

‘UhuRuto’ and Other Leviathans: The International Criminal Court and the Kenyan Political Order

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Abstract

The International Criminal Court’s intervention in Kenya emerged from a complex and contested political history, with different actors advocating for domestic solutions and others arguing for an international legal process in The Hague. Earlier positions have been disavowed and others have changed in the dynamic Kenyan political environment. The ICC intervention has produced a number of political effects, including the imbrication of the ICC process with electoral politics. This article takes up the case study of the Kenyan situation as a site of political contestation mediated through legal discourse. It considers these dynamics on two registers: at the geopolitical level (considering the relationships between the ICC, the African Union, and the United Nations Security Council) as well as at the domestic level (both state and civil society). By tracing the discourses through which these contestations transpire, this article highlights some of the themes, strategies, and practices through which the ICC’s intervention has been received.

Keywords

International criminal law – Kenya – International Crime Court – electoral politics – civil society – United Nations Security Council – African Union

1 Geographies of Justice

The Italian philosopher Roberto Esposito has argued that ‘the domain of law is gaining terrain both domestically and internationally’; he continued,

'the process of normativisation is investing increasingly wider spaces'.¹ As the introduction to this issue maintains, this (legal) domain carries with it a particular ontology that is reinforced through its increased uptake by actors at the domestic and international levels in response to mass atrocity. When acts of violence are described as crimes, this designation carries a set of assumptions about agency, responsibility, and appropriate forms for redressing suffering. As more terrain is captured for law and subjected to its particular logics – especially legal ontologies that focus on retributive forms – other ways of conceptualising responses to conflict are sidelined or considered inadequate when measured against its dominant terms.² As the field of international criminal law expanded in the post-Cold War period, it presented a contrasting paradigm to negotiated political settlements and truth commissions.³ Its focus on individualised responsibility for mass crimes reflects liberal legalist understandings of how causality operates in conflict settings; here the Nuremberg tribunal's famous assertion that crimes are committed by 'men, not by abstract entities' is one of the underlying premises of the field.⁴ The spread of international criminal law has produced unprecedented forms of what one diplomatic proponent of the International Criminal Court (ICC) has termed 'international judicial intervention'.⁵ The ICC Rome Statute's preamble claims that 'the most

- 1 R. Esposito, *Bios: Biopolitics and Philosophy* (University of Minnesota Press, Minneapolis, MN, 2008), 13.
- 2 This is particularly evident in relation to 'complementarity' at the International Criminal Court, as explained in this issue's introduction; challenges to the admissibility of a case before the court reproduce the dominant logic of retributive justice rather than contesting jurisdiction based on the existence of alternate forms of post-conflict responses, such as transitional justice mechanisms.
- 3 At the 2013 meeting of states parties to the ICC, for example, a South African representative wondered whether a political settlement as experienced in post-apartheid South Africa would have been possible under the Rome Statute, and whether it would have been possible to have peace with a formal justice process rather than a political settlement. 12th Assembly of States Parties, The Hague, 20 November 2013, author's notes. For an emerging critique of the use of criminal mechanisms rather than negotiated settlements in response to mass atrocity, see T. Mbeki and M. Mamdani, 'Courts Can't End Civil Wars' *The New York Times* (5 February 2014), available online at http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html?_r=2 (accessed 18 June 2014).
- 4 *Trial of the Major War Criminals Before the International Military Tribunal* (vol. 1, Nuremberg, 1947) 223. The judgment continues: 'only by punishing such individuals who commit such crimes can the provision of international law be enforced' (*ibid.*).
- 5 D. Scheffer, 'International Judicial Intervention', 102 *Foreign Policy* (1996) 34–51. Scheffer headed the United States' delegation for the ICC treaty negotiations and was the signatory on behalf of the United States. The signature of the US was later withdrawn under the Bush administration.

serious crimes of concern to the international community as a whole must not go unpunished', suggesting that 'ending impunity' ought to serve as a moral imperative in states affected by mass conflict.⁶

The terms through which international criminal law operates suggest that the field works through cosmopolitan and apolitical consensus, unified by a collective desire to bring what Walter Benjamin calls 'the great criminal' before the law, a figure whose violence is seen to threaten the very foundations of the legal order.⁷ The field presents the international community as the agent of these interventions, though this 'imagined community'⁸ is a rhetorical construct rather than a determinate body of states. Invoking the international community as its agent is meant to imbue the ICC's actions with moral force and political legitimacy. International judicial interventions are thought to be undertaken on behalf of a cosmopolitan constituency and in the interest of the global good rather than reflecting the interests of particular political actors. As prosecutors at the ICC have repeatedly emphasised, they are 'solely guided by the law';⁹ the current prosecutor contended that 'politics have no place and will play no part in the decisions I take'.¹⁰

The theoretical construction of international criminal law as a collective project of the international community, devoid of political interests and embracing the moral call to 'end impunity', contrasts with the field's work in practice. Translated into practice, international criminal law is selectively enforced; whether they directly address it or not, international prosecutors often consider political factors such as prospects for state cooperation when they exercise their discretionary power. Limits posed by state sovereignty, disputes concerning venue – national or international – and financial considerations ensure that international criminal trials are unusual events, whether

6 Rome Statute of the International Criminal Court 1998, Preamble.

7 W. Benjamin, 'Critique of Violence', *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken Books, New York, NY, 1978) 283.

8 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, London, 2006). For a similar use of Anderson in the international register, see L. Malkki, 'Citizens of Humanity: Internationalism and the Imagined Community of Nations', 3 *Diaspora: A Journal of Transnational Studies* (1994), 41–68.

9 F. Bensouda, 'The ICC: A Response to African Concerns', Keynote address at the Institute of Security Studies (10 October 2012), available online at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=331721&sn=Detail&pid=71616> (accessed 8 February 2014).

10 'Statement of Prosecutor Fatou Bensouda to the 12th Assembly of States Parties' (Speech at the Assembly of States Parties in The Hague, 20 November 2013), available online at http://icc-cpi.int/iccdocs/asp_docs/ASP12/ASP12-OP-Statement-PROS-ENG-FRA.pdf (accessed 11 February 2014) (emphasis in original).

at *ad hoc* tribunals such as the Special Court for Sierra Leone or before the permanent ICC.

To date, international judicial interventions have overwhelmingly occurred in the global South.¹¹ As of the time of writing, all suspects before the ICC have been from the African continent. Meanwhile, the court has not asserted jurisdiction over violations of international criminal law allegedly committed in Palestine, leading some observers to contend that what the court frames as a technical jurisdictional matter is also a product of the political interests of strong states.¹² The United Nations Security Council features prominently in the production of these geographies, whether by founding tribunals (as was the case with Rwanda and the former Yugoslavia) or through triggering the referral of a situation to the ICC through a resolution. The concerns of the permanent five members of the Security Council are reflected in the map of international judicial interventions, influencing where they do and do not take place.¹³

Against this backdrop of selective geographies, international judicial interventions have produced considerable resistance from states and regional bodies, particularly on the African continent.¹⁴ These interventions have also produced claims that the field of international criminal law is either inherently political or has been politicised in practice. Resistance to the ICC has

- 11 The ICC has exercised its jurisdiction in the 'situations' of northern Uganda, the Democratic Republic of Congo, the Central African Republic, the Darfur region of Sudan, Kenya, Côte d'Ivoire, Libya, and most recently Mali as of the time of writing. *Ad hoc* tribunals or special criminal divisions have been established to adjudicate violations of international criminal law committed in Rwanda (ICTR), the former Yugoslavia (ICTY), Sierra Leone (SCSL), Lebanon (STL), Cambodia (ECCC), and most recently Bangladesh (ICT).
- 12 In January 2009, the Palestinian National Authority issued a declaration under the authority of Article 12(3) of the Rome Statute accepting ICC jurisdiction over crimes committed in Palestinian territory. The Prosecutor initiated a preliminary examination. In April 2012, over three years later, the Prosecutor issued a statement claiming that he was unable to ascertain whether the Court could have jurisdiction over Palestine because he could not determine whether Palestine was a state. *Situation in Palestine* (OTP Decision on Preliminary Examination), available online at <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf> (accessed 18 June 2014).
- 13 See generally D. Forsythe, 'The UN Security Council and Response to Atrocities: International Criminal Law and the P-5', 34 *Human Rights Quarterly* (2012), 840–863.
- 14 In the months following the election of Uhuru Kenyatta and William Ruto to the positions of President and Deputy President of Kenya in March 2013, a number of African states expressed opposition to the ICC, and the African Union addressed the issue at an extraordinary summit in October of 2013.

