to understand—months after human rights NGOs had grasped this fact and had started documenting names and incidents—that the story had firmly shifted from a focus on stolen elections to a focus on violence. ODM itself would start to focus on the violence perpetrated by state agents, despite having been the first to call for protest and violence.

Finally, the debate drove a wedge (between Odinga, as a Prime Minister, and Ruto, his key agent in the Rift Valley) in what had previously been a seemingly monolithic ODM position. It also raised questions about the lengths to which the ODM elite from the Odinga camp—particularly the feted members of the human rights movement, such as Orengo—could go in order to tie their fates to the masses that had protested to secure their power. The underlying expediency of the coalition was exposed, and the patina of a multi-ethnic vehicle for winning power underwent serious strain from which it would not recover. While there was nothing pre-ordained about this fracture within the ODM—such is the nature of critical junctures—it is important to note that it emerged as a result of the PNU’s non-conciliatory position on prosecutions, and that it contributed to the future acrimony between Odinga and Ruto on account of the ICC prosecutions, and to Kenya’s transitional justice policies more broadly.

These three consequences—particularly the split between Odinga and Ruto—made it possible for the principled NGO elites to once again ally with the ODM in an effort to extract more concessions from the PNU.

This response to the PNU’s judicial statecraft in the early months of 2008 would itself affect the PNU in two ways. First, the discussion about amnesty also used the language of
reconciliation, and the PNU vilified this option and expressed a preference for prosecution in the name of the rule of law. Later, when they would demand a TJRC instead of prosecutions as a way to avoid the prosecution of regime clients, this option was tainted, and the alliance of the ODM and NGOs would reject it. Second, given the ease with which Kibaki resorted to the courts as a way to vanquish the ODM, many in the ODM-civil society alliance would find it easy to reject the option of domestic prosecutions as recommended by the Waki Commission (considering the courts biased), which would set the stage for ICC action in Kenya during the country’s most enduring phase of transitional justice.

**IV. Conclusion**

The purpose of this chapter was to demonstrate how the Kenyan elites’ embrace of policies that supported both prosecutions and truth-telling is a way of analysing how insecure regime elites react when faced with low threats of transitional justice. By mapping the manner in which the historical relationships between NGOs and politicians affected the perception of threat, the chapter also shows how history matters in the choice of transitional justice policies. Regime elites continued to see transitional justice as a non-credible threat due to the manner in which the issue had been addressed following the 2002 transition. Consequently, the ODM and PNU regime elites embraced all of the advocacy demands made by peace groups and human rights groups during the peace negotiation, and the PNU advocated for domestic prosecutions for the ODM youths, using the law to further weaken their political opponents. In the process of making these choices, regime elites vilified domestic processes, and unintentionally planted the seeds for an agenda that would later escape their control and precipitate ICC action, as the next chapter shows.
Chapter 4—Insecure Regime Faces High Threats: Selecting Truth-Seeking and Rejecting Prosecutions in Kenya

The previous chapter provided an overview of how, over the course of the Serena talks, the policies for truth-seeking (in the form of the TJRC) and prosecutions (in the form of the Waki Commission) emerged in the agenda of Kenyan regime elites. The chapter also explained how the creation of a coalition government exacerbated regime insecurity, and the ways that the history of interaction between the government and NGOs during the TJRC Task Force of 2003 resulted in regime elites feeling unthreatened by the transitional justice advocacy of 2008.

This chapter examines how the transitional justice policy preferences of insecure elites changed when they faced high threats. It proceeds in three steps. First, it shows how the Waki Commission served as a critical juncture that allowed NGOs to redefine accountability (from meaning a support for reconciliation to meaning a support for prosecutions). The second section traces how the Waki report facilitated the emergence of a prosecutions-for-regime-change agenda among NGO elites as a way to fight back against a political class with whom they had broken ties. NGO elites were able to transform themselves into a coherent anti-impunity community, which increased both the cost and credibility of transitional justice measures. The second section also demonstrates how the preferences of regime elites atomized in the face of the increased threats of transitional justice. Regime elites rejected independent domestic prosecutions through a special tribunal, settling only on support to truth-seeking. The final section of the chapter shows how NGO elites rejected the TJRC, discredited other domestic options for transitional justice, and embarked on a successful advocacy for an ICC intervention. In the course of making their demands, the NGO elites’
escalating threats created a political impasse, and precipitated the ICC’s intervention in Kenya. While the different sections are separated in order to focus on specific actors with ease, the reality is that the events on the ground happened much more simultaneously than they are presented here, with feedback and interaction among the actors involved.

I. The Consequences of History: Reckoning with Credible and Costly Threats

As explained in chapter two, one would expect elites who are facing regime insecurity to enthusiastically support justice-affirming institutions only in those cases when the regime elites do not themselves expect to fall under scrutiny. For the politicians who negotiated the National Accord in Serena, then, the support for the initial creation of the Waki Commission resulted from a low-threat expectation. However, for an observer unfamiliar with Kenya’s history of inconsequential commissions, the language of the Waki Commission’s mandate appeared strong. It highlighted the government’s commitment to an “impartial, effective and expeditious investigation of gross and systematic violations of human rights,” a promise that “those found guilty [will be] brought to justice,” and a commitment to the “identification and prosecution of perpetrators of violence.” Furthermore, the Waki Commission would “prevent the repetition of similar deeds and, in general…eradicate impunity and promote national reconciliation.”

Nevertheless, the fact that the report was supposed to feed into yet another commission—the TJRC that the Kibaki regime had previously rejected and were now resuscitating—demonstrated that the government elites did not expect the Waki Commission to do anything different from any other commission that had been formed previously. What

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1 See Kenyan National Dialogue and Reconciliation 2008; Republic of Kenya 2008b.
the political elites did not bank on was the fact that the Waki Commission would eventually become the basis for an entirely new maximalist agenda for prosecutions.²

The fact that the Waki Commission, entirely by accident, created a new set of political possibilities that activists cohered around and advocated for is an apt illustration of this story’s local nature and of the importance of critical junctures. None of the leading international rights advocates would have mistakenly authored the ICC into the Kenyan landscape in the way that the local activists did. Once the possibility of the ICC entered the political lexicon, however, ideas about impunity, international standards of due process, and the prosecution of political leaders who were otherwise politically untouchable, found their place in the local and international vocabulary pertaining to Kenya, and affected all subsequent transitional justice debates. How did the Waki Commission and the advocacy around it succeed in changing transitional justice from a low-threat to a high-threat demand? Three factors explain this departure: 1) the structure of human rights NGOs, 2) the decisions of the misinformed agents within them, and 3) the wish of Waki and his team to depart from a tradition of commissions-as-usual. These are discussed in turn below.

1. Unexpected Virtue in Weakness: Documentation and the Building Blocks of a Credible Threat

One of Mutua’s criticisms of Kenyan NGOs is that they have “rather blindly copied the models of AI [Amnesty International] and HRW [Human Rights Watch],”³ where they “monitor, document and publicise human rights conditions,”⁴ and focus on “cataloguing the violations of civil and political rights without analysing the context, or addressing seriously

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² For more on acculturation, see Goodman and Jinks 2004.
³ Mutua 2009a: 23.
⁴ Mutua 2009a: 19.
the violations of economic, social, and cultural rights.” Mutua sees this as a “myopia in leadership,” which can be explained from a disciplinary perspective. Because human rights organizations were primarily established by lawyers as projects to provide legal aid, many of them believed in the superiority of the law in articulating human rights. The collection of evidence for potential use in a legal process seemed to naturally follow from this idea.

In the violence that followed the 2007 election in Kenya, this weakness proved to be very useful in giving substance to NGOs’ demands for prosecutions that were launched against the government. Evidence collection began serendipitously. In early January 2008, Maina Kiai’s staff member, Anthony Kuria, had incidentally returned recently from training with No Peace Without Justice (NPWJ) on the documentation of human rights violations. NPWJ’s previous work was in Sierra Leone, Kosovo, and Afghanistan. As the violence broke out in Kenya, analogies with the Rwanda genocide began to circulate, and Kuria successfully convinced Maina of the critical importance of documentation. According to Kuria:

I was telling [Maina]: strategically, concentrating on the election is a very big blunder. Nobody will remember about the election…I always said the biggest story two years down the line will be about the violence and not who stole the elections.

Because Maina’s criticism of the government meant that KNCHR was seen as a non-neutral organization, the entire KNCHR was assumed to be pro-ODM, and Maina derided by Kikuyu IDPs as a “traitor.” This perception would prove useful when the KNCHR started documenting human rights violations in the ODM areas. As Kuria reported, on one occasion, a team was sent to the Mau-Narok area, an ODM region:

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5 Mutua 2009a: 22. Mutua’s point is not that there is a problem with this focus, but that this focus neglects the conditions under which the abuses originate.
6 Mutua 2009a: 19.
7 Njonjo Mue, Interview, Nairobi, October 23, 2009; Anthony Kuria, Interview, Nairobi, December 15, 2009.
9 School of International Public Affairs (SIPA), Columbia University 2008.
This small team actually got surrounded by Kalenjin warriors. The guy who was actually leading the group...is a Kikuyu. He just [showed] his KNCHR badge...ah, nyinyi hata ni watu wetu ["you are our people"]. They were left alone.

In a separate episode, Kuria described being surrounded by Luo youth in Kisumu. Upon saying that they were “Maina Kiai’s people,” they were left alone. Kuria states, “They even gave us bodyguards to take us wherever we wanted.”\(^{10}\)

The documentation was conducted in partnership with NPWJ, who trained KNCHR staff, and put teams on the ground while the violence was still going on.\(^{11}\) As NPWJ wrote on their website:

NPWJ is providing support with all aspects of the investigative operations...in more than 70 locations in those areas of Kenya where the majority of violence was suffered...investigative teams visited hundreds of people, in IDP camps and elsewhere, gathering an impressive 1,000 statements that recount more than 4,500 separate episodes of violence, many of which reveal a range of violations of human rights, Kenyan criminal law and international criminal law.... investigating and documenting the violence, will be the foundation for the work of any accountability mechanism that is determined to play its part in the restoration of peace through justice and truth.\(^{12}\)

The collaboration with NPWJ, an organization whose documentation work was in countries with evident violations in international law such as Sierra Leone, started to paint Kenya as a country where international law had been violated, instead of a country that had experienced an episode of ordinary political violence. Hints of international criminal prosecution began to emerge in the demands of NGO elites:

Someone must be held accountable...we are tracing, where these linkages and lines of accountability go to. And you will be surprised by some of the names that are coming up...we have a lot of names, a lot of stories told to us but we are going to gather that evidence. We will get it...they are people pretty high up in the government structures within the government.\(^{13}\)

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\(^{10}\) Anthony Kuria, Interview, Nairobi, December 15, 2009.

\(^{11}\) Njonjo Mue, Interview, Nairobi, October 23, 2009. At that time, Njonjo was in the KNCHR.


\(^{13}\) School of International Public Affairs (SIPA), Columbia University 2008.
The emerging demand for prosecution was clear in the KNCHR’s interim report, titled “Removing the Shield of Impunity.” The report mentions the word “victim” only seven times, five times as a descriptor of populations (such as “teams have talked to victims and perpetrators”), and only twice as a group whose redress must be the focus of any subsequent accountability process. In contrast, the concept of international law appears twelve times, primarily as a source of superior obligation, the violation of which would merit accountability.\(^\text{14}\)

Human rights NGOs, with their strategy, would change the trajectory of the reaction to the violence from one in which state elites established commissions as a routine, low-threat response to a high threat game where NGO elites set the agenda and the state elites reacted to protect key clients of the regime. In the process, NGO elites constructed the case for a prosecutions-based solution to Kenya’s violence. This increasingly narrow focus on evidence provided a cue to the rest of the human rights community, and later fed into what was then thought of as a wildly optimistic narrative about the ICC and its possibilities. As the section below demonstrates, the evidence from the documentation would give actors, such as the ICJ-Kenya, the confidence to present scenarios about ICC intervention to the Waki Commission.\(^\text{15}\)

2. Enter a Critical Juncture: The Accidental Invocation of the Unpredictable ICC

The Waki Commission was led by Justice Philip Waki of Kenya’s Courts of Appeal, who was appointed by a consensus between the ODM and the PNU negotiators.\(^\text{16}\) Waki was supported by two foreign commissioners: Gavin McFadyen, a former assistant police commissioner from New Zealand, and Pascal Kambale (described in the previous chapter),

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\(^{15}\) George Kegoro, Interview, Nairobi, January 11, 2011.

\(^{16}\) Martha Karua, Interview, Nairobi, January 12, 2011.
who, in addition to being an officer at the Open Society Institute, was also an international lawyer from the DRC and a former international justice expert at HRW. The commission’s staff included George Kegoro, the head of ICJ-Kenya and Secretary of the Commission, and Mr. David Manjaja, a practicing lawyer, who was Assisting Counsel of the Commission. Anthony Kuria, Maina Kiai’s associate who had started the documentation project at KNCHR, was Kambale’s assistant. Only Kambale and Kuria were well versed in international law and the ICC, a fact that would turn out to be of critical importance later.

The story of the ICC and the Waki Commission begins with George Kegoro. ICJ-Kenya, the organization which Kegoro helmed, was seen by Kenyan NGOs as a leader on issues pertaining to international justice. This was in part due to the fact that one of ICJ-Kenya’s legal officers, James Gondi, had worked at the ICC as an intern at the Chambers.\(^\text{17}\) As the Secretary of the Waki Commission, Kegoro had no voting rights, but he could engage in discussions about the agenda and recommend people who should speak before the commission. Wilfred Nderitu, the Chairman of ICJ-Kenya, was invited to give a presentation at the commission. As Kegoro explained:

> Ok, I was taking care of them a little, because that is where you come from into the commission, so when they want to come and make a submission, you say ok…there is no reason you are going to turn down an organization you are affiliated to.\(^\text{18}\)

Upon being invited, Nderitu reached out to Gondi to prepare the presentation. As Gondi looked at the interim reports from KNCHR prepared with NPWJ, he thought it was very clear that international crimes were being committed. The presentation he prepared was titled “Gross Violations of Human Rights Punishable Under International Law and

\(^\text{17}\) James Gondi, Interview, Mombasa, November 19, 2009.
\(^\text{18}\) George Kegoro, Interview, Nairobi, January 11, 2011.
Committed During the Post 2007 Election Period.”19 It outlined the crimes listed under the Rome Statute, and then asserted, “Several criminal acts concurrent with the aforesaid provisions of the Rome Statute occurred in the course of the widespread violence witnessed during the post election crisis in Kenya.”20 Gondi further listed the crimes that, in his view, had been witnessed during the violence in Kenya:

Crimes Against Humanity (Relevant to and Witnessed during the Post Election Crisis and; in keeping with Article 7 of the Rome Statute of the International Criminal Court): Murder, Extermination, Forcible transfer of populations, Torture, Rape, Sexual slavery, Enforced prostitution, Forced pregnancy….21

According to Kambale, the presentation was “shockingly” misinformed about the ICC.22 Kambale had worked on the HRW effort for ratification of the ICC, on the appointment of Ocampo, and had prepared materials for a possible ICC case focusing on Ituri in the Eastern Congo. More generally, Kambale remarked many times about his immense surprise at the lack of awareness about international law demonstrated by Kenyan lawyers of the highest stature during the life of the commission and afterwards. None of the ICJ-K lawyers were trained in international law. Kegoro was trained in corporate law. Nderitu was also a corporate lawyer. As Kambale explained:

There is a very big difference in the legal community in Kenya, and the legal communities elsewhere…I found the legal community in Kenya to be extremely either naïve or ignorant of international mechanisms…[even] human rights lawyers buy very, very limited exposure…Like the chair of ICJ-Kenya…he came…before the commission…and said you know, we need the ICC. I was…listening to him, and thinking, wait a minute, this is the ICJ’s chair, who has more experience in international criminal institutions than most of the Kenyan lawyers, and yet he is making the case for an ICC intervention in Kenya.23

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19 On file with the author.
21 Ibid.
22 Pascal Kambale, Interview, London, October 9, 2009.
23 Kambale 2009. Ugandan lawyers involved with their own ICC case also mentioned this point on Kenyan lawyers. Jacob Oulanya, Interview, Kampala, November 4, 2009.
While the Kenyan lawyers may have been exceptionally unaware in comparison to their peers, it is fair to say that in many ways, the ICC was still new. Kenya ratified the Rome Statute in March 2005, but it is reasonable to assume that before the arrest warrant was issued against President Omar Bashir of Sudan, the full potential of the Court was unclear to many actors. The ratification of the Rome Statute was expected to be an inconsequential exercise.

Consequently, Nderitu’s “shocking” presentation was the first and only suggestion about the ICC that was made to the Waki Commission. Once the suggestion had been made at this private hearing, however, it captured the imagination of the other members of the commission who were unversed in international law, and it took on a life of its own. The misinformed introduction of the ICC by Nderitu created a path from which the commission, and Kenya, would not veer.

As Kambale explained, “Even George Kegoro, in our internal debate [he] would say, yeah, the ICC, the ICC.” Kegoro himself admitted his lack of knowledge about the ICC: “There was also a huge amount of learning about what is its jurisdiction, what are the crimes, how is it invoked...what is Kenya’s readiness to invoke…” Critically, Waki, another non-international lawyer, thought it was a good idea, as did all the other Kenyan lawyers on the team. Kambale’s understanding of international law could not prevail over the enthusiasm of the Kenyans. They wanted to give the ICC the names of those who were thought to be responsible for the violence and close the story.

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24 Godfrey Musila, an international lawyer who was observing the developments, stated in 2009 that he is only the second Kenyan lawyer ever to receive a doctorate in international law. Godfrey Musila, Interview, Nairobi, January 14, 2011.
26 Pascal Kambale, Interview, London, October 9, 2009.
27 George Kegoro, Interview, Nairobi, November 16, 2009.
28 David Majanja, Interview, Nairobi, November 25, 2009.
While Kambale’s own preference was for a domestic process for Kenya, he did not dismiss what he thought to be a misinformed embrace of the ICC intervention. Kambale created the compromise that would later be considered the game-changing genius of the Waki Commission. As he explained, “I was not Kenyan. And I wanted the Kenyans to run the show.”29 Given the country’s past inaction toward violence, however, he understood the perils of a domestic-only approach to prosecution. Furthermore, he thought that if an ICC-only approach were used, the prosecutor would make “a total mess.”

Instead, he crafted an alternative approach. As he explained:

The judiciary in Kenya is completely useless, but why don’t we recommend some extra-judicial mechanism that will not be the ICC…not a mixed Sierra Leone Court, but some mechanism, let us recommend that [the government] put it in place, and if they fail to do that, then we go to the ICC.30

Before presenting the idea to the commission, Kambale discussed it with his colleagues, including Nowrojee and Mugambi, at the OSI in Nairobi. He also discussed it with Maina. They structured an idea of what such a special tribunal would have to look like. It would have to be a hybrid of international and national justice, it would have to respect international standards, and it would have to be independent of the Kenyan judicial process. This mechanism would have tight timelines, and it would use the ICC as a stick, a means of coercing the state to do what it was supposed to do. Kambale presented this suggestion to the Waki Commission, who embraced it and accepted it internally. The clause about the ICC became the central focus of all human rights advocacy, overtaking every other issue.

Despite their inclusion of the ICC clause, few members of the Waki team believed they had enough evidence to withstand scrutiny at the ICC. As they stated in their report:

29 Pascal Kambale, Interview, London, October 9, 2009.
30 Ibid.
The evidence the Commission has gathered so far is not, in our assessment, sufficient to meet the threshold of proof required for criminal matters in this country: that it be “beyond reasonable doubt.” It may even fall short of the proof required for international crimes against humanity.31

Thus, they conceived of the ICC as the “nuclear option,” a credible threat beyond domestic control that would trigger domestic prosecutions.32 Rational politicians would realise that the ICC would increase their costs of non-action, or they would be frightened about the possibility of an ICC intervention and want to control any prosecutions process themselves. In addition to introducing the ICC into the vocabulary of Kenyan demands, as the next section shows, the Waki Commission succeeded in increasing the level of the transitional justice threat by making proposals that bypassed government control, and by deliberately seeking to be different from all other previous commissions to date.

3. Judges Demonstrate Independence: High Threats Bypass Elite Control

Before the Waki report, even while NGOs recognized the violence as a “constitutional moment,” they were still caught up in their historical patterns of advocacy. When they collected evidence, they favoured the practice of naming suspected perpetrators, even though the NGOs had no evidence that this course of action led to any results.33 With this in mind, then, the Waki Commission’s explicit demands for prosecution—through specific institutional structures, with specific deadlines, and all beyond the control of domestic elites—were unprecedented.

The Waki Commission’s ability to make these unprecedented demands, however, was due to the same reason that separated the NGO elites from the regime elites. For everyone who was not a member of the political elite, the violence constituted a critical juncture in

history. Just as the NGO elites had recognized—and, in some ways, had sought to shape—a constitutional moment, without necessarily knowing exactly how to get there, the Waki Commission’s members saw the same window of opportunity for exercising their agency. Critically, the political insecurity and the high level of discord in the early days of Kenya’s coalition government meant that there were fractured fountains of patronage. This opened a window for different loyalties to be forged. Actors who were ordinarily thought of as agents of the state could now be independent, and they could break free of previous expectations.

When the Waki Commission team went to their first meeting with the Ministry of Justice, they met with Amina Mohammed, the Permanent Secretary of the Ministry of Justice, and her Secretary, Gichira Kibara.

Kibara in the course of the meeting said the phrase “baby commission.” Philip [Waki] said, “Baby commission?” [Kibara] said, “Sorry, that is how we refer to it as opposed to the TJRC.” That pissed Philip off …our sense was that these people were not ready to take us seriously.34

From this very first meeting, the Waki Commission team got the sense that they were supposed to be inconsequential.35 At a time when the political logic had been transformed by violence, it was precisely the regime elites’ expectation of business as usual that prompted Waki to consider breaking with the norm. Following his meeting with the Ministry of Justice, Waki decided to set his sights on a threat higher than the TJRC. “We were intent on having our recommendations not ignored,” Waki said.36 According to Kambale, this became the ethos of the commission:

Now we [were] not referring anything to the TJRC, we thought the stuff we were dealing with warranted more vigorous action than forgiveness and moving on, we

34 Pascal Kambale, Interview, London, October 9, 2009.
36 Ibid.
needed to recommend some serious stuff, and you do not recommend serious stuff by letting TJRC deal with them. We decided to by-pass TJRC.\textsuperscript{37}

The decision to increase the threat of the Waki Commission lay behind their eager support for the ICC. It also informed the decision concerning what to do with the names of the suspects once the commission was over. Having decided that they would play beyond the horizon of the TJRC and create an internationalized court that was secured by an ICC threat, the next question came to the surface: What should be done with the evidence and the perpetrators? Should they be named or not?\textsuperscript{38}

The team brought the issue of naming to the Annan team, explaining the ICC “nuclear option.” According to those close to the process, Annan pointed to the events that had taken place in Darfur, where an international commission of inquiry had given him a sealed envelope with 51 names, which he then handed over to the prosecutor of the ICC.

The Waki commissioners decided to put the names in an envelope. Because the commission would be legally disbanded after handing over its report, they decided to give the envelope to Annan, who would hand over the evidence to the ICC for further investigation if the government did not implement the report.\textsuperscript{39}

With a game-changing report in hand and a plan of action for the names, the commission came up with a final, threat-raising act to ensure that its findings would not be repressed from public debate as previous reports had been. It was common that many reports that included a provision for making them public actually remained private for years once they were handed over to the president. This strategy kept damaging or controversial findings out of the public eye, and it gave the government time, if they needed it, to consolidate their

\textsuperscript{37} Pascal Kambale, Interview, London, October 9, 2009.
\textsuperscript{38} McFadyen thought it was strange that they would name names at all, given the weakness of the evidence. Author interviews, Nairobi.
\textsuperscript{39} Justice Philip Waki, Interview, Nairobi, December 4, 2009.
response strategy. In the Waki Commission, once the decision was made about the names in the envelope, the report was finalized, and the final names were written down by Waki himself and placed in a sealed envelope. The report was then leaked to the Daily Nation. As a member of the commission explained:

Up to now Waki and the rest don’t know how The [Daily] Nation got the Report before the Statehouse got the report… I did not consult with anybody. I told George [Kegoro] afterwards. I told [him] look, you are the only one who can understand this. In tomorrow’s Nation, extracts of the report will be published...But he understood why, and supported me.  

On 15 October 2008, as the report was handed over to Kibaki and Odinga, it also appeared in the headlines of The Daily Nation. Subsequently, Waki handed Annan the envelope that would become the centre of intrigue for years to come. With that last action, the Waki Commission legally disbanded. They provided the public and the advocacy community with an alternative institution for which to lobby: a Special Tribunal of Kenya (STK) and its independence, and absent such a process, then the ICC. The next section shows how the path created by the Waki Commission would constitute a high threat with which insecure regime elites would have to grapple.

II. The Second Appropriation: Insecure Elites Lose Control

The Waki Commission report identified a range of human rights violations that had been committed during the post-election violence. It proposed domestic prosecutions for those most responsible for the violence, and threatened that, in the absence of such prosecutions, a sealed envelope of names of those deemed most responsible would be submitted to the ICC for further investigation and potential action. In this action, many of the NGO political entrepreneurs—buoyed by what had initially appeared to be an ambitious idea that Kenyan politicians could be tried by the ICC in The Hague or in an internationalized domestic

40 Key Informant 8, Interview, Nairobi, November 11, 2009.
tribunal beyond the control of domestic politicians—found their constitutional moment. Unlike the 2003 failed reconciliation season, however, where the TJRC was quickly shelved by politicians when it suited them, the narrative regarding prosecutions was a sensationalist one that was strongly supported (and often wildly exaggerated in terms of its possibilities) by the media. The prosecution narrative created the impression that reconciliation, which had previously been the solution to the country’s human rights violations, was at odds with, and was more lenient than, the prosecutions that the country actually required. This section shows how NGOs capitalised on the ICC in their demands for regime change, how political elites reacted to the high threats by rejecting the Special Tribunal of Kenya (STK) Bill that was drafted to implement the Waki Report, and how the PNU elites rejected escalating transitional justice threats from NGOs and the ICC and instead chose to support reconciliation through the TJRC.

1. Mobilization of Dissent: Threat-Holders Demand Regime Change

Given past government conduct, the Waki Commission anticipated that a common position would emerge amongst the PNU and the ODM, and that they would institute domestic prosecutions. It was this expectation that informed the Waki Commission’s strategy to create a “nuclear option” in the form of the ICC, an option they were confident would remain un-triggered because the government elites would collectively choose to implement a watered-down version of the STK in order to control the narrative. In order to understand why the government actors failed to use the Waki Commission’s recommendations to create judicial theatre (as the Waki commissioners expected) and saw it instead as a high threat, one has to step back from the actors and understand the environment that prevailed, particularly among NGO elites, after the Waki report was released in October 2009.
The report caused ripples in at least two spheres. In the sphere of NGO action, the Waki report became the tool for the much longed-for “constitutional moment” that could catalyse political regeneration. Regime change could be midwifed through the ICC’s threat. “Regime change” is a term frequently used in the literature on democratization and elections, but for Kenyan NGOs, it signified a “political transformation” that elections had been unable to deliver.41 Despite the presence of elections and changes in government since the introduction of a multi-party system in 1991, many NGO elites argued that the political class remained largely the same.42 Furthermore, civil society was unwilling to be agnostic about this political class. It was due to a tacit contract between civil society and the first Kibaki government that civil society had broken their “apolitical” position, which shred their credibility. The ICC was an opportunity to address a broader political culture that gave politicians the sense that they could get away with any type of conduct. Without addressing the broader political culture, the focus on justice (in the narrow sense of “direct victims”) would not yield any fruit. Justice and political transformation were twin strategies: “do you ask which of your two legs you use more than the other? They are both equally important.”43 In the NGOs’ calculations, prosecution before the ICC could be used to change the dynamics of the next election in 2012. Indeed, the most important anchors of the political class could be changed. “It seems short-term but it is long-term,” Mugambi Kiai said.44

NGO elites, among themselves, came to a tacit consensus of “imposing pain” on politicians, where the internal goal of regime change could be justified publicly as an attack

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41 A number of respondents expressed this view using these terms, for example, Mugambi Kiai, Interview, Nairobi, January 13, 2011.
42 Mwalimu Mati, Interview, Nairobi, December 3, 2009. To be sure, while there were changes in the members of the parliament, many critical actors, particularly those in key cabinet positions, remained the same.
43 Mugambi Kiai, Interview, Nairobi, January 13, 2011.
44 Ibid.
on impunity.\textsuperscript{45} Put differently, NGO elites would provide any justification that was necessary in order to make prosecutions become the preferred course of action for Kenyans. First, they argued that the violence was the result of a lack of “accountability.” Maina Kiai summarised it thus:

Part of the reason why militia—on both sides—have been so potent and dangerous is that they arose from the earlier violence of the 1990s and were never de-mobilized. Nor was there a process to deal with the root causes of that violence, with the Kibaki government choosing to sweep the matter under the carpet, despite campaign promises to the contrary. With grievances bubbling and fermenting close to the surface, it was relatively easy to reactivate the militia using methods similar to those of the 1990s. Most important, the paymasters and planners of the 1990s clashes were never held accountable.\textsuperscript{46}

Second, this messaging of the violence as a result of failed accountability was distinguished from any discussion of “accountability” during the 2003 season. In 2003, the TJRC was framed as an instrument that would be able to bring “accountability” and, consequently, to deter future crimes from occurring.\textsuperscript{47} In 2007, the new meaning of the term was one that did not include reconciliation.\textsuperscript{48} In fact, reconciliation was seen as subverting accountability.\textsuperscript{49} Kenya’s political elites were criminal, and ordinary Kenyans no longer had the agency to reclaim their country by acknowledging the past and creating a common history through truth-telling (as everyone wanted in 2003). The violence of 2007 had demonstrated that Kenyans were pawns in a political game, manipulated by ruthless political agents, and that the same old measures would not do.

With these two messages, the NGOs provided fodder for the media, where a sensational story was beginning to brew.

\textsuperscript{45} Respondents said that they could not talk publicly of this strategy, but they acknowledged its existence. Author interviews, Nairobi.
\textsuperscript{46} Kiai 2008: para. 7.
\textsuperscript{48} For a general discussion of the practice of changing the contents of contested or empty universals, see Renner Forthcoming.
\textsuperscript{49} Honourable Paul Muite, Interview, Nairobi, November 27, 2009.
It should be remembered that Kambale thought Kenya’s elites were unversed in matters of international law. It should also be remembered that the Waki commissioners had decided that they did not have enough information to definitively determine the existence of crimes against humanity (hence why perpetrators were not named publicly). There was nothing automatic about the international action that might follow the Waki report. The ICC had procedures that were enshrined in the Rome Statute on how to determine any actions it would take (if any).

These facts, however, were a mere inconvenience to both the NGOs who wanted to frame a strong threat in order to precipitate domestic prosecution, and the members of the media who wanted a sensational story. Discussions about the inadequate evidence were relegated to private misgivings that were shared among NGO elites. In spite of this, they chose to project an air of absolute certainty concerning the imminence of ICC action. In the media (as it was in the public perception), The Hague was sensationalized to the extent that editors knew that newspapers would sell out if they carried a headline about the ICC. In a country where the politicians at the top seemed to be untouchable, the promise—however remote it might be—that they could “face the indignity of being clamped in leg irons and handcuffs” and sent to The Hague captured the public imagination. Media speculation was also fed by the mystery surrounding the envelope (and the speculation concerning what names might be in it).

The spread of misinformation, particularly concerning how the ICC works, was a notable feature of this period. Leading Kenyan lawyers suggested that a failure to implement

51 Key Informant 8, Interview, Nairobi, November 11, 2009.
52 For an example of these images, see Gaitho 2009.
the Waki Report would automatically trigger the ICC.\textsuperscript{53} This assumption became common belief, was propagated by the media and repeated by politicians, and shaped advocacy action. For example, in November 2008, KPTJ held a conference to discuss the recently released Waki report. During the meeting, Harun Ndubi, a lawyer affiliated with the KPTJ and someone who worked closely with Gitobu Imanyara, a reformist member of parliament, gave a presentation, which said:

\begin{quote}
[The Waki Commission] is actually an organ of the mediation process (also known as the Serena process) and is in essence sub-contracted by the Africa Union (AU) to make recommendations on behalf of the AU, the United Nations, and the International Criminal Court (ICC). Its recommendations cannot therefore be flippantly dismissed as the international community has a huge say in the entire process.\textsuperscript{54}
\end{quote}

The idea that the Waki report was a tool for direct ICC action was reinforced in the media: one commentator stated that the parliament had to pass the STK bill in order to “forestall the prosecutions being taken over by the International Criminal Court at The Hague.”\textsuperscript{55} “Recommendations of the Waki Report must be carried out to the letter,” urged Mutua in an editorial, “otherwise, the Waki Envelope—which names high ranking suspects—will be handed over to Mr. Moreno-Ocampo for indictments.”\textsuperscript{56}

These statements were not entirely untrue, but they did eliminate a number of steps that would take place before the ICC took any action after a failure to implement the Waki report. The NGO actors, by removing the genuine uncertainty of the ICC process from the discussion and creating a binary of a flawed domestic process versus a clean and certain international process, shaped a perception about the threats that deeply informed the actions

\textsuperscript{53} For Court trigger mechanisms, see International Criminal Court 1998, especially Article 13(b), 14, and 15.
\textsuperscript{54} Ndubi 2008. On file with the author.
\textsuperscript{55} Warigi 2009.
\textsuperscript{56} Mutua 2009b. Mutua did later acknowledge to the author that he his threats of the ICC were intended to pressure the government to act.
of elites who were seeking to protect their own interests. It was within this context of misinformation that the political elites chose to reject the STK in parliament, as shown below.

2. Interests of Insecure Elites Diverge: STK is Rejected

Even before NGO elites escalated the threat of transitional justice as described above, the Waki report’s release in October 2008 started to shift the threat of transitional justice for the PNU. The report found that the single most frequent cause of death had been gunshots presumably fired by state agents. This finding lowered the PNU’s high-minded tone about justice that they had adopted earlier in 2008 when they were seeking prosecutions for ODM youth, which only compounded the speculations in the KNCHR’s report concerning the role in the violence that had been played by Uhuru Kenyatta, a key actor in the PNU. The culpability of state security forces was affirmed by a report from the Special Rapporteur Philip Alston.

By this point, it was becoming clear to the PNU that, as the party that held the presidency, there was nothing to gain from an external judicial process. Indeed, any external process would only reduce their control over the national narrative. Compounded with NGO and media reports about the possibility of ICC action, the PNU decided to support the STK in the hopes that they could control it once it was established. They had a level of control over the judiciary, the president was immune to prosecution, and the Attorney General could be relied upon to act politically. Overall, they had everything to gain from a domestic process.

The PNU’s perception of a high threat would explain why the head of the civil service, Francis Muthaura, wrote to all PNU members before the vote for the STK Bill: “I

57 Kenya National Commission on Human Rights 2008b. Uhuru unsuccessfully tried to expunge his name from this report.
58 Alston 2009.
have been directed to inform you to attend Parliament today, 12th February, 2009 at 2:30 p.m., to support the two above mentioned Bills. You are kindly requested to be punctual.” It is reasonable to assume that by this time, the PNU understood the possible costs of external judicial action, and they tried to shape a national compromise. Without a majority in parliament, they would have to rely on the support of the ODM.

However, the payoff for international prosecutions for the Odinga faction of the ODM was very high, and a compromise involving domestic prosecutions was not attractive. Why? The previous chapter concluded with a description of the early days of the coalition government, where the ODM’s Odinga and Ruto factions fractured, and Odinga, by supporting amnesty, alienated his progressive constituency.

During the voting for the STK, the ODM’s embrace of justice—contradictory as it may seem, given the ODM’s initial call to arms and the fact that the most visible violence came from the ODM—was complex. Initially, the ODM reportedly hired some of the best lawyers in the country who told leadership, “Hey, don’t be afraid, if you want this thing to die, send it to the ICC.” For Ruto’s supporters within ODM, the Waki report’s recommendation to establish a robust domestic prosecutions process that was independent of the Kenyan judicial system was threatening—for it was their “boys” who had caused the violence—and The Hague was a good option. For this reason, they initially and dismissively asked, “ICC Kitu gani?” (“What is this ICC thing?”). They seemed to want to trigger the nuclear option in order to see what its noisy advocates had to show for all their barking about it. This group voted against the bill.

60 Key Informant 8, Interview, Nairobi, November 11, 2009.
However, Odinga’s supporters faced a multi-faceted problem that required contradictory approaches. In one arena, Odinga could not neglect the resonance the ICC proposal had with the international community. He understood from the amnesty debate that if he did not support the Waki report, he risked losing support from the international community and the liberal, anti-government constituencies that were actually, or presumably, on his side. In another arena were his erstwhile allies from the Rift Valley, under the leadership of Ruto. The Waki report seemed to finger the Ruto faction of the ODM. For Odinga’s supporters, the report further disaggregated responsibility and gave the Prime Minister the opportunity to weigh the costs of repairing his already-failing standing with his Rift Valley allies against the benefits of standing with the international community and all the NGO actors. In a final arena, Odinga was the member of a coalition government he had little reason to trust, given the acrimonious relationship that had emerged between them after the MOU of 2002 and the subsequent contested election. As the governing partner of the PNU, Odinga was expected to support the STK and to ask his troops to vote accordingly, which would create a domestic tribunal in the image of the PNU. As a Ruto ally, he was supposed to reject the STK in light of Ruto’s concerns. As an ally of the international community, he was required to embrace prosecutions and advocate that they adhere to international standards.

Odinga had to act strategically, for it appeared that allowing the ICC process to take place could solve several problems at once. It would eliminate an archrival from the ODM political game, thus sparing Odinga the political capital of having to do that himself while simultaneously garnering him more international support. At the same time, Odinga could benefit if the PNU was seen as being ineffective in implementing the agreements stemming
from the Serena Talks, including the Waki Commission. These two factors (combined with
the emergence of maximalist transitional justice demands, including international standards
of prosecution and the removal of presidential immunity, from NGO elites and their
transnational allies) created a perfect strategy for the ODM.

Odinga decided to support the government position by voting for the STK, which
alienated the Ruto faction. However, he did not demand that the rest of the ODM necessarily
follow his lead. This meant that he could stand alongside Kibaki in supporting the Bill, and
the Bill would still fail because subordinates within his faction of the party would subvert the
government position and join the NGOs in shaping maximalist demands for justice at The
Hague. The cost of alienating Ruto occurred outside political time. After all, as it is with all
aspects of Kenyan politics, allies fall apart when it is necessary and reunite when it becomes
expedient again.

Another set of interests that were represented in the vote was that of NGOs. Here, it is
useful to revisit the structure of Kenyan NGOs. As briefly discussed before, in addition to the
division between human rights groups and peace groups, within the human rights groups,
there were the core group and peripheral actors. So far, this research has focused exclusively
on the core group, and this is the group that is labeled “elites.” It should be remembered that
the NGO elites, some of whom had been consulted by Kambale ahead of crafting the core
demands of the Waki report, understood that a threat of ICC intervention would tilt political
calculations toward the establishment of the STK. They understood that their job involved
lobbying the ICC so that its threat remained credible. As will be described later, the interests
of these NGO elites were congruent with those of the ICC prosecutor himself, and success

61 Martha Karua, then Minister of Justice, said in an interview with the author that she did not feel that PNU and
ODM made enough effort to get their members to support the bill. Martha Karua, Interview, Nairobi, January
12, 2011.
meant domestic prosecutions. These elites met with Ocampo, and with Annan during his visits to Kenya, and made sure their advocacy positions were understood. Furthermore, as Ocampo coordinated his statements on Kenya with the Annan team, there was a seemingly seamless escalation of the threat against regime elites with an eye toward precipitating domestic action.62

However, there were also many secondary human rights NGOs.63 These were the NGOs that took cues from the handful of NGO elites. These NGOs were also made up of lawyers, but they did not have as much access as the NGO elites did. For these secondary NGOs, the strategic threats of NGO elites were taken at face value, and they gave fodder to the maximalist anti-domestic justice, anti-STK platform espoused by the media. For those not in the inner circle of human rights NGOs, the signals that seemed to emanate from strategic elites seemed to suggest that action from the ICC was indeed imminent. For the secondary NGOs (and for what would eventually became public opinion), the ICC was the ideal location for prosecutions. Put differently, one faction of NGOs wanted the ICC to remain a threat in order to facilitate domestic trials, while another, more numerous, faction lobbied Gitobu Imanyara, a member of parliament, to suggest that the STK, as it was proposed by the Bill, was not sufficiently independent, and that they wanted the ICC itself. In the view of the secondary NGOs, from the very beginning, any domestic activity for justice would obviate the need for the ICC. Indeed, they discredited all domestic options and saw anyone who called for domestic measures as an apologist for human rights violators. Because everything else would represent an inferior form of justice, there was no other solution but the ICC.

