

# How Post-Colonial is the International Criminal Court?



## A case study on the Kenyatta and Ruto Case

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# Executive Summary

The International Criminal Court (ICC) in The Hague is a “tool of imperialism”, according to the well-known lawyer Charles A. Taku (TPIR Heritage Defense, 2012a). This is an often heard accusation in Africa. Numerous political leaders from the continent have expressed their doubts about the fairness of the ICC. The essence of these accusations is always the same: Western powers abuse their influence on the ICC to rule over the African continent. This thesis investigates where these accusations come from, and whether or not the African leaders might have a valid point. In doing so, this thesis uses the cases against the Kenyan leaders Uhuru Kenyatta and William Ruto as a case study, and the theory of post-colonialism as a theoretical framework.

The accusation of the African leaders is in fact the claim that the ICC is a neo-colonial court. Neo-colonialism is a phenomenon first described by Nkrumah (1965). It describes how Western powers still try to keep their influence in African countries, even though these countries are decolonized and (on paper at least) fully independent. But according to Nkrumah (1965), Western countries, not necessarily former colonial powers, still try to control African countries, through economic or monetary policies.

Neo-colonialism should not be confused with post-colonialism. Post-colonialism “deals with the effects of colonization on cultures and societies”, as Ashcroft, Griffiths & Tiffin (2000, p. 186) define it. This thesis focuses on the concept of post-colonialism as described by Fanon (1967, 1991). He argues that Western powers legitimize their (post-)colonial behavior by framing Africa as an uncivilized, undeveloped and backward continent. In doing so, the (former) colonial powers legitimize their actions in the (former) colonies. Spivak (1985) describes how the use of language can influence the politics of – in her case – colonial Great-Britain. She shows that British rulers in India created a false image of the Indians. Thereby the colonial British showed people in Britain and India who was in charge, and who was the dominated, subjected party.

This thesis investigates whether or not the ICC does something similar in their court documents. The International Criminal Court is the first permanent international court, founded in 1998, and fully operational since July 1, 2002. A total of 122 countries have signed up to the Rome Statute (2011), making them State Parties to the ICC. The fully independent ICC was established in order to end the impunity of criminals of war (ICC, 2014e). To date, twenty-one cases in eight situations have been brought to the ICC, all which concern African individuals (ICC, n.d.c.), a fact that might fuel the perceptions of the African leaders that the ICC is only focusing at Africa.

This thesis analyses the court documents pertaining to the cases against the Kenyan president Kenyatta and his deputy Ruto. Kenyatta and Ruto are facing trials for their alleged role in the post-election violence in their country that occurred in 2007 and 2008, during which over twelve hundred people got killed (CIPEV, 2008). Both are accused of crimes against humanity, and both object to their trials and claim that the ICC is targeting them for political reasons only. The Pre-Trial Chambers confirmed the charges against both individuals; the Office of the Prosecutor has a hard time collecting evidence, however – resulting in the prosecution asking for an adjournment of the case (Allison, 2014).

The final chapter (Chapter 4.0) of this thesis contains a content analysis that compares the court documents of the ICC with a so-called ‘neutral standard’, in this case the news coverage of the Kenyan newspaper *Daily Nation*. Differences between both groups of texts show the characteristics and meaning of the selected texts. If the African leaders are right in their perception that the ICC is a post-colonial tool that is only targeting Africans, the court documents should contain more post-colonial features than the neutral standard.

This thesis looks at (the framing of) two terms in both (groups of) texts. The first is the act of taking someone’s life. Is this act described in a neutral way (‘to kill’), or in a more colored way (for instance, ‘to cut his throat’)? The second aspect the content analysis of this thesis looks at is the framing of the attacks. Are the post-election attacks framed as spontaneous outburst of violence, or as pre-planned and organized killing sprees?

The results of the content analysis, and the comparison between the two sets of texts, show that the court documents of the International Criminal Court contain more features that might be called post-colonial. In the ICC documents, the act of taking someone’s life is slightly more often described in a negative way (32% in the ICC documents versus 27.4% in the neutral standard). In addition, the court documents frame the attacks in Kenya as being pre-planned more often than the neutral standard (33.1% in the ICC documents versus 16% in the neutral standard).

Nevertheless, these results and the analysis of this thesis do not lead to the conclusion that the ICC is indeed a post-colonial tool, as some African leaders claim it to be. There are other, possibly more likely explanations for the differences in the use of language. However, based on the results of the content analysis it becomes clear that the ICC portrays the acts in Kenya as more negative than the neutral standard. And whatever the reasons for this use of language is, that might strengthen the feelings of discontent about the ICC amongst African leaders.

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## List of abbreviations

AU	-	African Union
CIPEV	-	The Commission of Inquiry on Post-Election Violence
HRW	-	Human Rights Watch
ICC	-	International Criminal Court
GoK	-	Government of Kenya
NGO	-	Non-Governmental Organization
ODM	-	Orange Democratic Movement
OTP	-	Office of the Prosecutor
PNU	-	Party of National Unity
PTC	-	Pre-Trial Chamber
UN	-	United Nations

# 1.0 Introduction

This master thesis finds its roots in the third International Conference on the Defence of International Criminal Law, held in Montreal, Canada, in September 2012. During this conference, Charles A. Taku, a legal counsel from Cameroon, gave a videotaped speech. He has extensive legal expertise, being employed by the International Criminal Tribunal for Rwanda, the African Court on Human Rights and Peoples' Rights, as well as the Special Court for Sierra Leone. In his speech this experienced lawyer, without the blink of an eye, called the International Criminal Court (ICC), a "tool of imperialism" (TPIR Heritage Defense, 2012a). Taku claims Europe and the United States are specifically targeting Africans through their influence on the ICC. These statements of Taku inspired me to address these claims.

A quick search on Google shows these claims by Taku represent a more widespread sentiment in Africa. The impartiality, honesty and fairness of the ICC are doubted by numerous African leaders. On various occasions African leaders have labelled the methods and procedures of the ICC as a tool of extension of the colonial past. This thesis investigates whether or not these African leaders have a valid point. Taku specifically addresses the cases against the present political leaders of Kenya, Uhuru Kenyatta and William Ruto, as an example. It is no surprise that both Kenyatta and Ruto agree with Taku (as will be shown later on in this thesis), but other African leaders and politicians have made similar claims as well.

For instance, the Ethiopian Minister of Foreign Affairs, Tedros Adhanom Ghebreyesus, claimed, according to the PanAfrican News Agency (October 12, 2013), that the ICC is used as a "political instrument targeting Africa and Africans". African leaders believe that Western powers use the International Criminal Court as an instrument to exert their influence over the region. In May 2013, during the so-called Landmark Summit, the chair of the summit, Somalian Prime Minister Hailemariam Desalegn, accused the ICC of being involved in 'race hunting'. According to Hailemariam, African leaders are concerned that out of those indicted by the ICC, "99% are Africans. This shows something is flawed within the system of the ICC and we object to that" (Africa Research Bulletin, 2013b).



For reasons that will be addressed later on in this thesis, the case against Kenyatta and Ruto will also be the case my thesis will investigate.

## 1.1 Definitions

Before outlining the structure, purpose and aim of this study, it is crucial to define two key terms that will be used throughout this thesis. The terms '*neo-colonialism*' and '*post-colonialism*' might look alike, but have very different meanings.

According to Ashcroft, Griffiths & Tiffin (2000, p. 186), *post-colonialism* “deals with the effects of colonizations on cultures and societies”, and they add, “Post-colonialism as it has been employed in most recent accounts has been primarily concerned to examine the processes and effects of, and reactions to, European colonization from the sixteenth century up to and including the neo-colonialism of the present day” (Ashcroft, Griffiths & Tiffin, 2000, p. 188). Slemon (1994, pp. 16-17) states that the term '*post-colonialism*' is used to describe a broad variety of academic research fields. This thesis will largely focus on post-colonialism as described by Franz Fanon (1967, 1991). Fanon's concept of post-colonialism, in short, addresses the question of how Western historicism has legitimized and still legitimizes colonial behavior. Due to the framing of, in this case, Africa as being a historically backward continent and the assumption that Europe is the prime mover of civilization, Western countries have always had the idea that it was perfectly legitimized to invade and control non-Western parts of the world.

*Neo-colonialism* constitutes only a single, smaller element in the broader definition of post-colonialism. Neo-colonialism is a term coined by Kwame Nkrumah, the first president of independent Ghana. The literal translation is of course 'new colonialism'; countries such as Ghana might be formally independent, but the reality is different. “The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside” (Nkrumah, 1965, p. 10). He describes how ex-colonial powers (and other Western powers such as the United States) continue to have an influence in the day to day politics and economics of African countries. This influence is rarely enforced with military power, more often the control is exercised through what Nkrumah (1965, p. 10) calls economic or monetary means – for instance, by trade embargo's for non-friendly African countries. Other forms of neo-colonial behavior by Western powers is exercised through cultural

or educational institutions, multinational companies or international monetary funds. “The term [neo-colonialism; TvH] has since been widely used to refer to any and all forms of control of the ex-colonies”, as Ashcroft, Griffiths and Griffin (2000, pp. 162-163) put it.

Both terms (post-colonialism as well as neo-colonialism) will be extensively addressed in the theoretical part of this research report.

## **1.2 Structure and Methodology**

The introduction will – among other matters – formulate the research question and the various sub-questions of this thesis. It will also briefly discuss the structure of the chapters that follow. The relevancy of this study will also be outlined in this introduction. This paragraph will briefly outline the structure and methodology. A more in-depth explanation of the methodology that has been used will be given later on in this thesis. The purpose of this part is to help in understanding the choice of the structure and the research questions.

Chapter 2 of the thesis extensively describes the theory of post-colonialism and neo-colonialism. This academic school of thinking addresses a broad range of topics varying from cartography, through slavery, to world systems theory. Logically, most of this is beyond the focus of this thesis. This thesis mainly focuses on the most influential authors that have written about how the framing of the (former) colonies, consciously or unconsciously, impacts the way (former) colonial powers think, act and behave about and towards their (former) colonies. In a literature study, this chapter will look for possible characteristics of a so-called postcolonial text. Knowing how such a text looks like, is crucial for answering my research question.

Chapter 2 also looks at the claims made by African leaders, and will investigate to what extent African leaders suggest that the International Criminal Court is a neo-colonial and/or post-colonial institution. The research aim of the thesis is to see if these apparent feelings of discontent about the ICC are fuelled by possible expressions of so-called post-colonialism, as made by the ICC.

Chapter 3 looks at the ICC more closely, and particularly at the Ruto and Kenyatta case. How does the ICC act? What is the court’s history regarding this particular case? What decisions have been made by the court? This thesis chooses to describe the cases against Kenyatta and Ruto as a case study for several reasons. First of all, it is a topical issue. The case against both leaders is still in progress. Second, it involves two high-ranking individuals (being the President of Kenya



and his deputy). This not only makes the case more relevant, but it also makes the case a well-discussed topic, with a great number of African leaders responding to it.

Chapter 4 is based on a content analysis, in order to investigate if the court documents, as an expression of the opinions of the court, can be labelled as post-colonial. In a content analysis two (groups of) texts have been analyzed; a selection of court documents, and a group of texts that – for the purpose of this study – is assumed to be ‘neutral’. Based on the notions as discussed in the chapter on theories, the content analysis will look for words, expressions or sentences that might imply a post-colonial character. Comparing the number of possible post-colonial features in both (groups of) texts, should make it possible to answer the research question as stated in the following section of this introduction. Again, a more in-depth description of the methodology as used in Chapter 4 will be given later on in this thesis.

### 1.3 Research Question

The following research question and sub-questions will be leading in the master thesis. The main research question is:

**To what extent did the International Criminal Court (ICC) give rise to the claim of African leaders that the ICC is used as a post-colonial tool, using the charges against Kenyatta and Ruto as a case study?**

Before I will be able to answer this main research question, I have to answer the following sub-questions.

**What are the major claims as made by the theory of post-colonialism, as developed by Franz Fanon and others?**

The first sub-question will be answered by conducting a review of the available academic literature. This part will not only include the academic work of Franz Fanon, but other related and relevant authors will also be discussed, either because they can be seen as a source of inspiration for Fanon or because they have elaborated upon his theories. The goal in answering this sub-question is to address the question what the major, key elements in the theory building around the

concept of post-colonialism are, and subsequently to determine how these elements can be or are translated into post-colonial texts, documents or policies. In other words, how can post-colonialism be recognized, are there any specific characteristics?

**What is the structure of the ICC in general, and what is the case history of the claims against Kenyatta and Ruto, starting with the alleged crimes up to the latest legal developments?**

This section will describe the Kenyatta and Ruto case pending before the ICC in a chronological way. This description will also cover the main characteristics of the ICC in general. Next, it will give a (historical) narrative of the process, more specifically the crimes Kenyatta and Ruto are alleged to have committed. Subsequently, the thesis will thoroughly look at all the relevant court documents regarding these two cases. The thesis will look at the way in which the ICC handles the Kenyatta and Ruto case. In order to do so, it is also necessary to get a clear view of what exactly happened during the crimes Kenyatta and Ruto allegedly committed.