been mobilised around assertions of sovereignty, not only because sovereignty serves as a foundational value of the international legal order but also due to its historical significance for postcolonial states.¹⁵ Critics of the court's exercise of jurisdiction draw further support from its selective interventions. Whether the ICC's intervention takes place in a state which has consented to its founding treaty (as with Kenya) or not (as with Sudan), the court's selective geography is invoked to reinforce claims that the ICC serves the interests of strong states. Under what conditions and by whom is the decision to intervene taken? As all three triggers of the ICC's jurisdiction have shown – whether state (self) referral, the prosecutor's own initiation (*proprio motu*), or through a UN Security Council resolution – the court's actions are not only determined by the imperative to prosecute 'the most serious crimes of concern to the international community' but also by issues of political will, state cooperation, and protection of client states and state actors.¹⁶

At stake then is not whether the field can be separated from 'the political', understood here as the powers and interests that invest and shape social interactions. In this sense, and contrasting sharply with assertions by the field's proponents that 'politics have no place' within it, the legal domain is another site of political contestation. This article considers the ways in which powers and interests are channeled, disavowed, and contested by different actors, often through appropriating the very terms of the field and its corresponding ontologies. Such critiques of international criminal law have emerged in scholarship on the ICC and other tribunals, with Gerry Simpson's notion of 'juridified

15 See A. Anghie, 'The Evolution of International Law: colonial and postcolonial realities' 27 *Third World Quarterly* (2006), 739–753.

16 The Ugandan situation offers one of the more well-known examples, where the Office of the Prosecutor did not pursue cases against the Ugandan People's Defence Force (UPDF), possibly in the interest of maintaining cooperation from the Ugandan government, which had self-referred the situation to the court. See, generally, S. Nouwen, *Complementarity in the Line of Fire: the Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, Cambridge, 2013); A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford University Press, Oxford, 2011). The court claims that investigations in the Ugandan situation are still technically open (and could, in theory, lead to evidence of UPDF crimes). Despite President Museveni's public criticism of the court at the inauguration of Kenyan president Uhuru Kenyatta, ICC staff in the court's Ugandan field office noted that there was continuing cooperation with the Ugandan state; they still received support, police escorts, and easy renewals of work permits for international staff. Interview with ICC field staff member (Kampala, 6 February 2014).

diplomacy' offering one theorisation of the field's relation to the political.¹⁷ Kamari Clarke's 2009 *Fictions of Justice* served as a pioneering monograph in offering an empirically grounded critique of the field and its presumptions.¹⁸ Sarah Nouwen and Wouter Werner have explored the political dimensions of ICC interventions in Uganda and Darfur, arguing that 'international criminal justice has become a weapon in struggles in Uganda and Sudan' while 'the ICC has become implicated in the distinction, and thus construction, of friends (allies) and enemies.'¹⁹ While a contentious claim to many proponents of these courts, this diagnosis may in fact be bound up with the very idea of 'international judicial interventions': by intervening in complex conflict and post-conflict political settings, international criminal courts and tribunals become political agents themselves, in the sense that they form alliances with some actors (often states, whose support they rely upon) and designate others as alleged criminals, producing domestic political effects. In the Kenyan context, Mahmood Mamdani has observed that the ICC intervention has polarised domestic politics through re-ethnicising communities and criminalising one side of the conflict.²⁰ Powers and interests are routed through court interventions: new categories of identity are generated through distinguishing between 'friends' and 'enemies' of the international community, and old (colonial) forms of identity are reinscribed through how conflict narratives are recounted in the terms of international criminal law.

The mythology of an apolitical international criminal law, with its body of jurisprudence that seeks to distill individual criminal acts from complex

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- 17 Simpson defines 'juridified diplomacy' as '[t]he phenomenon by which conflict about the purpose and shape of international political life (as well as specific disputes in this realm) is translated into legal doctrine or resolved in legal institutions'. G. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity Press, Cambridge, 2007), 1.
 - 18 K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, Cambridge, 2009).
 - 19 Nouwen and Werner show specifically how in the contexts of Uganda and the Darfur region of Sudan, groups (such as the Lords Resistance Army) and individuals (such as Omar al-Bashir) are recast as enemies of the international community through the prism of the ICC. See S. Nouwen and W. Werner, 'Doing Justice to the Political: the International Criminal Court in Uganda and Sudan', 21 *The European Journal of International Law* (2010) 941–965, at 946.
 - 20 M. Mamdani, 'Kenya Election 2013: The ICC Election', MISR Working Paper No. 15 (2013), available online at <http://misr.mak.ac.ug/publications/working-paper-no-15-panel-discussion-kenya-elections-2013> (accessed 18 June 2014). See also M. Mamdani, 'You cannot solve political problems through the courts', 51 *The Africa Report* (June 2013), 25.

conflicts, is increasingly contested by work that places its practices in political and cultural context. This article builds upon this strand of critical legal scholarship by focusing on what is produced – politically and discursively – through international judicial interventions. It takes up the ICC's engagement in Kenya as a case study of the court's power to produce identities and narratives that in turn yield new sites of political contestation.

The Kenyan intervention has contributed to recalibrations of the domestic political field, unifying formerly opposed groups of the electorate and deepening the rift between the Kenyan state and domestic civil society organisations. There has been a long history of shifting alliances among political elites in post-independence Kenya, yet the ICC's intervention has polarised Kenyan politics in new ways. While the formation of an alliance between past political rivals may have contributed to a peaceful election in 2013, this was tenuously based upon a shared enemy, the ICC, while the structural bases of past violence remain unaddressed.²¹ In addition to providing a much welcomed venue for pursuing accountability through legal forms, the ICC's intervention has also resulted in security threats to ICC witnesses, conflict-affected communities, and civil society organisations who support the court's work.²² Regionally it has mobilised opposition from the African Union and led to UN Security Council involvement through the Kenyan government's request for a deferral under Article 16 of the Rome Statute.²³ The Kenyan situation before the ICC thus illustrates how tensions between different political actors play out in

21 For an account of these structural bases, including issues of land distribution, see K.M. Clarke, 'Rethinking the Impunity Gap: Crafting the Perpetrator and the Problem with Legal Time' (forthcoming 2014). See also A. Ngari, 'Reconciling Kenya: Opportunities for constructing a peaceful and socially cohesive nation' *Institute for Justice and Reconciliation Policy Brief No. 1* (2012), available online at <http://www.ijr.org.za/publications/pdfs/IJR-NCIC-FBA%20Policy%20Brief%201.pdf> (accessed 18 June 2014).

22 Prosecution filings have noted some of the security issues faced in the Kenyan situation. In 2011, for example, the Prosecution claimed that it 'continues to receive reports that persons living in Kenya face threats, intimidation, and other attempts to discourage their participation in the investigation. This includes publication of information about alleged witnesses on the internet and veiled public threats and incitement by associates of the suspects'. *Situation in the Republic of Kenya* (Prosecution's Response to 'Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194') ICC-01/09-80, PT Ch II (6 October 2011), para. 10.

23 As discussed in this issue's introduction, Article 16 of the Rome Statute permits a one year (renewable) delay in the proceedings through a UN Security Council resolution under the authority of Chapter VII of the UN Charter.

relation to the court's work, with implications for how the court is perceived on the sole continent where it has brought cases.

2 Producing 'UhuRuto'

The mass violence during and following Kenya's disputed 2007 election was not without precedent in a country that had moved from colonial oversight to a long period of one party rule.²⁴ Political rivalries established through the anticolonial struggle and during the period of early state formation resurfaced, sometimes in new configurations and alliances, in electoral cycles throughout Kenya's recent history. Multi-party elections conducted in 1992 and 1996 had led to political violence between rival factions. However, the 2007/2008 post-election violence – resulting in the loss of over one thousand lives and the displacement of large sections of the Kenyan population – prompted substantial involvement from international and regional actors.²⁵

The African Union engaged with Kenyan political actors in the early aftermath of the post-election violence. The AU Panel of Eminent African Personalities, chaired by former UN Secretary-General Kofi Annan, oversaw a political settlement reached through the Kenya National Dialogue and Reconciliation (KNDR) process that began in late January 2008. The KNDR led to the signing of a National Accord and Reconciliation agreement on 28 February 2008, which established a four-part agenda to address the consequences of the post-election violence. A coalition government was established with electoral rivals Mwai Kibaki of the Party of National Unity (PNU) and Raila Odinga of the rival Orange Democratic Movement (ODM) as President and Prime Minister. The Accord also led to a Commission of Inquiry into Post-Election Violence ('CIPEV' or the 'Waki Commission'), which issued a report in October 2008 recommending the establishment of a special tribunal to try those responsi-

24 On the early formation of the Kenya African National Union (KANU) party, which ruled for nearly four decades, see M. Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Fountain Publishers, Kampala, 2008).