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62 Author interviews in Nairobi and New York. The goal of these actors eventually shifted, as will be discussed later.
63 Secondary does not suggest they were less important. They simply did not set the agenda, but rather followed.
They coined the phrase, “Don’t be vague, go to The Hague.” In their opposition to the STK, they sat in the uncomfortable company of the conservative, anti-prosecutions politicians from the Rift Valley, such as Ruto.

The STK bill came up for a vote. It was defeated, receiving only 101 votes instead of the 145 that were required to pass. As far as the PNU elites were concerned, the TJRC would now be the natural fall back choice.

What they did not count on was that, due to the pre-Serena advocacy by human rights NGOs, the subsequent high-profile mediation, and the invocation of the ICC by threat-holders, the prosecutor of the ICC now saw Kenya as an opportunity to experiment with the principle of proactive complementarity, which will be discussed below.66 Previously thought to be a distant threat, the Court now became a threat in real political time, which amplified the concerns of the insecure PNU elites and provided further incentives for the ODM to defect. As a result of the ICC’s escalating threat described in the section below, the PNU further consolidated their support behind the low-threat TJRC as the option closest to doing nothing.

3. Enter Ocampo: Threat-Holder Interests Collide, Insecure Elites Choose Truth-Seeking

Thus far, the chapter has discussed human rights NGOs uniting as domestic threat-holders in order to bring about political regeneration. It is useful to point out, however, that a critical dimension of the threat credibility of transitional justice was external. As individuals with global contacts, NGO elites were actually transmitters of the ICC’s threat, which was
personified in the figure of Luis Moreno-Ocampo. Indeed, while Ocampo represented only one aspect of the Court—the Office of the Prosecutor—for many Kenyans, he was the Court.

Observers have suggested that Ocampo’s optimistic approach to Kenya was buoyed by an assumption that Kenya would be an “easy” case, one endorsed by the international community, supported by Annan and, in the view of many, tacitly supported by President Barack Obama.\(^{67}\) Indeed, according to a respondent at the ICC’s Kenya investigation team, Ocampo decided to investigate Kenya, telling his team at the ICC at the outset, “I will go to Kenya, you will get me evidence. If you do not agree, you will be fired.”\(^{68}\)

To be sure, Ocampo was not jumping into the Kenyan case because he wanted to prosecute it. On the contrary. Kenya was part of a self-conscious strategy by the ICC prosecutor to experiment with the use the threat of intervention to trigger domestic prosecutions. This policy was outlined by the prosecutor in the early days of the ICC, where he argued that the Court would be successful if it could trigger domestic prosecutions, obviating its own need to act. The policy was called “positive complementarity” or “proactive complementarity.”\(^{69}\) The idea rested on the notion of “sovereignty costs,” which can be ramped up until a target government implements prosecutions itself due to its fear of international intervention.\(^{70}\) Usefully, the Waki Commission had already created a scenario that relied on the “looming presence” of the Court to trigger action.\(^{71}\)

The pressure was exerted through the Office of the Prosecutor’s use of the media. Ocampo himself fed into, and capitalised on, the media attention that had already been

\(^{67}\) Author interviews, Nairobi.  
\(^{68}\) Key Informant 5, Interview, The Hague, October 7, 2010.  
\(^{69}\) See International Criminal Court 2003. For other views on complementarity, see Brown 1998; Perrin 2006; Schabas, Stahn, and El Zeidy 2008.  
\(^{70}\) Burke-White 2008.  
\(^{71}\) Akhavan 2003: 717.
generated by the Waki report. Privately, Ocampo coordinated with Annan’s team about when to make public pronouncements and escalate the threats against the regime elites.\textsuperscript{72} For example, on 11 February 2009, the day before Kenyan lawmakers were due to pass the law on the STK, the ICC released a report on Kenya.\textsuperscript{73} This report was a striking, colourful, 2-page document with a cover featuring a photograph of Annan and Ocampo. While the caption indicated that the photograph was taken in 2005, the impression it sent was one of collaboration between Annan and the ICC on the matter of the envelope and the list of names (this was before Annan gave names to Ocampo). The media samples in the ICC report were selected to highlight the Kenyans’ support for the ICC. One excerpt from the Kenyan media read, “The issue is not about the local process or The Hague. It is about where the most impartial justice for Kenyans will be delivered affordably. Which makes The Hague the best option.” Another excerpt read, “We, Kenyans, support The Hague option because having an independent unbiased third party such as the ICC in charge will ensure that the process for justice is free from political interference.”\textsuperscript{74}

Through statements such as these, the Court sought to demonstrate that its authority had the consent of the stakeholders who count—the citizens of the country in which the crimes have been committed. It also appeared that the Court was seeking to harness the popular consent that was inherent in the statements by Kenyans. These were statements that reflected a high level of endorsement that had been absent in victim communities in Uganda.

\textsuperscript{72} Respondents familiar with the Annan team confirmed that there was “perfect” coordination between Annan and Ocampo, on such things as when the Court should issue statements. Author interviews, New York.
\textsuperscript{73} Office of the Prosecutor 2009a.
\textsuperscript{74} Ibid.
and elsewhere. With such a vocal endorsement, the Court could point to the authority of the Kenyan victims when African statesmen said that the ICC was a neo-colonial project.\footnote{On African tensions with the Court, see Oette 2010: 259.}

It should be remembered, however, that while Ocampo’s action—both before and after the rejection of the STK—were undertaken in the service of proactive complementarity (in order that Kenya would prosecute the cases herself), NGO elites (the handful of agenda-setting actors previously described) had different interests. Initially, NGO elites wanted to keep the threat of the ICC credible so that regime elites would establish a domestic court out of fear. At a meeting organized by ICTJ and KPTJ to discuss transitional justice, they reiterated their strategy:

> Keeping the ICC threat credible as a way of building pressure for a national process should be a priority for human rights groups. Human rights groups could therefore undertake public information campaigns on the ICC; its potential role, its capabilities and the impact it might have on the rule of law and human rights generally in Kenya.\footnote{Author emphasis. See Kenyans for Peace Truth and Justice (KPTJ) and International Center for Transitional Justice (ICTJ-Kenya) 2009: 13. On file with the author.}

As established before, this framing of the ICC as a threat remained internal among lead human rights NGOs. In order to maintain the pressure that was necessary for achieving domestic prosecutions, the external framing of their advocacy was that the government could not be trusted to establish credible institutions. NGO elites did not tell the public, or even second-tier groups like the churches, that their ultimate goal was the establishment of a national processes, and that the discrediting of an internal process was being done in order to precipitate that very process. As established in opinion polls, the public believed that the ICC would be their saviour, given all the benefits it would bring (as promised by advocacy NGOs). In one opinion poll asking Kenyans whether they wanted truth-seeking or prosecutions at The Hague, 68% of Kenyans preferred prosecutions at The Hague. With
public opinion strongly in favour of the ICC, NGO elites were no longer speaking for themselves, but for the public.\textsuperscript{77}

The ICC’s wish to escalate sovereignty costs and trigger complementarity added credibility (as well as feasibility and public support) to the NGOs goal of regime change. In March 2009, a senior ICC official, who was attending a meeting hosted by Kofi Annan in Geneva to review the progress of the National Accord, said that the ICC had information and that it could act on Kenya. In April 2009, Martha Karua resigned from the Ministry of Justice, demonstrating a disagreement within the PNU on its approach to justice. As Annan put pressure on the deadline for a domestic process, in June 2009, cabinet officials, under the leadership of Mutula Kilonzo (the new Minister of Justice), decided to go to The Hague and negotiate a different timeline from the one included in the Waki report.\textsuperscript{78} With the prosecutor, they agreed that by September 2009, they would either institute a domestic process or refer the case to the ICC. The Office of the Prosecutor published the minutes of the meeting, as well as a photograph of the politicians and the prosecutor. This made headlines in Kenya.

This meeting with the prosecutor seemed to seek to marginalize Annan, who was, until this point, the only contact between Kenyans and Ocampo.\textsuperscript{79} On 3 July 2009, Annan submitted the envelope with the names of suspected perpetrators to the Office of the Prosecutor, which brought the Court into the scale of political time. When the envelope was handed to the Court by Annan, Ocampo was in Kampala with President Museveni.\textsuperscript{80} Upon

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{77}See Opiyo 2009. This is not to criticise the process by which the terms emerge that public opinion then gathers around, or the reasons behind the opinions, since these reasons may exist. Rather, it is to explain the role agenda-setters play in shaping what eventually becomes public opinion, since this opinion is not spontaneous.
\item \textsuperscript{78}Mutula Kilonzo, Interview, Nairobi, December 16, 2009.
\item \textsuperscript{79}Author interviews, New York.
\item \textsuperscript{80}The handover was to the Embassy of the Netherlands in Nairobi. Author interviews, New York.
\end{itemize}
\end{footnotesize}
returning to The Hague, a further performance occurred: the envelope was opened with ceremonial fanfare, and photographs were taken of the prosecutor looking at the names. These photographs made headlines in Kenya, and they would be used repeatedly in the media to fan speculation about the unrevealed names.

The handover of the envelope precipitated a shrill discussion in the media and among human rights actors about the necessity of removing immunity for heads of state and of bypassing national judicial processes in order to meet international standards. In reality, complementarity has no specified technical requirements, and while the removal of immunity is a preference of human rights activists, it is not essential for a domestic process, as the case of Uganda illustrates in chapter six.

Nonetheless, Kilonzo’s attempt to improve on the Karua bill and “amend it beyond recognition” failed, for it became politically impossible for coalition partners with different incentives to agree on a process regarding prosecution, especially given their limited knowledge about what was expected of them and the strength of NGO assertions about what prosecutions required. Human rights NGOs, through a draft bill presented to parliament by Gitobu Imanyara, demanded an ambitious national process. The bill was procedurally rejected by both the ODM and the PNU.

Ocampo lent more credibility to the NGO threats when he met with NGO elites at a meeting organized by ICTJ and the Minister of Foreign Affairs of the Netherlands. He supported their advocacy by arguing for a “three-pronged approach”: prosecution at the ICC, prosecution at home, and a TJRC. Photographs of this meeting were published by the press, and both Ocampo and the NGOs made public statements that sounded more certain than the

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82 Honourable Gitobu Imanyara, Interview, Nairobi, November 30, 2009.
legal process would allow. Ocampo stated, “Kenya will show how to manage past violence and how to create a peaceful process for the upcoming elections in 2012. Kenya will be an example to the world.” All the messaging seemed to suggest that there would be no solution outside of The Hague. Regime elites did not understand that this external pressure was, in actuality, seeking to lead eventually to a domestic process. They simply saw it as a high threat that was outside of their control.

The Court’s strategy involved coordinating closely with Annan’s team. This was a move of coercive diplomacy that was intended to ensure a threat level that would then—according to the idea of positive complementarity—trigger domestic prosecutions. This strategy failed, however, in its understanding of the logic of regime insecurity. Consequently, it threatened the already insecure elites who looked further inwards and sought to protect their key clients. The PNU elite would not willingly implement anything whose outcomes they could not control.

On 30 July 2009, the cabinet released a statement that it had finally reached a common position on how it would address the perpetrators of the violence. They would use a strengthened TJRC, a strengthened system of domestic justice, and the cooperation of the ICC. Kibaki said, “Cabinet was concerned that while it will not stand for impunity in the pursuit of justice, the country should equally pursue national healing and reconciliation. This does not in any way reduce its desire to punish impunity.” Here, using the language of civil society, noting all the important institutional priorities that a government ought to have, and pointing to the competing values and obligations inherent in transitional justice, the government chose reconciliation, a lowest-common-denominator process of transitional justice.

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83 Office of the Prosecutor 2009b.
justice that could pass the minimum test without placing its partisans in too much danger. In a thinly-veiled threat to the anti-impunity advocates, the cabinet said that they had considered and decided against pulling out of the ICC (this was a threat that would later be actualized when the Court process against government officials started).85

The insecure regime’s inability to control the narrative was most clear following this cabinet announcement, due to the fact that it precipitated a public battle. Odinga, who had incentives from multiple arenas, had supported the Cabinet decision in his role as a good politician. But he also had members of the cabinet of his faction distance the ODM from the cabinet’s position on the TJRC, and say that Kenya should go to The Hague. In response, the Minister of Foreign Affairs, PNU’s Moses Wetangula, had his permanent secretary write a statement about sovereignty and the Kenyan decision. In an interview, the Deputy Minister of Foreign Affairs (ODM) labeled the view of the Permanent Secretary on sovereignty “illiterate.”86 Mutula Kilonzo (who was allied with the PNU) distanced himself from the TJRC altogether. Some cabinet factions from both the PNU and the ODM, who were thought to be responsible for all the post-election violence, supported the TJRC. In the public fight, the governing elite evidently reached an impasse. The TJRC was seen as the lowest level of accountability, but the government was even having a difficult time creating a credible narrative to explain their thin consensus in support of the non-threatening institution. Their ultimate decision was, effectively, to do nothing.

Those close to the Prosecutor describe Ocampo as having expected his pressure to trigger a reaction of “sharks smelling blood” among political elites, with an effect of

85 This later position would be supported by everyone but Martha Karua. See National Assembly 2010.
86 Honourable Richard Onyonka, Interview, Nairobi, December 9, 2009.
immediate political isolation and domestic prosecution of those suspected.\textsuperscript{87} However, having failed to analyse the effect of pressure on an insecure regime, the result was a series of unintended events. As the next section shows, the outcome was ICC action, a result that was initially unwanted by both NGO elites and the ICC itself.

**III. The Third Appropriation: Insecure Elites Face History**

As the TJRC surfaced again as the politicians’ lowest-threat process choice in the face of escalating threats from the ICC, NGO elites rejected it, despite the fact that they had introduced its vocabulary in 2003. More importantly, NGO elites acted as Kenya’s institutional memory, recalling the fact that, for them, the TJRC could substitute for prosecutions, rather than enable them. They were able to bring up the consequences of past decisions to regime elites, making it impossible for the PNU to act as though it had not rejected the TJRC that had been proposed in the days of NARC. This was the discredited model to which NGO elites did not wish to return. This section shows how the anti-impunity community rejected the choices of the insecure PNU elites, acted as custodians of history, discredited domestic choices, presented Ocampo with arguments about why Kenya was a good situation for him to act (rather than simply to threaten action), and successfully advocated for the ICC’s involvement in Kenya.

**1. Threat-Holders as Institutional Memory: Rejecting the TJRC**

In 2008, before the Waki Commission’s report introduced its threat-raising nuclear option of the ICC, human rights NGOs were stuck in history. In 2003, their choices had been informed by a decade-long relationship with the anti-KANU opposition. In 2008, however, many of them felt that the post-election violence had opened an entirely new chapter in the Kenyan

\textsuperscript{87} Ocampo was under this impression up until summonses were issued to six suspects. Author interviews, New York.
political scene. Furthermore, the NGO elites were steeped within an international normative context that was more maximalist in 2008 than it had been in 2003. The truth commission model was being increasingly challenged as prosecutions took prominence as the preferred international strategy for deterrence.

By 2008, the NGO elites who had previously manufactured public support for the TJRC had stopped believing their own idea that the TJRC was the solution to Kenya’s governance problems. In 2003, they had claimed that a TJRC could place Kenya on an “irreversible trajectory to democracy and respect for basic freedoms.” They messaged it as a policy innovation, something entirely different from all previous commissions, and “a way for us to make history, make our own history.” In 2008, however, they were more clear-eyed about the proposed TJRC. NGOs finally resigned themselves to the fact that the act of setting up a commission and the debate about commissioners and their remuneration mattered more than what the commission actually did. Recommendations never had to be implemented.

In 2008, many NGOs felt that reconciliation was an orphan agenda, one without even a pretext of popular support. And yet the government was playing the game that the NGOs themselves had introduced back in 2003. For instance, the 2003 Task Force had made a case that, despite the advice of leading experts to the contrary, nothing required the TJRC to steer clear of the topic of government corruption. Indeed, it was suggested that transitional justice was actually strengthened by bringing a variety issues together under the same umbrella

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89 See, for example, Walker 1974: 114–115.
90 Makau Mutua, Telephone Interview, February 3, 2010.
91 The government understood that its role was to put institutions into place, rather than to have them succeed. When asked about the pace of reforms, the government gave itself a 90% score, because a range of task forces had been appointed to look at problem. See Republic of Kenya 2009b.
When the threat of the TJRC changed in 2003 due to the linkages between NARC and KANU, the government itself took a cue from this approach. If transitional justice was a flexible set of institutions from which one could pick and choose, NARC officials would perform transitional justice by stating that Kenya required a package of interventions that were focused on judicial reform and tackling corruption. These would be isolated reform exercises aimed at particular arms of the government that would leave the executive unscathed. NARC undertook a “radical surgery” of the judiciary (Justice Waki, implicated in this surgery, described it as the “invasion of the judiciary by the Executive”), established commissions of inquiry into large corruption cases (where, incidentally, clients of the regime were implicated), and explained that it was no longer necessary to institute a full-scale TJRC. Having rejected it before, the government now wanted to go back to the old and familiar TJRC because they understood it to be flexible.

In October 2008, the TJRC was established by an Act of Parliament, and it was assented to by President Kibaki on 28 November 2008. The temporal mandate of the commission covered any time between December 1963 (independence) and February 2008 (the signing of the National Accord, which ended the post-elections violence). Additionally, the TJRC set out to provide a forum for promoting a new national vision, one restoring the dignity of the victims, and facilitating national and individual healing and reconciliation. There was nothing disagreeable about all these ideas, or about the fact that the TJRC was expected to present a final report that would include recommendations on how to prevent future abuses.

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92 The author, who was working at the ICTJ at the time, co-authored a memo to the Task Force on this theme.
All this was changed, however, when the cabinet chose the TJRC at the expense of prosecutions, as described in the previous section. On 22 July 2009, in the midst of a fight between the government, the human rights organizations, and many international advocacy groups, about what accountability should look like, the President approved the names of the nine TJRC commissioners. He announced that the commission would be headed by a chair (Ambassador Bethuel Kiplagat) and supported by a vice-chair (initially, Ms. Betty Murungi). It would include three international commissioners and four national commissioners. The commissioners took their oath of office on 3 August 2009, and their appointment was noted in the Kenya Gazette on 17 August 2009. Murungi was the only person in the commission who was recognized by, and “belonged” to, human rights NGOs. Many human rights NGO elites, who considered themselves until that point the rightful owners of the TJRC, had applied for positions and did not even receive interviews. Indeed, one respondent who had applied to be commissioner was told by some members of the selection committee that he was too qualified, and that they would propose his name to another commission. This suggested that there was no merit to the process.\textsuperscript{95} NGO elites felt they had lost control over their reconciliation narrative. They were looking for an opportunity to break free from the history of commissions.

The pro-TJRC announcement by the cabinet unleashed a venomous response against the new commission and its officers. This provided the human rights NGO elites with the chance they needed to reject the TJRC. If, as the government had said in its statement, “national healing and reconciliation” were to come about only by giving up the fight against “impunity” and the pursuit of “justice,” then these groups did not want that brand of “reconciliation,” and they would reject any institutions promoting it. However, as the

\textsuperscript{95} Njonjo Mue, Interview, October 23, 2009.
language of reconciliation was at the core of the work of the peace groups (who had been largely left out of the 2003 Task Force process) these stepped up to “own” the TJRC.

The discontentment of human rights NGOs congealed around Bethuel Kiplagat, the chair of the commission. Kiplagat had been nominated by the National Council of Churches of Kenya (NCCK), which was a member of the peace groups. On 13 October 2009, Kenya Against Impunity, a coalition of vocal and prominent survivors of KANU repression, filed a lawsuit to halt the work of the TJRC by quashing the oath of office that had been taken by the commissioners.\footnote{Mutumishi Njeru Gathangu, Interview, Nairobi, December 1, 2009.} Among other allegations, the suit argued that Ambassador Kiplagat had been the Permanent Secretary of Foreign Affairs at the time that a prominent Kenyan minister was assassinated. NGOs urged Kiplagat to resign, and sent junior officials to TJRC meetings as a way to register their protest.\footnote{The author observed this in a meeting she attended on transitional justice in late 2009 in Kenya.} On 19 April 2010, Murungi resigned. She had been urged to do so by Mutua and others in the human rights community, who finally felt freed from the need to support the TJRC.

The rejection of the TJRC by human rights NGO elites was very strong. This rejection exposed once again the distinction between human rights groups and peace groups, a distinction which had initially manifested itself during the Serena talks, where human rights groups had demanded prosecutions while peace groups had pushed for reconciliation. Many donors were unwilling to back a commission without being told to do so by the prominent human rights NGOs.\footnote{Olatokunbo Ige, Interview, Mombasa, November 19, 2009.} The TJRC was supposed to be funded by the government, but despite promises to make Kenya the first country to fund the bulk of its truth-seeking process, only a very small percentage of the budget was allocated to it.\footnote{Patricia Nyaundi, Interview, Nairobi, December 10, 2009.} Parliament sought to disband the
commission (the Chief Justice had set up a Panel to investigate Kiplagat). And on 1 November 2010, almost sixteen months after he was first asked to do so, Kiplagat finally resigned.

Even then, many human rights NGO elites still refused to support the TJRC. They accused the commission of peddling lies to the victims in order to get statements and of making empty promises to victims to make them come forward. Some human rights NGO leaders suggested that the TJRC staff were promising, “‘we have the power to order the government to pay you Kenyan Shillings 1.5 million each.’ If you say that, villagers will get you thousands of statements. Without proper monitoring, we do not know what they are doing, what they are telling victims.” In return, the TJRC officials accused the “big boys” from the human rights movement of arrogance, even when they did not actually have any constituency. The TJRC pointed to their turnouts at public hearings as evidence that they were an institution that was performing a needed role. In the private war between human rights NGOs and the TJRC officials (for it was a private civil war, fought between those NGO elites who joined the mission of the “peace groups” and chose to work at the TJRC secretariat for reconciliation, and those who chose to stay outside of it), calls for the dissolution of the commission continued. The TJRC agenda, to the extent that it creaked along, was a zombie. (To be sure, in light of the fact that supporting the TJRC could have monetary benefits, some groups did have limited engagement by, say, raising funds to write a policy for the TJRC. But on the whole, the most vocal and visible approach was one of disengagement.) In the meantime, threat-holders set about discrediting the commission and all other domestic options in order to make the case for ICC action, as described in the final section below.

100 Author Interview with leader of key human rights NGO, Nairobi, January 2011.
2. Advocacy in Insecure Regimes: Threat-Holders Appropriate the ICC

The rejection of the STK, and the attempt by PNU elites to dictate the transitional justice agenda by suggesting that the TJRC was the only option, finally convinced those NGO actors that had previously wanted to use the ICC solely as a threat, that Court action was the preferred outcome. This decision to pursue the ICC had two challenges. The first was, as described above, the Court’s preference that there be domestic action. Within this context, NGO elites had to discredit all domestic actions in order to create domestic demand for international action. The second challenge was that the Court’s ultimate decision to initiate proceedings was, in the first instance, in the hands of the ICC prosecutor. The NGOs had to present a compelling legal case for him to act and convince him there was a moral hazard that would make it costly for him not to intervene. The manner in which NGO advocates achieved these two goals—and effectively chose the ICC for Kenya—is described below.

The key step that the anti-impunity community took to make Kenya an ICC situation country was to discredit all domestic processes. Critically, they had to discredit the TJRC, the only active transitional justice process. A key component of this task was conceptual: they had to make the case that the TJRC was the wrong tool for responding to the violence. While they had previously made a general point that the content of “accountability” had changed to mean prosecution, leading threat-holders now gave reasons why the change had taken place. As stated by leading NGO advocates who had previously championed the TJRC, “there is a sense in Kenya that the recent crimes deserve criminal prosecutions rather than truth-telling and recommendations.”\(^{101}\) They reiterated the view that reconciliation and truth-telling were tantamount to supporting impunity.

\(^{101}\) Kiai 2009: 10. Author emphasis.
Further, because there was no transition in Kenya, and NGO elites stated that truth-telling was only suitable for moments of transition, prosecutions were more suitable than truth-telling in Kenya. As Maina explained:

[The TJRC] is normally a transitional justice mechanism that operates when there is a change of government and acts as a signal that the new government has broken with the past. In the present case, we have a regime that is the same as before in terms of temperament and attitudes...the TJRC may increase, rather than resolve, historical tensions.  

Maina’s observation—that the absence of transition made the TJRC a cosmetic measure—draws on two contradictory registers of transitional justice simultaneously (as described in chapter two). In the register of the first-generation idea of transitional justice (as a compromise during political change), the absence of a transition could make a TJRC irrelevant, although practice shows that this fact does not stop governments from establishing TRCs. In this register, however, the conclusion should not be that prosecutions would be desirable, as Maina seemed to conclude, since in that first-generation register, a TJRC would be implemented precisely when prosecutions were not possible. If a TJRC would not be possible, then, within that register, it would follow that prosecutions would certainly not be possible. In concluding that prosecutions were possible, Maina is actually borrowing from the anti-impunity register, where transitional justice is delinked from both political transition and compromise. In this register, prosecution is the first among all pursuits. Indeed, in order to demonstrate the supremacy of justice over the law, prosecutions ought to be pursued precisely in those instances where they would be politically impossible. Maina’s argument simultaneously dismisses the linking of the transitional justice institution of prosecution with transition and compromise in the first register while affirming the necessity of transition as the condition under which one institutes another transitional justice institution (the TJRC).

102 Kiai 2009: 11.
The fact that this argument was made does not mean that the conditions it described were real. Rather, the conditions were being mobilized in order to justify the choices activists had made. This demonstrates how the NGO elites’ own appropriation of transitional justice for their own ends drove judicial statecraft.\(^{103}\)

Once the TJRC was described as inappropriate, the second step of NGO elites in their quest to make Kenya a situation country for the ICC was to offer compelling reasons for why ICC trials were the appropriate response. There were three tasks involved in this step. The first task was to justify the focus on a handful of perpetrators rather than on the victims (the latter being a promise of truth-seeking that NGOs had championed to date). This involved expanding the nature of victimhood beyond a reference to the direct victims (those who suffered in the violence) to include the broader notion of the victim-state that had endured murderous politics over a period of 40 years.\(^{104}\) As discussed previously, the framing of the victim-state was foundational to the thinking about regime change among NGOs. In this context, where victimhood was perpetuated by bad politics, redress would result when particular actors were removed from the political game. As the NGO elites argued, direct victims would not benefit if the victim-state was not redressed.

The second task of NGO elites was to demonstrate why an exceptional response was necessary for Kenya. To do this, they amplified the international importance of the Kenyan case, and clearly demonstrated the costs of non-action for everyone, including the prosecutor of the ICC. In this arena, NGO elites regionalized the Kenyan problem: “If Kenya is seen as the ‘indispensable’ state in the region, then the role of the international criminal justice apparatus to act on Kenya becomes even more indispensable to ultimately stop the slide into

\(^{103}\) Subotic also finds that NGOs hijacked transitional justice in this manner in former Yugoslavia. Subotic 2009.

\(^{104}\) Mugambi Kiai, Interview, Nairobi, January 13, 2011.
They also pointed out the contagion that would surely follow Ocampo’s non-action: “if he [the prosecutor] does not act on Kenya before next year then we can rest assured that Ethiopia, Sudan and Uganda will de-generate to Kenya election-like issues in 2010 and 2011.” Finally, they offered the ICC the low-hanging fruit, where the political elite could respond to threats and yield results: “The Kenyan ruling elite is closely linked up to the international community and the views of the international community matter to them.” This was closely linked with the goals of the international community: “An untransformed Kenya is not in the best interests of the international community and the best spur to that transformation remains an end to impunity.”

Their third task was to argue that not just any prosecutions would do. The prosecutions had to be at the ICC. As Maina said during the ICC meeting in New York, “I must say that the options available are not as attractive nor are they as comprehensive as the ICC option. But they would include the use of universal jurisdiction against particular Kenyan leadership for whom there is evidence of involvement.” Advocates called the ICC comprehensive even though the literature and the evidence did not suggest that the ICC could ever be comprehensive, particularly for direct victims. Indeed, the chief weakness of criminal justice more broadly (but especially of the ICC) is the fact that they are non-comprehensive. This inadequacy of prosecutions was the reason behind the creation of transitional justice in the first place, in an effort to expand possibilities for victim redress.

Having framed the case for ICC action, NGO elites set about coordinating their advocacy and undertaking internal lobbying to Ocampo in order to swing his prosecutorial

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105 Kiai 2009: 8–9.
106 Author interviews, Nairobi.
109 Kiai 2009: 10. Author emphasis.
discretion in favour of an engagement in Kenya. The sophisticated NGO elites understood the incentives of Ocampo. African heads of state were drumming up bad public relations for the Court, and Kenya offered a possibility for positive publicity. As Maina shared in an email to the author:

…there has been substantial lobbying at various levels with him [Ocampo], and I have spent quite a few hours myself with him talking about the politics of justice and the law. He is not a naive person, and as he is leaving in 3 years he is aware that there are legacy issues he has to confront, including restoring his name and reputation.110

The Court was the only hope for the constitutional moment that was sought by NGOs since the outbreak of the violence. Mutua, who was a critic of the western human rights project (which would ordinarily include the Court), admitted in his correspondence with the author that his support for the ICC was “instrumentalist because of the lack of political and viable institutions in Kenya to address impunity.”111 Maina echoed a similar sentiment when justifying his advocacy of the Court: “There is no other game in town...whether we think this is a good or bad game.”112 The use of the game metaphor is noteworthy (and recurs later in chapters 5 and 6 in Uganda) because it was conveying the human rights community’s tacit understanding that a prosecutor who sought to deliver a “clean election” for a country was not a neutral actor who was impossible to influence. International justice was a game, where those who best understood the strategies of how to ensure influence without appearing to be doing so, were likely to win.

The Kenyan NGO elites did, in fact, win by choosing the ICC for Kenya, because they succeeded in increasing the threat of justice with multiple, critical external audiences. For instance, the messaging about working for regime change using the language of anti-

110 Maina Kiai, Email, September 22, 2009.
111 Makau Mutua, Email, June 22, 2011.
112 Maina Kiai, Email, September 22, 2009.
impunity was self-consciously shared among the elites of the human rights NGOs to ensure that all of the actors were singing from the same hymn sheet. When Maina shared the notes of his ICC meeting in New York with Mugambi and Muthoni Wanyeki, the head of KHRC, he included a cover email:

Thought I would send this along to you as part of the continuing lobbying [efforts] that we are making... I understand that you have a lunch next week with EU ambassadors and there is a sense that many of them, especially the new ones, [don’t] get the gravity of what is happening and what could happen in Kenya... So these are some [thoughts]. Ocampo and his core team were at this [meeting] and this was received rather better than I expected.113

For many Kenyan advocates, success would be measured by whether the prosecutor would open a case. What happened after that—if those against whom the case was opened were eventually convicted—was not important. The NGO elites aligned their maximalist demands with the public pronouncements of the ICC prosecutor whose incentives they understood. The prosecutor was a willing accomplice who was happy to find an opportunity to demonstrate proactive complementarity. All of this made it impossible for political elites to differentiate the threat from reality. In the context of elite insecurity, where the government was unable to maintain a coherent narrative through a 24-hour sensationalist news cycle without being contradicted from within, it was clear for anyone looking into it that Kenya would be “unwilling” to prosecute. The case was therefore admissible before the ICC. For the government elites, who had worked together for decades and knew how to “game” the international system by giving the impression of doing the right thing, their atomization to protect their direct clients who were facing increased threats ironically created an environment that enabled an agenda of international prosecutions to emerge.

113 Mugambi shared these with his colleague, Pascal Kambale, who then shared them with the author.
In March 2010, the Pre Trial Chambers of the ICC, in a vote of 2 to 1, approved the prosecutor’s application to open investigations in his own initiative. This was the first time the prosecutor had done this, since all previous cases had come either from the countries involved or from the UN Security Council. In December 2010, the prosecutor requested summonses for six individuals from two parties and two different ethnic groups: cabinet members Uhuru Kenyatta, William Ruto, and Henry Kosgey; senior government officials, Francis Mutharura and Mohammed Ali, and radio journalist, Joshua Sang. At the time of writing, charges have been confirmed against all of these actors, with the exception of Kosgey and Ali. This was success. In the words of a leading human rights advocate, the ICC process was a “vindication of our years of professional work.” For Ocampo, it was a failure of proactive complementarity.

IV. Conclusion

This chapter has shown how insecure elites rejected prosecution and selected the TJRC. It also shows the role of critical junctures; in particular, the way that the Waki Commission, by introducing the ICC into the domestic lexicon of demands, changed the subsequent game and increased the credibility and costs of the transitional justice threats.

The credibility of the ICC threat also benefited from the informational asymmetry that arose from the multiple arenas many actors were engaged in. For example, while ICC actors wanted pro-active complementarity (in that they only wanted to act as a threat to spur domestic prosecution in Kenya), NGO elites thought it would be impossible to credibly marshal a threat that had domestic prosecutions as the desired end-point. As a result, the NGO elites discredited all domestic options for justice in order to shape the most credible

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114 George Kegoro, Interview, Nairobi, January 11, 2011.
115 Those close to Ocampo noted that he admitted that his theory of how elites would react to his threats did not work. Author interviews, New York.
threat possible against governing elites. Government elites, who could ordinarily appropriate any institution and use it for their own ends, seemed to see coordination between the ICC and the activists, and they did not understand that domestic prosecutions were still available as an option (and indeed, will remain an option right up to conviction of suspects). The story seemed to have slipped too far outside their grasp, so they opted to do nothing. The resulting political impasse meant that Kenya was unable to mount a political response, which allowed Ocampo to act.

NGO elites were central to this story because they simultaneously interacted with ICC officials, shaped the view of the media, and wrote the talking points of the victims, which produced the appearance of a seamlessly orchestrated demand to the ICC. Having closed all avenues for the discussion of alternatives, and indeed, having vilified any discussions of the alternatives by framing them as tantamount to impunity, NGOs elites effectively chose international prosecutions for Kenya.
Thus far, this research has established that insecure elites tend to support policies that are proposed in accordance with international standards in cases where transitional justice constitutes a low threat. Similarly, they will reject anything but the most minimal accountability measures when transitional justice becomes a high-threat game.

This chapter, in contrast, explores the autonomy secure elites possess that allows them to use transitional justice to pursue their own interests. It demonstrates how GoU elites demanded, and then later rejected, international prosecutions. In both instances, they did so in the name of ending a long proxy war that the government had conducted with Sudan, using the rebels of the Lord’s Resistance Army (LRA). Within the context of high regime security and low-threat transitional justice demands, the GoU elites were able to impose their preferences regarding ICC action on everyone, including the unwilling victims.

This chapter proceeds in three steps. First, it gives a historical overview of the Ugandan case, which will establish the parameters of regime security. Subsequently, it traces how the ICC came to be a relevant force in Uganda as a tool for addressing a regional conflict, which demonstrates how secure government elites initiated a political process with the intention of externalizing the GoU’s conflicts with the LRA and Sudan. The chapter then turns to a discussion of why the ICC constituted a low threat in Uganda, describing an understanding between the ICC and the GoU through which the GoU would support LRA prosecution and the UPDF would not be subject to ICC action. The section also describes the broader anti-impunity community, which initially refrained from criticizing the GoU in the interest of protecting the ICC, and thus effectively adopted the GoU’s framework for
understanding the conflict. Absent credible threats, once other geopolitical developments triggered an unexpected peace process and provided the GoU with an opportunity to pursue different political interests, the GoU embarked on rejecting the ICC. In both the GoU’s initial selection and subsequent rejection of the ICC, the Court was a low-threat tool that was always thought to be within the control of the governing elites. The chapter demonstrates the flexibility of secure GoU elites who were unconstrained by institutions and history, and could drastically revise any justifications for their policy choices to better fit their changing interests.

I. Justice and the Rebels: The Political Interests of a Secure Regime

On 5 December 2007, LRA representatives held a public consultation at the Hotel Africana in Kampala. The consultation was part of the Juba Peace Process (henceforth, Juba), a series of negotiations that began in July 2006 in an attempt to end the then twenty-year war between the LRA and the GoU. The consultations were designed to obtain public views on how the LRA’s top commanders, who were wanted for war crimes by the ICC, should be dealt with. Should they be prosecuted in a court of law or subjected to traditional justice? The consultation room contained donors, experts on transitional justice, military observers, the former heads of past Ugandan rebellions who were now living civilian lives under amnesty laws, and the public. The debate was essentially one about choosing transitional justice measures. The climax of the meeting came when James Obita of the LRA, the lead negotiator, stood up to speak:

And those of you who are so keen on implementing this issue of ICC…we [the LRA] do not condone impunity…We are not here to please the so-called Western benchmarks of justice. We can also create, can also invent, our own African benchmarks of justice. If in the views of the Western world that is not good enough, then we tell them sorry, you can go to hell. 1

1 James Obita, LRA Consultations, Kampala, December 5, 2007.
He then proceeded to present a message from Joseph Kony, the leader of the LRA:

The LRA and the High Command are sorry for what has happened in this country, and they ask for forgiveness. Equally, the LRA also has forgiven all those collaborators who were working with the government...they have forgiven everybody...so I stand here to say, let us make a new beginning, we all have a responsibility to those people of the North and Northeast Uganda.²

This meeting room in the Africana Hotel was replaying scenes that had been extracted from a previous, larger controversy that had ensued when President Museveni invited the ICC to address the issue of the LRA, and then subsequently sought to reject the ICC in order to negotiate peace.³ The main point of controversy surrounded whether the demands of international law to end impunity were compatible with the domestic politics of peace negotiations.⁴ On the one side of the controversy stood the supporters of international law who wanted to see the Court implement its mandate “to guarantee lasting respect for and the enforcement of international justice.”⁵ This camp consisted primarily of international human rights organizations. They asserted that, through international justice, war criminals could be isolated and conflicts could be brought to an end. In their view, the only choice for Uganda was to institute international prosecutions through the ICC: the crimes committed by the LRA were too grave to imagine that they could be addressed sufficiently by the inadequate justice system of Uganda.⁶ At the meeting in the Africana Hotel, those from this camp were mostly silent.

On the other side of the debate were the communities of victims and an assortment of transnational humanitarians who argued that international justice would only prolong war.

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² James Obita, LRA Consultations, Kampala, December 5, 2007.
⁶ See, for example, Human Rights Watch 2005.
For the sake of reconciliation, this group wanted the LRA to be addressed within Uganda, but not internationally.\(^7\) This group called for traditional processes of truth telling and reparations that could be reinvented and utilized.\(^8\)

The GoU elites, who had approved this theatre at the Africana Hotel, were absent. They were using the meeting to signal their rejection of the ICC’s engagement in Uganda. This rejection, however, was framed as a demand for reconciliation “from below.” After all, the government wanted to maintain an appearance of good global citizenry. The GoU was also using the Africana Hotel consultation as a concession to constituencies in Northern Uganda (as well as to other pro-peace constituencies), in order to show that it was serious about peace, something that a faction of the international community had deemed to be important. The GoU had allowed LRA negotiators, such as James Obita, who had not entered the country since the LRA rebellion began, to return home and conduct these public meetings.\(^9\)

The GoU supported these consultations because they allowed regime elites to reject the ICC without actually appearing to do so. How did this situation come to be, where the GoU, which had initially referred the LRA’s case to the ICC, was now seeking to reject it as a way to fulfill its obligations to different constituencies? This section offers some background on the conflicts in Uganda, and in particular the conflict between the GoU and the LRA, and traces the process through which GoU elites initially decided to pursue international prosecutions through the ICC in order to serve its regional and domestic political interests.