**Based on the answers to the other sub-questions, can the ICC documents be labelled post-colonial at all?**

The first sub-question addresses the main, defining characteristics of post-colonialism. The second sub-question closely looks at the case in question. The third and last sub-question tries to combine the answers to the first two sub-questions. Are there any expressions of the ICC that might be called post-colonial? What are the similarities, what are the differences? In answering these questions, the relevant chapter will be based on a content analysis of some specific court documents. (For a more in-depth description of the methodology used, see the methodology part concerning the third sub-question).

## **1.4 Relevance of the Thesis**

### **1.4.1 Social Relevance**

This thesis is relevant, for social as well as for scientific reasons. The ICC is a relatively young legal institution, founded in the Rome Statute in 1998. The court has been “established to help

end impunity for the perpetrators of the most serious crimes of concern to the international community.” (ICC, n.d.a) In trying to do so, the ICC aims to prosecute those that are suspected of war crimes and crimes against humanity (amongst other serious crimes). This should, in the long run, promote peace and prevent future conflicts. But in order to function to its full capacities, it is crucial that the mandate of the ICC is backed by as many countries as possible. As of now, 34 African nation states (out of 54) have ratified the Rome Statute, thereby acknowledging the ICC as a legal institution with a certain degree of control over its leaders (since the ICC only prosecutes individuals). (ICC, n.d.b) For the effectiveness of the court, it is key that all African countries, and wider: all countries, believe this court is balanced, unbiased and fair. If African nations believe the ICC is used as an imperial tool, whether justified or not, the future of the ICC is at risk. The feelings of discontent might (in the future) be a reason for African countries to withdraw from the Rome Statute; this would mean that a globally operating ICC is no longer possible. A well-functioning, peace promoting and war crimes punishing court is in the interest of everybody; not only to those in countries that are torn by war or internal conflict. This thesis will try to determine if the ICC is functioning as neutral as one might expect from an international court. In doing so, it could make a contribution, small as it may be, to the court’s possible success in the future. A well-functioning ICC is relevant for everyone, and therefore I believe the social relevance of this thesis is beyond doubt.

#### **1.4.2 Scientific Relevance**

I believe this study is also relevant from a scientific point of view. In more traditional studies, post-colonial theories have not been applied to court documents or other official policy documents. Usually the theory of post-colonialism addresses cultural expressions and manifestations of the West: literature, paintings, stories, songs, or myths. It describes how the image of the non-West is build and maintained in countries that once were colonial powers. This study will answer the question if these forms of post-colonial expressions (also) exist in the more formal setting of the ICC. Of course, this thesis is not the first study that focuses on the working methods and the effectiveness of the International Criminal Court. It is not even the first study that looks at possible post-colonial behavior of the ICC; see for instance Ba (2011). What is new in this research, however, is that it combines the theory of post-colonialism with an in-depth content analysis of the court documents. I did not find any other study that uses this angle. For

this reason, I believe this thesis will make a contribution to the field of post-colonial research, as well as research into the strengths and weaknesses of the ICC. This new angle might add new insights to the field of research and therefore I believe the scientific relevance of this study is clear and undisputed.

## 2.0 The Theory of Post-Colonialism

This thesis is based on the theory of post-colonialism (and, to a lesser extent, neo-colonialism). This chapter outlines the relevant authors and their theoretical notions which are central to this thesis. It will describe what post-colonialism is, what it looks like and how possible post-colonial behavior and expressions can be recognized.

### 2.1 Neo-Colonialism

African leaders claim that the ICC is an ‘imperial tool’, that is targeting Africans in order to have (some) influence on the African continent. This case is not the first, nor will it likely be the last case that tries to link modern day European or Western influences in the African region with the colonial past.

The former president of Ghana, Nkrumah, was one of the first to coin the term ‘neo-colonialism’, during the period after World War II, when African nations were decolonized and became independent (Nkrumah, 1965). The (former) colonial powers (and other Western nations) still attempted to keep their influence in Africa, even during and after the period of decolonization, because they had a hard time adjusting to their loss of power in the region, or because they tried to promote their own political, economic and/or cultural agenda in these countries.

In place of colonialism, as the main instrument of imperialism, we have today neo-colonialism [which] like colonialism is an attempt to export the social conflicts of capitalist countries [...] The result of neo-colonialism is that foreign capital is used for the exploitation rather than for the development of the less developed parts of the world. Investment, under neo-colonialism, increases, rather than decreases, the gap between the rich and the poor countries of the world. The struggle against neo-colonialism is not aimed at excluding the capital of the developed world from operating in less developed countries. It is aimed at preventing the financial power of the developed countries being used in such a way as to impoverish the less developed. (Nkrumah, 1965, p. 15)

Neo-colonialism, in a broad sense, refers to “any and all forms of control of the ex-colonies”, according to Ashcroft, Griffiths and Tiffin (2000, p. 163). Childs and Williams (1997) have analyzed how former colonial powers still try to maintain their influence in (and profits from) the regions they once used to control:

In the period after decolonization, it rapidly became apparent (to the newly independent nations, at least) that although colonial armies and bureaucracies might have withdrawn, Western powers were still intent on maintaining maximum indirect control over erstwhile colonies, via political, cultural and above all economic channels, a phenomenon which became known as neo-colonialism. (Childs & Williams, 1997, p. 5)

Neo-colonialism should not be seen as the continuation of colonialism, however. According to Nkrumah (1965), neo-colonialism is the last stage of imperialism, and most likely the most dangerous form since it might even be a more dangerous form of subjection than imperialism itself. Nkrumah describes how imperialism took place in plain sight, with clear motives. There was a colony and a colonial power – the distinction, the intentions and the relationship between these two was quite clear. In the era of neo-colonialism, however, the agenda of former colonial powers remains hidden. Nkrumah argues that on paper the former colonial powers and the former colonies might be equal, but in reality they are not. Nkrumah (1965) describes how neo-colonialism “means power without responsibility”. For colonial powers it means “exploitation without redress”. During the colonial period the colonial powers at least had to explain their actions and motives at home, before taking them to their colonies. The colonies, in turn, were offered security against (other) violent opponents. Not the best deal ever, but at least the conditions were clear. During the neo-colonial period, however, this is no longer the case, as Nkrumah argues. Former colonies could still be strongly influenced by their former colonial powers, even without them knowing it, according to Nkrumah. The result of this neo-colonialism is that the Western money that is going to African economies is not spent with the purpose of developing African economies (and societies). Under neo-colonialism, Western investments in Africa increase, rather than decrease the financial inequality between the Western powers and Africa.

Neo-colonialism as we know it today, does not necessarily involve former colonial powers, according to Nkrumah. At the time he wrote his *Neo-Colonialism, the Last Stage of Imperialism*



(1965), the intensity and scale of the war in Vietnam was at its peak. Although France was the former colonial power in Vietnam, during the 1960s the United States had a neo-colonial control of the State (at least the southern part). Nkrumah (1965, p.11) sees this as a clear example of neo-colonialism, even though the United States never was a colonial power and former colonial power France had little or no active (military) role in the conflict in Vietnam.

“Recently the term [neo-colonialism; TvH] has been associated less with the influence of the former imperial powers than with the role of the new superpowers, especially the United States, whose colonial past, it has been argued, has been replaced by its own dominant neo-colonialist role in establishing a global capitalist economy” (Ashcroft, Griffiths & Tiffin, 2000, p. 163). That explains why countries that are former colonies themselves, such as the United States, Australia and Canada, might nevertheless behave in a neo-colonial way, even though they never had any colonies in Africa themselves.

At a first glance, the African claims regarding the International Criminal Court can easily be called neo-colonial – based on the matching features between neo-colonialism on the one hand, and the claims of the African leaders on the other. They claim that European, former colonial powers, as well as the United States, try to influence African politics and economics, by using their power in the ICC. That, as described above, is exactly a feature of neo-colonialism.

## **2.2 Post-Colonialism**

The term neo-colonialism should not be confused with post-colonialism, however. As illustrated above, neo-colonialism describes a situation in which former colonial powers or other powerful Western nations try to maintain, respectively gain some sort of influence in former colonies. Post-colonial theory tries to analyze possible ways in which this is done. Post-colonial ways of thinking might lead to neo-colonial behavior – although they are not the same. The thesis will try to explain where the previously described neo-colonial claims come from. The question the thesis ultimately wants to answer is: are there any ‘post-colonial reasons’ for these feelings of discontent? In other words, are the claims made by African leaders regarding the ICC fuelled by post-colonial behavior of the international court? Before this thesis is capable of answering this question, it is crucial to get a clear view of what post-colonialism exactly is. In addition, it is important to be able to recognize possible post-colonial behavior.

The theory of post-colonialism describes how former colonial powers still perceive themselves as better, more modern, more civilized than the former colonies. “Culture is understood to have been wielded by colonialist powers to denigrate the traditions of non-western cultures, and to celebrate the superiority of particular versions of western culture.” (Barnett, 2009, p. 147) Through cultural ‘brainwashing’, Western countries still think they are better. The Western mind has still not been decolonized, in the words of Sidaway (2000). For this process of decolonization to take place, Western countries first have to work “through the embedded modes of reasoning, thinking, and evaluation that secrete assumptions about privilege, normality, and superiority”. (Barnett, 2009, p. 147)

### **2.2.1 Frantz Fanon**

One of the most influential authors in the debate on post-colonialism is Frantz Fanon (1967, 1991). Fanon was born in French Martinique, educated and trained in Paris, before he moved to Algeria. Although Fanon was educated as a psychiatrist, he wrote, thought and acted more like a revolutionary and philosopher. Allessandrini (1999) shows how his work has greatly been affected by his contribution to and role in the fight for independence, waged by the Algerian nationalists of the FLN against the French army. His *Black Skins, White Masks* (1991) and *The Wretched of the Earth* (1967) are commonly seen as key publications in the field of post-colonial theory.

Fanon’s work has a very broad scope. As a psychiatrist, Fanon wrote, in short, about the effects of domination on the hearts and minds of the colonized. Addressing all his ideas on post-colonialism is beyond the focus of this thesis, so therefore this chapter will mainly look at Fanon’s texts on the process of framing, both during and after the colonial period. These ideas are directly applicable to my case study, since this thesis also looks for links between the framing in (court) documents and possible signs of post-colonialism.

Fanon (1967, 1991) describes how twentieth-century imperialism was legitimized by sketching the image that non-European countries, regions or even entire continents were historically backward, if at all within the Western version of history. “Black Africa is looked on as a region that is inert, brutal, uncivilized – in a word, savage.” (Fanon, 1991, p. 130) European culture, according to Fanon, is seen as the prime mover of civilization. In doing so, colonial powers told themselves, its citizens and the colonies that imperialism was a good thing. After all,

the colonies would be trained, educated and organized according to the Western standards. This would eventually benefit both the colonies and the colonial powers – or so they argued.

Fanon objected to this idea. According to him the so-called First World is in fact a product of the Third World. The West has built its wealth, culture and civilization by plundering, looting and exploiting their colonies. Fanon argues that Western countries should not be thinking of the colonies as marginal to the history of Europe and/or North America. They should accept the extent to which the histories of both the (former) colonies and the (former) colonial powers are intertwined – they have never been separate entities, but they always relied on one another. Without the one, the other would look completely different.

Barnett states that Fanon not only meant this as an empirical observation. “It was meant as a challenge to a whole way of understanding the dynamics of historical development” (Barnett, 2009, p. 148). The fact that Western countries failed to acknowledge that there is no prime mover of history, but that cultures have always exchanged their knowledge, characteristics and products, had enormous consequences. Barnett (2009) describes how this way of thinking eventually resulted into imperialism. And, interesting for the scope of this thesis, he also shows that this same pattern of thought still persists in modern-day social sciences. So with Fanon in mind, possibly, similar patterns of thinking played a role during the foundation and the day-to-day management of the ICC. He shows how seemingly innocent terms as ‘First World’ and ‘Third World’ are examples of this post-colonial way of thinking. And what to make of the terms ‘developed world’ and ‘less developed world’?

All of these ideas presume one particular set of cultural values and practices as the benchmark against which to judge all others. In so far as they presume an idealized model of European history as the single model for other societies to emulate, these notions are often described as Eurocentric. (Barnett, 2009, p. 249)

### **2.2.2 Euro-Centrism**

Hobson (2012) describes Euro-centrism as the way of thinking that puts the European continent, its culture, its history, its people, its politics, etc. at the centre of things. Their norms and values regarding the rule of law, democracy, economy and so on are used as a benchmark. All others are judged against this European standard. Furthermore, Euro-centrism tends to see its own European values as universally applicable. This, combined with the already addressed feelings of

superiority (see 2.2.1), indirectly paved the way for imperialism as we have known it since the nineteenth and twentieth centuries. Colonial powers legitimized their imperial actions by telling themselves and others that they were bringing civilization to the African continent.

