**It’s not you, it’s me?**

Kenya’s breach in compliance with the ICC from a rationalist and constructivist perspective

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*Foreword*

*I would like to express my greatest gratitude to those who helped me to bring this academic journey to a good ending. First of all to my parents, who have supported me in so many ways. Secondly, to Jan Dirk Stam, who - justifiably or not - always continued to believe that everything would end well. Last but certainly not least, many thanks to the wonderful staff of the Political Science Department at the Radboud University who, with their enthusiasm, dedication and accessibility, made this academic journey a pleasure.*

***During the debate on the ratification of the Rome Statute, 14 November 2001:***

*“Mr Deputy Speaker, Sir, is the Attorney-General aware that with or without Kenya’s ratification of the ICC Statute, the International Criminal Code allows any country in the world to arrest anybody implicated in any crime against humanity, and that our top leaders can be arrested anywhere once they fly out of the country? What is he doing to protect our criminals who are now in leadership? (Laughter)”*

 ***- Mr. Gatabki, Member of Parliament***(Kenya National Assembly Official Record, 2001, pp. 3094-3095)

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# 1. Introduction

Establishing up the International Criminal Court
The International Criminal Court (ICC) was established in 2002, after a remarkable decade in the history of international law, marked by the foundation of the first international tribunals for war crimes: the Yugoslavia Tribunal in 1993 and the Rwanda Tribunal in 1994[[1]](#footnote-1). For the first time since the Nuremberg trials of World War II, international courts dealt with the prosecution of war crimes by having jurisdiction over individuals. However, these early tribunals still had their limitations: they were restricted to crimes committed during a specific time and on a specific place. In order to deal with all crimes against humanity, the establishment of an international criminal court was still necessary (Schabas, 2001, p. 252)[[2]](#footnote-2).
 The process of establishing an international criminal court took over fifty years to be completed. The draft statute was ready in 1954, but preparations came to a standstill because of the difficulties of determining a definition for the crime of aggression - a difficult task in the midst of Cold War tensions. The process gained momentum again with the end of the Cold War, and the atrocities that followed in Yugoslavia and Rwanda.
 On 15th of June 1998, a diplomatic conference was organised in Rome to discuss the statute that would be the foundation of the new International Criminal Court (Schabas, 2001, p. 15)[[3]](#footnote-3). More than 160 states sent delegates to take in this conference, expressing the enthusiasm of those days for establishing such a court. Especially African states were very keen, agonized by the Rwandan genocide and the unpunished evils of apartheid (International justice: Nice idea, now make it work, 6 December 2014 ). Africa even became the continent with the largest absolute regional grouping of member states to the Rome Statute[[4]](#footnote-4). The Court eventually became fully operational after the first of July, 2002, after 120 states had signed the statute[[5]](#footnote-5).

Tables turning
At the Rome Conference, most African states favoured a strong and independent court (Schabas, 2001, p.15). However, despite their initial enthusiasm and grand participation, noawadays a critical attitude towards the ICC seems to be commonplace in Africa. Despite several ICC arrest warrants for the Sudanese President Omar Al-Bashir in 2009 and 2010, several State Parties still let him visit their country while not arresting him (Malawi urged to arrest Sudanese President al-Bashir or bar his entry, 2011). The African Union, the largest organization of African States representing almost all states of the continent, has adopted a resolution in 2013 stating that no sitting African head of state should appear before the International Criminal Court (Ayele Dersso, 2013). Added to this was a proposal to change the Rome Statute, by arguments of popular sovereignty and in favour of bringing justice by domestic or African Courts.

#### Compliance: a rational choice or socially driven?

How is it possible that the attitude of many African states towards the ICC has changed so significantly since its establishment? How come many states do no longer comply with the international institution they once supported? In this thesis this broader trend will be investigated by zooming in on the compliance by Kenya with the ICC. In 2008, the Prosecutor started *a* *proprio motu[[6]](#footnote-6)* an investigation in Kenya*,* after a disputed election had resulted in a terrible outbreak of ethnic based violence in December 2007 as heavy as the country had not seen since 1963 (Mueller, 2014, p. 25). After the government and parliament failed to set up a tribunal to deal with the prosecutions, Kenya initially declared to support the ICC investigation (Kenya and the ICC: Brace yourself, 2012). However, while the investigation was ongoing, more and more rumours reached the surface that Kenya was not cooperating as would have been expected from a Member State (Office of the Prosecutor, 2011b). The hostile attitude of Kenya towards the ICC investigation became visible to everyone when in May 2013 Kenya tried to convince the UN Security Council to intervene and stop the proceedings. The ICC Prosecutor eventually withdrew her charges in December 2014, claiming that the continuing frustrations and obstructions by the Kenyan government made it impossible to gather the necessary evidence (Kenyans for Peace, Truth and Justice, 2014).
 The behaviour of Kenya is strange according to what is expected by many in the discipline of International Relations (IR). It is unusual for a state to first sign and ratify a treaty and then not comply with it. This especially seems odd behaviour for Kenya, seen as an exemplary state with its fast and full-fledged democratization process and home to many international organizations’ headquarters (Klopp, 2012 ). How can this country can be an example of non-compliance at the same time? The main question of this thesis will therefore be:

**How to explain a state’s lack of compliance to an international justice institution although it has signed and ratified the treaty constituting that institution?**

In order to answer this main question a rationalist and a constructivist approach will be applied to the case of Kenya’s compliance with the ICC. For both approaches, rationalist and constructivist, the assumed non-compliance of Kenya, as a member state to the Rome Statute, is an unexpected event. In a rationalist approach every policy is regarded as the outcome of a rational weighing of costs and benefits. States or state leaders make decisions on the basis of material cost-benefit analyses. From a rational viewpoint, it is assumed that such decisions are well thought. Moreover, it seems counterproductive to not comply while costs for ratification have been made.
 Constructivists challenge the claim that a decision is always guided by rational considerations by disputing the assumption that rationality would always be the same in every situation. ‘*What is rational is a function of legitimacy, defined by shared values and norms within institutions or other social structures rather than purely individual interests’* as Fierke (2010, p. 181) puts it. Constructivists recognize that material factors such as cost benefit analyses play a role, but oppose the thought that policy decisions are only rationally driven. They point out the importance of taking ideational factors into account such as roles, ideas and norms. However, also the constructivists expect from a state to have accepted the norms that support a treaty when it signs and ratifies it, and to feel obliged to comply with that treaty. This would especially be expected when a state has committed itself to multiple international institutions that all respect the same norms. In this case, the charter of the AU, of which Kenya is a member, largely corresponds on key points with the Rome Statute. The objectives and principles of promoting and protecting human and peoples’ rights, the rule of law and good governance are clearly mentioned in the AU charter, as is the rejection of impunity. Therefore, also from a constructivist perspective, Kenya’s non-compliance seems unaccounted for.

#### Contributing to the understanding of compliance with international justice institutions by African states

The scientific relevance of this thesis is based on its aim to shed light on which approach -constructivist or rationalist - comprises the best explanatory power for understanding the compliance by African states with international justice institutions by investigating Kenya’s compliance with the ICC. By doing so, this thesis contributes to the debate between rationalists and constructivists. Furthermore, scientific relevance is found in the fact that the growing understanding of the influence of international organizations on compliance stems mostly from studies based on the foreign policy of Western states (Joachim, Reinalda & Verbeek, 2008, p. 4). The suggestion that international relations theories may need adjustment in order to fit cases of non-Western states is based on authors such as Ayoob (1991) and Dunn and Shaw (2001). Ayoob points out that the foreign policy of Third World States is mainly analysed from a Western perspective in which the position of the state and the relationship to the great western powers drives the foreign policy of these states (Ayoob, 1991). He argues that there are strong indications that these assumptions do not hold for Third World countries, and hence indicates that some IR theory can be western-biased. IR theory thus might require adjustment when it is applied to Third World countries. This could very well also be the case with compliance theory, as compliance forms a part of a state’s foreign policy. In Dunn and Shaw’s edited book *Africa’s challenge to International Relations Theory* (2001), this suggestion is confirmed by scholars that question the analytical and explanatory utility of concepts and frameworks within the discipline of International Relations (IR) for Africa, since IR theory has many times treated Africa as a blanc political space where Western powers excerted their power, without taking into account the contintent’s own political dynamics. Therefore, this thesis’ scientific relevance also consists of its aim to contribute to the knowledge about the range of validity of compliance theories.
 This thesis’ societal relevance rests on the fact that certain countries, for example the BRICS-countries[[7]](#footnote-7) and many African states, that used to constitute the periphery of international politics, seem to develop possibilities to head towards the centre of international politics. Their possible rise to the forefront in international politics based on their demographic and economic growth underlines the importance of gaining more insight in the mechanisms that determine the foreign policy of these states - such as their compliance with international justice institutions.
 This thesis will start with a theoretical chapter that highlights the basic assumptions of the rationalist and the constructivist approach, and subsequently highlights the basic assumptions of the theories based on these approaches that are employed in this research work. Hypotheses are formulated with regard to explaining compliance, which are then operationalized in the methodological chapter. Research methods and design are also introduced in this latter chapter, next to the time frame and the sources. The empirical chapter describes the workings of the International Criminal Court and the history between Kenya and the ICC into further detail in order to provide necessary background information. Chapter 5 presents the outcomes of the measurements of the variables proposed by the theories. The results are later discussed in chapter 6, which places the results in a broader context and explores consequences and possibilities for further research.

2. Theory
2.1 Introduction
As stated, this thesis seeks to explain why a state – Kenya – no longer seems to comply with an international justice institution - the ICC. In order to answer this question this chapter will first discuss the two opposing theoretical approaches that will be used to explain compliance and non-compliance: rationalism and social constructivism. Rationalist based approaches, such as neorealism and neoliberalism, explain compliance as the positive outcome of a rational cost benefit analysis. Social constructivism, on the other hand, explains compliance as the result of both material and ideational factors that are socially constructed, such as norms, identities and ideas.
 In this chapter, the basic assumptions of both approaches will first be discussed: namely, what is their underlying ontology and how do they explain outcomes in international relations? Secondly, the concept of compliance will be defined. Thirdly, both rationalist and constructivist approaches will be applied to the concept of compliance. How do these approaches account for the different degrees of compliance that can be observed?[[8]](#footnote-8) Hypotheses will be formulated in order to test both approaches’ explanatory power, which will subsequently be applied to the case Kenya’s compliance with the ICC. Finally, the chapter will end with a short debate on how to combine rationalist and constructivist research in the same methodological framework, where the possibility of doing so has proven a point of contention amongst international relations scholars.

2.2 Basic assumptions of the rationalist and social constructivist theories

2.2.1 A rationalist approach

The essence of rationalist theories
Rationalism is not a theory on its own, except when one looks at it at the most general level (Carlsnaes, Risse-Kappen, & Simmons, 2002, p. 74). Its core is the assumption that humans can be regarded as rational actors, motivated by self-interest and the desire to maximize utility (Nugent, 2010, p. 441). However, in order to determine what exactly constitutes said self-interest, another theory is necessary to provide assumptions about the given circumstances that form the boundaries within which the self-interest of the actor is formulated (Snidal, 2002).
 Rationalist theories are actor-based theories, as opposed to system-based theories. The first tenant of rationalist theory is the assumption that rationalist actors will strive to utility maximalization and subsequently set their goals on the basis of what serves their interest best. As such, it is assumed that a rational actor will always seek to achieve the highest gains and the lowest costs. Decisions are made on the basis of an evaluation of all possible options which are then valued by a cost-benefit analysis and put into a hierarchy of preferences for certain options. The final decision-making takes place on the basis of a logic of consequences (Nugent, 2010, p. 441). When decision making is viewed from a logic of consequences perspective, then an actor is perceived as having fixed preferences that are determined by self-interest. As such, the actor chooses that option that serves his self-interest best after a calculation of the expected returns that alternative choices may bring. This means that the actor will focus on the result of his or her decision, not on the intrinsic goodness of this decision. Some rational choice theories do leave room for ideational factors such as norms to alter the cost benefit analysis (Snidal, 2002). However, these ideational factors never guide a decision – something a social constructivist would argue based on a logic of appropriateness[[9]](#footnote-9). At most, rational choice theories assume that norms are sources of exogenously given preferences of actors that are unexplained (Fierke, 2010, p. 181)*.*Therefore, norms are not endogenized, but only seen as standards of behaviour that can alter the the calculations of a cost benefit analysis (Snidal, 2002). A rational actor will always obey the original hierarchy of his or her preferences. When option B is favored over option A and A is favoured over C, than a rational actor will not pursue option C when option B is not possible, but instead opt for option A - the concept of transitivity[[10]](#footnote-10). This rests on the full information assumption, which most rational choice theories hold and which comprises two assumptions: a) the actor has access to all information with regards to the circumstances; and b) that the actor is capable of correctly processing all of this information (Keohane R. O., 2005); (Fearon & Wendt, 2002, p. 59).
 Besides this first tenant, there is a second general aspect to rational choice theories: the assumption of what the actor desires. When a theory follows a logic of consequences, it is important to know what an actors’ self-interest is comprised of, that is, what he or she desires, because it forms the basis for predictions of its future behavior. In all rational choice theories the self-interest of the rational actor does not derive from ‘within’ the actor but instead has its origin in the given circumstances in which the actor is situated (Snidal, 2002).

Rationalist theories in IR
 When rationalist thinking is applied to the study of international relations, rationalist theories subsequently focus on relevant actors[[11]](#footnote-11), the goals they seek and their ability to do so in order to explain the dynamics of international politics. Rationalism assumes that events in international relations can be explained by regarding actors as acting rationally and egotistically in order to serve their self-interest (Keohane R. O., 2005, p. 70). What exactly constitutes the self-interest of the actor in a given situation remains a point of contention between different rational choice theories, as previously stated. It is important to know what an actors’ self-interest is comprised of, because it forms the basis for predictions of its future behavior. Hence, the two main theories within the International Relations discipline with a rationalist approach will now be discussed: neorealism and neoliberalism. Both are regarded as rationalist approaches because the basis of their explanation of event in international politics assumes the existence of rational actors with a given interest that does not change.

Neorealism
The central idea of realism is that international politics is about states and their search for power. Within the realist camp there exist different explanations for why states always want to expand their power vis-à-vis one another. Classical realists like Morgenthau argue that this drive originates from human nature, with power being an end in itself. Every human is supposed to be born with the desire to attain power. At the state level, this translates to great powers being led by individuals who are determined on having their state dominate its rivals (Mearsheimer, 2010, p. 78). Neorealists, however, do not regard the human nature as the cause for states to constantly strive for power, but the anarchical structure of the international system. Said anarchical structure originates in the fact that there is no higher authority above the states to protect states from each others aggressiveness and forces states to pursue power in order to defend themselves (Ibid.). Power is therefore not an end, but a means to an end, which is survival of the state in the international state system. Within neorealism, the interest of the state actor is therefore always survival in an anarchical state system.
 The difference between considering power as an end and power as a means to an end leads neorealists to explain phenomena in international relations differently than neoclassicals do. By using the structure of the international system as the key variable for explaining events in international politics, neorealists are often indicated as structuralists. For structuralists the central actors, states, are regarded identical, despite their cultural and regime differences. They do not deny these differences, but claim it is not necessary to take them into account in order to explain events in international relations. After all, the structure of the international system creates the same basic incentives for all great powers. These same basic incentives result in states being equally rational and unitary actors, striving to serve their own interest: power in order to survive (Waltz, 1979).
 This leads to the following question: What does power comprise? According to the realists, power is based on the material capabilities an actor can control. Lukes (2005) sets out three ways of conceptualizing power (Lukes, 2005, p. 1). The first one is the one-dimensional view of power, based on a first effort to define power by Dahl (1957). This encompasses the notion that actor A has power over actor B to the extent that actor A can get actor B to do something that actor B would otherwise not do (Lukes, 2005, pp. 11-12). The effects of the execution of this one-dimensional view of power can be observed in decision-making processes concerning key-issues and open conflict (Ibid, p. 29). The second way of conceptualizing power is based on the critique by Bachrach and Baratz (1963) that Dahl’s aforementioned concept is too restrictive, since power can play a role even if it not executed. Therefore, this second concept of power also focuses on non-decisionmaking, potential issues, covert conflicts and grievances (Lukes, 2005, p. 29). Lukes expands this concept to a third conceptualization of power, in which power is not only defined as in terms of its being wielded, but also in terms of latent capacity to be exercised. The focus should therefore not only be on decision making, but also on agenda-setting, latent conflict and real interests ( Ibid., p. 29, 108). Power can be held even where it is not used or needed, for example by continuing the current status quo, which is always in favor of some actor[[12]](#footnote-12). The mere fact that a certain actor holds a certain amount of power can influence preference setting and shape beliefs. Realists therefore not only look at what states do to define their power position, but also to what they have, that is, the resources they hold. Most of the time, these are tangible military assets. The second kind of powerful resources - more latent - refers to the socio-economic ingredients that are necessary for building up military power such as population or natural resources. Neorealists claim that the constant awareness of the threats of other states gaining power hinders cooperation between states. Because there is no higher authority that punishes those states who fail to live up to their promises, states are less trusting of one another in an anarchical system. Furthermore, the fear exists for another state to attaining relatively more gains from cooperation than the state itself, which in turn makes the own state more vulnerable. A situation of cooperation is only possible to arise, according to realists, when it is in favor of a great power. This great power may then subsequently force weaker states to fulfill their part of the cooperation. As such, realists do not really believe in cooperation, unless it results from coercion and results in benefits for the most powerful countries

Neoliberalism
Neoliberalism arose during the 1970’s and 1980’s and is derived from liberalism. The most defining characteristic of liberalism is that war and conflict can be overcome by a greater application of human reasoning. The application of human reasoning, according to liberals, will lead to the conclusion that the outcome of cooperation does not necessarily have to be a zero-sum game[[13]](#footnote-13). On the contrary, cooperation can offer extra benefits that would otherwise not be obtained. Liberals therefore strongly believe in democratic government, economic interdependence and the development of international law. Increased cooperation in these areas will subsequently lead to the development of international organizations and institutions. These will help take away the distrust between states by providing an interaction level, and can thus reduce the risk of living in an anarchical system (Russet, 2010, p. 96). In other words, institutions change the conditions of the international game, reducing the incentives for war and conflict.
 The second defining characteristic of liberalism is that liberals do not treat states as like-units. This assumption causes neorealists to regard the state as a ‘black box’ in which processes at the inside remain untouched since they do not matter for explaining outcomes in international politics (Batta, 2011, p. 91). Liberals open this black box that the realists perecive the state to be, by focusing for example on democratic and economic domestic variables. States are still the central actors, but effects of domestic institutions of the powerful states should be taken into account when explaining events in international politics.
 Neoliberals differ from liberals in this last aspect. Neoliberalism has the same state-centric perspective as neorealism: it considers states to be unitary, rational and utility-maximizing actors who dominate international politics. The state is again perceived as a black box that remains closed. It also agrees with the neorealist view of the state system as anarchical, which subsequently results in difficulties for cooperation because of the fear and uncertainty this causes (Keohane, 1993a, p. 285).
 However, where neorealists focus on the distribution of power among states, neoliberal explanations focus on the relative efficiencies institutional forms can bring (Florini, 1996, p. 365); (Hemmer & Katzenstein, 2002, p. 583). Neoliberalism is still premised on the basic liberal assumption that cumulative progress in human affairs is possible and that collective benefits may be in reach when there is a greater application of human reasoning. Neoliberals point at particular historical elements in the Twentieth Century that have made it easier to achieve cooperation. These developments comprise the increasing interdependence in a variety of global issues. This is made possible by modern technological and industrial advances, as well as the U.S.’ position as a global hegemon. The latter has resulted in hegemonic stability (Sterling-Folker, 2010, p. 120)[[14]](#footnote-14). Both developments have caused the growth of formal and informal international institutions. Even now, when the hegemonic status of the US is being questioned, the institutions once created continue to play an important role in global politics. This means that it is possible for humans to mitigate the negative impact of anarchy on international collective outcomes. Within neoliberalism, therefore, the interest of the state actor is wealth maximization in an anarchical system where cooperation is possible (Krasner, 1983). Neoliberals hence argue that states voluntarily create international institutions in order to obtain particular collective interests. In their research they focus on the design, structure and role that these international institutions play in obtaining international collective outcomes (Keohane, 1993a); (Keohane R. O., 2005); (Krasner, 1983). This is why the neoliberal approach is also sometimes referred to as ‘neoliberal institutionalism’. Whether or not these institutions succeed in obtaining collective outcomes such as freedom, peace, prosperity and justice, and how said institutions might be improved upon to do even better, is the primary subject of neoliberal institutional analysis.
 Krasner was one of the first scholars to set out a theoretical framework for this institutional analysis. He argues that cooperation is possible through international institutions, because these institutions create ‘*sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of IR’* (Krasner, 1983, p. 57). This way, institutions provide a platform for discussion, shared practices and the outing of expectations towards each other. This creates a web of meaning that constitutes the ‘force’ of international institutions. Regimes do not produce outcomes on their own, but instead they form a meeting place where states can meet and subsequently bring about change.
 Keohane (2005) too has studied the effect of international institutions and regimes in international politics[[15]](#footnote-15). He argues that there are three possible situations in IR: harmony, cooperation and conflict. Where there is harmony, cooperation is unnecessary and no role exists for international institutions. This view is derived from the liberal thought that conflict is not a necessary outcome if every actor pursues their own interest. The second situation Keohane describes is cooperation. In this scenario the actions of different actors have to be reconciled by means of negotiation, which takes place in the framework of international institutions. The third situation is discord, in which no cooperation takes place and in which there is also no harmony. Keohane concludes that regimes are of great value for states because they reduce transaction costs and particularly because they reduce uncertainty in the external environment. In doing so they remain in existence even when there is no hegemon (Keohane R. O., 2005, p. 181). With regimes in place, every government is better able to predict that whether its counterparts will follow predictably cooperative policies (Keohane R. O., 2005, p. 115). This contradicts the neorealist claim that cooperation will only take place when this suits a great power.
 Like neorealism, neoliberalism too is a rational choice theory. However, there are some differences in how rationality is perceived by neoliberals. Neorealists believe in a purely self-help system in which each state or government calculates its interests in an issue and preserves its options when it has made a decision. Keohane on the other hand argues that it is not irrational for a state or government to let an international institution make some decisions for them, based on Herbert Simon’s (1982) concept of *bounded rationality*. Simon states that it is wrong to regard a human decision maker as perfect. Instead, a human decision maker suffers from a bounded rationality, since every human being faces limitations on his or her cognitive capacity for calculation or information processing, independently of uncertainties stemming from its environment (p. 162). As Keohane states it: ‘*To imagine that all available information will be used by a decision maker is to exaggerate the intelligence of human species*.’ (Keohane, 2005, p. 111). Keohane argues subsequently that the costs of the decision-maker’s own calculations and the limitations of the rational actor himself should also be taken into account and hence alter an actor’s cost benefit analysis, since it is nearly impossible for a state to always attempt utility-maximization in the classical sense. The state is not capable of gathering and processing all information that is potentially available. Processing all the available information would entail mean creating exhaustive lists of alternative courses of action as well as allotting the correct value to each alternative and accurately judging the chance of occuring of every possible outcome (Ibid., pp. 111-112). This provides the basis for the rationality behind compliance with international organizations or institutions without pressure from a hegemon: organizations take on some of the costs of information processing and provide a solution for the cognitive or time limitations decision makers face. Keohane thus uses the concept of bounded rationality to demonstrate the utility of regimes for states and therefore the rationality behind accepting a regime’s rules. In other words: the argument of Keohane is that if an international institution takes away a part of this workload by providing information and a platform for cooperation for multiple states at once, then it makes sense for a rational state to cooperate[[16]](#footnote-16). The question is whether the value of the constraints imposed by the regime on others and the benefits of the organization taking on some costs of information processing justifies the costs of accepting its rules. This will be further discussed when applying neoliberalism on compliance (paragraph 2.4.2).

2.2.2 A constructivist approach

The essence of constructivism
Unlike rational choice theories such as neorealism and neoliberalism, constructivists do not believe that decisions are purely founded on a rational cost-benefit analysis, that bases itself solely on objective material factors[[17]](#footnote-17). In contrast, constructivists believe that the world is comprised of both material objects and objects that are socially constructed (Checkel, 1998). They argue that material objects only become relevant to the extent that actors attach meaning to them. Their relevancy is therefore context dependent and can change over time and place. The same holds for social constructions. Objects that are socially constructed are for example banknotes. Objectively, a banknote is simply a piece of paper. However, almost every human will accept it is as a form of payment. The *paper* is the objective material factor. The *value* of the banknote is an example of a (subjective) social construction .
 Although international politics is determined along many structural lines, like the anarchical structure of the international system, constructivists argue that these structures are not necessarily material hard facts (Ibid., p.325-326). Instead, the structures of the international system are also social constructs. This even accounts for the realist notion of an anarchical structure according to Wendt’s (1992, 1999) famous statement: ‘*Anarchy is what states make of it.*’ Again, this does not mean that all constructivists deny the existence of material factors. They do, however, emphasize that IR scholars should focus on how humans give meaning to these material factors. Confering meaning upon material objects allows for ideational factors to drive actors. Famous examples of such ideational factors are social identities, norms and values (Nugent, 2010, p. 442); (Katzeinstein, 1996). Constructivists point out that some decisions can subsequently not be explained as being the rational outcome of a cost benefit analysis. Instead some decisions can be better explained as being driven by these ideational factors. Such decisions do not produce the highest utility for the actor, but instead they fit a social norm or an actor’s identity better (Hemmer & Katzenstein, 2002). This way of decision-making follows a logic of appropriateness (March & Olsen, n.d., p. 2.), as opposed to rationalist decision-making which follows a logic of consequences. A logic of appropriateness assumes that an actor is embedded in a social collectivity in which the actor acts according to what he deems is appropriate behavior in a specific type of situation (Ibid.). An actor is thus assumed to be driven by what he feels he should do, that is, what he ought to do according to norms or rules of appropriate or exemplary behavior. Rules are obeyed because they are seen as natural, rightful, expected and or legitimate. These rules or obligations are often inherent to a role, an identity, a membership of a political community or group and can be encapsulated in an ethos, practices and expectations, which are embedded in institutions.