25 See K. Kanyinga, 'Stopping a Conflagration: the Response of Kenyan Civil Society to the Post-2007 Election Violence', 38 *Politikon: South African Journal of Political Studies* (2011), 85–109. In addition to attributing the violence to the election itself, some scholars have located it within a broader history of elite fragmentation, political liberalisation, and state informalisation. See D. Branch and N. Cheeseman, 'Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya', 108 *African Affairs* (2008), 1–26.

ble for orchestrating the violence.²⁶ The Commission forwarded an envelope containing the names of suspected perpetrators to Kofi Annan, then head of the Panel of Eminent African Personalities, to be forwarded to the ICC in the event that a special tribunal was not set up. Three attempts to develop a bill for a tribunal did not garner sufficient support to pass in the Kenyan parliament.²⁷ After diplomatic efforts failed to yield a referral of the situation from the Kenyan government, the ICC Prosecutor sought to initiate investigations *proprio motu* under Article 15 of the Rome Statute in November of 2009.²⁸ At the end of March 2010, the ICC's Pre-trial Chamber authorised the Prosecutor to begin an investigation.²⁹ Six individuals, equally divided between the PNU and ODM, were summoned to appear in The Hague in March 2011. Charges were confirmed against four of the six, still equally divided between political parties, and were subsequently dropped against Francis Muthaura, the former head of the civil service for the PNU. Charges were not confirmed against the former police commissioner for incidents of police violence, producing a lingering sense of impunity for the acts of state security services despite efforts by Kenyan civil society organisations to bring domestic cases against these actors.

At the time of the 2007 election, the two most prominent politicians among the indictees – Uhuru Kenyatta, current President of Kenya, and William Ruto, the current Deputy President – were rival members of opposing parties. After withdrawing from the presidential race on the Kenya African National Union (KANU) ticket, Kenyatta had backed Mwai Kibaki of the PNU; meanwhile

26 'Report of the Commission of Inquiry into Post-Election Violence' (2008), available online at http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf (accessed 18 June 2014).

27 These efforts were brought by then Justice Minister Martha Karua in January 2009, when the bill was voted down by Parliament; by then Justice Minister Mutula Kilonzo in July 2009, when Parliament rejected efforts to table the bill; and by MP Gitobu Imanyara in November 2009, when parliamentary quorum was not met. For further details, see Kenyans for Peace, Truth and Justice (KPTJ) and Kenya Human Rights Commission, 'Securing Justice: Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya' (2013), available online at <http://kptj.africog.org/securing-justice-establishing-a-domestic-mechanism-for-the-2007-8-post-election-violence-in-kenya/> (accessed 18 June 2014).

28 For a more extensive account of this history, see L.M. Wanyeki, 'The African Intervention in Kenya: agency or instrumentalisation, compromising or leveraging political and social justice?' (draft manuscript). See also S. Brown and C.L. Sriram, 'The Big Fish won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya', 111 *African Affairs* (2012), 244–260.

29 *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr, PT Ch 11 (31 March 2010).

previous KANU member Ruto supported Raila Odinga and the ODM in the 2007 election cycle. During the post-election violence attacks were allegedly carried out against perceived PNU supporters, including many members of the Kikuyu community. Retaliatory attacks were allegedly carried out against perceived ODM supporters, including members of the Kalenjin, Luo and Luhya communities. During the 2007 election Kenyatta and Ruto were positioned both politically and ethnically as members of rival communities, yet in the 2013 election cycle they aligned as members of the Jubilee coalition. Many popular accounts assert a causal relationship between the ICC cases and this dramatic reconfiguration of the political field.

In the Kenyan situation, the ICC intervention thus became deeply imbricated with the domestic electoral process. Kenyatta and Ruto are both accused of having orchestrated crimes against humanity – including murder, deportation and persecution – directed at each other's respective communities, the Kikuyus and the Kalenjins.³⁰ The alliance between the politicians and their communities was forged in the period after they were identified as subjects of the ICC investigation. Relations improved between these former political rivals in early 2011, about a month after the Prosecutor announced summonses for the six suspects.³¹ Members of the Kikuyu and Kalenjin communities who had held antagonistic positions following the 2007 election jointly attended rallies as a working relationship developed between Kenyatta, Ruto, and then Vice-President Kalonzo Musyoka, which was referred to as the 'KKK alliance' (Kikuyu, Kalenjin and Kamba) by its detractors.³² During this period, Musyoka undertook diplomatic trips to try to convince members of the African Union to support a Kenyan request to defer the situation under Article 16 of the

30 *Situation in the Republic of Kenya* (Decision on the Prosecutor's Application for Summonses to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang) ICC-01/09-01/11, PT Ch II (8 March 2011), *Situation in the Republic of Kenya* (Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali) ICC-01/09-02/11, PT Ch II (8 March 2011).

31 International Commission of Jurists, Katiba Institute, Kenya Human Rights Commission and Africa Centre for Open Governance, 'If Uhuru Kenyatta and William Ruto is elected President and Deputy President: Implications of a Kenyatta/Ruto Presidency for Kenya' (2013), available online at <http://www.icj-kenya.org/index.php/icj-programmes/access-to-justice/56-resources/publications/reports/482-if-uhuru-kenyatta-or-william-ruto-is-elected-president-and-deputy-president> (accessed 18 June 2014).

32 *Ibid.*

Rome Statute.³³ Ruto left the ODM to join an affiliated party, which he eventually left in January 2012 in order to launch a new party, the United Republican Party (URP). Meanwhile Kenyatta left the PNU and affiliated with The National Alliance (TNA), a previously defunct party that had been re-registered in 2008. Months before the alliance between Uhuru and Ruto was formally announced, a civil society representative from an organisation based in the Rift Valley noted that the two communities of presidential aspirants who had been taken to The Hague were coming together.³⁴ At the elite level, the ICC intervention appeared to be reuniting conservative forces from the former ruling party KANU.³⁵ Kenyatta's TNA and Ruto's URP signed a pre-election alliance agreement stipulating that Kenyatta would run for president with Ruto as his deputy. They formed the Jubilee coalition in early December 2012, about three months before the election, which they symbolically enacted at a campaign rally through exchanging baseball caps from the other's respective party. In the space of roughly two years, these former rivals and their communities who had been violently opposed in the past appeared to have moved from antagonism to cooperation. As a civil society representative characterised it, 'two major antagonistic tribes – Kikuyu and Kalenjin – were united through the elections'.³⁶

This imbrication of the ICC process and the election was represented through the figure of 'UhuRuto', which came to dominate the Nairobi skyline in the months preceding the March 2013 election. It appeared on posters covering freeway overpasses, underpasses, walls, and buildings. 'UhuRuto' permeated the Kenyan landscape, either as the term alone or accompanied by the two smiling politicians. But the term was much greater than the amalgamation of the two names would suggest. The Jubilee coalition's advertising campaign merged Uhuru Kenyatta and William Ruto into a composite, a unity forged from out of past enmity in the 2007 election cycle. The figure was meant to stand for the melding of two previously opposed communities, who

33 'Kenya: VP Vows to Press on With Shuttle Diplomacy' *Daily Nation* (Nairobi 28 March 2011), available online at <http://www.nation.co.ke/News/politics/vp+vows+to+press+on+with+shuttle+diplomacy+/-/1064/1134888/-/ym5ecfz/-/index.html> (accessed 18 June 2014).

34 Interview with civil society representatives (Eldoret, 1 August 2012). One of the representatives explained that 'if someone worshipped like a demi-god is taken to The Hague, it feels like an attack on my person.'

35 Interview with legal scholar Godfrey Musila, conducted jointly with Christian De Vos (Nairobi, 18 June 2011). Ruto had been groomed by Daniel arap Moi, as was then Vice-President Kalonzo Musyoka.