The concept of Euro-centrism derives from the (pre-)imperial period, but is still applicable to the current state of affairs in world politics. In modern days, Europe is no longer the main centre of power; therefore one might say Euro-centrism has lost its relevancy. The African leaders in this case study not only blame Europe for being involved in 'race hunting' (Africa Research Bulletin, 2013b), but also point their finger at the United States. Nevertheless, the notion of Euro-centrism is to a great extent still applicable to this thesis, since the United States (as well as most Western countries) are very similar to Europe where its values, culture and politics are concerned. After all, modern day United States is a result of the British colonies in the eighteenth century.

Although the *term* Euro-centrism clearly only refers to Europe, the *concept* of Euro-centrism is still relevant when applied to Western societies in general, and not only to European nations. Fanon was one of the first to notice that. "Two centuries ago, a former European colony decided to catch up with Europe. It succeeded so well that the United States of America became a monster, in which the taints, the sickness and the inhumanity of Europe have grown to appalling dimensions." (Fanon, 1991, p. 252) Ashcroft, Griffiths & Tiffin (2000, p. 163) state something similar: "Recently the term [neo-colonialism; TvH] has been associated less with the influence of the former imperial powers than with the role of the new superpowers, especially the United States, whose colonial past, it has been argued, has been replaced by its own dominant neo-colonialist role in establishing a global capitalist economy."

### **2.2.3 Orientalism**

Another relevant author on post-colonialism is the influential Edward Said. In his most famous book, *Orientalism* (1978), Said describes how the West compares itself with the non-West or '*the Orient*', and paints a picture of this 'other' – based on false, incorrect or incomplete information. Said shows how images, paintings, novels and pictures in the West create a false, incomplete and unrealistic image of the non-West. Western conceptions of identity, culture and civilization in the non-West are based on these false conceptions. These images – they can be positive or negative –

highlight the aspects of the non-West or the Orient that are presumed to be completely different than in the Western societies.

Orientalism, in short, describes how the West (or the ‘Occident’, as Said dubs it) deals with the non-West (the ‘Orient’). Said describes how Orientalism is an institution for dealing with the Orient, “dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient” (Said, 1978, p. 3). Said frames Orientalism as what he calls imagined geography; the Orient is described as something alien, something exotic. This imaginative picture of an entire country, region or even continent dominates the view of the politicians (and the population) from the Occident. The function, or at least the result, of framing the Orient as something distant, different and alien, is to “incorporate it [the Orient; TvH] schematically on a theatrical stage whose audience, managers and actors are *for* Europe, and only for Europe” (p. 72). This, eventually, led to the colonialism, as Said (1978) argues.

This concept of Orientalism is useful for this thesis as well, since African leaders accuse the Occident of abusing the ICC to rule over the African continent. Western powers still make statements about Africa, authorize views of it and describe it. Since the end of imperialism they are no longer settled in Africa, but, according to the African leaders, they still try to rule over it. Looking at Said’s concept of how Orientalism functioned during the days of imperialism, is helpful to investigate how neo-colonialism works (if at all) in current times.

Said (1978) describes that the Orient itself does not exist. It is an epistemological and ontological phenomenon that has been constructed over time. When intellectuals, artists, politicians, authors, and commentators keep repeating the same range of clichés, false assumptions and stereotypes about what they consider to be the Orient, these ideas of the Other become reality, at least in the minds of the Occident. Orientalism is

a *distribution* of geopolitical awareness into aesthetic, scholarly, economic, sociological, historical and philological texts; it is an *elaboration* not only of a basic geographical distinction [...] but also of a whole series of ‘interests’ which [...] it not only creates but maintains. It *is*, rather than expresses, a certain *will* or *intention* to understand, in some cases to control, manipulate, even incorporate, what is a manifestly different world. (Said, 1978, p. 12)

When analyzing how this construction is being made, it is useful to read the work of Gayatri Spivak. Spivak (1985) came up with the word '*othering*' to describe this process of framing the Orient. A word Said (1978) earlier referred to as the act of putting emphasis on perceived weaknesses of the Other, in order to strengthen the position of the Occident.

In one of her most influential papers, Spivak (1985) investigates the archives of the British Colonial Office, the institution which from 1768 until 1966 was responsible for handling the colonial affairs of the overseas colonies that at that time belonged to the British empire. In doing so, she was the first to systematically and academically apply the concept of *othering* to the field of post-colonialism.

In the 'proceedings' (dispatches, letters and consultations) Spivak (1985) found three examples of othering. The most simple form of othering is linking the subject (in this case the Indian tribes) to savage, barbarian or otherwise negative and/or backwards characteristics or behavior. Spivak (1985, pp. 254-255) quotes a letter in which an unknown British general describes the 'highlanders' as he sees them: "I see them [the Indians; TvH] only possessing all the brutality and purfidity [sic] of the rudest times without the courage and all the depravity and treachery of the modern days without the knowledge of refinement". In linking the other, the indigenous tribes in India, to terms as 'perfidy', 'brutality', 'treachery' and 'depravity', the other is constructed as "pathological and morally inferior", in the words of Spivak (1985, p. 256). These tribes were complex cultures with century old histories and their own culture and values. The image that is sketched in the description above is, clearly, completely different. By repeatedly sketching this false image of the Indians, one creates a similarly false image in the heads of the colonial British – leading to all sorts of consequences.

Another, more subtle process of othering, is what Spivak (1985) calls *worlding*. From the archives, she picked dispatches between a certain Captain Geoffrey Birch and his superiors Major-General Ochterlony and Lord Moira<sup>1</sup> Spivak as an example. Spivak sees the descriptions of Birch riding over what used to be Indian territory as "consolidating the self of Europe" (p. 253). Spivak shows how Birch ("a slight romantic figure") describes the country of the other as

1. Shortly after the British colonization of India, Sir David Ochterlony (1758-1825) became the first British Resident in Delhi. According to Coleman (2004), Ochterlony's main responsibilities were the safety of the city of Delhi and the protection of the Emperor. Lord Moira was born as Francis Rawdon Hastings (1754-1826). He was a politician and an officer of the British Army and as the Governor-General of India he commanded a total of 15,000 British troops that were deployed in British India (Thorne, 2004). Spivak (1985, p. 254) describes Geoffrey Birch as "small unimportant folk". He was an assistant agent of the Governor-General.



inscribed earth, thereby completely ignoring the natives and suggesting that the new found territory became a part of the British empire the second the British troops arrived. In doing so, Spivak (1985, p. 254) suggests, “the necessary yet contradictory assumption of an uninscribed earth which is the condition of possibility of the worlding of a world generates the force to make the ‘native’ see himself as ‘other’.” According to Spivak (1985, p. 254), this dimension of othering is all about making the people (in this case the native Indians) aware that they are the colonial Other, the subject, the dominated. This behavior of the English colonialists in India had to make the Indians aware of “who they are subject to.”

The third example comes from a letter of the Board of Control of the East India Company, received by Governor-General Moira. In this letter, the Board of Control forbids Moira to give the subaltern permission to join the British army troops. The Indian Army should not be given access to British technology, science and knowledge because “the master is the subject of science or knowledge” (p. 256). According to Spivak this implies that the colonial Indians are not good, not civilized and not distinguished enough to cope with such intellectual matters. Only the powerful colonial power can be trusted with such high value information, not the colonial other. Just by stating that the master (the British troops) is the subject of science, the entire population of India is portrayed as inferior. In the words of Spivak (1985, p. 256), “The manipulation of the pedagogy of this science is also in the ‘interest’ of creating what will come to be perceived as a ‘natural’ difference between the ‘master’ and the ‘native’ – a difference in human or racial material.”

These are – according to Spivak (1985) – three “random” examples of how othering took place in the colonial days. But, more important, Spivak shows that othering, the creation of the Orient (in Said’s (1978) words), can be done in countless ways and by different sorts of institutions or individuals. There is not one template that shows how this process of othering usually is being done. It can take many different forms and shapes. Therefore one will have to look differently at every single text in order to determine whether or how a text contains examples of post-colonial othering, or any other form of post-colonial framing.

#### **2.2.4 Empire**

The concept of Empire, as developed by Hardt & Negri (2000), is also relevant for this thesis. This concept is more recent and looks at the globalized world in the late twentieth century. In

addition, it describes the role of international organizations and institutions (such as the ICC) within the context of modern day post-colonialism. Hardt & Negri (2000) do not question whether or not the ICC could be post-colonial; according to them the existence of a globally operating, international court is already by definition post-colonial.

Hardt & Negri claim that the sovereignty and authority of nation states has taken on another form and should no longer be thought of as supreme and sovereign authorities, either within or outside their own borders. But this does not mean that the idea of sovereignty has disappeared as well. It has just taken on another form. “Our basic hypothesis is that sovereignty has taken a new form, composed of a series of national and supranational organisms united under a single logic of rule. This new global form of sovereignty is what we call Empire.” (Hardt & Negri, 2000, p. xii) The ICC in its current form can be seen as a modern version of this concept of Empire, especially if one notes that Empire, in contrast to imperialism, does not limit itself by space; it is not fixed by borders, barriers or boundaries. “It is a *decentered and deterritorializing* apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers.” (Hardt & Negri, 2000, p. xxi) Also relevant is the notion:

Every juridical system is in some way a crystallization of a specific set of values, because ethics is part of the materiality of every juridical foundation, but Empire – and in particular the Roman tradition of imperial right, is peculiar in that it pushes the coincidence and universality of the ethical and the juridical to the extreme: in Empire there is peace, in Empire there is the guarantee of justice for all people. (Hardt & Negri, 2000, p. 10)

This quote illustrates that, in the concept as described by Hardt & Negri (2000), Empire pushes for some sort of universal judicial system, in order to guarantee justice for everybody. That is exactly what the International Criminal Court is all about. Hardt & Negri describe Empire as a post-colonial phenomenon, just because it exists – aiming for a universal judicial system as one of its characteristics.

## 2.3 Conclusion

As described in the introduction, African leaders claim that the International Criminal Court is abused by Western powers in order to have some sort of influence over the African continent. This chapter has put this claim, this accusation in a context of neo-colonial behavior. That means

that Western nations, not necessarily former colonial powers, still tend to get involved in African politics and economics, because they want to push their global (capitalistic) agenda or because they have a hard time adjusting to their loss of power in the region after decolonization.

Possible neo-colonialist behavior can be fuelled by post-colonial ways of thinking. The theory of post-colonialism describes how former colonial powers still perceive themselves as better, more modern, more civilized than the former colonies. According to the theory of post-colonialism, (former) colonial powers abuse(d) such images to legitimize their (neo-)colonial powers. “Black Africa is looked on as a region that is inert, brutal, uncivilized – in a word, savage” (Fanon, 1991, p. 130). By sketching this image in popular art, literature but also in official government documents and through other communication channels, the Western powers told themselves they were bringing civilization and humanity to, what Said (1978) calls, ‘The Orient’.

Given the fact that African leaders claim that Western powers abuse the ICC to have an influence over the African continent, this thesis wants to investigate where these feelings come from. This chapter shows a possible answer: according to Fanon (1967, 1991) and Said (1978) (neo-) colonialism is usually legitimized by the Western powers by sketching a negative image of the Orient – in this case Kenya. If the ICC is indeed portraying Africa (or in this case Kenya) as barbarian, this would explain where the African feelings of discontent regarding the ICC come from. The question whether the ICC is indeed a neo-colonial tool (as claimed by African leaders), cannot be answered by this master thesis. But possible post-colonial expressions made by the ICC could in part explain why African leaders are unhappy with the court. How this process usually works, cannot be described with one template. The most simple (and therefore most visible) form of ‘othering’ is linking the subject (in this case the Kenyan leaders and their followers) to savage, barbarian or otherwise negative matters (Spivak, 1985), as this chapter shows. The analysis should therefore focus on trying to find out if this post-colonial form of describing a case, a person or a country can be recognized in the ICC’s documents regarding the cases against Kenyatta and Ruto. For the purpose of this thesis and based on the literature review in this chapter, an ongoing depicting of Kenya as backwards, savage or barbarian, is considered to be a possible sign of post-colonial behavior. Chapter 4 will look for such signs of possible post-colonial behavior in the ICC’s documents.

## 3.0 The Case: The ICC and Post-Election Violence in Kenya, 2007 and 2008

This chapter answers the second sub-question as described in the introduction. **What is the structure of the International Criminal Court (ICC) in general, and what is the case history of the claims against Kenyatta and Ruto, starting with the alleged crimes up to the latest legal developments?**

The chapter first describes the structure of the ICC. Subsequently, it addresses the cases against Ruto and Kenyatta. It describes the crimes that have been committed, the legal actions the ICC has taken and the problems the International Criminal Court encountered in collecting enough evidence against Kenyatta. This chapter also shows there is great discontent regarding this particular case amongst African leaders.