Constructivism in IR

By the use of social constructs, constructivists are better able to explain change in international relations. Ideational factors are built up by shared ideas, which means that when ideas change, the social structure changes. Constructivists believe that also a state’s self-interest is not a static concept, but instead is a social construction in its own right. This is why social constructivists work with a model that does not take the interest or identity of actors as exogenous or given – as rationalists do - but instead sees them as endogenously constructed. By questioning exogenously given and fixed interests and identities, constructivists can better account for change in the international system than the ‘static’ theories of neorealists and neoliberalis. This strength constitutes the core of constructivists’ criticism on rationalism: by taking the identity and interests of actors as exogenous rationalism leaves one of the most interesting aspects of international politics and change untouched (Snidal, 2002, p. 75); (Checkel, 1998, pp. 325-326). Furthermore, constructivists argue that it is not only the structure of the international system that influences the actor (where ‘agent’ is the term more commonly used in the literature), but that the actor also influences said structure. The two are mutually constitutive. The danger that mutual constitutiveness poses is that of that of losing sight of a causal mechanism between the actor and the structure, as a clear distinction of the monocausal relationship between the independent and the dependent variable no longer exists in such a case. This is the main criticism on constructivism voiced by both neorealists and neoliberals: it becomes impossible to speak of causality if it is not clear which variable is the dependent variable and which is the independent variable. In response to this criticism, constructivists that work with such a positivist epistemology have employed the concept of ‘bracketing’[[18]](#footnote-18), a concept that will be explained later on when discussing the possibilities for a comparison between constructivist and rationalist hypotheses’ explanatory power.
 The constructivist notion of identity, one of the ideational factors, is very important in this research work. As said, ideational factors and therefore identities are not given for constructivists. The constructivist model questions the static, exogenous identity of the state – which is called the Self (Wendt, 1999, pp. 21-22)- and states that the boundaries of the Self are not fixed but variable. Constructivism argues that an identity is produced by social actors through interaction (Ibid, p. 171). Therefore, the boundaries of the Self may change as a result of interaction – which occurs in the form of processes like cooperation and leads to the formation and reformation of the identity of the Self (Ibid, p. 317). This sometimes happens by creating or joining a collective identity (Ibid, p. 229-231, 335). According to Hemmer and Katzenstein (2002), the idea of a collective identity has arisen from social identity theory (Hemmer & Katzenstein, 2002). Studies of the phenomenon of social identity have discovered that once people have identified themselves as part of a particular group, they start treating members of that group very differently to those outside the group. Group identification can therefore evolve from a subjective to an objective tangible phenomenon. Hemmer and Katzenstein argue that identification is the mechanism that helps connect the construction of specific regional groupings in Europe and Asia to particular institutional features, in their case NATO and ASEAN respectively (Ibid., p. 575). Another example of the influence of identity on foreign policy is the suggestion Steven R. David (1991) makes on alignment between Third World countries. He argues that one should not overlook the implications of a Third World state identifying itself with other Third World states. When a country considers itself to be a Third World country, it is likely to hold a set of attitudes and goals that will support this identity as a whole, even though the specific characteristic of a Third World country might not even apply to it. David calls this ‘Third World solidarity’ (p. 241).

 In order to explain a phenomenon in terms of a regional or collective identity it is important to first have a grasp of the formation and reformation of identity. Variations in the identities of actors are caused by changes at the unit level that are subsequently translated to the macro-level of the state and the international political system (Wendt, 1999, p. 319). This occurs through natural and cultural selection, two causal pathways through which identities may evolve (Ibid., pp. 321-325). Wendt discards natural selection as an important factor in the evolution of state identities in the future. The key premise behind this pathway is that a failure to adapt will drive a species to extinction. Wendt argues that a failure to adapt will not be what drives states to extinction. That only leaves cultural selection as a pathway to identity evolution, where Wendt describes cultural selection as ‘*an evolutionary mechanism involving ‘the transmission of the determinants of behavior from individual to individual, and thus from generation to generation, by social learning, imitation or some other similar process*’ (p. 324). Used in a rationalist way cultural selection can explain behavior; when employed by constructivists cultural selection can explain identities and interests. This relates to the extent to which rationalists and constructists believe social norms are internalized and in terms of how deep they believe the effects of imitation and learning go.
 Cultural selection takes place via two mechanisms: imitation and social learning.
 Imitation constructs identities and interests ‘*when actors adopt the self-understandings of those whom they perceive as successfu*l’ (Wendt, 1999, p. 325). Success can be viewed as material success or status success and presupposes some form of standardized measuring of success. These standards of success are constituted by shared understandings that vary according to a specific cultural context.
 For rationalists, social learning - the second mechanism of cultural selection – entails a focus on the means how gaining new information about the environment leads to actors more clearly realizing their interests. Constructivists claim that the effects of social learning go beyond these behavioral effects - which Wendt calls ‘simple’ learning – and highlight the possibility that social learning may also effect actors’ identities and interests – which Wendt calls ‘complex learning’ (Ibid., p. 327). Wendt uses the concepts of Ego and Alter to explain the process of social learning. By employing an interactionist framework Wendt explains how ‘*identities and their corresponding interests are learned and reinforced in response to how actors are treated by significant others’* (Ibid.). If an Other treats an actor as though he or she were an enemy, then the actor is likely to internalize that belief in her own role identity vis-à-vis the Other. Which Others play a ‘significant’ role is heavily influenced by power and dependency relations (Ibid.).

2.3 The concept of compliance

Young (1979) defines compliance and non-compliance as follows: ‘*Compliance can be said to occur when the actual behaviour of a given subject conforms to prescribed behaviour, and non-compliance (...) occurs when actual behaviour departs significantly from prescribed behavior*.’ (In Simmons, 1998, p. 77). Compliance asks whether the actual behaviour of an actor conforms to a prescribed behaviour (Simmons, 1998, p. 78). Some regard compliance as a fact, whereby an actor is either in compliance or not. However, this thesis argues that compliance is not a static notion that points at the nature of policies at a specific moment in time[[19]](#footnote-19), but, rather, is an ongoing process which can take shape in different ways and to different degrees. For example, the implementation of law is conceptually neither a necessary nor a sufficient condition for compliance, but in practice frequently a critical event (Raustalia & Slaughter, 2002, p. 539). Is a state then, which is in the process of implementing such a law, not in compliance? It is argued that compliance should be regarded as a state that consists of a spectrum of varying degrees of compliance.
 There are different interpretations of what compliance is. Some scholars apply a ‘small’ definition, or ‘formal’ definition, of compliance. This ‘small’ definition regards compliance as purely following legal rules (Young, 1979). The second interpretation, named the ‘broad’ definition, regards compliance not only as following legal rules but also as a commitment to achieving the goal behind the rules. . Some analysts call this the difference between obedience and compliance. The first means following the rules for instrumental reasons such as avoidance of punishment, while the latter is regarded as behaviour resulting from the internalization of norms (Raustalia & Slaughter, 2002, p. 539). Joachim, Reinalda and Verbeek add to this the distinction between compliance and *effectiveness*, latter refering to ‘*the impact of internationally agreed upon policies and varyingly defined as the degree to which a rule induces changes in behavior that promote the underlying objectives of rule, the degree to which it improves the state of the underlying problem or the degree to which its achieves its policy objectives.’* (Joachim, Reinalda & Verbeek, 2008, p. 6.). It is important to make this distinction between compliance and effectiveness, since it is possible that a poorly designed agreement could achieve high levels of compliance without resulting to the allevation of the problem. While compliance may be necessary for effectiveness, there is no reason to view it as sufficient for the realization of effectiveness (Simmons, 1998, p. 3-4).

2.4 The theories applied on compliance

Both rationalist based theories and constructivist theory will now be applied to the concept of compliance and hypotheses will be introduced, to test on the case of Kenya’s compliance by the ICC.

2.4.1. The rational cost benefit analysis from a neorealist position
Neorealism has always been skeptical about treaties or formal agreements influencing state actions in any important way. This is because for the most part realist perspectives have focused on the fundamental variables of power and interest. As such they do not see the necessity of expanding their inquiry to states’ compliance with international agreements. When they do, the conclusion is usually that the topic at hand was not about *low politics -* issues that are not absultely vital to the survival of the state such as economic and social affairs - after all and that compliance followed out of *high politics* considerations, such as security (Collins, 2007). This *‘*Waltzean’ position has been fiercefully defended by both Maersheimer (1994) and Waltz (2000).

 As discussed in paragraph 2.2.1.1., neorealists argue that security concerns urges states to strive to power[[20]](#footnote-20). Therefore, neorealists employ rational cost benefit analyses in order to explain why states comply, since this often comprises a loss in power. The outcome of this cost benefit analysis must still contain an absolute and or relative gain in power or has to serve the interest of the state otherwise, in order to fit the neorealist framework. The basic idea of a rational costs benefit analysis is that the option that includes the lowest cost and the highest benefits will end up being chosen. Subsequently, choosing this option will maximize utility for the decision maker according to rationalist principles. However, because of the anarchical structure and the wish to maintain a balance of power, it is also important what an actor may gain or lose compared to other actors. These are called the *relative* gains. Grieco (1993) argues that realist theory sees the state as a rational-egoist state seeking to maximize its absolute utility. Utility is by neorealism determined as the security of the state, which is threathened by other states due to the anarchical structure of the international state system. Therefore, a state’s position vis-à-vis another is very important: ‘*Uncertain as to whether other states are friends or foes, realists states worry not only about absolute gains for themselves, but also about relative gains for other states.’* (Grieco, 1993, p. 487). Absolute gains are not increasing utility – security - when another state wins the same absolute gains. The difference between relative and absolute gains is that when a state attains absolute gains – for instance in the form of an increase in power - this does not necessarily change the underlying relationships between two states as long as the second state also achieves the same absolute gain in power. Therefore, ‘*the fundamental goal of states in any relationship is to prevent others from achieving advances in their relative capabilities (…) even if absolute gains are assured, states are concerned about relative gains may be unwilling to cooperate’* (Ibid., p. 498-499).An IR scholar thus should also take into account what gains are won by other actors relative to chosen actor’s position. Compliance will only take place when it will provide the state with relative gains, meaning that it will not cause relative gains loss by the state compared to other states, since then the power position of a state - vital part of its security - will not increaseTherefore, the neorealist hypothesis that will be tested in this research work is:

*H1: If a state expects that compliance to the rules of an international institution will entail relative gains for it, that state will increase its compliance.*It is important to note here when a state’s prerogative is on relative gains, then accepting a loss can still be rational for a state as long as they lose less than the other state does. As such, the following proviso is made: if compliance results in a greater loss of relative gains than the loss of relative gains caused by non-compliance, then compliance will decrease. This is based on the basic rationalist assumption that a rational actor will always choose that decision, based on a rational benefit analysis that comprises the highest gain possible under the circumstances.

2.4.2.The rational costs benefit analysis from a neoliberal position
Neoliberals are not as skeptical of compliance to international institutions. They are not convinced that the only factor driving states into compliance is a search for the best power position. Instead, they argue that states comply because there are absolute gains to be won. Just like neorealists, neoliberals believe that compliance results from a rational cost benefit analysis: the state choses to accept the short term cost of sacrificing a degree of its legal freedom of action in exchange for long term benefits. In addition, neoliberals allow international institutions to influence power: *‘Institutions themselves are equilibria- sometimes emerging endogenously within a game and sometimes the legacy of interaction in a prior game – that serve as constraints for actors in a game.*‘ (Carlsnaes, Risse-Kappen, & Simmons, 2002, p. 75). Institutional institutions are often attributed with even more power and viewed as actors in their own right (as opposed to being an extension of the state or an arena in which to build winning coalitions) (Joachim, Reinalda, & Verbeek, 2008, p. 3). In practice, this means neoliberals believe cooperation to be possible, as international institutions often prove to be more than the sum of their parts and become independent actors whose function is to guarantee that states live up to their promises.

 Neoliberals have suggested several mechanisms on how international institutions influence compliance. The most central one is fear for reputation. States fear that if they breach international rules in return for immediate short turn gains they will pay higher costs in the long run when it comes to other agreements (Keohane, 2005). Through this mechanism, international institutions change the time horizon for the effects of state’s of cooperation or noncooperation[[21]](#footnote-21).
 A second mechanism by which international institutions put constraints on the rational cost benefit analysis of an actor is through the creation of transparency (Keohane, 1984); (Mitchell, 1998). They create a surrounding in which states can monitor one another. Neoliberal research points out that international agreements or institutions additionally contribute to the legitimacy of their focal points[[22]](#footnote-22). This way, compliance is viewed as a rational response to the need of finding stable solutions to otherwise difficult and costly disputes. Thus, by arguing that indeed there are absolute gains to win for states by compliance, neoliberals believe that compliance results from a rational cost benefit analysis: the state choses to accept the short term cost of sacrificing a degree of its legal freedom of action in exchange for the long term benefits. The second hypothesis will thus be:

*H2: If a state expects long term benefits from compliance with an international institution, it will accept the short term costs of compliance, and display a high degree of compliance.*

2.4.3 Identity driven compliance
Through the use of social constructs, constructivists are better able to explain change in international relations, such as compliance. Constructivists claim that rational prudence alone cannot explain the initiation of the game (Hurrell, 2002, p. 149). Unlike the rationalists, the constructivists believe that ideational factors - such as norms, identities and ideas play a role in compliance. Norms have featured heavily in constructivist research on compliance. A norm is regarded as a standard of appropriate behaviour for actors with a certain identity (Finnemore & Sikkink, 1998, p. 891).The embedding of norms in institutions socializes actors, both those in the institution and those who want to join (Herrmann, 2002, p. 129). This relates to Franck’s (1978) legitimacy theory, which suggests that ‘*state behaviour is determined not by rational calculation but by normative processes and specifically legitimacy’* (Raustalia & Slaughter, 2002, p. 544)*.*  But how does such a processes take shape? The most important framework for this process has been provided by Finnemore and Sikkink (1998). They call the process of compliance to a norm the ‘norm-life cycle’. This norm-life cycle entails different stages. In the first stage, the norm is accepted by a few norm entrepreneurs, but not by the majority. In the second stage, there is a norm cascade, in which the majority of people accept the norm, resulting in the norm becoming general to everyone. In the last stage, people view the norm as a given and no longer actively discuss its legitimacy. Once the norm is regarded as ‘natural’ and has become part of the new logic of appropriateness, it has been internalized and conformance with the norm should be almost automatic (Finnemore & Sikkink, 1996, p. 881); (March & Olson, 1989); (Finnemore & Sikkink, 1998, p. 904).
 Other important constructivist research on norms has been employed by for example Price (1998), who examined the role and influence of transnational state actors through issue networks. Checkel (2001) argued that domestic politics delimit the causal role of persuasion and social learning of actors, and instead proposes a synthetic approach to compliance that encompasses both rational instrumental choices and social learning. Carpenter (2003) has written on how norms influence stand operating procedures, whilst Acharya (2004) has examined importance of local actors on the diffusion of norms. Kersbergen and Verbeek (2007) have expanded to the life cycle of Finnemore and Sikkink by adding the possibility that a new battle emerges after the internalization of a norm about its exact meaning.
 As stated before, from a constructivist perspective, ‘*compliance is less a matter of rational calculation or imposed constraints than of internalized identities and norms of appropriate behaviour’* (Raustalia & Slaughter, 2002, p. 540)*.* A norm’s effect is created by changing an actor’s motives and beliefs, which constitute its identity. Therefore, identity as an ideational factor for driving compliance will now be discussed. Manea (2009) argues that in the constructivist way of understanding change, change ‘*always takes place in connection with the production, reproduction or alteration of identity*.’ (p. 28). Interaction is key in identity formation[[23]](#footnote-23). Manea describes it as follows: ‘*Identity means ‘interaction’, not yet in the form of particular actions, but as reflexive and assimilative attempts of one actor or group of actors with regard to their and others’ specific actions and external conditions.*’(p. 29). Central to the possibility of change in identity are thus processes of interaction, communication and socialization, which, according to social constructivists, correspond with the appearance of new intersubjective knowledge such as new rules and new social structures (Adler, 2002, p. 102), where these can lead to a change in collective identity. The central idea on identity and compliance in this thesis revolves around the suggestion that an actor will comply with a norm when it fits his or her identity. The definition of Raustiala and Slaughter (2002) fits this latter interpretation by describing compliance as ‘*a state of conformity or* ***identity*** *between an actor’s behaviour and a specified rule’* (p. 539, boldness added by author)*.* The identity aspect of their definition points out that not only compliance to the rules exists, but also that an identity – to which the actor’s behaviour and the specified rules both belong – could be regarded as the basis of compliance.
 Identity has an effect on what logic of appropriateness is followed. As opposed to rationalists, constructivists argue that actors follow a logic of appropriateness (Fierke, 2010, p. 181), and that this logic of appropriateness can differ per time and place. Which logic of appropriateness is regarded as *the* logic of appropriateness is influenced by who is perceived to be the significant Other. That is, who is used as an example to construct the counterpart Ego (the identity of the actor) (Wendt, 1999, p. 328). Motives and beliefs form an integral part of an actor’s identity. The Other, who is crucial for the formation of an identity by interaction, can be a country, but also an institution[[24]](#footnote-24) which carries a normative framework entailing such motives and beliefs. These significant Others can all be present at the same time without any problem when they conform to the same logic of appropriateness and support the same norm. However, when they do not correspond with each other, the actor has to deal with an identity and corresponding norm conflict. Hence, this will influence the actor’s compliance.
 In conclusion, compliance to a norm is the outcome of a logic of appropriateness. Which logic of appropriateness is chosen by the actor is influenced by its identity. Therefore, a change in compliance can occur by a change in identity. In this research work, it is expected that when there is more consensus between the identity of the state and the norm of the international institution. Therefore, the hypothesis will be:

*H3: The more consensus exists between the identity of a state and the norm of the international institution, the more that state will display compliance with that institution.*

A change in identity can follow from the reformation of social identity. Reformation of social identity entails that the Self reformulates his interest and beliefs. Since its interests and beliefs constitute his identity, this will lead to a reformation of the social identity of the Self. This reformation can happen by interaction between the Self and a significant Other. Therefore, this research work will also analyze if a significant Alter has arisen which has brought about a change in the identity of Kenya, influencing the compliance by Kenia with the ICC.

# 3. Methodology

3.1 Introduction
This chapter will outline the methods employed in this research work, and through which the theoretical hypotheses from the previous chapter will be tested. Firstly, the chosen research design will be explained and justified. This research design will be elaborated with a choice for a specific case-study. It will be argued how many cases will be studied and why. Appropriate research methods will subsequently be introduced in order to test the hypotheses. Secondly, the concepts that appear in the theoretical hypotheses set out in the previous chapter will be defined and operationalized. Lastly, an evaluation of the consulted resources and their reliability will be presented.

## 3.2 Justifying the research design

The appropriate research design to analyse the case of the compliance by Kenya with the ICC is a case study. A case study is defined by Gerring (2007) as ‘*an intensive study of a single unit or a small number of units (the cases), for the purpose of understanding a larger class of similar units (a population of cases)’* (p. 37). This method thus suits the goal of this research, namely the comparison of the explanatory power of two different theoretical approaches – rationalism and constructivism - in order to understand a broader phenomenon: compliance.
 The case study at hand will be a single case study, since the population of cases that this study aims to explain consists of only a limited number of cases. First of all, there are not many international justice institutions to which the ICC can be compared. Many international judicial bodies are regional, such as the European Court of Justice, while the International Criminal Court is a global international justice institution. Global justice institutions can be subdivided into courts and arbitral tribunals. Courts are the permanent bodies, such as the International Criminal Court. They differ from arbitral tribunals because the latter are set up for the purpose of a single case. An example is the WTO Dispute Settlement Body, which consists of a panel built up of representatives from different countries that change for each new case. Besides these there are quasi-judicial institutions such as the individual complaints mechanisms that are available under the various human rights treaties of the United Nations. However, the rulings of these are not legally binding (United Nations Office of the Human Rights Commisioner, 2013). When looking at global international courts, only two seem to fit the profile: the International Court of Justice and the International Criminal Court. However, the International Court of Justice arguably differs from the ICC as the ICJ tries states whilst the ICC tries individuals.
 Secondly, also the number of non-Western states to which the findings can be generalized is limited. The ICC has, until now, only opened cases in African states. It is very likely that this fact has altered the circumstances under which compliance by African states with the ICC takes place, leading to different circumstances for African states versus other non-Western states. Therefore, the population of cases this research work aims to explain is limited to African states. There are other African states that can serve as a partner of comparison for Kenya. Of the 53 countries on the African continent, 35 currently have signed and ratified the Rome Statute (Ayele Dersso, 2013a). When looking at countries that have or had an ICC investigation, the population becomes even smaller: the ICC has opened cases in only nine countries[[25]](#footnote-25). Because the ICC is so unique and the number of ICC-cases is so limited and restricted to African states, this qualifies the selected case of compliance with the ICC by Kenya as belonging to a very small population of cases. With no comparable justice institutions and only nine comparable cases, the very limited amount of comparable cases (n)[[26]](#footnote-26) justifies the use of a single case study in this research work.
 In recent years there has been much debate between proponents and opponents of ‘small n’-research and ‘large n’-research. Often – though not exclusively – this debate mirrors the distinction between qualitative or quantitative research in the social sciences[[27]](#footnote-27). Traditionally, case studies belong to the qualitative research methods because of their small n. Quantitative researchers object to small n research because they assume that a theory can only be accepted as scientific when it has been tested on a significant amount of cases and has been proven to be generalizable. If one only tests one case or a few cases, it could be that they are outliers whose results hold no relevance for other cases. This is the problem of generalizability, causing a low external validity of the research results. Furthermore, the danger with single case studies is that too many variables are included: too much detail can overcloud the variables that really matter, thereby needlessly complicating the theory. This could lead to a false conclusion that two cases differ while in fact they agree in terms of the variables that actually matter (Gerring, 2007, p. 41). Too many details also entails the risk of telling stories instead of actually highlighting a causal mechanism. Lastly, within qualitative research the researcher has to be careful not to go cherry picking, that is only investigating those cases that support ones expectations. These are all pitfalls that have to be kept in mind while exploring small n research.
 However, small n research also has great advantages. Doing small n research offers the researcher the possibility to examine the case in detail and to add weight to the different observations. With large n, this would not be possible as all measurements of x-variables have to be treated the same. With small n analysis, it is possible to make a qualitative difference between the different variables and their weight: not all pieces of evidence count equally when constructing an explanation. A new fact in qualitative research can lead to the conclusion that a given theory is not correct even though a considerable amount of evidence –and cases - suggested that it was (Mahoney & Goertz, 2006, p. 241). This means that small n research is very useful for uncovering complex causal mechanisms and for the in-depth exploration of causal interference. Qualitative research thus offers the scholar the opportunity to collect a significant amount of data whilst also leaving the scholar the room for a conscientious analysis. The importance of doing single case research is furthermore supported by the fact that a theory should at least be able to explain the most obvious, ‘big’ cases – such as the end of the Cold War for example - while there is no distinction between cases in quantitative research: every case is attributed the same weight. The past, however, shows that a failure to explain one single case can have a detrimental effect for a theory’s explanatory reputation: for example, realism’s not being able to explain the end of the Cold War[[28]](#footnote-28). When looking at the compliance by African states with international justice institutions, it can be argued that the case of Kenya and the ICC constitutes such a big case. Compliance with an international justice institution entailed here that even the highest authority in the country had to be subjected to its rules, making it the ultimate test for compliance[[29]](#footnote-29). Furthermore, it is argued by some that the ICC-cases constitute a turning point in the history of international justice (Block, 2014). It is the first time that state leaders were prosecuted by the ICC in cases that were initiated by the ICC prosecutor, and the first time that such cases have occurred in a country that is considered to be ‘stable’ and acting as leader in the region (Ibid., p. IV). In addition, the attitude of many states was affected by the cases, as is shown by the adaptation of AU-resolutions that urged the ICC to stop their proceedings in Kenya (AFP , 2013) and the efforts to establish an African court to replace the ICC. Thus, the Kenya cases possibly have large consequences for the ICC’s future, justifying regarding the ICC-cases in Kenya to be seen as constituting a big case. Due to this and all aforementioned arguments, the employment of small n research is justified in this research work.

 3.3 Research methods and timeframe
First of all, process tracing will be employed. Process tracing is a method of analysis used to reconstruct a causal process within a single case by means of deductive logic and contextual evidence. Multiple types of evidence which each entail each unique observations of unique populations and which are therefore not comparable, are employed for the verification of a single outcome. The process itself can be quite complex, involving complicated causal chains. Process tracing is often employed in case studies where it is impossible to set up an experimental design, because different ‘sorts’ of evidence are compared whereby it is impossible to keep all other variables constant, for instance when events have taken place in history (Gerring, 2007, pp. 172, 173, 216). In such a situation, process tracing is the appropriate method for reconstructing the numerous steps in the causal chain within the specific context. Some argue that process-tracing in a single-case study cannot sufficiently identify causal linkages. George and Bennett (2005) argue that it can:

‘*While process-tracing may not be able to exclude all but one of the alternative theories in a single case, if some competing theories make similar process-tracing predictions, many single case studies can exclude at least some explanations. Process-tracing in single cases, for example, has the capacity for disproving claims that a single variable is necessary or sufficient for an outcome. Process-tracing in a single case can even exclude all explanations but one, if that explanation makes a process-tracing prediction that all other theories predict would be unlikely or even impossible*.‘ (p. 220).