\(^7\) Baines 2007.
\(^8\) For the notion of invented tradition, see Allen 2006.
\(^9\) James Obita, Interview, Kampala, December 14, 2007.
1. The Logic of Peace for Patronage: Amnesty and Ugandan Conflicts

The outbreak of the LRA rebellion in Northern Uganda came in the wake of a counter-insurgency campaign by President Museveni’s government in an effort to exert authority and gain control over the territory of Uganda. The country had experienced a turbulent post-independence history that had been characterized by military dictatorships and widespread violence, all under the leadership of politicians from northern Uganda.\(^\text{10}\) Notably, an alliance between the party of Milton Obote, the first Ugandan prime minister (the Uganda People’s Congress), and the party of the southern Kingdom of Buganda (Kabaka Yekka), soured.\(^\text{11}\) While the alliance had ensured that Obote, a Langi from the north, won the election, it was soon characterized by rivalry and intrigue, as each of the two parties struggled to control of the government. By the time a Kabaka Yekka-affiliated parliamentarian sought to establish a commission to investigate a charge of corruption against then army officer Idi Amin in early 1966—an investigation that would have implicated Obote and some members of his family—“Obote’s control of the government…seemed to have ebbed away.”\(^\text{12}\) In an effort to shore up his power, Obote used force to arrest rival cabinet ministers and suspend the constitution. Subsequently, Obote oversaw the passing of the 1967 constitution which set the stage for the north-south divide in Ugandan politics that would continue into the war of Museveni against the LRA: he abolished Buganda and other southern kingdoms which had been privileged under colonial rule and in the independence constitution, centralized power, and created a one-party state supported by a strong military.\(^\text{13}\)

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\(^\text{10}\) For a good overview of Uganda’s post-independence violence, see Museveni 1997. Also see Behrend 1999a; Branch 2007a; Doom and Vlassenroot 1999; Finnström 2008.

\(^\text{11}\) For a broader discussion of the politics of Obote and the Baganda, see, for example, Kasfir 1976: 195-214.


During this period, Obote created a patronage machine through which northern ethnic groups, especially the Acholi and the Langi, came to dominate parastatals and the army. This machinery mobilized grievances from those who were left out of it. When Idi Amin overthrew Obote in 1971, he purged the Acholi elite from the military and civil service. When the second Obote regime under the Uganda National Liberation Army (UNLA) overthrew Amin in 1979, once again the Acholi and Langi returned to positions of power. Finally, complaints by Acholi troops that the Langi were favoured led to the Acholi coup of 1985.\textsuperscript{14}

It is from this background of 25 years of northern domination that in 1986, Museveni’s National Resistance Army (NRA), which later became the national army under the name of the Ugandan People’s Defence Forces (UPDF), orchestrated a military takeover.\textsuperscript{15} The NRA’s rebellion built a broad non-ethnic base of support for itself throughout southern Uganda against the north. Museveni established the building blocks for regime security by creating decentralized Resistance Councils (RCs) in every village. These RCs, which were later created throughout Uganda, were loyal to the National Resistance Movement (NRM), the political wing of the NRA.\textsuperscript{16} The overthrow of the UNLA in 1986 was followed by an occupation of Acholiland by the NRA, in order to confront the supposed popular base for the UNLA.\textsuperscript{17} The occupation repressed the population of Acholiland, which resulted in extensive atrocities against the people there, and succeeded in imposing a governmental presence in the community in the form of the RCs.

\textsuperscript{14} Branch 2011: 58.
\textsuperscript{15} Branch 2004; Branch 2007a; Allen and Vlassenroot 2010.
\textsuperscript{16} Branch 2005: 10; Branch 2007a: 22.
\textsuperscript{17} Branch 2007a.
The struggle of the Acholi against the NRA occupation led to a series of rebellions. Most notably, it led to the Holy Spirit Movement of Alice Lakwena,\(^\text{18}\) a movement that arose in protest of both the UNLA army that was returning home, and the RCs, which had become a local embodiment of the NRM’s repression. Lakwena considered these “internal strangers” to have bad spirits, and began engaging in a contradictory quest to purify the bad spirits of violence by engaging in violence themselves.\(^\text{19}\) Lakwena mobilized widely, and while her rebellion was defeated, it eventually led to the rise of Joseph Kony, and to the LRA.

Thus, while Museveni had succeeded in expanding state control to the village level in Northern Uganda through the RCs, the process sowed the seeds for the rebellion that would eventually lead to the invitation regarding ICC involvement. The RCs would later be renamed Local Councils in the 1995 constitution, and form part of a five-tier structure that remain central to Museveni’s secure regime under the “movement political system.” In the movement, candidates were elected on individual merit and could not be sponsored by political parties.\(^\text{20}\) In a referendum held in 2000, the no-party system was supported by 90.7% of Ugandans.\(^\text{21}\) By this account, Museveni’s regime was secure, and as will be described later, would remain so even following controlled return to multiparty rule.\(^\text{22}\)

The LRA rebellion under Kony resulted in a high exposure to brutality for most of the civilian population. In what was considered by many to be indiscriminate violence, the rebels attacked and massacred villages, raped women, and mutilated others.\(^\text{23}\) While actual numbers are contested, one report estimates that the LRA abducted over 60,000 people (most of them

\(^{18}\) For more on Lakwena, see Behrend 1999b. For more on the Resistance Councils and more on the history of the conflict, see Branch 2007b.
\(^{19}\) Behrend 1999b: 24.
\(^{21}\) Dagne 2011: 5.
\(^{22}\) Makara et al. 2009.
children) who were forced to join combat.\textsuperscript{24} In what the GoU described as an effort to protect the population, entire villages were moved into camps for internally displaced people, which resulted in a humanitarian crisis. International advocacy groups highlighted countless children, “night commuters,” who left their unsafe camps every night so they could sleep in the open, but safe, town of Gulu.

In the past, Ugandan rebellions were addressed through peace processes that extended amnesty to rebel leaders and brought them back into the patronage fold of the GoU in the form of ministerial positions and other perks. Museveni’s government had successfully ended a number of rebellions this way.\textsuperscript{25} Attempts at a similar settlement with the LRA had occurred in 1993-1994 when the Minister of the Pacification of the North, Betty Bigombe, came close to a peace deal with the LRA.\textsuperscript{26} Commonly referred to as Bigombe I, this first effort was followed by at least nine other initiatives to bring peace to Northern Uganda.\textsuperscript{27} The LRA Legal Advisor summarized those early attempts as follows: “They would go some distance, then the government would get impatient and start issuing ultimatums, threats: ‘if you do not finish this in seven days...we shall flush you out...’ then [the LRA] would withdraw.”\textsuperscript{28}

The prospect of a negotiated settlement, however, always remained on the horizon. The period between 1995 and 1998 saw a process led by Leo Onek, who initiated an exchange of letters between the LRA and the GoU. In 1996, another process that was initiated by two Gulu elders ended with their murder. In 1999-2000, the Carter Center

\textsuperscript{24} Allen 2006: 112–114. On estimates, see Baines and Stewart 2011.
\textsuperscript{25} Walter Ochora, Interview, Gulu, December 10, 2007.
\textsuperscript{26} Allen 2006: 48.
\textsuperscript{27} Cosmas Lam, Interview, Kampala, November 9, 2009. See also Rodriguez Soto 2009.
\textsuperscript{28} Ayena Odongo, Interview, Kampala, December 14, 2007.
mediated an agreement between Sudan and Uganda.\footnote{Rodriguez Soto 2009.} In 2002-2003, Museveni allowed religious leaders in the north to meet with rebels, which led to the formation of a Presidential Peace Team. In March 2003, Kony spoke on the radio and asked for negotiations with the government. Subsequently, in 2003-2004, a Vatican-linked Italian group called Sant’Egidio proposed that the LRA go to Rome to negotiate with the GoU. 2004 saw the beginning of Bigombe II, Betty Bigombe’s second peace initiative that was still ongoing by the time ICC arrest warrants were issued. Finally, 2006-2008 featured Juba, which occurred under the mediation of the Government of Southern Sudan (GoSS). In all these attempts, there was an understanding that, similar to all the earlier peace settlements with previous rebel groups, amnesty would be extended to the rebel leaders, and that they would return to society and be further rewarded with some form of government patronage.\footnote{See Rodriguez Soto 2009.} In 1999, in order to solidify the promise of non-prosecution for those rebels who gave up on the rebellion, politicians from LRA-affected areas campaigned for and passed an Amnesty Act.\footnote{Republic of Uganda 1999.} This act also created an Amnesty Commission within the Ministry of the Interior, an institution tasked with ensuring that any rebels who entered Uganda were given amnesty certificates and could not be prosecuted for treason.\footnote{Steven Kagoda, Interview, Kampala, November 2, 2009.} The act contained no exemptions for human rights abusers. As both the Permanent Secretary of the Minister of the Interior and the Director for Public Prosecutions explained to the author, all the LRA rebels, including Kony, could benefit from it.\footnote{Richard Butera, Interview, Kampala, November 5, 2009; Steven Kagoda, Interview, Kampala, November 2, 2009.}
In this context, then, it was clear that the ICC (and the anti-impunity movement that it symbolically helmed) ran counter to the ordinary processes President Museveni’s government had used to settle previous rebellions. Peace was a notion that resonated with the government. So did reconciliation, in the sense that it would end the confrontation with the rebels. In exchange for both, the language of amnesty had always been available. This logic, where peace could be achieved in exchange for political patronage, was entrenched, including in the law, and everyone in the GoU’s network of patronage understood this. Why, in this context, did Museveni refer the LRA case to the ICC? A brief overview of the LRA proxy conflict below will clarify why, notwithstanding the preference for amnesty, the ICC became the tool of choice to serve the GoU’s regional interests.

2. Geopolitics of the Great Lakes Sub-Region: Secure Regimes and Clients Beyond Borders

Geopolitically, the Ugandan army had been involved in a long proxy war with Sudan since the early 1990s, when the LRA entered into the patronage network of the Sudanese government in Khartoum. It is not clear as to who supported whose rebels first, but it is generally assumed that, between 1991 and 1993, the LRA started receiving support from Sudan. According to a senior member of the UPDF, it became the GoU’s policy to focus on “weakening the Khartoum government by supporting Sudanese People’s Liberation Army/Movement (SPLA/M) in their quest for autonomy, by agreeing to become a conduit of arms, of forces that are fighting that government of Sudan.” As Museveni himself summarised the situation, “Our fight was not with Kony, but with the Arabs of Khartoum.”

34 See J. F. Clark 2001; Branch 2007b; Allen and Vlassenroot 2010.
35 Key Informant 2, Interview, Kampala, March 20, 2008.
36 Mugabi 2008.
In 1995, the two countries severed diplomatic ties, and it was not until December 1999 when, under the auspices of US President Jimmy Carter, they agreed to restore relations.\textsuperscript{37} The agreement between Khartoum and the Ugandan government led to Uganda receiving the authority to pursue the LRA into Sudan during “Operation Iron Fist” in March 2002. This operation, however, did not eliminate the LRA.

According to those close to Museveni, the most revealing aspect about the referral of the LRA to the ICC is that it originated from a military discussion between Museveni and Amama Mbabazi.\textsuperscript{38} Mbabazi was a lawyer and a member of Museveni’s inner circle since their days of guerrilla warfare in the “bush.” He was the Minister of Defense when the leading GoU elites determined their LRA strategy, and he was subsequently appointed Attorney General. As a critical node in Museveni’s patronage network, Mbabazi’s responsibilities included his role as the Secretary General of the NRM, the ruling party headed by Museveni. Critically, Mbabazi also “[was] instrumental in determining government’s legal position on critical matters, especially those regarding Mr. Museveni’s hold on power.”\textsuperscript{39} The early discussion about the ICC also involved John Garang, the late leader of the SPLA/M and, later, the Government of South Sudan (GoSS). According to the Private Secretary to Museveni (who is also an assistant to Mbabazi), Garang and Museveni thought of the ICC referral as “a military response to a military threat, that still remained part of an overall political process.”\textsuperscript{40} Uganda was drawing on “anything that would slow down

\textsuperscript{37} Rodríguez Soto 2009: 33.
\textsuperscript{38} Key Informant 4, Interview, Kampala, November 9, 2009.
\textsuperscript{39} Editor 2010.
\textsuperscript{40} Key Informant 4, Interview, Kampala, November 9, 2009.
(the Government of Sudan in) Khartoum, anything that would cause embarrassment to Khartoum.”

While this discussion to make an ICC referral was taking place after an ad-hoc committee appointed by the National Executive Committee (NEC) of the NRM had recommended a return to a multi-party system, it should be noted that at no time was there concern from Museveni that the GoU could lose control of the ICC engagement. To be sure, the debate about political pluralism was initially triggered by the 2001 elections, when Kizza Besigye, Museveni’s challenger and former personal physician during the days of the NRA insurgency, won 27.8% of the presidential vote. This result was considered a “shock” to the NRM, forcing them to acknowledge the fractures within the movement. As the NRM machinery had become increasingly indistinguishable from the state, criticism of the movement became indistinguishable from criticisms of Museveni’s rule. For instance, Besigye, a member of the armed forces, opposed the ban on political parties. Some politicians with ties to the guerrilla days of the NRM were critical of how power had become centralized around Museveni and his close kinsmen. Some new parliamentarians who did not have the same ties to the historic NRM also criticized the corruption and vast power of the executive. This was the backdrop against which the NEC discussed and recommended in 2002 the return to multi-party rule.

What is often overlooked is the fact that the NEC simultaneously discussed a second, more important motion: the removal of presidential term limits enshrined in the 1995

41 Ibid.
42 Makara et al. 2009: 188.
43 Ibid. :190.
44 Ibid. :191.
constitution.\textsuperscript{45} Museveni was supposed to be serving his final term as president, and the NEC recommended removing term limits at the same time as they recommended a return to multipartyism. As some scholars have convincingly argued:

The decision to open up for multiparty competition was intimately linked to Museveni’s ambitions to remain in office and control the transition process. By linking the return to multiparty politics to the removal of the term limits, the power of the executive was consolidated, arguably, through a weakening of the institutions that could act as a check on executive dominance. \textsuperscript{46}

The Ministers who opposed the removal of term limits were dismissed, including long-term allies.\textsuperscript{47} The vice-president resigned.\textsuperscript{48} The Political Parties and Organizations Act of 2002 was passed, allowing political parties to register, and NRM was the first party to register in July 2003. Registration of other parties was delayed; the leading opposition party was registered over a year and a half after the registration of NRM.\textsuperscript{49} As a result, this exercise of linking liberalization with the removal of term limits would create greater control for the NRM, while simultaneously allowing the movement to “purify” itself of dissenters, silence critics, and appease donors.\textsuperscript{50} This was the context within which GoU elites decided to make the LRA referral: despite what appeared to be shifting political ground, the regime remained secure.

Thus, the ICC seemed to be the type of tool a secure regime could use for political gain in multiple arenas, without the fear that such a tool could be turned against core regime clients. A referral would benefit core constituents of the regime and the army in at least two ways. First, it would allow the GoU to address the pressure the UPDF was facing for its role

\begin{footnotesize}
\textsuperscript{45} Republic of Uganda 1995: Article 105(2).
\textsuperscript{46} Makara et al.: 200.
\textsuperscript{47} Dagne 2011: 6. Also IRIN 2006b.
\textsuperscript{48} PANA 2003.
\textsuperscript{49} Makara et al. 2009: 196.
\textsuperscript{50} National Executive Committee 2002 in Makara et al. 2009.
\end{footnotesize}
in the Great Lakes conflicts. Uganda had come under immense pressure as a result of its involvement with Rwanda in a regional war in the Democratic Republic of Congo (DRC), a war that began as an effort by Rwanda and Uganda to stabilize Rwanda’s soft underbelly of the eastern DRC by overthrowing Mobutu in then-Zaire and installing the Rwanda-friendly regime of Laurent Kabila.\(^5\) The DRC subsequently accused Uganda of aggression before the International Court of Justice (ICJ). Incidentally, GoU lawyers were in The Hague to defend this case when the idea of an ICC referral was initially broached with ICC lawyers.\(^6\) As a country that was previously seen as one of the most promising in Africa (and with a president who had been labeled a “true believer” in human rights), the positive labels were rapidly coming under fire because of Uganda’s bad press in the DRC.\(^7\) If Museveni’s secure regime could invite the highest scrutiny through the Court, then surely Uganda would be seen to be speaking the language of the international community. The UPDF would be viewed as if it had nothing to hide.

The referral’s second benefit to Museveni’s core constituency was that the ICC had the potential to legitimize future UPDF’s activities in the sub-region, as well as the associated increases in military expenditures. Having previously exceeded the recommended ceiling for military spending and justifying it on account of fighting the LRA, the weight of the international community behind Museveni would legitimize the continuation of his policies and their costs.\(^8\) After all, his military was pursuing the enemies of humanity, the terrorist LRA.\(^9\) Better yet, that legitimacy would be associated with any future pursuit of the

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\(^{5}\) For a more detailed view on the nature of the conflict leading to the case before the ICJ, see Prunier 2009.

\(^{6}\) Schiff 2008.

\(^{7}\) For the label of Museveni as a “true believer” in human rights, see Risse, Ropp, and Sikkink 1999: 16.

\(^{8}\) Major Philip Kulagigye, Interview, Kampala, December 12, 2007.

\(^{9}\) On 5 December 2001, the LRA was placed on the US State Department’s list of terrorist organizations. See Wasike 2001.
LRA that the UPDF might undertake in any countries in the sub-region. If the ICC accepted the case of the LRA, the UPDF’s actions would no longer be seen as regional adventures, but instead as the pursuit of the GoU’s obligations to support the ICC in ensuring the arrest of the LRA. A less charitable, but related, view would be that all the military officers returning from the DRC needed fruitful avenues of engagement, and moving the attention to Sudan in an effort to try to arrest the LRA for the ICC was a good solution.

If these were the benefits that the secure GoU elites had an interest in securing, its ability to use judicial statecraft was made easy by the low-threat transitional justice demands it faced, as the next section shows.

II. The First Appropriation: Secure Elites Face Low Threats

The ICC came to the attention of Museveni as a low-threat, fungible tool that could serve his interests, for three primary reasons: 1) the Office of the Prosecutor had reached out to him to ask for a referral, assuring him that his core constituents would be safe from scrutiny; 2) threat-holders (mostly international NGOs and a handful of domestic groups based in Kampala) had unquestioningly used the framing the GoU had created in order to justify their own characterisation of the LRA problem and its solution;\textsuperscript{56} and 3) the threat-holders refrained from criticizing the GoU. Under these conditions, the costs and credibility from the anti-impunity community remained low, as described below.

1. The ICC as a Non-Credible Threat

It should be recalled that, following the ICC’s coming into force in July 2002, international law advocates were interested to find a first “easy” case for the Court, as “the context and

\textsuperscript{56} Unlike Kenya, the anti-impunity community in Uganda was predominantly made up of international advocacy organizations. Domestic NGOs familiar with the LRA were largely focused on the humanitarian aspects of the conflict.
conduct of its first proceedings would have far-reaching consequences on its credibility.\textsuperscript{57}

Given the disquiet of countries, such as the United States, about the risk of an overreaching international Prosecutor, the ideal case would be one where the Court intervened in a country that would cooperate fully with the Prosecutor, where the tricky proposition of balancing complementarity with respect for sovereignty could easily be demonstrated by the target country’s willingness to allow the Court to intervene.\textsuperscript{58} The country would also have to easily meet the other requirements for ICC action, namely large-scale human rights violations that had occurred after July 2002. This type of case would allow the Court to begin operations, receive support from the international community during the critical early years, and create a credible track record.

Soon after Ocampo took office in 2003, the Office of the Prosecutor (OTP) announced that they would focus on Ituri in the eastern DRC, where armies and militias from neighbouring countries (including Uganda) had wreaked havoc.\textsuperscript{59} In his statement, Ocampo indicated his willingness to use his own power (as he later did in Kenya) to investigate the case by applying to the Pre-Trial Chamber (PTC), although he would prefer a state referral.\textsuperscript{60} This less-than-ideal course of action was averted when, later in 2003, “informal conversations” between lawyers of the Ugandan government who were in The Hague and ICC staff members “led the OTP to believe that the Ugandan authorities might be interested in referring the LRA conflict…to the Court.”\textsuperscript{61} The Prosecutor of the Court is thought to have

\textsuperscript{57} Akhavan 2005: 405.
\textsuperscript{58} For an example of the early concerns about the ICC, see Goldsmith 2003.
\textsuperscript{59} Office of the Prosecutor 2003.
\textsuperscript{60} Rod Rastan, Interview, The Hague, October 7, 2010.
\textsuperscript{61} Schiff 2008: 198.
reached out to Uganda in “pre-referral shuttle diplomacy” to encourage this course of action.  

For the Court, Uganda offered the perfect test-site for its mandate. According to one senior ICC official, Ocampo came to the office one day and exclaimed, “I have a great case, it is about children, everyone will love it!” Uganda had ratified the Rome Statute on 14 June 2002. The country also contained a rebellion that was scarcely understood, whose actors were described as “slave masters,” and they appeared to engage in senseless, apolitical violence. From the outside, then, “the gravity and notoriety of LRA abuses in Northern Uganda—widespread civilian atrocities including forcible conscription of thousands of child soldiers—represented the type of exceptional situation that justified international judicial intervention.” Most helpfully, from the perspective of the ICC, a “friendly government’s request for help avoided a clash with sovereign prerogatives.”

Given all the possible benefits of a friendly start to the Court’s life, officials of the Office of the Prosecutor are thought to have assured Museveni that his interests would not be investigated. According to one senior ICC official involved in the investigations of the Uganda case, on a number of occasions, the investigation team suggested to Ocampo that they should examine Museveni’s side, and in particular, atrocities related to the camps of internally displaced persons, but Ocampo always refused. As Schabas argues:

It seems apparent enough that the Prosecutor solicited Uganda’s self-referral…[it] cannot have been a spontaneous and unexpected development that emerged as a result of creative thinking by international lawyers within the Ugandan Foreign

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62 Thanks to Phil Clark for this point.  
63 Key Informant 6, Interview, The Hague, October 8, 2010.  
65 See Ibid.: 403.  
66 Schiff 2008: 209.  
67 Key Informant 6, Interview, The Hague, October 8, 2010.
Ministry...[Ocampo] surely had to reassure States that those who referred the case 
were not threatened.\textsuperscript{68}

People close to the GoU affirm this private bargain. It was clear to the GoU elites that 
the ICC could be used without “upsetting the legal niceties” and without consequences to the 
governing elites.\textsuperscript{69} Even though many human rights organizations could make a strong case 
about crimes committed by the UPDF,\textsuperscript{70} it was also understood that the ICC would not 
overreach if the GoU instituted “domestic arrangements that Ocampo would not be 
uncomfortable with.”\textsuperscript{71} After all, complementarity did not have technical benchmarks, and it 
was therefore clear that in the absence of Court action, Museveni could establish any process 
for his side (and the process did not have to lead to conviction), and it would make his case 
inadmissible before the Court. For the GoU elites, then, it was an unthreatening, win-win 
proposition for Uganda and the ICC. The manner in which this internal understanding was 
framed (so that it would be justifiable to external observers) reinforced the weakness of the 
ICC as a threat to the GoU, as examined below.

2. Games of Good Global Citizens: A Secure Regime Sets the Terms of Reference

On 16 December 2003, Museveni sent a formal letter to the ICC.\textsuperscript{72} He subsequently met with 
the Prosecutor in London in January 2004 “to discuss how to proceed” on the matter of the 
LRA. In a press conference on 29 January 2004, GoU’s invitation to the ICC to investigate 
the LRA was made public.\textsuperscript{73} During that press conference, the Prosecutor outlined the 
process by which the LRA would be arrested, signaling the partnership between the GoU and 
the ICC in demanding regional support to GoU goals: “This will require the active co-

\textsuperscript{68} Schabas 2011: 165–166.
\textsuperscript{69} Key Informant 4, Interview, Kampala, November 9, 2009.
\textsuperscript{70} See Human Rights Watch 2004.
\textsuperscript{71} Key Informant 4, Interview, Kampala, November 9, 2009.
\textsuperscript{72} The “ICC” and the “Office of the Prosecutor” are used interchangeably to refer to all interaction with 
Ocampo.
\textsuperscript{73} See Schiff 2008: 198.
operation of states and international institutions in supporting efforts of the Ugandan authorities...This will require the concerted support of the international community—Uganda and the Court cannot do this alone.”

The outward messaging of the internal understanding between the GoU and the ICC was left largely in the hands of the GoU. Two frameworks were particularly important in disguising the politics that informed the self-referral to ICC supporters. First, the GoU framed the LRA problem as one of international human rights, which created a new understanding of the conditions under which the ICC could intervene. According to the Rome Statute, the Court can only intervene in cases where the country is *unwilling* or *unable* to prosecute.\(^75\) GoU elites were clear that the Ugandan courts, conventionally speaking, had not been deemed unable to prosecute the LRA. Rather, they had simply not had the opportunity to gain custody, given that the rebels resided outside Ugandan territory. For Uganda, then, the ICC was portrayed publicly as a solution to the vexing issue of perpetrators of human rights abuses who resided across state boundaries. As the Permanent Secretary of the Interior Ministry Steven Kagoda stated:

(LRA) ran out of Ugandan government jurisdiction. Uganda government negotiated with the government of Sudan in Khartoum to allow Uganda armed forces to pursue the LRA in Sudan. Permission was granted for UPDF to operate only up to a certain latitude, the LRA went beyond...Uganda government had no alternative but to refer the matter to the ICC.\(^76\)

The fact that the Rome Statute did not mandate the ICC to help states apprehend perpetrators at large—the Court has no comparative advantage in the arresting process, due to the fact that it depends on other states for this process—was not at issue for Uganda. To bring a rebel group to prison would be to end a war. What Uganda was asking the ICC to do,

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\(^74\) Price 2004.

\(^75\) International Criminal Court 1998. In particular, Article 17.

\(^76\) Oxford Transitional Justice Research (OTJR) and Transitional Futures Africa 2008.
under the guise of a very broad “inability” to prosecute, was to end the rebellion for Uganda.
And because the rebellion was really about a war with Sudan, the Ugandan government was
involving the ICC to weigh in on its war against Sudan. Using the ICC, Kony would not be
considered merely as the violent political opposition who operated under the patronage of a
hostile neighbouring government. Rather, he would be seen as an international criminal. The
human rights abuses suffered by the Northern Ugandan population would be decoupled from
the violent politics that had engendered them, and they would be treated instead as
disembodied “war crimes” that would be addressed through the technicalities of Prosecutors
and judges in distant chambers. If efforts to capture Kony resulted in further violence and
militarization in the sub-region, no one could blame the GoU. They were simply acting as the
agents of international justice.

The second framework the GoU elites used to disguise the politics behind their self-
referral was closely linked to, and facilitated, by the first one: they depoliticized and
criminalized the LRA struggle. The LRA was painted as a senseless, apolitical force of
bandits. When Museveni extended a ceasefire to the LRA in November 2004, his statement
read, “any bandit who moves into this area for the purposes of those consultations will not be
attacked.”77 The media and the Ugandan government portrayed Kony and the LRA as a rag-
tag army perpetually on the verge of defeat by the UPDF.78 They were described as fighting
for “a divine cause that is being directed and guided by God through his prophet Kony” and
it was said that they regarded divinely decreed violence as “morally justified, almost a
sacramental act.”79 The international lawyer who advised Uganda on the referral added:

77 Rodríguez Soto 2009: 237.
78 Major Philip Kulagigye, Interview, Kampala, December 12, 2007.
79 van Acker 2004: 348–349.
LRA’s ranks were filled with ruthless warlords and slave masters who exercised power through terrorizing civilians. From its inception until the present, the LRA has had no coherent ideology, rational political agenda, or popular support.  

From this perspective, the violence perpetrated by Kony could not be rational. Depicting the LRA in this way made it easy to criminalize the LRA’s violence, and to present it as a social ill whose cure, even while it came from a reinterpretation of the rules in the Rome Statute, would benefit everyone. Lacking a political goal in their orientation, and given the abduction of innumerable children, no one could consider that Museveni had anything to gain from ridding the Northerner Uganda of their scourge, and ridding the world of a key human rights abuser. The LRA simply had to appear before the ICC. This view guided the actions of the NGOs, who refrained from criticizing the GoU and the ICC, as shown in the section below.

3. Non-Threatening Threat-Holders: NGOs Refrain from Criticism

The transnational community of international NGOs and the natural critics of the GoU did not engage with, contest, or affirm the framing of the GoU’s “inability” to pursue the LRA on their own, which effectively led to the ICC’s engagement in Uganda. This lack of criticism occurred for at least four reasons.

First, had the NGOs criticised the GoU’s referral, as they might have been otherwise inclined to do, it would have suggested that there might be something wrong with the involvement of the Court in Uganda, and that the Court was mistakenly intervening. In their view, if the Court was created to deal with actors like the LRA, then it became inconsequential how the case had been opened. To be sure, some critics pointed out that

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81 The depiction of the LRA as irrational and apolitical is debatable. See, for example, LRA political manifestoes described in Finnström 2008. For other suggestions about the rationality of the LRA, see Allen and Vlassenroot 2010; Branch 2005.
justifying the referral on the basis that the LRA was outside Ugandan government jurisdiction was a military and not a judicial issue, and that the entire exercise could be seen as one that fell outside the ICC treaty. However, supporters of the ICC stayed outside the debate. To criticize the GoU would have amounted to criticizing the judgment of the young Court, and many anti-impunity organizations had adopted a general policy of non-criticism towards the Court.

The second reason why advocates did not criticize the GoU was the fact that such questioning might suggest that there was nothing lacking within Ugandan courts, which was generally the reason for requesting outside judicial intervention. Yet, surely, there had to be something the matter with Uganda’s judiciary, even if judicial unwillingness or inability, as traditionally understood, had not been the initial reason for self-referral. To be sure, some commentators pointed to the fact that the Ugandan courts were sound, but unavailable, due to their lack of neutrality. For instance, Payam Akhavan, who advised the GoU’s referral to the ICC, argued:

International trials were also viewed as a depoliticized venue for justice that would be perceived as impartial if and when the LRA’s top leaders were captured. Notwithstanding the recognized competence of Uganda's judicial system, in the face of the continuing distrust between Uganda's north and south, the ICC could also become an instrument for national reconciliation.

Even after acknowledging the ability of Uganda’s judiciary, advocates still came away in support of the Court’s involvement because 1) there were war crimes committed, 2) Uganda was an ICC state party, and 3) there was no active ongoing prosecution of the same

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82 Thanks to Dr. Phil Clark for this point.
84 For more on how international justice can be used for other unfinished human rights agendas, see Megret Forthcoming.
85 Akhavan 2005: 411. Author emphasis.
persons accused of the same crimes in the Ugandan courts. The initial reasons why the case came before the Court were not important.

The third reason for the NGO’s non-criticism was the fact that they had been somewhat demobilized by the GoU’s self-referral. Ordinarily, advocacy would be necessary in order to persuade a government to make a referral. In Uganda’s case, the GoU itself acknowledged violations and invited the Court, which left the anti-impunity community with little to advocate for. (It must be remembered that the assurances Museveni received from the ICC before making the self-referral rested on complementarity, and Museveni had to give the impression that he was genuinely interested in ending impunity.) To be sure, as the conflict suddenly came under the media spotlight and Uganda received unprecedented attention from an assortment of advocates who were interested in seeing the fruits of the Rome Statute, opposition emerged in some quarters about the framework the Ugandan government had used when it made its case for an ICC referral. Some vocal critics looked beyond the GoU’s criminalization of the LRA to suggest that the conflict demonstrated a failure of the GoU.86 Others suggested that the GoU might have its own crimes to answer for.87 But the primary way the referral was criticized was that it was one-sided, not that it was political to start with.88 In subsequent public pronouncements, both Ocampo and Museveni affirmed that all crimes, not just LRA crimes, could be investigated. With such assurances, as far as the anti-impunity community was concerned, the matter was considered to be resolved.

Finally, in a world limited by scarce resources, the anti-impunity community was too occupied elsewhere to scrutinize Uganda too closely, which effectively allowed the GoU’s narrative to become truth. Uganda was the first country to refer its situation to the ICC. What

86 For a view on donors and the conflict of Northern Uganda, see Perrot 2010.
87 For instance, Branch 2007a.
88 See, for example, Human Rights Watch 2004.
the referral meant, what it might achieve, and what implications the prosecutions could have on humanitarian efforts and on the conflict in general, were all poorly understood issues. Further, the referral occurred during what were heady days for transitional justice, where its leading advocates were already invested in other stories unfolding at the same time: Iraq announced its Special Tribunal in December 2003; the Special Court of Sierra Leone commenced work in March 2004; Charles Taylor had become the centre of attention on the African continent with regard to atrocities; and Ghana’s National Reconciliation Commission was conducting public hearings. Organizations that ordinarily would have held local-level workshops to develop a constituency for the international processes, were already fully invested in those other processes. Consequently, humanitarians made up the bulk of the international community that was present on the ground at this point, and their concerns were contrary to those of the anti-impunity community: they advocated for negotiations with the LRA rather than arrests. The anti-impunity community was not on the ground producing a flurry of op-eds and workshops to drum up local demand for prosecutions, so they couldn’t supply Ugandan victims with the arguments they had to use in order to be aligned with the transnational anti-impunity movement, and they could not promise aid to local NGOs supporting the ICC. Consequently, mobilization of public opinion in favour of the Court as a justice mechanism remained low.

These shortcomings in the actions of the threat-holders meant that the government-spun narrative concerning the ICC remained dominant. This outcome had a profound impact on the legitimacy of the transitional justice project in Uganda, as well as on the GoU’s future

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89 As an indication of Uganda’s priority level, a delegation of Acholi leaders (Rwot Onen Acana III and with Norbert Mao) visited ICTJ in the spring of 2005. In the author’s recollection, very few ICTJ staff attended the meeting.
confidence concerning how to appropriate it. For many in Uganda, the Court was understood to have a single constituent: Museveni.

On 29 July 2004, the Office of the Prosecutor announced that investigations would be opened against the LRA.\textsuperscript{90} The Court then proceeded to focus on the LRA to the exclusion of the GoU, which further fuelled the local rejection of the ICC and discredited the anti-impunity community’s message about even-handed justice in Uganda. When human rights NGOs advocated for an exploration of the atrocities of the Ugandan army, these calls rang hollow in a context where the Office of the Prosecutor relied entirely on the GoU machinery for its investigations.

Transitional justice had entered into the age of the ICC, and the secure regime of the GoU was its flag bearer. In Uganda, the Court was seen by many local actors as aligned with wielders of political power, against the very people in whose name justice would ordinarily legitimate itself. The Court seemed largely unconcerned that it was amplifying the political power of an illiberally-inclined president who was already searching for an unconstitutional third term in office.\textsuperscript{91} As an act of resistance, local actors also started offering—or inventing—a number of traditional processes that could be used to seek truth and reconciliation in order to bring the LRA home.\textsuperscript{92} These acts of resistance sowed the seeds for a search for alternative avenues for justice, and for the rejection of the ICC that will be discussed later in this chapter. But more importantly, these acts of resistance highlighted the contradictions in the ideas that were held by the international community, which further weakened the credibility of their threats.

\textsuperscript{90} International Criminal Court 2004
\textsuperscript{91} Mwenda 2003.
\textsuperscript{92} On the invention of tradition, see Allen 2006.
Due to the fact that their pre-referral diplomacy had promised no cost to the regime, the threat-holders could only wield low-cost threats. The GoU effectively had its way. The ICC put pressure on Khartoum in the name of international justice. After the SPLA’s road to autonomy was clearly negotiated and Khartoum was no longer a key GoU interest, GoU elites chose to reject the Court once peace with the LRA became possible, as demonstrated in the next section.

III. The Second Appropriation: Secure Elites Face Critical Junctures

If the GoU’s first appropriation of the ICC was in the form of a self-referral whose aim was externalizing a sub-regional conflict, the second moment of ICC appropriation arrived once peace talks, mediated by the GoSS, became a reality. While this moment chronologically followed the first appropriation, it was not caused by it. In other words, there was nothing inevitable about this second moment, and no evidence to suggest that the Ugandan government made the initial referral in order to force the LRA to negotiate for peace. Rather, the opportunity for peace negotiations at Juba was driven by the GoSS’s needs for internal stability after the signing of the Comprehensive Peace Agreement (CPA). When the initial idea for the peace talks was broached, “there was much resistance in [Museveni’s] cabinet,” said the head of the UN’s LRA office. In the UN’s view, “[Museveni] was not planning to do anything [about peace], until he was convinced by Salva Kiir.” Kiir was Garang’s successor as the head of the GoSS. The Minister of the Interior of Uganda, Ruhakana Rugunda, confirmed this general position: “It is (because of) the initiative of the government of Southern Sudan that the government of Uganda responded positively. The proposal by the GoSS fell in place in a situation where the GoU, although it had tried many times without

93 For more on the effect of the LRA in South Sudan, see Schomerus 2007.
94 Warner Ten Kate, Interview, Kampala, March 25, 2008.
95 Ibid.
success, were still willing to resolve this matter peacefully.\textsuperscript{96} Indeed, the benefits of yet another peace negotiation (for there was one already ongoing with Betty Bigombe), which would offer the possibility for a second appropriation of the ICC, were not self-evident. And yet Juba got underway with the support of the GoU, a process which the GoU would eventually use to reject the ICC. How did this happen? This section shows how sudden developments related to peace shifted the political interests of the GoU’s secure elites who, relatively unconstrained by their previous choices, found they could pursue their new interests by rejecting the Court.

1. The Unintended Consequences of History: Humanitarians Demand Peace

The GoU’s self-referral of the LRA to the ICC set into motion two developments, the first in the sphere of transitional justice and the second in the sphere of humanitarianism. As previously explained, in the sphere of transitional justice, the threat-holders lacked credibility, as did their threats. The criminalization and depoliticization of the LRA provided the GoU with a new arsenal where new, universal tools of international justice could be applied in order to solve political problems (and that could be emulated by other regional actors who sought to use the Court to solve their own political problems).\textsuperscript{97} It also gave the secure GoU elites confidence that the external narrative was firmly within their control and in the full service of their political ambitions, which set the stage for a future rejection of the ICC once political interests shifted.

The humanitarian sphere was the second impacted by the referral. In contrast to the justice sphere, which was formed largely in the image of the GoU, government elites

\textsuperscript{96} Ruhakana Rugunda, Interview, Kampala, December 14, 2007.
\textsuperscript{97} Tellingly, Uganda’s self-referral set the precedent for, and was followed shortly thereafter by, a self-referral from the government of the DRC, and another one later from the Central African Republic. For more on self-referrals, see Schabas 2008. For a general view on the ICC, see Waddell and Clark 2008.
struggled to control the narrative regarding the humanitarian agenda. Concerns about the internally displaced persons drew unwanted scrutiny to a government that had otherwise had good credentials with their development partners. The ICC referral meant that Uganda was seen (against the wishes of the GoU elites) as an extension of the ungoverned spaces of Darfur and Eastern DRC. Because the violence within these zones demonstrated that government had failed in their sovereign responsibilities, these zones were within the jurisdiction of the international community and their “responsibility to protect.”

It was from the humanitarian quarter that strong international pressure for peace originated, and, as will be discussed later, it would be these arguments that the GoU would later use to justify its rejection of the ICC. Jan Egeland, the head of the UN’s Office of the Coordination of Humanitarian Affairs (OCHA), visited Uganda in November 2003 before the ICC referral, and urged the LRA and the GoU to “come to the table and enter negotiations to end this unnecessarily long conflict.” Egeland pointed out that Uganda remained as one of the last “dark spots” that was “the world’s worst humanitarian crisis” and was in need of humanitarian assistance. Following Egeland’s report, “Museveni was under tremendous pressure” to end the conflict, and soon, “peaceful resolution of the conflict became part of the policy dialogue” in Northern Uganda. Egeland issued a statement before the UN Security Council on Uganda in April 2004. The Canadian Ambassador to the UN created a “friends of Northern Uganda” group, and the US supported a Northern Uganda Peace Initiative (NUPI) in August 2004. While donors and other international actors had previously been

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98 For more on the responsibility to protect generally, see International Commission on Intervention and State Sovereignty 2001.
99 IRIN 2003a.
100 IRIN 2003b.
101 Warner Ten Kate, Interview, Kampala, March 25, 2008.
102 UN News Centre 2004.
103 For more on donors and the Ugandan conflict, see Perrot 2010: 191.
confused about how to relate to the LRA, Egeland’s visit “removed the taboo” of talking to the LRA.  