### 3.1 The ICC in General

#### 3.1.1 The Rome Statute

During the second half of the twentieth century the world witnessed a number of horrifying conflicts that shocked the entire world. Right after World War II the Nuremberg and Tokyo tribunals were established to punish criminals of war, but these courts were exceptions; during the following decades no international court was specifically responsible for trying alleged war crimes. Many violators of international law therefore remained unpunished, for different reasons. “In 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the United Nations General Assembly recognised the need for a permanent international court to deal with the kinds of atrocities which had just been perpetrated.” (ICC, 2014e, p. 3) It took until the summer of 1998 however, before such a global court was finally established. The International Criminal Court was officially founded on July 17, 1998, by adopting the Rome Statute. The Statute entered into force at July 1, 2002.

This Rome Statute (ICC, 2011) describes the organization, structure and mandate of the ICC in detail. The ICC is the first permanent global court, based in The Hague. To date, 122 countries

are State Parties to the ICC: 34 African states, 18 Asia-Pacific states, 18 from Eastern Europe, 27 Latin American and Caribbean states, and 25 are listed as Western European and other states. The Rome Statute (ICC, 2011) describes that the court is funded by its State Parties, as well as by donors.

The ICC can only prosecute individuals (so, no groups nor states) that either have the nationality of one of the State Parties, or cases where the alleged crimes have been committed within one of the State Parties. Article 5 of the Rome Statute (ICC, 2011, p. 3) states that the

jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

### **3.1.2 The Structure of the ICC**

The International Criminal Court is divided into four different offices: the Presidency, the Office of the Prosecutor (OTP), the Chambers, and the Registry. (ICC, 2014e)

First there is the *Presidency*. This office consists of three judges. These judges are in office for a maximum of two three-year terms and are elected by an absolute majority of all 18 judges of the Court. The Presidency can be seen as the head of the ICC, since it is responsible for the entire administration of the Court, with the exception of the Office of the Prosecutor (see below), since that is an independent office within the ICC. (ICC, 2014e, p. 9)

The *Office of the Prosecutor* (OTP) is a completely independent office within the ICC, which collects information on possible crimes within the jurisdiction of the ICC. After an analysis of the situation, the OTP has to determine how severe the allegations or suspicions against an individual (or multiple individuals) are, and if there is reasonable ground to start a juridical investigation into crimes against humanity, crimes of genocide, war crimes or the crime of aggression. If so; the OTP will try to bring the perpetrators of the alleged crimes before the Court, in order to get them convicted. (ICC, 2014e, p. 10)

The *Registry* acts as the administrative and operative section of the ICC. Its main role is to support the Chambers and the OTP. (ICC, 2014e, p. 10)

The *Chambers* consist of three different divisions. The Pre-Trial Division (seven judges), the Trial Division (six judges) and the Appeals Division (five judges). Each division is responsible for its own chambers (respectively the *Pre-Trial Chambers*, the *Trial Chambers* and the *Appeals Chambers*). (ICC, 2014e, p. 10)

The *Pre-Trial Chambers* are meant to rule over all (mostly judicial) problems which arise before the actual trial begins. It rules over, for instance, the admissibility of evidence and the compliance of the court procedures prior to the trial. In doing so, the Pre-Trial Chambers supervises how the Office of the Prosecutor does his work. Goal is to guarantee the rights of suspects, victims and witnesses in the earlier stages of the court procedures. The Pre-Trial Chambers, all consisting of either one or three judges, are also responsible for the warrants of arrest or summons to appear, and they decide whether or not to confirm the charges against the suspected individual. If a Pre-Trial Chamber confirms the charges against a suspect, the case goes to trial and a Trial Chamber becomes the responsible office on the case. (ICC, 2014e, p. 10)

When the Pre-Trial Chamber has confirmed the charges against a person, the Presidency establishes a *Trial Chamber*, which consists of three judges. According to the ICC (2014e, p. 10) the main role of the Trial Chamber is to ensure a fair and expeditious trial. The Trial Chamber also determines whether a person is guilty or not. If so, the Trial Chamber sets the penalty.

If any party (the suspect or the Office of the Prosecutor) is – for whatever reason – not satisfied with the verdict of the Trial Chamber, it can turn to the *Appeals Chamber*. This chamber is composed of the President of the Court and four other judges. At request, the Appeal Chamber will look at the case again to verify if all necessary judicial procedures have been executed in the correct manner. (ICC, 2014e, p. 10)

### **3.1.3 The Cases at the ICC**

There are numerous cases under investigation or under trial at the ICC. According to the Rome Statute (ICC, 2011), any State Party can ask the OTP to start an investigation. Non-State Parties can also accept the jurisdiction of the court and ask the ICC's OTP to start an investigation within its own borders, or an investigation into an individual with the nationality of the non-State Party in question. The UN Security Council may also refer cases to the ICC.



Until the present day, twenty-one cases in eight situations have been brought to the ICC. All of these cases concern African individuals (ICC, n.d.c).

Cases against	Organization/ Country	Status
One case against <b>Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen</b> . Raska Lukwiya was a suspect, but he died in 2007.	The Lord's Resistance Army (LRA), Uganda	The Pre-Trial Chamber issued arrest warrants. All four remaining suspects are at large.
Six different cases against six individuals: (1) <b>Thomas Lubanga Dyilo</b> , (2) <b>Germain Katanga</b> , (3) <b>Bosco Ntaganda</b> , (4) <b>Callixte Mbarushimana</b> , (5) <b>Sylvestre Mudacumura</b> , (6) <b>Mathieu Ngudjolo Chui</b> .	Democratic Republic of the Congo	Lubanga and Katanga have been sentenced to fourteen, respectively twelve years of imprisonment. Ntaganda is in custody of the ICC and waiting for his trial. Mbarushimana was released when the Pre-Trial Chamber did not confirm charges. Mudacumura is at large and wanted by the ICC. Ngudjolo Chui is acquitted of all charges. The prosecutor appealed.
Two cases: one against <b>Jean-Pierre Bemba Gombo</b> ; one against a total of five individuals: (1) <b>Aimé Kilolo Musamba</b> , (2) <b>Jean-Jacques Mangenda Kabongo</b> , (3) <b>Fidèle Badala Wandu</b> , (4) <b>Jean-Pierre Bemba</b> and (5) <b>Narcisse Arido</b> .	Mouvement de Libération du Congo (MLC), Central African Republic <sup>2</sup>	All suspects are in custody and are facing their trials.
Five cases against a total of six individuals. One against <b>Ahmad Muhammad Harun</b> and <b>Ali Muhammad Ali Abd-Al-Rahman</b> ; four against (1) <b>Omar Hassan Ahmad Al Bashir</b> , (2) <b>Bahar Idriss Abu Garda</b> , (3) <b>Abdel Raheem Muhammad Hussein</b> ; (4) <b>Abdallah Banda Abakaer Nourain's</b> case was terminated after he died.	Darfur, Sudan	Muhammad Harun, Abd-Al-Rahman and Ahmad Al Bashir are at large. The Pre-Trial Court refused to confirm charges against Abu Garda, therefore he is no longer a suspect. Abakaer Nourain is deceased and therefore this case got terminated. The execution of the arrest warrant of Muhammad Hussein is pending.
Three cases against a total of four individuals. One against <b>William Samoei Ruto</b> and <b>Joshua Arap Sang</b> ; one against <b>Uhuru Muigai Kenyatta</b> ; one against <b>Walter Osapiri Barasa</b> .	Republic of Kenya	Ruto and Sang are facing trial at the ICC. The case against Kenyatta is postponed. The ICC filed an arrest warrant against Osapiri Barasa.
Three cases against three individuals: <b>Saif Al-Islam Gaddafi</b> and <b>Abdullah Al-Senussi</b> ; the case against <b>Muammar Mohammed Abu Minyar Gaddafi</b> got terminated after he died.	Libya	The ICC filed an arrest warrant against Saif Gaddafi. In the case against Abdullah Al-Senussi, the Appeals Chamber confirmed the Pre-Trial Chamber's decision declaring the case inadmissible before the ICC.
Three cases against three individuals: <b>Laurent Gbagbo</b> , <b>Charles Blé Goudé</b> , and <b>Simone Gbagbo</b> .	Republic de Côte d'Ivoire <sup>3</sup>	Laurent Gbagbo and Charles Blé Goudé are in custody of the ICC. The ICC filed an arrest warrant for Simone Gbagbo.

Although the International Criminal Court is up till now only involved in 'African cases', the

2. Most of the suspects are from the Democratic Republic of the Congo, but the alleged crimes were committed in the Central African Republic.
3. Although Ivory Coast did not sign the Rome Statute, the country has accepted the jurisdiction of the ICC, making it possible for the ICC to rule over these cases.

ICC is broadening its scope: “the OTP is currently conducting preliminary examinations in a number of situations including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria” (ICC, n.d.c.).

### 3.2 What Happened in Kenya?

Kenyan president Uhuru Kenyatta and his deputy William Ruto are facing trials at the International Criminal Court, for their role in the post-election violence in 2007 and 2008 that resulted into hundreds of fatalities amongst Kenyan civilians. The following parts of this thesis will extensively describe what happened during these outbursts of violence, how the ICC reacted to these events, and what the reaction of African leaders was in this context.

As with all reports on war (or war-like) situations, it is difficult to distinguish facts from fiction, and neutral reports from propaganda. The following narrative is mainly based upon the *Ballots to Bullets* report from Human Rights Watch (2008) and the so-called Waki Report (CIPEV, 2008) by the Commission of Inquiry on Post-Election Violence, chaired by Philip Waki, a judge at Kenya’s Court of Appeal. This Commission of Inquiry was established by the Kenyan government in February 2008. The international commission consisted of five members (three from Kenya, one from Congo, and an individual from New-Zealand). The Waki Report (CIPEV, 2008) is a 518-page document that describes what happened prior to, during and after the outbursts of violence in Kenya. It is mostly based on accounts of interviews with witnesses. The commission decided to give “the names of alleged perpetrators to the special prosecutor of the International Criminal Court (ICC) in the Hague to conduct further investigations in accordance with the ICC statutes.” (CIPEV, 2008, p. 18).

The HRW report (2008) is less extensive, yet very similar to the Waki Report. It has been published by Human Rights Watch, a New York City based NGO. Its findings are based on Kenyan court documents as well as on interviews with over two hundred witnesses. The document was originally presented as evidence by the Office of the Prosecutor (ICC, 2009b). After the charges had been confirmed, the document was rejected by the court of the ICC, mainly because the writers of the report did not want to give the names of the witnesses they spoke to during their research (Daily Nation, 2014).

For the record, and in order to prevent any possible confusion regarding the background of the attacks, today Ruto and Kenyatta are political partners in the so-called Jubilee Alliance, but during the attacks in 2007/2008 they were political enemies.

### **3.2.1 The Background of the Attacks**

The post-election events in 2007 and 2008 were exceptionally violent and resulted into dozens of casualties; it was, nevertheless, no exception to the rule, since every election since the establishment of a multiparty system in 1991 has witnessed widespread violence (HRW, 2008, p. 11). According to both reports, this violence during election times partly finds its roots in the land distribution that followed after Kenya's independence from Britain in 1963. HRW (2008) describes how during colonial times British settlers (and a smaller group of settlers from other European countries) confiscated approximately twenty per cent of Kenya's most fertile agricultural lands, without asking, without permission, and without paying for it. After decolonization, most of the settlers left. The valuable land they once possessed was not handed back to the people that used to own it before confiscation, however, but according to colonial laws the land came in the hands of the new nation state of Kenya. The reason for this was that the colonial laws described the 'natives' as being incapable of being land owners, therefore the government held the land 'on trust'. After independence, the newly installed Kenyan government, with Jomo Kenyatta (the father of present-day President Uhuru Kenyatta) as Prime Minister and later as President, did not hand the land back to its original owners either. Instead, the Kenyatta administration sold it to the highest bidder, most of the time these buyers belonged to Kenyatta's own Kikuyu ethnic group. This land issue has not been resolved yet. On the contrary, it became a symbol of corruption, nepotism and theft by government officials.

The impunity of these land grabbers also led to escalation of the issue in the years after decolonization. The practice of illegal allocations of land increased dramatically during the late 1980's and throughout the 1990's [...] and land was to become granted for political reasons, or simply subject to outright plunder by a few people at the great expense of the public. (Southall, 2005, p. 146)

Southall shows that most of these illegal allocations of public land took place right after the national elections in 1992, 1997, and 2002. This led to grievances against the government, and

(regardless of the outcome) will put pressure on every general election Kenya will hold in the future.

Another issue that has to be discussed in this context, is the impunity for perpetrators of political motivated violence in the past. Every election since the British colonizers left ended up in violence. HRW (2008) shows that between 1991 and 1993, fifteen hundred people were killed and 300,000 Kenyans were displaced as a result of political violence. This violence was orchestrated by political leaders, yet no one was ever held responsible for his or her role in the organization of this violence. The violence that followed the elections in 1997 shows the same pattern: a lot of people were killed after political leaders organized riots, yet no one was brought to justice.