Process tracing constitutes a usefull method for testing rational choice theory. Although rational choice theories can predict fairly precise outcomes, they still do not constitute acceptable causal explanations unless they demonstrate that their predicted causal mechanisms where indeed operative in the case at hand and are causally linked to the predicted outcomes. In other words, not only should the empirical evidence back up the outcomes predicted by rational choice, but, it should also support the existence of ‘*the causal effects of the independent variables and causal mechanisms or the observed processes that lead to outcomes*.’ (Ibid., p. 208). When one is using process-tracing, one thus has to account for two important constraints on process-tracing. Firstly, process-tracing can provide evidence for a causal mechanism only if it can establish an ‘*uninterrupted causal path’* that links the suspected causes to the effects that have been observed. This must have taken place at the level(s) of analysis that are predicted by the theory being tested. Secondly, it could be the case that more than one hypothesized causal mechanism is consistent with the process-tracing evidence. In this case, the researcher must assess if the explanations are indeed complementary or whether one is causal and the other one false (Bennett & George, 2005, p. 222).
 Through process tracing, the exact circumstances in the time period between the start of the ICC investigations in Kenya on 31st of March 2010 and the closure of the case ‘*Prosecution versus Uhuru Muigai Kenyatta’* on December 5th 2014 will be analyzed. Attention will be focused on the behavior and rhetoric of representatives of the Kenyan state and the ICC. Moreover, interviews will be held with those who were closely involved with the case: an employee from the pre-Trial chamber, a Kenyan government official and an ICC-expert.
 Next to process tracing, also quantitative content analyses will be employed.
Content analysis is a method for the interpretation of (usually written) documentation. The method is rooted in the communication sciences, but has been used by political scientists since the 1920’s (Lock & Seele, 2015, p. 27). It helps to understand and interpretate the manifest as well as the latent content of communication, and therefore is usefull in measuring attitudes and behavior (Ibid., p. 25). It should not be confused with discourse analysis, since the latter is a purely qualitative approach that focuses on the meaning of a text with respect to its semantic, linguistic and argumentative dimensions (Ibid., p. 27). Quantitative content analysis involves many observations within a certain discourse, whereby the focus is on the frequency of certain words, and not the context within which they are used or the ‘value’ or ‘meaning’ behind their usage (where the latter would be qualitative). This quantitative content analysis is meant to expose processes of identification and re-identification. Words are always chosen with a certain argumentation in mind and they cover a certain load. In the case study of the compliance by Keny with the ICC it is assumed that certain words stand for a certain identity[[30]](#footnote-30). If these processes can indeed they can help explain the case. Their identification would furthermore a confirmation of the constructivist claim that ideational factors, in this case identity and accompanying norms, do matter. Using a quantitative content analysis also suits a rationalist research design, which makes it easier to compare the variables of the different theories[[31]](#footnote-31).
 Also qualitative content analysis is part of this research work, in which the focus is more on the value of the used arguments and the context in which the words were used (Lock & Seele, 2015). It is limited to an interpretation of the content of the sources that are used for the quantitative analysis and meant to put the results of the quantitative analysis in perspective. In addition to the use of process tracing and quantitative and qualitative analysis, interviews were conducted with experts to gain insight in and provide background information on the course of certain processes and the additudes of the different actors involved in the case.

3.4 Operationalization of hypotheses
3.4.1 Compliance
Although the importance of treating compliance as a broader concept must not be overlooked (i.e. the ‘broad’ definition that takes into account effectiveness and identity, see paragraph 2.3), the small definition would fit the rationalist approach better - while still being usefull for the constructivist approach - and is more feasible. Therefore, the concept of compliance, the dependent variable, is restricted to this ‘small’definition. It will be operationalized as cooperation with official requests of the ICC. Official requests of the ICC are those that are made public such as arrest warrants and requests that are mentioned in the public filings of the two ICC cases in Kenya. The indicators of the degree of cooperation are the behaviour of Kenya between 2005 and the end of 2014 and judgements by the ICC organs on the degree of compliance by Kenya[[32]](#footnote-32). As previously discussed in the theoretical chapter, compliance will be measured in degrees and not treated as a dichotomous variable. This also fits the legal judgement by the ICC on the matter. It describes the question of compliance as ‘*an instance where the question of compliance is one of degree’* (Trial Chamber V (B), 2014). The following table shows the categorization of the different degrees of compliance:

|  |  |
| --- | --- |
| High degree of compliance | *Full cooperation with official requests of the ICC.* |
| Medium degree of compliance | *Partial cooperation with official requests of the ICC.*  |
| Low degree of compliance | *No cooperation with official requests of the ICC.*  |

**Table 3.1 Degrees of compliance**

Considering the fact that the theories whose hypotheses are being tested each take state’s behavior as their unit of analysis, it follows that acts and behavior of compliance are only relevant if they can be brought into direct connection with the state apparatus and not with civil individuals. Therefore, only those words and deeds that have been spoken or performed by state officials whilst executing their jobs will be included in this research. This for example means that acts by Mr Kenyatta’s Defence team will not be included, as they are categorized as private actors. However, Mr Kenyatta’s own words and deeds as President will be included, since as President he is assumed to be acting as state official.

3.4.2 The neorealist hypothesis: Relative gains
In this section, the theoretical neorealist hypothesis with its independent variables will be operationalized. Neorealist theory assumes that if a state expects that compliance to the rules of an international institution will entail relative gains for it, that state will increase its compliance. It is difficult to establish what a state expected at a certain time. An interview with a Kenyan government official will be done to provide basic insight in Kenya’s expectations at the time. However, this research work has mainly focused on the question if and which relative gains were indeed entailed by compliance, in order to argue if it was likely that Kenya was expecting them. Therefore, to test this hypothesis, the concept of relative gains has to be operationalized.

Relative gains
Relative gains entail all of the gains that a state wins over other states as a result of a particular decision of act. Gains will be operationalized as power, reputation and quid pro quo situations.
 When measuring relative gains or losses in a realist way, it is important to determine Kenya’s geopolitical place and corresponding power position within the international state system, and on which levels it operates. In this research work, three relevant levels are distinguished: the regional, the continental and the global. The power position of the state is defined as its place in the international state system, vis-à-vis other states in a hierarchical order. This hierarchical order is based on military and economic resources as well as ideological influence. It is relative because it is based on the positions of states vis-à-vis on another. For example, if there are two states and both lose some of their military resources, then this has no influence for the relative power position of state A. However, if state B wins military power and A’s military capacities do not change, than state A has to accept that its relative power position towards state B has weakened. When applied to the case of Kenya, a loss of relative gains would be if compliance to the ICC comprises more negative consequences for Kenya than for other states. As such, compliance would have a negative effect on the relative power position of the state, i.e. Kenya. Not all relative gains and losses vis-à-vis other states are relevant. For example, those that are suffered with reference to small island states are not of great influence for a country the size of Kenya. Those that are suffered or won in comparison to states that hold an almost equal power position as Kenya are of greatest influence and therefore most essential. The important states for each level of analysis will be explored in the analysis chapter, just as Kenya’s position on the different levels.

Power
In the theoretical chapter, the conceptualization of power is discussed (see paragraph 2.2.1.1)***.***Power is therefore operationalized as the capability of state A to affect state B in a significant manner leading state B to undertakes action that is against state B’s interests (Lukes, 2005, pp. 16-17), as displayed by decisions and non-decisions made on key issues and potential issues; observable, covert and overt conflict; subjective interests and grievances (ibid., p. 29).This means for thiscase study that Kenya gains power when it is more able to influence decision making on (potential) key issues in the direction of its own interests on either a local, regional of global scale. A closer look will be given to Kenya’s influence on decision making on issues in the Horn of Africa, the African Union and the UN. An example of such outcome could be the assignment of a powerful political function to a Kenyan citizen or approved membership of certain (international) organizations. This research work will then examine if any changes in decision-making have taken place within the timespan starting from the ratification of the Rome Statute by Kenya in March 20005 up until the end of the Kenyatta trial in December 2014. Reputation
The measurement of the neorealist variable of reputation will be focused on the short term. The short term reputational gains for Kenya, or lack thereof, resulting from its compliance to the ICC will be measured by means of a content analysis of news paper articles in *The Economist* and *Le Monde*. The newspapers are chosen as representatives of the West: *The Economist* is a very well read newsmagazine of British descent, and *Le Monde* is an important French newspaper, which is also very well read outside of France. Although nowadays Germany is taking on more and more leadership in Europe, traditionally, the UK and France are seen as the great diplomatic powers of Europe. Whilst the US is also an important representative of the West, it is not a party to the Rome Statute. Therefore, the US has been left out as a representative for the West. The newspaper articles will be analyzed for sentences that are either positive or negative about the behavior of Kenya with regards to the ICC. Positive sentences will be counted as plus one, while negative sentences will be counted as minus one for the short term reputation of Kenya. The total figure will thus reveal per year if the reports have generally been negative or positive or an equal amount of both.
Quid pro quo
Quid pro quo is a situation in which two actors make an agreement in which actor A does something in order to receive something from actor B in return. Hence norms of trust and reciprocity play a great role in quid pro quo situations (Groβer, Reuben, & Tymula, 2013, p. 583). In international politics, quid pro quo agreements are particularly likely when there is repeated interaction between the actors. After all, repetition provides a strong incentive for the enforcement of reciprocity norms. Because of Kenya’s position as an ex-colony and a recent ally in the War on Terror, there probably are multiple diplomatic interactions for Kenya. Therefore, the presence of quid pro quo arrangements seems likely. Quid pro quo could be confused with short term costs and long term benefits, but these are not the same. Quid pro quo emphasizes a deal between two actors, whereas short term and long term benefits do not have to be that closely related with the interaction and do not have to entail a deal with a specific partner. Moreover, quid pro quo does not have to involve a short term investment and a long term gain. The exchange of favors can also take place simultaneously. Political quid pro quo can be hard to observe because it takes place outside of publicly observable channels (Ibid.). However, in order to fit the scope of this research work the analysis of quid pro quo exchanges in the case study will be limited to those that are publically observable. Quid pro quo here forms part of the realist framework, where Kenya’s special interest of Kenya will be assumed to be the retention of sovereignty and the right to self-determination in judicial affairs (this is what is at stake when a state considers compliance to an international justice institution such as the ICC). In exchange for giving up these rights to the ICC, Kenya can gain economic resources, development aid and or more power in the international arena.
To conclude, the following factors will be examined when testing the influence of relative gains:

|  |  |
| --- | --- |
|  | Relative Gains |
| Geopolitical system level | Power | Reputation | Quid pro Quo |
| Global |  |  |  |
| Continental |  |
| Regional |  |

 **Table 3.2 Possible relative gains for Kenya per international geopolitical system level**

The neorealist hypothesis will be rejected if Kenya does win relative power, reputation and or quid pro quo gains by complying to the rules of the International Criminal Court and does not comply.

3.4.3 The neoliberal hypothesis: long term benefits and short term costs
Neoliberalist theory assumes that if a state expects long term benefits from compliance with an international institution, it will accept the short term costs of compliance, and display a high degree of compliance. In order to test these hypotheses the following variables and corresponding concepts will be operationalized in addition to the ones mentioned above: long term benefits of an international institution and short term costs of an international institution.

Long term benefits
Long term benefits of international institutions for states can be that they can function as a platform for cooperation on other issues. It offers possibilities for issue linkage: agreements on one issue if agreements on another issue are also concluded (van der Vleuten, 2001, p. 15). Additionally, international institutions offer secure policy changes from others, or influence over their policies (Keohane, 1993b). Summarizing, there are two long term benefits that states could gain: reputation in order for other states to trust it in cooperation, and transparency in order to be sure that other states live up to the agreements. The operationalization of the concept of reputation for testing the neoliberal hypothesis is slightly different than for the neorealist hypothesis. Where the neorealists focus on states, neoliberal focus on the role of international institutions. Therefore, for the neoliberal hypothesis it is important to closely study if and how much reputation is given to the actor by the compliance with the international institution. So, it is no longer only about what the other states think about a state’s reputation, but the role of the institution in a state’s reputation. If this is positive, the state wins reputational gains by complying with the international institution. It is important to take into account *which* states’ opinion has been influenced by the compliance with the international institution. For example, if only very small island states add value to a states’ trustworthiness if the latter one complies with an international institution, then the incentive will not be strong for the state to comply and win a reputation of trustworthiness.The small states have little to offer and cooperation will be unlikely. Therefore, one could argue for the importance of taking into account the other members of the international institution to see if the received reputational gains really matter. On the other hand, reputation won by complying with one international institution could easily spill over to reputational gains within another institution. Possible cooperation partners that maybe are not involved with the primary international institution can still signal the state’s trustworthiness in complying with the primary institution, and subsequently include this observation in their judgment of the state’s suitability for cooperation.
 The long--term benefits for Kenya by complying with the ICC will be measured by the amount of foreign direct investment (FDI) the country received in the years 2005-2014. FDI represents the trust foreign investors have in a country’s stability and respect for the rule of law. Therefore, it is connected to Kenya’s compliance with an international justice institution as the ICC. Furthermore, the amount of FDI is a clear signal of a long-term reputation benefit since investments are per definition long term commitments. The measurements of FDI s will be complemented by the ratings of FreedomHouse, whose yearly reports represent the country’s international reputation concerning human rights. This can also be brought into close connection with Kenya’s compliance with the ICC, since this is included in the FreedomHouse reports.
 Transparency can also play an important role in providing these reputational gains. Transparency is given by the international institution when it monitors and or reports on the behavior of member states. This monitoring adds to the insight in a state’s trustworthiness concerning mutual agreements. In this research work, it will be analyzed if and how the International Criminal Court succeeds in providing transparency on its member states’ behaviour. This can be done for example by publishing information on its member states’ passed legislation, providing or updates on its compliance or by enforcement mechanisms (See for example Mitchell, 1998). Note here that too much information works against cooperation, because unavoidable deficits in the compliance of every state will come up and states become (unnecessarily) suspicious of each other. However, a reasonable amount of information stimulates the trust in each other willingness to cooperate and fulfill the corresponding requirements. Therefore, in this study it will be investigated if and how the ICC facilitates such kind of information.

 Short terms costs
Complying with policy almost always comes with certain costs. For example, law has to be created or adapted and existing structures have to change. The operationalization of short term costs of policy compliance is based on van der Vleutens (2001) distinction for measuring expensive compliance within the EU. According to her study, costs for complying with policy occur:

* ‘*if for a state the distribution of the expected political, economic and ideological costs and benefits of the policy deviate negatively from its original preference.*
* *if for a state the distribution of the expected political, economic and ideological costs and benefits of the policy is unfavorable in comparison with other states*.’ (van der Vleuten, 2001, p. 20)[[33]](#footnote-33)

These conditions can occur separately, but also combined. Ideological costs are those who ask for a radical change of existing national policy. Political costs are those that will lead to much protest in the public political arena. Economic costs are those that lead to unfavorable economic consequences (Ibid., p. 71). Costs will be regarded short term when the state is faced with them within two years.

The neoliberal hypothesis will be rejected if compliance by Kenya with the ICC provides long term benefits – reputation or transparency – and low costs and Kenya does not comply.

### 3.4.4 The constructivist hypothesis: Level of consensus between identity of the state and the norm of the international institution

The theoretical hypotheses derived from constructivist theory were based on social identification. If the identity of the state matches the identity of the international institution, then it will comply by its norms. Therefore, the constructivist hypothesis was that the more consensus exists between the identity of a state and the norm of the international institution, the more that state will display compliance with that institution.This will be operationalized by measuring the level of consensus between the identity of the state and the norm of the international institution between the time frame of this research work: March 2005-December 2014. Since identity change can take place by the appearance of a significant Other (see paragraph 2.2.2), this research work will also investigate whether another significant Other has risen.

Identity of the state
Identity is the combination of a certain set of interests and normative ideas about what is appropriate in striving to fulfill these interests. Reformation of identity occurs by a change in interests and normative ideas about what is appropriate in striving to fulfill these interests. Variation in identity can therefore be measured by a change in words and behavior.
Identity will be operationalized as words and deeds by the government of Kenya. The identity expressed by the rhetoric of the Kenyan government will be measured by a quantitative analysis on the public communication of the Government of Kenya with regard to the ICC[[34]](#footnote-34). It could be that Ego, Kenya, moved away because of the rise of a significant Other. In this research work, it is porposed that the African Union could have fulfilled this role of significant Other as the largest and strongest organization that includes the whole continent. If therefore seems the right candidate for bearing the collective African identity. The collective ICC-identity could have then shifted from a focus on universal values and ideas to a specific African identity. Therefore, a quantitative content analysis will be employed on the rhetoric of the Kenyan government with regard to the ICC that will compare the amount of ‘ICC-identity’ present in the rhetoric of the Kenyan government with the ‘AU’-identity that is present. The collection of documents on which the quantitative analysis on the identity of Kenya holds 18 documents. These documents are found at the site of the ICC and on the site of the Coalition for the Criminal International Court. The documents are mainly statements made by the Government of Kenya at the yearly Assembly of State Parties to the Rome Statute or at the UN General Assembly, completed with several other public documents such as non-papers and press releases[[35]](#footnote-35). Every time a word (combination) was used, it is counted. Words that are operationalized as to represent an ICC identity are: *universal(ity), international/global justice* and *impunity.*These are all based on the ICC norm, which is highlighted in the following paragraph. Words that are operationalized as to represent an African Union identity are *sovereignty, complementarity and Africa(n) .* These words are seen as related to the African Union identity, since critic on the ICC often contained the argument of intruding on the sovereignty of a state. This is also an important issue with regard to the anti-colonial rhetoric which is often used by those who appeal to an African identity. Therefore, the complementary character of the court is often emphasized to push back ICC involvement. Reformation of identity has taken place when the words that are related to the global justice identity of Kenya are less present in the discourse than words which are related to the African identity of Kenya. Deeds will be investigated by process tracing, to indicate in which degree the actions of the Kenyan government have supported the ICC norm. As previously stated, what constitutes the ICC norm is discussed in the following paragraph.

Norm of the institution
Finnemore and Sikkink (1998) indicate that what in the political science literature often is described as a norm is regarded in the social sciences as an institution (Finnemore & Sikkink, 1998, p. 891). The core norm of the international institution, the ICC in this regard, is determined by the researcher as ‘fighting impunity’ and ‘international justice’ based on interviews with ICC experts (R.J. Bartels, interview, 3 June 2015); (F.Burger, interview, 21 July 2015). The founding idea of the ICC is providing a guarantee that no war criminal will be left unpunished. Its core goal is the battle against impunity. Furthermore, by its Statute having a universal jurisdicition, it assumes that law is universal. These two core aspects of the ICC are being confirmed in its preamble[[36]](#footnote-36).
 Finnemore (1996) notes that identification ‘*emphasizes the affective relationship between actors’* and ‘*is an ordinal concept, allowing for degrees of affect as well as changes in the focus of affect. ‘* (Finnemore, 1996, p. 160).The consensus between the state’s identity and the norm of the institution will therefore be measured in an ordinal way:

|  |  |
| --- | --- |
| High degree of consensus  | Words and deeds of the Kenyan government correspond with the norm of the international institution.  |
| Medium degree of consensus | Words of the Kenyan government still correspond with the norm of the international institution, but deeds do not.  |
| Low degree of consensus  | Words and deeds of the Kenyan government do not correspond with the norm of the international institution. |

**Table 3.3 Degrees of consensus between the identity of the state and the norm of the institution.**

Since the measurement of consensus and compliance both comprise of an analysis of the behavior of Kenya, there is a risk of distorting the distinction between the independent and the dependent variable. However, with the measurement of compliance, the focus is upon material that discusses the behaviour of Kenya with regard to official requests of the ICC. With regard to the measurement of the consensus, the focus is on data that describes other actions of the government of Kenya in relation to the ICC norms. In addition, the data on which the quantitative analysis will be employed, in order to determine Kenya’s identity over the past years, will also be different data than which is used to determine the degree of compliance.

The constructivist hypotheses will be rejected if there is more consensus between the identity of the state and the norm of the institution, but less compliance; or when there is more positive communicative action between the state and the international institution but compliance becomes less.

3.5 Studied sources and their reliability
The empirical data for this study will come from process tracing, quantitative and qualitative content analyses and interviews. The process tracing has taken place on the basis of court documents provided by the ICC and additional (scientific) literature. The three interviews that will be conducted have taken place with experts in the field of the ICC and the Kenya-cases. Their expertise adds to their reliability and they reflect a broad spectrum of actors involved in this case. With regard to the first content analysis that measures short term reputational gains, *The Economist* and *Le Monde* are considered as trustworthy sources. However, not all articles orginiating from *Le Monde* could be read in their totality due to a constraint in open access. This could have resulted in a lower validy of the measurements resulting from these articles, if the first part of the article does not cover the same tone as the rest. The second quantitative content analysis is based on the public communication by the government of Kenya in relation to the ICC. The collection mainly consists of statements given by Kenya at the yearly Assembly of State Parties to the Rome Statute and those given at the United Nations General Assembly when the agenda-item of the ICC was discussed. The collection is completed with other documents given free by the NGO Coalition for the International Criminal Court, which collects all documents that are published by, among others, states with regard to the subject of the ICC (www.coalitionfortheicc.org). This NGO is a network of 2.500 civil society organizations in 150 different countries. The organizations work together in order to enhance international cooperation with the ICC, to ensure that the International Criminal Court is fair, effective and independent and to make justice both visible and universal (Coalition for the International Criminal Court, n.d.). The CICC website offers a large collection of documents concerning ICC matters, under which the statements of Kenya used in this analysis. These statements were given to the Assembly of States Parties to the Rome Statute, which is held every autumn in either The Hague or New York, or to the General Assembly of the United Nations during the agenda item covering the activities of the International Criminal Court. Next to statements, the CICC collection also contains other public documents such as non-papers, press releases and public letters. These are also used in this analysis and regarded as trustworthy sources. However, there seem to be omissions in the archive of the CICC, for example yearly statements that are absence in certain years[[37]](#footnote-37). Therefore, it is likely that the analysis does not cover all public communication of Kenya with regard to the ICC of the years 2005-2014. However, the representativeness of the selected sample is guaranteed as much as possible by the amount of documents – 18 – and their distribution over the selected time span.

4. Empirical Chapter

4.1 Introduction
In this chapter more in depth-information will be given on the current workings of the ICC, the events that took place in Kenya after the 2007 post-election violence and the history between Kenya and the ICC. This will provide the necessary background information for the analysis in the following chapter.

4.2 The workings of the International Criminal Court
The ICC-jurisdiction covers the most serious crimes that concern the international community as a whole: genocide, crimes against humanity and war crimes such as the crime of aggression (F.Burger, interview, 21 July 2015). The Court’s jurisdiction has got one limitation: it covers only crimes that occurred after the first of July 2002, when the Rome Statute entered into force (F.Burger, interview, 21 July 2015); (Schabas, 2001); (International Criminal Court , 2014) [[38]](#footnote-38). Contrary to the ad hoc tribunals, that have compulsory jurisdiction with primacy over domestic state courts, the ICC is designed to be complementary to domestic state courts. It is only able to act where a state with jurisdiction is ‘unable’ or ‘unwilling’ to act itself. Furthermore, the Court has only jurisdiction on those international crimes that are committed on the territory of a state that is party to the Rome Statute, or by one of its nationals (Schabas, 2011, p. 76)[[39]](#footnote-39). An exception to this is when a state for one specific issue accepts the jurisdiction of the court.
 Officially, there is no immunity for anyone when it comes to the jurisdiction of the Court. Anyone that operates in an official function as head of state, Member of Government or Parliament, chosen representative, civil servant or even military commander, can be charged for what they have done. Leaders can be held accountable for what their subordinates have done, if there was a clear and active command structure[[40]](#footnote-40).

 During the year the State Parties come together in working groups to discuss topics like the annual budget and the exact workings of the Court. Once per year the signatories to the Rome Statute come together in the Assembly of State Parties. During this Assembly the results of the working groups is discussed and the progress of the Court in general. It is also the place where the general state of compliance can be discussed. Lacking an own police force, the ICC is dependent of the cooperation of member states for making arrests. The ICC does not have any enforcing mechanism, nor a naming and shaming mechanism[[41]](#footnote-41). In the case of noncooperation with an investigation by one of the member states, the Prosecutor or the (Pre)Trial Chamber can file a complaint of noncooperation. Such a complaint can be referred to the Assembly of State Parties or to the UN Security Council (if the case was referred to the ICC by the UN Security Council). As an instrument of last resort against noncooperation, a resolution can be adopted that condemns the noncooperation and might add sanction (F.Burger, interview, 21 July 2015). A good example here is Sudan, which refuses to obey the arrest warrant against their President Omar Al-Bashir.
 Contrary to the earlier established international tribunals, the International Criminal Court is mainly funded by the UN[[42]](#footnote-42). This gives the UN Security Council the power to refer cases to the ICC, in which the aforementioned conditions of nationality and territory no longer hold since almost every state is part of the UN. Others options for starting an inquiry are referral by a State Party or at *proprio motu* (Schabas, 2011, p. 17) [[43]](#footnote-43).

 Until now, there are 22 cases in nine situations that have been brought before the Court until now (ICC, 2015d) [[44]](#footnote-44). All of them concern African states. There are preliminary examinations in countries outside Africa, such as Afghanistan, Georgia and Iraq, but these have not yet led to an actual case[[45]](#footnote-45). At this moment, only two actual convictions have been made by the ICC: Thomas Lubanga Dyilo and Germain Katanga, both from the Democratic Republic of the Congo (American Non-Governmental Organizations Coalition for the International Criminal Court , 2015).