36 'ICC Public Information and Outreach Consultative Meetings: CBOs from the affected communities' (Nairobi, 28 June 2013), author's notes.

were to abandon their grievances in the symbolic reconciliation embodied in 'UhuRuto' and the Jubilee coalition.

This narrative of unity from out of enmity was reflected in popular discourse. Newspaper accounts attributed the court with a causal power, suggesting that the ICC process had produced the political alliance. As early as July 2012, one paper reported that the election was being recast as a 'referendum on the Kenya cases',³⁷ which one observer noted was part of the campaign platform of the nascent Jubilee alliance toward the end of 2012.³⁸ Headlines at that time announced that the ICC created a 'Coalition of the Accused'.³⁹ According to one journalistic account, the coalition 'coalesced around the perceived persecution of its leaders by the much-vilified ICC'.⁴⁰ A representative of a Northern donor state described this recalibration of the political field as 'an almost contradictory situation' where communities previously opposed to each other were brought into an alliance by political leaders 'to propagate impunity'.⁴¹ A prominent Kenyan academic expressed a similar position: '[Kenyatta and Ruto] have been so preoccupied with ICC that they finally settled on running for the leadership of the country, probably to fight from a position of advantage'.⁴² Jubilee supporters interpreted the ICC intervention as persecution of their communities; meanwhile, supporters of the Court process regarded the political realignment as an effort to escape legal accountability. In both instances, the ICC was attributed with causing this shift in the domestic political landscape.

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- 37 A. Ndegwa, 'Campaign themes shape up as hopefuls scramble for numbers' *The Standard* (Nairobi 22 July 2012), available online at <https://www.standardmedia.co.ke/?articleID=2000062385&pageNo=1> (accessed 19 June 2014).
- 38 Interview with member of Kenyans for Peace, Truth and Justice (KPTJ) (Nairobi 28 February 2013).
- 39 E.-M. Gekara, 'How ICC and Raila Created "Coalition of the Accused"' *The Daily Nation* (Nairobi, 2 December 2012), available online at <http://www.nation.co.ke/news/politics/How-ICC-and-Raila-created-coalition-of-the-accused/-/1064/1634576/-/x71lc1z/-/index.html> (accessed 18 June 2014).
- 40 L. Mwititi, 'Regardless of the poll outcome, the ICC will preoccupy the next President' *The Daily Nation* (Nairobi, 25 February 2013), available online at <http://elections.nation.co.ke/Blogs/Regardless-of-poll-outcome-ICC-will-preoccupy-next-President/-/1632026/1704752/-/format/xhtml/-/12u6w63/-/index.html> (accessed 18 June 2014).
- 41 Interview with political representative from donor state (Nairobi, 27 July 2012).
- 42 K. Kanyinga, 'Every election has consequences, but this time our choices are stark' *The Daily Nation* (Nairobi, 23 February 2013), available online at <http://elections.nation.co.ke/Blogs/-/1632026/1701738/-/1187g0l/-/index.html> (accessed 18 June 2014).

Voting choices for the 2013 election were also re-cast in relation to the ICC. Some commentators in the *Daily Nation* argued that '[w]hile the Jubilee team had vowed to make the election a referendum on the case at the ICC, their opponents hoped to use it as a campaign tool against the Uhuru-Ruto ticket.'⁴³ Uhuru and Ruto's public statements suggest that voting for them could be construed as a rejection of the ICC: one commentator claimed 'Uhuru said, "A vote for us is a vote of no confidence in the ICC." Ruto said, "Presidential victory for the Jubilee Alliance may indicate there is something wrong with the charges its two leaders are facing at The Hague"'.⁴⁴ Following their election victory, the *Daily Nation* reported that '[i]t is noteworthy that it is the ICC case which formed the basis for the union between Mr Kenyatta and Mr Ruto which would later be built into a formidable political juggernaut.'⁴⁵ Mahmood Mamdani has claimed that the Jubilee coalition's victory at the polls stemmed from its successful presentation of itself as a party of reconciliation and portrayal of its rival coalition (CORD) as a party of vengeance.⁴⁶

Even civil society organisations working in the interests of the court – assisting with its outreach efforts or helping to identify and register potential victim participants – noted the polarising effect of the ICC's work in Kenya. A member of a civil society organisation operating in Kenya's Western district claimed 'the ICC process created some kind of negative ethnicity that has been politicised at the expense of peace and justice.'⁴⁷ A representative of an organisation working in the Rift Valley explained that the ICC was not perceived well in the region; it was regarded as a betrayal of other communities by the Luos 'in the ODM pentagon.'⁴⁸ Resistance to the ICC intervention thus provided a common, external enemy against which the figure of 'UhuRuto' – and the

43 E.-M. Gekara and B. Muriithi, 'Why the West has interest in poll outcome' *The Daily Nation* (Nairobi, 2 February 2013), available online at <http://elections.nation.co.ke/news/Why-Obama-EU-have-interest-in-outcome-of-Kenyan-election/-/1631868/1689720/-/9aoc7q/-/index.html> (accessed 18 June 2014).

44 P Nowrojee, 'The March 4 Polls and the ICC Cases' *The Star* (Nairobi, 6 February 2013), available online at <http://www.the-star.co.ke/news/article-106098/march-4-polls-and-icc-cases> (accessed 18 June 2014).

45 E.-M. Gekara, 'Bitter-Sweet Victory for Uhuru and Ruto' *The Daily Nation* (Nairobi, 10 March 2013), available online at <http://www.nation.co.ke/News/politics/ICC-cases-an-obstacle-in-smooth-Jubilee-ride/-/1064/1715776/-/4qxxqk/-/index.html> (accessed 18 June 2014).

46 Mamdani, *supra* note 20, at 12.

47 Representative of a rehabilitation program for victims of post-election violence, roundtable co-facilitated by Chris Tenove (Kisumu 31 July 2012).

48 Interview with civil society representative (Eldoret, 1 August 2012).

reconciled communities that it was thought to stand for – could then define themselves as part of a common Kenyan nation.

3 Sovereignty and State Strategy

At the domestic level, the ICC intervention in Kenya contributed to a political realignment that forged a unity from out of past enemies.⁴⁹ Viewed from the standpoint of the ICC and its proponents, however, the electoral success of the Jubilee Alliance meant that alleged perpetrators of international crimes became the apex of the Kenyan executive. This was coupled with the attendant fear that Kenya – a major African power, trading partner, and ally in regional counter-terrorism – could be perceived as a ‘rogue state’ headed by alleged perpetrators of grave crimes. States parties to the Rome Statute treaty struggled to form policy responses that would allow them to distance themselves from the new Kenyan leadership while maintaining economic links to the country. Meanwhile, the Jubilee alliance government offered regular official reassurance of cooperation with the ICC while antipathy was displaced to other fronts, including before the United Nations Security Council and the African Union.⁵⁰

The political contestations that played out at the Assembly of States Parties annual meeting in November 2013, where the Kenyan state overtly criticised how the Rome Statute system was being applied in practice, represented a high point of international tension around the court’s interventions, involving regional actors such as the AU and reflecting a polarisation among ICC states parties. Tensions were further compounded by AU-backed Kenyan efforts to seek a deferral before the Security Council under Article 16. However, domestic

49 As noted above, such alignments and realignments were not unprecedented in recent Kenyan political history. For example, the two main contenders for the 2007 election, Odinga and Kibaki, had been aligned in the 2002 election cycle under the National Rainbow Coalition (NARC).