Another factor that might have played a background role during the post-election violence in 2007 and 2008, is the ethnic diversity of Kenya's population. According to the Waki Report (CIPEV, 2008) Kenya consists of 42 different ethnic groups. And although this ethnic diversity has never been the main or only reason for violence, the post-election outbursts of violence have always followed these ethnic lines. Most of the violence occurred in ethnically mixed regions, villages, or cities.

### **3.2.2 The Violence**

Although the violence was carefully orchestrated (as will be described later on), HRW (2008) states there was an immediate trigger before Kenya began to slide into violence. The riots began straight after the first reports on fraud during the counting of the votes, on December 27, 2007. The fraud committed during the last stage of the counting of the votes for the Presidential elections was the most striking, and directly led to disturbances. The Presidential election was a fight between Mwai Kibaki, the leader of the Party of National Unity (hereafter: PNU) and his political rival Raila Odinga, the leader of the Orange Democratic Movement (hereafter: ODM). At night, when the counting was coming to an end, Odinga had a lead of approximately one million votes. But at the close of the counting, Kibaki, miraculously, won with a "razor thin margin", in the words of HRW (2008, p. 22). Five of the electoral commissioners publicly stated fraud was committed and observers (domestic as well as international) also voiced serious doubts about the fairness of the elections. In the meantime, Kibaki had himself sworn in to a second term in office. As reports about the fraud spread over the country, the violence started.

Throughout the entire country numerous people got killed or wounded, but for the purpose of this thesis I will only discuss the violent acts that are linked to Kenyatta or Ruto. Kenyatta is held responsible for the organization of riots in the cities of Naivasha and Nakuru, both located in Rift Valley Province, while the ICC suspects Ruto to be the mastermind behind the violence in and around the Eldoret county. First the violence in Eldoret will be addressed, since the violence in Naivasha and Nakuru was a direct response to the events in Eldoret.

### ***3.2.2.1 The Violence in Eldoret***

The first wave of Rift Valley violence took place in and around Eldoret, a highland town 125 kilometers east of Kenya's border with Uganda (HRW, 2008, p. 35). Eldoret is a town mostly inhabited by Kalenjin residents. This ethnic group traditionally supports the ODM, led by Odinga, the 'victim' of the fraud during the Presidential elections. Fueled by rioting and violence in other ODM supporting towns and areas, and encouraged by ODM and Kalenjin elites, Kalenjin people started attacking the Kikuyu minority (and to a lesser extent also the Luo and Luhya minorities) in Eldoret. HRW (2008, pp. 35, 36) describes how the tensions between the various ethnic groups was already "exacerbated by the sharp ethnic lines drawn between opposing camps during the 2007 electoral campaign [...]. Around Eldoret many Kalenjin politicians stoked ethnic tensions to mobilize political support among their ethnic kinsmen, a tactic familiar to Kenyan politics."

HRW (2008, p. 36) mentions examples of dangerous rhetoric prior to the elections. A Kalenjin politician claimed he would "remove the roots" of local Kikuyu communities. Other politicians talked about the Kikuyu minority as a "snake we have to get rid of". Due to this use of language, many Kalenjin believed that the earlier addressed land ownership issues would be resolved once ODM would have been elected. Only a few days prior to the elections, "local elders and ODM organizers in many communities around Eldoret called meetings where they declared that electoral violence for Kibaki would be the signal for 'war' against local Kikuyu. They told community members of PNU victory should be seen as conclusive proof of electoral fraud and that all Kikuyu were complicit in it" (HRW, 2008, p. 37).

Needless to say, the ground was fertile for political violence against Kikuyu residents in Eldoret. So even before Kibaki was officially declared the winner of the Presidential elections, violence erupted in and around Eldoret. Rumors of possible fraud and a delay in the counting of

the votes were enough to spark the violence. The Waki Report gives an example of what this violence looked like.

In Uasin Gishu [the district of Eldoret; TvH], the violence entailed large marauding gangs of 1,000-2,000 Kalenjin youth, brandishing machetes, bows and poisonous arrows, occasional firearms, matches and projectiles filled with petrol. These menacing gangs blocked and manned a variety of roads with trees trunks and huge rocks, some of which were transported by tractors, throughout the district. They also burned vehicles and tires while refusing to allow anyone to pass as well as engaging in killing, rioting, and looting. (CIPEV, 2008, p. 42)

The Waki Report (CIPEV, 2008) also gives an example of how these gangs were killing Kikuyu people. The story of the 70 year old Mzee Joseph Mwangi Macharia is one of the most striking examples.

On 31st December, 2007 at about 5 p.m., he had a family get-together in his house at Chagaiya village in Kesses location, when a group of about forty young people, among them his neighbours, struck. They said they wanted five heads from that house – his and his four sons'. As he pleaded for mercy one of them struck his son on the chest with a club and another shot him with an arrow as he tried to escape. Another son was pierced with a spear and his throat was cut. The rest of the family tried to hide inside the house but it was broken down and they were pulled out. His daughter and her child were pulled out and their throats were slit. So was his wife's throat.

One of the most horrifying and therefore well-known acts of violence occurred in rural Kiambaa, south of Eldoret. On January 1, 2008, a group of terrified Kikuyu residents was hiding for the aggressive gang that terrorized the region. They were seeking refuge in a church in Kiambaa when they got encountered by the mob of outraged men, belonging to the Kalenjin ethnic group. The Kalenjin gang took the mattresses the victims brought with them, stacked them up against the church, covered them in petrol and then set the mattresses on fire. (HRW, 2008, p. 41). The women and children inside the church that tried to get out of the burning inferno were pushed back. The men outside the church that were trying to protect their families, were killed with machetes. At the end of the day, seventeen burned alive in the church, eleven others died on the



way to the hospital, fifty-four were injured. (CIPEV, 2008, p. 46) In total, 230 people died in the violence in the Uasin Gishu district (CIPEV, 2008, p. 308).

The violence in the Eldoret region was not a spontaneous outburst of anger, but a well-organized attack – implemented before and after the election results were made public, according to both reports. HRW (2008, p. 37) describes that meetings were held for Kalenjin residents. During these meetings the atmosphere was aggressive and hostile. “The term ‘war’ was widely used in urging a violent reaction to disappointment at the polls.” The meetings were compulsory for the Kalenjin people in the region. During these meetings younger men were pressured to join the violent killing gangs. Those who could not participate, for whatever reason, were asked to donate money to support the anti-Kikuyu violence. Those who refused, were threatened. HRW (2008) writes that the chief architects of these plans were prominent members of the ODM, all well-known and respected individuals. Jackson Kibor, for instance, is named as one of the main organizers behind the violence. Kibor is an elected member of the local government in Eldoret. In an interview with the BBC (Harter, 2008) he openly claimed that Kalenjin had the right to kill Kikuyu. Kibor was arrested for incitement, but later released on bond.

HRW (2008) found evidence of local leaders (like Kibor) being involved in the planning and execution of the lethal attack plans, but could not prove the national leadership of the ODM was directly involved as well. HRW describes how all the Kikuyu victims blame William Ruto, then a member of the parliament, for the attacks. They suggest that his strong anti-Kikuyu rhetoric prior to the election sparked the already tense situation. In addition, all Kalenjin people that HRW spoke to in January (during the attacks) said: “If Ruto says stop, it will stop” (HRW, 2008, p. 39). The report of HRW did not present any hard evidence on Ruto (or anybody else). In an interview with HRW, William Ruto denied that he was involved in the planning or execution of the attacks.

In the Waki Report, the commission decided not to name the persons that were held responsible for the planning and organization of the violence. It chose not to name the perpetrators because, in its view, in the given time frame it was not possible to conduct a solid investigation that would answer the guilt question. “One of the fundamental principles of law is the application of the rules of natural justice in the adjudication of disputes. The other is the presumption of innocence. And one of the rules of natural justice, which the Commission jealously guards, is that no one should be condemned without giving them an opportunity to be heard” (CIPEV, 2008, p. 16).

In conclusion: although word on the street is that Ruto was involved in planning the post-election attacks, neither of the reports could present evidence for these claims.

### ***3.2.2.2 The Violence in Nakuru and Naivasha***

It took almost a month before the violence in other parts of Kenya reached the villages of Naivasha and Nakuru, both located in the center of the Rift Valley Province, not far from Nairobi. The violence in Nakuru and Naivasha followed the first wave of Rift Valley violence, with its epicenter in and around the town of Eldoret.

Both HRW (2008) and CIPEV (2008) describe how large numbers of Kikuyus fled from the Eldoret region to Nakuru and Naivasha, both towns with a majority of Kikuyu residents. At its peak Naivasha was home to 22,000 refugees (IDP's), mostly Kikuyus. (CIPEV, 2008, p. 117). These refugees told stories about what had happened. These reports of murders, burnings, rapes and lootings sparked the anger of the entire Kikuyu population in Nakuru and Naivasha. It did not take long before organized groups of Kikuyus started targeting groups they associated with ODM; Luo, Luhya and most of all Kalenjin ethnic minorities. According to HRW (2008, p. 43), between January 23 and January 30 the Kikuyu-led pogroms were responsible for hundreds of fatalities. Notorious is the burning of nineteen people, including at least two babies, that were trapped in a locked house in a village near Naivasha. One eyewitness describes this scene in the report of HRW (2008, p. 47). "I saw a man cut, and a house burned, the one with all the people in. It was around twelve in the afternoon. The house was surrounded by a mob. [...] I saw boys go in and take the kids out of the house before the place was set on fire with the man left in there. But they did not know that in the back room were hiding more people." It is one of many horrifying eyewitness reports on what happened in and around the towns of Nakuru and Naivasha. According to CIPEV (2008, p. 308), a total of 213 people were killed in Nakuru during the post-election violence. Another fifty died in Naivasha.

There is little doubt that a well-known criminal gang was responsible for the revenge attacks in this two cities. Both HRW (2008) and CIPEV (2008) show that the power and influence of this gang, the Mungiki, should not be underestimated.

The Mungiki are a brutal criminal gang that promotes a violent brand of Kikuyu chauvinism. They emerged in the late eighties as a principally cultural and spiritual movement promoting Kikuyu

heritage and culture, but increasingly became involved in organized crime in the slums of Nairobi in the 1990s. By 2002 they were a well-established group with large number of followers and alleged ties to leading politicians. Since then the government has cracked down on them. In 2007 the group was driven underground and badly weakened through a violence government campaign aimed at its suppression. (HRW, 2008, p. 44)

Although the term Mungiki is often misused (victims usually call any group of rioting Kikuyu youth Mungiki), it is commonly believed ‘true’ Mungiki members initiated the riots. Even more striking is the fact they were organized, paid and guided by local leaders, politicians, business men or other high level individuals. HRW states, however, that it is unclear whether or not national politicians were involved in controlling the Mungiki.

The extent to which the local organizers were in touch with senior PNU politicians or members of the government is unclear. But circumstantial evidence suggests that senior members of the government may have been aware of what was going on. Mungiki leaders told Human Rights Watch that they had described the activities of their renegade colleague, Wariunge, in detail to the police and government. [...] Other reports cited by the BBC describe contacts between the renegade Mungiki leader and State House [...]. Several newspapers articles also describe the involvement of unnamed government ministers in raising funds for self-defense units. (HRW, 2008, p. 45)

CIPEV (2008, pp. 121, 122) claims it has proof that in the weeks prior to the attacks of January 2008, high ranked politicians helped to reinstall this gang in order to execute the attacks. The report states that it received credible evidence that the attacks in Naivasha between January 27 and 30, 2008, were planned and executed by Mungiki members. In doing so, they were fully supported by the political leaders and the leading figures in the business world of Naivasha. The Commission also claims to have direct evidence that the government and its political leaders in Nairobi may have had a direct contribution to the preparation of these violent attacks. This, according to CIPEV (2008, p. 122) included “key office holders at the highest level of government”. The report mentions two meetings (one held in the State House, the other in Nairobi Safari Club) as crucial to the planning. Senior members of the Government and other key Kikuyu personalities attended these meetings.

For the purpose of this thesis it is unfortunate that, as mentioned earlier, the CIPEV (2008) decided not to mention the names of the individual people behind the planning of the attacks. In the entire document there is only one reference to Uhuru Kenyatta, which is about his appearance at a peace meeting after the post-election violence. HRW (2008) did not link Uhuru Kenyatta to any of the attacks either.

### **3.3 The (Re)action of the ICC**

The Waki Report suggested that a Special Tribunal should be installed in order to prosecute the masterminds behind the violence. If Kenyan authorities would fail to do so – the commission threatened – it would compile a list with all the names and information belonging to those who bear the greatest responsibility for the post-election violence. This list would then be sent to Special Prosecutor of the ICC, with the request to analyze the situation as described, and the question to look at the possibilities of starting an investigation and a possible prosecution of the suspected individuals as mentioned in the report. Kenyan authorities failed to act accordingly, so the commission decided to pass the results of the Waki Report to the ICC, including a list with names of the suspects. (CIPEV, 2008, p. 473)

#### **3.3.1 The Pre-Trial Procedures**

The case summary of the ICC (2013b) shows that on November 5, 2009, the ICC prosecutor notified the President of the court that he intended to admit a request to start a formal investigation into the post-election violence in Kenya. A day later, the situation was assigned to Pre-Trial Chamber II (hereafter: PTC II). This chamber, on March 31, 2010, granted the request to open an investigation into alleged crimes against humanity.