4.3 Description of the two ICC-investigations in Kenya

Kenya joins the court

Although Kenya was not among the most enthusiastic supporters of the Court in its negotiation phase[[46]](#footnote-46), it was never one of the most critical states either. It did not sign a bilateral agreement with the US to protect US citizens from Prosecution by the court, unlike many other states. For example, at the final adoptation vote to determine the content of the Rome Statute, the United States decided to withdraw from the Court out of fear to expose its citizens to political prosecution by the ICC (Schabas, 2011, p. 28). It even started a diplomatic offensive which lead to the signing of more than 100 bilateral agreements between the US and member states to the Rome Statute (Schabas, 2001, pp. 25-34).

 Kenya signed the Rome Statute on 11 August 1999, and ratified it on 15 March 2005 by the implementation of the Kenyan International Crimes Act (Stone, L. & du Plessis, M., n.d.); (ICC, 2005a). At the time, Kenya acted with much enthusiasm to join the Court because ‘[it] *believed, that in an unequal world, only a common set of rules governing international conduct could keep anarchy at bay*.’ (PSCU, 2014). In that same year, at the opening of the fourth session of the Assembly of State Parties to the Rome Statute, Kenya was elected as member of the Bureau (ICC, 2005b, November 28)[[47]](#footnote-47).

#### The 2007 post-election violence

For a long time Kenya was regarded as an island of stability due to its rapid democratization process, its active role in the region as a peacemaker and a shelter for refugees, and the providing of a solid regional base fo the international diplomatic community. In December 2007 however, violence broke out in Kenya, as heavy as the country has not seen since 1963 (Klopp, 2012 , p. 182). It was the result of constantly switching alliances by an opportunitic elite that resulted in etno-political tensions that eventually had to burst[[48]](#footnote-48) .
 The 2007 presidential elections in Kenya had three candidates: Raila Odinga from the Orange Democratic Movement (ODM), which was supported by the Luo ethnic group; Kalonzo Musyoka from the Orange Democratic Movement-Kenya, supported by the Kamba tribe; and sitting President Mwai Kibaki of the Party of National Unity (PNU), supported by the Kikuyu ethnic group (Klopp, 2012 , p. 183) ; (Horowitz, 2009, p. 1). Kibaki was declared the winner, but the outcome was disputed by some observers. This was the fuel to light the flames. The violence started with attacks on the Kikuyu supporters of Kibaki in the North Rift Valley, supposedly organized by high-level politicians from ODM (Mueller, 2014, p. 27). The Kikuyu’s then took revenge by attacking allies of Kibaki’s opponent Raila Odinga in the Central Rift. The ruling PNU government was accused of abusing the police by orders not to intervene in the killings, and even worse, to massacre innocents at protest rallies. The Mungiki, a Kikuyu-based ethnic militia that was ignored for far too long by the police, was also mobilized to kill citizens that were perceived as opponents of the PNU. Numbers vary greatly, but the post-election violence caused the death of approximately 1,000-1,300 people and the displacement of around 300,000 to 600,000 people (Klopp, 2012 ); (Mueller, 2014). Also Kenya’s economy, based on interethnic cooperation and trust, suffered heavily, indirectly leading to even more victims.
 International mediation led in February 2008 to a deal between the warring parties, according to which both sides had to share power (Klopp, 2012 , p. 182). After this settlement, inquiries were started by the Kenyan National Commission on Human Rights (KNHCR) and the Waki Commission[[49]](#footnote-49) to find out what exactly had passed. The KNCHR released a rapport at the end of August 2008, exposing that at least six Ministers of Kenya were involved in organising the killings, all members of parliament at the time. The Minister of Agriculture, William Ruto, and the Minister of Turism, Najib Balala, both members of ODM, were accused of organising and financing the violence against the supporters of former President Kibaki, the Kikuyu people (Rapport: Ministers Kenya zaten achter geweld verkiezingen, 2008);(International Criminal Court to investigate violence after 2007 Kenya election, 2010). According to the rapport, Ruto and other ODM officials had planned an ethnic cleansing of the Rift Valley already before the elections. Uhuru Kenyatta, vice-Minister President at the time, was accused of being the mastermind behind the counterattacks. The Waki Commission strongly advised the Kenyan government to start a tribunal with national and international judges to address the crimes (Mueller, 2013, p. 30). Former UN-secretary Kofi Annan was handed the evidence with the assignment to assist in setting up a tribunal. If this would not succeed, he was asked to hand over the material to the ICC.
 While the research of the KNHCR and the Waki-commission were still underway, the ICC Prosecutor Luis Moreno Ocampo announced in February 2008 that he was carrying out a preliminary examination of the post-election violence in Kenya (Mueller, 2014, p. 25). Due to the lack of action on the side of the Kenyan government, Kofi Annan decided to hand over the material of the Waki Commission to the Prosecutor in November 2009, including a list of suspects (ICC, 2009). President Kibaki and Prime Minister Raila Odinga publicly stated that they committed themselves to cooperate with the ICC, in accordance with the Rome Statute and the International Crimes Act of Kenya (ICJ Kenya, n.d.). On 31 March of 2010, Pre-Trial Chamber II of the ICC granted the PProsecutor permission to open an investigation propio motu in Kenya (ICC, 2015b). There was a significant amount of international support for the ICC to start an investigation. Among others, the US and the EU were in favour of the ICC investigation, as were certain states from the region such as Uganda and Tanzania (Maupas, 2010). The case knew no precedent: it would become the first case in a member state of the Rome Statute.

Inviting Al-Bashir
In August 2010, Kenya adopted a new constitution. The former one was a heritage of colonial times, with repressive institutions that supported a concentration of powers in the presidency (Klopp, 2012 , p. 183); (KPMG, 2012). These powers could easily be used to undermine and corrupt the civil service, police and judiciary. It had led often to accumulation of land and wealth and repression of opponents. Therefore, a very important part of the new constitution was the limitation of the power of the presidency. Despite several ICC arrest warrants, President Omar Al-Bashir of neighbouring Sudan was invited for the celebrations in honor of the adaptation of the new constitution (L'UE demande au Kenya d'arrêter le président soudanais , 27 August 2010). Already in March 2009, Al-Bashir was accused by the Court of serious war crimes and crimes against humanity in the Darfur region (Le Soudan expulse l'ambassadeur kényan , 29 November 2011 ). Kenya justified the invitation of the Sudanese President by saying that the Sudanese President had to be present as a ruler of their neighboring country, and that ‘*the invitation would add to peace, security and stability in the region*’ (L'UE demande au Kenya d'arrêter le président soudanais , 27 August 2010).

 In December 2010, Prosecutor Ocampo concluded that there was enough material to start two cases in order to deal with the post-election violence of 2007. He revealed the names of six suspects. In the first case, William Samoe Ruto and Henry Kiprono Kosgey, both members of parliament for the ODM, were accused of committing the crimes against humanity of murder, forcible transfer, and persecution by their involvement in a plan to attack perceived supporters of PNU. Radio host Joshua arap Sang faced the same charges (Human Rights Watch, 2011).
 The second case concerned the Kibaki-camp, consisting of charges against Francis Kirimi Muthaura, head of the public service and secretary to the cabinet, Mohammed Hussein Ali, the Kenyan police commissioner during the violence, and Uhuru Kenyatta. They were all accused of committing the crimes against humanity of murder, forcible transfer, rape, other inhumane acts and persecution, by instructing the Mungiki, to attack perceived ODM supporters and prohibiting the police to intervene (Ibid.).
 These accusations caused the original enthusiasm for ICC intervention to quickly fade (R.J. Bartels, interview, 3 June 2015). However, all six suspects did appear before the Court voluntarily in the beginning of April 2011. On 21 April 2011, the Kenyan government requested assistance from the Court and the Prosecutor and asked for the evidence material, allegedly for national investigations to address the post-election violence (Government of the Republic of Kenya, 2011a). The Prosecutor refused to make all the material public, out of fear it would harm the witnesses (Office of the Prosecutor, 2011a). This heavily offended the Kenyan government.
 In January 2012, the Court confirmed the charges against William Samoe Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta, while it declined the charges against Henry Kiprono Kosgey and Mhammed Hussein Ali (Kenya and the ICC: Brace yourself, 2012); (ICC, 2011b). Eventually, the charges against Francis Kirimi Muthaura were also withdrawn. In June 2012, the Gambian Fatou Bensouda took over the cases as the new Head Prosecutor of the ICC. She was already working at the office of the Prosecutor, and was the preferred candidate of the African Union (Permanent Mission of the Republic of Kenya to the United Nations, 2011).

#### Kenyatta and Ruto team up and win the 2013 elections

Despite being indicted by the ICC, Kenyatta and Ruto announced their candidacy for the Presidential elections to be held in March 2013. An interesting move, since the two had been in opposing camps during the post-election violence. Despite of earlier announcements, President Kibaki did not ask the men to step down because of their ICC indictment (Kenya and the ICC: Brace yourself, 2012). Surprisingly, Kenyatta and Ruto won the elections. Kenyatta became the new President and Ruto his vice-President.
 Regardless of earlier announcements that his ICC indictment would be a private matter, President Kenyatta soon started a public lobby to terminate the ICC-proceedings against him (Kenya and the International Court: It's show time, 2013). In May 2013, a special debate between the members of the Security Council and the Kenyan government took place, in order to discuss if the proceedings against Kenya’s President and vice-President could be suspended. With the ICC being a UN Security Council instrument, it had the option to postpone the trial, as was lobbied for by the Kenyan government. The request however was however rejected (Ibid.). In September 2013, a motion to withdraw from the Rome Statute was adopted by the National Assembly of Kenya and the Senate (Letter African MP's to Kenya's MP's Withdrawal ICC, 2013). A little later, a large terroristic attack by the terroristic group Al Shabaab took place on the elite shopping centre Westgate, resulting in 67 deaths (Kenya marks anniversary of deadly Westgate mall attack, 2014). This event only strengthened the President’s rhetoric that he was needed to secure stability and security at home, and that his ICC-indictment was a hindrance for executing his duties as head of state.

The government officially accused of non-compliance
Meanwhile, the ICC investigation experienced great difficulties. On 18 March 2013, the Prosecutor had to withdraw charges against chief of police Muthaura, due to lack of evidence (R.J. Bartels, interview, 3 June 2015). Head Prosecutor Fatou Bensouda struggled with the collection of the evidence since many witnesses had pulled back. Some did come after being summoned, but others had become hostile and refused to come and testify again what they had testified before. Of the 35 witnesses in total, half of them were not able to testify anymore or only did so after a lot of pressure. Most of the summoned witnesses were still in Kenya, trying to appeal in order to prevent testifying at the ICC (Ibid.). The Prosecutor accused the government of Kenya of deliberately holding back phone and bank records of Kenyatta - that could have been used to prove direct links between Kenyatta and the Mungiki - for which the Office of the prosecutor had repeatedly requested (Trial Chamber V (B), 2014, p. 11). On 29 November 2013, the Office of the Prosecutor eventually filed an application for a finding of non-compliance against the Government of Kenya based on article 87(7) (Office of the Prosecutor, 2013, p.3)[[50]](#footnote-50). She asked the Chamber to find that the Kenyan Government had failed to comply with its co-operation obligations, and to order such compliance.
 In January 2014, the Kenyan government responded to these accusations (Trial Chamber V (B), 2014). It stated that it had tried its best to cooperate fully. However, it accused the Prosecution of failing to provide additional information, such as land reference numbers, vehicle registration numbers and telephone numbers. Furthermore, since the Kenyan government was no party in the proceedings, it claimed it could not be held accountable for identifying and collecting the evidence. Lastly, the Kenyan government stated that it did not have any procedure to bypass the regulatory framework, and that it had no extralegal or extrajudicial measures under the Kenyan domestic framework for obtaining the requested material[[51]](#footnote-51). Kenyan domestic law supposedly prohibited the release of these documents, although the Rome Statute states that domestic law may not interfere with cooperation to the Court[[52]](#footnote-52). The Chamber decided to hold a status conference in February 2014 to discuss the matter, and again in October 2014. Kenyatta also travelled to The Hague, however, not as President, but as an individual. In a speech on the 6th October to the Kenyan parliament, he temporarily declared Deputy President Ruto as acting President (Speech by His Excellency Hon. Uhurua Kenyatta, 2014). This way, according to Kenyatta, the sovereignty of the Kenyan republic would be protected. Again, the status conference did not result in an answer on how to deal with the arisen conflict between the Prosecution and the Republic of Kenya.
 On 3 December 2014, the Trial Chamber issued its decision in which it rejected the request to issue a finding of non-compliance by the government of Kenya (Kenya: How the Kenyatta Case was won, 2014). It also rejected the Prosecution request for further adjournment. The Trial Chamber concluded that information was hold back and that there was clearly a lack of willingness to cooperate from the side of the Kenyan government. However, it decided not to refer the case to the Assembly of State Parties, since it assumed this would not improve the situation. Following this ruling, the Prosecutor filed a notice to withdraw charges against Mister Kenyatta on the fifth of December 2014.

# 5. Analysis

## 5.1 Introduction

After having introduced the most important events in the history of Kenya and its the relationship with the ICC, this chapter will present the measurements of the variables the different theories have proposed and discuss their implications for the hypotheses that were discussed in the theoretical chapter.

## 5.2 Compliance

The degree of compliance has been measured by the degree of cooperation by Kenya with official requests by the ICC. Full cooperation with official requests from the ICC requests is categorized as a high degree of compliance. Partial cooperation with requests is categorized as a medium degree of compliance. No cooperation with requests is categorized as a low degree of compliance.

 It is important to realize that the ICC neither has a strong capacity nor an incentive to create transparency about the cooperation of member states. One reason for this is its dependence on the funding of member states for its existence. This forces the ICC to be careful not to disturb the relationship with a member state by enforcing compliance, because this could backfire[[53]](#footnote-53). The main reason, however, is that the ICC largely depends on the cooperation of member states - and often also non-member states for arresting suspects. Cooperation of non-member states is often essential but a sensitive issue. This results in a situation where the ICC better succeeds in achievement of its goals by remaining silent about the cooperation of states than by publicly stating which states cooperate and how[[54]](#footnote-54). This makes it a challenging task to establish a degree of compliance from a member state. There are however some NGO’s which follow the activities of the court and provide documentation, such as the Coalition for the International Criminal Court (CICC).
 It is assumed that at the time of ratifying the Rome Statute in June 2005, Kenya had a high degree of compliance. This is based on the country not only signing but also ratifying the Rome Statute in 2005, and having not yet shown any act of non-compliance with requests of the Court, until the investigation into the situation in Kenya was opened in March 2010.

 The first breach in compliance with the ICC by Kenya occurred in August 2010, when Kenya invited the Sudanese President Omar Al-Bashir to attend the celebrations surrounding the new constitution and refrained from arresting him. Since the ICC had twice issued an arrest warrant for the Sudanese President and all members to the statute are obliged to obey arrest warrants, this can be seen as an official request of the ICC that Kenya ignored. The President of the Assembly of State Parties, Christian Wenaweser from Luxembourg, called the actions of Kenya therefore a serious breach with the requirements of the Rome Statute (Commonwealth chief admonished by ICC over 'war crimes' remarks, 2010). Therefore, not arresting President al-Bashir was the first act of non-cooperation with a request of the ICC by Kenya. August 2010 is therefore indicated as the changing point in compliance from the government of Kenya.
 In October 2010, President Al-Bashir again intended to travel to Kenya to attend a meeting organized by the Intergovernmental Authority for Development (IGAD), an international organization charged with finding a solution for the situation in Sudan (IGAD summit moved from Kenya as ICC demands arrest of Sudan’s Bashir, 2010). This time, the ICC publicly reminded Kenya of its responsibility to arrest Al-Bashir. This led to the transfer of the meeting to Ethiopia, which is not a party to the Rome Statute. This could be seen as cooperation with the ICC official request, since Kenya did not again receive Al-Bashir. However, Kenya defended its decision to let Bashir visit the country on the summit of the African Union (AU) in January 2011. Therefore, the breach in compliance by the government of Kenya led to a medium degree of compliance, since Kenya did not ignore the second request of the ICC, but also avoided a situation in which it had to obey the arrest warrant.

 The government of Kenya continued with its medium degree of compliance. This stems from the following court document: ‘*Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya’* (Office of the Prosecutor, 2013). In this application, the request of the Prosecution from the 24th of April 2012 is described, which comprises an official first request by the ICC relating to the ICC investigation in the country. In the request the Prosecution asks the Government of Kenya for assistance in retrieving financial and other records from four of the six suspected Kenyans[[55]](#footnote-55). Additionaly, the Prosecution asked the Government of Kenya to freeze the assets of these people. In the Prosecutor’s application for a finding of non-compliance, the Prosecutor concluded that the Government of Kenya had not cooperated with the request because on the date of the filing, 29 November 2013, the requested financial records were still not handed over. In December 2014, the requested records were still not handed over (Trial Chamber V (B), 2014), leaving the compliance of Kenya with official requests of the ICC at a mediate degree.
 This categorization of the compliance of the government of Kenya also fits the ruling of the Trial Chamber on the issue on the compliance of Kenya. It ruled as follows on the third of December 2014 on the aforementioned request of the Prosecutor for a finding of non-compliance by the Kenyan Government:

‘*Based on the materials available to the Chamber, the Kenyan Government's*

*submission that it has taken* ***all possible steps*** *available to it to execute the Revised Request, and that it is only the failure of the Prosecution to provide certain additional*

*information that has prevented execution,* ***is not supported****. The Chamber considers*

*that, where a State fails to meaningfully take basic steps to obtain requested material,*

*or to provide clear, timely and relevant responses,* ***mere declarations of compliance***

***are insufficient****. Therefore, and notwithstanding the Chamber's concerns regarding*

*the adequacy of the Prosecution's approach to this litigation, the Chamber finds that,*

*cumulatively, the approach of the Kenyan Government, as outlined above****, falls short***

***of the standard of good faith cooperation*** *required under Article 93 of the Statute. The*

*Chamber considers that* ***this failure has reached the threshold of non-compliance***

*required under the first part of Article 87(7) of the Statute.’* (Trial Chamber V (B), 2014, p. 38).*’[[56]](#footnote-56)*
[boldness of words attributed by the author].

However, the degree of compliance of the Government of Kenya cannot be categorized as low. With concern to the investigation in the country itself, a certain amount of the records were delivered by the Kenyan government in the end (Trial Chamber V (B), 2014, pp. 25-39). Therefore, this research concludes that Kenya went from a full degree of compliance in 2005 to a mediate degree of compliance at the end of 2014, with the visit of Omar al-Bashir in August 2010 as a breaking point.

## 5.3 Neorealism

The neorealist hypothesis suggests that states comply with rules of international institutions because they expect relative gains in the form of power and/or reputation and/or quid pro quo.

5.3.1 Power Neorealism predicts that when a state expects to receive relative power gains in the case of compliance, it will increase its compliance with the international institution. The likelihood of relative power loss in the case of compliance will lead to a decrease in compliance. Therefore, when the data shows that Kenya lost relative power gains and as a reaction decreased its compliance, the neorealist hypothesis is confirmed. When, however, Kenya lost relative power gains but did not decrease its compliance, the neorealist hypothesis is falsified. This is also the case when Kenya did receive relative power gains but did not increase its compliance.
 At the time of ratifying the Rome Statute, relative power gains were likely for Kenya. Some suggest that the enthusiasm of especially African states for joining universal treaties like the Rome Statute - human rights treaties are often signed and ratified firstly by African states - originate from the wish to establish and support instruments of international law that emphasize the universal equality of people, as a reaction to colonial oppression (R.J. Bartels, interview, 3 June 2015). This suggestion is supported by the interview with a Kenyan government official, who indicated that the Kenyan government expected the Rome Statute to become universal in the future. He also suggested that Kenya signed and ratified the Rome Statute as part of its international duty as an internationally oriented state to uphold standards. From that perspective, there was the prospect of a likely relative power gain, because the Rome Statute gives Kenya an equal status as the more developed countries. The power position of Kenya regionally, continentally and globally will be discussed and subsequently analyzed, in order to establish whether Kenya has won relative power gains or suffered relative power losses by compliance with the ICC.

Regional relative power gains for Kenya by compliance with the ICC
Kenya belongs to the region called the Horn of Africa, in the eastern part of Sub-Saharan Africa. Kenya’s direct neighbours include Somalia, South Sudan, Ethiopia, Uganda and Tanzania. Due to the instability in the first two countries, the latter three countries are regarded as the important regional players next to Kenya. Kenya plays a significant role in the regional politics of the Horn of Africa (Bachmann, 2012, p. 126). It has an influence in many security issues in the region, a key issue according to neorealists. From within Kenya, the AU and the United Nations (UN hereafter) try to handle the crisis of Kenya’s unstable neighbour Somalia. Next to its involvement in solving the crisis in Somalia, Kenya also acts as a regional peacemaker by creating regional mechanisms for conflict resolution and peace building in Sudan Ibid; (Kentan Government Official, interview, 29 July 2015). In terms of the economy, Kenya has been called ‘its region undisputed economic motor’(Can Kenya make its new deal work?, 2010), with its banks, hotels and services that beat those of Tanzania and Uganda in performance. Because of its strong position with regard to security and economic issues in the region, one could argue that regionally there are no states that hold the same power position as Kenya and to which gaining or losing relative power is relevant. However, this would be presumpsuous. Kenya is an emerging power on the continent, but still relative power gaining and losing in the region remains important.
 Regionally, it seems that compliance led to more relative power losses than relative power gains. Firstly, because of Kenya’s obligations as an ICC member state, the IGAD summit meeting of October 2010 that was supposed to take place in Kenya had to be relocated. Not being able to host an important peace negotiation arguably diminishes one’s possibility to influence decision-making. Secondly, following the ICC arrest warrant, a Kenyan judge in November 2011 ordered a mandate to arrest Sudanese President Al-Bashir (Sudan to expel ambassador after Kenya’s Bashir warrant, 2011). This was directly followed by the ousting of the Kenyan ambassador in Sudan. Compliance to the ICC thus led to tensions in the relations with Kenya’s neighbouring states. Although Sudan is not an important regional player, bad relations with Sudan do diminish the possibility of Kenya to influence decisions with regard to the Sudanese civil war, one of the key regional security issues. The consideration that the other regional powers Uganda and Ethiopia currently oppose the Court (R.J. Bartels, interview, 3 June 2015), adds to the observation that Kenya did not receive relative power gains regionally by compliance with the ICC. Instead of relative power gains, it risked relative power loss by compliance.

Continental relative power gains for Kenya by compliance with the ICC
Secondly, one must consider Kenya’s position on the African continent. An important force in East Africa, Kenya’s power positions echoe through in its position on a continental scale. Nairobi hosts the largest African headquarters of the UN (Can Kenya make its new deal work?, 2010); (United Nations Office at Nairobi, 2012)[[57]](#footnote-57). Important states vis-à-vis relative gains and losses matter for Kenya continentally are South-Africa, Nigeria and Angola. These sub-Saharan states, together with Kenya, are said to constitute the continent’s emerging powers (Almeida Cravo et al., 2014); (Why Nigeria hates S.A.: Gloves off to be champion of Africa, 2012)[[58]](#footnote-58). Important to note is that the first two are also Member States to the Rome Statute, while Angola is not.
 On a continental scale, compliance with the ICC led to more relative power losses than non-compliance. Likely power losses from non-compliance were indeed present. A letter was sent in September 2013 by several members of parliament of different African countries, calling on Kenya to not adopt a bill that would result in the withdrawal of Kenya from the Rome Statute (Letter African MP's to Kenya's MP's Withdrawal ICC, 2013). However, none of these Members of Parliament came from a great power on the continent. Therefore, the letter did not have much impact.
 Relative power gains were won by Kenya by non-compliance. Firstly, not arresting President Al-Bashir answered to a specific order of the AU (The ICC’s first verdict: benchmark, 2012). Furthermore, relative power gains from non-compliance were found in the fact that Kenya became a leader in the AU in the revolt against the ICC[[59]](#footnote-59). Secondly, the ICC-investigations placed Kenya in a bad light, while there were no ICC-investigations in South-Africa, Nigeria or Angola. Therefore, Kenya lost relative power gains compared to these states. Thirdly, Kenya was able to lead the AU in adopting a far-reaching resolution that called for all African states to withdraw from the Rome Statute and to support the establishment of an African tribunal. This shows Kenya’s relative power gains by non-compliance since it was able to influence such an important decision. Neither Nigeria nor South-Africa or Angola played a part in this revolt. Therefore, a strong case can be made for the argument that it was actually non-compliance which entailed relative power gains for Kenya on a continental scale.