Pressure for peace also came from other sources. The spotlight on Northern Uganda’s failures through a series of 2005 reports on internally displaced persons (IDPs), the ICJ verdict on Uganda’s guilt for aggression in the DRC in December 2005, and the reduction of donor funding in the same period, were all sources of unexpected bad publicity for the GoU. While the previously described strategic policy linking a return to multiparty rule to the elimination of term limits was already made for internal reasons linked to NRM’s need to ensure control, the laws for implementing the decision were passed in 2005: the lifting of term limits was passed in the NRM-dominated Parliament in May (where it would be approved by the relevant committee in a vote of 11 to 1) and assented into law by the Museveni in September 2005, precipitating criticism. In response to all these issues, the government contracted a London-based publicity firm in May 2005 to help with the challenge of “wrestling with a civil war, a tarnished human rights record, and a wave of criticism from western media and human rights groups.” Moreover, against the views of donors and civil society, the GoU held a referendum in July 2005 on the issue of political pluralism, publicly casting the president as a supporter of democracy. Nonetheless, with the LRA issue still unresolved, a letter to the Security Council in January 2006 by Canada, which urged them to place Uganda on their agenda, formed a further critical pressure point. The GoU was keen to return to the good books of the international community.

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104 Warner Ten Kate, Interview, Kampala, March 25, 2008.
105 See, for example, IRIN 2005b.
106 Vasagar 2005.
107 Those objecting argued that there was no need for a referendum, given that both the government and the opposition were in agreement about the need to return to multi-party rule, and besides, a referendum would be an expensive exercise. Makara et al.: 2009.
While the pressure about the humanitarian situation in Northern Uganda was mounting, a critical development emerged in the region. The decades-long war between North and South Sudan, the war within which Uganda and Sudan had been fighting by proxy, was rapidly drawing to a negotiated close. While this conflict is beyond the scope of this research, it is critical to point out that the negotiations that would eventually lead to the Comprehensive Peace Agreement had begun in 1993 under the auspices of the Inter-Governmental Authority on Development (IGAD) between North and South Sudan, and had continued with the first Machakos Protocol, which was signed in July 2002. By May 2004—four months after the announcement of the ICC referral—the protocol on power sharing was signed, and Southern Sudan was moving confidently towards peace (with no reference to justice).¹⁰⁹ In January 2005, the CPA was signed.¹¹⁰ If, as Museveni suggested, the involvement of the ICC had been about “the Arabs in Khartoum” who were frustrating SPLA ambitions,¹¹¹ then with the signing of the CPA, the Court was no longer useful to Museveni.

A succession of events followed this peace settlement in Southern Sudan, which negated the initial military logic behind the ICC referral and facilitated the GoU’s subsequent rejection of the Court. In July 2005, John Garang, the man who had planned the ICC referral with the GoU, died in an airplane accident. In August, Kiir gave the LRA rebels an ultimatum to leave the south, negotiate peace, or face military action.¹¹² In September 2005, the LRA moved their camps from southern Sudan into Garamba Park in the DRC, which reduced the violence in Northern Uganda.

¹⁰⁹ Lazaro Sumbeiywo, Interview, Nairobi, January 13, 2009.
¹¹⁰ Young 2007. On file with the author.
¹¹¹ Mugabi 2008.
¹¹² See IRIN 2005.
This pressure from humanitarians was important, because it stressed an alternative, contradictory value around which the international actors mobilized most actively; that a peaceful end to the conflict was a way to end the humanitarian crisis. While the GoU had almost single-handedly orchestrated the justice issue while the anti-impunity community was largely quiet, the international advocates seemed to suggest that a peaceful end to the conflict was thought to be important. Humanitarianism was entirely opposite to the justice register. As a way to end suffering, it called for negotiations with, rather than the arrest of, the LRA.

The contradiction within the transnational advocacy community was not lost on the GoU. It further assured the GoU elites that the ICC threat was low, as its mechanism for bringing peace through arrests appeared to be ignored at the highest international political levels, including the Security Council, which asked the GoU to end the conflict through negotiations.\textsuperscript{113} The humanitarian concerns resonated with the GoU’s practice in previous decades to offer rebels amnesty in exchange for peace, and would later, when it was necessary, provide the government with the arguments it needed to reject the ICC once it became necessary in order to further the unexpected peace process described below.


It is important to establish that Juba began outside of the GoU’s control, and that secure GoU elites were nonetheless able to use available policy choices in transitional justice in the service of their revised political goals. However, before showing how the talks were unplanned by the GoU, it is useful to critique a number of frequently offered, but insufficient, explanations that credit the ICC with the genesis of the peace process.

\textsuperscript{113} In April 2004, the President of the Security Council released a statement asking for an end to the conflict through negotiation. See United Nations Security Council 2004.
Those who credit the ICC with instituting the Juba talks use two arguments. First, they point out that Kony was afraid of the ICC, and argue that he initiated the talks because he believed that the only way to avoid ICC action was through negotiations. Indeed, there is evidence to suggest that Kony and the LRA in general were worried about the ICC. For instance, before the formal start of the negotiations, in the process of planning the meeting of 3 May 2006 between Machar and Kony, Kony telephoned Dr. Onek. “Kony said, ‘Can I come Dr. Onek? Can you assure me that I will not be arrested?’”114 Separately, Justice Onega spoke about a similar conversation with Kony: “When news came about the warrants, Kony rang me...and said, ‘Is it all over, all these things we were talking about peace talks?’” Justice Onega reported that he gave Kony an assurance that the ICC was negotiable: “I said, ‘No, the warrants have been issued, ok, but I still advise you go in for peace talks...If the talks go well, you never know. The warrants could be dropped or something.’”115

This rationale explains why the talks had the content they did, and contributes to our understanding of why they lasted for as long as they did (through the state agents’ use of the ICC, something that’s not generally acknowledged by advocates of the ICC’s contribution to the peace process). These observers cannot explain, however, why the LRA had engaged in previous peace efforts without the ICC. Neither can they explain why the ICC did not seem to have a discernible impact on LRA conduct with reference to human rights abuses. When the LRA moved to Garamba, they continued to launch attacks into Sudan, which caused a “big problem” for the new Government of Southern Sudan.116 In January 2006, the LRA killed eight UN soldiers while they were in Garamba. Clearly, if ICC action concerned them, the LRA did not demonstrate this in their conduct. An explanation is needed that goes

114 Leo Onek, Interview, Kampala, December 12, 2007.
115 Peter Onega, Interview, Kampala, March 25, 2008.
beyond the LRA’s fear of the ICC, an explanation that also gives the GoU, the other party to these talks, some agency in the matter.

The second, ICC-focused explanation that is often given is that peace only became possible because the ICC’s actions resulted in a situation where the military wing of the LRA could not engage in talks. In their absence, the Lord’s Resistance Movement (LRM) emerged. The LRM was a political class that was not concerned with the Ten Commandments, but about political access. The marginalization of the military wing led to a reframing of the LRA that portrayed them as a political organization instead of just a radical, millenarian sect. This reframing made it possible to negotiate with them.

There is some evidence that supports this position. Obita, the lead LRA negotiator, confirmed the material interests of the LRM when he talked about their goals with Juba: “We also want to be driven with sirens in front just like everybody else. We want our children also to go to the best universities in the world. We achieve that by participating in government. Effectively.”117 This explanation is useful in understanding the eventual content the talks addressed (the power sharing discussions, for example), but it does not sufficiently explain why the negotiations began when they did, why the Court was rejected when it was, and the role that geopolitics played in the overall process. Critically, supporters of this argument return to the register of the LRA-as-a-sect in order to explain why they did not sign the Final Peace Agreement.

A sufficient explanation, then, would address why the talks began when they did, why they continued, and why they addressed the content they did. It would also link the agents, both in the LRA and the GoU, who started the peace talks with their interests and contacts. This type of explanation would allocate agency where it is due, rather than granting agents

117 James Obita, Interview, Kampala, December 14, 2007.
(and agent-less institutions) peace-making aspirations that they could not have had at the moment of action. A useful explanation would also render intelligible the rejection of the ICC that became evident during the peace process.

This research argues that the combination of the humanitarian attention that was given to Uganda and the geopolitical developments in the sub-region laid the foundations for an unexpected peace. The ICC influenced the content of the agreements. This section offers an agency-based account of how these factors came together to precipitate a change in the GoU’s goals, and created a context where the secure GoU elites could reject international prosecutions so that they could bring the LRA into their patronage fold.

As mentioned previously, Juba began as a process that was outside the GoU’s control. On 11 April 2006, a secret meeting took place near Nabanga in Sudan. The meeting brought together Riek Machar, the vice President of Southern Sudan, and Vincent Otti, who was then Joseph Kony’s deputy in the LRA. The meeting was historic because it demonstrated the converging interests of the LRA, who were ready for peace talks, and the GoSS, who were ready to act as third-party mediators. This meeting was the precursor to the more formal meeting between Riek Machar and Joseph Kony that occurred three weeks later, where, for the first time in over two decades, images of Kony were broadcast to Ugandans and the world. The other attendees at the meeting included Simon Simonze from Pax Christi, whose organization had financially underwritten the meeting, Mr. Martin Ojul, the man who would later be the LRA’s chief negotiator until January 2008, Dr. Leo Onek, a friend of Machar and the man who had been involved in attempting to bring peace to the North since 1995, and
Peter Oriem, a Nairobi-based Acholi.\textsuperscript{118} This meeting would mark the beginning of the public phase of what would be known as the Juba Peace Talks.

This attempt was consistent with the usual process of peace talks in Northern Uganda. Even as the negotiations that would eventually turn into Juba were underway, Onega stated, “Bigombe was doing her things, I was doing my thing. They were parallel. We did not do it together.”\textsuperscript{119} In many ways, then, there was nothing unique about Juba’s beginning. These talks were yet another effort in what had become the permanent background noise in Uganda about peace.

Yet all the key stakeholders saw Juba as something different. First, Juba was the only process that had included third-party mediation. Second, Juba occurred after arrest warrants had been issued by the ICC, and actors on the ground had varied understandings of what that meant. In this context, even mundane tasks, such as arranging meetings, required more commitment and trust. The first difference signaled the geopolitical shift that was not within anyone’s control, and Uganda, in light of the pressure from the humanitarians and the Security Council for peace negotiations, found it compelling. The second difference implied that opportunities had to be pursued using the new language and new rules of international justice. Thus, while the international community presented the situation as an example of a revolution in justice, an instance where even the rebels were calling for prosecutions, political elites on the ground saw it merely as the use of a different vocabulary and new carrots and sticks to play a familiar game.

During the initial meeting of the LRA and the GoSS, Machar made a commitment to mediate the talks. A follow-up between Kony and Machar was held and videotaped in its

\textsuperscript{118} The peace process dynamics are informed by author interviews. For other perspectives, see Simonse and Junne 2010: 223; Rodriguez Soto 2009: 252.

\textsuperscript{119} Peter Onega, Interview, Kampala, March 25, 2008.
entirety. On the tape, Kony affirmed his interest in peace if Museveni would stop oppressing
the Acholi.\textsuperscript{120} The video was given to Museveni by Kiir, when Kiir made a state visit to
Uganda ten days later. Because Kony had asserted that he wanted peace while Museveni did
not, Museveni also affirmed that he wanted peace. On 14 July 2006, the talks officially
opened in Juba. “Then, remarkably quickly, the process has been very positive for the
government of Uganda.”\textsuperscript{121} The Cessation of Hostilities Agreement was signed in August,
and “that was when Museveni saw that there was a real benefit to the process…they basically
got rid of the conflict.”\textsuperscript{122} At that point, the government re-assessed their goals, and chose to
reject the ICC, as explained below.


The GoU’s ability to successfully manufacture a rationale for invoking the ICC’s jurisdiction
without garnering a negative reaction from the anti-impunity community made regime elites
confident that, when their own priorities shifted, they could use any suitable explanation to
change their preferences on the Court and it would have few consequences. Put differently,
the anti-impunity community had given the GoU no reason to take them seriously, and the
GoU’s experience with the referral confirmed to them that the ICC did not constitute a
binding regime of regulations, but rather, a fungible tool with no independent constraining
power. Besides, despite having won the 2006 multiparty elections with only 59.3% of the
vote, the NRM party obtained 205 out of the 319 seats in parliament.\textsuperscript{123} Museveni’s
patronage network also continued to dominate all aspects of Ugandan society. His wife was
appointed a state minister, his brother a general in the army, and his brother-in-law the

\textsuperscript{120} Farmar 2006.
\textsuperscript{121} Warner Ten Kate, Interview, Kampala, March 25, 2008.
\textsuperscript{122} Ibid.
\textsuperscript{123} Makara et al. 2009: 199.
Minister of Foreign Affairs. The NRM also appointed the inspector general of police from the UPDF ranks, and commanded the loyalty of the Department of Public Prosecutions. In this context, the ICC story could not escape their control.

In the GoSS-initiated peace talks in Juba, the GoU elites saw three interrelated opportunities. First, Museveni saw an opportunity to reinvent himself and shore up political support in Northern Uganda. Previously, Museveni had been cast by politicians from the north as a figure who was unsupportive of peace. Northerners believed Museveni was benefiting from the ongoing rebellion because it gave the army, his strongest constituency, opportunities to spend money and act corruptly in the name of crushing the LRA. The international community, which was no longer willing to believe that Northern Uganda was a local crisis with an easy military solution, could be appeased by this peaceful engagement. Furthermore, some of Museveni’s critics had started to question his counter-insurgency techniques involving the forced displacement of the Acholi, and they labeled them as genocide. In this context, Juba and the possibilities of peace gave the GoU “a lot of brownie points in Northern Uganda.”

The second opportunity that was apparent to Museveni as a result of the GoSS initiative has been described before, and that was his ability to extend the patronage system in his amnesty governance paradigm to the LRA rebels and their political kinsmen from the north. In February 2006, Museveni had just won the first multiparty election organized since he came into power in 1986. Cognizant of previous failed peace processes, and given the transformed geopolitical context, Museveni saw that he could use the ICC as an effective

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124 Mwenda 2009.
126 Otunnu 2006.
127 Warner Ten Kate, Interview, Kampala, March 25, 2008.
*stick* to maintain the momentum of Juba, while the hope of the ICC’s removal would work as a *carrot*. Museveni integrated the ICC into his war-and-peace making strategy. He oscillated between threats that the government would attack the LRA and arrest them for the ICC, and concessions that stated that the GoU would negotiate with the LRA, reject the ICC, and offer amnesty.

As early in the life of the ICC referral as April 2004, following the release of a statement by the president of the Security Council that highlighted “the importance of exploring all peaceful avenues to resolve the conflict, including through creating a climate in which a solution based on dialogue might be found,” Museveni expressed interest in negotiating a peace with the LRA.\(^\text{128}\) By November 2004, in response to pressure from the humanitarian sector, Museveni was already talking about extending amnesty to the LRA and withdrawing the charges from the ICC if the LRA wished to negotiate. Notwithstanding the ICC, Museveni would be a willing partner in peace if Kony would:

>come out and engage in internal reconciliation mechanisms put in place by the Acholi community such as mataput or blood settlement. The state could then withdraw its case and we could inform the ICC that we have a solution to the Kony problem. That is what the ICC wants. No cover-up, no impunity.\(^\text{129}\)

To be sure, since the enactment of the Amnesty Act of 1999, this amnesty was always available to the LRA. Following the ICC referral in January 2004, however, Museveni had suggested that the national amnesty would exclude the LRA leadership. The GoU never took any steps to create exemptions to amnesty, however. Instead, amnesty remained a part of the law in order to serve the interests of the secure regime, as will become clear in the next chapter.

In line with Museveni’s amnesty-for-peace politics of previous decades, if the GoU could negotiate with Kony, they would no longer be physically “unable” to deal with Kony, which was the rationale they had used to justify ICC intervention. Given the framing the Ugandan government had used to invite the ICC into Uganda in the first place—the LRA was “outside” Ugandan jurisdiction, a rebel group at large—as the Ministry of the Interior stated, “the only way that the ICC can get out is if the conditions that prevailed then no longer apply.” Consequently, “upon LRA submitting to jurisdiction of the state,” the Ministry of the Interior added, Uganda would ask the ICC to suspend its warrants.

As it was, when they shifted the rules to make the initial referral (when the GoU saw the ICC as a tool to pressure Sudan), in this second appropriation, the most useful role the ICC could play was to make it possible for the LRA to return to the GoU fold. Throughout the period covered by this research, Museveni’s view was that the ICC was not a binding obligation, but a carrot or a stick, depending on what his needs might be.

The third and most important opportunity provided by the peace process was an opportunity for government elites to get rid of the ICC. Why was this important? It should be remembered that Ocampo had publicly declared that, in response to pressure about the one-sided self-referral, he would investigate both sides of the conflict. Museveni had been forced to respond, “if any of our people were involved in any crimes, we will give him up to be tried by the ICC...in any case, if such cases are brought to our attention, we will try them ourselves," which gave Ocampo the exact language he needed for the assurance he had to give to those who criticised his approach in Uganda as being pro-government.

130 Steven Kagoda, Interview, Kampala, November 2, 2009.
131 Ibid.
Critically, however, as time moved on, Ocampo had confronted the GoU. He contradicted Museveni’s promises to the LRA in public and argued that amnesty to the LRA was not Museveni’s to give. On one occasion, Museveni argued that he would give “total amnesty” to the LRA and added that "to hand over Kony after he has come out himself; that's out."133 In response, Ocampo retreated to a legal position and told the media that the matter was out of Museveni’s hands: “We have a clear relationship with Uganda and we expect them to execute their legal duties.”134 Ocampo further added that ensuring the prosecution of actors like the LRA was now “a challenge not for Uganda, Sudan or the [Democratic Republic of] Congo. It is a challenge for the international community. This is a new court supported by 100 states. We do our judicial work; we cannot be involved in the rest."135 In this context, where Ocampo was being “tenacious”136 about his role in Uganda, closer observers noted that Museveni “regretted” having asked the ICC to come in the first place.137

Presumably, Ocampo and Museveni could have engaged in a public argument while having a strong private understanding that their exchange did not matter. However, they prioritized different audiences. While the ICC’s core audience at this time was the anti- impunity community, Museveni’s was the UPDF, and they were directly threatened by anything that would please Ocampo’s core audience. For the first time, the Prosecutor became unpredictable in ways that seemed to threaten the GoU. The secure GoU regime looked for a way to regain the upper hand. It was within this context that the peace process presented the possibility of constructing the ICC as a stick whose removal could finally settle

133 Doyle 2006.
134 IRIN 2006.
135 Ibid.
136 Key Informant 4, Interview, Kampala, November 9, 2009.
137 Warner Ten Kate, Interview, Kampala, March 25, 2008.
the conflict with the LRA. It was the possibility of this peace process that precipitated the GoU’s rejection of the ICC. The rejection would have to be structured in the peace deal.

Thus, having previously used the ICC to put pressure on the LRA and Sudan, Museveni now wanted to change course and use the ICC as the “concession” it would give for peace. In the process, the government would shore up its credibility as a peace-supporting entity, which would respond to the humanitarian pressure and repair its fraying international credentials (Museveni had once been thought of as “the most influential head of state in sub-Saharan Africa after Nelson Mandela”). The GoU resolved to give unprecedented support to the peace process.

By pushing the ICC aside and supporting alternative means of reconciliation, the government would continue to guarantee protection to all the important nodes in its patronage network. And while the rejection of the ICC could not be accomplished outright—after all, there are rules concerning how states that have signed the Rome Statute can behave—the right game could ensure the ICC’s removal while also instituting domestic prosecutions with predictable outcomes for regime elites. The next section considers how the secure GoU regime orchestrated its rejection of the Court.

4. Rejecting Increasing Threats through Complementarity

In order to reject the ICC, the GoU needed to craft responses for multiple audiences. These responses had to satisfy Museveni’s core military constituency by removing any threat of prosecutions, placate northern politicians by offering peace to the LRA, and seem to be playing by the contradictory rules of the international donors and humanitarians who appeared to want both peace and justice. By supporting Juba, the GoU restored the conflict to

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its political frame, one where they were searching for a political settlement to which the ICC was an impediment to be removed.

An agreement on how to reject the ICC was reached in Mombasa during an informal meeting that included Pax Christi, the government, the LRA, and Salim Saleh, Museveni’s brother and a leading general in the Ugandan army. At this private meeting, secure GoU elites agreed that the GoU would “enact a law that makes it possible to apply alternative justice mechanisms.” According to the “agreement” behind Juba, accountability would be crafted in such a way that it would make the Ugandan case inadmissible before the Court. It would be a political settlement that would serve the political needs of ending the war and returning the LRA into the patronage fold of the GoU, but it would be crafted in the acceptable, but empty, universals of transitional justice. And since it seemed that many in the transitional justice community expected some form of prosecutions, these too would be provided for. According to Pax Christi, “at this stage the main challenge was no longer to come to a definite agreement,” but rather to package it in the language that was required to achieve the approval of all the other parties observing Juba, as well as the public. According to Museveni’s private secretary, the GoU saw complementarity as “an exit clause from international obligation.” Complementarity could be performed, and the Juba agreements would provide the stage, and set the parameters, for that performance. For the Ugandan regime, then, everything, including international organizations that were making

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139 Simonse and Junne 2010: 236.
140 Simonse and Junne 2010: 236.
141 Key Informant 4, Interview, Kampala, November 9, 2009.
viable threats, could be changed to suit its needs. The rules of any game could be varied as required.  

The first act in the performance of complementarity involved articulating the Mombasa consensus in a document that could satisfy the international actors who had sought to increase the threat of transitional justice, to beat them at their own game. More importantly, the document would simultaneously satisfy the GoU, the LRA, the UPDF, and, of course, the absolutist anti-impunity community. On 29 June 2007, a suitably worded Agreement on Accountability and Reconciliation was signed. It was the work of the legal advisor on the mediation team under Barney Afako, a London-based, politically-savvy international lawyer. In this document, the broad agreement regarding domestic prosecutions was enshrined, with the understanding that only the LRA, not the UPDF, would be subjected to this process. The agreement was subject to “the constitution…and in particular the principle of complementarity.” The agreement stipulated that prosecutions and tribunals would be “implemented through the adapted legal framework in Uganda,” and sentencing would be done according to a regime of “alternative penalties and sanctions [which]…reflect the gravity of the crimes or violations, promote reconciliation…and, require perpetrators to make reparations to victims.” On the face of it, the agreement about principles was comprehensive in its provisions concerning transitional justice measures. The details would be elaborated in a subsequent Annexure.

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142 The GoU did not understand (as it would later) that the delegation to the ICC did not allow for an easy rejection.
143 Author interviews, Kampala and Oxford.
146 Ibid. sec 4.4.
147 Ibid. sec. 6.4.
148 A draft of the Annexure already existed prior to the consultation.
The *second* act in the performance was aimed at the scrutinizing public, and it was possible due to the regime security of the GoU. The agreement of 29 June 2007 provided for “consultations,” which were framed as being essential in order to “receive the views and concerns of all stakeholders, and to ensure the widest national ownership of the accountability and reconciliation processes.”

This second act was undertaken in November and December of 2007. In hotel rooms across Uganda, these consultation meetings were replicated. They began with an apology from Kony that was carried through the mouthpiece of his lead negotiator, Obita, and this was followed by presentations about what transitional justice meant. These presentations were given by groups that had been organized by Transitional Futures Africa, a group that also doubled as the secretariat of the LRA. The consultations focused primarily on extolling the virtues of traditional and restorative justice over prosecutions. They particularly highlighted a contradiction between prosecution and “reconciliation,” between peace and justice, and between the ICC and the explicit goals of Juba. Given the flexibility of the language about transitional justice, it was easy for other processes of transitional justice to check the right boxes even as they were legitimating the rejection of the ICC.

At the end of each consultation, the participants were asked by a show of hands whether they supported traditional measures. The following day, this vote was the basis for a news article about the population’s overwhelming support of traditional justice and reconciliation. From the perspective of the legal counsel of the mediation team, this was supposed to send a message to the ICC about its lack of popular support. Many people who attended the meetings thought of the hearings as necessary theatre.

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149 Government of Southern Sudan 2007: sec. 2.4.
By explaining to the people that the LRA was sorry, the GoU created public momentum for traditional reconciliation measures, and they framed the ICC as an institution that was counter-productive and against the interests of justice as it was understood by the victims in whose name transitional justice was legitimizing its actions. In the view of those who organized these consultations, however, they were intended to build a public case against prosecutions, particularly prosecutions that originated with the ICC.\footnote{Carine Kaneza, Interview, Kampala, December 2008.} The LRA team needed to offer Kony a public guarantee that he would not be prosecuted when he came out of the bush; “everything else hinges on that.”\footnote{Ibid.} This exercise was designed to legitimize the Mombasa “agreement behind the agreement,” and to present the rejection of the ICC as if it were coming from victims rather than from political actors. The views that were collected from these consultations would go into the annexure that would offer details concerning how the agreement’s principles about accountability and reconciliation would be made operational.

Following the consultations, on 19 February 2008, the Annexure to the Agreement on Accountability was signed. In order to put those most responsible on trial, the document provided for the establishment of a War Crimes Division (WCD) of the High Court of Uganda.\footnote{Government of Southern Sudan 2008.} While this agreement seemed to do the right things legally, everyone involved understood that the WCD’s principles of operation would favour reconciliation, which was understood in Uganda in very specific, traditional, and restorative terms. Indeed, the Principle Agreement on Accountability had boldly asserted that “once a person has been subjected to accountability or reconciliation proceedings for any conduct into the course for the conflict, that person shall not be subjected to any other proceedings with respect to that
Everyone understood this to mean that ways would be found for Kony to avoid being subjected to the Court to the full extent that the agreement stipulated. “Those of us who have stayed with Kony, monitoring Kony over the years [can tell you that] Kony is not interested to appear in any court.” Even this potentially extreme position was worked into the agreements. So while the discourse of justice was underway in the public domain, the paradox of the LRA negotiating how they would be brought to account made perfect sense to the actors on the inside. According to a respondent from the UPDF:

You can only get punished if the director of public prosecutions takes you to court. Bringing in the issue of a division of the high court, this is on the understanding that the government will not produce Kony before court…that is why they want to remove ICC first. Because he knows that once he comes here, he will not be taken to high court. People will forgive him, and that is it.

According to the view from the Ministry of Defence:

If it is to promote reconciliation they are not going to put him in prison forever. You put [Kony] in for five years, and you give him time for rehabilitation…five years in prison, two years under supervision…[the LRA] are happy with that.

A respondent from the Ministry further explained the logic of domestic process.

[The LRA] may be jailed in their local areas. There, they will have access to their relatives, and our system of justice is different from The Hague. And you might even see a political thing taking place. Anything can change, and find they have been released.

The political goal of rejecting the ICC using the political game of complementarity was accomplished through the agreements above. The task then shifted to the lawyers who had to craft appropriate window-dressing. According to the LRA lead negotiator:

Now the challenge goes to the lawyers. We want a very strong set of laws to be enacted in parliament, which as we said must satisfy the so-called international

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155 Walter Ochora, Interview with Author, Kampala, March 25, 2008.
156 Key Informant 2, Interview, Kampala, March 20, 2008.
157 Key Informant 3, Interview, Kampala, March 22, 2008.
158 Ibid.
community and everybody, to show that we are not just a bunch of fools. Our laws meet the standards of any nation. The so-called benchmarks.\footnote{James Obita, Interview, Kampala, December 14, 2007.}

The choice of language was cynical: “so called international community,” “so called benchmarks.” The ICC became a hoop that had to be passed through by deploying certain rhetorical devices and institutional processes. It was all a game. Even the head of the UN Office for the LRA-affected areas that supported President Chissano independently employed the imagery: “This game needs to be carefully played...I think we can get quite far if the parties play it well and I think so far they have played well.”\footnote{Warner Ten Kate, Interview, Kampala, March 25, 2008.}

Through the theatre of pushing the ICC aside and supporting alternative means of reconciliation, the government would shore up its credibility as a peace-supporting institution that would listen to the northerner’s needs. Internationally, the GoU would also appear to be doing the right thing. While the GoU used the ICC as a “concession” it would give for peace, government elites understood and appropriately deployed the empty universals of transitional justice. Consequently, it cast its lot with the anti-ICC position without appearing to renego on its international obligation of ending impunity. They used the imprecise (but politically expedient) language of “ending impunity,” but strongly relied on the (also woolly) notion of “reconciliation.” According to the head of the Ugandan negotiation team and the Minister of the Interior Ruhakana Rugunda:

> The right to justice is a must, but must not be taken in isolation. Is justice critical yes, but reconciliation cannot be left to the side and say, ‘oh, it is just justice.’ The way forward must take into account justice, must take into account reconciliation, and must make sure there is no impunity.\footnote{Ruhakana Rugunda, Interview, Kampala, December 14, 2007.}

Museveni echoed the same talking points. In March 2008, he told a press conference that Uganda did not wish to have the LRA tried before the ICC because he thought it would
be a “retributive” system of justice. Instead, he wanted traditional justice, which would serve the interests of the war victims (in whose name everyone, including the Prosecutor of the ICC, often legitimized their enterprise). “If that's what the community wants, then why would we insist” on the ICC, Museveni asked.\textsuperscript{162}

If people insisted on standards, the GoU (indeed, all officials throughout the bureaucracy) would remind them that Ugandan justice systems were never in doubt when they invited the ICC to intervene. Rather, they simply needed assistance with the policing function. The GoU would invoke “complementarity,” arguing that it had appropriate justice measures for dealing with the LRA: “A trial is a trial. A sentence is a sentence, whether it is a caution, or a death sentence.”\textsuperscript{163}

IV. Conclusion

Unconstrained by insecurity, the Government of Uganda could choose how to use the ICC. It knew what arguments to craft, including the creation of an entirely new basis for referring the LRA case to the Court even while it had capable domestic institutions. The anti-impunity community’s compact of non-criticism with regard to the ICC made them non-threatening, and this aided the GoU’s confidence in its appropriation of the Court as a way to externalize its political fight with Sudan. Ocampo threatened to wrest the international justice narrative from the control of government elites by suggesting that the GoU could not grant amnesty even if it had a current Amnesty Act in its law books. But even that threat only marginally constrained the GoU. Elites seized the opportunity of peace that had been presented by the critical juncture that occurred in the region, they returned to the drawing board, and they created entirely new goals (and supporting processes, complete with public support) about

\textsuperscript{162} BBC 2008.
\textsuperscript{163} Peter Onega, Interview, Kampala, March 25, 2008.
peace. While the LRA had demanded (and the GoU agreed) that the ICC should be dropped, the parties simply found new ways of incorporating the language of justice into their non-justice related goals, which allowed them to faithfully keep up appearances. The GoU’s control of the external narrative prevailed until early 2008, until the international community was finally able to change the threats of transitional justice, as the next chapter demonstrates.
Chapter 6—Secure Regime Faces High Threats: The War Crimes Division of the High Court of Uganda as a Rejection of the ICC

The previous chapter pointed out how secure elites in Uganda were largely unconstrained in their choices of transitional justice options. In order to pursue their political strategies, they changed their support of the ICC to a call for its rejection as it suited them. As a secure regime, the GoU was able to invite the highest international scrutiny through its referral to the ICC. In the process, they reinterpreted the meaning of “inability” in the Rome Statute to be something other than what was originally intended by law. Later, when the GoU was approached by a key ally, Southern Sudan, who suggested the GoU support peace with the LRA, government officials used the opportunity to reject the Court. The narrative was supposed to be one where the elites maintained total control: the government would embark on a domestic process with all the appearances of complementarity, but it would be one where LRA crimes would be leniently addressed. The LRA would have signed the Final Peace Agreement in Juba and returned into the GoU’s patronage fold, and Museveni would have fallen back into the good graces of the international community, which had previously compared him to Nelson Mandela.

As this chapter demonstrates, however, this was not to be, due to the fact that the secure GoU regime was forced to reckon with the threats of transitional justice, which increased as the international anti-impunity community awoke to the potential enormity of the precedent that could be set by Museveni’s challenge to the Court and his request to withdraw the LRA case.¹ This anti-impunity community had worked hard for the

¹ See, for example, BBC 2008b.
They had previously been largely silent as the GoU elites took liberties in their interpretation of the Rome Statute when they made the self-referral. But once the arrest warrants were issued against the LRA, and a peace process seemed imminent, Uganda became a precedent-setting case. Complementarity could only be accomplished by prosecutions that were in accordance with specific (although largely undefined) international standards. Anything short of that (for example, traditional justice as an “alternative” to prosecutions) was simply out of the question, no matter how stridently the direct victims of human rights violations might demand such alternatives. For the anti-impunity community, the decision about what to do with the LRA went beyond its impact on the direct victims; after all, the anti-impunity community spoke for humanity, which was the LRA’s victim more broadly. Uganda had become an opportunity where an uncompromising principle could be realized, and the anti-impunity community argued that, as soon as the GoU elites made their referral, they ceded their ability to decide what measures would be appropriate for them. In a context of regime security and high threats of transitional justice, the GoU was nonetheless able to realize its vision of complementarity as politics.

The following chapter proceeds in three steps. It explains, first, how the GoU’s previously unthreatening policy decision to invite the ICC was transformed to a high threat that discredited the promises the GoU had made to the LRA during the peace process. In response, the LRA did not sign the Final Peace Agreement. Secondly, the chapter describes the emergence of the War Crimes Division (WCD) as a routine GoU procedure in response to the transitional justice community’s insistence on the ways that Uganda must meet its complementarity obligations. The establishment of the WCD set in motion a political process

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2 For the role of NGOs in the development of the Rome Statute, see, for example, Struett 2008.
3 Because the standards were undefined, they would only be met when human rights activists said they had been met.
that would allow the GoU to eliminate the threat of the external Court and to regain authority and control over the narrative regarding the LRA. Finally, the chapter shows how secure regime elites, within a context where they maintained an active amnesty law alongside the WCD, supported and rejected the ICC to suit their needs. The chapter concludes that, even in cases where secure regimes cannot avoid high transitional justice threats, they tend to have the flexibility to control outcomes. The next part illustrates how the anti-impunity community found their voice and mounted a threat that the GoU had to reckon with.

I. Stirring the Hornet’s Nest: The Rise of Credible, Costly Threats

As explained in chapter five, upon the acceptance of the GoSS-mediated peace process in Juba, a confrontation ensued between Ocampo and Museveni, as the Court and the GoU elites disagreed over whether the GoU could negotiate with the LRA. Contradicted by the ICC—an institution whose engagement the GoU elites thought they could control—secure GoU elites now embarked on a new strategy for the ICC’s rejection. They shaped a series of agreements in an attempt to satisfy different constituencies, including the army, different factions of the LRA, the politicians of Northern Uganda, international anti-impunity advocates, and other custodians of international standards of behaviour.

This section outlines how it became impossible for the GoU to balance all of these different audiences. As the information that was intended for one audience affected the actions of other unintended audiences, contradictions became difficult to resolve within a context of asymmetrical information. This led to the eventual collapse of Juba. The section proceeds in three steps: 1) it shows the challenges that stemmed from the way the GoU messaged its rejection of the ICC, 2) it demonstrates the unintended consequence of ignoring,
and thereby generating resistance from, the anti-impunity community with regard to Juba, and 3) it outlines the eventual failure of Juba.

1. Information Matters: The Challenge of Managing Games in Multiple Arenas

In 2003, Kenyan NGO elites faced the difficult problem of trying to exaggerate the possibility of truth telling to the public while simultaneously diminishing the importance of that very process to the threatened elites of the former KANU government. In Uganda, as Juba neared conclusion, the GoU elites faced a similar problem in trying to manage multiple audiences. They had to find a way to maintain the confidence of Kony and the LRA high command in the bush, and to convince them that the government would be able to deliver on their promise of circumventing the ICC. The GoU also had to maintain the legal and human rights language in their settlement description, and establish the institutional shell that was necessary in order to lend credibility to the WCD, in order to keep up appearances with the international community and show that the Juba settlement was indeed complementary to the ICC. They also had to maintain the confidence of the UPDF generals and senior officials who wanted to be assured that the army would not, under any circumstances, be prosecuted by any laws outside the existing Court Martial. Finally, the GoU had to maintain the trust of the LRA negotiators at the peace table who understood the bargain that had been struck in Mombasa but who had a high self-interest and a low level of trust with reference to the GoU.

GoU elites understood that their games in multiple arenas would only work if a number of factors held steady. First, the international community had to accept at face value what the GoU was proposing for complementarity (after all, the GoU knew how to say the right things to the international community, and they had hired a PR agency when its own
efforts had not borne enough fruit). Second, the GoU would have to be seen as the only key, credible source of information to the LRA about the ICC and what was possible there. Finally, the ICC Prosecutor could not insist on particular institutional forms for complementarity, but would instead simply have to observe Uganda’s institutional performance of transitional justice without pronouncing his view on their intent. In large part, these assumptions were based on previous experiences of GoU delegations to international institutions: Museveni frequently knew the minimum boxes he needed to check in order to assuage any international concerns.

When the GoU assessed how it could send messages about its approach to all these arenas at the same time, they chose the LRA and the UPDF as the principle arenas where they would place their focus.

Why did they make this choice? The international community was expected to be predictable. Advice from highly accomplished international lawyers led the GoU to believe that the Agreement on Justice and Accountability would fulfill the requirement of complementarity. Consequently, the GoU chose to ignore the anti-impunity community, because that community was expected to focus on whether the institutions had been established that could pay tribute to international principles. Since the Agreement checked the right boxes, the GoU considered the matter solved. But it should be remembered that the Court was young, Uganda was the first country to make a referral to it, and nobody understood how the Court’s ongoing proceeding in a case could be terminated. Moreover, there was no way of knowing how the Prosecutor—invested as he was with a powerful role

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4 Vasagar 2005.
5 For an example of how he was able to have his way on military expenditure, see Reno 2000.
6 Key Informant 4, Interview, Kampala, November 9, 2009.
within the Rome Treaty—might react to a challenge to a case where he had invested so much political capital.

However, Uganda elites assumed the Court to be an international organization like any other, and instead focused their public messaging on reassuring the LRA, who was the constituency they considered to be most unpredictable, and the UPDF, who was the constituency that was critical to maintaining GoU power. To the former, Museveni used public assurances about domestic reconciliation. To the latter, he offered private assurances about the window-dressing nature of the policies that had been chosen for the anti-impunity community’s benefit, and he constantly reiterated the importance of the Court Martial. After all, Salim Saleh, Museveni’s brother and a General in the UPDF, had been at the Mombasa meeting from which the agreements and their supporting processes had been hatched. The LRA and the UPDF were expected to trust that the GoU’s proposal of a domestic prosecution process was indeed designed simply to give the international community a shell of the institutional response that they demanded. These domestic constituencies had to further believe that once the anti-impunity community took the bait offered by Juba, Uganda would be left alone with the liberty to do whatever it wanted domestically. GoU elites sought to have this message understood by emphasizing Museveni’s autonomy to act as a sovereign.

For instance, at a London press event, Museveni reiterated this position on Kony:

> We can save him because we are the ones who sought assistance from the ICC…because he was not under our jurisdiction, we sought assistance from the ICC. If he signs the peace agreement and returns to our jurisdiction, it becomes our responsibility not any other party’s, including the ICC.  

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7 Key Informant 4, Interview, Kampala, November 9, 2009.
8 For more on the Mombasa meeting, see Simonse and Junne 2010.
This focus on assuaging the concerns of the LRA (and ignoring the anti-impunity community) cohered the threat-holders against the GoU. They were unpredictable in their opposition to the GoU strategy, and for the first time, the GoU had to take them into account. These actors sought to wrest the narrative from Museveni’s control, which thereby increased the threats of transitional justice. This rise in the threat level of transitional justice is described in the next section.

2. International Reaction to Juba: Peace, Justice, and the Emergence of Credible Threat-Holders

As explained in chapter five, the disagreement between Ocampo and the GoU about the things the GoU could or could not negotiate with the LRA was one of the factors that precipitated the second appropriation of the ICC as a concession for peace. For example, in response to the amnesty offer that was implicit at the start of Juba, Ocampo said, “the judges will have to decide what to do with the case...we believe the best way to stop crimes and restore security to the region is to arrest the top leaders of the LRA...We trust the arrest warrant will be executed.”\(^\text{10}\) However, because Ocampo also indicated in the same interview that the Court “respects the mandate of the president,”\(^\text{11}\) Juba proceeded apace, resulting in the agreements that the GoU expected to have the autonomy to execute. The sense was that a good performance through Juba would continue to silence all anti-impunity advocacy.