50 For example, at the 2013 Assembly of States Parties meeting, the Kenyan Secretary for Foreign Affairs and International Trade, Ambassador Amina Mohammed, stated that ‘Kenya wishes to highlight her cooperation with the Court from the year 2010, even when it has been challenging to do so’ while also articulating support for the African Union’s proposed amendments to the Rome Statute. See ‘Statement by Amina Mohammed, Cabinet Secretary for Foreign Affairs and International Trade’, General Debate of the 12th Session of the Assembly of States Parties (The Hague 20 November 2013), available online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Kenya-ENG.pdf (accessed 18 June 2014).

resistance to the ICC had predated the court's intervention in Kenya and the high politics at stake before the AU and the Security Council. Writing in 2009, before the ICC prosecutor officially sought to intervene, Kenyan legal scholar Godfrey Musila observed that '[m]embers of government in Kenya have evoked questions of autonomy and ownership in a bid to keep the ICC at bay'.⁵¹ Kenya hosted Sudanese president Omar al-Bashir at the signing ceremony for the new Kenyan Constitution in August of 2010 without executing the warrant for his arrest, which the court claimed was in violation of Kenya's obligations as a state party. In December of 2010 the Kenyan parliament passed a non-binding motion calling for the country's withdrawal from the Rome Statute, which was rejected by the executive. Although the African Union did not endorse withdrawal from the ICC at its January 2011 summit, the regional body supported Kenya's attempt to challenge the admissibility of the cases under Article 19 in March of 2011. During this period the Kenyan government also filed a request for assistance and cooperation from the ICC on the grounds that it was 'conducting an investigation at all levels in respect of all persons against whom there may be allegations of participation in Post-Election Violence', where it emphasised that 'it has at all times fully co-operated' with requests from the Court.⁵²

The ICC dismissed the government's admissibility challenge in May 2011 on grounds that the evidence did not demonstrate that the government of Kenya was taking concrete steps to investigate the suspects.⁵³ In 2012, President Kibaki requested the Attorney General to establish a 'Working Committee on the International Criminal Court', which was mandated to review the confirmation of charges decisions and advise the government on what legal measures to take arising from the decision and to advise the government on its legal obligations and rights under the Rome Statute and Kenyan law. The Committee presented its report in March 2012, where it claimed that the Kenyan government had 'cooperated substantially' with ICC investigations and complied with requests from the ICC, whereas the court had not responded

51 G. Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions', 3 *The International Journal of Transitional Justice* (2009), 445–464, at 461.

52 *Situation in the Republic of Kenya* (Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194) ICC-01/09, PT Ch II (21 April 2011), paras 3 and 9.

53 *Situation in the Republic of Kenya* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11, PT Ch II (30 May 2011).

to Kenyan requests for assistance in its national investigations.⁵⁴ The Kenyan government's efforts to have the ICC dismiss or defer the cases are extensively documented elsewhere;⁵⁵ for the purposes of this article I primarily intend to highlight these ongoing tensions between cooperation and contestation in the Kenyan state's relationship to the ICC.

In addition to government efforts to resist ICC jurisdiction, there has been considerable regional and international involvement in response to the court's intervention in Kenya. The genealogy of United Nations and African Union engagement with the Kenyan situation extends back to the period in which the alleged crimes were committed.⁵⁶ As discussed above, former UN Secretary-General Kofi Annan and an African Union-appointed Panel of Eminent African Personalities brokered the political settlement under the February 2008 Kenyan National Dialogue and Reconciliation (KNDR) process. The Kenyan government has repeatedly sought support from the AU and an audience before the Security Council to defer the cases under the authority of Article 16 of the Rome Statute. In a March 2011 letter, a Kenyan representative attempted to reassure the Security Council that both sides of the coalition government supported the deferral request following a decision by the ODM party 'to push for the International Criminal Court cases relating to Kenya to be handled locally through a credible local mechanism.'⁵⁷ In April 2011, UN Security Council members met regarding Kenya's request to defer under Article 16 of the Rome Statute, which was subsequently rejected. The Working Committee on the ICC advised the Kenyan government against a further application to the UN for deferral under Article 16, noting that to be successful an application would have to show that the prosecution of the cases before the ICC would constitute a threat to international peace and security.⁵⁸

54 'Report of Government's Working Committee on the International Criminal Court', March 2012, on file with author. Two of the Committee's members – Rodney Dixon and Sir Geoffrey Nice – had served as legal counsel for the Kenyan government during the 2011 admissibility challenge.

55 International Crisis Group, 'Kenya: impact of the ICC proceedings' (2014) Africa Briefing No. 84, available online at <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/bo84-kenya-impact-of-the-icc-proceedings.aspx> (accessed 18 June 2014). See also Brown and Sriram, *supra* note 28, at 256.

56 See Brown and Sriram, *supra* note 28.

57 'Letter dated 23 March 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council – Request of Kenya for deferral under article 16 of the Rome Statute of the International Criminal Court' (29 March 2011) UN Doc S/2011/201.

58 Report of Government's Working Committee, *supra* note 54.

Kenyatta and Ruto were summoned to appear before the ICC long before they were elected to executive positions in March 2013. This formal shift in their political subjectivity mobilised further resistance to the work of the ICC on the African continent. In May 2013, the African Union resolved to support efforts to try the Kenyan cases domestically.⁵⁹ In August 2013 an AU delegation led by the Ethiopian foreign minister delivered a letter to the ICC President asking for the ICC Assembly of States Parties to consider transferring the cases to the Kenyan national jurisdiction.⁶⁰ AU chairpersons sent two letters to the ICC in July and September 2013 requesting a 'referral' of the ICC cases to a national mechanism, claiming, among other things, that 'the proceedings of the Court on the Kenyan defendants are beginning to adversely affect the ability of the Kenyan leaders in discharging their constitutional responsibilities.'⁶¹ In a telling instance of what Kamari Clarke has termed 'legal encapsulation',⁶² the court responded that the request was not recognisable within the ICC's legal framework.⁶³ The matter was raised at the UN General Assembly in late

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- 59 'Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)' (26–27 May 2013) Assembly/AU/Dec. 482 (XXI), available online at http://iccnow.org/documents/AU_decisions_21st_summit_May_2013.pdf (accessed 18 June 2014). The text states that the AU 'SUPPORTS AND ENDORSES the Eastern Africa Region's request for a referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence in Kenya.'
- 60 J. Sigei, 'Kenya Launches Fresh Attempt to Block ICC Cases' *The Daily Nation* (Nairobi, 16 August 2013), available online at <http://www.nation.co.ke/news/-/1056/1956896/-/qas860/-/index.html> (accessed 18 June 2014).
- 61 'Letter from Hailemariam Desalegn, Prime Minister of Ethiopia and Chairperson of the African Union, and Nkosazana Dlamini-Zuma, Chairperson of the African Union Commission, to ICC President Song' (10 September 2013), available online at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr943/130910-AU-letter-to-shs.pdf (accessed 18 June 2014).
- 62 K.M. Clarke, 'Africa and the International Criminal Court: Pushing Back with New Geographies of Justice' (unpublished manuscript, forthcoming 2015).
- 63 The letter states that 'the decision of the Assembly of the African Union as such does not constitute a request to the Court in accordance with the Court's legal framework.' 'Letter from Judge Cuno Tarfusser, Second Vice-President of the ICC, to Hailemariam Desalegn and Nkosazana Dlamini-Zuma' (13 September 2013), available online at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr943/130913-VPT-reply-to-AU.pdf (accessed 18 June 2014).

September 2013, where the Ethiopian prime minister claimed that the ICC 'has degenerated into a political instrument targeting Africa'.⁶⁴ The Kenyan government requested an extraordinary summit of the African Union to discuss ICC-related issues, which was convened in October 2013 and resulted in a resolution asserting that the trials of Kenyatta and Ruto should be suspended until their terms in office were completed.⁶⁵ Backed by the African Union, the Kenyan government then approached the Security Council for a second time to request an Article 16 deferral. In the wake of the attack on the Westgate mall in Nairobi, Kenya argued that a deferral was needed 'to prevent the aggravation of the threat, breach of the peace or act of aggression that the terrorism menace poses to national, regional, continental and international peace and security'.⁶⁶ A divided Security Council failed to grant the request, with seven of fifteen states voting in favour, two votes short of the nine requisite votes, while eight abstained.⁶⁷

As noted above, tensions between the ICC and the African Union resurfaced at the annual Assembly of States Parties meeting in The Hague in November of 2013.⁶⁸ A number of AU states made direct reference to the deferral request in their statements to the general assembly. South Africa expressed disappointment that the Security Council did not take more time to review the situation before calling for a vote, and Namibia described it as 'highly regrettable'.⁶⁹ Tanzania noted its concern with the growing rift between the court and

64 K. Kelley, 'African Leaders take anti-ICC battle to the UN' *The East African* (Nairobi 26 September 2013), available online at <http://www.theeastafrican.co.ke/news/African-leaders-take-ICC-battle-to-the-UN/-/2558/2008286/-/13vpn6gz/-/index.html> (accessed 18 June 2014).