Global relative power gains for Kenya by compliance with the ICC
Relevant states for Kenya’s global power position are still the continental great powers of South-Africa, Nigeria and Angola. They remain to be the states that have an almost equal power position as Kenya and deal with comparable circumstances as fellow African states. The global power position of Kenya is argued to be strong in comparison with other African states. During the Cold War, Kenya succeeded in keeping friendly relationships with both the Soviet Union and the Western bloc. Its relationship with former colonizer Great Britain and other western allies such as the US has always remained close (Cheeseman, 2013). Moreover, Kenya has put itself forward as an important partner in the ‘War on Terror’*.* The country therefore acts as an important counterpart for the Western world and is seen as one of the key African allies of the U.S. (Bachmann, 2012); (Don’t expect a revolution: Barack Obama may differ little from George Bush in his approach to Africa, 2009); (Can Kenya make its new deal work?, 2010). In addition, in recent years Kenya has also built up trade ties with China and India. China has quickly become one of Africa’s most important trading partners and an important investor in Kenya’s railroads (World Bank, 2015b). According to a research from 2010, Kenya was responsible for ninety percent of the African import to India at that time, together with Tanzania (Narlikar, 2010, p. 457)[[60]](#footnote-60). Last but not least, the discovery in 2012 of oil in Kenya’s South Lokichar Basin may help to attract even more attention from states all over the globe (Malingha Doya, 2014). Therefore, Kenya’s global power position is steadily rising.
 Global relative power gains that were realized by the compliance of Kenya with the ICC were all closely related to the domain of the ICC itself. Kenya was member of the ICC Bureau from 2005-2008 (ICC, 2005b) and provided one of the vice-Presidents of this Bureau from 2008-2011 (Permanent Mission of the Republic of Kenya to the United Nations, 2011). Other global relative power gains that were likely did not become reality. The Rome Statute did not provided Kenya with a more equal status to those of the West, since the Rome Statute has not become universally ratified. Very powerfull states have not joined, such as the U.S. and Russia. The greatest regional majority of member states still consist of African states, which does not help ensure a more equal treatment of African states globally. From a member state, more than a non-member state, full cooperation with the ICC is expected. This means that Member States have sacrifized part of their sovereignty, leading to relative power loss compared to those states that did not sign. This relative power loss was intensified for Kenya by the start of the ICC investigation to the 2007 post-election violence. This made Kenya’s western allies and donors uncertain about how to treat leaders under investigation by the Court (Kenya: A different country, 2013). When Kenyatta was elected, the US, Great Britain and the EU announced their intention to avoid more than essential contact with the new head of state (Uhurua Kenyatta prête serment en tant que 4e pr-esident du Kenya, 9 April 2013 ). Naturally, this decreased Kenya’s options in the international diplomatic realm.Compliance to the ICC meant having to agree and cooperate with an ICC investigation, which made the country vulnerable for international critique. Subsequently, compliance therefore did not increase Kenya global relative power position. On the contrary, it seemed to have resulted in relative power loss, which was not suffered by South-Africa, Nigeria or Angola who do not have ICC-investigations in their country or are not a Member State. Resistance to the Court, however, brought relative power gains since Russia and China announced their support (Kenya’s president goes east: Why China could become Uhuru’s Kenyatta’s closest friend, 2013). With China’s recent interests in Kenya’s economy, close ties with China may entail more important power gains than fulfilling the demands of the West. Therefore, compliance with the ICC resulted mainly in a relative power loss for Kenya on a global scale.
 To conclude, although ratification would likely bring power gains, it seems that compliance led to more relative power loss than non-compliance on all geopolitical levels. The relative power loss suffered by compliance, in the shape of the ICC investigation starting in March 2010, also holds close connection to the timing of the breach in compliance in August 2010.

5.3.2 Reputation
With regard to reputation, neorealism predicts that likely reputational gains in case of compliance will lead to an increase in compliance with the international institution. The likely reputational loss in case of compliance will lead to a decrease in compliance if this succeeds the likely reputational loss from non-compliance. Therefore, when the data shows that compliance to the ICC led to reputational costs for Kenya and the degree of compliance decreases as a reaction, the neorealist hypothesis is confirmed. The neorealist hypothesis is falsified when Kenya received reputational gains but did not increase its compliance.
 The short term reputational gains or losses for Kenya resulting from its compliance to the ICC are measured by means of a content analysis of news paper articles that appeared in *Le Monde* and *The Economist* between 2005 and 2014[[61]](#footnote-61). Unfortunately, no news reporting in *Le Monde* on Kenya and the ICC was found from before 2008. News reporting in *The Economist* on Kenya and the ICC was not found until 2009.
 **Figure 5.1. A** below represents the balance between positive and negative news coverage with regard to Kenya and the ICC between 2008 and 2014 in *Le Monde*. The graph does not show a clear trend in positive or negative news coverage on Kenya with regard to the ICC. There seems to be a trend towards negative news reporting between 2009-2011. Between 2011 and 2014 the figures are fluctuating. However, from 2010 onwards, negative news coverage always constitutes more than fifty per cent of the total news coverage.

**Figure 5.1. A.** **Scores on positive and negative news coverage in *Le Monde* on Kenya in relation to the ICC between 2008 and 2014[[62]](#footnote-62).**

In order to fit the proposed mechanism by neorealism, negative news coverage should preceed the breach in compliance. Therefore, a close-up graph (figure B) is produced to provide more detailed information on the news coverage before the breaking point in compliance in August 2010:

**Figure 5.1. B. Close-up on scores of positive and negative news coverage by *Le Monde* on Kenya in relation to the ICC in 2010.**

The close-up graph of 2010 shows that in April the news coverage about Kenya and the ICC was mostly negative. The measurement of August is from the 27th of August, and therefore was published after the breach. With only one measurement before the breach, this does not comprises a very convincing piece of evidence. However, the topic of the article in *Le Monde* of April 2010 was the announcement of the ICC investigations in the country (Maupas, 2010). Therefore, the article could still be an indication that indeed negative news coverage because of the ICC investigation was increasing, and thus that compliance led to reputational losses.
 In order to strengthen the findings of the quantiative analysis employed on articles published in Le Monde the results of the quantiative analysis employed on articles published in *The Economist* will now be presented. **Figure 5.1.C** represents the balance between positive and negative news coverage *The Economist* with regard to Kenya and the ICC between 2009 and 2014.

**Figure 5.1.C.** **Scores on positive and negative news coverage in The Economist on Kenya in relation to the ICC between 2009 and 2014[[63]](#footnote-63).**

The graph shows an upward trend in positive news coverage between 2009 and 2011 and increasing negative news coverage from 2012 onwards, with a slight revival in positive news in 2014. Note that the news coverage has never been predominantly positive (more than 50 per cent). This means that most of the news coverage in *The Economist* on Kenya in relation to the ICC has been negative, which could be an indication that indeed reputational losses caused the decrease in compliance. However, in order to establish a clear causal effect the negative news coverage has to have been significantly risen before the breach in compliance in 2010. Although the amount of negative news coverage was very high in 2009, it does not fit the picture that afterwards negative news coverage decreased. It could be that the graph per year is too unspecified in order to notice a increase in negative news coverage before the breach. Therefore, to investigate whether significant negative news reporting took place right before the breach in August, graph D is composed:

**Figure 5.1.D.: Close-up on scores of positive and negative news coverage in The Economist on Kenya in relation to the ICC in 2010.**

Graph D shows that indeed there was a strong increase in negative news reporting before the breach in compliance.
 The neorealist predicition, that if relative losses by compliance increase then compliance will decrease, is slightly confirmed by the measurements of the reputational gains variable. This is mostly shown by the close-up graphs. However, based on the limited amount of articles and the limited points in time where there was data available, urges one to approach this conclusion with prudence.
 With regard to the content of the articles, it is worth mentioning that there was little media coverage on the cooperation of Kenya in the ICC-cases itself. Most negative coverage focused on Kenya’s failure to establish a domestic tribunal to deal with the post-election violence, and the attempts to suspend the cases via the UN and the AU. The lack of news coverage on the actual compliance of Kenya could be explained by the troubled view the public has on a state’s cooperation with the ICC, due to low transparency given by the ICC. The non-compliance of Kenya with cooperation requests was thus not visible to outsiders and subsequently its effect on the country’s reputation limited. This opposed to attempts to gather support for the suspension of the cases, via the African Union and via the UN Security Council, which were far more visible for the public eye and thus likely to reach the media.

5.3.3. Quid pro quo
With regard to quid pro quo gains, neorealism predicts that the possibility of quid pro quo gains in the case of compliance will lead to an increase in compliance with the international institution. Therefore, when the data shows that the ICC-cases in Kenya led to possible quid pro quo gains for Kenya and the degree of compliance increases, the neorealist hypothesis is confirmed.
When the data shows that the ICC cases in Kenya led to possible quid pro quo gains for Kenya and the degree of compliance however decreases, the neorealist hypothesis is falsified.
 In 2005, when Kenya ratified the Rome Statute, it was not unlikely for quid pro quo gains to occur. Brown and Raddatz (2013) argue that Kenya’s sensitivity for political pressure from international actors would have been high based on the degree of alignment with international patrons, the reliance on foreign aid and the participation in world trade as a primary commodity producer. Combined with a high intensity and a broad variety of linkages for an African country – the presence of Western investment, trade, military cooperation, aid flows, tourism and the ties with civil society - this would suggest that donors would have been more likely to use their
leverage (p. 46).
 However, their study revealed that Western donors used very little quid pro quo in order to force the compliance of Kenya with the ICC, and if they did it was without much effect. Western diplomats and aid officials showed a reluctance to put Kenya under pressure because of other vital interests. The United States for example focused on Kenya’s strategic security location with regard to Somalia, piracy, oil and drones instead of supporting an ICC trial (Ibid., p. 50). This became an even more pressing issue after the attacks on the Westgate shopping mall in September 2013 (Howden, 2013). Next to this, the assumption that the retraction of donor money would not have a great impact was also widely spread, not in the least because alternative investors like China and India were right around the corner[[64]](#footnote-64). While trade figures with western powers such as the United States and Great Britain were dropping, the amount of trade between Kenya and China was only increasing. Donors feared this room for maneuver of Kenya, especially with regard to economic interests. With China and India eagerly trying to break into Kenyan markets, Western donors feared they would miss out. Something similar happened in the case of Sudan, in which some donors decided to stop their aid flows after the ICC started a case against Omar al-Bashir. China however, stepped in the vacuum and afterwards benefitted greatly from the oil resources from the country (R.J. Bartels, interview, 3 June 2015). According to a newspaper article in Le Monde 24 November 2013, China stated it will continue its support for a suspension of the cases against Kenyatta, as had Russia (Coloma, 2013); (Victoire pour le Kenya à la Cour pénale internationale, 9 December 2014), affirming the fear of western diplomats that putting pressure on Kenya to abide the ICC rules would only drive the country further into the arms of other investors. With China and Russia to fall back on, Kenya would probably feel confident enough to withstand any Western threats to impose sanctions or suspend aid. Indeed, the first official state visits by the Kenyan President and vice President were to Russia and China in order to ask them for support in their request for ending the ICC proceedings in the country (Coloma, 2013).
 The first opportunity for a quid pro quo bargain came after the rapport from the Waki-commission. The Waki- Commission gave the government three months to establish a national tribunal to deal with the cases stemming from the post-election violence. This was heavily supported by the donors, framing it as essential for future cooperation with the Kenyan government. The disruptive consequences of the 2007 post-election violence, however, caused Western donors to focus on peace and stability. They did not threaten with sanctions or other measurements if the Kenyan government would fail to create a tribunal (Brown & Raddatz, 2013, p. 48). By early 2010, most donors’ attention for the subject had waned and they failed to push through the political conditions they had set. This weakened the credibility of future quid pro quo conditions.
 Because a national tribunal became a very unlikely scenario, a trial at the ICC was a new goalpost for some donors, under which the Scandinavian states. Other donors however, like the US, Great Britain, Japan, France and Canada, were focusing their aid more on answering to their economic interests. This lack of common priorities, also caused by the diverging opinions of the donors on the ICC, meant little input for a quid pro quo approach with regard to the ICC. Instead, focus was put on support for the constitutional review process and its implementation, in order to enhance stability in the future, instead of risking a new escalation of the situation by bringing up the events of December 2007 before an international court (Ibid., p. 49).
 With new elections in sight in spring 2013, most donors kept a low profile, hoping for stable and peaceful elections, not as much as fair and free elections (Ibid., p. 51). Things got complicated when ICC-indictees Kenyatta and Ruto joined together and were running in the elections in spring 2013. Threats were outed by Great Britain and the US, the former stating that contact would be limited to the essential while the latter announced that Kenyans should realize that certain choices would have consequences. This was quickly followed by statements from France and other donors, repeating the same message. After the victory of the Kenyatta and Ruto combination, pressure was first maintained and indeed official contacts were avoided. However, the shift towards a new condition was quickly generated: the new message from the international community was that if Kenya should stay true to its international duties, including cooperating with the ICC, diplomatic contact would be resumed (Ibid., p. 52). However, even this condition was not pushed through. Despite repeated accusations of ICC Head Prosecutor Fatou Bensouda that the government of Kenya failed to answer requests of the Prosecution, the donors did not put consequences to this. Even after May 2013, when Kenya, via the UN and the AU, tried to stop the ICC proceedings in the country, a European diplomat admitted to Brown and Raddatz that sanctions were never an option (Brown & Raddatz, 2013, p. 53).
 Therefore, it is concluded that no significant quid pro quo gains were either lost or won by Kenya with regard to their compliance with the requests of the ICC.

### 5.3.4. Conclusion on neorealism variables

The overall prediction of neorealism was that if a state expected there would be relative gains to win in the case of compliance, the degree of compliance would increase. The likelihood of Kenya having such expectations was determined by measuring the actual relative gains that were inherent to compliance. The measurements of relative gains was split up into the variables power, reputation and quid pro quo gains.

 The analysis of the variables shows that although compliance would likely bring relative gains, it seems compliance actually led to relative power and reputational losses, also opposed to the states that would matter most for Kenya since they held an almost equal power position. Quid pro quo gains were not visibly present, since the donor community did not put significant pressure on Kenya to comply with the ICC. The timing of Kenya decreasing its compliance from a high degree to a mediate degree of compliance seems to be proceeded by a change in the neorealist variables of relative power and reputation gains. Therefore, the neorealist hypothesis is confirmed. Interestingly, it looks like it is actually non-compliance that led to more relative gains than compliance. This would also fit a neorealist framework.

5.4 Neoliberalism

Neoliberalism focuses on the role the structure of an international institution can play in compliance by providing long-term benefits such as reputation and transparency. However, in the preceeding paragraph 5.2 on compliance, it was already discussed that the ICC does not have its own transparency mechanisms. Therefore, the focus here will be oin the long term benefit of reputation.
 Neoliberals predict that if a state expects long term benefits from compliance with an international institution, it will accept the short term costs of compliance, and display a high degree of compliance. When the short term costs for the compliance of Kenya are higher than the long-term benefits and the compliance of Kenya decreases, the institutional liberal hypothesis is confirmed. When however the short term costs for compliance are lower than the long-term benefits and the compliance of Kenya still decreases, the institutional liberalist hypothesis is falsified. This is also the case when the short term costs of compliance are higher for Kenya than the long-term benefits, but Kenya’s compliance does not decrease.

5.4.1. Short term costs

Short term costs for complying with policy would occur if the distribution of the expected political, economic and ideological costs and benefits of the policy deviate negatively from the state’s original preference, or if for a state the distribution of the expected political, economic and ideological costs and benefits of the policy is unfavorable in comparison with other states (van der Vleuten, 2001, p. 20)[[65]](#footnote-65).
 The original ideological costs for Kenya were operationalized as those that constitute a radical change of existing national policy. The country had to adopt new laws (among which the International Crimes Act and the Witness Protection Act (Permanent mission of the Republic of Kenya to the United Nations, 4 December, 2007, p. 2);(R.J. Bartels, interview, 3 June 2015)). These are viewed as ideological costs. Political costs were operationalized as those costs that will lead to much protest. There are no indications that the ratification to the Rome Statute led to much protest. In the Kenyan Parliament, the discussion concerningthe ratification of the Statute of the International Criminal Court was led more by impatience for implementation than sounds of protest (Kenya National Assembly Official Record, 2001, pp. 3094-3095). Kenya was one of first countries to take care of the bilateral implementation treaty, named the International Crimes Act (R.J. Bartels, interview, 3 June 2015). Economic costs are those that lead to unfavorable economic consequences. There have been no costs of relevant size or shape, besides costs for the adjustment of laws. This can be explained by the fact that compliance to an international justice institution for war criminals rarely links with the economic conditions of a country. Therefore, there were not much short term costs for Kenya in the case of compliance, except the ideological cost of adaptation new laws.

### **5.4.2. Long-term benefits**

Long-term benefits for Kenya by joining the ICC will be measured by the amount of foreign direct investment (FDI), which represents the trust foreign investors have in a country’s stability and rule of law, and reports of NGO’s such as Freedom House and Human Rights watch.

Foreign Direct Investment
The net inflow of foreign direct investment has been fluctuating in Kenya between 2005 and 2015:

**Figure 5.2 Foreign direct investment in Kenya between 2005 and 2014** (World Bank, 2015a)

As the graphic shows, there has been a major peak in 2007. The US increased its FDI from $ 51 million US Dollar to $729 million US Dollar (KPMG, 2012, p. 21). In 2008, there is a strong decrease in FDI for Kenya. This could be related to the post-election violence in December 2007, which discouraged investors (Can Kenya make its new deal work?, 2010), or the worldwide economic financial crisis, which started in 2008. It is difficult to trace back the sources of Kenya’s FDI, since there is no clear mandate by any Kenyan agency to collect data on FDI (KPMG, 2012, p. 22). Newspaper articles however offer some indication, next to a report by KMPG dating from 2012. The latter reports that the FDI from the US decreased to $96 million in 2008, only slowly recovering to $116 in 2009 en $ 186 million in 2010. As mentioned, this could be a result of the financial crisis. However, neighbouring countries Tanzania and Uganda received much higher FDI from the US in these years while having smaller economies (KPMG, 2012). The Business Daily, a Kenyan business paper, reported in September 2011 that China and India had replaced Britain as Kenya’s top source of FDI (Juma, 2011). South Africa and South Korea had also taken place in the top five of investors, pushing off old FDI-providers such as the UK, the Netherlands and Germany.The US edition of the China Daily reported in August 2013 that China has become Kenya’s biggest FDI source with $474 million American Dollar (China tops Kenya's FDI sources, 2013). Together with the slow increase in US FDI, this seems to indicate that the rise in FDI is not resulting from renewed investments from the West, and therefore, FDI from western investors seems to have decreased compared to 2007.The small hick up in 2011 followed after the breach in compliance of Kenya, but should have happened before in order to support the institutional liberalist hypothesis. It seems unclear if the decreasing long term benefits of FDI can be linked to the decrease in compliance by Kenya.

FreedomHouse
The FreedomHouse ratings often speak about the behavior of Kenya with regard to the cases at the ICC (FreedomHouse - Kenya 2011);(FreedomHouse, 2014);(FreedomHouse, 2015). Kenya’s behaviour with regard to the ICC is therefore understood to be part of the measurements of FreedomHouse, and the measurements of FreedomHouse to be contributing to Kenya’s long-term reputation.

**Figure 5.3 Kenya’s scores in FreedomHouse reports between 2005-2014[[66]](#footnote-66). Measurements range from 1 to 7, in which 1 is best and 7 is worst.**The paragraph depicted above represents the scores of Kenya in the FreedomHouse reports. The ratings decreased twice: Firstly in 2009 and secondly in 2012. In their report over 2009, this is mainly credited to the international criticism on the lack of the Kenyan government to push through crucial reforms that would solve the root causes of the post-election violence, among which the establishment of a tribunal to investigate post-election violence in 2008(FreedomHouse, 2010). The decrease in the FreedomHouse rating in 2012 is according to the corresponding text not mainly caused by Kenya’s behavior on ICC’s proceedings, but by other domestic circumstances.
 In order to confirm the institutional liberalist hypothesis, it would be expected to see a fall in reputation before the breach in compliance in August 2010. Indeed, there is a fall in reputation in the 2010 report over 2009. This would seem to confirm the institutional liberalist hypothesis that reputational losses led to a decrease in compliance.. Therefore, the ratings of FreedomHouse confirm the institutional liberalist hypothesis with regard to the breach in compliance.

### 5.4.3. Conclusion on the neoliberal variables

Neoliberals predict that a high degree of compliance will occur when long-term benefits outweigh short term costs.
 The analysis shows that the short term costs were not high, since only ideological costs had to be made concerning the implementation of a new law, in which Kenya succeeded. Long-term benefits from transparency were not present, since the ICC does not invest in creating transparency involving the compliance by member states. Long-term reputation benefits were gained by compliance but declined over the years In order to fit the institutional liberal hypothesis, the timing of the fall of long-term reputational gains should have happened before 2010. This is the case for the measurements of FreedomHouse. However, the drop in FDI seems to be more an indication of failing of trust because of the post-election violence than originating from a bad reputation with regard to the ICC, resulting in non-compliance.
 Concluding, with regard to the neoliberal hypothesis concerning short term and long-term benefits, as soon as the long-term benefits seems to erode, compliance decreases according to the FreedomHouse measurements. Therefore, the institutional liberalist hypothesis seems to be confirmed by the FreedomHouse measurements. In the end the long-term benefits were lower than the short term costs, and therefore compliance decreased. The FDI measurements, however, do not confirm the hypothesis.

## 5.5 Constructivism

### 5.5.1 Identity of the state and norm of the institution

As discussed in the methodology chapter, a change in compliance could be explained by a change in consensus between the identity of the actor and the norm of the institution. When there is a high degree of consensus between the identity of the state and the norm of the international institution, compliance will be high. When there is a low degree of consensus between the identity of the state and the norm of the international institution, compliance will be low. Identity was operationalized as words and deeds of the government of Kenya and would be measured by a quantitative content analysis on documents comprising the rhetoric of the Kenyan government on the ICC. The core norms of the international institution, the ICC in this regard, are determined as ‘fighting impunity’ and ‘international justice’[[67]](#footnote-67). Therefore, when the words and deeds of the government of Kenya will be less about fighting impunity and promoting international justice, and compliance subsequently decreases, the constructivist hypothesis is confirmed. When the words and deeds of the government of Kenya keep containing an references to fighting impunity and promoting international justice and compliance decreases, the constructivist hypothesis is falsified.
 Statements at the Assembly of State Parties and the UN General Assembly, court documents, press releases, a non-paper and a draft letter from the AU to the ICC, were used in order to determine the amount of correspondence between the words and deeds of the Kenyan government with the ICC norms. The data-analysis starts with documents from 2007 since there were no public documents of Kenya retained in relation to the ICC that were dated before those years. The paragraph will start with a review of the words and deeds of Kenya based on process tracing.

From a strong commitment to a critical outlook
From 2007 until the review conference in Kampala in June 2010, Kenya’s rhetoric was full of a strong commitment to the court (Permanent Mission of the Republic of Kenya to the United Nations, 1 November, 2007) (Permanent mission of the Republic of Kenya to the United Nations, 4 December, 2007) (Permanent Mission of the Republic of Kenya to the United Nations, 30 October, 2008); (Embassy of the Republic of Kenya, 2008); (Wako, 2010). Kenya reaffirmed the consensus in the common goal of fighting impunity for example in its statement in the general debate during the eighth session of the Rome Statute ASP in November 2009 and at the ICC Review Conference in June 2010 in Kampala. The first change of course appeared in December 2010, after Prosecutor Ocampo announced that he will start investigations to six suspects. Then-ruling President Kives gave a public statement in which support for the ICC investigation was surprisingly absent, while intentions to establish a natural tribunal were emphasized (Kenya State House , 2010). In January 2011, this message was repeated in a joined press statement with the Prosecutor, while the complementary character of the court was highlighted. However, the press statement did confirm the country’s cooperation with the ICC investigation (Kenya State House, 2011). In the same year,the Kenyan government pressured for a suspension of the ICC’s proceedings in Kenya at the United Nations in New York (Human Rights Watch, 2011)[[68]](#footnote-68). Arguments were that the ICC prosecutions were potentially divisive and could endanger national reforms, needed to address the post-election violence (Office of the Government spokesperson , 2011). Furthermore, the jurisdiction of the court was put into question since Kenya was capable of prosecuting the suspects of the post-election violence by means of domestic courts. This was a first hint that the deeds of the government of Kenya also no longer support the ICC norm of universal jurisdiction, since it so much preferred its own domestic courts, even while proceedings at the ICC were already started. On April 21, 2011, the Government of Kenya requested the cooperation of the Court and the Prosecutor in respect of its national investigations, referring to the principle of complementarity (Government of the Republic of Kenya, 2011a). Kenya appealed to the fact that States Parties have the primacy to exercise their sovereign national jurisdiction, and therefore the Court and the Prosecutor should cooperate with national investigations. The Pre-Trial Chamber rejected Kenya’s request (Pre-Trial Chamber III, 2011). In its appeal, the tone of Kenya is striking. In this document, Kenya clearly waived itself from the court for the first time:
 *‘The decision of the Chamber instead shows what some or many may see as the Chamber’s absolute determination to find a way of rejecting the Government’s request. To be perceived as vulnerable to such treatment by the very court Kenya has supported from its creation is embarrassing or humiliating for Kenya and potentially unfortunate for the future of the court. Kenya is entitled to be treated with respect and its assertions are not to be circumvented by procedure or treated as worthless without evidence and reason*.’ (Government of the Republic of Kenya, 2011b, p. 6)

Translating words into deeds
Despite objections of the Kenyan government the Appeals Chamber confirmed the admissibility of the cases on the 30th of August 2011(ICC, 2011b) and rejected the Kenyan appeal on its decision on the sharing of evidence by the Court and the Prosecutor. The Prosecutor indicated that his refusal for sharing information was based on the continued receiving of reports that participants to the investigations in Kenya face threats and intimidation, including from associates of the suspects (Pre-Trial Chamber III, 2012). This is another indication that the deeds of the Government of Kenya were no longer are in line with the norms of the ICC. Kenya responded on the accusations by denying all accusations. It continued its rhetoric on establishing domestic mechanisms to deal with the prosecutions. It also accused the ICC of leaking to the media first instead of informing the government of Kenya first with regard to issues relating to Ambassador Muthaura (Government of the Reppublic of Kenya, 2013a, p.4). In a press statement of the 14th of March 2011, the Kenyan Government emphasized its willingness to cooperate with the court, but added the remark that the Prosecutor should continue to put effort in a good relationship with Kenya by respecting the natural rights of countries and individual rights of any people mentioned in ICC cases. The Prosecutor was subsequently accused of impinging on the natural rights of the sovereign state of Kenya and not being aware of the important consequences the process has on peace and security within the Kenyan state (Government of the Republic of Kenya, 2013a, p.6).
The drifting apart of Kenya and the ICC continued in 2012. In May 2013, during an interactive dialogue with members of the UN Security Council, the permanent representative of Kenya at the United Nations Office, attacked the ICC for not having taken care of the accountability of the Head Prosecutor and the checks and balances in her powers (Permanent Mission of the Republic of Kenya to the United Nations, 23 May 2013 ), which were supposed to threaten the notion of sovereignty, the equality of nations and the democratic outcomes of the Kenyan 2013 election. By valueing the sovereignty of the state and the election outcome higher than the ICC proceedings, Kenya continued to show a decrease in ICC identity.