The PTC II claims that there is ground to believe the following happened (ICC, 2014a): between January 24 and 28, 2008, there were violent attacks against the non-Kikuyo populations in the Kenyan villages of Nakuru and Naivasha. The victims of these attacks, mostly belonging to the Kalenjin, Luo and Luhya ethnic groups, were perceived as supporters of the Orange Democratic Movement, a political movement in Kenya. Due to the widespread and systematic attacks in these two villages many were killed, raped, displaced, injured or robbed. The ICC (2014a) holds the Mungiki criminal organization primarily responsible for these attacks. But, in the background, there is good reason to assume that Kenyatta and his direct subordinates were the

masterminds behind the violence. “Between, at least, November 2007 and January 2008, inter alia, Mr Kenyatta and members of the Mungiki, allegedly created a common plan to commit these attacks. According to the alleged plan, it was envisaged at the meetings that the Mungiki would carry out the attack with the purpose of keeping the Party of National Unity (PNU) in power, in exchange for an end to government repression and protection of the Mungiki’s interests.” (ICC, 2014a)

The ICC clearly sees Kenyatta as one of the driving powers behind the attacks.

The contribution of Uhuru Muigai Kenyatta to the implementation of the common plan was allegedly essential. More specifically, Mr Kenyatta’s contribution allegedly consisted of providing institutional support, on behalf of the PNU Coalition, to secure: (i) the agreement with the Mungiki for the purpose of the commission of the crimes; and (ii) the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha. (ICC,2014a)

Furthermore, the ICC (2013b) holds Ruto responsible for crimes against the Kisii, Kamba and Kikuyu ethnic groups in other parts of Kenya. These groups were seen as supporters of the Party of National Unity (PNU), an opposition party in Kenya. The crimes committed in Kapsabet town and Nandi Hills alone led to the death of 230 people. Another 505 were injured and five thousand displaced. According to the ICC:

[...] there was a plan to punish PNU supporters in the event that the 2007 presidential elections were rigged, which allegedly aimed at expelling them from the Rift Valley, with the ultimate goal of creating a uniform Orange Democratic Movement (ODM) voting block. In order to implement the plan agreed upon, a network of perpetrators has been allegedly established with the purpose of evicting members of the Kikuyu, Kisii, and Kamba communities in particular because they were perceived as PNU supporters. The Network was allegedly under responsible command and had an established hierarchy. The network possessed the means to carry out a widespread or systematic attack against the civilian population, as its members had access to and utilized a considerable amount of capital, guns, crude weapons and manpower. (ICC, 2013)

Ruto was a key player in organizing these attacks, according to the ICC (2013b). His contributions to the organization and coordination of the attack plans “that meet the threshold of

crimes against humanity” were crucial for the attack plans to succeed. Ruto was responsible for the overall planning of the attacks in the entire Rift Valley. Ruto was responsible for the purchase of a large amount of weapons and guns that was used during the attacks on the political opponents. He also recruited and gathered participants for the attacks and instructed them whom to kill and displace and whose property they were supposed to destroy. After the killing, fighting, rioting and looting, Ruto paid the participants that behaved as instructed (ICC, 2013). In his actions, Ruto was supported by Joshua Arap Sang, the head of operations at Kass FM.

On December 15, 2010, the prosecutor requested the PTC II to issue summonses to appear for six Kenyans, including Kenyatta and Ruto. According to the prosecutor, there were reasonable grounds to believe that these six were responsible for crimes against humanity. On March 8, 2011, the PTC II issued the decisions on the applications submitted by the prosecutor. Ruto and Kenyatta (and the other four) were summoned to appear for the ICC. The same month, on March 31, 2011, the Kenyan government filed an application challenging the admissibility of the case before the ICC. On May 30, 2011, the PTC II rejected this application, a decision backed by the Appeals Chamber on August 30, 2011. The confirmation of charges hearing in the case against William Ruto was held from September 1 to September 8, 2011. The confirmation of charges hearing in the case against Uhuru Kenyatta was held from September 21 to October 5, 2011. After these hearings, the charges were confirmed by the PTC II and both Kenyatta and Ruto were put on trial. Three other Kenyans were dismissed. Joshua Arap Sang is facing trial in the same case as Ruto (officially the case is called *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, but the scope of this thesis only limits itself to Ruto since he is a high level politician).

### **3.3.2 The Trials**

The trial against Kenyatta was scheduled to start on October 7, 2014. The trial has been postponed in order to provide the government of Kenya the opportunity to come up with certain records, which the Prosecution has previously requested (ICC, 2014b) The charges against Kenyatta are as follows (ICC, 2012a):

Mr Kenyatta is allegedly criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the crimes against humanity of:

- murder (article 7(l)(a));

- deportation or forcible transfer (article 7(l)(d));
- rape (article 7(l)(g));
- persecution (articles 7(l)(h)); and
- other inhumane acts (article 7(l)(k)).

The trial of Ruto already started, on September 10, 2013. The charges against Ruto are as follows (ICC, 2012b):

Mr Ruto is accused of being criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the crimes against humanity of:

- murder (article 7(l)(a));
- deportation or forcible transfer of population (article 7(l)(d)); and
- persecution (article 7(l)(h)).

Since Ruto is the deputy president of Kenya, and therefore cannot attend all hearings at the ICC, the responsible Trial Chamber excused Ruto from a continuous presence in The Hague, under certain conditions.<sup>4</sup>

For the ICC, the Spring and Summer of 2014 were full of complications, especially in the case against Kenyatta – as Allison (2014) shows. The Office of the Prosecutor accused (the legal team of) Kenyatta of frustrating the court procedures. During the collection of any possible evidence by the ICC's investigators, Kenyatta was already elected as president of Kenya. Due to this unusual situation (ICC investigations usually do not involve heads of state), Kenyatta was at least technically able to obstruct the ICC's investigators. According to Allison (2014), the investigators repeatedly asked for access to the records of Kenyatta's bank account as well as access to his telephone details. These records could contain evidence that Kenyatta paid perpetrators of the post-election violence – making him at least partly responsible for planning the post-election attacks. The Kenyan government (with Kenyatta at the head of the government, obviously) denied access to these details over and over again. In addition, the Office of the Prosecutor had a very hard time finding witnesses that are willing to testify against Kenyatta. Various witnesses that agreed to testify in front of the ICC at an earlier stage, withdrew in 2014.

4. For a list of the conditions, see: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/pages/ruto-sang.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/pages/ruto-sang.aspx), on July 4, 2014.



In both the Ruto and the Kenyatta case there is a very high drop-out rate among witnesses. “We are having tremendous difficulties [...] with our witnesses not wanting to come forward or changing their minds at the last minute”, said the ICC Chief Prosecutor Fatou Bensouda in the *Daily Nation* (Kelley, 2014). In the same article, Bensouda also shows what – in her view – is the reason for the behavior of these potential witnesses. Bensouda claims these witnesses are the subject of “unprecedented intimidation” in Kenya.

The Office of the Prosecutor also believes there is ground to assume that witnesses were being bought off. The ICC is pressing charges against a Kenyan called Walter Osapiri Barasa. Barasa was charged with several offences against the administration of justice. One of them was “corruptly influencing or attempting to corruptly influence ICC witnesses” (ICC, 2013a). In three cases Walter Barasa tried to bribe witnesses that were involved in the Kenyatta case.

The withdrawal of witnesses and the non-cooperating attitude of the Kenyan government has led to a lack of evidence and, subsequently, has seriously weakened the case of the Office of the Prosecutor. In the Kenyatta case it even came to the point that the Office of the Prosecutor wants the case to be adjourned indefinitely – allowing the prosecution to collect more evidence. It was not the first time the prosecution asked the court to delay the case because of a lack of evidence. In a special notice to the trial chamber, the Office for the Prosecutor wrote the following:

From an evidentiary standpoint, the situation is the same as when the Prosecution sought an adjournment of the trial date on 19 December 2013 – the available evidence is insufficient to prove Mr Uhuru Kenyatta’s alleged criminal responsibility beyond reasonable doubt. In ordinary circumstances, the insufficiency of evidence would cause the Prosecution to withdraw the charges. As previously explained, however, it would be inappropriate for the Prosecution to withdraw the charges at this stage in light of: (i) the Government of Kenya’s (“GoK”) continuing failure to cooperate fully with the Court’s requests for assistance in this case; and (ii) Mr Kenyatta’s position as the head of the GoK. In the circumstances, the Prosecution respectfully submits that the trial should be adjourned until the GoK executes the Prosecution’s Revised Request for records in full. (ICC, 2014d)

The court has not decided to adjourn the entire case against Kenyatta yet. But, in response to the request of the Office of the Prosecution, it published a press release on its website, stating that: “The Chamber [...] convened two public status conferences for 7 and 8 October 2014 [...], to

discuss the status of cooperation between the Prosecution and the Kenyan Government” (ICC, 2014).<sup>5</sup>

At present, Kenyatta and Ruto are not in custody of the ICC.

### **3.3.3 Discontent of (Other) African Leaders**

At the end of November 2009, the ICC started its judicial procedures in the two cases. But ever since the beginning of the process, both Kenyatta and Ruto objected to the procedures and the ensuing trial. In a speech at the African Union Summit in Addis Ababa, Kenyatta voiced his complaints about the ICC.

[...] America and Britain do not have to worry about accountability for international crimes. Although certain norms of international law are deemed peremptory, this only applies to the non-Western states. Otherwise, they are inert. It is this double standard and the overt politicization of the ICC that should be of concern to us here today. If it is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and people that should outrage us. People have termed this situation ‘race-hunting’. I find great difficulty judging them wrong. What is the fate of International Justice? I dare say that it has lost support owing to the subversive machinations of its key proponents.

Cynicism has no place in justice. Yet it takes no mean amount of selfish and malevolent calculation to mutate a quest for accountability on the basis of truth, into a hunger for dramatic sacrifices to advance geopolitical ends. The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers.

Kenyatta is not alone in his critique. During a Special Summit of the African Union on October 11-12, 2013, in Addis Ababa, Ethiopia, African leaders challenged the ICC, calling for a deferral of all the cases against incumbent heads of state. “The summit urgently asked for the deferral of the cases against President Kenyatta and his deputy William Ruto so they can fulfil their duties to run the country. A sitting head of state or government should not be prosecuted while in office, leaders said.” (Africa Research Bulletin, 2013a, p. 19901)

5. This source also contains a list of all the previous decisions to adjourn the process against Kenyatta.

The reason behind these feelings of discontent is instrumental for this thesis. As described in the introduction, the Ethiopian Minister of Foreign Affairs Tedros Adhanom Ghebreyesus is unhappy with the ICC, calling it a “political instrument targeting Africa and Africans” (PanAfrican News Agency, October 12, 2013). The Somali Prime Minister Hailemariam Desalegn refers to the policy of the ICC as ‘race hunting’. According to Hailemariam African leaders are concerned that out of those indicted by the ICC, “99% are Africans. This shows something is flawed within the system of the ICC and we object to that.” (Africa Research Bulletin, 2013b).

Rwanda’s ambassador to the African Union, Joseph Nsengimana also expressed his discontent. “It is not only the case of Kenya. We have seen international justice is becoming more and more a political matter.” (BBC, 2013).

Another claim the African leaders keep making is that the United States controls the ICC. The fact that the United States officially has no role in the ICC, does not change their opinion. According to some, the United States plays an important role in the background. “The US controls the ICC, first of all through the NGOs,” according to Otachi Bw’Omanwa, a defence lawyer of Kenyatta (TPIR Heritage Defense, 2012b). Bw’Omanwa states that much of the evidence behind the indictments of the ICC is gathered by NGOs. These NGOs are, at least according to Bw’Omanwa, funded by the United States. He also points at the dominant role of the United States in the United Nations Security Council. “More importantly, the US exerts political and military muscle through the UN Security Council.” According to the Rome Statute (ICC, 2011) the UN Security Council is able to refer situations to the ICC.

It eventually came to the point that, during an extraordinary summit on October 11 and 12, 2013, the African Union discussed the possibility of a mass African withdrawal from the ICC. The plan got drafted by Kenya, but a possible success of the plan would not have had any influence on the Kenyatta and Ruto cases, since Kenya was a signing member of the ICC at the time the crimes were committed – a necessity for the ICC to be able to rule in the case, as stipulated in The Rome Statute (2011). The Kenyan initiative was not backed by the required two thirds majority.<sup>6</sup> Although a majority of the African Union members did not feel an urge to push

6. As a compromise, the African Union decided that “to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any Inter Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.” (African Union, 2013, p. 2) In addition, the AU also states that the trials against Kenyatta and Ruto

for mass withdrawal, according to the media numerous countries (Kenya, Uganda, Rwanda, Ghana, South Africa, Zimbabwe, Sudan, Ethiopia, Nigeria, Malawi, Tanzania and Algeria) were in favor of an immediate declaration of withdrawal from the Rome Statute, thereby extracting the African countries out of the ICC's jurisdiction (Namunane, 2013). Although this plan did not get a majority during the summit of the African Union, the fact that such a rigorous plan got drafted in the first place, and the reports that it got backed by twelve African countries, shows above all that there is a high level of dissatisfaction with the way the ICC is acting in Africa.