65 'Decision on Africa's Relationship with the International Criminal Court (ICC)' (12 October 2013) Ext/Assembly/AU/Dec.1, available online at http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf (accessed 18 June 2014).

66 'Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council' (22 October 2013) UN Security Council Doc. S/2013/624, available online at http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/624 (accessed 18 June 2014).

67 'Security Council: bid to defer International Criminal Court cases of Kenyan leaders fails' *UN News Centre* (15 November 2013), available online at <http://www.un.org/apps/news/story.asp?NewsID=46499#.U6FjhdsMr4g> (accessed 18 June 2014).

68 The following observations are drawn from the 12th Assembly of States Parties annual meeting (The Hague, 20-21 November 2013), author's notes.

69 'Statement by Hon. Albert Kawana, Minister of Presidential Affairs and Attorney General of the Republic of Namibia, 12th Session of the Assembly of States Parties' (The Hague 21 November 2013), available online at http://icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Namibia-ENG.pdf (accessed 18 June 2014).

the African continent, and added that a deferral under Article 16 would have helped to address these challenges. Speaking on behalf of the African Union, Uganda claimed that 'the Kenyan situation warrants [the] UN Security Council to exercise its mandate under Article 16 of the Rome Statute of the ICC read together with Chapter VII of the UN Charter to allow Kenya to move forward and deal with the challenges confronting it.'⁷⁰

In response to these claims concerning tensions with African states and the prospect of a Kenyan deferral, ICC proponents such as Belgium argued for the integrity of the legal process, contending that 'political time should not interrupt legal time'.⁷¹ Meanwhile, civil society representatives from Kenya argued that 'the ICC intervention is a direct result and an integral part of an African Union- and Kenyan-initiated process that ended the 2008 post-election violence (PEV); it is neither alien to that process, nor a threat to it.'⁷² A number of civil society proponents contested the claim that the Kenyan situation had generated a rift between the court and African states, noting instead the widespread support for the court on the continent and maintaining that the ICC's intervention in Kenya was domestically driven rather than an external imposition. These different discursive framings reflected broader contestations around whose agency generated the ICC intervention in Kenya, and in particular, whether it should be regarded as domestically driven or as an external imposition.

Political contestations increasingly transpired through the discourse of state sovereignty and its alleged breach. Before the 2013 election, discussions about the relationship between the ICC intervention and the Kenyan electoral process had centred on the candidates' qualifications for office under the 2010 constitution's 'leadership and integrity' provisions and whether their abilities to run the government and engage in diplomacy would be hindered by the cases they needed to answer. Once Kenyatta and Ruto won the election, however, the issue of Kenyan sovereignty became a more prominent theme. The 2013 Assembly of States Parties annual meeting included a special segment,

70 'Statement by Frederick Ruhindi, Deputy Attorney General/Minister of State for Justice and Constitutional Affairs of the Republic of Uganda, on behalf of the African Union' (The Hague 21 November 2013), available online at http://icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-AU-Uganda-ENG.pdf (accessed 18 June 2014).

71 12th Assembly of States Parties annual meeting, intervention by Belgian representative (The Hague, 20 November 2013), author's notes.

72 G. Otieno (AfriCOG), 'Statement for the General Debate from Kenyans for Peace with Truth and Justice' (The Hague 21 November 2013), available online at http://icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-KenyansPTJ-ENG.pdf (accessed 18 June 2014).

at the request of the African Union, entitled 'Indictment of Sitting Heads of State and Government and its consequences on peace and stability and reconciliation', where some participants appeared to conflate the issuance of summonses for Kenyatta and Ruto with the indictment of sitting heads of state.⁷³ At Kenyatta's inauguration ceremony in April 2013, President Museveni of Uganda, who had previously supported the ICC, noted that 'the usual opinionated and arrogant actors' are using the ICC 'to install leaders of their choice in Africa and eliminate the ones they do not like'.⁷⁴ In May 2013 Macharia Kamau, the Kenyan representative to the UN, requested 'termination' (as opposed to deferral) of proceedings against Kenyan nationals in a confidential letter to the Security Council, invoking the sovereign right of UN states and arguing that 'Kenyans, in whom this sovereign right rests, spoke with a loud, clear, concise voice when they overwhelmingly elected Uhuru Kenyatta and William Ruto as President and Deputy President respectively'.⁷⁵ Meanwhile, at the AU summit that month, a resolution regarding the ICC expressed 'concern with the misuse of indictments against African leaders'.⁷⁶ Although the resolution was brought by Uganda and South Sudan, Kenya circulated an aide memoire claiming that the prosecutor was contradicting the sovereign will of the people that

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- 73 'Informal summary by the Moderator' (27 November 2013), available online at http://icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-61-ENG.pdf (accessed 18 June 2014). A Kenyan civil society representative reminded the audience that at the time the summonses were issued, Kenyatta and Ruto were not President and Deputy President. 12th Assembly of States Parties annual meeting, intervention by representative from the Kenya Human Rights Commission (The Hague, 21 November 2013), author's notes.
- 74 Y. Museveni, 'Statement by H.E. Yoweri Kaguta Museveni, President of the Republic of Uganda, Inauguration of H.E. Uhuru Kenyatta, Kenya's President-Elect' (Nairobi 9 April 2013), available online at <http://allafrica.com/stories/201304091224.html> (accessed 18 June 2014).
- 75 'Brief on the Situation in Kenya and the International Criminal Court' (2 May 2013), available online at <http://kenyastockholm.files.wordpress.com/2013/05/secret-letter-to-un.pdf> (accessed 18 June 2014). The letter is mentioned by the ICC Office of the Prosecutor as part of an 'ongoing campaign by elements of the Government of Kenya to discredit the Court and derail the present case'. *Prosecutor v. Uhuru Muigai Kenyatta* (public redacted version of the 13 August 2013 Prosecution's observations on the Chamber's 'Order for further observations on where the Court shall sit for trial') ICC-01/09-02/11, TC V(B) (13 August 2013), para. 13.
- 76 'AU Summit: Decision on International Jurisdiction, Justice and the ICC' (24 May 2013), available online at <http://www.safpi.org/news/article/2013/au-summit-decision-international-jurisdiction-justice-and-icc> (accessed 18 June 2014).

had been expressed through the elections.⁷⁷ The Ethiopian Prime Minister publicly stated that the ICC process 'has degenerated into some kind of race hunting'.⁷⁸ In September 2013, Kenyan MPs approved a motion to withdraw from the Rome Statute tabled by the Jubilee coalition majority leader, with the intention of introducing a bill to this effect. Jubilee majority leader Aden Duale reportedly stated: 'Let us protect our citizens. Let us defend the sovereignty of the nation of Kenya.'⁷⁹

Not only Kenyan sovereignty but the sovereignty of African states more broadly was perceived to be under threat, which is in part a product of the ICC's selective geographies of intervention. The form of sovereignty under threat is presented as self-determination and freedom from external intervention. The intervener's identity as the 'international community' is understood by its critics to be masking other influences – 'the usual opinionated and arrogant actors', in Museveni's words, with their civil society conduits that are presumed to be funded by Northern donor states. In this way the work of the ICC has become bound up with claims of neocolonialism.

4 Tensions between Civil Society and the Kenyan State

In contestations around the politics of ICC interventions, Kenyan state actors and some AU member states and officials have invoked the discourse of sovereignty as part of what Clarke and Koulen refer to in this issue as the 'African Union-ICC push-back'. From the standpoint of the Kenyan state, the involvement of civil society organisations with the ICC process presented a threat to its sovereignty. According to a member of a prominent non-governmental network, a number of Kenyan civil society organisations made the clear decision in 2010 to welcome ICC involvement, and donors materially supported this decision.⁸⁰ Scholars have noted the historical involvement of Kenyan civil society organisations in domestic politics more broadly, an involvement that Karuti Kanyinga characterises as 'non-traditional and non-conventional' through its

77 W. Menya, 'AU Summit Considers Draft Resolution on Withdrawal from ICC' *The Star* (Nairobi, 24 May 2013), available online at <http://allafrica.com/stories/201305250124.html> (accessed 18 June 2014).

78 'African Union accuses ICC of "hunting" Africans' *BBC News* (27 May 2013), available online at <http://www.bbc.co.uk/news/world-africa-22681894> (accessed 18 June 2014).