A definite breach
 The final stage of no consensus between the Kenyan identity and the ICC norms was reached at 5 September 2013 when Kenya’s National Assembly voted on a special motion to withdraw Kenya from the Rome Statute. On September 10th 2013, Kenya’s Senate likewise approved a motion to withdraw Kenya from the Rome Statute (Government of Kenya, 2013b). At the same time a heated discussion started between the Prosecutor and the Government of Kenya, discussing whether the latter provided all necessary cooperation. This discussion was taken by the government of Kenya as an attack on its sovereignty. The national laws of the country prescribed that the Prosecutor should have gone to a Kenyan court in order to ask for the requested records instead of asking them directly from the government (Kenyan government official, interview, 29 July 2015). Furthermore, the Kenyan law also prescribed that the Prosecutor should have appear before a Kenyan Court with regard to her refusal to hand over the list she got from the Waki Commission. As a Kenyan government official stated: ‘*The Prosecutor does not have full immunity and also has to abide Kenyan law whenever dealing with Kenya. The constitution of Kenya stands above international law. It does refer international crimes to the Court, but within certain limits that guard Kenya’s sovereignty. The constitution guards the sovereignty of Kenya and the rights of its nationals*.’ (Kenyan government official, interview, 29 July 2015). This is a fundamental difference in opinion with the content of the Rome Statute and shows the detertoriation in consensus between the ICC norms and Kenya’s words and deeds.
 5.5.2. The African Union as significant Other As demonstrated in the paragraph above, Kenya took distance from the ICC identity in words and deeds. According to constructivism, this could have been caused by the rise of a significant Alter. In the methodological chapter, it is argued why the African Union would be most likely to fulfill this role. Ifthe African Union indeed appeared as an alternative Other, will be discussed here. This will firstly be done by by a quantitative analysis on the communication of Kenya with regard to the ICC, followed by a qualitative analysis of the communication of Kenya to provide background to the findings of the quantitative analysis. The African Union will be regarded as a significant Alter for Kenya if in the communication of Kenya with regard to the ICC if the moment when the amount of words referring to the identity of the African Union exceeds the amount of words referring to the ICC identity overlaps with the trend of non-compliance[[69]](#footnote-69).

#### An ICC identity versus an African identity

The graph below represents the results of the quantitative analysis and shows end scores per year based on the average score on both identities per document. If an end score is a plus, this means that there were more words mentioned in the documents that corresponded to the ICC identity, than words that corresponded with the African Union identity. If the score is a minus, then there were fewer words mentioned in the documents that corresponded to the ICC identity than words that corresponded with the African Union identity. **Figure 5.4 Average score on ICC- or AU-identity of Kenya between 2007 and 2014 per year**
As the graph shows, the trend line on AU-identity has some striking measurements. The switch in identity seems to be at the end of 2010. Before that, the ICC identity seems to be in favour. To establish the exact time of the switch in identity, the measurements are put in a table:

|  |  |  |
| --- | --- | --- |
| Date | End score ICC identity | End score AU identity  |
| November 2007 | 5 | 1 |
| December 2007 | 1 | 0 |
| October 2008 | 4 | 2 |
| November 2008 | 6 | 0 |
| November 2009 | 5 | 1 |
| **June 2010** | **4** | **1** |
| **December 2010** | **0** | **0** |
| **January 2011** | **0** | **2** |
| March 2011 | 0 | 0 |
| December 2011 | 8 | 15 |
| November 2012 | 2 | 1 |
| May 2013a | 5 | 45 |
| May 2013b | 5 | 6 |
| November 2013 | 0 | 6 |
| January 2014 | 1 | 2 |
| October 2014 | 1 | 2 |
| December 2014 | 4 | 3 |

**Tabel 5.5 Scores of Kenya on ICC-identity and AU-identity between 2007 and 2014 per document**

The table shows that the switch in identity took place around December 2010. Before the breach in compliance, August 2010, the ICC identity was still in favour. In December 2010, there seems to be neutrality and in January 2011 the identity seems to have turned in favour of an African Union rhetoric, which means that the identity change took place after the breach in compliance and not before. This means that the quantitative analysis falsifies the constructivist hypothesis.
 It is worth mentioning that the moment of the identity switch, in the end of 2010, falls together with the Prosecutor announcing the names of the six suspects that were going to be investigated. Therefore, it seems as if the switch in rhetoric identity is more pushed by strategic reasons than by a genuine identity shift.
 The qualitative analysis seems to support this conclusion resulting from the quantitative analysis. Kenya only rarely refers in its statements to the opinion or the actions of the African Union with regard to the ICC before the breach in compliance in August 2010.
 It did in 2008, when Kenya gave its opinion on the case against President Al-Bashir by underlining the statement of Tanzania:
 *‘The International Criminal Court in its work is not to take into consideration political implications. That responsibility lies with the Security Council, in terms of article 16 of the Statute. With regard to the indictment of President Omar Al-Bashir, the African Union found that there were under the current circumstances, and given the peace process in Sudan, a basis for a Security Council to avail itself of the powers granted to it under Article 16 of the Rome Statute, to request a deferral of the situation. This is in no way contrary to the fight against impunity.’* (United Republic of Tanzania, 2008, p.2). Also in 2013, in its statement at the Assembly of State Parties (ASP) of the ICC, Kenya referred to AU by recalling amends to the Rome Statute proposed by the AU(Government of the Republic of Kenya, 2013d). However, the qualitative analysis indicates that it is more likely that it was actually Kenya that tried to influence the general opinion of the African Union. A non-paper dating from May 2013 demonstrates that Kenya pushed for a critical approach of the AU towards the ICC (Government of the Republic of Kenya, 2013b). The document circulated among UN-members in New York, around the same time the interactive dialogue with members of the Security Council was held about the ICC investigation in Kenya. According to the source, the NGO *The Coalition for the ICC*, the non-paper was written by Kenya. The document especially addresses African states and the AU:

‘*The ICC’s Kenya cases have grave implications for Africa. (…) The African Union has pronounced itself unanimously on Kenya’s, together with other ICC cases. The African Heads of State must ensure that the will of their Assembly is telling on the conduct of international governance and justice as reflected in the ICC’s Kenya cases.
 At a time when the traditional approach to state sovereignty is changing on the basis of right to protect and other measures to maintain peace and security supported by Africa and the African Union, it is imperative that this is not an excuse to totally vacate the notion of sovereignty and the equality of nations.* ***In light of the foregoing, we request the African Union and all friendly nations to individually and collectively recall the common African Union position on the ICC and acknowledge the changed circumstances in Kenya, and in particular the democratic outcome of the 2013 election****. The AU should consider urging the ICC to terminate the case or refer it in review of changes to Kenya’s reformed judiciary and new constitutional dispensation*. ‘(Government of the Republic of Kenya, 2013b, p. 1-2)[[70]](#footnote-70).

A letter dated 30 May 2013 urges the African Member States to the ICC to give follow-up action to the AU resolution concerning the ICC that was discussed during the African Union Heads of State and Governments 21st Ordinary Summit (Kamau, 2013, p.1). The resolution condemned the continuance of the proceedings against President Kenyatta and Vice-President Ruto (AFP , 2013). Furthermore, some stated that it was Kenyatta by his speech at the AU State Assembly in October 2013 who started the negative tone with regard to the ICC (Dersso, 2013). This State Assembly was an extraordinary session to discuss the relationship between Africa and the ICC, called together byrequest of Kenya. Kenya was said to use this summit to campaign aggressively against the ICC (ibid.). It led to the adaptation of another resolution which stated that government officials should not be charged before the ICC while in duty:

‘*To safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International 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’* (AFP , 2013).

 Several documents, published after this assembly, support the statement that Kenya had started an active anti-ICC lobby, as well at the AU as in NY with the UN (Government of the Republic of Kenya, 2013b);(Dutch Ministry of Foreign Affairs & Dutch Ministry of Justice , 2015). A draft letter, allegedly written by the government of Kenya during the 2014 AU summit in January, addresses the President of the ICC on behalf of the members of the African Union with regard to alleged breaches of basic principles of criminal courts by the ICC (Draft letter from the AU to ICC allegedly written by the government of Kenya during 2014 AU Summit , 2014). This also points into the direction of Kenya as a pioneer in the discussion, rather than the AU influencing Kenya. In his speech of 6 October 2014, President Kenyatta indicated himself that he is leading the critical mass by stating ‘*Kenya will remain at the front of this common cause [*struggle against domination and exploitation*], which is both our opportunity as a nation and our obligation as a people. I am grateful for the support our brothers and sisters have lent Kenya.*’ (Speech by His Excellency Hon. Uhurua Kenyatta, 2014). Therefore, the quantitative and qualitative analysis on Kenya’s public communication with regard to the ICC does not show much proof for the suggestion that the African Union became a significant Other for Kenya instead of the ICC. Therefore, the constructivist hypothesis was not confirmed.

## 5.6 Conclusion

The empirical analysis shows that the breach in Kenya’s compliance with the ICC occurred in August 2010, with the refusal to arrest Al-Bashir. Kenya continued a mediate degree of compliance by not fully cooperating with the request of the Prosecutor to hand over certain records.
 The analysis confirmed the neorealist hypothesis. The overall prediction of neorealism was that if a state expects that compliance to the rules of an international institution will entail relative gains for it, that state will increase ts compliance. The analysis of the variables showed that although compliance through ratification would likely bring gains, compliance by Kenya actually led to relative power and reputational losses. Quid pro quo gains were not visibly present. The timing of the breach in compliance from a high degree to a mediate degree of compliance seemed to be preceded by a change in the neorealist variables, thereby assuming a causal relationship. Therefore, the data confirmed the neorealist expectations.
 The neoliberal hypothesis predicted that a high degree of compliance would occur if the long term benefits outweighed the short term costs. The analysis showed that the short term costs of compliance were low: only ideological costs occurred as Kenya had to adopt a new law. Long term benefits of transparency were not provided by the ICC. However, long term reputational benefits were present. They however became less when the ICC started its investigation in the country. in order to fit the institutional liberal hypothesis, the timing of the loss of long term reputational gains should have happened before 2010. This is the case for the measurements of FreedomHouse. In the end the long-term benefits were lower than the short term costs, and therefore compliance decreased. The fall in FDI seems to be more an indication of failing of trust because of the post-election violence and an effect of the worldwide financial crisis, than originating from a bad reputation with regard to the ICC. Therefore, the institutional liberalist hypothesis is confirmed, but needs more confirmation.
 The constructivist approach predicted that the more consensus exists between the identity of a state and the norm of the international institution, the more that state will display compliance with that institution. Although indeed the degree of consensus between the identity of Kenya and the norm of the ICC decreased just as compliance did, the decrease in consensus did not precede the decrease in compliance. Instead, the decrease in compliance was followed by a decrease in ICC-identity. Therefore, the constructivist hypothesis was not confirmed.

# 6. Conclusion

6.1 Summary of the results
This research work has tried to contribute to the insight in the specifics that determine the compliance of African states with an international justice institution by answering the following research question: How can it be explained that a state no longer fully complies to an international justice institution while it has signed and ratified its treaty? At face value, neither. Rationalist nor constructivist approaches seemed able to explain the decrease in compliance by Kenya once ratification was established. A case study of Kenya’s compliance with the International Criminal Court was chosen, in order to shed light on the compliance by African states with an international justice institution.
 The rationalist approaches of neorealism and institutional liberalism, focusing on cost benefit analysis, were compared to a constructivist approach, focusing on identity, in order to determine which approach had the best explanatory power. The neorealist hypothesis predicted that if a state expects that compliance to the rules of an international institution will entail relative gains for it, that state will increase its compliance. The institutional liberalist hypothesis predicted that if a state expects long term benefits from compliance with an international institution, it will accept the short term costs of compliance, and display a high degree of compliance. The constructivist hypothesis predicted that the more consensus exists between the identity of a state and the norm of the international institution, the more that state will display compliance with that institution. The analysis of the Kenya case showed that the rationalist approach provided the best explanation. Neorealism and neoliberalism are capable to explain a decrease in compliance after ratification if circumstances change. Compliance will occur if compliance brings likely relative gains, as neorealism predicted. However, the analysis also showed that if the relative gains lost by non-compliance are smaller than the relative gains lost by compliance, then compliance will decrease. In the case of Kenya, this happened when the ICC investigation in the country started. For Kenya, compliance with the ICC actually led to relative power and reputational loss since the ICC cases in Kenya, a direct result of Kenya’s ratification of the Rome Statute. It led to negative news coverage about its behavior, thus significantly changing the cost benefit analysis, with lower relative gains by compliance. Even more, relative power and reputational gains were won by non-compliance by leading the African revolt against the ICC. Quid pro quo gains were not visibly present in this case, since an earlier study showed that the donor community did not put pressure on Kenya to fulfill political conditionality’s, such as cooperation with the ICC, in return for aid. The research work also found some evidence for the neoliberal assumption that compliance will occur if the long term benefits outweigh the short term costs. The ICC cases in Kenya decreased the long term benefit of reputation. FreedomHouse provided evidence for the causal mechanism, but this was not confirmed by the FDI variable. For the constructivist hypothesis, the data did not provide much evidence. The constructivist approach predicted that if there would be a high degree of consensus between the identity of the state and the norm of the international institution, compliance would be high, and vice versa. Although indeed the degree of consensus between the identity of Kenya and the norm of the ICC decreased, as compliance did, the drop in consensus did not precede the decrease in compliance. Instead, it followed the non-compliance, giving rise to the thought that change in discourse of Kenya is more an act of strategic action *-* a rationalist concept that refers to verbal exchange mainly aimed at the exchange of information in order to fulfill practical aims in a strategic context[[71]](#footnote-71)- than an indication of an identity change. Therefore, the constructivist hypothesis was not confirmed.
 When translating the results of this case study back by generalizing the findings of this case study of Kenya’s compliance with the ICC, one has to acknowledge some limitations. First of all, there is the uniqueness of the ICC, as explained in the methodology chapter. Secondly, Kenya is only the second country to face an ICC investigation that is aimed at its democratically chosen leaders. However, when all these limitations are accounted for, the general conclusion of this research work is that it seems that the balance of relative gains and losses has a greater influence on the compliance of an African state with an international justice institution than ideational factors have such as norms or identity.

6.2 Reflection
This research had to cope with some difficulties concerning the desired research material. First of all, taking the interviews was a sensitive and time consuming task. The Kenya cases have caused a diplomatic minefield for many who were involved. Therefore, not everybody admitted in giving an interview. Those who did refrained from providing too much detail. Furthermore, the ICC does not have a clear transparency mechanism, which made it more challenging to produce an overview of the events surrounding the case and the acts of the Kenyan government. This was aggravated by the fact that not all court documents were made public by the ICC, which led to gaps in the process tracing process.
 Furthermore, this research was not able to cover all factors that potentially affect the compliance with international justice institutions by African states. The fact that the identity switch of Kenya seemed to be more of a strategic action raises the question if state level actors and individual level actors should have been included in the analysis: the idea of ‘opening the black box’. Most international relations research focuses mainly on interactions between states to explain the foreign policy of a state, basing its research design the system level. However, the case of Kenya and its compliance to the ICC also puts forward a strong argument for including variables on the national level. With regard to Waltz’s ‘first image’ (Waltz, 1979), the level of the political elite, leader theory could maybe add extra explanatory power to theorizing about the compliance by African states such as Kenya. Bruce Bueno de Mesquita (2000) for example suggests that foreign policy decisions are always ‘*the reflections of the preferences, or desires, of key foreign policy leaders and those constituents whose support they require to stay in office*’ (p. 15). In other words, the foreign policy of a state is heavily influenced by the attempts of its political elite to stay in power. In order to explain foreign policy outcomes, such as international cooperation and compliance, a research design that combines system level factors and domestic factors could be very fruitful.
 There are good arguments to make for including Kenya’s political elite while trying to explain Kenya’s foreign policy. With regard to Africa’s history of strong, often even tyrannical, leaders and weak democratic institutions, political leaders naturally exercise a lot of power without much democratic interference. Kenya seems to be no different: *‘In Kenya, as elsewhere in Africa, the rule of law is still weak, politicized, and hard to enforce; individuals are often sanctioned for trying. (…)This is business as usual in Kenya. The public is used to politicians acting as if they were the law and not subject to it.’* (Mueller, 2014, p. 26).Mueller also indicates that indeed there were gains that could be won by political opponents by either compliance or non compliance, which she describes as ‘post-ratification political risks’ (Ibid.). Other authors indicate that indeed the strong political elite of Kenya, in power for years, heavily influences its policy (Klopp, 2012). This would also shed light on the discussion around the immunity for state leaders and its seemingly connection to the flawed enthusiasm for the ICC in several African states. The Kenyan case showed that state leaders were not immune anymore to ICC investigations, and that the ICC could rise above being an instrument to help catch rebels. Since the investigations in Kenya started, more African states, like Rwanda and Nigeria, have become critical (R.J. Bartels, interview, 3 June 2015). Therefore, the influence of a state leader on whether or not an African state complies with an international justice institution would be an interesting subject for further research.
 Another interesting factor that came up during the research was the role of the BRICS-countries in influencing African politics. As an economic alternative -China and India for the measurements of quid pro quo gains- as well as a political alternative - China and Russia backing Kenya’s attempts in the UN Security Council to suspend the ICC cases. Although the world is becoming ever more globalised and justice is regarded as a universal phenomenon, it seems regional power blocks and cultural differences remain to be an important factor of influence. In order to get more insight in the compliance by African states with international (justice) institutions, it would be interesting to investigate the consequences of the new rising power blocs. Also, next to the new power blocs, special attention could be given to renewed interest of the US in Africa (Carter, 2009). From a security perspective, since the instability in some countries turned them into breeding zones for terrorism and criminality, and from a economic perspective since Africa bears essential resources necessary for new technological development. One will have to wait and see what this in the future will mean for African-American relationships.

The ICC cases in Kenya have not yet come to a close. Mister Kenyatta can still be tried for the alleged crimes in the future, becausethe proceedings have never actually gone to trial. Also, the charges against Joshua Arap Sang and Vice-President William Ruto have not, yet, been withdrawn. The result of the Kenya cases will be very important for the future of the ICC, since its credibility largely depends on its effectiveness. Despite the African protests and the establishment of an African Court for People’s Justice on June the 30th 2014 by the Malabo protocol which grants immunity to state leaders (F.Burger, interview, 21 July 2015), a viable alternative for the ICC has not yet been established. An exodus of African States has not taken place. This means that there is still hope for the ICC as an international justice institution to restore relations with the African member states, and to think of ways to turn back negative spirals of decreasing compliance.

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# Appendix

## Neorealist reputation variable

The measuring of the neorealist reputation variable is based on newspaper articles published in The Economist and Le Monde between 1 January 2005 and 31 December 2014. Search terms were ‘Kenya AND ICC’ and Kenya AND International Criminal Court’ or ‘Kenya ET CPI’ and ‘Kenya ET Cour Penale Internationale’. Articles were selected when containing phrases that included a judgment about and/or negative or positive news on the behaviour of Kenya in relation to the ICC or the ICC investigation in the country. Twenty articles were used that were published by The Economist. Thirty-eight articles were used that were published by Le Monde. Validation has been executed per phrase. The table below shows the validation of the separate phrases.