As the peace process came close to conclusion, however, vociferous objections emerged from the broader anti-impunity community outside the Court, which rejected the compromises that were entailed in the agreements reached at Juba. For instance, immediately following the signing of the Principle Agreement on Accountability, Judge Richard

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\(^\text{10}\) New Vision 2006.
\(^\text{11}\) Ibid.
Goldstone, a prominent international lawyer and the former Prosecutor of the International Criminal Tribunal for Rwanda, added his criticism to that of other prominent human rights voices. In Goldstone’s view, Museveni’s conduct toward the ICC—promising amnesty in exchange for peace to the LRA high command, who the Court had issued arrest warrants for—could be “fatally damaging to the credibility” of the ICC. “I just don't accept that Museveni has any right to use the International Criminal Court like this.”

Ocampo also participated in the criticism, intervening strongly to discredit the justice settlement that underpinned the peace process. He added that “all negotiations did was lead to impunity.”

Even though the agreement provided for prosecutions, its intention, argued the Prosecutor, was to give Kony a free pass.

The floodgates of criticism opened. The actors who were largely marginalized during the Mombasa and Juba processes, or those who had self-censored so they would not be seen as influencing the peace process, looked for a platform on which they could build an argument about the balance of peace and justice, something that had been brought into sharp relief by Juba. No precedent existed concerning whether the Prosecutor could continue an investigation when a peace deal was at hand, especially a peace deal whose logistics and financing were supported by the international community. The anti-impunity community, now with a moment to showcase their expertise about the Rome Statute, masked their own uncertainty about what the law meant in practice.

The actions of the anti-impunity community were, in part, informed by the fact that Uganda’s seeming defiance to the Court was coming at a particularly sensitive time. In February 2007, following a referral from the Security Council, arrest warrants against two

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Sudanese ministers had been met with disdain from Khartoum. In a context where the Court seemed unable to get results, the anti-impunity community’s concern that peace and politics would get in the way of the Court’s work was understandable. Thus, while peace could end a 20-year old war, many human rights groups concluded that the case was too important to be left to the GoU and its sovereign games. Unlike donors who were careful around the GoU, the anti-impunity community strongly rejected the intention of Juba, even though such a rejection also amounted to a rejection of domestic proceedings and, therefore, a rejection of an approach to complementarity. As a Court senior official involved the decision-making at the ICC argued:

There was a discussion about Museveni wanting to withdraw from the ICC…if the LRA said that we will kill people if you don’t drop this, it will be like hostage taking…we cannot be swayed, we have to be principled…where is the threshold where you say that the principles of the arrest warrant are more important?\(^\text{14}\)

A primary strategy of key actors in the anti-impunity community was to find a flaw in the GoU’s reasoning that had led them to the Mombasa consensus and, subsequently, to the language of Juba. Presenting the agreement, the subsequent consultations with victims, and the details of implementation as being based on a wrong understanding of the Rome Statute (in particular, it was wrong about the ideas of the “interest of justice” and the “interest of victims”), organizations such as HRW offered opinions concerning why putting the victims’ preferences for peace over a state’s obligation to prosecute could not be “in the interest of justice.” When determining what was “in the interest of justice,” HRW argued, neither the language of the Rome Statute nor actual language in the travaux préparatoires reflect any agreement that the phrase “the interests of justice” permits the prosecutor to consider the

\(^\text{14}\) Key Informant 6, Interview, The Hague, October 8, 2010.
existence of a national amnesty or truth commission process, or ongoing peace negotiations as factors to be evaluated.\textsuperscript{15}

In their view, to take peace into account would be to make a “political” determination that was outside the Prosecutor’s mandate. Instead, the ICC should focus on the apolitical and universal (and surely, desirable) understanding of crime and punishment.\textsuperscript{16} The activists crafted a universal position, stating that this matter was out of the Prosecutor’s hands. They concluded: “the Prosecutor may not fail to initiate an investigation…because of concerns regarding an ongoing peace process.”\textsuperscript{17} Because the Court was still setting policy about how to interpret the Rome Statute, these views of key actors in the anti-impunity movement became guiding principles. With this argument, the most visible actors within the transitional justice community—including the Prosecutor himself and prominent organizations like Human Rights Watch—rejected Juba, despite the fact that it provided for domestic prosecutions and for alternatives to prosecutions.\textsuperscript{18}

Advocates rationalized their criticisms of the peace process in two ways. First, they argued that the LRA was made up of unreliable, irrational actors (given the initial framing the GoU had established when seeking a referral) who were asking for the ICC to be “removed.” They could not be relied upon to sign the peace deal, so there was no need to risk the Court’s credibility on their account. The second argument cited by the anti-impunity group, and in many ways their overriding concern, was about the credibility of the young

\textsuperscript{15} Human Rights Watch 2005: 4.
\textsuperscript{16} Ibid.: 7.
\textsuperscript{17} Ibid.
\textsuperscript{18} See, for example, Human Rights Watch 2008b; IRIN 2006.
Court: “to be seen to drop the case because there is a peace process would seriously undermine [the ICC’s] credibility.”

To shift attention away from the uncomfortable discussion above, some actors suggested that deferral of the ICC case through the UN Security Council was the only (im)possible avenue for the GoU’s political need to get rid of the Court. Instead of having Museveni’s wishes conflict with the ICC, this new suggestion put him in conflict with the Security Council. The suggestion was successful. Advocates shifted away from finding arguments for the Court to suspend proceedings, and instead started debating whether and how the issue of the LRA could technically come before the Security Council. Naturally, others warned that even approaching the Security Council should be avoided, that action at the UN would be a “dangerous interference by the Security Council in the work of the ICC,” and they lobbied UN member states and prominent actors against supporting such a deferral.

The anti-impunity community’s war of words against the GoU reached the ears of the LRA, which sowed doubt about the GoU’s intentions and further contributed to the unraveling of the GoU’s multiple games. In this context, the lack of clarity about what might happen to the LRA if they signed the Final Peace Agreement and returned to Uganda became the defining issue in early 2008, during what was meant to be the last days of the Juba negotiations. The LRA was operating with the same limited information about the possibility of ICC action as everyone else, but they were unsophisticated about the workings of the international advocacy community and their ability to assert their wishes as fact. They found themselves exposed to a cacophony of legal opinions.

19 See BBC 2008a.
20 Human Rights Watch 2008a. While Security Council referrals and deferrals are provided for in the law, the former was embraced, the latter rejected.
The LRA began to realize that the GoU did not run the show, and that actors existed who could authoritatively cite articles and binding sub-sections of a statute that they had barely come to grips with, a statute that seemed to require the GoU to serve the virtues of international law, whatever the cost to peace. The Mombasa consensus had been based on an implicit promise that the ICC would become inconsequential once the promise of peace became real. Ocampo made a speech asserting that the ICC could not wished away. The LRA started to task the GoU with demonstrating how it was going to fulfill its end of the bargain, given the fact that the ICC itself (through Ocampo) was arguing that it could not be “removed.”

The repercussions of all this, as the section below shows, was a breakdown of trust between the LRA and the GoU, and a failure of the Juba process, which later affected the form of the WCD.

3. Narratives Escape Elite Control: The Threat Rises

The vocal rejection of Juba suddenly removed predictability from the transitional justice game, which increased the credibility and cost of the ICC’s threats. The expectation from the GoU had been that Ocampo, given that his views would be taken as representative of international justice’s collective voice (which would skew the power balance of any debate in which he took a side), would watch the process unfold without intervening. According to Museveni’s private secretary, unexpectedly, “Ocampo proved a little tenacious in his approach.” The insistence of the ICC and its supporters, that the cases they had investigated would be heard only at The Hague, surprised the GoU, who did not expect “the

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21 Carine Kaneza, Interview, Kampala, October 31, 2009.
22 Moreno-Ocampo 2009.
23 David Matsanga, Interview, Nairobi, November 25, 2009.
24 Key Informant 4, Interview, Kampala, November 9, 2009.
determination of the ICC officialdom to hang onto what they saw as their turf” on the matter of the LRA.  

The views of the international actors ought not to have mattered. Indeed, they did not matter to GoU elites. Expressing the view of the secure elite, Museveni’s private secretary claimed, “the international community has these views, so what?” Juba was a domestic settlement, and the government was ready to uphold their end of the bargain to the LRA: “Museveni says that among African people, when you fight and you get someone down, you do not hit them when they are down.” In this view, the LRA was negotiating from a position of weakness, and Museveni was ready to honor the good-faith deal that had been struck in Mombasa and validated by Juba. While they were unable to deliver what the LRA wanted in an ideal world because international scrutiny would not allow “an outright removal of the Court,” there was no doubt in the President’s mind that if the LRA signed the peace agreement, “there would be no jail,” as those close to Museveni said.

And indeed, the Mombasa consensus might have been sufficient had the LRA continued to trust the GoU. The GoU’s advisors knew that complementarity did not have any fixed standards, and they were familiar with what Colombia had done, which was effectively to create a legal process behind which a lenient political compromise could be enacted. Furthermore, as will be explained later in this chapter, Museveni could legally give amnesty and still be operating within Ugandan law: while he had promised to exempt the LRA from

25 Ibid.
26 Ibid.
27 Ibid.
28 Author interviews, Kampala and Oxford.
29 According to one interviewee, Colombia had created a process to “launder” those who had committed grave crimes, in order to place them out of the reach of the Court. Author interviews, New York.
the amnesty laws when he made the ICC referral, the government had done nothing to operationalize that promise. The secure GoU elites wanted it this way.

The GoU elites, however, did not have a sufficient legal response to the doubts that were raised by different factions of the LRA and from the international community, and these doubts resonated more strongly to the LRA than the GoU’s promise to uphold the Mombasa compromise. Government officials appeared flat-footed and unprepared when responding to the LRA’s questions concerning whether the Mombasa agreement was still valid. The reasons for the GoU’s inadequate response were clear. The GoU had expected the agreement about the WCD’s creation to be a sufficient process for “removing” the ICC. In the minds of GoU elites, the government would perform domestic trials that would have no bite, and cases would become inadmissible before the ICC once domestic processes were instituted. Put differently, given the initial leeway the GoU experienced in reinterpreting “inability” and inviting the ICC, the law seemed flexible enough then. The GoU elites had not expected to find the right legal argument outside of their understanding that complementarity was political, and that they could do what they wanted if they created the right institutional shell.

Now, with the high threat coming from the anti-impunity’s cohesive messaging about the rejection of Juba, a legal response was required, and the ground beneath the GoU’s promises seemed shaky. The GoU’s ability to exercise control over the narrative was in doubt. There were discussions at one point about organizing a meeting between Saleh and the LRA, because “military men could trust each other.”30 This meeting never happened.

In early March 2008, on what was thought to be the eve of signing the final peace agreement, an LRA delegation went to The Hague with a wish to meet Ocampo. Given the fact that the LRA no longer believed that the GoU would find a way of fulfilling its

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30 Key Informant 3, Interview, Kampala, March 22, 2008.
Mombasa promise, the purpose of this meeting was to further clarify, from the “source,”
what the options for “removing” the ICC would be. Ocampo refused to meet with them.
Instead, the LRA delegation only met with officials of the Registry and received basic and
routine information about the workings of the Rome Statute that focused on the role of the
registry in matters like witness protection and the facilitation of defense. The briefing was
targeted as though it were to representatives of perpetrators who would appear before the
ICC, as though the appearance of the LRA at the ICC was a foregone conclusion. To the
LRA, it appeared that there was no legal way to remove the ICC. The very act of seeking a
meeting with the ICC—rather than allowing the GoU to act as the middleman to interpret the
wishes of the international community to them—was further evidence of the mounting
distrust between the LRA and the GoU.

The distrust had consequences. On the appointed date in April 2008, the LRA did not
sign the Final Peace Agreement. To be sure, the LRA did not definitively reject the
agreement. They brought up the issue of the ICC ahead of the initial signing date, and later
explained that they were simply postponing the signing, promising they would sign on a
future date if they received a better explanation about the ICC. They rescheduled this
signature several times. Each time, they asked for clarification concerning how the ICC
arrests could be addressed, and each time, there was not a satisfactory answer.

The skeptical advocates were emboldened by the LRA’s non-signature, and they
considered it a vindication—rather than a result—of their uncompromising stand on the
reasons why peace must not trump justice. In reality, the anti-impunity community had
criticized the GoU and precipitated a crisis of confidence that led to the initial non-signing of

31 Indeed, in a March 2008 meeting co-organized by the author in Kampala, one got the sense that the lawyers
were just then becoming familiar with different ways of withdrawing jurisdiction from the ICC, which
suggested they had not been expecting to have to answer the question.
the FPA by making the ICC an immovable institution. Now, the anti-impunity community considered the case for domestic prosecutions to be closed. The LRA would be left for the ICC to prosecute.

What the anti-impunity community did not count on was the fact that their actions had drastically changed the threat level of the transitional justice game for the secure GoU regime, and that domestic prosecutions would indeed be the way for the GoU to regain authority and control. Museveni had believed the ICC constituted a delegation of authority like any other. Ultimately, only he could decide what could happen within his borders. But if the Court could act independently of the GoU’s will and insert itself into what the GoU thought was a national story, what else could Ocampo do? Having lost control of the peace process, the GoU was determined to regain the upper hand. Rugunda, the Minister of the Interior who had also led Uganda’s negotiations with the ICC, was made the new permanent representative of Uganda to the UN, a position from which he could better protect Uganda’s interests with reference to the international community. (When the arrest warrant was issued against Bashir in March 2009, Rugunda held a private consultation with Ugandan lawyers in New York to find out what the ICC’s threat to Uganda might be.)

The Agreement on Justice and Accountability—the instrument that had been designed for the purposes of window dressing a process through which the LRA would receive only minimal punishment—was seized enthusiastically for domestic implementation, in order to eventually ensure that the Uganda case would be inadmissible before the ICC. Effectively, the secure GoU elites explicitly rejected the ICC by establishing the WCD, an institution that was fully within the control of the GoU, as examined in the next section.

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32 Author interviews, Kampala and New York.
II. Secure Regimes Manage High Threats: The Invisible Arm of Secure Regimes

If the second appropriation of the ICC as a concession for peace failed when a threat emerged from the previously non-credible anti-impunity community and the failure of Juba, the third appropriation occurred in direct response to the high threat faced by the GoU. This section shows how domestic prosecutions through the WCD shifted from being a window-dressing option, to being the firm choice of secure GoU elites, aimed at managing the threat of transitional justice and reassuring the GoU’s critical constituents. It shows how the bureaucratic organization of a secure regime reinforced the goals of regime elites by outlining the ways that the judiciary organized organically behind the vision of the secure regime elites, creating apolitical legal structures to enact the GoU’s vision. The section also demonstrates how secure elites owned the political culture, a factor which enabled the transitional justice industry to support the approach of the regime, resulting in domestic prosecutions processes that were within the regime’s control.

1. The Third Appropriation: Secure Regimes Control Organizational Routines

This section shows how the process of shaping what would be Uganda’s most enduring rejection of the ICC—their complementarity response—was a technical one, in the sense that it was the result of decisions that were made by elites in the judiciary who were acting as elites in the Ugandan judiciary routinely do.

As explained elsewhere, secure elites dictate bureaucratic culture. Thus, judicial decisions were made which secure regime elites nonetheless expected to be acceptable to their overall vision. Put differently, Museveni did not meet with the judiciary to ask them to institute domestic prosecutions of a particular character. Since the compromise, which offered the political parameters for a domestic process, was shaped in Mombasa and captured
in the Juba agreements, he did not have to. Notably, by March 2008, on the eve of the expected signing of the Final Peace Agreement, there had been no “formal contacts” regarding the WCD between the government officials who were negotiating in Juba and the Ugandan judiciary.\textsuperscript{33}

Museveni’s signaled commitment to a domestic process of a particular character set into motion an apolitical process for domestic prosecutions that was driven by the legal fraternity who were, in the final days of Juba, concerned about the “spectre of masses and masses of these rebels, turning up at the border, saying, ‘we have given up rebellion, we are coming in.’”\textsuperscript{34} Following the February 2008 signing of the Annexure on Accountability and Reconciliation, which provided for the WCD, the Justice, Law and Order Sector (JLOS) of the GoU established a Transitional Justice Working Group (TJWG), chaired by the Principle Judge of the High Court of Uganda, Justice James Ogoola.\textsuperscript{35} Its task was to think about what an appropriate institutional response to an LRA exodus would be. This working group was comprised of all the major government departments and agencies: defense, internal affairs, prisons, police, law reform, amnesty commission, civil society, traditional elders, and others. They were to act as a “think tank,” investigating the implementation of the transitional justice policies in the Agreement.\textsuperscript{36}

As would be expected within a secure regime, the political decisions in Juba concerning what would be politically acceptable provided the background for the judiciary to institute an independent set of deliberately apolitical responses which nonetheless fulfilled the regime elites’ political expectations. Accordingly, the TJWG’s task was technical. It had

\textsuperscript{33} Justice James Ogoola, Interview, Kampala, January 6, 2011.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid.
to ensure that the terms outlined in the agreement were defined, that processes were proposed, and that the government’s vision in the agreement translated into a fact on the ground. The working group created sub-groups to elaborate all of the transitional justice measures that were envisioned in the Juba accord.

The judiciary was acting under Ogoola’s leadership. He was the highest-ranking judge in Uganda, and he thought it was obvious that the Ugandan judiciary could carry out the trials of the LRA free of executive influence. “I think Uganda is one of the judiciaries that are fierce about their independence,” he said. He illustrated this point with an example from 2005 when, during the treason trial of opposition politician Kizza Besigye, executive-ordered commandoes stormed into the courtroom: “We put our foot down and said, ‘No, this cannot be,’ and we made life impossible for the executive,” he noted. “I myself wrote a poem about this one…The Rape of the Temple of Justice.”

Uganda had the intellectual capacity to carry out good trials; indeed, it was “exporting” international judges and other senior staff to other tribunals. With the WCD, the judiciary could further demonstrate their competence and obviate the need for the ICC, which is just what the regime elites wanted.

The TJWG sought to deliberately distance itself from the political process. For example, Ogoola pointed out that, very early on in the life of the working group, they realised that they needed a governing law that could address the legal complexities that any LRA case could bring. “War crimes” did not exist as a category of offenses in Ugandan law, and a person could not be prosecuted for a crime that did not exist in the law. And even if a law was passed, a person could not be prosecuted for a crime that had occurred before it was outlawed. As a solution, the TJWG decided they could draw on existing domestic and international laws to ensure that any conduct that was already a crime, like mass murder,

37 Ibid.
could be prosecuted, even if it was not labeled as a “war crime.” In general, the TJWC based their deliberations on firm legal ground.

To give life to their recommendations about the nature of the WCD, the TJWG would need a law, an act of parliament. However, the TJWG decided that, if the WCD was established by parliament, it would be a subsidiary to the High Court. Yet, war crimes were serious crimes that deserved serious attention by a court that was at least at the same level as the High Court. Besides, the establishment of the WCD was urgent:

If we say that the court be established by parliament, it would take forever…The debate…the opposition would say one thing, the government would say another one, other people would say I don’t know whatever, that was a problem, therefore we had to find another mechanism for the actual establishment of the court.38

The next section describes how the TJWG got around this overtly political problem and cast itself as apolitically as possible by creating the WCD as an administrative division of the Ugandan High Court. This effectively gave life to the GoU’s vision where it could show the ICC that it was both able and willing to prosecute its own cases, and where it legally became possible to wrest cases from the ICC’s grasp.

2. Neutralizing High Threats I: Judges Draw Up “Little Instruments”

As explained above, the TJWG decided to insulate the WCD from domestic politics, and they resolved to separate the establishment of the WCD from the passing of the law that would enable the Court. They further resolved that the WCD would be established administratively by the Principle Judge and the Chief Justice, who have power to administer the High Court.39 This meant the two of them could establish divisions of the High Court, and allocate resources (such as judges, or a budget) for the exclusive performance of a particular task, in

38 Justice James Ogoola, Interview, Kampala, January 6, 2011.
39 On the functions of the Principle Judge, which include the “administration of the High Court,” see Republic of Uganda 1995: sec. 141 (1)(a).
order to best meet any gaps that were identified in the judiciary. Divisions that were created in this way would have the added advantage of being equal, rather than subsidiary, to the High Court. As Ogoola explained:

In the constitution, we have a provision, which says that the Chief Justice, and the Principle Judge have power to administer the work of the High Court. We already did that before, with the commercial court…in similar vein we said, this war crimes court, let’s simply take it out of the existing criminal division, subdivide that, that one let it remain for ordinary crimes, ordinary murder…but these serious war crimes, let us establish another division. So we did…we drew up this little instrument, and we defined everything that we wanted about this Court.40

This “little instrument” defined the WCD’s structure. As Ogoola explained, “We needed to inject into this system what happens at the international courts, such as ICC.”41 They designated that the WCD would have the judges sit in panels of at least three, as the international courts do. “But the international courts go two stages ahead of what our High Court would be doing, and we wanted to do the same.” To approximate these international courts, and in order to create a “mini-ICC” within Uganda, they managed to get every aspect of the Ugandan justice, law, and order sector to partake in the WCD:

The DPP agreed to assign…six prosecutors…to work with the Court, so whenever we did trainings, they were …earmarked just for that…The inspector of police came in, and like the DPP, agreed to assign twelve investigators to be permanently assigned to the court, to learn with us …Prisons…they would then put the facilities, because you do not want these international criminal people being taken into a dungeon, if they were to go to the ICC they would live almost in a hotel like this one. The only one thing we have not done is…a defender…we do not have because of budget."42

Utilizing a genius found in secure regime institutions, Ogoola described an apolitical exercise that seemed to be taking place at a distance from the political needs of Museveni. The ostensible concern of Ogoola was purely judicial, and he was uncompromising about the standards he would pursue to make sure the Court matched international standards:

40 Justice James Ogoola, Interview, Kampala, January 6, 2011.  
41 Ibid.  
42 Ibid.
You are also buying political blessing, because of the integrity of the mechanism, the acceptability of the mechanism, here within the country and outside…to show that we are willing, is to establish [the WCD], but to show that we are able, is partly to answer the question, do you have the standards that are acceptable internationally?  

It must be remembered, however, that the TJWG that Ogoola chaired included representatives from every arm of the government, which included elites who would have been marching to the orders of the secure regime. In the ordinary course of business, these elites would have understood the priorities of the government, and would have proposed these priorities for consideration in the context of the working group. Indeed, this is the very nature of policy making, where actors, with identities, preferences, and agendas, bargain about them, and some agendas win over others. These preferences would eventually be given the force of law. The administrative establishment of the Court, which was only possible within the context of regime security, made the GoU’s interests and influence much less visible.

Thus, even as the parties to the technocratic interventions ostensibly ignored the politics of what they were executing, they nevertheless affirmed the political background and legitimated it. That the Principle Judge—as well as all elites—took Juba as a starting point (and as a boundary setter of what was possible and what was not) is an illustration of this point. When some observers pointed out that the WCD should be a tool for fair justice where the GoU could also be held to account, in an argument similar to one made by Ocampo, Ogoola and other WCD officials argued that politics occurred in domains that were outside their influence. As the Registrar of the WCD emphasized, the task of the WCD would be to make sure that any case before them was legally sound and that it was addressed

43 Ibid.
44 For an example of how some issues rise in the policy agenda over others, with an example from global health, see Shiffman and Smith 2007.
45 Alex Ajiji, Interview, Kampala, January 6, 2011.
with the best standards. In principle, nothing could stop the WCD from hearing a case involving the UPDF if it was brought to the Court’s attention.\textsuperscript{46} This apolitical, principle-based orientation of the WCD brought it external support and legitimacy, and reduced the antagonism of threat-holders, as described below.

3. Neutralizing High Threats II: Secure Elites Appease Threat-Holders

By letting bureaucratic routines take their course at a seeming distance from the political needs of the GoU, GoU elites created a space where other technical partners could come to the fore and further strengthen the technical soundness of the WCD, which would reduce future arguments against its weakness and strengthen the GoU’s case for the ICC’s rejection. In effect, the GoU was shifting its primary attentions to the anti-impunity community. This was unlike the Juba period, when regime elites assumed the wishes of this group were a given. The strategy paid off, and the WDC received important endorsements. The “transitional justice industry” reached out to the Court and offered suggestions about how to carry out different aspects of its mandate.\textsuperscript{47} As Ogoola explained:

\begin{quote}
We had a lot of help from academia. There is a group who call themselves PILPG…these two professors are expert in these war crimes law. They have written books on it, they have even practiced law in those courts, one of them was even there even at Nuremberg? I don’t know, but they are people who are very, very knowledgeable. So somehow they got to offer their services.\textsuperscript{48}
\end{quote}

PILPG is the Public International Law and Policy Group, and its experts supported the TJWG in drafting the law for the domestication of the Rome Statute. Ogoola’s point about Nuremberg, while hyperbolic, suggests that the services they received came from a group that epitomized expertise in transitional justice. Furthermore, an outreach strategy for

\textsuperscript{46} Ibid.
\textsuperscript{47} For more on the notion of the transitional justice industry, see Subotic 2009.
\textsuperscript{48} The Nuremberg reference was to the Planethood Foundation, whose founder, Donald Ferencz, was the son of Benjamin Frerencz, a prosecutor at Nuremberg.
the WCD was commissioned, based on “a creative outreach philosophy that focuses less on spreading information to the general public and more on responding to public perceptions and responses while engaging the population and international perceptions throughout the transitional justice process” in order to prevent “myths and misunderstandings from taking root in the popular consciousness and thereby undermining the larger goals of an accountability mechanism.”\(^{49}\) PILPG also supported the TJWG in holding public meetings about the WCD in order to expand awareness about it, and to draw attention to the larger goals about the state’s obligations. The technical soundness of the WCD was further shored up by the support of JLOS partners, who sent the WCD staff to Sierra Leone and the ICC for training.\(^{50}\)

An internationally reputable staff was selected for the WCD. This was done to further demonstrate the WCD’s independence and ability, should it ever be necessary to challenge the admissibility of the Ugandan cases before the ICC. Honourable Dan Akiiki Kizza, who was appointed to head the Special Division, had worked in Sierra Leone’s anti-corruption commission. Honourable Justice Eldad Mwangusya, who had experience in public prosecutions, and Honourable Lady Justice Elizabeth Ibanda Nahamya, who was a Principal Defender in the Special Court for Sierra Leone, were also selected.

In a further act of internationalization of the WCD, JLOS sought to recruit a transitional justice advisor who, among other things, would contribute to the “interpretation and implementation of the Juba Agreement on Accountability and Reconciliation and its Annexures.” Preference was given to a person with knowledge of “contexts relevant for

\(^{49}\) Public International Law and Policy Group (PILPG) and Vanderbilt University Law School International Legal Studies Program 2010: 4,5. The strategy was written with the support of Oxford Transitional Justice Research.

\(^{50}\) Elizabeth Nahamya, Interview, Kampala, November 3, 2009.
Uganda (Colombia).” The fact that the desired advisor needed to be knowledgeable about Colombia confirmed the political role of the WCD in keeping the Uganda case out of the reach of the ICC. With all the support from external actors, the WCD was formally created in May 2008. In the meantime, the TJWG finalized the ICC domestication law, which Parliament passed in May 2010 (having initially tabled it in 2004).

With the WCD’s formal establishment in May 2008, the GoU elites effectively lowered the threat of the ICC. They regained control of their external environment, which they had lost in the final days of Juba. To be sure, the ICC was still engaged in the country. In October 2008, the ICC Pre-Trial Chamber (PTC) set out to determine whether Uganda’s LRA case were still admissible before the ICC, given that the WCD had already been established. Because the WCD had not yet started its work, the case was found to still be admissible. At this point, this finding was not alarming to GoU elites. They effectively had a WCD at their disposal that was technically sound, and they could now go back to using the Court as they wanted, knowing that if it became necessary (for instance, should a case ever be opened against the UPDF), they had an institution of complementarity that could challenge any external pressure. The next section offers examples of how the secure GoU elites pursued a policy of engagement with both the ICC and the WCD, managing the domestic political and international advocacy arenas and achieving its goals in both.

III. The Aftermath: Secure Elites Revise History

Having established the WCD in a technical register that reflected the vision of the government (while it simultaneously checked the right international boxes and became an insurance mechanism with which to launch possible future admissibility challenges before  

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51 Justice Law and Order Sector (JLOS) 2010.
52 Pre Trial Chamber II 2008.
the ICC), the GoU was once again in control, and the potential cost of the ICC threat had been reduced. Following the WCD’s establishment, the GoU went about its business of using the ICC to pursue its interests as it had done before the collapse of Juba. Through their interaction with the ICC (and the anti-impunity community), the GoU elites continued to present clear examples of how secure regimes are dismissive of low-threat transitional justice demands. This section shows how, following the WCD, regime elites reverted to the behaviour described in chapter five, where they adopted policies that supported and rejected the non-threatening ICC in equal measure, to suit their political needs. It also shows how elites were largely unbound by previous choices, and how they institutionalized contradictory approaches to cooperation with no short-term consequences.

1. In the Name of the ICC: Secure Elites Support and Dismiss Non-Credible Threats

The first opportunity for GoU elites to pursue their interests by alternately supporting and rejecting the ICC came immediately following the failed Juba process. The GoU, which had always favoured militarization in the region, now had the support of formerly antagonistic threat-holders across the globe in their pursuit of LRA war criminals. The LRA was now seen as a new category of outlaws, and the earlier terms the GoU had used to define them (that they were apolitical criminals) applied once again. Every means of pursuing them (outside of peace) was legitimate. The UPDF, alongside forces from Sudan and the DRC, and with support from the United States, mounted a military operation labeled Operation Lightning Thunder (OLT) in December 2008. Even when all LRA activity in Northern Uganda had ended in October 2006, and the character of the LRA was increasingly regional rather than solely Ugandan, the LRA’s failure to sign the FPA in 2008 provided a new

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53 For more on the tension between governments and international courts, see Del Ponte 2009.
54 For an overview of the operation, see Schomerus and Tumutegeyreize 2009.
justification for the UPDF’s pursuit. The UPDF’s engagement was now crafted as an attempt to arrest Kony for the ICC and, since the LRA’s continued human rights abuses served to “portray Uganda in bad light and are injurious to the diplomatic relationship with the affected countries,” to repair neighbourly relations.\(^{55}\) In the immediate post-OLT attack period, Human Rights Watch took credit for having urged “regional and international coordination to execute the ICC’s warrants with minimum risk to civilians and without excessive force,”\(^{56}\) while simultaneously urging the UN Security Council to ask countries “with relevant capacity” to create a “viable plan” for Kony’s apprehension.\(^{57}\)

What resulted was an unholy alliance between Court supporters and GoU military hawks. The former saw the latter as a necessary tool for the enforcement of international law, and the latter saw the former as a new legitimizing framework for their regional ambitions. Coming so quickly on the back of the failed peace process, a military approach to the LRA became the new normal as a way to further international justice. Ocampo asked for “special forces” and US “operational” support to execute arrest warrants;\(^{58}\) a House of Lords debate stated that a “solution would be a combined operation, with UN logistical support, to arrest Kony and to eliminate the group once and for all;”\(^{59}\) and lobbying activists got legislation passed in the US Congress that was aimed at disarming the LRA, and in 2011, the US authorized 100 special forces to, among other things, “end the scourge and violence of the LRA and to help bring Joseph Kony to justice.”\(^{60}\) Just as the GoU elites had used the referral

\(^{55}\) See Akunda 2008. For a different view on the changing justifications for OLT, see Atinkson 2009.
\(^{56}\) Human Rights Watch 2008c.
\(^{57}\) Human Rights Watch 2008d.
\(^{58}\) See Branch and Al Bulushi 2010. Also Lerner 2010.
\(^{60}\) Gollust 2011.
to the ICC to fight Sudan, they were once again able to shape their political world by using the Court.

However, though they used the ICC to justify their expanded militarization through OLT (and even while they were still engaged across the borders in the name of arresting the LRA), GoU elites promptly dismissed the jurisdiction of the ICC when it became inconvenient. During the December 2008 OLT, the GoU did not capture Kony as was intended, but the LRA sustained injuries. In January 2009, Okot Odhiambo, one of the LRA commanders wanted by the ICC, called Jeremy Haslam, the director of the International Office of Migration (IOM) in Uganda, and said that he wanted to surrender himself to Uganda.  

IOM routinely worked with the Amnesty Commission to repatriate LRA returnees from neighbouring countries back to Uganda. Because the establishment of the WCD had not had an impact on the Amnesty Act of 2000, there was no legal reason why Okot Odhiambo (or Kony for that matter) could not receive amnesty if they surrendered to Uganda. According to Haslam, Odhiambo acknowledged that he would go through the domestic courts, but added a threat. “I have enough on the governments of the region,” he is said to have stated, “that I know I will walk free.” According to a different report, Odhiambo said, “I won’t go to The Hague. I am defecting and seeking amnesty in Uganda.” In return, the Permanent Secretary of Internal Affairs (whose office, following the GoU’s referral of the LRA to the ICC, was supposed to have drafted an instrument for exempting people like Odhiambo from amnesty) assured Odhiambo that he would be tried at home. “The agreement we signed in Juba is clear. It stated that those accused would face the courts and we stand by

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61 Jeremy Haslam, Interview, Kampala, October 30, 2009.
62 Ibid.
63 Among 2009a.
that,” said Kagoda. He said this while the UPDF were still in neighbouring countries, attempting to capture members of the LRA for the ICC.

The announcement of Odhiambo’s willingness to come home immediately released a wave of criticism from the anti-impunity community against the GoU. Amnesty International launched severe criticism against the IOM, releasing a statement that urged the IOM to arrest Okot Odhiambo and hand him to the ICC “as soon as possible,” arguing that, as an international organization, the IOM should not help war criminals “evade justice.” “Should the IOM proceed with this transfer [of Odhiambo to Uganda], it would constitute an obstruction of justice,” Amnesty concluded.64 Amnesty International’s protest made headlines, provoking the Ugandan Attorney General to respond that, as a demonstration of the government’s “unwavering stance against impunity,” any surrender of Odhiambo would be handled according to the Juba agreement, which provided for domestic courts.65 The use of the language of impunity by the GoU, which pulled the rug out from under the anti-impunity supporters, was something the GoU elites were able to do now that they simultaneously had the WCD operating alongside the ICC, and the ICC threat was low.

While Odhiambo’s defection was eventually denounced by the government as a hoax66—despite the fact that the government had monitored the calls with the IOM and confirmed that the caller was indeed Odhiambo—it starkly demonstrated how the GoU saw the ICC. Though they were still operating in the ICC’s name with their engagement in OLT in the DRC, the GoU saw the ICC as a tool of convenience.67

64 Amnesty International 2009.
65 Candia 2009.
66 Among 2009b.
67 According to Haslam, “the government verified” that it was indeed Odhiambo who was calling. Later events beyond the scope of this research convinced Haslam that the GoU sabotaged the return and called it a hoax because they did not want Odhiambo to return. This possibility notwithstanding, GoU elites saw no need for ICC engagement in his case, given the WCD.
This process led to a head-on collision between the GoU and the Court’s supporters. Uganda’s director of public prosecutions (DPP)—the man whose office would have to effect any prosecution of the LRA—said, “I find no justification for an international trial if Kony comes back.” He added:

The ICC should realize the purpose for which it was set up. It was never meant to be the first option for any trial. The reaction with respect to Uganda will not be different elsewhere. All nations want to handle their affairs themselves, and go abroad later. It should not be in a hurry to be the first option.68

This was the reaction of a bureaucrat in a secure regime, one for whom transitional justice was more of a nuisance than a set of rules that was binding.

The DPP’s remarks underscore a second characteristic of secure regimes. They can dismiss cooperation without seeming to do so, since they expect organs of the state to act in harmony with their vision, as shown below.

2. Secure Elites Control Political Culture: “You Can Say We Have Our Cake and We Eat It Too”69

The second opportunity for GoU elites to pursue their own interests by alternately supporting and rejecting the ICC as necessary came in July 2009, when Uganda invited President Omar Bashir of Sudan to the Smart Partnership Dialogue. Incidentally, this was at the same time that Uganda had the presidency of the UN Security Council. It should be remembered that the UN Security Council had referred Bashir’s case to the ICC in 2005, and that an arrest warrant was requested for him in July 2008 and issued in March 2009. Bashir now became the focus of the anti-impunity activists. The success of the case against him would impact the legitimacy of the Court, and all the member states of the ICC were urged to arrest Bashir if he visited their country.

68 Richard Butera, Interview, Kampala, November 5, 2009.
69 Key Informant 4, Interview, Kampala, November 9, 2009.
Before Bashir’s expected visit to Uganda, Ocampo visited Kampala to remind the GoU that it was required to arrest Bashir. While in Uganda, Ocampo said, “President Bashir can be here but he should know the obligation of Uganda is to arrest him. He should know that before he comes.” Okello Oryem, the State Minister for Foreign Affairs who flanked Ocampo during this visit, described the Prosecutor as follows: “Ocampo is like a children’s story. To know the mango is ripe, you have to shake the tree. He has come here and shaken the tree several times.”

The GoU, secure regime that it was, could not be pressured into doing anything it did not wish to do, so they instead decided to play politics in multiple arenas with Ocampo’s “shake-the-tree” visit. In reaction to being on this international stage with Ocampo, Oryem seemed to affirm what Ocampo wanted. Uganda was committed to its obligations to the Rome Statute, Oryem said, and in fact, the arrest warrants for Bashir were already with the right authorities. It would be up to the Inspector of Police to arrest him. Oryem intended to imply that the executive had carried out its obligations. In this law-abiding state where the separation of powers is the law, the executive had given the warrants to the state organ that was tasked with the arrest of perpetrators. The matter was now out of the executive’s hands.

With this declaration, Uganda earned points as “the first African country” to openly express its willingness to arrest Bashir. This label was important because, following the issue of arrest warrants against Bashir in March 2009 (a development outside the scope of this research), the ICC experienced great resistance from African ICC member states about

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70 Incidentally, it was during this visit that the ICC received the famous “Waki envelope,” from Kenya. See Ntale and Limo 2009.
71 Mukasa 2009.
72 Okello Oryem, Interview, Kampala, November 5, 2009.
73 Mukasa 2009.
74 Okello Oryem, Interview, Kampala, November 5, 2009.
75 Voice of America 2009.
its jurisdiction. A so-called “African position” against the ICC had emerged at the African Union, and Uganda had seemed to support that anti-ICC position. It was in the spirit of being a team player in the African arena that Uganda extended an invitation to Bashir in the first place. Thus, when a GoU minister said that he would arrest Bashir, it was a development that ICC supporters could sit up and take note of. This gesture seemed to affirm the GoU’s important commitment to international justice and human rights.

As would be expected of a secure regime, the policy of supporting the ICC meant whatever regime elites wanted it to mean. Immediately following Oryem’s statement, both Museveni and the Minister of Foreign Affairs distanced themselves from the State Minister. On his part, the senior Minister of Foreign Affairs said the statement was a “media error.” Museveni called Bashir to apologise, stating that the views of his minister were not the views of his government.

What is interesting is what happened within the more private arena involving GoU elites. According to those close to Museveni, before and after Oryem’s seemingly bold declaration, he had met with the President, and he had presumably received tacit consent to commit the “media error.” After his statement, he also met with Museveni.

As it was with the apolitical establishment of the WCD, which lowered the threats of transitional justice, the GoU could rely on different elites running different state organs to adhere to the GoU’s world-view regardless of the theatre they performed for Ocampo and the anti-impunity community. Thus, even though Oryem stated that the ball had been passed to the Inspector of the Police, when questioned by the media, the Inspector said he would not

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76 For more general information on the resistance of African states to Bashir’s arrest, see a leading blog on the subject: de Waal 2009.
77 Sudan Tribune 2009.
78 Key Informant 4, Interview, Kampala, November 9, 2009.
act without “harmony” in the government.\textsuperscript{79} He passed the buck forward, saying, “We do not have any instructions from the office of the Director of Public Prosecutions or the Attorney General [to arrest Bashir].”\textsuperscript{80} The Inspector was indeed suggesting that the lack of a clear executive directive on how to act meant that he would have to wait on Museveni and the DPP. As it was pointed out in the conclusion to the section above, however, the DPP disagreed with the ICC’s thinking that seemed to suggest that it had primacy in Uganda.\textsuperscript{81} There was no way he would give the required instructions.

This was a secure regime at work. “You can say we have our cake and we eat it too,” said an informant familiar with the political games.\textsuperscript{82} This governmental theatre signaled support of the ICC through one official statement and withdrew support with another, which meant that regime elites never had to make any hard choices. This process was further facilitated by the ability of the secure regime to institutionalize contradictory policies, as shown in the final section below.