79 'Kenya MPs vote to withdraw from ICC' *BBC News* (5 September 2013), available online at <http://www.bbc.co.uk/news/world-africa-23969316> (accessed 18 June 2014).

80 Interview with civil society representative (Nairobi, 2 August 2012).

role in political leadership.⁸¹ However, this involvement has led to questions about whose interests these organisations represent. In a monograph addressing state reform through constitutional change subtitled ‘Taming Leviathan’, legal scholar Makau Mutua argued that civil society is ‘the only sector that can fundamentally renew the political class’ in Kenya.⁸² Elsewhere, however, he has warned of domestic organisations mimicking the narrow mandates and standardised objectives of international non-governmental organisations, observing that ‘the unhealthy reliance on external, donor funding from the West is the biggest threat to the NGO sector in East Africa.’⁸³ Describing Kenyan civil society involvement in the constitutional reform process leading to the 2010 constitution, some commentators have claimed that Kenyan civil society was ‘dependent upon donor funding, and in subtle ways it became as responsible to donors and their perspectives and demands (as well as the demands of donor funding cycles) as it was to the demands of Kenyans they were “representing”’.⁸⁴ Betty Murungi has pointed out how ‘disillusioned citizens placed their trust in civil society organizations’, which led to the Kenyan state declaring that ‘NGOs were an unelected nuisance or the agents of foreign interests or powers.’⁸⁵

Kenyan political actors have invoked this historical patron-client relationship between foreign funding sources and domestic non-governmental organisations in an attempt to discredit their work. Before the election, for example, a prominent international civil society organisation was accused of favoring Raila Odinga and the CORD alliance.⁸⁶ At a hearing of a case brought before the Kenyan High Court challenging Kenyatta’s and Ruto’s eligibility to run for office based on ethics and integrity provisions of the 2010 constitution, Kenyatta’s legal representative argued that these cases were backed by Northern donors: ‘All the petitions have been filed by individuals and organisations that are interrelated and whose source of funding is primarily the Open Society of America and whose objective is to disrupt our democratic processes

81 Kanyinga, *supra* note 25, at 2.

82 Mutua, *supra* note 24, at 1.

83 M. Mutua, ‘Human Rights NGOs in East Africa: Defining the Challenges’, in M. Mutua (ed.), *Human Rights NGOs in East Africa: Political and Normative Tensions* (Fountain Publishers, Kampala, 2009).

84 M. wa Githnji and F. Holmquist, ‘Reform and Political Impunity in Kenya: Transparency without Accountability’ 55 *African Studies Review* (2012), 53–74, at 63.

85 B. Murungi, ‘To Whom, for What, and About What? The Legitimacy of Human Rights NGOs in Kenya’, in M. Mutua (ed.), *Human Rights NGOs in East Africa: Political and Normative Tensions* (Fountain Publishers, Kampala, 2009).

86 Interview with ICC common legal representative (Nairobi, 4 July 2013).

and whose objective is aimed at whipping the sentiments of the people of Kenya against a candidate or candidates.⁸⁷ Meanwhile, a Kenyan government official claimed that civil society organisations are 'just interested in getting money and talking', suggesting that they form part of a broader patron-client economy.⁸⁸

What this narrative of civil society organisations as materially dependent proxies of foreign interests effaces, however, is the degree to which some civil society alignments were domestic initiatives forged as a response to the post-election violence. The influential Kenyans for Peace, Truth and Justice (KPTJ) coalition emerged during this time. The non-governmental sector in Kenya is considerably more autonomous and established than in other states of the region.⁸⁹ Civil society in Kenya is heterogeneous, with much variation in degrees of donor dependence. Yet efforts by state actors to discredit the work of organisations and individuals have presented Kenyan civil society as a homogeneous field subject to foreign influence. The 'UK dossier' affair of 2012 is one such example, where three prominent activists were called before a parliamentary committee to explain the nature of their connections to the ICC on the suspicion that they were collaborating with the British government to have then-president Kibaki appear before the court after he left office. John Githongo, one of the accused activists, later noted that '[d]uring the election campaigns earlier this year, a virulent and effective propaganda onslaught against the 'evil/civil society' was rolled out'.⁹⁰ The phrase 'evil society' was introduced into the Kenyan political vocabulary, supplementing the criticism of civil society actors as foreign proxies with a moral condemnation of their

87 L. Wanambisi, 'Uhuru, Ruto fate to be known Feb 15' *Capital News* (Nairobi, 6 February 2013), available online at <http://www.capitalfm.co.ke/news/2013/02/attorney-general-iebc-oppose-uhuru-integrity-case/> (accessed 18 June 2014). The case was dismissed by the High Court for jurisdictional reasons.

88 Interview with member of the department of the Director of Public Prosecutions conducted jointly with Christian De Vos (Nairobi, 29 November 2012).

89 Civil society expanded considerably during the Moi era as an oppositional political force. For an account of its role in the period following the post-election violence, see L.M. Wanyeki, 'Kenyan Civil Society and the 2007/8 Political Crisis: towards and following the Kenya National Dialogue and Reconciliation', in O. Okombo (ed.), *Civil Society and Governance in Kenya since 2002: between transition and crisis* (African Research and Resource Forum, Nairobi, 2010). Kenyan civil society can be contrasted with Adam Branch's account of the highly dependent clientelist political economy of NGOs in northern Uganda; see Branch, *supra* note 16, at 142–149.

90 J. Githongo, 'Whither Civil Society?' *The Star* (Nairobi 6 April 2013), available online at <http://allafrica.com/stories/201304060654.html> (accessed 18 June 2014).

work. In pre- and post-2013 election political discourse in Kenya, the sovereignty of the Kenyan state was presented as being under threat from external forces and their presumptive conduits at the domestic level.

As an extension of its efforts to contest the ICC presence in country, the Kenyan state has also opposed practices of civil society organisations that support the court's work. There were varying degrees of collaboration between the ICC, foreign (donor) states, and civil society networks. Before the election, for example, court actors relied upon their civil society partners to raise questions about whether the suspects were fit to run for office under the integrity provisions of the 2010 constitution. Some organisations within the KPTJ network have collaborated with the ICC on activities such as community outreach, identifying potential victim participants, and facilitating interfaces between their constituents and court actors. In the period preceding the election and in the following months, donor state representatives, international and domestic civil society members, and in-country ICC staff expressed the need to maintain a low profile, particularly in sensitive areas such as the Rift Valley.⁹¹ Meanwhile, attempts to amend the Public Benefit Organisation Act to cap foreign funding for NGOs at 15% of their budget were regarded by some observers as a result of negative perceptions of the ICC intervention in Kenya and its support from civil society organisations.⁹²

The convergent discourses of Kenyan state sovereignty and the perceived threat of neocolonialism have attracted the attention of court actors. Despite deliberate efforts to maintain a sharp distinction between law and politics, the politicisation of the court's work in the Kenyan context has led some of its staff to engage more directly with these claims in an effort to develop counter-discourses and strategies. After the start dates for the trials were postponed for a second time in June 2013, contributing to a sense among some Kenyans that the court had been weakened, the ICC's Outreach program engaged in a series of consultative meetings with civil society organisations, journalists and 'intermediaries' in Kenya to attempt to develop new approaches to mitigate misperceptions of the Court's work and gain support for its judicial activities.⁹³

91 Interviews conducted in Nairobi in late November/early December 2012, early March 2013, and late June 2013.

92 Interview with representative from Kenyans for Peace with Truth and Justice (Nairobi, 29 January 2013). The Miscellaneous Amendments Bill of 2013, in which this amendment was contained, was rejected by Parliament in December 2013.