**Appendix 1.A Rating of articles published by *Le Monde* on Kenya and the ICC**
Explanatory note: Sometimes ‘[…] ‘ is used in the citation colomn. These cover either explanatory words added by the researcher or comprise a sentence in the original source that is needed for understanding the validation of the selected sentence.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Nr. | Date | Title | Citation | Score  |
| 1 | 22-01-2008 | L'opposition kényane porte plainte auprès de la Cour pénale internationale pour crime contre l'humanité | * En réaction, le gouvernement kényan a déclaré son intention de saisir lui aussi la CPI contre les dirigeants de l'opposition pour les violences post-électorales qui ont déjà causé la mort de 700 personnes et le déplacement de 250 000 autres à travers le pays
* Les responsables de l'ODM *"se précipitent à La Haye car ils savent que nous détenons des preuves accablantes contre eux pour nettoyage ethnique.*
* *"Nous collectons actuellement des preuves et nous nous apprêtons à aller à La Haye pour déposer des plaintes contre eux"*, a-t-il ajouté.
 | Title: -1 +1-1 +1Endscore: +2; -2 |
| 2 | 11-07-2009 | Kofi Annan remet à la CPI une liste de suspects | [Une commission d'enquête avait préconisé la mise en place d'un tribunal spécial, que le gouvernement kenyan s'est engagé à mettre en place] * Lors d'une rencontre avec M. Ocampo, début juillet, Nairobi s'est engagé à se dessaisir en faveur de la CPI si aucune poursuite n'est engagée sur son territoire d'ici .
 | +1 End score: +1  |
| 3 | 05-11-2009  | La CPI va ouvrir une enquête sur les violences post-électorales au Kenya | * Les entretiens du procureur de la CPI avec MM. Kibaki et Odinga devaient notamment porter sur les modalités d'entrée en action de la CPI : soit l'exécutif kényan en faisait la demande formelle, soit il laissait le soin à la CPI d'user de ses prérogatives et de se saisir elle-même de ce dossier.
* Mercredi, le procureur général du Kenya, Amos Wako, a admis lors d'une conférence de presse qu'il était le premier responsable kényan visé par une interdiction de voyage aux Etats-Unis, qui lui reprochent de faire obstacle aux réformes décidées à la suite des violences post-électorales.
 | +1 - 1 Endscore: +1; -1  |
| 4 | 01-04-2010  | La Cour pénale internationale ouvre une enquête sur des crimes contre l'humanité commis au Kenya | * Selon M. Ocampo, "les hauts dirigeants du PNU et de l'ODM poursuivaient des objectifs politiques consistant à*rester*ou à*accéder*au pouvoir.
* [Ils ont] mis en oeuvre leur*politique*avec le*concours*d'un certain nombre de fonctionnaires et d'institutions publiques et privées, comme des membres du Parlement, des hauts responsables du gouvernement, les forces de*police*et les bandes de jeunes".
* Depuis le dépôt d'une requête du procureur en vue de l'ouverture d'une enquête, le 26 novembre, plusieurs organisations non gouvernementales ont fait état d'intimidations répétées à l'égard de témoins.
* L'UE, les Etats-Unis et le secrétaire général de l'ONU, Ban Ki-moon, s'en étaient inquiétés.
* Ils avaient demandé au Kenya d'adopter des mesures de protection.
* Fin mars, le Parlement kenyan a adopté une loi en ce sens.
* A Nairobi, l'UE s'est félicitée de la décision de la Cour, mais a affirmé que cela ne "change pas l'urgente nécessité (de créer) un tribunal spécial local pour*juger*les autres cas".
* Un projet puis une proposition de loi sur ce thème ont été repoussés à deux reprises, en février et novembre 2009.
 | -1 -1-1 -1 -1+1 -1 -1 End score: +1;-7 |
| 5 | 27-08-2010 | L'UE demande au Kenya d'arrêter le président soudanais | * Le Kenya a violé ses obligations en n'arrêtant pas lors de sa visite le président soudanais Omar Al-Bachir, visé par des mandats d'arrêt de la Cour pénale internationale (CPI), a affirmé vendredi 27 août le président de l'assemblée des Etats reconnaissant la CPI
* Qu'il ne l'ait pas fait est "une violation très sérieuse de ses obligations découlant du statut de Rome dont il est signataire", a ajouté Christian Wenaweser dans un entretien téléphonique avec l'AFP.
* Plus tôt dans la journée, Catherine Ashton, chef de la diplomatie de l'Union européenne, avait pourtant appelé le Kenya à "respecter ses obligations" et à arrêter le président soudanais.
* "La haute représentante de l'UE pour les*affaires étrangères*est préoccupée par la visite du président Omar Al-Bachirau Kenya, un pays qui a ratifié le statut de Rome instituant la CPI", indique un communiqué de ses services.
* Elle demande instamment au Kenya de respecter ses obligations de droit international et d'arrêter et remettre au tribunal les personnes inculpées par la CPI."
 | -1 -1 -1 -1 -1 End score: -5;  |
| 6 | 15-12-2010  | Kenya : la CPI épingle six hauts responsables pour les violences de 2008 | * La Cour pénale internationale (CPI) a dévoilé mercredi 15 décembre le nom de six hauts responsables kényans, dont trois ministres de l'actuel gouvernement et un ancien chef de la police, qu'elle soupçonne d'être mêlés aux violences postélectorales de 2008
* D'après le procureur de la CPI, William Ruto et Henry Kosgey, membre du Mouvement démocratique orange (ODM), ont commencé à ourdir, au début de décembre 2008, "un plan criminel" visant à attaquer des partisans du Parti de l'unité nationale (PNU), le rival, notamment dans le Rift.
* A Nairobi, quatre des six suspects ont fait savoir qu'ils se présenteraient de leur plein gré devant la CPI et coopéreraient avec les enquêteurs.
* Le chef de l'Etat a également réaffirmé son intention de créer une juridiction locale pour juger les suspects impliqués dans des actes de violence au Kenya
 | -1 -1 +1 +1 End score: +2;-2 |
| 6 | 16 -12- 2010  | Six responsables kényans mis en cause par la CPI pour les violences commises après la présidentielle de 2007 | * Comme lui, William Ruto, ministre de l'enseignement supérieur, assure vouloir affronter les témoins.
* Du fait de cette coopération, le procureur a décidé de ne pas émettre de mandats d'arrêt à leur encontre.
* [Ce dernier [ Kofi Annan] avait enjoint les autorités kenyanes à mettre sur pied un tribunal spécial]. Mais le projet n'a jamais recueilli l'aval du parlement.
* Vingt-quatre heures avant que le procureur ne remette ses conclusions, le projet de tribunal spécial était de nouveau examiné par le gouvernement. Une tentative de garder la main sur l'affaire si les accusations de Luis Moreno Ocampo venaient à déplaire.
 | +1+1 -1 -1 End score: +2;-2  |
| 7 | 09-03-2011 | Kenya : six responsables devant la Cour pénale internationale (CPI) | * Les autorités kényanes ont demandé au Conseil de sécurité de l'ONU de suspendre les procédures engagées, ce que la France, le Royaume-Uni et les Etats-Unis ont refusé.
 | -1End score: -1 |
| 8  | 12-12-2011  | La Gambienne Fatou Bensouda élue procureure de la CPI | * De son côté, le Kenya fait campagne contre l'enquête lancée sur les violences post-électorales de 2007-2008.
 | -1End score: -1  |
| 9 | 02-01-2012  | Vent démocratique | * Les poursuites engagées contre des responsables politiques, qui pourraient comparaître devant la Cour pénale internationale (CPI) avant le nouveau scrutin, auront peut-être un effet calmant sur une classe politique qui n'hésite pas à créer des troubles pour pousser ses intérêts
 | -1End score-1  |
| 10 | 26-01-2012  | Son nom signifie liberté | * A-t-il, comme l'accusation de la CPI l'affirme, participé à l'organisation de campagnes d'une extrême violence menées par les membres de la secte Mungiki (la multitude), qui recrute essentiellement parmi l'ethnie kikuyu, à laquelle appartiennent à la fois M. Kenyatta et M. Kibaki ?
* Les efforts de coopération des six personnalités kényanes visées par les enquêtes préliminaires de la CPI (et dont quatre font finalement l'objet de poursuites) leur ont permis de comparaître volontairement lors les audiences préliminaires.
 | -1 +1 End score: +1;-1  |
| 11 | 01-03-2013  | Le Kenya hanté par ses heures sombres | * Les deux [ Rutto et Kenyatta] hommes contestent en effet la légitimité de la CPI et accusent leur principal adversaire, l'actuel premier ministre, Raila Odinga, d'être l'instrument de l'étranger et responsable de leurs démêlés avec une justice internationale partiale.
 | Title: -1 -1 End score: -2 |
| 12 | 01-04-2013 | Au Kenya, un bon point démocratique | * Ils [Uhurua Kenyatta and William Rutto] ont promis de répondre aux questions des juges.
* Mais comment gouverner tout en étant inculpé par la CPI ?
 | Title: +1 +1 -1 End score: +2;-1  |
| 13 | 09-04-2013 | Uhuru Kenyatta prête serment en tant que 4e président du Kenya | * Une quinzaine de chefs d'Etat et de gouvernement africains étaient présents à la cérémonie, mais aucun responsable occidental.
* Les pays de l'Union européenne et les Etats-Unis, qui ont d'ores et déjà prévenu qu'ils limiteraient leurs relations avec la tête de l'exécutif kényan aux "contacts indispensables", ne devaient être représentés qu'au niveau de leurs ambassadeurs.
* La CPI soupçonne MM. Kenyatta et Ruto d'avoir joué un rôle dans l'organisation des violences sur lesquelles avait débouché la précédente présidentielle de la fin de 2007, les pires de l'histoire du pays qui avaient fait plus d'un millier de morts.
 | -1 -1 -1 Endscore: -3  |
| 14 | 10-4-2013  | Le nouveau président kényan embarrasse la CPI et les pays occidentaux | * Les Occidentaux souhaitent limiter leurs relations avec lui aux *"contacts indispensables"*, à l'image de la politique déjà adoptée à l'égard du président soudanais, Omar Al-Bachir, poursuivi par la même juridiction.
 | Title: -1 -1Endscore: -2  |
| 15 | 25-5-2013  | Première grande tournée africaine d'Obama fin juin | [Le président américain, Barack Obama, va effectuer du 26 juin au 3 juillet sa première grande tournée africaine depuis son arrivée au pouvoir, en se rendant au Sénégal, en Afrique du Sud et en Tanzanie, mais en évitant la terre natale de son père, le Kenya. "Si M. Obama s'était rendu en 2006 au Kenya, terre natale de son père et où vivent encore des membres de sa famille étendue, après son élection au Sénat de Washington, l'absence de ce pays de la tournée annoncée lundi est aussi notable que peu surprenante] * Le nouveau président du pays, Uhuru Kenyatta, est en effet poursuivi par la Cour pénale internationale (CPI), tout comme son vice-président, William Ruto, pour leur responsabilité présumée dans les terribles violences qui avaient suivi la précédente présidentielle, fin 2007.
 | -1 Endscore: -1  |
| 16 | 27-05-2013 | L'Union africaine dénonce la "chasse raciale" opérée par la Cour pénale internationale | * La CPI avait autorisé en 2010 son procureur à engager des poursuites en raison de "l'inaction des autorités kényanes" dans l'établissement des principales responsabilités de ces violences, mais les chefs d'Etat africains ont mis en avant les réformes de son système judiciaire menées depuis par le Kenya.
* Kenyatta et Ruto, dont la victoire électorale a mis les capitales occidentales dans l'embarras.
 | -1 -1 Endscore -2  |
| 17 | 06-09-2013 | Le Kenya se fait le porte-parole des Etats africains opposés à la CPI | * Nairobi s'apprête à rompre avec la Cour pénale internationale (CPI).
* Jeudi 5 septembre, le Parlement kényan a adopté une motion pour se retirer du traité établissant la CPI.
* Interrogée par téléphone, Tiina Intelmann, la présidente de l'Assemblée des Etats parties, sorte de Parlement où siègent les Etats membres de la Cour, ne cache pas sa déception.
 | Title: -1 -1 -1-1End score: -4  |
| 19 | 11-09-2013  | Ouverture à La Haye du procès du vice-président kényan | * William Ruto, vice-président du Kenya depuis six mois, est arrivé devant la Cour pénale internationale (CPI) de La Haye en Mercedes. L'accusé, dont le procès débutait mardi 10 septembre, comparaît librement, et ce n'est pas la seule singularité de ce procès.
* Dans l'histoire de cette justice émergente, c'est la première fois qu'un homme d'Etat en fonction doit répondre de crimes contre l'humanité.
 | +1+1 Endscore: +2  |
| 20 | 23- 09-2013  | Nairobi : le procès du vice-président kényan ajourné par la CPI | * Le procès de William Ruto, qui comparaît libre, s'est ouvert le 10 septembre.
 | +1 Endscore: +1  |
| 21 | 11-10-2013  | La défiance des dirigeants africains envers la Cour pénale internationale | * Depuis ce scrutin, les autorités kényanes s'activent pour faire annuler ces procédures ou trouver des aménagements à ces procès.
* Entre Nairobi et La Haye, la tension monte.
* Ainsi, peu avant l'ouverture du procès de William Ruto, les parlementaires kényans de la majorité ont annoncé le dépôt imminent d'une loi permettant à leur pays de se retirer de la CPI.
* Une arme redoutée des partisans de la justice internationale. "L'évoquer a déjà ouvert une brèche", dit-on.
 | Title -1 -1 -1 -1 -1 End score: -5  |
| 22 | 12-10-2013  | L’Union africaine veut ajourner les procédures de la CPI contre les présidents kényan et soudanais | * Outre MM. Kenyatta et Ruto, qui ont promis de coopérer avec la CPI, celle-ci veut juger le président soudanais pour des crimes présumés commis au Darfour, dans l’ouest du Soudan.
 | +1 End score: +1  |
| 24 | 12-10-2013  | L'Union africaine demande le report du procès Kenyatta à la CPI | * La CPI "n'est plus le lieu de la*justice*mais le jouet des pouvoirs impérialistes en déclin", a accusé le président Kenyatta, lors d'un discours devant le Sommet de l'Union africaine à Addis Abeba.
* "Cette Cour agit sur demande des gouvernements européens et américain, contre la souveraineté des Etats et peuples africains (...) des gens ont qualifié cette situation de 'chasse raciale', j'ai de grandes difficultés*trouver*cela faux", a-t-il ajouté.
* L'examen des liens entre l'UA et la CPI avait été réclamé par le Kenya, dont le président Uhuru Kenyatta et le vice-président William Ruto, élus en mars dernier, sont poursuivis depuis 2011 pour crimes contre l'humanité par la Cour de La Haye.
 | -1 -1 -1 End score: -3  |
| 25 | 13-10-2013 | Amnesty déplore l'appel de l'Union africaine à l'immunité des hommes d'Etat | * Les victimes de ces violences "ont attendu plus de cinq ans pour que les rouages de la justice se mettent en place, après l'échec du Kenya à*rendre*justice. (...)
* L'attaque meurtrière à la fin de septembre à Nairobi d'un centre commercial par des islamistes somaliens "ne doit pas être utilisée pour*protéger*le président kényan et son vice-président" contre une procédure devant la CPI, conclut l'organisation de défense des droits humains.
 | -1 -1 End score: -2 |
| 26 | 18-10-2013 | Kenya : la CPI autorise le président à ne pas assister à toutes les audiences de son procès | * M. Kenyatta comparant la CPI a "un jouet des pouvoirs impérialistes en déclin",
 | -1 end score: -1  |
| 27 | 26-10-2013 | Le vice-président du Kenya n'échappera pas à son procès devant la Cour pénale internationale | * Depuis son élection en mars, il se bat sur tous les fronts pour le faire annuler.
* Le 12 octobre, l'Union africaine était mobilisée pour un sommet « anti-CPI ».
 | Title: -1-1 -1 Endscore: -3  |
| 28 | 15-11-2013  | L'ONU refuse le report du procès des dirigeants kényans par la CPI | * Le projet de résolution avançait que le procès des deux dirigeants kényans "empêche" MM. Kenyatta et Ruto de faire leur devoir.
 | Title: -1 -1End score: -2  |
| 29 | 22-11-2013  | La CPI interrompt le interna du vice-président kényan | * Ils ont depuis fait alliance pour diriger le pays et internatio les faits.
* Les dossiers de MM. Ruto et Kenyatta ont connu de nombreux internat et reports, don’t la rétractation de plusieurs témoins et une internati inter par le Kenya pour que les interna soient suspendus.
 | Title +1 -1 -1 End score: -2; +1  |
| 30 | 24-11-2013  | Jugeons les despotes africains | * Forts de leur internat à la tête du pays, le 4 mars 2013, ils ont présenté, avec le soutien de l’Union africaine, de la Russie et de la Chine, un projet de internatio devant le Conseil de sécurité des Nations unies pour que soient ajournées les internatio interna à leur encontre.
* Cette fronde contre la Cour pénale international se justifierait, selon le internati kényan, par le caractère raciste et impérialiste d’une institution occidentale…

[Il y a inter arguments qui sont mis en avant.] * Ce sont des arguments de mauvaise foi.
* Tout d’abord, il faudrait que les menaces à la sécurité nationale ou régionale soient réelles pour que le Conseil de sécurité intern d’arrêter une internati de la CPI.
* Ensuite, la Constitution kényane stipule explicitement que l’immunité des élus à la tête du pays ne s’applique pas lorsqu’il s’agit de crimes relevant du droit international.
* De plus, ces interna ne représentent aucune menace pour la sécurité nationale ou inte régionale, car la internat du internati ou du vice-président sur le territoire n’est pas une garantie de non-agression, de dissuasion ou d’un meilleur traitement du interna terroriste.
* Pour intern sa cause auprès de l’UA, Uhuru Kenyatta n’a pas hésité à qualifier la CPI d’institution « raciste » et « impérialiste » ‘Ce sont des accusations ridicules.
* Si les dirigeants kényans sont devant la CPI, ce n’est pas parce qu’elle a été saisie par le Conseil de sécurité, mais bien parce que le Kenya n’a pas donné suite aux enquêtes sur les violences postélectorales de 2007-2008 (plus de 1 000 morts), qui avaient été demandées par le gouvernement et le Parlement kényans.
* Le Kenya n’a pas obtenu le soutien massif escompté auprès des pays africains pour qu’ensemble ils quittent la CPI.
* En ce qui concerne le Kenya, si les dirigeants continuent de ne pas vouloir coopérer avec la CPI, ils exposeraient le pays à des sanctions internatio, économiques et diplomatiques. J’espère que nous n’en arriverons pas là.
* De son côté, le Kenya a la capacité – mais pas la volonté – de juger les auteurs internat des violences postélectorales de 2007-2008.
* Cette dynamique est prouvée par la internat du procureur interna kényan de internat toutes les affaires relatives aux violences postélectorales au motif que les enquêtes ne permettaient pas de justifier les poursuites.
 | -1-1 -1 -1-1 -1 -1 - 1 -1 -1 -1 -1  End score: +0; -12  |
| 31 | 21-12-2013  | CPI : la procureure repousse le procès Kenyatta pour insuffisance de preuves | * Uhuru Kenyatta est en passe de remporter le conflit qui l'oppose à la Cour pénale internationale (CPI)
 | Title: +1 -1 Endscore: +1; -1  |
| 32 | 06-10-2014  | Le président du Kenya accepte de comparaître devant la justice internationale | * Le président kényan, Uhuru Kenyatta, a quitté mardi 7 octobre Nairobi pour se rendre à la convocation de la Cour pénale internationale, le 8 octobre aux Pays-Bas.
* C'est la première fois qu'un chef d'Etat en exercice comparaît en personne devant la CPI, même si M. Kenyatta a répété qu'il s'y rend à titre personnel et non pas en qualité de président.
* Depuis son élection à la tête du pays en mars 2012, Uhuru Kenyatta a multiplié les tentatives pour obtenir la clôture de l'affaire.
* L'Union africaine s'était même mobilisée pour plaider sa cause devant le Conseil de sécurité des Nations unies mi-novembre.
 | Title: +1 +1 +1 -1 -1 Endscore: +3;-2  |
| 33 | 09-10-2014 | Accusé de « crimes contre l’humanité », le président kényan réclame l’acquittement à la CPI | * “Nous savons que les preuves existent”
* Et depuis un an, il explique sans relâche ne pas avoir de preuves assez solides pour conduire l’affaire.
 | Title: -1 -1 +1 End score: +1; -2  |
| 34 | 04-12-2014 | Le procès Uhuru Kenyatta en manque de preuves | * Les juges ont refusé, le 3 décembre, de reporter le procès du chef de l’Etat kényan et ont invité le procureur à retirer les charges de crimes contre l’humanité portées contre lui, faute de pouvoir présenter des preuves substantielles d’ici une semaine.
* L’affaire Kenyatta pourrait donc se solder par un non-lieu, mais pas un acquittement, comme le souhaitaient les avocats du chef de l’Etat.
 | Title: +1 +1 -1 End score: +2; -1  |
| 35 | 05-12-2014  | Uhuru Kenyatta, premier chef d'Etat en exercice à comparaître devant la CPI | * Il est le premier chef d'Etat à accepter d'y comparaître depuis la création de la CPI, en 2002.
* Uhuru Kenyatta, convoqué pour évoquer les difficultés de l'enquête dans son procès pour crimes contre l'humanité, a assisté au début de l'audience sous le regard de dizaines de partisans présents dans la galerie du public, pleine à craquer.
* La procureur a accuse Nairobi de ne pas coopérer avec la CPI en refusant notamment de lui transmettre des relevés bancaires ou téléphoniques.
* Depuis son élection à la tête du pays, en mars 2012, Uhuru Kenyatta a multiplié les tentatives pour obtenir la clôture de l'affaire.
* L'Union africaine s'était même mobilisée pour plaider sa cause devant le Conseil de sécurité des Nations unies à la mi-novembre.
* Le procès du président kényan devait initialement s'ouvrir en septembre 2013, mais il a été reporté à de nombreuses reprises sur fond d'accusations quant à des intimidations de témoins.
 | +1 -1 -1-1 -1-1 End score: -5: +1   |
| 36 | 05-12-2014  | La Cour pénale internationale abandonne les poursuites contre le président kényan | * La procureure de la CPI, Fatou Bensouda, a expliqué dans un document officiel ne pas avoir assez de preuves « pour*prouver*, au-delà de tout doute raisonnable, la responsabilité criminelle présumée de M. Kenyatta ».
* Uhuru Kenyatta s'est réjoui de l'abandon des charges, estimant que la CPI lui avait ainsi « donné raison ».
 | Title: +1 +1 +1 End score: +3  |
| 38 | 09-12-2014 | Victoire pour le Kenya à la Cour pénale internationale | * Le président kényan ne porte plus le label « criminel de guerre ».
* Une décision difficile pour l’accusation mais juste : depuis plus d’un an, elle assurait ne pas avoir de preuves suffisamment solides pour conduire son procès.
* Démocratiquement élu au printemps 2013, avec une courte majorité (50,03 % mais dès le premier tour), le chef de l’Etat kényan aura conduit une coûteuse bataille judiciaire et diplomatique pour obtenir la clôture de l’affaire.
* La victoire de M.Kenyatta est évidente.
* Mais elle dépasse son combat personnel.
* A Nairobi, même l’opposition a salué le retrait de l’affaire comme une victoire « pour le Kenya tout entier ».
* Devant la cour, Uhuru Kenyatta devait payer pour les violences commises cinq ans avant son élection.
* Son camp avait répliqué aux tueries perpétrées par les perdants de la présidentielle de décembre 2007.
* Ce sont néanmoins les Kényans qui, avec son élection, devaient payer le prix des poursuites engagées par la cour contre lui.
* Russes et Chinois, vers lesquels M. Kenyatta s’est tourné, ont tiré leur épingle du jeu par rapport aux Occidentaux.
 | +1 (+1 voor title) +1 -1 +1 -1 +1-1-1 -1 +1 End score: +6; -5  |

**Appendix 1.B Rating of articles published by *The Economist* on Kenya and the ICC**

Explanatory note: Sometimes ‘[…] ‘ is used in the citation colomn. These cover either explanatory words added by the researcher or comprise a sentence in the original source that is needed for understanding the validation of the selected sentence.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Nr. | Date  | Title  | Citation  | Score  |
| 1 | 10-10-2009  | Kenyan Politics: Rebuilding at a crawl | * ‘East Africa’s most important country is failing to pick itself up after a traumatic and bloody election ‘
* [‘WHAT exactly has Kenya’s grand coalition government done to put the country right after last year’s post-election violence, which killed 1,500 people and displaced 300,000 more? By its own account, just about everything.] Yet the visit of a former United Nations secretary-general, Kofi Annan, was a harsh reminder that in the real world the situation is a lot less rosy.’
* ‘He [Kofi Annan] was in Kenya to shame the government into getting on with reforms that were promised as part of the deal, and which most think are now stalled. ‘
* Most egregiously, the pursuit of justice after the post-election killings has been too slow.
* Indeed, Mr Annan has chosen to hand over a list of those suspected of stoking the violence to the International Criminal Court (ICC), ecause Kenya’s politicians failed to agree on their own domestic judicial process to charge the perpetrators.
* Frustration with the lack of progress has boiled over into unusually terse exchanges with the country’s main allies.
* The American ambassador was told to "shut up" by a government minister after strongly criticising anti-reform Kenyan officials.
* The only recent success anyone can point to is the removal of the head of the country’s anti-corruption commission, Aaron Ringera, who had been reappointed to a second stint in office by Mr Kibaki despite (or thanks to) his bringing no significant Prosecutions in five years. [Parliament opposed Mr Kibaki, however, and so Mr Ringera had to resign]
* Kenya functions best where the government does not intrude.
 | - 1- 1-1-1 -1 -1 -1 +1 - 1 End score:-8; +1 |
| 2 | 20-02-2010  | Fragile Kenya: The politicians just don't seem to get it | * Kenya remains east Africa’s commercial hub, yet the bickering and dithering of its dodgy and unwieldy government could ruin what is left of its reputation
 | Title: -1-1 Endscore: -2 |
| 3 | 10-04-2010  | Kenya and the international court: Will justice be done at last? | * SO FAR nobody has been charged with killing any of the 1,100-plus Kenyans who died in the violence after a disputed election at the end of 2007.
* [The Kenyans were meant to set up their own tribunals to punish the worst offenders.] But since they failed to do so, the International Criminal Court (ICC) at The Hague has at last agreed to proceed with cases against unnamed powerful Kenyans who, for their own political ends, are suspected of inciting the violence and paying its perpetrators.
* [The bloated coalition’s first task was to set up a special tribunal to charge those responsible for the election violence] But nothing happened.
* [Cases against several thousand people accused of such crimes as arson, rioting, looting and shooting were opened.] Thanks to police bungling few have ever come to court.
* Mr Kibaki and Mr Odinga sound co-operative.
* Mr Odinga says he will send anybody the ICC asks for to The Hague.
* Mr Kibaki says he agrees.
* The justice minister insists his ministry is ready to help.
 | -1 -1 -1 -1+1+1 +1 +1End score: +4; -4  |
| 4 | 29-05-2010 | International justice: Courting disaster? | * A formal probe of Kenya’s post-election violence was opened this year only after its rival politicians could not agree to let their own courts do the job.
 | Title: -1-1End score: -2  |
| 5 | 05-06- 2010  | The International Criminal Court: Why Africa still needs it | * In Kenya’s case, the ICC was brought in only with the agreement of the country’s politicians after they had failed to agree on how to investigate the post-election violence of 2007.

\*The sentence covers positive - the agreement of the countries politicians – and negative news coverage – they had failed to agree. Incombination with the title, it is decided to value the article as more negatively than positively.  | End score: -1\* |
| 6 | 01-01- 2011 | Kenya and the international court: Will they go quietly? | * A coalition of the accused may try to block the International Criminal Court.
* Mr Moreno-Ocampo charges that incitement by politicians and civil servants directly led to the deaths of 1,200 Kenyans and the displacement of at least 300,000.
* Publicly, he [Kibaki] has spoken of Kenya’s support for the ICC.
* But his aides are scheming with Mr Ruto, hitherto their sworn enemy, to remove Kenya’s signature from the Rome treaty that set up the court in the first place.
* A bill to do just that has already been passed by Parliament.
* Hectic discussions about how to snub the ICC have apparently been going on behind the scenes in Kenyan government circles since 2008.
 | -1 -1 +1 -1 -1 -1 End score: +1; -5  |
| 7 | 19-2-2011 | The ICC and Africa: Dim prospects | * A year ago Kenya seemed eager to help.
* The Prime Minister, Rail Odinga, said in April that he would send anyone whom the ICC sought to The Hague.
* But a large chunk of Kenya’s elite thinks differently.
* In December the parliament in Nairobi called for withdrawal from the Rome statute which governs the ICC.
* The vice-President, Kalonzo Musyoka, himself a lawyer, toured Africa to seek support for a year’s deferral, to allow time to set up a domestic tribunal that would, by law, kick the ICC off the case.
* [But a recent opinion poll found that 73% of Kenyans still want the ICC involved.]

They regard their government’s stance as laughable: the ICC took up the case precisely because of two years of inaction and empty promises.  | +1+1-1 -1 -1 -1 End score: +2; -4  |
| 8 | 26-11-2011  | International justice: Cosy club or sword of righteousness? | * [But the distance has shortened in recent weeks as six important Kenyans, including Uhuru Kenyatta, the ultra-rich deputy Prime Minister and son of the country’s first President, Jomo Kenyatta, have made appearances at the ICC to face possible charges of crimes against humanity]. They are not in custody, but turned up when summoned.
 | +1 End score: +1  |
| 9 | 28-01- 2012  | Kenya and the ICC: Brace yourself | * Mr Kenyatta, who says he will co-operate with the court, is likely to be the main challenger to Prime Minister Raila Odinga.
* [President Mwai Kibaki had originally planned to ask the men to step down for the duration of the case.]