3. Secure Elites Create Their Own Rules of Conduct: Protecting Regime Interests Is the Rule of Law

The first set of tensions between the GoU and ICC described above pertaining to Odhiambo and Bashir were those of strategic non-cooperation, where the secure regime could rely on its agents to deliver its vision. The second set of tensions demonstrated how secure GoU elites structurally enabled the regime’s non-cooperation. The secure GoU largely created its own rules of conduct in two ways: 1) by balancing an active Amnesty Act alongside an ICC

\textsuperscript{79} Sudan Tribune 2009.
\textsuperscript{80} Ibid.
\textsuperscript{81} Richard Butera, Interview, Kampala, November 5, 2009.
\textsuperscript{82} Key Informant 4, Interview, Kampala, November 9, 2009.
implementation law, and 2) by resisting the application of any legal standards outside those that Ugandan law provides for. These points are tackled in turn below.

The first reason why Uganda was able to support and reject the ICC simultaneously is because, as of 2011, the Amnesty Act was still active in Ugandan law. As previously explained, the Amnesty Act was enacted within the Ugandan logic of amnesty for patronage and peace in order to encourage the LRA and other rebels to surrender. An amendment from May 2006 suggested that it was possible for a person to be declared not eligible for amnesty by the Minister through a statutory instrument made with the approval of Parliament, but the Minister of Internal Affairs never drafted such an instrument for exemption. The Amnesty presently remained available, even after it was renewed on 21 May 2010 for two additional years. Because anyone could apply for it at any stage of the process, the existence of the amnesty law meant that the WCD would never take a case to conclusion.83 As the DPP stated:

It is simply the case that everyone charged invariably applies for the amnesty law. It is not a good legislation; the person applying does not even have to say for what facts they apply for it you gave it automatically. There is no record of what you are responsible for. I would rather everyone who wants amnesty at least there be some facts established…It is so frustrating and not genuine, in my view.84

The absent guidance concerning the conditions under which the Amnesty Act would not apply was expected to be addressed by the ICC Domestication Act. Indeed, some expected that the ICC Implementation Act would annul the Amnesty Act, or severely restrict its application. Without such a restriction, asked the DPP, “On what grounds would you say that we cannot implement the [Amnesty] law?”85 That the ICC Act did not touch the Amnesty law left Uganda with the notable distinction of having both Amnesty and ICC

83 Richard Butera, Interview, Kampala, November 5, 2009.
84 Ibid.
85 Ibid.
Domestication in its books. This was something that the Principal Judge considered simply to be “an oversight.” Other political observers saw it as another instance where the country was having its cake and eating it too.

This was a secure regime in action. It could interpret national and international rules to suit its political needs. Amnesty served the domestic political needs for the constituency of Northern Uganda, and it would not be touched, unless it contradicted other goals. The DPP simply found a way to have cases before the WCD while the Amnesty Act remained valid. He proposed that the LRA rebels who were captured in the field, rather than those who voluntarily came forward, could be charged before the WCD. They would not be charged for treason, which was ordinarily the case, but for war crimes. If they applied for amnesty, they could be denied it because, by waiting to be captured before they abandoned rebellion, they would have contravened the spirit of the Amnesty law, which was instituted to facilitate voluntary return. While it was outside their mandate to think of how a case might come before them—this belonged to political discussions—the Registrar of the WCD and the Principle Judge of the High Court both pointed to this logic of volunteerism as the manner in which amnesty would be balanced with war crimes prosecutions, thus affirming the DPP’s position.86

The view of the Amnesty Commission was rather different. In the view of Nathan Twinomugisha, the officer in the commission who was responsible for administering amnesty certificates to returning rebels, it was not unusual for him to visit prisons in order to give amnesty certificates to men who were being held in custody after having been captured in combat. Rebel reporters had not previously been denied amnesty because their surrender breached the tacit voluntarism principle. Ordinarily, once the men were captured,

86 Justice James Ogoola, Interview, Kampala, January 6, 2011.
Twinomugisha would have them sign the Amnesty forms, then the DPP would issue a *nolle prosequue*—a non-prosecutions instruction—and the Amnesty Commission would receive a copy. The rebel would then be released from custody. “The DPP has never said no, although at times he delays, which means consideration of offense, or disapproval. Might take six months instead of one or two months,” Twinomugisha said.87 But amnesty always came.

Something different happened, however, with the case of Thomas Kwoyelo, when the DPP decided they were interested in giving the WCD its first case. Kwoyelo was an LRA commander who was captured in the Central African Republic during the course of OLT. When Kwoyelo was initially captured, he was charged in the ordinary magistrate Court. Then, according to those close to the situation, the DPP “realized” that, given his attempt to institute a new interpretation of the Amnesty Law where exemption would be based on whether rebels surrendered or were captured, his case might provide a good first case for the WCD.88 This realization was not formally communicated to the Amnesty Commission. Officials of the Amnesty Commission simply found out that Kwoyelo was of special interest to the DPP when Twinomugisha went to issue the Amnesty Certificate for signature. Twinomugisha said, “I have gone to prison, found him transferred…it would seem they want him to appear before the WCD. Should I or should I not go there to give him the forms?”89 Twinomugisha concluded that he did not think he could give Kwoyelo an amnesty certificate, although, “in our law, as far as concerned, we should.”90

For Twinomugisha, there was no clear legal reason why Kwoyelo was not offered amnesty. As a lower-level operative in a secure regime, however, he understood the response

87 Nathan Twinomugisa, Interview, Kampala, November 10, 2009.  
88 Ibid.  
89 Ibid.  
90 Ibid.
that was required of him once the higher-ups expressed their political preference. He even acknowledged the political importance of having a case come before the WCD, stating that it was useful for Uganda to “try ten people as an example, to satisfy the people here and the international community.”91 After all, the DPP was under political pressure to make the Court operational. He would create whatever justification was necessary to do so.

The second structural reason why secure GoU elites were able to support and reject the ICC was due to the way the political culture tended to privilege local law over international law whenever it suited them. Regime elites imbued the political culture with the understanding that any extra-judicial interpretation of “international standards” would be unacceptable within Uganda. This is illustrated by two examples: 1) the debate about trial avenues for the UPDF, and 2) discussions of the immunity of the president. In the first example, Museveni, and consequently every elite in the rank and file of the GoU, including the Principle Judge, agreed that the UPDF could not be subjected to any other form of justice other than what was offered in the law by the Court Martial. The Principle Judge and the Registrar of the WCD both thought that the WCD could try the UPDF, but they acknowledged that such a case would depend on political decisions elsewhere. According to the DPP, this distinction between the prosecutorial forum for the LRA and the UPDF should not have been a cause of concern within the transitional justice community, since it was a sign of adherence to the law: “The Court Martial is an institution of Uganda as a nation. It is in the structure of our Uganda criminal system, I do not think of it incapable of handling the cases. I find nothing wrong [with the UPDF cases]…being handled by Court Martial.”92

91 Ibid. Emphasis added.
92 Richard Butera, Interview, Kampala, November 5, 2009.
In the second example, secure GoU elites created their own rules concerning Museveni and his ability to be brought to account by the WCD. According to the DPP, Uganda was a law-respecting country where the constitution entrenched the immunity of the president. The president would have “immunity for as long as our [constitution] is as it is.”

The debates that took place in Kenya about passing legislation that would remove presidential immunity as part of the implementation of the Special Tribunal for Kenya were “inconceivable” in Uganda. “I do not see how they would pass this legislation,” Butera said of the Kenya legal process when Kenya was seeking to establish an STK outside the control of regime elites. Similar to the first view concerning the location of UPDF trials, this view was shared across the independent institutions of the secure regime. According to the WCD’s first registrar, the question about immunity was not useful. “We cannot be impractical,” he said of the suggestion that a domestic process can only be legitimate if it removes the immunity of the president. “It cannot be done…and we never wanted to be like ostriches and bury our heads in the sand.”

Interestingly, as much as they strengthened Museveni’s hand through their non-criticism following his referral of Uganda to the ICC, the international advocacy actors have continued to increase Museveni’s confidence about making up his own rules for the justice game. Toward the end of 2008, for example, when the Pre-Trial Chamber determined that the Ugandan case was still admissible, the organizations, who were giving the ICC submissions so that it could make determinations, did not focus on the shortcomings of the standards that were applied by the GoU in establishing the WCD, but simply on the fact that the Court was not operational at that point. Thus, the intention of the WCD’s structure was tacitly endorsed,

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93 Ibid.
94 Ibid.
95 Alex Ajiji, Interview, Kampala, January 6, 2011.
and it is no wonder that the Ugandan government renewed its Amnesty Act, focused solely on the LRA for WDC prosecutions, and still managed to host the 2010 Rome Review Conference for the ICC.

**IV. Conclusion**

This chapter has demonstrated how the GoU came to demand domestic prosecutions in the form of the WCD, as a way of reducing the high threat of the ICC at the breakdown of Juba. Within a context where the anti-impunity community had demanded prosecutions at all cost and derailed the Juba peace process, the instrument the GoU had fashioned in order to guarantee leniency for Kony was transformed into one that would reduce the threat of the ICC.

With its establishment through bureaucratic routines, the WCD became the mechanism through which the GoU, under the cover of the rule of law, could play whatever political games suited the regime, and could wrestle with the ICC and the international community more broadly when necessary. The WCD could only investigate the LRA, and the GoU reserved the legal right to broker a deal with the LRA through the Amnesty Act. This included the right to arbitrarily curtail the application of amnesty, according to the DPP’s discretion, in order to bring a case before the WCD and make it operational. Moreover, the GoU was able to revert to its militaristic ambitions in the sub-region under the cover of the ICC. After the peace process failed, the language of international justice provided further legitimacy to the Ugandan government’s cross-border activities into the DRC for the pursuit of the LRA. This new action, where Uganda was seen as a government who was chasing war criminals, birthed an era of the militarized enforcement of international justice.
It is indeed the case that a future Ugandan president could take the WCD and use it to ensure any abusers of human rights face justice. In the short term, however, that is simply not the case. Currently, the WCD serves Museveni’s political goals. Indeed, so does the ICC, which continues to have outreach in the country. Having learned its lesson when the anti-impunity community derailed Juba, the GoU retains contact with the ICC as a way to reduce the criticism from anti-impunity advocates, who see ongoing contact as a sign of Uganda’s cooperation with the Court. This engagement allows Ugandan politics to continue with its organizing logic, while still “throwing a bone” to the international community from time to time.
Chapter 7—Conclusion: Understanding Judicial Statecraft

This research sought to explore the political dynamics that render intelligible the elite choices concerning transitional justice policies. In particular, despite transitional justice’s proliferation in practice, the literature cannot sufficiently explain why and how elites come to choose or reject particular transitional justice policies. By situating transitional justice policies within the continuum of power contesting strategies in Africa, this research has pointed out how in-depth case studies on the micro-processes of policy choices can contribute to a systematic understanding concerning how transitional justice comes to be, and how it fits into the larger political processes of contesting power that drive African governments. This research also has implications for practitioners, who continue to shape the field of transitional justice. Without understanding why a particular policy is chosen, it would be hard to explain real-world observations, to understand when changes in preference when they occur, and to incentivize desired choices.

This research also sought to explore how the new era of the ICC—a transitional justice mechanism that has brought fresh challenges to a field that was previously driven by compromise—affects domestic politics. It looks at the choices of elites within contexts where coercion is not the default mode, because complementarity, in the form of domestic prosecutions, is the preferred outcome. Building on research that is concerned with consequences, where transitional justice is a means rather than an end, this research brings forth further evidence to show how transitional justice preferences are formed when the actors are multiple. There are also multiple arenas where the action and signaling matters.
This research is among the first to engage in a micro-level exploration of the ways in which the complementarity doctrine affects target-country politics, in particular through its impact on the cost and credibility of transitional justice threats. The research demonstrated that the terrain of choosing transitional justice policy is complex, constantly shifting, and frequently characterized by domestic agents who have competing interests. A country’s ultimate decision regarding transitional justice policies is not a choice that is made, as some of the early literature in the field seems to suggest, by aggregate government actors who are responding to an aggregate social demand from below. The chapters on Kenya and Uganda have used a framework of judicial statecraft to describe how, in various ways, interest-pursuing regime elites (and, in some cases, NGO elites) chose or rejected international prosecutions, domestic prosecutions, or alternatives to prosecutions, as a way to pursue or consolidate power.

This concluding chapter pulls together the new empirical evidence from the previous chapters and outlines some general patterns concerning the different transitional justice choices of African countries that are operating within the context of the ICC. In the past, when transitional justice policies have been subjected to a political analysis, they have been particularly prone to contradictory predictions, with little empirical evidence to support the different conclusions that result. Without an empirical examination of the factors that figured into the micro-decisions of actors who were actually engaged in making (and changing) policies about transitional justice, the debate would necessarily remain a matter of unresolved speculation. Each side could pick facts that suit their desired conclusion.

The chapter proceeds in three steps. First, it draws general conclusions about the importance of regime security and the threat level of transitional justice in shaping the
preferences of agents, as well as the way that history informs both. Next, it discusses the cases of judicial statecraft beyond Kenya and Uganda, using examples of the Democratic Republic of Congo, Sudan, Cote d’Ivoire and Libya. The research concludes by outlining some implications of its findings on scholarship and practice. The research does not try to make universal conclusions about the changing preferences of elites on questions of transitional justice. It suggests factors to which we should pay closer attention when seeking to understand real world observations in the complex area of transitional justice.

I. Conditions of Judicial Statecraft

Having conducted a micro-study of how actors choose or reject different transitional justice policies—for the empirical evidence suggests that they do choose—this section turns toward distilling some of the conditions under which we can expect to see different transitional justice policy choices. Toward the end of 2003, secure regime elites in Uganda wanted prosecutions through the ICC as a way to add firepower to their proxy war against Sudan. By early 2006, the GoU elites had rejected this first choice and had instead orchestrated, within Juba, a justice process that effectively demobilized the ICC and its supporters. This gave way to what was, in theory, the desired outcome of ICC supporters: domestic prosecutions in the name of complementarity. In order for the GoU to achieve its goals, their actions and messages had to somehow reconcile the contradictory goals they sought to achieve with the government of Sudan, with the LRA high command in the bush, and with the transnational community of anti-impunity supporters. GoU elites were able to support and reject international prosecutions at various times because, as a secure regime operating within a context of weak institutions, they could easily revise their previous decisions and reduce the consequences of history on their actions.
In Kenya, by contrast, insecure government elites were factionalized. Having initially approved both prosecutions and truth-seeking during the Serena process, they subsequently vacillated between accepting and rejecting prosecutions based on the threat such policies would pose to their core constituencies. In this context, PNU elites, who had earlier demanded prosecutions for ODM “youths,” rejected international prosecutions and independent domestic prosecutions, and instead settled on truth-seeking. Kenyan NGOs took advantage of the lack of consensus between ODM and PNU elites to successfully advocate for the ICC’s intervention, while simultaneously discrediting any attempts for a domestic process. Here, too, both regime and non-regime elites had multiple audiences to appease. For example, during the vote for the STK Bill, ODM elites had to appear to be compromising toward the PNU in the coalition government. At the same time, they had to send out elements of their party leadership to reject the compromises that had been made within the government and instead align the ODM with the transnational, anti-impunity community. NGO elites, on their part, had to maintain a hard, maximalist line that privileged international action toward the government without letting it appear that they were rejecting the demands of complementarity through domestic prosecutions that were favored by the broader anti-impunity movement, including by the Court itself. A framework of judicial statecraft, where the level of internal and external control shapes the preferences of elites, and where past decisions can have consequences, helps us understand and create an agency-based model of observed elite behavior.

1. Regime Security Matters

This research has demonstrated that a critical factor in determining the choice of transitional justice policy is regime security: the confidence government elites have that their decisions
cannot be subverted from within. While regime security is an ideal-type, regimes that are more secure have internal authority and control, they dominate the political culture, and the country’s domestic institutions can be trusted to deliver outcomes that accord with the world-view of regime elites.

In Kenya, the 2007 election brought with it a sharp rise in regime insecurity. While some observers have pointed out that the coalition government that was created in 2008 was a recreation of the single-party dynamics of Kenya’s past, this view overlooks the fact that a single party had a single fountain of patronage. However, unlike a one-party state, the 2008 Serena settlement that called for power sharing and a coalition government was inherently unstable and insecure. Different centres of patronage were supposed to co-exist, even though the PNU dominated the traditional centres of patronage and the ODM elites were added to the government as weaker partners with the international community as their guarantors.

In the context of a political impasse during the Serena process, where it was impossible for one side to impose its view on the entire negotiation process, the primary arena on which to win arguments became the advocacy arena. For a while, it appeared that each party could trump the other by making arguments that placed it on a moral high ground and drew in the clout of international partners. NGO elites, through KPTJ, were able to channel a range of cosmopolitan demands into the Serena agreement. Different elite factions embraced these demands for different reasons. For the PNU, who wanted the ODM’s violence in the spotlight, an inquiry with a view toward possible prosecutions was acceptable, so they thought the Waki Commission would serve their interests. The ODM, because they wished to see what they considered their electoral win certified, supported an examination into elections through the Kriegler Commission. Both key parties embraced the
TJRC, understanding it in historical context as a choice with few consequences. At the same time, both parties sent information to the ICC and traded accusations of genocide. In a context of regime insecurity, each party embraced positions that could lay the groundwork for a potential future advantage over the other, even though they did not consider their policy choices to be in any way threatening to their own side in political time.

Regime insecurity manifested itself in the inability of different factions of the government, who were keen to continue the unresolved electoral contest through other means, to compromise and cooperate on transitional justice policies. In this sense, the PNU’s embrace of prosecution for the ODM’s violent “youth” was an example of regime insecurity deploying a transitional justice policy that was couched in terms of a respect for the rule of law. Regime insecurity further escalated as a result of the introduction of the ICC into the lexicon of domestic demands. The ICC option provided the ODM faction that was allied with Odinga with more reasons to reject the government’s positions on transitional justice.

In this insecure context, where Odinga’s faction of the government would stand to benefit from a harsh prosecutorial process, consensus became impossible. Members of the PNU coalition would message a “government” position, with which some members of the ODM would publicly disagree. While this form of discord was used strategically in Uganda to achieve the GoU’s vision, in Kenya, this discord stemmed from real, rather than manufactured, disagreements. This undermined the bargaining position of government elites and made room for civil society to insert itself into the power vacuum and assert an alternative, cosmopolitan, and maximalist vision for transitional justice. The PNU elites’ only viable strategy, manifested in its support of the TJRC, was to reject prosecutions and do nothing.
In Uganda, the GoU elites were secure in both their support and rejection of transitional justice policies. Museveni made the first ever self-referral to the ICC in 2004, and it later sought to withdraw that referral and instead institute a domestic process through its War Crimes Division. Unlike Kenya, with its constantly shifting, NGO-originated opposition, Uganda had a secure regime whose most visible opposition, for a long time, was the LRA co-ethnic politicians from Northern Uganda. To be sure, there were other opposition parties in the Ugandan government, but they did not have the history of social activism that the Kenyan opposition had. Furthermore, the nature of the Ugandan regime is that, at the local level, even in opposition strongholds, the administrators are chosen by the NRM and are, for the most part, loyal to Museveni. The NGO field in Uganda is also highly decentralized. Many active NGOs are located outside Kampala and they do not have a revolving door into the government.

Consequently, the GoU had a great sense of authority and control, and in their first appropriation of the ICC, they used the Court to, in effect, support the SPLM/A and threaten Sudan. Through its self-referral, Museveni’s secure regime could invite the highest level of scrutiny from the Court and be seen to be speaking the language of the anti-impunity community. At the same time, the regime could know full well that the narrative of the GoU elites could not be contradicted internally and that the UPDF regime clients were not at risk. The fact that this move of appropriation was made through arguments that did not satisfy international actors, who saw their shiny new tool of international justice being put at risk by the GoU, did not seem to matter.

The GoU regime remained secure, even as the threat level changed and the external narrative escaped its control when the ICC Prosecutor discredited Museveni’s offer of
amnesty to the LRA. The regime’s security was critical to the GoU’s ability to manage the threat and, in fact, eventually manage it. The utility of the ICC was reduced by the resolution of the SPLA problem through the Comprehensive Peace Agreement, so the secure GoU regime shifted its focus to the section of the patronage arena that included the UPDF and the LRA. Here, the GoU crafted a deal where the ICC would be rejected through the peace process in Juba. When the international anti-impunity community discredited Juba and it failed, regime security was nonetheless evident in the manner in which the government bureaucracy generated GoU-friendly routines, and reduced the threat of transitional justice.

The principle Judge understood that he could draw up a legal instrument to establish the WCD and then wait for the DPP to do whatever he thought was appropriate in terms of case selection. On his part, the DPP understood that, as agreed in Juba, the argument about maintaining the domestic “rule of law” could be used to bring cases against the LRA and not the government. When it suited regime politics, he made reference to the Amnesty Act in the books, which contradicted the requirements of the ICC. He also used his critical position in the Ugandan court system to decide which of the contradictory existing laws (would there be amnesty or prosecution in the WCD for captured LRA leaders?) could apply in a particular instance. He did all this while maintaining the appearance of a respect for the rule of law.

In Uganda, actors at all levels—ranging from the Inspector of Police, who was supposedly ordered to arrest President Bashir in case of a visit, to the officer in the Amnesty Commission who was tasked with issuing amnesty certificates to captured LRA member Kwoyelo and all the LRA returnees—knew that they could not do anything outside of what Museveni’s political machinery required of them. Indeed, the ICC officials also kept themselves within the negotiated space in Uganda. It was expected that Ocampo would not
investigate the UPDF during his entire term, as this was the condition under which Uganda was understood to have initially offered its cooperation.

The general lesson of the research is that secure regimes tend to do what they want, and they are unlikely to embrace transitional justice institutions that will rupture their security. The wrath of transitional justice supporters, both domestic and foreign, is viewed as costing less than the cost of fracturing of patronage networks. Secure elites are likely to promulgate policies that maintain their control. When those policies stop serving them, they can reject or change them with ease, and they are limited by the past in only minor ways.

This empirical observation has an impact on practitioners. There is little need for Court officials and others in the anti-impunity community to seek to appease secure regime elites, since they will not do any more than what is domestically beneficial for them, with or without external sticks and carrots. In these contexts, since the regime will not compromise, threat-holders may as well make maximalist demands from regime elites.

3. Threat Level Matters

This research has also made a second contribution to the literature, which is to demonstrate that the threat level of transitional justice matters. Domestic elites do not simply make decisions in a vacuum. Instead, they respond to signals from other (often external) actors who seek, wittingly or unwittingly, to influence their policy choices. If regime security refers to a regime’s confidence about the internal response, threat level refers to a regime’s confidence with regard to controlling the external narrative. Both secure and insecure regimes reckon with threats, which are scalar: transitional justice demands can be more or less threatening to the target elite.
In early 2008, transitional justice did not constitute a credible threat in Kenya. The lesson from the 2003 season was that transitional justice was a flexible set of principles that could be mobilized for any political end, even as it checked the right boxes with the international normative community. Thus, when PNU and ODM negotiations in Serena embraced transitional justice in 2008, the choice of both prosecutions and truth-seeking was not threatening. Two further reasons made it easy to embrace everything without fearing the consequences.

First, over the years, it could be argued that elites had learned from the international community that it was process that mattered, that outcomes were inconsequential, and that elites, without undergoing any fundamental changes, could go through the maximalist motions of accountability and strengthen their international standing. The ability to pass window-dressing measures off as actual reform lowered any external requirements for policy change. Second, processes typically moved very slowly. Given the history of Kenyan commissions in general, elites greatly discounted the potential costs of the commissions they chose. They expected that, by the time an institution would have consequences (if it had them at all), it would be in the distant future, during another electoral cycle where new issues, interests, and alliances were on the table. Thus, the PNU and the ODM saw no risk in pledging support for domestic prosecutions, even after they had both sent information to the ICC and traded accusations of genocide. In the same spirit, the PNU, knowing it was above the law, strongly mobilized the language of prosecution and the rule of law with reference to ODM violations.

When the violence of 2008 created a divorce between the regime elites and NGO elites, the well-connected NGO elites became effective threat-holders, and sought to craft a
“constitutional moment.” As they advocated for the ICC’s involvement in Kenya, NGOs created the perception of the ICC as a credible, costly, and imminent threat. They did this initially as a threat to ensure domestic prosecutions, and later as the sole avenue through which to obtain regime change. ICC officials and supporters, who were seeking to demonstrate “proactive complementarity,” and were oblivious to the changed preferences of NGO elites, added their weight behind the NGO position. Doing so made the threat of transitional justice high for insecure PNU elites, and gave incentives to the Odinga faction of the ODM to defect from the government’s policies of transitional justice and craft themselves instead as the anti-impunity camp within the coalition.

In response to the high threats, PNU elites who had vociferously called for domestic prosecution for ODM “youths” rejected international prosecutions as well as independent domestic prosecutions through a special tribunal. They chose the TJRC as the least threatening option, which was tantamount to doing nothing. NGOs were able to use this choice as a sign that the PNU was “unwilling” to prosecute in line with the Rome Statute, and they lobbied for Ocampo to act.

In the first instance in Uganda, the ICC was a low-threat tool that was under the control of GoU elites close to Museveni who were seeking a military advantage over Sudan. Despite discussions about investigating the UPDF, the threat from the ICC remained low. When ICC investigators came to Uganda, the GoU determined what information and documents to provide, as well as where to take the investigators during their search for evidence. This, in no small measure, influenced their investigative theory and strategy. Further, when Ugandan NGOs became visible, it was within the context of humanitarian concerns over displaced persons rather than within the context of human rights
accountability. Consequently, it was the GoU that embraced prosecutions and the general anti-impunity agenda.

The narrative briefly escaped GoU control when international NGOs raised the threat of transitional justice by rejecting Museveni’s strategy to dismiss the ICC through Juba. In a manner similar to Kenya in 2003, when the human rights NGOs lost the TJRC battle to the government because they failed to cultivate a deep constituency, the international NGOs similarly lost in Uganda, and the secure regime’s vision was implemented in the form of a WCD within the High Court. Facing a low threat, the GoU could pursue its interests within the discourse of strengthening the rule of law. The GoU could implement the ICC Act, maintain an active Amnesty Act on the books, invite President Bashir, who was wanted for genocide, to Uganda, and still host the 2010 Rome Statute Review Conference.

This research shows that the international justice community should calibrate their threat levels for different regime elites. High threats can be counterproductive, which can spur the rejection of transitional justice by both secure and insecure elites. Some of those rejections will pave the way for international action (as they did in Kenya), while other rejections will make a mockery of transitional justice (as they did in Uganda). This is not to suggest that threats should never be high, but rather to point out the fact that high threats trigger particular responses that require understanding.

4. History and Unintended Consequences

Finally, this research has demonstrated that history matters, and that due to history’s impact, regime elites may not always be in control of outcomes. History can affect the behaviour of agents by influencing both regime security and the transitional justice threat level. History matters, albeit in varying degrees, even in countries where the natural repositories of history
(institutions) are weak. In contexts where there are weak institutions, NGOs and other counter-elites, when they exist, can make previous policy decisions count. In the absence of a strong domestic NGO community, the transnational community of anti-impunity agents can also, to some extent, make past decisions count.

In Kenya, the history of the power contests prior to the 2007 election—in particular, the tactics Kibaki used to consolidate power following the 2002 elections—created the backdrop for the struggle between the PNU and ODM, as well as the regime insecurity that was inherent in the power-sharing agreement of 2008. Following the 2007 violence, the history of inconsequential commissions of inquiry informed the establishment of a number of commissions-as-usual, especially the Waki Commission and the TJRC. Given past experiences, these commissions were not expected to be game-changers.

Furthermore, there was nothing preordained about the ways in which Kenyan human rights advocates, who were overwhelmingly trained in corporate law, were poorly versed in international law. It is precisely because of this background, however, that the initial idea for ICC intervention, given during an under-informed presentation before the Waki Commission, caught fire in the advocacy arena. The ICC’s involvement would present a break with a history of the inconsequential commissions. Against the advice of international lawyers, the ICC anchored the goals of domestic human rights activists and gave different actors a common purpose. The discussion of prosecution was made possible by the fact that evidence was collected during the violence, which was the result of a fortuitous relationship that had recently emerged between KNCHR and NPWJ. This evidence provided the basis for the talking points of human rights organizations. It also gave confidence to the ICC and Ocampo as they analyzed the Kenyan situation. Ocampo, even before he conducted any investigations
himself, made strong statements about involvement in Kenya on the basis of the findings by human rights NGOs. These factors came together to affect both the perceived transitional justice threat level, as well as the incentive for the ODM to cooperate with the PNU.

In Uganda, a history of post-independence militarized politics served as the genesis of the LRA rebellion, and also of the distrust that was inherent in the relationship between Museveni and other elites from Northern Uganda. The GoU established a secure regime under a unified network of patronage, and this system was strengthened by Museveni’s use of an amnesty-for-peace strategy, which brought rebels into his patronage fold. The history of the proxy war between Uganda and Sudan informed the GoU’s self-referral to the ICC. Museveni expected to use all the tools that were available to him to pursue the GoU’s own purposes. However, the unexpected development (which stemmed from a different historical pathway) of the signing of the CPA for South Sudan, and South Sudan’s subsequent request for a peace process between the GoU and the LRA, changed the interests of the GoU toward peace negotiations, and the two warring parties agreed to reject the ICC. The historical distrust between the GoU and the LRA, however, returned when the ICC Prosecutor, and others in the anti-impunity community, contradicted the GoU’s promises to the LRA and cast doubt on the ICC-rejecting peace settlement that the LRA and the GoU had crafted. The result was a failed peace process, and a return of the GoU’s preference for militarization. Simultaneously, regime elites facilitated the creation of the WCD in their own image, and effectively returned to their historical amnesty-for-peace stance while they were still operating in the name of respecting the domestic rule of law.

Acknowledging history and contingency further reinforces the point that, in a world where all agents face multiple arenas whose requirements do not necessarily co-vary, a
careful political analysis of security and threats on the part of threat holders would mitigate any unintended consequences more effectively than a position blind to political cause and effect would. For example, the narrative of transitional justice in both Kenya and Uganda, so far, is likely to have unexpected consequences in the lessons it teaches other regimes. If the lesson from Uganda is that a regime can negotiate with the ICC in exchange for its cooperation (thereby facing a non-credible threat that is not targeted at the elite patronage network), then regime elites elsewhere will support the ICC (and prosecutions in general) with this in mind. Similarly, if the lesson from Uganda is that the transnational anti-impunity community allows regime elites to use the Court for non-justice related ends (for example, when the GoU uses the discourse of international justice to justify militarization that is framed as pursuing suspected war criminals across neighboring borders), then the ICC and its supporters may find themselves with strange bedfellows, more closely aligned with illiberal regimes and against alternative voices and visions of justice. To be sure, such instrumental support from illiberal states, which stems from a transitional justice threat being seen as non-credible or non-costly, may lead to the promulgation of policies that will eventually escape the control of their creators and truly prosecute violators of the law. In the short run, however, they would affect the victims’ support of the Court. Another unintended consequence of Uganda, which stems from the unpredictability of the anti-impunity community during Juba, may be a decline in the number of self-referrals that facilitated the early work of the Court. Similarly unintended consequences may emerge from Kenya. If the Prosecutor is thought to vary his interpretation of gravity and act on an opportunity to experiment with the possible effects of the Court (in this case, to demonstrate proactive complementarity), it may be difficult for the Court to avoid charges of politicization.
The next section shows how judicial statecraft applies beyond Kenya and Uganda.

II. Judicial Statecraft Beyond Kenya and Uganda

It is useful to note that the choice of transitional justice policy changes according to regime security, threat level, and history, applies in countries beyond Kenya and Uganda. Transitional justice now forms part of the vocabulary concerning how to operate as a 21st-century, rule-bound state. It draws on the resonating ideas of justice, international law, and human rights, in order to empower some actions and actors while disempowering others. A quick survey of a sampling of cases that have involved ICC engagement demonstrates that political elite decisions have some patterns. During the era of the ICC, judicial statecraft is likely to increase, due to the fact that it offers—with international legitimation that cannot be labeled as partisan, ethnic, or self-seeking—a powerful vocabulary behind which the continuation of violent or partisan politics can be masked.
### Table 3: Mapping Judicial Statecraft Beyond Kenya and Uganda

<table>
<thead>
<tr>
<th>Regime Security</th>
<th>Threat of Transitional Justice</th>
<th>History</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td><strong>UGANDA I</strong></td>
<td></td>
</tr>
<tr>
<td>High</td>
<td><strong>DRC:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC: YES, self-referral</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Complementarity: YES</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Truth Seeking: YES</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Central African Republic:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC: YES, self-referral</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Cote d’Ivoire (under Gbagbo):</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC: YES, acknowledged jurisdiction</td>
<td></td>
</tr>
<tr>
<td>Low</td>
<td><strong>KENYA I</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Cote d’Ivoire (under Ouattara):</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC: YES, acknowledged jurisdiction</td>
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</tr>
<tr>
<td></td>
<td>Complementarity: YES</td>
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</tr>
<tr>
<td></td>
<td>Truth Seeking: YES</td>
<td></td>
</tr>
<tr>
<td>High</td>
<td><strong>UGANDA II</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Sudan (Darfur):</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC: NO, hostile rejection</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Complementarity: YES, initially, later rejected</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Truth-seeking: LIKELY, recommended by Mbeki Panel but not implemented</td>
<td></td>
</tr>
<tr>
<td>Low</td>
<td><strong>KENYA II</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Libya:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC: UNLIKELY, regime has contested jurisdiction</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Complementarity: UNLIKELY beyond ICC cases, regime has passed amnesty law</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Truth Seeking: LIKELY</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Afghanistan</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC: UNLIKELY</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Complementarity: UNLIKELY</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Truth Seeking: POSSIBLE</td>
<td></td>
</tr>
</tbody>
</table>

This section outlines how these three factors matter in countries beyond Kenya and Uganda. It analyses regime elite responses to low threats by briefly drawing on the example of the DRC, which shows how secure regime elites made referrals to the ICC, and the example of Ivory Coast, which shows how the ICC was chosen by both a secure regime and an insecure government-in-waiting, and that both had the objective of vanquishing political rivals. By considering Sudan and Libya—cases where ICC jurisdiction was triggered by the UN.
Security Council referral and rejected by secure and insecure regime elites, respectively—the chapter also analyses the responses by regime elites to high threats.

1. Secure Regime Elites Face Low Threat: The DRC Embraces the ICC and Prosecutions

The Democratic Republic of Congo (DRC) had been a scene of vast abuses of human rights, even before the 1996 First Congo War that led to the toppling of Mobutu Sese Seko.¹ The history of the First Congo War was critical to subsequent regime security. Laurent Kabila’s installation through Rwandan and Ugandan-supported militias risked painting him as a puppet of his two smaller neighbors; an image he sought to shed by eliminating influential Rwandans and Ugandans from the government. In what has been described elsewhere as threat substitution—Kabila was more fearful of a palace coup by his externally linked advisors than he was of fighting a civil war—he turned against the influence of Rwanda and Uganda. This narrowed his loyalty base, but precipitated the Second Congo War from 1998 to 2003.² Laurent Kabila was assassinated, and his son, Joseph Kabila, who was then the Chief of Staff of the Land Forces, became president, inheriting the loyalty of the political machinery that had been created by his father.

On 19 April 2004, President Joseph Kabila followed the example of Uganda and self-referred the DRC’s situation to the ICC. The ICC opened investigations in June 2004. The Court decided to focus particularly on Ituri, which was an area with a record number of gross human rights abuses. These were the early days of the Court, and it was more important for the ICC to get cases and begin doing work than it was for it to appear to be at arm’s length from the government. Consequently, the Court negotiated with regime officials to secure the

¹ For a general overview of the violence in the DRC, see United Nations Office of the High Commissioner for Human Rights 2010.
² For more on the conflict, see Prunier 2009. For a general description of threat substitution, see Roessler 2011.
transfer of three militia leaders to The Hague: Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo.

Observers considered the self-referral to be a project of the executive, aimed to create good international public relations and to further weaken regime opponents. The effort expended by the regime was also low: Lubanga and Katanga were already in custody in Ituri, and therefore, they were presumably dispensable. The threat to the government from the ICC engagement in Ituri was low. Observers have pointed out that, while a case that considered the conflict in the Kivu provinces, “where government forces and Mai Mai militias backed by Kabila,” would have implicated the president, there was little direct evidence that connected Kabila to the crimes in Ituri. Indeed, even in Ituri, the OTP did not seek to widen the scope of the cases in a manner that could implicate Rwanda and Uganda of supporting Lubanga. For example, in reference to Lubanga’s militia group, the UN’s mapping report of human rights violations in the DRC stated: “In 2000, at least 163 [child soldiers] were sent to Uganda to undergo military training in the UPDF camp at Kyankwanzi…between 2002 and 2003, some children…were abducted and taken to Rwanda to undergo military training.” Such a strategy of narrow, low-threat prosecutions assured the ICC of support from regime elites.

The DRC bureaucracy executed Kabila’s wishes. The new Congolese constitution lowered the age requirements for presidential candidates in order to accommodate his young age. After this, Kabila won the internationally supported, but disputed, election of 2006

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3 Pascal Kambale, Interview, Nairobi, January 10, 2010.
4 For some initial links between Mai-Mai rebels and Kabila, see United Nations Office of the High Commissioner for Human Rights 2010. See also Clark 2008: 40.
5 Kabila is thought to have supported Ituri rebels, including a group that was led by one of the rebels who is presently facing charges before the ICC, Germaine Katanga. However, there is said to be little evidence for this. See Clark 2008: 40.
against his key rival, Jean Pierre Bemba. Kabila ruled by law, in a context where, even historically, “interference and intrusion by the political and military authorities into judicial affairs are common and widely recognised.”7 While the Kabila regime’s elites are seemingly supportive of the ICC, they have been selective in their cooperation with the Court, dismissing the Court when it does not suit them.8 The ICC’s arrest warrant against Bosco Ntaganda remains unexecuted, and Ntaganda lives openly in Goma and is part of the Congolese army. It is thought that if Ntaganda and his rebel group were to become threatening or stop being useful, Kabila would arrest him. Either way, since the Court’s threat is low enough for the secure Kabila regime elites to do as they please, the assumption is that their choices, with reference to cooperation with the ICC, pertain to internal political control.

The secure regime also supported complementarity. Despite the regime’s previous promise, in Resolution 5 of the Inter-Congolese Dialogue (ICD), to establish “an International Criminal Tribunal for the DRC” to deal with the crimes of genocide, crimes against humanity, and massive violations of human rights, this tribunal was never established.9 The regime has not domesticated the Rome Statute, which means military courts and tribunals have the exclusive ability to prosecute international crimes. The military courts lack independence from the executive, and interference is common, particularly by political actors who were incorporated into the government as a result of the Sun City accords and who have committed crimes. High-ranking military officers, who were implicated in human rights abuses, have largely escaped justice. Many of them are in leading institutions of the state. In 2011, a new effort to pass the implementing legislation and another effort to create a

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8 See, for example, Human Rights Watch 2005.  
9 See Bosire 2006: 75.
special court that would look at human rights violations were stalled, because members of parliament with past human rights records worried about the law’s implications.

Finally, as would be expected of the judicial statecraft of secure elites facing low threats, the DRC has also supported truth-seeking in a manner that can be interpreted to suit the needs of regime elites. The ICD resolved to create a truth commission that would be constituted of individuals of “great moral and intellectual probity.” Commissioners to the TRC, however, were nominated by their political parties rather than by an impartial body, and they represented groups whose human rights violations were well known. The commission was thought to be ineffective, and by 2008, there were calls for a new truth commission. Ultimately, secure regime elites enacted different measures of transitional justice without achieving justice. They engaged with what they understood to be the low-threat language of the anti-impunity community without undertaking any risk.

2. Secure Regime Elites Face High Threats: Sudan Rejects the ICC

By many accounts, the process of strengthening regime security in Sudan, as a response to historical patterns of patronage relations, was instrumental to the rebellions that precipitated violence. Much like the DRC’s situation described above, the process of reframing center-periphery political relations triggered rebellion as President Omar Bashir’s party streamlined the patronage machinery and dropped those elites whose loyalty could not be fully relied upon. Elites who were left out of the newly defined borders embarked on a rebellion in Darfur. This provoked brutal government repression, and alarm in the international anti-impunity community.