### **3.4 Conclusion**

In summary, the situation is as follows: the ICC has a mandate to convict perpetrators of certain crimes in State Parties. After the post-election violence in 2007 and 2008 the OTP of the ICC decided to start an investigation. Ruto and Kenyatta, among others, were named as alleged perpetrators of illegal actions. The Pre-Trial Chambers confirmed the charges, and therefore both Ruto and Kenyatta are currently (or soon to be) facing charges. This chapter shows that the ICC is – according to the Rome Statute – a completely independent international court. Nevertheless, African leaders claim that the ICC is being abused by former Western powers in order to maintain or attain some sort of influence in the African continent. The following chapter will examine if there is any ground to these claims.

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should be suspended until they complete their terms of office.

## 4.0 Do the African Leaders Have a Point?

This chapter addresses the third sub-question, which is: based on **the other two sub-questions, can the ICC documents be labelled post-colonial at all?**

The chapter starts with examining the claims by looking at the literature and the situation at a first glance. Are there any indications that the ICC is indeed a post-colonial tool? Next, this chapter takes a closer look at the court documents of the ICC. After describing the methodology, this chapter examines whether or not the sentiments of the African leaders could possibly be fuelled by post-colonial expressions in court documents.

### 4.1 A First Glance

At first sight, what could possible indications be that the International Criminal Court is indeed primarily a court that is trying to influence politics in Africa, as the African leaders claim it to be? The previous chapters described the claims and doubts of African leaders regarding the ICC. The following paragraph is examining these claims at a first glance.

First of all, the court is founded in Rome and based in The Hague, both capitals of former colonial countries. Most European countries, and all former colonial powers, have signed and ratified the Rome Statute of the ICC. In addition, on many occasions the European Union has expressed its firm support for the court (Sicurelli, 2010, p. 43). The strongest consideration in support of the claims made by the African leaders is that all of the present (and past) cases at the court are/were targeting African suspects (ICC, n.d.c). As mentioned before, there is a total of twenty-one current cases at the ICC, all of them directed at prosecuting individuals from a total of eight African countries. This fact seems hard to swallow for the African leaders and supports them in their perception that the ICC is an ‘imperial tool’, only targeting Africans. Obviously, Africa is not the only continent where crimes against humanity have been or are committed. There are numerous situations in non-African countries that are under the attention of the ICC’s prosecutors. “The OTP is currently conducting preliminary examinations in a number of situations including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria” (ICC, n.d.c). But the exclusive prosecution of Africans creates the impression that “blacks are

inherently criminal and have a propensity to kill each other”, as voiced by Taku (TPIR Heritage Defense, 2012a).

On the other hand, there are of course also considerations in opposition to the claim that the ICC is a post-colonial instrument. The majority of the State Parties to the Rome Statute are non-European, let alone former colonial powers. In addition, the claim that the United States has a great influence on the ICC is at best questionable, since it is no longer an official member of the court. President Clinton signed the treaty at the end of his second term in office, but his successor George W. Bush withdrew the American signature (Calzonetti, 2012). The Americans have never ratified the treaty and, after the withdrawal of its signature, now no longer have any official part in the ICC.

The claim that the United States controls the ICC through the UN Security Council is questionable. Although the UN Security Council can refer situations to the ICC (ICC, n.d.b), it can only do so with a unanimous decision by its members. And with regard to the sponsoring of NGOs, one of the most important reports on the post-election violence, the earlier described Waki Report, was officially handed over to the ICC’s prosecutor in 2009 (ICC, 2009a) and accepted as a piece of evidence by the Pre-Trial Court, despite objections of the defense attorneys (ICC, 2014f). This piece of evidence was, contrary to what Bw’Owamna claims, not paid for by foreign (American) donors but mostly funded by the Kenyan government. According to the Kenyan National Assembly (2008, p. 4107) the total costs of the Waki report were 7,635,694 Kenyan Shilling (or 64,405 Euro). The Kenyan government paid almost eighty per cent of the costs, the rest was paid for by unknown (American?) donors. This is the only (public) piece of evidence that might suggest that American donors contributed to the case-related court procedures at the ICC. It is of course possible that there is other, non-public (and therefore unknown) evidence which has been funded by American NGO’s or other donors, but as far as the important Waki report is concerned, the claims of Bw’Owamna are at best questionable.

A closer look at the composition of the offices of the judges and the prosecutor also shows that the court, at least at first sight, does not seem to be very Western(-European). There are sixteen judges in office. The number of European and African judges is exactly the same: four from both continents. The ICC’s prosecutor, Fatou Bensouda, is from Gambia, her deputy is Canadian. The head of the jurisdiction department comes from Lesotho. Only the head of investigations (Michel de Smeth from Belgium) was born in a former colonial power.

Nevertheless, all these considerations can be and are countered, if looking through an African lens. The fact that a Western country (be it Australia, Canada, or the United States) is not a former colonial power, does not mean in itself it cannot behave in a neo-colonial way. As Chapter 2 of this thesis has shown, neo-colonialism does not necessarily involve former colonial powers. Neo-colonial behavior can also be conducted by other Western countries, trying to push their own political, economic or cultural agenda.

Even the fact that African judges or prosecutors are part of the ICC does in itself not mean it cannot be considered to be a post-colonial court, applying post-colonial theory. The post-colonial scholar has a word for the relatively privileged class that acts in line with the (former) colonial power: '*comprador*', Portuguese for 'purchaser' (Ashcroft, Griffiths & Tiffin, 2000, p. 55). "The word continues to be used to describe a relatively privileged, wealthy and educated elite who maintain a more highly developed capacity to engage in the international communicative practices introduced by colonial domination, and who may therefore be less inclined to struggle for local cultural and political independence."

To summarize: there are some considerations that could support the African leaders in their idea that the ICC is abused by Western powers, in order to maintain or attain some sort of influence in Africa. The fact that all cases so far are targeting Africans, is likely to be one of the main reasons for the African discontent. And although there are some facts that might debunk their claims (such as the fact that the United States has no official part in the ICC), the above shows that the African leaders (or their representatives) come up with counter arguments that in their view still support their claim of the ICC being an 'imperial tool'.

In the end, African leaders still strongly stick to their claims that the ICC is a tool to control the African continent. Facts that might possibly support that idea are embraced, while arguments that seem to contradict these claims are countered by notions from the post-colonial scholar.

## **4.2 A Content Analysis of Court Documents**

### **4.2.1 Methodology**

This part of the thesis is based on a content analysis to try to see if the texts of the ICC could be called post-colonial at all. A content analysis is a methodology that is used to structure and/or analyze written materials. "Content analysis is a set of procedures for collecting and organizing information in a standardized format that allows analysts to make inferences about the



characteristics and meaning of written [...] material.” (GOA, 1989, p. 6) Content analysis has also been described as “the systematic examination of written or recorded communication in order to break down, identify, and analyse the presence or relations of words, word sense, characters, sentences, concepts, or common themes.”

The nature of the written material that is looked at, can be very diverse – varying from books and newspapers to reports, legislation or other written public documents. This methodology can be used to identify subtle differences in tone of voice, content and meaning. Krippendorff (2004) and GOA (1989) extensively describe how to perform a content analysis. Below will be outlined how the content analysis in this thesis is designed.

#### **4.2.1.1 The Texts**

In order to see if the court documents of the ICC are post-colonial, it is useful to compare these to a ‘neutral’ text, as Krippendorff (2004) states. In doing so, the possible differences in choice of words, tone of voice or context enables one to make judgements about the selected texts.

Finding a neutral standard is challenging. There are two (earlier discussed) major reports that at first sight seem suited: the report conducted by HRW (2008) and the Waki Report (CIPEV, 2008). But, unfortunately for this thesis, both reports cannot be used, albeit for different reasons. As described, the Waki Report (2008) is used as a piece of evidence by the prosecutor of the ICC. For that reason it is not unlikely to presume that the texts of the ICC are more or less comparable, and therefore a comparison through a content analysis would not make much sense. The report of the HRW (2008) has a different drawback. Human Rights Watch is a New York City based NGO, and although the foundation does not accept any funds of any nation state (HRW, 2013), the previous chapters showed the opinion of African leaders regarding the role of NGOs and the possible relation to the ICC. If the ICC is a priori seen as an imperial tool, then HRW could also be called a post-colonial institution. In order to obviate such claims, for the purpose of this study it is better to ignore the HRW (2008) report for the content analysis.

My neutral standard will be the coverage of Kenya’s largest newspaper, the *Daily Nation*. There is no reason to assume that this newspaper behaves (or is considered to be) post-colonial in any way. It is a domestic and independent newspaper with no special ties to Europe or the United States. In addition, the *Daily Nation* is the largest newspaper in the country, so it is not only directed at the ‘post-colonial elite’, the *comprador*. During the times of turmoil in 2007 and 2008

there have been serious issues regarding press freedom around the elections. Television and radio broadcasts were taken off the air, but there are no indications that newspapers (like the *Daily Nation*) were being censored as well (Freedom House, 2008). The *Daily Nation* keeps a database of their news coverage on its website.<sup>7</sup> All coverage since August 2008 can be found here. All the more substantial articles, varying from reconstructions of events, news coverage of the ICC trials, to letters to the editor, are included. Short articles are not included in the database, however. I chose to analyze all the articles between August 2008 and November 2009 that include the words ‘post-election’ and ‘attacks’, in total 35 articles, consisting of more than one hundred pages.

I chose to look for a combination of these two terms for a number of reasons. First of all, it was crucial to find and select texts that referred to the actual attacks that followed the election in Kenya. The court selected documents reflect on the situation prior, during and after the attacks. In a best case scenario, the neutral texts would do the same. Only looking for articles with the word ‘post-election’, would also bring up articles on post-election negotiations, post-election opinion polls and post-election policy making. Only looking for articles with the word ‘attacks’, would also show bring up articles on terrorist attacks, shark attacks and offensive plays on the soccer pitch. Combining both search terms brings up all the articles that reported on the post-election attacks in Kenya in 2008. This thesis chose to search for articles between August 2008 and November 2009 for two reasons.

For a start, the database belonging to the period before August 2008 is not complete. From this date onwards, all relevant news coverage that appeared in the *Daily Nation*, can now be found in the online database. Starting to look for news articles on the post-election attacks prior to August 2008, would end up with an incomplete result. That timing is convenient, because the Fall of 2008 is approximately the period in which both major reports (HRW, 2008; CIPEV, 2008) were published. Comparing a text from directly after or during the attacks with a text from nine months after the first attacks, could possibly show a distorted view. This is also the reason I searched for articles that were published before November 2009 – plus the fact that I found more than enough material (over a hundred pages) for a fair comparison.

The court documents I have used are the two files belonging to the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute in the Ruto and Kenyatta case, respectively. These documents of respectively 155 and 139 pages long have been

7. The database can be found on <http://www.nation.co.ke/>.

written by the court (ICC, 2012a; ICC, 2012b), partly based on the (non-public) evidence as presented by the Office of the Prosecutor of the ICC. The documents extensively describe what – in the view of the ICC – has happened during the post-election violence in Kenya and the (alleged) role of the suspects.

After selecting and collecting the various texts – the possible post-colonial texts versus the neutral standard – it is crucial to formulate relevant coding categories. These categories provide the structure for grouping the analyzed content. By counting the qualitative texts, this thesis comes up with quantitative data that can rather easily be analyzed and compared. How these coding categories are designed is described below.

#### ***4.2.1.2 The Coding Categories***

Coming up with adequate and relevant coding categories is essential for the analysis. A content analysis does not only look for words, but also looks at the context in which they have been used. For instance, according to the theory of post-colonialism, the imperial powers are used to display African countries as backwards and uncivilized. The coding categories in this thesis are looking for words (and its context) that might indicate that such post-colonial framing is used in the court documents as written and published by the ICC.

The first coding category looks at the words used by both groups of texts to describe the act of taking someone's life (this means it has to be a verb, so 'the murder of Mr XYZ', for instance, is excluded from my data). 'Killing' is a rather neutral term. 'Murdering' suggests that the killing was intentional and planned, making it less neutral and more judgemental. Words like 'slaughtering', 'lynching' or 'hacking to death' make the attacks look even more brutal. In line with the theory as described in this thesis, if the claim of post-colonialism is to be taken seriously, the ICC documents should contain relatively more of these words than the neutral standard, the newspaper the *Daily Nation*.