But a recent speech indicates he lacks the stomach--or the power--to act against Mr Muthaura, his closest aide. * After four years, Kenya has done almost nothing to get justice for victims of the killing spree.
* Initially, the government welcomed international involvement, but with trials in The Hague now imminent, that has changed.
 | +1 -1 -1 -1 Endscore: +1 ; -3 |
| 10 | 02-03- 2013  | Kenyan election: Don't mention the war | * Both men have been indicted by the ICC for ordering their followers to kill each other five years ago.
* Their alliance is hardly a triumph for justice, but for the moment it has removed a big source of conflict.
* Kenya’s  Truth, Justice and Reconciliation Commission set up in 2008 after the violent elections has still not published its findings.
 | -1 -1 -1 Endscore: -3  |
| 11 | 09-03- 2013  | Kenyan politics: And the winner is... | * For their alleged part in orchestrating the violence, Mr Kenyatta and Mr Ruto were indicted by the International Criminal Court (ICC) at The Hague.
* They may have struck their electoral alliance--"a coalition of the accused", as their opponents call it--to improve their chances of avoiding a trial.
 | -1 -1Endscore: -2 |
| 12 | 16-03- 2013  | Kenya’s Presidential election: A Kenyatta is back in charge | * The ICC’s chief Prosecutor, Fatou Bensouda, has complained that several witnesses have died or are now "too afraid" to testify.
 | -1 End score: -1  |
| 13 | 07-09-2013  | Kenya and the international court: It's show time | * But they teamed up last year to win parliamentary and Presidential elections held this March, partly by stirring up national and tribal feeling against the International Criminal Court (ICC) at The Hague, where they are to be tried.
* Warnings from Kenya’s Western allies evidently had little effect on the voters.
* As a result, their relations with Mr Kenyatta and his new government have been frosty, though on a visit to London in May he did meet Britain's Prime Minister.
* James Gondi, who campaigns for legal rights, says the country's leaders are conducting a "propaganda war" and parading themselves as heroes defending their communities.
* But he still hopes that once the trials get under way Kenyan consciences will be pricked by the gravity of the charges against the President and his deputy.
* The defendants' attempts to rally support at the UN Security Council to have their cases dropped came to nothing.
* African Union leaders have condemned the Prosecution of two of their own but none of the 34 African states that signed up to the Rome statute of the ICC has withdrawn from it.
* Mr Ruto is to travel to The Hague with 100 MPs to show he has popular support. They will try to force Kenya to withdraw from the Rome statute, though that would not affect the trial.
* Even though most African cases were referred to the ICC by African governments; Kenya’s consented.
 | -1 -1 -1 -1 -1 -1 -1 -1 +1 Endscore: -8;+1 |
| 14 | 28-09- 2013 | Kenya: A different country | * Kenya’s Western allies and donors--already unsure how to treat its indicted leaders--will have to tread more carefully still in a country which can legitimately claim it is under threat.
* During the Kenyan election in March, America and Britain semi-openly opposed Mr Kenyatta's candidacy and later vowed to have no more than "essential" contact with him.
* "We are on the defensive," admitted a Western ambassador following the attack.
 | -1-1 -1 End score: -3 |
| 15 | 19-10- 2013  | Kenya and the international court: In a tangle | * Instead of courting governments that prize Kenya’s help in the fight against Islamist extremism in the Horn of Africa, his [Kenyatta’s] administration has picked what one Western diplomat called "childish fights".
* A son of Kenya’s founding President, Jomo Kenyatta, he ran for office earlier this year insisting that the ICC indictment was a "private matter" and that he would co-operate with the court, which had been asked by Kenya’s previous government to undertake the task of bringing to justice anyone responsible for perpetrating the terrible violence that followed Kenya’s election at the end of 2007.
* But he has evidently changed his line since winning.
 | -1 +1 -1 End score: +1;-2  |
| 16 | 15-03-2014  | Kenya: Trotting ahead | * He has used every conceivable ruse to ensure that his case ends in acquittal or is dropped altogether, an outcome considered increasingly likely.
* Mr Kenyatta has stirred up Kenyans and fellow African leaders against the ICC, badly damaging relations with allies in Europe and America.
* But much of Mr Kenyatta's first year in office has been wasted on this issue.
* Campaigners for democracy and openness are worried that Mr Kenyatta and his friends are trying to impede them, much as the government has plainly done its best to hamstring the ICC’s investigation.
 | -1 -1 -1 -1 End score: -4  |
| 17 | 13-09-2014 | Kenya and the International Criminal Court: off the hook?  | * But Ms Bensouda, a Gambian, refused to withdraw the charges, blaming Kenya’s government for its "continuing failure to co-operate fully with the court's requests for assistance in this case" and in particular for failing to provide banking and telephone records.
* It was the inability of Kenya’s courts to try these suspects that obliged Mr Annan, with the agreement of Mr Kibaki and Mr Odinga and the approval of a majority of Kenyans in parliament and at large, to pass their names to the ICC, which then singled out six suspects (three on each side, in two separate cases) for indictment in 2011.
* Since their indictment, the two main accused have agreed on paper to co-operate with the court.
* Yet they have heaped abuse on it, calling it, in Mr Kenyatta's words, "a toy of declining imperialist powers".
* Meanwhile Mr Kenyatta, whose country is a regional hub of capitalism and a key ally of the West against terrorism, hopes his frosty relations, especially with the United States and Britain, will thaw.
* He has sounded unusually hostile since his indictment, angrily declaring China to be his real friend.
* But he met Barack Obama last month in Washington and may soon be re-embraced within the Western fold--just as the ICC’s clout may diminish.
 | -1 -1 +1 -1 -1 -1 +1End score: +2; -5 |
| 18 | 06-12-2014 | International justice: Nice idea, now make it work | * Kenya’s government has been accused of failing to co-operate, allowing witnesses to be bribed and intimidated, and refusing to provide tax returns, bank statements and mobile-phone records which could support allegations that the President paid people to clobber followers of a rival party after the poll.
* Nor, it seems, will a definitive finding of "non-compliance" be issued against the Kenyan government.
* But Mr Kenyatta has stirred up an array of fellow African leaders, some of whom insist that sitting rulers should have immunity.
* He has dubbed the court a "toy of declining imperialist powers", pointing jeeringly at Britain, which once locked up his late father Jomo, Kenya’s founding President.
* It "must unshackle itself from a pernicious group of countries that have hijacked its operational mandate" with an agenda that has been "shameless, disruptive and unrelenting", says Kenya’s man at the UN.
 | -1+1 -1-1-1 End score: +1; -4  |
| 20 | 20-12-2014 | Human rights law: First Kenya, now Sudan | * T HAS been a bad few weeks for the International Criminal Court (ICC)--and for the cause of justice, in Kenya and Sudan.
* Mr Kenyatta and Mr Bashir, both of whom portray the court as a tool of Western governments bent on doing them down, are jubilant.
* Though Ms Bensouda has complained about the failure of Kenya’s authorities to co-operate with the case against Mr Kenyatta, he accepted the court's jurisdiction [The case against him has been definitively withdrawn].
 | -1 -1 +1 End score: +1; -2  |

## Constructivist identity variable

**Appendix 2 Scores of Kenya on ICC-identity and AU-identity including document’s name and validation**

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Nr  | Name  | Date | Universal(-ity) | International/global justice | Impunity | Sovereignty | Complementarity | Africa(n) | Endscore ICC Identity  | Endscore AU Identity  |
| 1 | Statement by H.E. MR. Z.D. Muburi-Muita Ambassador/Permanent Representative on Agenda Item 76 Report of the International Criminal Court (ICC) at the 62nd session of the United Nations Generaal Assembly  | 1/11/2007 | 2 | 1 | 2 | 0 | 1 | 0 | 5 | 1 |
| 2 | Statement to the 6th session of the assembly of States Parties to the Rome Statute of the International Criminal Court.  | 4/12/2007 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| 3 | Statement by H.E. MR. Z.D. Muburi-Muita Ambassador/Permament Representative on Agenda item 69 Report of the International Criminal Court (ICC) 63rd Session of the United Nations General Assembly Plenary  | 30/10/2008 | 2 | 0 | 2 | 0 | 1 | 1 | 4 | 2 |
| 4 | Statement to the seventh session of the assembly of state parties to the International Criminal Court  | 14-22/11/2008 | 2 | 1 | 3 | 0 | 0 | 0 | 6 | 0 |
| 5 | General debate of the eight session of the assembly of states parties to the Rome Statute of the International Criminal Court – Statement by prof. Ruthie C. Rono, Ambassador of the Republic of Kenya to the Kingdom of the Netherlands  | 18-26/11/2009 | 3 | 2 | 0 | 0 | 0 | 1 | 5 | 1 |
| 6 | Statement by hon. S. Amos Wako, Attorney General of the Republic of Kenya to the Review Conference of the Rome Statute of the International Criminal Court  | 31/5 – 11/6/2010 | 1 | 2 | 1 | 0 | 1 | 0 | 4 | 1 |
| 7 | Press Statement by his Excellency the President Hon. Mwai Kibaki, Kenya State House | 15/12/2010 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 8 | Press statement issued by the Government of Kenya  | 28/01/ 2011 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 2 |
| 9 | Press Statement by Hon. Amos Wako, Hon. Prof. George Saitoti and Hon. Mutula Kilonzo on ICC summons  | 09/03/2011 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 10 | Statement by Mr Wanjuki Muchemi, Sollicitor General during the 10th session of the Assembly of States Parties to the Rome Statute  | 14/12/2011 | 0 | 2 | 6 | 0 | 1 | 14 | 8 | 15 |
| 11 | The Government of the Republic of Kenya Statement to the General Debate of the 11th session of the Assembly of State Parties to the International Criminal Court  | 14-22/11/ 2012 | 0 | 2 | 0 | 0 | 1 | 0 | 2 | 1 |
| 12 | Aide Memoire Kenya and the International Criminal Court - Executive Summary  | 05/13 | 1 | 3 | 1 | 12 | 2 | 31 | 5 | 45 |
| 13 | Statement by H.E. Mr. Macharia Kamau Ambassador/Permanent Representative Permanent mission of Kenya to the United Nations, during an interactive dialogue with members of the Security Council | 23/5/2013 | 0 | 2 | 3 | 2 | 1 | 3 | 5 | 6 |
| 14 | Letter to the vice-President of the Bureau of the Assembly of States Parties  | 30/5/2013 | 0 | 0 | 0 | 0 | 0 | 6 | 0 | 6 |
| 15 | Statement by the hon. Amina Mohammed, CBS, CAV, Cabinet Secretary for Foreign Affairs and International Trade during the general debate of the 12th session of the Assembly of State Parties  | 20-28/11/2013 | 0 | 1 | 0 | 0 | 1 | 1 | 1 | 2 |
| 16 | Draft letter from AU to ICC allegedly written by government of Kenya during 2014 AU summit  | 29/1/2014 | 0 | 1 | 0 | 0 | 0 | 2 | 1 | 2 |
| 17 | Statement at the UN  | 30/10/2014 | 0 | 0 | 4 | 0 | 2 | 1 | 4 | 3 |
| 18 | ASP Statement  | 11/12/2014 | 0 | 3 | 3 | 0 | 0 | 3 | 6 | 3 |

1. The establishment of the Rwanda tribunal constituted a step forward for international law because, contrary to the Yugoslavia tribunal which was concerned with an international conflict, it was a domestic conflict that was being judged by international jurisdiction. [↑](#footnote-ref-1)
2. Article 7 of the Rome Statute gives the ICC the jurisdiction to rule over crimes against humanity ‘against any civilian population. [↑](#footnote-ref-2)
3. For a detailed description of the proceedings, see: Kirsch, P. & Holmes, J.T., (1999) The Rome Conference on an International Criminal Court: The Negotiating Process, *The American Journal of International Law,* 93 (1), pp. 2-12. [↑](#footnote-ref-3)
4. Of the 123 states that have signed and ratified the statute, 34 of them are African (out of the 55 states Africa currently counts). In comparison, there are 27 Member States from Latin America and the Caribbean, 25 Members States from Western Europe, 18 Member States from Eastern Europe and 19 Member States from Asian-Pacific Member States.(International justice: Nice idea, now make it work, 6 December 2014 ); (www.africacheck.org , n.d.). [↑](#footnote-ref-4)
5. The Statute required sixty ratifications before it could enter into force. [↑](#footnote-ref-5)
6. Legal term meaning ‘at own initiative’. [↑](#footnote-ref-6)
7. The term ‘BRICS-countries’ refers to Brazil, Russia, India, China and South-Africa. These countries are assumed to have the same level of economic development, and have become a symbol for the shift in economic power from the most developed countries to the developing countries. [↑](#footnote-ref-7)
8. Compliance is operationalized in this thesis as an ordinal variable; see paragraph 2.3. and chapter 3 paragraph 4.1 [↑](#footnote-ref-8)
9. A logic of appropriateness is followed when an actor is driven by what he feels he should do, that is, what he ought to do according to norms or rules of appropriate or exemplary behavior (Fierke, Constructivism, 2010, p. 181). [↑](#footnote-ref-9)
10. For a more detailed description of the concept of transitivity, see for example Hammond, T.H. (2007). Rank injustice?: Hoe the scoring method for cross-country running competitions violates major social choice principles. *Public Choice,* 133, pp. 359-375. [↑](#footnote-ref-10)
11. There is some debate on who should be qualified as a (relevant) actor – states, leaders and/or international institutions – given that rational choice can explain outcomes on an individual and a collective level. [↑](#footnote-ref-11)
12. This comes close to a constructivist notion of power. [↑](#footnote-ref-12)
13. A zero- sum game is a mathematical representation often used in game theory and economic theory. It refers to a situation in which one person’s gain is equivalent to another person’s loss. This results in a net change in wealth of benefit of zero. This is opposed to a non-zero-sum game, which refers to a situation in which the interacting parties aggregate gains and losses can be less or more than zero (Non-Zero-Sum Games, n.d.). [↑](#footnote-ref-13)
14. Hegemonic stability refers to the period in the 20th century in which the US is regarded as being the most powerful state regarding military, economic and ideological power. [↑](#footnote-ref-14)
15. The difference between an international institution and an international regime is that an international institution is a tangible asset with for example a fixed office, whereas an international regime is a set of circumstances forcing an actor to behave in a certain way (March & Olsen, n.d.) [↑](#footnote-ref-15)
16. Another rationalist neoliberal explanation of accepting regime rules is found in game theory. See for example: Axelrod, R. (1984). *The evolution of cooperation.* New York: Basic Books.  [↑](#footnote-ref-16)
17. Such as power in the case of neorealists or power and wealth in the case of the neoliberals. [↑](#footnote-ref-17)
18. Bracketing is a way to perceive a mutually constitutive relationship as being comprised of monocausal links.It is used as a method to be able to question the giveness of certain variables while including them in a causal mechanism. For more information, see: Fierke, K. (2010). Constructivism. In T. Dunne, M. Kurki & S. Smith, *International Relations Theories* (pp. 177-194). New York: Oxford University Press. [↑](#footnote-ref-18)
19. Cf:Joachim, Reinalda and Verbeek, 2008, p. 6. [↑](#footnote-ref-19)
20. Here, the distinction can be made between offensive and defensive realists. Offensive realists maintain that states should attempt to gain as much power as possible, while defensive realists argue that systemic factors put significant limits on how much power states can and should gain (Carlsnaes, Risse and Simmons, 2002, p. 343, 348). [↑](#footnote-ref-20)
21. With Kenya being a developing country, it is interesting to note that some scholars have suggested that these reputational mechanisms are especially important for developing countries, because these countries want to build up credits as a country that abides by the rule of law (Shihata, 1965). [↑](#footnote-ref-21)
22. See for example: Franck, T.M. (1990). *The power of legitimacy among nations.* New York: Oxford University Press. [↑](#footnote-ref-22)
23. See also paragraph 2.2.2. [↑](#footnote-ref-23)
24. An institution is according to the definition of March and Olson (1989): ‘*a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations (...) The definition of a norm means a single standard of behavior, whereas institutions emphasize the way in which behavioral rules are structured together and interrelate (a collection of practices and rules)*’. Quoted in: Finnemore, M. & Sikkink, K. (1998). “International norm dynamics and political change.” *International Organization,* 52 (4): p. 891. [↑](#footnote-ref-24)
25. Namely, the Democratic Republic of the Congo, Uganda, the Central African Republic (twice), Sudan (Darfur), Kenya, Libya, Ivoary Coast and Mali (ICC, 2015b). [↑](#footnote-ref-25)
26. In quantiative research, the letter ‘N’ indicates the population number. The capital N refers to the total population of cases, while the small N refers to a selection of cases from the total population). In the case of compliance by Kenya with the ICC the N is 35, since 35 African countries are Member Party to the Rome Statute. [↑](#footnote-ref-26)
27. See: King, G., Keohane, R. and Verba, S. (1994) Designing Social Inquiry: Scientific Inference in Qualitative Research. Princeton: Princeton University Press; or Brady, H., & Collier, D. eds. (2010) Rethinking Social Inquiry: Diverse Tools, Shared Standards 2nd ed. Lanham, MD: Rowman & Littlefield. [↑](#footnote-ref-27)
28. Argument by Mahoney, J. & Goertz, G. (2006). A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research. *Political Analysis,* 14, pp. 227-249. [↑](#footnote-ref-28)
29. The same accounts for Sudan which president is warranted by the ICC. However, this case has never gone to trial. [↑](#footnote-ref-29)
30. See paragraph 3.4.4. for an explanation of which words are selected to represent a certain identity. [↑](#footnote-ref-30)
31. Quantitative content analysis is compatible with a rationalist approach when it is limited to what can be measured positively, regardless of the interpretation of the researcher. The latter comprises a qualitative analysis. Once researchers engage themselves in qualitative analysis, they soon cross the line of a reflectivist ontology. To justify a comparison between the rationalist and constructivist variables, the same positivist ontology is applied. [↑](#footnote-ref-31)
32. The ICC organs are the Presidency, the Office of the Prosecutor, the Registry or the Judicial Division (consisting of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division) (ICC, 2015a) [↑](#footnote-ref-32)
33. Van der Vleuten also has a third ground on which costs can occur for states, namely if the implementation of the agreement on a national level will lead to higher political, economic and ideological costs. This one is not included here, because the focus of this research is on the system level, while this is about factors on a domestic level. [↑](#footnote-ref-33)
34. A sample is used due to time and resource constraints in identifying all documents that constitute the public communication of the Government of Kenya with regard to the ICC. However, the sample is representative since the data is originating from recurring events, such as the Assembly of States Parties. [↑](#footnote-ref-34)
35. See appendix 2 for an extensive list of the used documents and their scores. [↑](#footnote-ref-35)
36. Its preamble states: ‘A*ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution mist be ensured by taking measures at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes (…) resolved to guarantee lasting respect for and the enforcement of international justice’* (Schabas, 2001, pp. 167-168). [↑](#footnote-ref-36)
37. For example the UN General Assembly speeches of Kenya with regard to the ICC agenda item in the years 2010, 2011, 2012 and 2013, which could not be found on the CICC-website. [↑](#footnote-ref-37)
38. This is based on the legal principle *no crimen sine lege* (an act can only become a crime when at that time of committing it, it was known to be a crime). This limitation of the ICC’s jurisidiction also means that ad hoc tribunals have not become superfluous. The Sierra Leone tribunal for example came into existence after the ICC was already established.The tribunal deals with war crimes committed in Sierra Leone’s civil war that took place from 1991 till January 2002, which falls outside the ICC’s jurisdicition. [↑](#footnote-ref-38)
39. The exception is the newly formulated crime of aggression: then the ICC can only exercise its jurisdiction if a party State has accepted these amendments. [↑](#footnote-ref-39)
40. The only restriction the Court has is that it cannot prosecute anyone under the age of 18. [↑](#footnote-ref-40)
41. However, several NGO’s keep close track of states’ cooperation with the Court, such as the Coalition of the International Criminal Court and the PGA International Criminal Justice Program (F.Burger, interview, 21 July 2015). [↑](#footnote-ref-41)
42. The tribunals were funded by individual member states that had an interest, such as old colonizers. [↑](#footnote-ref-42)
43. Permission of the Pre-Trial Chamber of the ICC is however still required (ICC, 2011a). [↑](#footnote-ref-43)
44. A situation refers to the event in a country in relation to which the war crimes are committed. [↑](#footnote-ref-44)
45. Currently preliminary examinations are conducted by the Office of the Prosecutor into the situations in Palestine, Ukrainem Iraq and Honduras. The Prosecutor had not yet determined whether the alleged crimes meet the requirements to open a formal investigation. At the same time, the office of the Prosecutor of assessing whether genuine national proceedings are underway in Afghanistan, Georgia, Guinea, Colombia and Nigeria (ICC, 2015c) [↑](#footnote-ref-45)
46. Kenya was not part of the like-minded nations block that during negotiations favoured a strong and independent international criminal court (Schabas, 2011, p. 18) [↑](#footnote-ref-46)
47. The Bureau is part of the Assembly of State Parties. It consists of a President, two vice-Presidents and eighteen members, all elected for a three-year term. The Bureau takes into consideration the principles of equitable geographic distribution and adequate representation of the principal legal systems of the world. In 2008, Kenya provided one of the vice-presidents, Mr. Zachary Muburi-Muita. [↑](#footnote-ref-47)
48. For a detailed description of the run-up to the post-election violence, see Klopp, J. (2012). Kenya Struggles to Fix Itself. *Current History* , 181-186; and Murunga, G.R., Okello, D. and Sjögren, A. (2014). *Kenya: The Struggle for a New Constitutional Order*. London: Zed Books. [↑](#footnote-ref-48)
49. Named after its chairman Judge Philip Waki (Mueller, 2014, p. 30). [↑](#footnote-ref-49)
50. Article 87(7) of the Statute provides:

*Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.* [↑](#footnote-ref-50)
51. This latter concern was confirmed by an interview held by the researcher with a Kenyan government official. He stated that international law did not overrule Kenyan domestic law, and that the Prosecutor should have requested for the materials at a Kenyan court. [↑](#footnote-ref-51)
52. This is for example demonstrated in Article 88: ‘*State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part*. ‘ (Schabas, 2001, p. 226) [↑](#footnote-ref-52)
53. The threats expressed by some members of the British parliament to stop payments to the ICC, following the announcement of a possible ICC investigation to the involvement of the United Kingdom in the Iraq War, show that this concern is not groundless (R.J. Bartels, interview, 3 June 2015). [↑](#footnote-ref-53)
54. Example is the handing over of Ntaganda by the US embassy in Kigali, Rwanda, who was accused of war crimes in the DRC. Publicly, the U.S. do not support the ICC (R.J. Bartels, interview, 3 June 2015). [↑](#footnote-ref-54)
55. The Trial Chamber noted that the request concerned eight different records concerning business ownership, land and real estate ownership, tax records, vehicle ownership, savings, transactions, phone records and information of the Kenyan intelligence service (Trial Chamber V (B), 2014, pp. 8-10) [↑](#footnote-ref-55)
56. However, the Trial Chamber in the end rejected the claim of non cooperation by the Prosecution. Primary responsibility for finding evidence lies with the Prosecution that should have flagged the noncooperative attitude of Kenya earlier. On top of that, the Trial Chamber considered the Prosecution’s concession, that the sought evidence fell below the standard required for trial, an indication that ruling on a non-compliance of Kenya would not improve further proceedings, and therefore a finding of non-compliance would not do any good. [↑](#footnote-ref-56)
57. For example the world headquarters of UN-Habitat, the UN organization responsible for improving urban planning and housing, as well as UNEP, the UN’s environment program. [↑](#footnote-ref-57)
58. These states are said to be profiting from their natural wealth and recent economic growth to pursue a change of status from developing country to emerging power. [↑](#footnote-ref-58)
59. That this was indeed a result of Kenya’s actions is indicated by a non-paper drafted by Kenya during the 21st AU summit in May 2013, which called on all African states to condemn proceedings of the ICC against head of states (Government of the Republic of Kenya, 2013b). [↑](#footnote-ref-59)
60. For more information on Indian-Kenyan trade relations, see: MacCann, G. (2010). Ties that bind or binds that tie? India’s African engagements and the political economy of Kenya. *Review of African Political Economy,* 37 (126), pp. 465-482. [↑](#footnote-ref-60)
61. See appendix 1a and 1b. [↑](#footnote-ref-61)
62. The score per year is the accumulation of the scores of all the valued sentences of that year. [↑](#footnote-ref-62)
63. The score per year is the accumulation of the scores of all the valued sentences of that year. [↑](#footnote-ref-63)
64. China is particularly known for keeping its distance of ethical diplomacy and focusing on economic benefits, regardless of the consequences. Interestingly, Brown and Raddatz (2013) make a strong argument for the fact that this assumption of western diplomats - that the retraction of donor money would not have great impact - is not justified. In 2008, 21 per cent of the governments expenditures in Kenya was financed by donor money. According to World Bank data, donors’ development assistance doubeld from 16 per cent to 32 per cent of the Kenyan government spending in less than ten year (p. 48). According to Brown & Raddatz, this suggests that the possible diplomatic pressure the donors collectively could exert was far greater than they realized. Concerning the option of China and India as an alternative source of investments, Brown and Raddatz argue that China is not ’a credible alternative’ for the Western assistance. Neither the quantity nor the range of sectors in which China is investing are an adequate replacement for the Western involvement (2013, p. 56). [↑](#footnote-ref-64)
65. Van der Vleuten also has a third ground on which costs can occur for states, namely if the implementation of the agreement on a national level will lead to higher political, economic and ideological costs. This one is not included here, because the focus of this research is on the system level, while this is about factors on a domestic level. [↑](#footnote-ref-65)
66. Since measurement of the previou year determines the score of the following year, FreedomHouse scores of 2006 are marked here as 2005, scores of 2007 as 2006 etc. [↑](#footnote-ref-66)
67. This is based on the preamble of the Rome Treaty: ‘*affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution mist be ensured by taking measures at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes (…) resolved to guarantee lasting respect for and the enforcement of international justice’* (Schabas, 2001, pp. 167-168) and confirmed by interviews (R.J. Bartels, 3 June 2015); (F.Burger, interview, 21 July 2015). [↑](#footnote-ref-67)
68. Only the United Nations Security Council can defer a case from commencing on the base of it forming a threat to international peace and security. [↑](#footnote-ref-68)
69. See appendix 2. [↑](#footnote-ref-69)
70. Boldness of words added by author. [↑](#footnote-ref-70)
71. For an elaboration on this topic, see: Schimmelfennig, F., (2003), ‘The Community Trap: Liberal Norms, Rhetorical

Action, and the Eastern Enlargement of the European Union’, *International Organization*, vol. 55 (01), pp. 47-80; and Manea, M., (2009), ‘How and Why Interaction Matters: ASEAN’s Regional Identity and Human Rights’, *Cooperation and Conflict: Journal of the Nordic International Studies Association,* vol. 44(1), pp. 27-49.  [↑](#footnote-ref-71)