Sudan, which is not a State Party to the Rome Statute, encountered the ICC as a high-threat demand from the very first instance, when the UN Security Council imposed it by
means of a referral. In response to NGO advocacy, the United States labeled the conflict as “genocide” in September 2004, which suggested it wanted nothing short of maximalist international intervention into Sudan. The subsequent International Commission of Inquiry that was established by the UN Security Council created a secret list of 51 names that were given to UN Secretary General Annan along with a recommendation for a UN Security Council referral under Article 13 of the Rome Statute. Despite having the US as a hostile, non-State Party to the ICC, the Security Council was able to pass Resolution 1593 in March 2005, which allowed the first ever Security Council referral of a case to the ICC.

This was a high threat for regime elites, who saw themselves as being punished only two months after they had made historic concessions and signed the Comprehensive Peace Agreement (CPA) with the rebels of South Sudan. History was critical to the manner in which this threat was shaped and perceived. For Sudan, the ICC formed part of a well-coordinated orchestra that was led by the Bush Administration, and that was targeting Sudan for its Islamic identity and its perceived role in Islamic terrorism. Sudan’s leaders did not believe the US was “distinct from other punitive measures imposed upon them.”

Initially, the regime instituted a number of complementarity measures intended to “divest the ICC of jurisdiction”.

These included a new Special Criminal Court for Events in Darfur (SCCED) on June 7, 2005, only one day after the Prosecutor opened his investigation. In November 2005, the Ministry of Justice established two additional chambers for the Special Court and created special investigative committees—the Judicial Investigations Committee, the Special Prosecutions Commissions, the Committees Against Rape, the Unit for Combating Violence Against Women and Children, and the Committee on Compensations—to also address the crimes committed in Darfur.

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10 The US State Department already perceived Sudan as a sponsor of terrorism, having harboured Osama bin Laden in the 1990s, and having provided support to the LRA.
11 de Waal 2008: 32.
13 Baldo 2010: 3.
However, these measures—which may have sufficed for a country that had better relations with the West, for, as Ugandans had put it, complementarity provided an exit from international obligation—were widely described as “propaganda strategies.”¹⁴ A year into their operation, the human rights community widely thought these measures had failed. Human Rights Watch stated that, despite the effort, the “government cannot be said to have demonstrated ability and willingness to establish accountability for the crimes in Darfur.” Nevertheless, between the Security Council’s referral and 2007, the government cooperated with the Court, giving access to people and documents.¹⁵

Despite these questionable efforts at cooperation and complementarity, the threat only escalated. In April 2007, the ICC issued arrest warrants for Ahmed Mohamed Haroun, the Minister of State of the Interior, and for Ali Mohamed Abdel Rahman (Kushayb), a militia leader closely associated with the regime’s counter-insurgency strategy. In July 2008, Ocampo announced that he would seek an arrest warrant against President Al Bashir. Within a context where Khartoum did not believe that any effort on their part could be “respected, let alone reciprocated,” the threat seemed to escalate.

The government stopped cooperating with the ICC in 2007. From that point forward, despite pressure, regime elites sought to increase African hostility against the Court, and obtained resolutions from the African Union to that regard. Bashir also visited neighboring countries, as well as China, despite his arrest warrant amounting to a travel ban. He also left Ahmed Haroun as the Minister of State for Humanitarian Affairs, a position where international actors had no option but to engage with him. In strengthening their policy of non-cooperation, Sudan enacted the Criminal Procedure Act that, in addition to prohibiting

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¹⁴ For instance, Suliman Baldo of ICTJ terms them as such. See Baldo 2010: 3.
extradition, prohibited investigations or proceedings outside the country for anyone who had been accused of international crimes.

At no point was transitional justice a low threat in Sudan. After their attempt to put on a performance was unsuccessful, regime elites simply adopted a hostile stance against the Court. A High Level Panel for Darfur (the Mbeki Panel), which was appointed by the African Union to look into the issue of Darfur and the Court, issued a report in October 2009, recommending the establishment of domestic prosecutions, as well as a truth and reconciliation commission. While these have not been established to date, they remain an option in the future. However, policies that are in support of prosecutions seem unlikely while the threat level remains high and while the regime continues to be secure.

3. Insecure Regime Elites Face Low Threats: Côte d’Ivoire Requests ICC Jurisdiction and Enacts a Truth Commission

The story of Côte d’Ivoire and transitional justice began in April 2003, when Laurent Gbagbo’s secure regime recognized the jurisdiction of the ICC, in order to draw the Court’s moral force to its side in the regime’s efforts to respond to an internal conflict that had broken out. At that time, a coup attempt had effectively divided the country in two, with the north under Alassane Ouattara, and the south under Gbagbo. The ICC application, signed by Gbagbo’s Minister of Foreign Affairs, asked for an investigation into the “events of 19 September 2002,” and accepted the Court’s jurisdiction “for an unspecified period of time.”^{16} Ocampo did not act on the case then, but he did on 14 December 2010, when Ouattara, who was then an insecure president-in-waiting, decided to confirm Gbagbo’s 2003 declaration to the ICC. Ouattara had been elected president on 2 December 2010 (the first election since the conflict of 2002), but because Gbagbo refused to concede a loss in the elections, he did not

^{16} Pre-Trial Chamber III 2011: para. 10.
assume the presidency until 11 April 2011. Eventually, a military ouster, with the help of UN and French intervention, was undertaken, in order to install Ouattara. In the period between the election and Ouattara’s installation into power, approximately 3,000 civilians died in post-election violence.

For Ouattara, the threat of the ICC appeared to be low when compared to the benefits. The struggle for power was existential. He was unlikely to assume power unless Gbagbo got out of the way. In inviting the ICC to act, he requested that they consider crimes that had been committed since 28 November 2010, when his win was contested. For him, the Court was another avenue through which to affirm his victory in the fight for power. Once he was installed in office, Ouattara again wrote to the Court on 3 May 2011 to confirm his interest in intervention. Because Gbagbo was still in the country, his supporters could continue to rally around him. In October 2011, the Pre-Trial Chamber authorized the Prosecutor’s application to institute a second proprio motu investigation, after the first one in Kenya.

The Prosecutor affirmed Ouattara’s hope for a low threat. The Prosecutor pointed out that pro-Gbagbo forces had committed crimes, but he could not find evidence that was sufficient to prove that crimes had been committed by pro-Ouattara forces. However, it is noteworthy that there were records that demonstrated that the rebels, called “Forces Nouvelles,” were overtly supported by Ouattara, who signed a presidential decree that unified them with other forces that were under the command of Guillaume Soro, the new Prime Minister of Cote d’Ivoire. Soro’s forces are thought to have committed extensive human rights abuses. In calling on the Court in this context, Ouattara seems to be relying on

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17 His application to the ICC, Ouattara notes that other bodies have recognized his win, and that he the ICC would be the best venue to deal with the post election violence.
19 Pre-Trial Chamber III 2011: para. 124. Also para. 92-97.
the patronage of the French, and the Court’s precedent to date of adopting a one-sided approach to a conflict in the interest of receiving political support for prosecutions.

Ouattara’s ICC policy has been one of cooperation. On 23 November 2011, an arrest warrant for Gbagbo was issued under seal. The Ouattara regime orchestrated an arrest on 30 November 2011, transferring Gbagbo to the ICC’s custody in the interest of ensuring that his “trial is fair.”20 In the meantime, much as Kenya did in the early post-Serena days, the regime also supported rule by law, targeting Gbagbo supporters for prosecution. In addition to trying the wife of Gbagbo for economic crimes, other members of Gbagbo’s elite circle were charged for post-election violence, including Charles Goude, one of the leaders of the pro-Gbagbo youth groups that perpetrated the post-election violence.21 Finally, as would be expected of insecure regime elites facing low threats, the regime, affirming international standards, has supported truth-seeking. In September 2011, the government established a TRC, modeled after the South African TRC. Ouattara declared that this institution would “be independent and…hear everyone.” This was an effort by an insecure regime to bring the moral of transitional justice on their side, in the hopes that it would further vanquish those who were loyal to the Gbagbo regime.

While the regime continues to be insecure and it faces threats of a fresh coup, support for international justice is likely to continue as they seek to vanquish their opponents using this tool. As long as the threat level does not shift and shine a spotlight on the crimes of Ouattara’s partisans, one can expect policies to be enacted that support transitional justice in accordance with international standards.

20 Reuters 2011.
4. Insecure Regime Faces High Threats: Libya Rejects the ICC and Passes Amnesty Law

Historically, the Libyan regime has been implicated in violations of human rights, both inside and outside its territory. On 26 February 2011, in response to international concerns about Muammar Al Gaddafi’s threats to protesting civilians, the United Nations Security Council voted unanimously to refer the situation of Libya to the ICC. In record time, on 3 March 2011, the Prosecutor concluded that he had a reasonable basis for opening an investigation. On 16 May, the Prosecutor requested an unsealed arrest warrants for Al Gaddafi, his son Saif Al Islam, and the head of intelligence, Abdulla Al Sanousi.

Like Sudan, Libya is not a State Party to the ICC. The Court constituted a high threat, both for the Gaddafi regime, and later, for the National Transitional Council (NTC) that took over after Gaddafi. For the NTC, while international support (through NATO) had been on their side during the civil war, their historical experience with the international community—some of them had been in the Gaddafi regime, and they understood their vulnerability to changes in international opinion—colored their trust of the international community and of the potential reach of the Court.

Unlike Uganda after the end of the Juba process, or Kenya after the failure of the Special Tribunal for Kenya Bill, the Prosecutor made very low demands of the NTC. He argued that Libya could indeed try those against whom the ICC had issued arrest warrants, if the question about domestic judicial capacity could be addressed. He also urged the transitional government to adopt a plan for accountability to obviate the need for ICC intervention, making it clear that he did not wish to escalate the threat level of the Court.22

22 Author interviews, New York.
Nonetheless, the perceptions of the threat by regime elites were colored by history. It should be recalled that it was Gaddafi who had sponsored the resolution for non-cooperation with the ICC at the African Union. Consequently, the Libyan regime elites adopted a hostile stance towards the Court. The NTC hosted president al-Bashir of Sudan, who had supported them in their fight against Gaddafi, despite the existence of an arrest warrant against him for genocide. Beyond the historical distrust between the NTC and the international community, the rebels were also responsible for violations against the Gaddafi regime, and could be brought before the ICC themselves. As of early 2012, pressure about the fate of Saif from the international anti-impunity community, and calls for transparency and even-handedness on the part of the ICC, have also unwittingly increased the threat of transitional justice for the new regime elites.

A key reason for the distrust of the external community is that the regime is inherently insecure. Incentives for defection among factions within the NTC are many, due to the fact that some actors may stand to gain before the division of power is completed. While the regime was unified in its ouster of Gaddafi (as well as in their unity against the West; they rejected the idea of a UN peacekeeping mission and instead settled for a Special Political Mission with no “boots on the ground”), the ICC story was unfolding while center-periphery relations were still emerging, and loyalties remained fractured. More importantly, the NTC was thought to be highly infiltrated by elements from the previous regime.

23 BBC News.
25 Stephen 2012a. Incidentally, human rights groups are more maximalist in their demands for a handover of Saif than the Prosecutor himself. Author interviews, New York.
Consequently, the NTC’s policy with reference to the ICC has been rejection. NTC regime elites state, “No amount of pressure will push Libya to hand [Saif] over.”26 In addition to contesting the case on the grounds of complementarity, regime elites have built a large, modern prison to demonstrate that they can ensure humane conditions for Saif, even while he is not yet in their custody. Despite outrage from the international anti-impunity community about both the treatment of Saif and the ability of Libya to hold its own trial, given the broken state of the judiciary under Gaddafi, the NTC has remained determined to prosecute at home.27

In terms of broader complementarity, the insecure regime elites have also chosen a path of confrontation with the international community by passing an amnesty law (Law 38) for all “military, security, or civil actions dictated by the February 17 Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution.”28 This is not surprising, because it would be impossible to have a complementary transitional justice process if there was a risk that some faction of the NTC would be held to account. Thus, whatever will be established at home is likely to have a minimalist relationship with international standards. While the anti-impunity community has called attention to the nature of the human rights violations of the regime, including war crimes, and has criticized their new laws, it may increase the threat level further and reduce the possibility of transitional justice processes. Furthermore, the regime does not have local NGOs that can vocally speak against the actions of the NTC regime. Another law (Law 37) has been passed, which restricts speech and makes it a criminal offence to insult the NTC or “glorify Qaddafi.”29

26 See, for example, Agence France Presse (AFP) 2012.
27 Stephen 2012b.
28 Human Rights Watch 2012.
29 Grant 2012.
It is very likely that the regime will establish a truth commission and other alternatives to truth telling, but, in a context where there is effectively an impasse within the political class, even these are unlikely to have extensive reach into the actions of the NTC. Transitional justice policies will not veer dramatically from the status quo unless regime security changes, or if the international community takes it upon themselves to explicitly reduce the threat the NTC perceives (for instance, by suspending the ICC case). Alternatively, threat-holders can make the highest demands of the NTC (to create reality behind the NTC’s perceptions), and be prepared for a long confrontation.

III. Smart Justice in the Age of the ICC

If institutions are “the rules of the game in a society…the humanly devised constraints that shape human interaction,”\textsuperscript{30} then transitional justice policies that may have been institutionalizing and reaching equilibrium experienced a shock when the ICC emerged as a force in 2002, and increased the certainty of norm enforcement through an independent, apolitical Prosecutor. The change also shifted prosecutions from being the exception to being the expectation. However, as described in chapter one and two, this potentially radical change in the rules was moderated by the fact that agents that were invested in viewing transitional justice as a compromise and tool for other ends continued to play a key role during this new, confrontational era where transitional justice could countenance no compromise, and is an end in itself. These organizations incorporated into the new Court some of the language of compromise and the promise of social outcomes such as deterrence. As a result of folding the new formal rules of the ICC into previous understandings of what transitions required (as described in chapter one and two), contradictions emerged, which facilitated judicial statecraft. To achieve institutionalization in this context, agents should

\textsuperscript{30} North 1990: 3.
engage in smart justice, which would require their understanding the nature judicial statecraft and how it can affect their long-term goals, as described below.

1. Tradeoffs between Perfect Rules and Good Outcomes

A key finding of this research is that the implementation of perfect rules does not always lead to a perfect world: tradeoffs exist between rules and outcomes. Acknowledging the tradeoffs has become more important as the field of transitional justice has absorbed the ICC and the confrontational demands of justice-as-an-end into a framework where transitional justice was developed primarily in a compromise-based, justice-as-a-means scholarship and practice. The result has been incoherence between tactical choices (the policies that are advocated) and the stated strategic objectives of transitional justice more broadly. Tactics are often simply framed as serving objectives, even when there is little evidence to support that claim. Framing, however, does not change the reality. In Kenya, for example, we see that the aspiration to support vibrant domestic institutions, and the need to wield a strong stick against politicians in form of a high threat, may not co-vary, and would require different approaches. If the anti-impunity actors’ objective is to realize the promise of complementarity in the form of domestic prosecutions, they may have to abandon the demand for the implementation of perfect rules. Anti-impunity advocates cannot simultaneously discredit domestic options of justice, create domestic conditions where there is an inability or unwillingness to prosecute among regime elites, and still suggest that their actions accord with their rhetorical support for complementarity. Evidence in this research demonstrates that insecure regimes facing high threats will do the equivalent of nothing, while secure elites facing high threats will support policies that are molded in their own image. This has implications for threat-holders, and it means that the impulse to impose high

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threats, possibly with an eye toward deterrence, can demobilize domestic principled agents, and consequently, affect institutionalization negatively. Low threats on the other hand—because they are politically predictable, and can be used in the domestic game of power by savvy domestic elites at no risk—are particularly useful for domestic institutional development in contexts involving insecure regimes. Transitional justice supporters must choose between a politically-conscious approach that is focused on outcomes (where, with a long-term view of domestic institutional development, second-best outcomes are acceptable), or an apolitical approach that is focused on propagating a particular vision of transitional justice that meet international standards, even if the chances are higher that regime elites will reject it.

2. Implication of Research on Ongoing Debates

It would be incomplete to conduct research on transitional justice in two African cases without commenting on the impact of the findings of this research on two ongoing debates in the field of transitional justice. The first debate is on whether transitional justice in general, and the Court in particular, lead to outcomes such as peace and justice. This is a difficult question to answer without empirical inquiry. What is clear from this research is that the ICC is an intervening power that brings about, whether it intends to or not, a change in the balance of power (including moral power) by favouring the confrontational strategies of those elites who choose the discourse of justice, in part because those elites stand to gain from its deployment. As in Uganda, an illiberal government can use the Court to fight a war, use it to negotiate peace when the opportunity arises, or use it to extend and legitimize a military strategy, as Uganda did when they invoked the Court in their quest to arrest war criminals in OLT. As in Kenya, NGO elites can use the Court to discredit complementarity
(with the paradoxical consequence that this limits the victims’ access to justice), or to seek to change a human rights abusing government to a different one. In all cases, the probable outcomes have to be mapped out with an awareness about regime security, threat level, and history at the centre. It simply may not be possible to make a credible prediction without having such a nuanced contextual analysis.

The second debate is on the politics of Africa and the ICC. While commentators have worried about the future of African relations with the Court (to whatever extent it is useful to think about Africa as a unitary actor), the findings of this research suggest that it is not likely that self-referrals to the Court will decline. Indeed, all regime elites seeking to further secure their authority and control will make self-referrals so they can externalize the political costs of their ongoing fight, unless they learn (from Court practice that is currently absent, although it could emerge under a new Prosecutor) that self-referring regime elites can also be targeted by the Court. Secure regimes, in cases where the external narrative ever escapes their grasp, can subsequently reject the ICC by instituting domestic measures, since, as discussed in this research, they have more control over bureaucratic routines. Judicial statecraft also suggests that concern about short-term instrumentalization should be allayed with an appreciation of contingency. Regime elites make short-term calculations. Because history matters, and unintended consequences are always possible, if a regime changes in the future, or if elections bring people with varying interests into power, it is possible for those elites who invited the Court in the first place (or who created domestic institutions in their image) face an unexpected fate.
3. Limitations of research

An important limitation of the replicability of this research stems from the fact that the threat-level in the first decade of the Court has been informed by a relationship between Ocampo and NGOs. With a new prosecutor at the ICC (Fatou Bensouda), the use of her discretion may be different from that which has been observed to date. While all indications are that she will maintain Ocampo’s approach, there is nonetheless room for her to be more or less predictable, and more or less willing to support the views of the anti-impunity community, which may affect the credibility of the threats of transitional justice facing regime elites. In any event, the same incentives that are identified in this research will apply: regime security and the perceived threat level of transitional justice, which are each affected by history, will determine how elites will respond.

4. Avenues for Future Research

This research has focused on an under-explored question regarding the causes, rather than effects, of transitional justice policies, making transitional justice policy choice a dependent, rather than an independent, variable. The theoretical contributions of this research should be used to examine in greater detail the extent to which the dynamics in Colombia and Afghanistan, for example, correspond to the findings from African cases. The pressure that the Court has faced, with reference to its seemingly heavy African focus, means that there is an increasing likelihood that cases outside of Africa will be acted upon in the future. If this is the case, are the effects of threat-level uniform across other countries in different regions? Or is it particularly important in African post-colonial states where the symbols of belonging to the broader world are still useful, where increasing democratization without corresponding strong institutionalization has increased the uncertainty of the power game, and where the
anti-impunity community generally is thought to have a high credibility? In order to better understand why elites outside Africa will choose different policies at different times, broader research is required that addresses these questions.
Appendix 1—Research Methodology: Data Collection

The research reported in this thesis has relied extensively on elite interviews conducted in both Kenya and Uganda. This appendix outlines the process by which respondents were identified and interviews conducted, highlighting the role of identity in the data collection and outlining the challenges posed by this methodology.

I. Gaining access: Insider or Outsider?

Given that the research sought to understand why elites chose different transitional justice policies at different times, gaining access to people close to the decision-making process was an important issue.

For any research, one’s position as an outsider or an insider affects the likelihood of access. The fact that I am a Kenyan woman who has worked for the ICTJ (a well-known international organization in the field), and that I am studying at the University of Oxford gave me a range of credentials from which I could choose when negotiating access.

My interviews with the LRA peace negotiating team illustrate the insider/outsider dynamic and its impact on gaining access. My first research trip to Uganda was conducted in December 2007, which coincided with the final stages of the public consultations that had been planned by the LRA in order to solicit views from the public about the judicial elements of the Juba peace agreements that had been signed up to that point. The LRA negotiating team was in Kampala for a day. Their consultation was facilitated by Transitional Futures Africa, and I was familiar with their Ugandan director because she was a former fellow of the ICTJ, my former employee. This meeting ended up being pivotal. During a social break, I met Leo Onek, the key “gatekeeper” of the LRA team, who was serving as a facilitator
between the LRA and Sudanese vice-president Riek Machar. Onek was also a professor at one of the universities in Kenya, which is how we made our initial social connection, which then led to further discussions about Kenyan affairs.

Onek introduced me to the rest of the LRA negotiating team, and I spent the post-consultation evening with them socially. Initially, it appeared it would be difficult to get formal interviews with them. In a space of a week, they had to travel to Northern Uganda, meet President Joachim Chissano (the UN Special Envoy to the peace talk at Juba), they had to meet Ugandan President Museveni, and then leave (many of them were based outside Uganda).

However, things changed fortuitously in two ways. First, the expected meetings between the LRA team and former President Chissano and President Museveni were highly publicized. As a result, upon the negotiators’ return from Northern Uganda, the hotel where they were staying while awaiting the rest of their meetings was full of sympathizers, parliamentarians, press, and NGOs. Many of these people were also good contacts for me to know. A number of military observers, who formed part of the cessation of hostilities monitoring team, milled about or sat around in silent expectation. The atmosphere was busy and tense. I joined the crowd at the hotel, negotiating time for one-on-one interviews with those who were present. Secondly, the meeting between the LRA and President Museveni was rescheduled about three times a day for almost an entire week, which left the negotiators, who I had been introduced to by Onek, with unscheduled time. I was able to talk to many of them or schedule interviews while they waited.

32 On gatekeepers, see Burgess 1984.
For my Uganda interviews with the LRA, an interesting “insider” dynamic emerged. Because the LRA team knew I was from Kenya (most of the researchers interviewing them were European) and that I had Onek’s approval, they were very friendly. I had meals with them. Whenever the chief of the LRA team passed me, he would greet me in Kisii, my mother tongue. Onek gave me access to information on individual dynamics, personalities, and ambitions in the LRA team, information I would not have been able to obtain otherwise. At one point he recognized that he was giving me too many details about one of his colleagues and said, “I only tell you this because you are a graduate student. Do not tell him I said this.”³³ As the LRA team was engaged with all members of the Ugandan government, I received mobile numbers for most of the people on my list of potential interviewees at the time. I was even given the (working) number of Salim Saleh, the president’s brother (he declined an interview through text). Whenever I called anyone, I would say that I had received his or her contact information from Onek (or from other members of the LRA negotiation team). If, over the course of an interview, names came up of persons with an interesting perspective but whose contacts I did not have, I would ask an interviewee if they could possibly put me in contact. They typically agreed. In this way, I was able to snowball my elite contacts.

In my interviews in Uganda, I found that the boundaries between being an insider and an outsider were not always clearly delineated. My interview with Obita was an example of the vacillation between the “insider” and “outsider” dynamic.³⁴ During a breakfast meeting, Obita took a call where he understood the caller to be telling him that the Prosecutor of the ICC had resigned (the call turned out to be about the stepping down of Carla del Ponte of the

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³³ Leo Onek, Interview, Kampala, December 12, 2007.
³⁴ James Obita, Interview, Kampala, December 14, 2007.
ICTY, which was also in the Hague). In a burst of glee, Obita told me how there would be no stopping the LRA. “We finished the man,” he said of the ICC Prosecutor, considering me to be an ally who he could candidly talk to about how he felt, “Justice does not come from the white man!” But then he added, as though recalling standard lines he had to say to an outsider, “that does not mean we do not respect the ICC” (emphasis his), and he proceeded to explain why the ICC was for Somalia and not Uganda.35

In Kenya, the “insider” dynamic was essential for access. My interview with the former Minister of Justice Martha Karua was illustrative of this point. I had been trying to schedule a meeting with Karua through the “proper” channels of calling her personal assistant since 2009. With an insider track, however, a meeting was arranged in under 24 hours. George Kegoro, the President of ICJ-Kenya who I had interviewed on three occasions for over 2 hours each time (I knew Kegoro from my ICTJ days), told me he could link me with Karua. This was a critical interview: Karua was one of the political elites who called for ICC intervention during the violence, and as Minister of Justice, she had crafted the STK bill for domestic prosecutions. At the time of our interview, she was a presidential candidate who was critical of both the ODM and PNU. On 11 January 2011, Kegoro wrote a text message to Karua and introduced me as “a friend of the ICJ-Kenya and a Ph. D. student at Oxford.”36 She wrote back and suggested that we meet the following day at Panafriic Hotel, where she was taking executive MBA classes. After a number of changes to the meeting time were communicated through text message, she finally met me at the appointed place. While she had initially agreed to meet with me because I was a friend of her friend, it quickly became clear during our meeting that she saw me as a representative of an outside audience that she

35 Ibid.
36 George Kegoro, Interview, Nairobi, January 11, 2011.
was hoping to reach with her message, which was mostly about the incompetence of her fellow politicians in failing to support her bill for domestic prosecutions of the post-elections violence.37

   It is to the “outsider-ness” that I now turn, as it also had some benefits in my research. In both Uganda and Kenya, my identity as an Oxford scholar gave me a quality of safe, objective distance. This meant I was invited to meetings which I otherwise would not have been invited to, and that I was given platforms and access that might have been denied otherwise. In Kenya, I was invited to give a talk at the ICJ-Kenya’s 50th anniversary conference. While I was there, I joined a dinner that seemed otherwise reserved for members of the Kenya’s Court of Appeals and some of the Judges from the ICC who came for the meeting. Because of being an outsider, I was unaware that there was anything wrong with my sitting at their table with them. They did not seem to see it as a breach of protocol either, since I was not seen as a Kenyan but a harmless researcher from Oxford. This opened doors for very interesting interviews with Justice Philip Waki of the Kenyan Court of Appeal—I was the first person to interview him since his famous report. Through Justice Waki, I was also able to interview Justices Bosire and Lenaola of the Court of Appeal. In Uganda, three high level interviewees, including the Special Presidential Advisor for Northern Uganda, Museveni’s Private Secretary, and a high level member in the Ministry of Defense, all told me they wanted to do doctoral work at Oxford. The (now late) Resident District Commissioner in Gulu seemed to want to impress me about everyone he knew, and he gave me the mobile numbers for the Minister of the Interior and the Minister of Foreign Affairs, and told me to tell them it was he that referred me. He also wanted me to write his memoirs.

37 Martha Karua, Interview, Nairobi, January 12, 2011.
Thus, despite being a conspicuous character with a laptop and recorder (or perhaps because of it), people talked to me. This became clearest to me when a member of the Cessation of Hostilities Monitoring Team, who specifically told me not to name him or his country of origin, spoke to me surreptitiously in the computer room of the hotel as I waited for my interview with the LRA negotiators. He said he had been seeing me around, and asked if I was with the media. When I assured him that I was not, he proceeded to talk to me without looking at me—pretending not to be talking to me—while encouraging me to ask him about whatever I wanted to know about the process unfolding in Juba. I immediately realized the opportunity he was offering, and got into my researcher role, asking questions for twenty minutes without once looking up from my computer, so that I would not appear to be talking to him. In his role, he was not meant to talk about the peace process. He talked to me because I was a safe outsider.

But outsider-ness also had the obvious disadvantage of limiting access. This happened when I tried to meet Kenyan Attorney General Amos Wako. I had met Wako in New York when he contested his seat at the International Law Commission. I also knew his assistant, Anthony Okara, who would have set up a meeting socially. However, by 2010, Wako had a new assistant, James Waweru, who insisted that meetings only be set up according to protocol. On almost a daily basis in November and December 2009 and then again in December 2010 and January 2011, I stopped by Wako’s Chambers or called Waweru. Each time, a reason was given why I could not talk to the Attorney General. The meeting never happened. I was similarly unable to meet Moses Wetangula, the Kenyan Minister of Foreign Affairs who was responsible for crafting Kenya’s policy on the ICC.

38 Key Informant 1, Interview, Kampala, December 12, 2007.
When I reached him on his mobile number (which had been given to me by a mutual friend), he told me to call him in 20 minutes. He never answered his phone for weeks afterwards.

II. Conducting Interviews

After gaining access, I had to prepare for, and conduct the interviews. Initially, I prepared a different list of questions for each type of respondent (government, UN, judiciary, civil society, etc). I quickly found that respondents mostly wanted to engage in dialogue, which worked well to “enhance rather than diminish their sense of selfhood and agency.”39 Thus, despite the elite nature of the interviews (which intuitively makes one want to have precisely scripted questions), I found it was most useful to raise many of my questions as informally and conversationally as possible. I adopted an open-ended and informal interview format, which allowed respondents to answer in narrative form and to discuss topics in any order they wished to. My task was to listen carefully and refer to their answers as points from which to launch further questions. Sometimes the informality resulted naturally from the fact that by the time a meeting was secured for an interview, many exchanges had already taken place by email, telephone, or short messaging service (SMS). Consequently, the respondent would dispense with formalities, and the only formal reminder before the interview was whether or not they would be open to my recording the interview.

I was also aware of positionality when I was conducting interviews, as it affected the information that respondents chose to reveal. Within the insider dynamic, because I frequently had access to the elite respondents through their friends, whenever I thought respondents were hesitating on a question, I asked whether they would prefer that I turn off the recorder. I found that many respondents felt at liberty to give answers both on and off the record, letting me know when their answers were designed to give me context without

attribution. At one point, Ambassador Nana Apanteng asked me to turn off my recorder as he
gave me contextual information.40 A key informant at The Hague looked at my iPhone at the end of the interview to be sure that, as promised, I had not recorded him.41 In respect of the trust in which respondents placed in me, I have made an effort to ensure that, whenever it may be sensitive to identify respondents, I have replaced their names with the term “Key Informant.” In other cases, where a respondent gave sensitive information that was also reflected in other views that were given to the author by at least one other respondent, the research refers to “Author Interviews.”

When conducting interviews, I found that I had to be vigilant when the outsider dynamic applied for two reasons. First, some respondents saw me as a platform for political statements. I therefore often had to let respondents dispense with what they thought I wanted to hear and I had to ask more questions to get to the main point for which I had requested the interview. Sometimes respondents said what they wanted to say despite the questions I asked, so I increasingly sharpened my questions to steer them away from political generalities and toward accounts of what happened: who said what, in response to what, when, and why they acted as they did (interests, interpretation, expectations). Whenever it was possible, I asked about their personal role in a process, or the role a specific person played in a specific action. Sometimes, this steering was not without resistance. When I asked Karua, “Why did you resign,” she answered, “Is that part of the interview?”42

Second, in the outsider dynamic, people, assuming my lack of knowledge, tended to overstate or gloss over what they may have done. I found myself having to use the line, “As a Kenyan, I…” many times, when I felt that it was important to re-establish my local

40 Nana Apanteng, Interview, Nairobi, December 16, 2009
41 Key Informant 6, Interview, The Hague, October 8, 2010.
42 Martha Karua, Interview, Nairobi, January 12, 2011.
credentials in order to get views that were different from those that would be packaged for the typical (meaning European, or at least non-Kenyan or non-East African) interviewer. Whenever I was cognizant of this tendency among the respondents who saw me as an outsider, I would either press tactfully for respondents to be very specific in their responses, or simply ask another character in the same story to clarify for me how different actors participated.

The outcome of each interview depended on which elements of my identity had been privileged to secure the interview, which previous elite interviews I chose to allude to as a way of putting a current interviewee at ease, and so on. In the acutely ethnic environment of Kenya, and in order not to (further) affect the information that was given to me, I also had to be careful to present myself as someone who saw the point of every side of the story. In that context, I have no doubt that my ethnicity as a Kisii—a politically anodyne group—was relevant to the information Kenyan respondents chose to share during interviews. I am also certain that the fact that I shared a surname with a well-known Justice in the Court of Appeal (Justice Bosire), with whom elite respondents generally assumed I shared relations, affected the information I received.

III. Challenges

A key challenge that was encountered during this research was that the cases under examination were, at the time of writing, dynamic. While this meant that I had access to reports, statements, and views in real time, it also meant that in some cases, elites did not know what they thought, or they did not want to go public about what they thought, or that they changed their mind as facts on the ground shifted. The possibility of future criminal

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43 For example, Alex Ajiji, Interview, Kampala, January 6, 2011.
44 When Justice Waki introduced me to Justice Bosire, he told Bosire that he was bringing back a lost daughter. Justice Philip Waki, Interview, Nairobi, December 4, 2009.
trials made other elites self-conscious about what they could or could not say. While this affected what the elites chose to reveal in the interviews, the research has triangulated interview data with other sources of data. Further, despite the dynamism, this research is based on past decisions that actors made, and its findings remain relevant regardless how these stories end.

A second challenge that was encountered at the beginning of the research was ethical in nature. When I initially went to Gulu in December 2007, I had no intention of interviewing elites. I wanted to talk to conflict-affected communities about justice, and in particular about reparations, in the context of the peace process that was underway. The issue of reparations was of interest because I had contributed to some research on the theme conducted by the UN Office of the High Commission for Human Rights. Cognizant of the “extractive industry” that research could be, I linked up with an acquaintance who previously ran a peace initiative in the area. With his help, I visited Teetugu, a camp for internally displaced persons, to meet some “former abducted persons.”

According to Amina Mama, “ethical questions arise...between researchers and the researched communities, all of whom inhabit bodies that are perceived, received, and related to in ways that convey histories and historical relations.” When I asked the first question about the harms for which justice through reparations could be useful, I did not get a list. Instead, each participant took it as an opportunity to tell me about life experiences that would, self-evidently, illustrate their individual need for reparations and compensation. As I listened to the experiences recounted to me (in translation) I encountered an ethical challenge. Participants told me about rape, unwanted children fathered by LRA soldiers, and violence. They told me about killing and coercion. They offered to show me bullet scars. A

woman cried throughout the session. They may have felt, despite my clarifications about my goals, that to bare their lives to me implied potential future material benefit. I could not defend that line of inquiry; it was not dignified for my participants. At this point, I changed my focus and instead decided to interrogate the controversy that was swirling in the Ugandan media, and to examine the impact of the ICC on the peace process. I had attended the LRA consultation in Kampala prior to my trip to Gulu, and I already had a starting point. I would focus on elite interviews. I returned to Kampala, and to the hotel where LRA peace negotiators were waiting for a meeting with President Museveni, and embarked on the first of my elite interviews.