The other coding category relates to the framing of the attacks. Are the attacks described as (or linked to) well-orchestrated, pre-planned riots under the supervision of Kenyan leaders, or as spontaneous outbursts of sincere anger amongst the civilians of Kenya, fighting for democracy? Needless to say, describing the attacks as pre-planned would make Kenya look worse, and in that sense it is interesting to see if there is a difference between the coverage in the Kenyan media and the documents from the ICC. The analysis looked at every instance the word 'attack' has been

used in the texts (as a noun, not as a verb. ‘He was ready to attack’, for instance, has been excluded from my data).<sup>8</sup> How many times is this word ‘attack’ linked to words such as ‘planned’, ‘organized’, ‘well-orchestrated’, ‘systematic’ or, on the other hand, ‘spontaneous’?

By coding the texts in line with the categories above, I have been able to quantify the texts in both the court documents and the ‘neutral’ description of the case (the media coverage). The coding provided me with data sets that belong to the two groups of texts. Comparing the data sets enables me to answer the main research question. If the court documents from the ICC contain significantly more ‘post-colonial’ expressions, sentences, or words than the ‘neutral’ text in the Kenyan newspaper, one might conclude that in the Kenyatta and Ruto case the ICC acts in a post-colonial way. If there is no significant difference between the coding categories from both groups of texts, the conclusion of at least this thesis would be that this analysis did not find any evidence that would support the African claim that the ICC is a post-colonial tool in order to suppress or influence the African continent, its leaders, and/or its people.

#### **4.2.2 The Findings**

The exact findings after conducting this research can be found in Appendix I. Here I will highlight the most striking differences between both groups of texts.

##### ***4.2.2.1 The Act of Taking Someone’s Life***

In the court document (ICC, 2012a) regarding the Kenyatta case, the analysis found a total of 28 references to the act of taking someone’s life. Eleven times a text used the verb ‘to kill’, three times it used the term ‘to murder’. The other fourteen times the text used other, more negative language or the text added additional information that makes it look more cruel or horrifying. Examples are ‘beheading a victim’ (p. 24), ‘burning to death’ (p. 86), or ‘killed in front of his five year old son’ (p. 97). The court document belonging to the Ruto case (ICC, 2012b) contained 72 references to the act of taking someone’s life, way more than in the Kenyatta case, for reasons unknown. Out of those 72 references, a total of 48 were neutral (‘to kill’), six were less neutral (‘to murder’), 18 were more negative. Examples are ‘cutting [...] into pieces’ (twice on p. 91), ‘executing’ (p. 87) or ‘cutting the throat of the baby’ (p. 87).

8. In the article ‘The night that changed my life’ (*Daily Nation*, July 29, 2009) there are two references to an asthma attack. Of course, these ‘attacks’ are excluded from the results, since they do not refer to any of the violent attacks during the period of post-election violence in Kenya in 2007 and 2008.

In the neutral standard, the news coverage in the *Daily Nation*, this study found no less than 95 references to the act of taking someone's life. There are 61 references to the verb 'to kill', eight references to 'to murder' and 26 other, more negative uses of language. Examples are 'shot in the head with an arrow' or 'cut into pieces'.

The results are summarized in the Table below. The texts belonging to both the Ruto and the Kenyatta case are accumulated under the box 'ICC':

<i>Table 1: The act of taking someone's life</i>				
	ICC absolute	Neutral standard absolute	ICC %	Neutral standard %
Neutral (to kill):	59	61	59%	64.2%
Less neutral (to murder):	9	8	9%	8.4%
Negative:	32	26	32%	27.4%

The differences might not be very large, but Table 1 does show that the neutral standard (the Kenyan newspaper the *Daily Nation*) uses slightly more neutral words to describe the acts of killing/murdering/slaughtering victims during the post-election violence in Kenya. In doing so, the ICC documents make the people of Kenya, and thereby the entire Republic of Kenya, a bit more savage, uncivilized and barbaric than the neutral standard. But the differences are not large enough to justify the feelings of discontent about the ICC amongst African leaders.

#### **4.2.2.2. The Attacks**

The other coding category looks at the framing of the attacks in Kenya. More specifically, it looks at how often the different texts refer to the attacks as being organized or not. Again, there are three possibilities: the attacks are linked to or framed as spontaneous, they are linked to or described as orchestrated and organized, or the post-election attacks in Kenya are, in this particular instance, not framed at all.

The decision on the confirmation of charges in the Kenyatta case (ICC, 2012a) mentioned the noun 'attack' a total of 170 times. In 114 occasions the text does not frame the attacks as being spontaneous or planned, while in 55 times the text calls the attacks organized, (pre-)planned, orchestrated, systematic, not spontaneous, coordinated, or something similar. Only in one

occasion the attacks are labelled as ‘spontaneous’ (ICC, 2012a, p. 68).<sup>9</sup> The decision on the confirmation of charges in the Ruto case (ICC, 2012b) shows a similar picture. The word ‘attack’ is mentioned a total of 89 times; 57 times the text does not frame the attacks as being spontaneous or planned, 32 times the text calls the attacks organized, (pre-)planned, orchestrated, systematic, not spontaneous, coordinated, or something similar. In this document this thesis found no statements that frame the attacks as spontaneous.

The neutral standard, the news coverage in the *Daily Nation*, shows a completely different outcome. This study found the word ‘attack’ 106 times in the selected data; 88 times the word was not framed as planned or spontaneous, 17 times the attacks were framed as planned, orchestrated, coordinated or words with similar meanings. The attacks were called spontaneous on only one occasion.

The above is summarized in the Table 2, as shown below. The texts belonging to both the Ruto and the Kenyatta case are accumulated under the box ‘ICC’:

<i>The attacks: planned, spontaneous, or neutral?</i>				
	ICC absolute	Neutral standard absolute	ICC %	Neutral standard %
Neutral:	171	88	66.5%	83%
Planned:	85	17	33.1%	16%
Spontaneous:	1	1	0.4%	0.9%

Table 2 clearly shows that the ICC, more often than the neutral standard, frames the attacks as being organized; 33.1% of the times versus 16.0% of the times. Previously in this chapter it was explained how describing the post-election violence as planned and organized makes the attacks look more barbaric than just calling it an ‘attack’, without mentioning it was all pre-planned. The ICC could have good reasons for framing the attacks in this way – as will be discussed in the next, concluding chapter. But the (most likely unintended) side effect is that the ICC makes the perpetrators of the attacks look more savage and barbaric than the neutral standard.

9. The document also includes a couple of quotes from the defence of Kenyatta. Those are excluded from the data, since the purpose of this study is to find out if the ICC is post-colonial in any way. Including statements from the defence (in this case Kenyatta himself), would give a distorted image. However, it is interesting to see how the defence frames the attacks. The defence mentions the word ‘attack’ seven times; two times it does not frame the attacks. The other five times the defence clearly links the attacks to/frame them as spontaneous, not orchestrated and unplanned.

### 4.3 Conclusion

This chapter is based on a content analysis in order to investigate whether or not the court documents of the ICC show any signs of post-colonialism. In line with the theory as described in Chapter 2, this would be the case if the court documents would make Kenya, its leaders or its people look more barbaric, backwards, savage or otherwise less developed and civilized than the neutral standard.

A content analysis compares a certain text, in this case the court documents, with a selected neutral standard, in this case the news coverage in the Kenyan newspaper the *Daily Nation*. Using the same coding categories for both groups of texts, “allows analysts to make inferences about the characteristics and meaning of written [...] material” (GOA, 1989, p. 6).

This chapter found differences in the way the neutral standard and the court documents frame both the attacks and the acts of takings someone’s life. In the ICC’s court documents both terms were more often linked to, or described as savage, barbarian or otherwise less developed and civilized – compared to the same terms in the neutral standard. Whether this necessarily means that the ICC’s court documents contain expressions of post-colonialism is debatable and will be discussed in the next, concluding chapter.



## 5.0 Conclusion

The purpose of this master thesis was to investigate claims made by African leaders. They claim that the ICC is an imperial tool, abused by Western powers. This conclusion will answer the research question as formulated in the introduction:

**To what extent did the ICC gave rise to the claim of African leaders that the ICC is used as a post-colonial tool, using the charges against Kenyatta and Ruto as a case study?**

First, the analysis shows that the claims made by African leaders can be seen as accusation of neo-colonial behavior. That means that the African leaders say that Western nations – not necessarily former colonial powers – still tend to get involved in African politics and economics, because they want to push their global agenda or they have a hard time adjusting to their loss of power in the region since the period of decolonization.

Subsequently, this study showed that the theory of post-colonialism offers ways in which possible neo-colonial can be recognized. “Black Africa is looked on as a region that is inert, brutal, uncivilized – in a word, savage” (Fanon, 1991, p. 130). By sketching this image in popular art, literature but also in official government documents the Western powers legitimize their actions in what Said (1979) calls “The Orient”. The most simple (and therefore most visible) form of so-called ‘othering’ is linking the subject (in my case the Kenyan leaders and their followers) to savage, barbarian or otherwise negative and/or backwards characteristics or behavior.

As described, the African leaders claim that the ICC is an imperial tool. The thesis shows that the ICC is – according to the Rome Statute – a completely independent international court. Nonetheless, African leaders still find reasons to have their doubts about the court. The Kenyatta and Ruto cases were yet other examples of how – according to the African leaders – the ICC is influenced by Western powers, in order to influence African politics and/or economics.

A content analysis has been used to analyze whether or not the court documents of the ICC show any signs of post-colonialism. In line with the theory as described in Chapter 2, this would

be the case if the court documents would make Kenya, its leaders or its people look more barbaric, backwards, savaged or otherwise less developed and civilized.

The content analysis in this thesis compares a certain text (in this case: the court documents in the Kenyatta and Ruto case) with a selected neutral standard (in this case: the news coverage in the Kenyan newspaper the *Daily Nation*). Using the same coding categories for both groups of texts, enables one to make statements about the meaning of the texts (GOA, 1989, p. 6). The content analysis looked at how a text that (for the purpose of this study) is assumed to be neutral (the news coverage in the Kenyan newspaper the *Daily Nation*) has framed the attacks and the killings during the post-election violence in Kenya in 2007 and 2008, and compared this with the way these events were framed in the court documents of the ICC.

The research found that there is data that might support the African idea that the court documents of the ICC contain some post-colonial features. In the court documents of the ICC both the attacks and the acts of takings someone's life were more often linked to, or described as, savage, barbarian or otherwise less developed and civilized – compared to the same terms in the neutral standard.

But this does not necessarily mean the ICC is a post-colonial tool. While reflecting on the data and the methodology, there could be other explanations for the differences in the way the attacks and the killings are framed. First of all, it is not unlikely that the Kenyan newspaper overall has a more positive view on its 'own' country. Although for the purpose of this study the coverage in the *Daily Nation* is assumed to be neutral, the journalists that are working for this newspaper are not unlikely to have some feelings of patriotism, or a troubled, nationalistic view on Kenya and its citizens. This could be one explanation for the differences in the framing of the attacks and the killings. If this is the case, the ICC would not portray Kenya as barbaric or savage, but the *Daily Nation* would make Kenya look bright and beautiful.

Another possible explanation has to do with the differences in the nature of the groups of texts. The first group consists of two documents written by a prosecutor of an international court, with the purpose to prove that Kenyatta and Ruto are guilty of committing crimes against humanity. The other group of texts consists of over hundred articles from a newspaper, with the purpose of informing its readers of what happened during the post-election attacks in Kenya. With this in mind, it is not strange that the authors of the court documents frame the attacks as

planned, orchestrated and organized – otherwise there might not be a reason to prosecute Kenyatta and Ruto at all. The *Daily Nation*, of course, does not have this agenda.

But, nonetheless, this does not make the data useless. The research question of this thesis is not whether the ICC is indeed a post-colonial instrument that tries to influence African politics and/or economics. The research question asks to what extent the ICC gave rise to the *African idea* that the ICC is a post-colonial tool. This master thesis would not like to suggest that the ICC acts post-colonial and targets Africans to favor the West. But the data found does show a difference in the way the post-election attacks are framed. And this difference that – once again – might very well be explained by other reasons than post-colonial related matters, could fuel the Africans in their believe that the ICC is abused to rule over the African continent in general, or Kenya in particular. There is a Dutch saying that states that whoever wants to beat a dog, will always find a stick to hit it with. African leaders who believe that the Western countries still try to rule over the African continent, might find their stick in the differences between the use of language in the court documents and the news coverage that they read in their own country. The existence of this difference does not necessarily mean the texts of the ICC contain post-colonial features. But it might cause the African leaders to believe the text (and thereby the entire ICC) is.

## **Appendix 1: The data**

The results of coding the document belonging to the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute in the Kenyatta case.

The results of coding the document belonging to the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute in the Ruto case:

The results of coding the 'neutral' standard, being the news coverage on the post-election attacks in the Kenyan newspaper the *Daily Nation*:

Below you will find all the data as shown above, summarized, combined and compared.



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