93 'ICC Public Information and Outreach Consultative Meetings' programme, on file with author. The author attended two of these meetings in Nairobi on 26 June 2013 with representatives from the Law Society of Kenya and from community-based organizations

An ICC spokesperson opening the meeting stated that 'in this context the ICC has become a political issue – it is part of the political discourse'. A representative from the court's Outreach Unit noted that the court had been perceived as a 'neocolonial tool', which required new strategies to counter this narrative. Participants expressed that the language of victimhood was being appropriated by the suspects, who claimed that they had been unfairly targeted by the ICC and were thus 'victims' of the court's interventions. One participant claimed that the ICC 'has let the other side shape the narrative that it is a Western imposition,' and added, 'it is a powerful narrative that has played very well'.⁹⁴

The Court's Office of the Prosecutor has also begun to publicly acknowledge the politicisation of the trials in Kenya. Referencing the AU resolution of May 2013, one filing noted that '[t]he Prosecution believes that the combined effect of this resolution and related media reports in the Kenyan press have served to further rally Kenyans against the Court by fostering the perception that the Court is a foreign entity that was imposed on Kenya by illegitimate, western, interests'.⁹⁵ At the opening of the case against Ruto and Sang, ICC Prosecutor Fatou Bensouda addressed these perceptions directly:

This is not a trial of Kenya or the Kenyan people. It is not about vindicating or indicating – indicting one or other ethnic group or political party. It is not about meddling in African affairs. This trial, Mr President, Your Honors, is about obtaining justice for the many thousands of victims of the post-election violence and ensuring that there is no impunity for those responsible, regardless of power or position.⁹⁶

As a rhetorical tactic, critics of the ICC intervention seek to substitute the individuals on trial for a broader entity – either the communities they are seen to represent or the Kenyan state. For example, in his opening statement on behalf of his client Joshua Arap Sang, Joseph Kigen-Katwa claimed that it was

'from the affected communities'. Chatham House rules applied, and thus individual comments are not attributed. A third meeting with journalists was closed to the public.

94 'ICC Public Information and Outreach Consultative Meeting with the Law Society of Kenya' (Nairobi, 26 June 2013), author's notes.

95 *Prosecutor v. Uhuru Muigai Kenyatta* (Public redacted version of the 13 August 2013 Prosecution's observations on the Chamber's 'Order for further observations on where the Court shall sit for trial') ICC-01/09-02/11, TC V(B) (13 August 2013) para. 15.

96 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, TC V(A), Transcript of 10 September 2013, 19–20.

not his client but rather the Kalenjin community that was on trial: 'it becomes very clear and apparent that what is on trial are not individuals. It is actually a community and its culture'.⁹⁷ Court proponents respond within the liberal counter-discourse of individual accountability: in the words of the prosecutor above, by 'ensuring that there is no impunity for those responsible'. For example, members of the Coalition for the ICC (CICC) argued that

By using the weight of the government to argue its case before the Security Council based on some vague, illusory threat that amounts to an extra-judicial request for impunity, Kenya's political elite is seeking to frame the ICC as having put the entire Kenyan state in the dock, rather than select individuals alleged to be responsible for the worst of the crimes committed during the post-election violence.⁹⁸

The claims of ICC critics take for granted that Kenyatta and Ruto stand metonymically for a larger entity under threat – either their respective communities or Kenyan sovereignty. For ICC proponents, this is a manipulative category mistake – putting 'the entire Kenyan state in the dock' – whereas other African states and the African Union may regard the trials of Kenyan political leaders as representing a broader threat to African self-determination.

5 Conclusion

It is by democratic reference to the Universal Declaration of Human Rights that one tries, most often to no avail, to impose limits on the sovereignty of nation-states. One example of this, among so many others, would be the laborious creation of an International Criminal Court. (Jacques Derrida)⁹⁹

97 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, TC V(A), Transcript of 11 September 2013, 18.

98 S. Lamony and S. Pal, 'Politicizing the ICC Process in Kenya Will Not Let ICC Suspects off the Hook' (Blog post at *African Arguments*, 22 May 2013), available online at <http://africanarguments.org/2013/05/22/politicizing-the-icc-process-in-kenya-will-not-let-icc-suspects-off-the-hook-by-stephen-lamony-sunil-pal/> (accessed 18 June 2014).

99 J. Derrida, *Rogues: Two Essays on Reason* (Stanford University Press, Stanford, CA, 2005), 87.

The 'political dream'¹⁰⁰ of international judicial intervention harbours an internal contradiction of the kind that the poststructuralist philosopher Jacques Derrida illustrates above. The 'democratic reference' to a cosmopolitan ideal of law and legal institutions exists in tension with the principle of state sovereignty, compounded by the latter's substantial normative value for post-colonial states. The ICC's intervention in Kenya relies upon a legal ontology that privileges individual accountability while sidelining other values in practice, including other liberal legalist norms such as political transitions through peaceful elections. The Leviathan of 'UhuRuto' – a political identity produced from the ICC intervention – in turn led to an effective (if tenuous) suspension of conflict between the Kikuyu and Kalenjin communities in the 2013 electoral cycle. Yet this weak alliance, forged from opposition to the court, may unravel depending upon the outcome of the cases. As one civil society representative noted, The Hague represents 'the life blood of their coalition'; another commented that 'all is not going well in this coalition', as the Kikuyu and Kalenjin communities have not substantively reconciled.¹⁰¹

In addition to unsettling and reconfiguring political identities and alliances, another effect of the ICC intervention in Kenya has been the appropriation of narratives of victimhood by political actors. Such assertions divert attention from the harm suffered by conflict-affected communities, enabling these actors to channel political interests through claims regarding their own victimisation. At the final pre-trial status conference, for example, Deputy President William Ruto made the following statement:

the circumstances surrounding these matters has produced two sets of victims, which I am very passionate about. Post-election violence victims, whose lives and property were destroyed and deserve justice and truth, and another set of victims, which I belong to. Victims of a syndicate of falsehood, and a conspiracy of lies choreographed by networks that are obviously against truth and justice.¹⁰²

Many members of Kenyan civil society organisations pointed out that the language of victimhood was deployed by the suspects rather than directed toward

100 M. Foucault, *Discipline and Punish: the Birth of the Prison* (Vintage Books, New York, NY, 1977), 198.

101 Interview with member of KPTJ (Nairobi, 3 February 2014); interview with member of Kenyan National Human Rights Commission (Nairobi, 4 February 2014).

102 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, TC V(A), Transcript of 14 May 2013.

the ongoing suffering of internally displaced people. This produced a strategic effort by the ICC and its civil society proponents to reclaim the terms through which victimhood is understood, as when the Prosecutor addressed criticisms of the ICC as an affront to African sovereignty by invoking 'the many thousands of victims of the post-election violence' in response.¹⁰³ The ICC's work in Kenya also reinforced the demands for legal accountability among domestic political actors. As the coordinator of a civil society network observed, 'if we didn't have the ICC perhaps then there wouldn't be as much discourse about post-election violence in the political arena.'¹⁰⁴ In this sense the ICC's work produces sites of discursive contestation in addition to disseminating the terms of international criminal law – shifting political narratives, fostering counter-claims, and producing a new rhetorical arena where issues of sovereignty, neocolonialism, and elite impunity are asserted and contested.

Although its broader impact upon conflict-affected communities remains unclear, the ICC's intervention has clearly reconfigured domestic politics within Kenya. It produced a political alliance forged out of opposition to the court through the figure of 'UhuRuto'. This international judicial intervention introduced a new, shared enemy (the court itself) into the Kenyan political order that appeared to displace past forms of enmity between communities. Furthermore, the ICC's intervention in Kenya led to greater state mobilisation against civil society organisations, which were depicted as the neocolonial trace or space of Western influence. Whether or not the ICC intervention constituted a form of neocolonialism seemed less a matter than how to direct the popular narrative toward particular political ends. It has also led to increased tensions between the court and the African Union, with political contestations playing out through the language of sovereignty. The court's intervention in Kenya may have contributed to producing its own enemy, in the sense that UhuRuto – forged out of shared opposition to the court – appears to pose an existential threat to the ICC, as African leaders and the African Union mobilise around the claim of neocolonialism and threats to African sovereignty and self-determination.

103 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, TC V(A), Transcript of 10 September 2013, 20. For a critique of such invocations of 'the victims', see S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: the Gap between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2014), 235–262.

104 Interview with the coordinator of KPTJ, conducted jointly with Chris Tenove (Nairobi, 2 August 2012).

Finally, the ICC's work in Kenya has produced further UN Security Council involvement with the court, reminding states parties and court critics of the Council's exceptional position within an otherwise consent-driven Rome Statute system. Even through the Security Council's decisions *not* to grant an Article 16 deferral, which might be read as a form of restraint and unwillingness to interfere in the workings of the ICC, the force of political concessions and compromise from which the ICC emerged are made clear. For in declining to grant the request made by Kenya and backed by the AU, the Security Council reinscribes its own (sovereign) authority to determine the workings of a system that some of its members remain outside. What the Kenyan situation has produced, in effect, is a more overt politicisation of the ICC's work, where the interrelationships between the juridical and the political are rendered increasingly visible.

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