Finally, there are aspects of elite interviews one could not anticipate. Sometimes interviewees were hostile. The Deputy Minister of Justice of Uganda asked me why I was speaking to him before speaking to his Solicitor General, and he sought to systematically dismiss most of my questions. Others were misinformed. A leading commentator among Kenyan NGOs on the subject of the ICC told me that if the ICC did not have enough evidence against perpetrators, it would issue “sealed warrants,” incorrectly suggesting that these were issued in cases where the ICC does not have enough evidence against perpetrators. Other interviews required enormous flexibility. In my interview with Ruhakana Rugunda, the Minister of the Interior of Uganda, my interview was interrupted less than seven minutes into it by a diplomatic visit, and I had to wait for two hours further before we could resume, at which point he took several calls on his mobiles during the half hour he allocated for the interview. Throughout, my task was to rely on good judgment to get, at the very least, a couple of phone numbers for further interviews.
### Appendix 2—List of Interviews Cited

<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Position/Role</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Marieke Wierda</td>
<td>Head of Prosecution Programs, ICTJ. Formulated ICTJ’s position on prosecution, and led organization’s involvement with ICC and Uganda.</td>
<td></td>
<td>3-Nov-07</td>
</tr>
<tr>
<td>2</td>
<td>Katherine Liao</td>
<td>Regional Human Rights Officer, Office of the UN High Commissioner for Human Rights.</td>
<td>Gulu</td>
<td>Dec-07</td>
</tr>
<tr>
<td>3</td>
<td>Carine Kaneza</td>
<td>Program Director, Transitional Futures Africa. Acted as the secretariat for the LRA during negotiation for Juba, and organized the consultations of LRA with the public. Former ICTJ fellow.</td>
<td>Kampala</td>
<td>Dec-07</td>
</tr>
<tr>
<td>4</td>
<td>Richard Otim</td>
<td>Public Affairs Officer for the ICC office in Uganda.</td>
<td>Kampala</td>
<td>Dec-07</td>
</tr>
<tr>
<td>5</td>
<td>Peter van der Horst</td>
<td>Coordinator, Special Programme on Africa, Amnesty International, Dutch Section.</td>
<td>Kampala</td>
<td>Dec-07</td>
</tr>
<tr>
<td>6</td>
<td>Joseph Akwenyu Manoba</td>
<td>Coordinator, Victims Working Group, Uganda.</td>
<td>Kampala</td>
<td>Dec-07</td>
</tr>
<tr>
<td>7</td>
<td>Francis Onyango</td>
<td>Coordinator, Coalition for the ICC, Uganda.</td>
<td>Kampala</td>
<td>Dec-07</td>
</tr>
<tr>
<td>8</td>
<td>Godfrey Orach</td>
<td>National Coordinator, Civil Society Organizations for Peace In Northern Uganda.</td>
<td>Gulu</td>
<td>Dec-07</td>
</tr>
<tr>
<td>9</td>
<td>Simone Rizzo</td>
<td>Area Team Lead, AVSI (an Italian NGO), Northern Uganda.</td>
<td>Gulu</td>
<td>Dec-07</td>
</tr>
<tr>
<td>10</td>
<td>Lachambel Oriem</td>
<td>Owner, Mega FM, the radio on which Kony routinely spoke to the public. First Ugandan journalist to meet Joseph Kony.</td>
<td>Kampala</td>
<td>5-Dec-07</td>
</tr>
<tr>
<td>11</td>
<td>James Latigo</td>
<td>Former head of Northern Uganda Peace Initiative.</td>
<td>Gulu</td>
<td>7-Dec-07</td>
</tr>
<tr>
<td>12</td>
<td>Rachel Goldstein</td>
<td>Head of Office, UN Population Fund.</td>
<td>Gulu</td>
<td>8-Dec-07</td>
</tr>
<tr>
<td>13</td>
<td>Julian Hopwood</td>
<td>Country Representative, Quaker Peace and Social Witness.</td>
<td>Gulu</td>
<td>8-Dec-07</td>
</tr>
<tr>
<td>14</td>
<td>Walter Ochora</td>
<td>Resident District Commissioner, Gulu. Local administrator for Museveni’s party. Former leader of rebel group that signed a peace agreement with Museveni in 1988.</td>
<td>Gulu</td>
<td>10-Dec-07</td>
</tr>
<tr>
<td>15</td>
<td>Moses Chrispus Okello</td>
<td>Head of Research, Refugee Law Project (RLP). RLP research widely used in framing Ugandan NGOs’ opposition to the ICC.</td>
<td>Kampala</td>
<td>10-Dec-07</td>
</tr>
<tr>
<td>17</td>
<td>Lauren Bienkowski</td>
<td>Program Coordinator, American Refugee Council.</td>
<td>Kampala</td>
<td>11-Dec-07</td>
</tr>
<tr>
<td></td>
<td>Name</td>
<td>Position/Role</td>
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<td>Date</td>
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<tr>
<td>18</td>
<td>Major Philip Kulagigye</td>
<td>Spokesperson, Ugandan Army (UPDF).</td>
<td>Kampala</td>
<td>12-Dec-07</td>
</tr>
<tr>
<td>19</td>
<td>Leo Onek</td>
<td>Key broker of Juba process. Friend to Riek Machar, the vice president of South Sudan who mediated Juba. Has long history of involvement with the search for peace in Uganda. Knows all key actors in Uganda political scene.</td>
<td>Kampala</td>
<td>12-Dec-07</td>
</tr>
<tr>
<td>20</td>
<td>Key Informant 1</td>
<td>Member, Cessation of Hostilities Monitoring Team. Tasked with implementation of the agreement between Government of Uganda and LRA.</td>
<td>Kampala</td>
<td>12-Dec-07</td>
</tr>
<tr>
<td>22</td>
<td>Martin Ojul</td>
<td>Chief of LRA Negotiation Team (until January 2008). A key person in the initiation of the Juba process. Was affiliated with Vincent Otti, the deputy of Kony.</td>
<td>Kampala</td>
<td>13-Dec-07</td>
</tr>
<tr>
<td>23</td>
<td>Ruhakana Rugunda</td>
<td>Minister of Internal Affairs, Head of Government of Uganda delegation to Juba. After the failure of the Juba process, he became the Permanent Representative of Uganda to the United Nations when Uganda took the presidency of the Security Council.</td>
<td>Kampala</td>
<td>14-Dec-07</td>
</tr>
<tr>
<td>24</td>
<td>James Obita</td>
<td>Former Secretary for Foreign Affairs for the LRA. Became Chief Negotiator for the Juba process in April 2008. In the LRA since 1988, and had attempted to broker previous peace processes, including one initiated by Onek.</td>
<td>Kampala</td>
<td>14-Dec-07</td>
</tr>
<tr>
<td>25</td>
<td>Ayena Odongo</td>
<td>Legal Adviser for the LRA (until January 2008).</td>
<td>Kampala</td>
<td>14-Dec-07</td>
</tr>
<tr>
<td>26</td>
<td>Joe Oloka Onyango</td>
<td>Dean of Law, and Head of Human Rights and Peace Centre, Makerere University. Internationally respected legal scholar.</td>
<td>Kampala</td>
<td>14-Dec-07</td>
</tr>
<tr>
<td>27</td>
<td>Tim Allen</td>
<td>Professor, London School of Economics. Expert on the Acholi of Northern Uganda, as well as on the LRA (conversation).</td>
<td>London</td>
<td>5-Feb-08</td>
</tr>
<tr>
<td>28</td>
<td>Paul Nantulya</td>
<td>Head of Peace Building and Governance Catholic Relief services, South Sudan.</td>
<td>Kampala</td>
<td>18-Mar-08</td>
</tr>
<tr>
<td>29</td>
<td>Moses Okello</td>
<td>See (15) above.</td>
<td>Kampala</td>
<td>18-Mar-08</td>
</tr>
<tr>
<td>30</td>
<td>Carine Kaneza</td>
<td>See (3) above.</td>
<td>Kampala</td>
<td>18-Mar-08</td>
</tr>
<tr>
<td>31</td>
<td>Steven Kagoda</td>
<td>Permanent Secretary, Ministry of Internal Affairs. Key bureaucrat in ministry charged with overseeing amnesty for the LRA. Was supposed to create instrument to exempt LRA high command from amnesty.</td>
<td>Kampala</td>
<td>19-Mar-08</td>
</tr>
<tr>
<td>32</td>
<td>Santa Okot</td>
<td>LRA Negotiator. Former member of Museveni’s political party.</td>
<td>Kampala</td>
<td>19-Mar-08</td>
</tr>
<tr>
<td>33</td>
<td>Lachambel Oriem</td>
<td>See (10) above.</td>
<td>Kampala</td>
<td>19-Mar-08</td>
</tr>
<tr>
<td>34</td>
<td>Key informant 2</td>
<td>Ugandan Army (UPDF), Department of Doctrine.</td>
<td>Kampala</td>
<td>20-Mar-08</td>
</tr>
<tr>
<td>35</td>
<td>Key informant 3</td>
<td>Ministry of Defense official. Involved in peace talks in the official government delegation since 1988, including Juba.</td>
<td>Kampala</td>
<td>22-Mar-08</td>
</tr>
<tr>
<td>36</td>
<td>Louise Khabure</td>
<td>Analyst, Central Africa, International Crisis Group (ICG). Researched on Uganda for the ICG, and had access to key political decision-makers.</td>
<td>Kampala</td>
<td>22-Mar-08</td>
</tr>
<tr>
<td>37</td>
<td>Key informant 4</td>
<td>Private Secretary to Museveni and to Amama Mbabazi (minister of defense at the time of the LRA referral). Also head of Institutions and Political Affairs for the President. Trained in Ethiopia with the SPLA, and knew John Garang.</td>
<td>Kampala</td>
<td>25-Mar-08</td>
</tr>
<tr>
<td>38</td>
<td>Walter Ochora</td>
<td>See (14) above.</td>
<td>Kampala</td>
<td>25-Mar-08</td>
</tr>
<tr>
<td>39</td>
<td>Peter Onega</td>
<td>Chairman of the Amnesty Commission of Uganda. Charged with reception of LRA combatants returning to Uganda. Had access to LRA high command, including Kony. Involved in start of Juba talks.</td>
<td>Kampala</td>
<td>25-Mar-08</td>
</tr>
<tr>
<td>40</td>
<td>Richard Todwong</td>
<td>See (21) above.</td>
<td>Kampala</td>
<td>25-Mar-08</td>
</tr>
<tr>
<td>41</td>
<td>Ten Kate Warner</td>
<td>Head of Office, Office of the UN Special Envoy to LRA-affected areas. Supported the work of President Chissano, the UN Special Envoy to Juba. Represented the Department of Political Affairs of the UN at the peace talks.</td>
<td>Kampala</td>
<td>25-Mar-08</td>
</tr>
<tr>
<td>42</td>
<td>Luis Moreno-Ocampo</td>
<td>Prosecutor, International Criminal Court (conversation).</td>
<td>Oxford</td>
<td>8-May-08</td>
</tr>
<tr>
<td>43</td>
<td>Mamadou Diouf</td>
<td>Professor of African politics, Columbia University (conversation).</td>
<td>Oxford</td>
<td>27-May-09</td>
</tr>
<tr>
<td>44</td>
<td>Barney Afako</td>
<td>Legal advisor to Riek Machar (the mediator of the Juba peace process). Widely-respected London-based international lawyer who designed the Agreements pertaining to transitional justice during Juba (conversation).</td>
<td>Oxford</td>
<td>26-Jun-09</td>
</tr>
<tr>
<td>45</td>
<td>Maina Kiai</td>
<td>Former Chairman, Kenya National Commission on Human Rights (KNCHR), described as the “moving spirit” behind the KPTJ strategy, key spokesperson of Kenyan NGOs in the post-violence period.</td>
<td>Email</td>
<td>22-Sep-09</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Role/Comment</td>
<td>Location</td>
<td>Date</td>
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</tr>
<tr>
<td>46</td>
<td>Pascal Kambale</td>
<td>Commissioner on Waki Commission. Designed the ICC/STK clauses of the Waki report. Credited for persuading the Democratic Republic of Congo to make a referral to the ICC while working at HRW. Officer at Open Society Institute.</td>
<td>London</td>
<td>9-Oct-09</td>
</tr>
<tr>
<td>47</td>
<td>Priscilla Hayner</td>
<td>ICTJ Geneva. One of the three founders of the ICTJ. Wrote key book in field of transitional justice on truth commissions. Author co-authored memo with her to Kenya TJRC to address the question of economic crimes.</td>
<td>Telephone interview</td>
<td>9-Oct-09</td>
</tr>
<tr>
<td>48</td>
<td>Dismas Mokua</td>
<td>Owns company that advised ODM media strategy during the elections. Knowledgeable about the strategies politicians to shape what receives the attention of Kenya media houses.</td>
<td>Nairobi</td>
<td>19-Oct-09</td>
</tr>
<tr>
<td>49</td>
<td>Cyprian Nyamwamu</td>
<td>Chief Executive Officer, National Convention Executive Council, and contender for a seat in Parliament. Well connected among NGOs, and progressive politicians.</td>
<td>Nairobi</td>
<td>20-Oct-09</td>
</tr>
<tr>
<td>50</td>
<td>Roselyn Akombe</td>
<td>Office of the Under Secretary-General, Department of Political Affairs, United Nations. Department oversees UN mediation efforts.</td>
<td>New York</td>
<td>23-Oct-09</td>
</tr>
<tr>
<td>51</td>
<td>Njonjo Mue</td>
<td>Head of ICTJ in Kenya. Previously at the KNCHR, where he conducted trainings for committee charged with selection of commissioners for TJRC. Was part of documentation of human rights violation at KNCHR.</td>
<td>Nairobi</td>
<td>23-Oct-09</td>
</tr>
<tr>
<td>52</td>
<td>Yash Ghai</td>
<td>Head, Kenya Constitution Review Commission. Widely respected constitutional scholar. Board Member of ICTJ.</td>
<td>Nairobi</td>
<td>23-Oct-09</td>
</tr>
<tr>
<td>53</td>
<td>Betty Murungi</td>
<td>Deputy Chair, Truth, Justice and Reconciliation Commission (TJRC). Widely respected member of civil society. Married to James Orengo, a confidante of Odinga in the ODM.</td>
<td>Nairobi</td>
<td>22-Oct-09</td>
</tr>
<tr>
<td>54</td>
<td>Comfort Ero</td>
<td>Director, ICTJ Cape Town Office. Was part of group that called for resignation of Kenya TJRC chairman, Ambassador Kiplagat.</td>
<td>Kampala</td>
<td>27-Oct-09</td>
</tr>
<tr>
<td>55</td>
<td>Key informant 3</td>
<td>See (35) above.</td>
<td>Kampala</td>
<td>29-Oct-09</td>
</tr>
<tr>
<td>56</td>
<td>Philip Kasaija Apuuli</td>
<td>Lecturer at Makerere University, observer of the ICC relations with Uganda.</td>
<td>Kampala</td>
<td>29-Oct-09</td>
</tr>
<tr>
<td>57</td>
<td>Jeremy Haslam</td>
<td>Chief of Mission, International Office of Migration. Routinely works with Amnesty Commission to oversee surrender of LRA rebels originating outside Uganda. Contacted by Okot Odhiambo, one of the LRA rebels against whom an ICC arrest warrant has been issued, asking to surrender.</td>
<td>Kampala</td>
<td>30-Oct-09</td>
</tr>
<tr>
<td></td>
<td>Name</td>
<td>Position/Role</td>
<td>Location</td>
<td>Date</td>
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</tr>
<tr>
<td>58</td>
<td>Rwot Oryang Lagony</td>
<td>Paramount chief, Acholi.</td>
<td>Kampala</td>
<td>30-Oct-09</td>
</tr>
<tr>
<td>59</td>
<td>Michael Otim</td>
<td>Head of Office, ICTJ, Uganda.</td>
<td>Kampala</td>
<td>30-Oct-09</td>
</tr>
<tr>
<td>60</td>
<td>Carine Kaneza</td>
<td>See (3) above.</td>
<td>Kampala</td>
<td>31-Oct-09</td>
</tr>
<tr>
<td>61</td>
<td>Janet Ingram Lewis</td>
<td>PhD researcher, Harvard University. Studying former Ugandan rebellions.</td>
<td>Kampala</td>
<td>1-Nov-09</td>
</tr>
<tr>
<td>62</td>
<td>Justice Peter Onega</td>
<td>See (39) above.</td>
<td>Kampala</td>
<td>2-Nov-09</td>
</tr>
<tr>
<td>63</td>
<td>Steven Kagoda</td>
<td>See (31) above.</td>
<td>Kampala</td>
<td>2-Nov-09</td>
</tr>
<tr>
<td>64</td>
<td>Major Philip Kulagigye</td>
<td>See (18) above.</td>
<td>Kampala</td>
<td>2-Nov-09</td>
</tr>
<tr>
<td>65</td>
<td>Lawrence Tewyaze</td>
<td>Registrar, Special Division of the High Court. Previously assistant to the Principle Judge of the High Court of Uganda.</td>
<td>Kampala</td>
<td>3-Nov-09</td>
</tr>
<tr>
<td>66</td>
<td>Lady Justice Elizabeth Nahamya</td>
<td>Judge, War Crimes Division. Previously at the Special Court of Sierra Leone.</td>
<td>Kampala</td>
<td>3-Nov-09</td>
</tr>
<tr>
<td>67</td>
<td>Stephen Othieno</td>
<td>Director of External Relation, The Pan African Movement</td>
<td>Kampala</td>
<td>3-Nov-09</td>
</tr>
<tr>
<td>68</td>
<td>Amongin Apolo</td>
<td>Commissioner, Amnesty Commission</td>
<td>Kampala</td>
<td>4-Nov-09</td>
</tr>
<tr>
<td>69</td>
<td>Key informant 2</td>
<td>See (34) above</td>
<td>Kampala</td>
<td>4-Nov-09</td>
</tr>
<tr>
<td>70</td>
<td>Martin Ojul</td>
<td>See (22) above</td>
<td>Kampala</td>
<td>4-Nov-09</td>
</tr>
<tr>
<td>71</td>
<td>Honourable Jacob Oulanya</td>
<td>Former Legal Advisor to the Government on Juba. Former member of parliament and Former Deputy Speaker of the House. Advised government on ICC case.</td>
<td>Kampala</td>
<td>4-Nov-09</td>
</tr>
<tr>
<td>72</td>
<td>Honourable Okello Oryem</td>
<td>State Minister of Foreign Affairs. Close to Museveni, member of GoU delegation to Juba. Son of Tito Okello, who was overthrown by Museveni in 1986.</td>
<td>Kampala</td>
<td>5-Nov-09</td>
</tr>
<tr>
<td>73</td>
<td>Richard Butera</td>
<td>Director of Public Prosecutions. Responsible for initiating cases within the High Court system in Uganda, including at the War Crimes Division.</td>
<td>Kampala</td>
<td>5-Nov-09</td>
</tr>
<tr>
<td>74</td>
<td>Christopher Gashibarake</td>
<td>Legal advisor, Ministry of Justice. Advisor to Ministry, including in ICC matters.</td>
<td>Kampala</td>
<td>5-Nov-09</td>
</tr>
<tr>
<td>75</td>
<td>Brigadier James Mugira</td>
<td>Chief of Military Intelligence, Uganda. Key person involved in Operation Lightning Thunder, and other military operation in Uganda.</td>
<td>Kampala</td>
<td>6-Nov-09</td>
</tr>
<tr>
<td>76</td>
<td>Rachel Odoyi</td>
<td>Senior Advisor of the Justice Law and Order Sector; the entity charged with advising the government of Uganda on transitional justice.</td>
<td>Kampala</td>
<td>6-Nov-09</td>
</tr>
<tr>
<td>77</td>
<td>Cosmas Lam</td>
<td>Founding Chair, Acholi Religious Leaders Peace Initiative.</td>
<td>Kampala</td>
<td>9-Nov-09</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Position</td>
<td>Location</td>
<td>Date</td>
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</tr>
<tr>
<td>78</td>
<td>Honourable Frederic</td>
<td>State Minister of Justice, Uganda and Deputy Attorney-General.</td>
<td>Kampala</td>
<td>6-Nov-09</td>
</tr>
<tr>
<td></td>
<td>Ruhindi</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>79</td>
<td>Key informant 4</td>
<td>See (37) above</td>
<td>Kampala</td>
<td>9-Nov-09</td>
</tr>
<tr>
<td>80</td>
<td>Ronald Otim</td>
<td>Senior Resettlement Officer, Amnesty Commission.</td>
<td>Kampala</td>
<td>10-Nov-09</td>
</tr>
<tr>
<td>81</td>
<td>Nathan Twinomugisha</td>
<td>Legal advisor, Amnesty Commission.</td>
<td>Kampala</td>
<td>10-Nov-09</td>
</tr>
<tr>
<td>82</td>
<td>Michael Otim</td>
<td>Head of Uganda office of the ICTJ.</td>
<td>Kampala</td>
<td>11-Nov-09</td>
</tr>
<tr>
<td>84</td>
<td>Key Informant 8</td>
<td>Senior official in Waki Commission, who was responsible for giving Waki Report to the media.</td>
<td>Nairobi</td>
<td>11-Nov-09</td>
</tr>
<tr>
<td>85</td>
<td>Chidi Odinkalu</td>
<td>Senior Officer, Open Society Justice Initiative. Well respected legal scholar.</td>
<td>Nairobi</td>
<td>11-Nov-09</td>
</tr>
<tr>
<td>86</td>
<td>Apollo Mboya</td>
<td>CEO, Law Society of Kenya.</td>
<td>Nairobi</td>
<td>12-Nov-09</td>
</tr>
<tr>
<td>87</td>
<td>Ndung’u Wainaina</td>
<td>Executive Director, International Center for Policy and Conflict.</td>
<td>Nairobi</td>
<td>13-Nov-09</td>
</tr>
<tr>
<td>88</td>
<td>George Kegoro</td>
<td>Executive Director, ICJ-Kenya. Secretary of Waki Commission. Arranged presentation which introduced the ICC into the list of Kenyan demands. Organized meeting of author with Martha Karua.</td>
<td>Nairobi</td>
<td>16-Nov-09</td>
</tr>
<tr>
<td>89</td>
<td>Davis Malombe</td>
<td>Legal Counsel, Kenya Human Rights Commission (KHRC). Active on transitional justice issues.</td>
<td>Nairobi</td>
<td>17-Nov-09</td>
</tr>
<tr>
<td>90</td>
<td>Leo Onek</td>
<td>See (19) above.</td>
<td>Nairobi</td>
<td>16-Nov-09</td>
</tr>
<tr>
<td>91</td>
<td>Muthoni Wanyeki</td>
<td>Executive Director, KHRC. Was involved in KPTJ, and active in presenting the perspective of human rights NGOs at Serena.</td>
<td>Nairobi</td>
<td>17-Nov-09</td>
</tr>
<tr>
<td>92</td>
<td>Godfrey Musila</td>
<td>Senior Researcher, Institute for Security Studies. Director of Research, TJRC. Second Kenyan with a PhD in international law.</td>
<td>Mombasa</td>
<td>19-Nov-09</td>
</tr>
<tr>
<td>93</td>
<td>Olatokunbo Ige</td>
<td>Senior Advisor, UN Office for the High Commission on Human Rights. Key liaison between UN and institutions of transitional justice. Supportive of TJRC, personal friend to Betty Murungi.</td>
<td>Mombasa</td>
<td>19-Nov-09</td>
</tr>
<tr>
<td>94</td>
<td>James Gondi</td>
<td>Program Officer, ICJ-Kenya. Prepared presentation that introduced ICC to Waki Commission. Former intern at the ICC.</td>
<td>Mombasa</td>
<td>19-Nov-09</td>
</tr>
<tr>
<td>95</td>
<td>Monageng Sanji</td>
<td>Judge, ICC (conversation).</td>
<td>Mombasa</td>
<td>19-Nov-09</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Organization/Role</td>
<td>Location</td>
<td>Date</td>
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</tr>
<tr>
<td>96</td>
<td>Betty Okero</td>
<td>Civil Society Organization Network, Kisumu. Supporter of TJRC despite criticism from Nairobi-based NGOs.</td>
<td>Nyeri</td>
<td>23-Nov-09</td>
</tr>
<tr>
<td>98</td>
<td>David Majanja</td>
<td>Legal Counsel, Waki Commission.</td>
<td>Nairobi</td>
<td>25-Nov-09</td>
</tr>
<tr>
<td>99</td>
<td>David Matsanga</td>
<td>Chief Negotiator for the LRA, who has lived in exile. Took over from James Obita, and lasted until the failure of Juba.</td>
<td>Nairobi</td>
<td>25-Nov-09</td>
</tr>
<tr>
<td>100</td>
<td>Gichara Kibara</td>
<td>Secretary, Ministry of Justice. Key bureaucrat in the Ministry.</td>
<td>Nairobi</td>
<td>26-Nov-09</td>
</tr>
<tr>
<td>101</td>
<td>Tanya Braganza</td>
<td>Secretary of STK Working Group. Volunteer at the International Center for Policy and Conflict.</td>
<td>Nairobi</td>
<td>26-Nov-09</td>
</tr>
<tr>
<td>102</td>
<td>Honourable Paul Muite</td>
<td>Former member of parliament under Safina party. Mungiki lawyer. Member of STK working group.</td>
<td>Nairobi</td>
<td>27-Nov-09</td>
</tr>
<tr>
<td>103</td>
<td>Alice Ondieki</td>
<td>Head of Witness Protection, Attorney General Chambers.</td>
<td>Nairobi</td>
<td>27-Nov-09</td>
</tr>
<tr>
<td>104</td>
<td>Honourable Gitobu Imanyara</td>
<td>Member of Parliament, unaffiliated with PNU/ODM. Closely connected with NGOs. Drafted version of STK Bill, which was maximalist in its vision of accountability. He and his personal assistant received death threats. Bill defeated on a technicality.</td>
<td>Nairobi</td>
<td>30-Nov-09</td>
</tr>
<tr>
<td>105</td>
<td>Mtumishi Njeru Gathangu</td>
<td>Chairman, Citizens for Justice. Former political prisoner in Nyayo torture house chambers, who filed a lawsuit against the TJRC against the leadership of Ambassador Kiplagat.</td>
<td>Nairobi</td>
<td>1-Dec-09</td>
</tr>
<tr>
<td>106</td>
<td>James Gondi</td>
<td>See (94) above.</td>
<td>Nairobi</td>
<td>1-Dec-09</td>
</tr>
<tr>
<td>107</td>
<td>Gladwell Otieno</td>
<td>Executive Director, Africa Centre for Open Governance (AFRICOG), co-chair of KPTJ.</td>
<td>Nairobi</td>
<td>2-Dec-09</td>
</tr>
<tr>
<td>108</td>
<td>Rosemary Tollo</td>
<td>Coordinator for KPTJ in office of Gladwell Otieno (107 above).</td>
<td>Nairobi</td>
<td>2-Dec-09</td>
</tr>
<tr>
<td>109</td>
<td>Mwalimi Mati</td>
<td>Director, Mars Group Kenya. Group leading advocacy for good governance. Former head of Transparency International Kenya Chapter.</td>
<td>Nairobi</td>
<td>3-Dec-09</td>
</tr>
<tr>
<td>110</td>
<td>Tom Kaggwe</td>
<td>Deputy Director, Kenya Human Rights Commission.</td>
<td>Nairobi</td>
<td>3-Dec-09</td>
</tr>
<tr>
<td>111</td>
<td>Justice Philip Waki</td>
<td>Justice in Kenya Court of Appeal. Headed the Waki Commission, which created pressure for the STK and the ICC. Initially affected by the “radical surgery” of the judiciary enacted by the NARC government, before reinstating himself.</td>
<td>Nairobi</td>
<td>4-Dec-09</td>
</tr>
<tr>
<td>112</td>
<td>Boniface Njeru</td>
<td>Lawyer who helped design the Imanyara Bill for the STK.</td>
<td>Nairobi</td>
<td>4-Dec-09</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Position/Role</td>
<td>Location</td>
<td>Date</td>
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</tr>
<tr>
<td>113</td>
<td>Justice Samuel Bosire</td>
<td>Justice, Kenya Court of Appeal. Head of the Goldenberg Commission to investigate large-scale corruption.</td>
<td>Nairobi</td>
<td>4-Dec-09</td>
</tr>
<tr>
<td>114</td>
<td>Honourable David Ngugi</td>
<td>Member of Parliament. Supporter of Imanyara and his proposed approach to the Special Tribunal. Close working relations with NGOs.</td>
<td>Nairobi</td>
<td>7-Dec-09</td>
</tr>
<tr>
<td>115</td>
<td>General Daniel Opande</td>
<td>Former head of the United Nations Peacekeeping Mission to Sierra Leone, personally known to Kofi Annan. Created Concerned Citizens for Peace. Member of “peace groups”.</td>
<td>Nairobi</td>
<td>8-Dec-09</td>
</tr>
<tr>
<td>116</td>
<td>Harun Ndubi</td>
<td>Lawyer who helped design the Imanyara Bill for the Special Tribunal for Kenya.</td>
<td>Nairobi</td>
<td>8-Dec-09</td>
</tr>
<tr>
<td>117</td>
<td>Divya Khosla</td>
<td>UN Studies Program, Columbia University. Accompanied the documentation project conducted by Columbia University to examine the mediation efforts of Kofi Annan.</td>
<td>Nairobi</td>
<td>8-Dec-09</td>
</tr>
<tr>
<td>118</td>
<td>Charles Sande</td>
<td>Personal Assistant to a member of Parliament.</td>
<td>Nairobi</td>
<td>9-Dec-09</td>
</tr>
<tr>
<td>119</td>
<td>Honourable Richard Onyonka</td>
<td>Assistant Minister of Foreign Affairs, Kenya. Affiliated with the ODM.</td>
<td>Nairobi</td>
<td>9-Dec-09</td>
</tr>
<tr>
<td>120</td>
<td>James Kihwaga</td>
<td>Head of Legal Affairs, Ministry of Foreign Affairs. Bureaucrat affiliated with PNU.</td>
<td>Nairobi</td>
<td>9-Dec-09</td>
</tr>
<tr>
<td>121</td>
<td>Ambassador Muburi-Muita</td>
<td>Kenyan Ambassador to the UN, and Special Representative of the UN Secretary-General to the African Union.</td>
<td>Nairobi</td>
<td>10-Dec-09</td>
</tr>
<tr>
<td>122</td>
<td>Patricia Nyaundi</td>
<td>Executive Director, FIDA Kenya, a leading NGO working on gender rights. Later became CEO for the TJRC.</td>
<td>Nairobi</td>
<td>10-Dec-09</td>
</tr>
<tr>
<td>123</td>
<td>Hassan Omar Hassan</td>
<td>Vice Chair to Maina Kiai, KNHRC.</td>
<td>Nairobi</td>
<td>11-Dec-09</td>
</tr>
<tr>
<td>124</td>
<td>Hassan Omar Hassan</td>
<td>See (123) above.</td>
<td>Nairobi</td>
<td>12-Dec-09</td>
</tr>
<tr>
<td>125</td>
<td>Gilbert Onyango</td>
<td>Deputy Executive Director in an NGO, and Coordinator of Civil Society Organizations intervention in the Governance, Justice, Law and Order Sector (GJLOS).</td>
<td>Nairobi</td>
<td>14-Dec-09</td>
</tr>
<tr>
<td>126</td>
<td>Kamau Kinyanjui</td>
<td>Senior Program Officer, National Council of Churches of Kenya (NCCK). Involved in drafting recommendation for Ambassador Kiplagat when he applied for position in TJRC.</td>
<td>Nairobi</td>
<td>14-Dec-09</td>
</tr>
<tr>
<td>127</td>
<td>Kibunja Mzalendo</td>
<td>Chairman, National Commission on Integration and Cohesion. A key commission established after the Serena settlement, in order to address future tensions and hate speech.</td>
<td>Nairobi</td>
<td>15-Dec-09</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Details</td>
<td>Location</td>
<td>Date</td>
</tr>
<tr>
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</tr>
<tr>
<td>128</td>
<td>Prisca Kamungi</td>
<td>Senior Official at South Consulting Group. Group responsible for documenting progress in implementation of Serena agreements by coalition governments and reporting to Annan.</td>
<td>Nairobi</td>
<td>15-Dec-09</td>
</tr>
<tr>
<td>129</td>
<td>Antony Kuria</td>
<td>Officer in Movement on Democratic Accountability, supporting the work of Maina Kiai. Previously at the KNCHR where he initiated documentation of human right abuses. Assistant to Kambale at Waki Commission.</td>
<td>Nairobi</td>
<td>15-Dec-09</td>
</tr>
<tr>
<td>130</td>
<td>Samuel Mbithi</td>
<td>Advisor, Embassy of Finland. Finland was a key donor to sector-wide Governance Justice Law and Order Sector.</td>
<td>Nairobi</td>
<td>15-Dec-09</td>
</tr>
<tr>
<td>131</td>
<td>Ambassador Nana Apenteng</td>
<td>Chief of Staff, Panel of Eminent African Personalities. Representative of Kofi Annan in Nairobi. The authors’ was the first interview he gave since he took his position.</td>
<td>Nairobi</td>
<td>16-Dec-09</td>
</tr>
<tr>
<td>132</td>
<td>Karuti Kanyinga</td>
<td>Director, South Consulting Group. Group responsible for documenting progress in implementation of Serena agreements by coalition governments and reporting to Annan.</td>
<td>Nairobi</td>
<td>16-Dec-09</td>
</tr>
<tr>
<td>133</td>
<td>Honourable Mutula Kilonzo</td>
<td>Minister of Justice, Government of Kenya. Former lawyer of former President Moi.</td>
<td>Nairobi</td>
<td>16-Dec-09</td>
</tr>
<tr>
<td>134</td>
<td>Ambassador Bethuel Kiplagat</td>
<td>Chair, TJRC. His appointment was controversial, as Kiplagat was also a permanent secretary in the Ministry of Foreign Affairs during the assassination of the Minister of Foreign Affairs, Robert Ouko.</td>
<td>Nairobi</td>
<td>6-Jan-10</td>
</tr>
<tr>
<td>135</td>
<td>Irungu Houghton</td>
<td>Director, Pan African Programs, Oxfam.</td>
<td>Nairobi</td>
<td>7-Jan-10</td>
</tr>
<tr>
<td>136</td>
<td>Ozonnia Ojielo</td>
<td>Human Rights Advisor, UNDP. Liaison between peace and development sections of the UN.</td>
<td>Nairobi</td>
<td>8-Jan-10</td>
</tr>
<tr>
<td>137</td>
<td>Pascal Kambale</td>
<td>See (46) above.</td>
<td>Nairobi</td>
<td>10-Jan-10</td>
</tr>
<tr>
<td>138</td>
<td>George Kegoro</td>
<td>See (88) above.</td>
<td>Nairobi</td>
<td>14-Jan-10</td>
</tr>
<tr>
<td>139</td>
<td>Godfrey Musila</td>
<td>See (92) above.</td>
<td>Nairobi</td>
<td>14-Jan-10</td>
</tr>
<tr>
<td>140</td>
<td>Mildred Ngesa</td>
<td>Former head of communications at the Waki Commission. Consultant for communications for the TJRC.</td>
<td>Nairobi</td>
<td>14-Jan-09</td>
</tr>
<tr>
<td>141</td>
<td>General Lazaro Sumbeiywo</td>
<td>Special Advisor to the UN Secretary General on DRC. Negotiated the Comprehensive Peace Agreement between North and South Sudan. Personally known to Kofi Annan. Part of the “peace groups”.</td>
<td>Nairobi</td>
<td>13-Jan-09</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Position</td>
<td>Location</td>
<td>Date</td>
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<tr>
<td>142</td>
<td>Louise Khabure</td>
<td>See (36) above.</td>
<td>Nairobi</td>
<td>Jan-09</td>
</tr>
<tr>
<td>143</td>
<td>Godfrey Musila</td>
<td>See (92) above.</td>
<td>Nairobi</td>
<td>14-Jan-09</td>
</tr>
<tr>
<td>144</td>
<td>Dapo Akande</td>
<td>Co-Director, Ethics, Law and Armed Conflict, University of Oxford.</td>
<td>Oxford</td>
<td>1-Feb-10</td>
</tr>
<tr>
<td>145</td>
<td>Godfrey Musila</td>
<td>See (92) above.</td>
<td>Telephone Interview</td>
<td>3-Feb-10</td>
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<tr>
<td>147</td>
<td>Morten Bergsmo</td>
<td>Former Legal Counsel at ICC. Created the “Legal Tools” database of the ICC. Exceptional knowledge of workings of the Office of the Prosecutor.</td>
<td>Telephone interview</td>
<td>5-Feb-10</td>
</tr>
<tr>
<td>148</td>
<td>Louis Bickford</td>
<td>Unit Director, ICTJ. One of social scientists at ICTJ seeking to find unifying principles for transitional justice in early day of ICTJ (conversation).</td>
<td>New York</td>
<td>19-May-10</td>
</tr>
<tr>
<td>149</td>
<td>Duncan Muhumuza-Laki</td>
<td>Legal Advisor, Mission of Uganda to the UN.</td>
<td>New York</td>
<td>20-May-10</td>
</tr>
<tr>
<td>150</td>
<td>Karen Mosoti</td>
<td>Head, ICC Liaison Office, New York.</td>
<td>New York</td>
<td>7-Sep-10</td>
</tr>
<tr>
<td>151</td>
<td>Ian Martin</td>
<td>Special Representative of the UN Secretary General in Nepal and Libya. Former vice-president, ICTJ, and former Secretary-General, Amnesty International.</td>
<td>New York</td>
<td>7-Apr-10</td>
</tr>
<tr>
<td>152</td>
<td>Nicholas Haysom</td>
<td>Political Advisor to the UN Secretary General. Former legal advisor to President Mandela, 1994-1999. Involved in negotiation of Comprehensive Peace Agreement for South Sudan-Sudan.</td>
<td>New York</td>
<td>11-Apr-10</td>
</tr>
<tr>
<td>153</td>
<td>Nahla Valji</td>
<td>Editor, International Journal for Transitional Justice. This is the key journal in the field of transitional justice.</td>
<td>New York</td>
<td>13-Aug-10</td>
</tr>
<tr>
<td>154</td>
<td>Ejeviome Eloho Otobo</td>
<td>Director and Deputy Head, Peace Building Support Office, United Nations.</td>
<td>New York</td>
<td>29-Sep-10</td>
</tr>
<tr>
<td>155</td>
<td>Castro Wesamba</td>
<td>Political Officer, Office of the Special Advisor on the Prevention of Genocide, United Nations</td>
<td>New York</td>
<td>13-Aug-10</td>
</tr>
<tr>
<td>156</td>
<td>Paul Thomas Strieder</td>
<td>Head of ICC Section, Federal Foreign Office, Germany (conversation).</td>
<td>Berlin</td>
<td>5-Oct-10</td>
</tr>
<tr>
<td></td>
<td>Key Informant</td>
<td>5</td>
<td>Analyst, ICC. Worked on Kenya investigations team. Previously worked on DRC with Human Rights Watch.</td>
<td>The Hague</td>
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<tr>
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<tr>
<td>159</td>
<td>Sunil Pal</td>
<td></td>
<td>Legal Advisor, Coalition for the ICC (CICC). The CICC led the effort to ensure more governments ratify the Court, and were key in aggregating views of the anti-impunity community.</td>
<td>The Hague</td>
</tr>
<tr>
<td>160</td>
<td>Giovanni Bassu</td>
<td></td>
<td>Head of External Relations, ICC.</td>
<td>The Hague</td>
</tr>
<tr>
<td>161</td>
<td>Klaus Molitor</td>
<td></td>
<td>Analyst, Office of the Prosecutor, ICC. Involved in the Kenya case.</td>
<td>The Hague</td>
</tr>
<tr>
<td>162</td>
<td>Gilbert Bitti</td>
<td></td>
<td>Senior Legal Advisor to the Pre-Trial Chamber, ICC.</td>
<td>The Hague</td>
</tr>
<tr>
<td>163</td>
<td>Olivia Swaak-Goldman</td>
<td></td>
<td>Head of the Judiciary, Complementarity and Cooperation Division, ICC.</td>
<td>The Hague</td>
</tr>
<tr>
<td>164</td>
<td>Key informant 6</td>
<td></td>
<td>Very senior official formerly in the Office of the Prosecutor at the ICC.</td>
<td>The Hague</td>
</tr>
<tr>
<td>165</td>
<td>Akingbolahan Adeniran</td>
<td></td>
<td>Trial Lawyer, ICC. Working on Kenya case.</td>
<td>The Hague</td>
</tr>
<tr>
<td>166</td>
<td>Rod Rastan</td>
<td></td>
<td>Legal Advisor, Judiciary, Complementarity and Cooperation Division, ICC.</td>
<td>The Hague</td>
</tr>
<tr>
<td>167</td>
<td>Kirstin Kalla</td>
<td></td>
<td>Senior Program Officer, Trust Fund for Victims, ICC.</td>
<td>The Hague</td>
</tr>
<tr>
<td>169</td>
<td>Justice James Ogoola</td>
<td></td>
<td>Principle Judge, the High Court of Uganda. Established the War Crimes Division following Juba.</td>
<td>Kampala</td>
</tr>
<tr>
<td>171</td>
<td>Alex Ajiji</td>
<td></td>
<td>Registrar, Special Division of the High Court. Previously assistant to the Principle Judge of the High Court of Uganda. Left for another job before the initiation of cases before the High Court.</td>
<td>Kampala</td>
</tr>
<tr>
<td>172</td>
<td>Key informant 7</td>
<td></td>
<td>TJRC official. Head of a leading NGO involved in and critical of the TJRC efforts of 2003.</td>
<td>Nairobi</td>
</tr>
<tr>
<td>173</td>
<td>George Kegoro</td>
<td></td>
<td>See (88) above.</td>
<td>Nairobi</td>
</tr>
<tr>
<td>174</td>
<td>Dismas Mokua</td>
<td></td>
<td>See (48) above.</td>
<td>Nairobi</td>
</tr>
<tr>
<td>175</td>
<td>Martha Karua</td>
<td></td>
<td>Former Minister of Justice, Government of Kenya. Was part of PNU during Serena, introduced STK bill to parliament, where it was defeated, paving the way for ICC action. Quit PNU to become presidential candidate.</td>
<td>Nairobi</td>
</tr>
<tr>
<td>176</td>
<td>Njonjo Mue</td>
<td></td>
<td>See (51) above.</td>
<td>Nairobi</td>
</tr>
<tr>
<td>177</td>
<td>Mugambi Kiai</td>
<td></td>
<td>See (83) above.</td>
<td>Nairobi</td>
</tr>
<tr>
<td>No.</td>
<td>Name</td>
<td>Notes</td>
<td>Location</td>
<td>Date</td>
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<tr>
<td>178</td>
<td>Godfrey Musila</td>
<td>See (92) above.</td>
<td>Nairobi</td>
<td>14-Jan-11</td>
</tr>
<tr>
<td>179</td>
<td>Isaac Lenaola</td>
<td>Justice of the High Court of Kenya. Head of Judicial Services Committee, the policy-making body for the Kenyan judiciary.</td>
<td>Nairobi</td>
<td>11-Jan-11</td>
</tr>
<tr>
<td>180</td>
<td>Makau Mutua</td>
<td>See (146) above.</td>
<td>Email</td>
<td>22-Jun-11</td>
</tr>
<tr>
<td>181</td>
<td>Karen Mosoti</td>
<td>See (150) above.</td>
<td>New York</td>
<td>7-Jul-11</td>
</tr>
</tbody>
</table>
## Appendix 3—Events Relevant to the Research

<table>
<thead>
<tr>
<th>Event</th>
<th>Title</th>
<th>Where</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Consultation of the LRA negotiation team with members of the Ugandan public</td>
<td>“LRA Consultations”</td>
<td>Hotel Africana, Kampala 5-Dec-07</td>
</tr>
<tr>
<td>2</td>
<td>Workshop featuring leading Kenyan commentators representing both ODM and PNU, organized by the African Studies Centre</td>
<td>“Kenya Elections 2007 Workshop”</td>
<td>University of Oxford, Oxford 17-Jan-08</td>
</tr>
<tr>
<td>3</td>
<td>Panel Discussion at the School of International Public Affairs with Maina Kiai</td>
<td>“Kenya - Forward to Peace”</td>
<td>Columbia University, New York 12-Feb-08</td>
</tr>
<tr>
<td>4</td>
<td>Workshop organized for LRA and GoU by Oxford Transitional Justice Research and Transitional Futures Africa</td>
<td>“Implementing Juba – A Roadmap for Peace and Justice in Northern Uganda”</td>
<td>Hotel Equatoria, Kampala 19-21-Mar-08</td>
</tr>
<tr>
<td>5</td>
<td>Small group discussion between Oxford Transitional Justice Research and Mr. Luis Moreno Ocampo</td>
<td>“International Justice in Africa: Complementarity in Practice”</td>
<td>University of Oxford. 8-May-08</td>
</tr>
<tr>
<td>6</td>
<td>Lecture by Peter Katzenstein</td>
<td>“Analytical Eclecticism and International Relations Theory”</td>
<td>University of Oxford. 14-May-09</td>
</tr>
<tr>
<td>8</td>
<td>ICJ-Kenya’s 50th Anniversary Conference</td>
<td>Presented paper on challenges facing TJ</td>
<td>Continental Hotel, Mombasa 18-20-Nov-09</td>
</tr>
<tr>
<td>9</td>
<td>ICTJ Conference for NGOs and the Truth, Justice, and Reconciliation Commission</td>
<td>Presented paper on Gender and TJRC</td>
<td>Treetops Lodge, Nyeri 22-25-Nov-09</td>
</tr>
<tr>
<td>10</td>
<td>STK Working Group Meeting, Public awareness on Special Tribunal</td>
<td>Presentations from CSOs on why the STK is important</td>
<td>Lillian Towers Nairobi 30-Nov-09</td>
</tr>
</tbody>
</table>
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II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei 
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Commander-in-Chief of the Armed Forces of the Republic of Kenya During the 2008 
Madaraka Day Celebrations at the Nyayo House Stadium on 1st June, 2008”. Speech. 
President.” 
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