

Original citation:

Lugano, Geoffrey. (2017) Counter-shaming the international criminal court's intervention as neocolonial : lessons from Kenya. *International Journal of Transitional Justice*, 11 (1). pp. 9-29.

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Publisher's statement:

This article has been accepted for publication in 'International Journal of Transitional Justice' Published by Oxford University Press.

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Counter-Shaming the International Criminal Court's Intervention as Neo-colonial: Lessons from Kenya

Geoffrey Lugano*

<A>ABSTRACT[∞]

The International Criminal Court's (ICC) intervention in Kenya's 2007/2008 political crisis was reframed as neo-colonialism by two of the accused – Uhuru Kenyatta and William Ruto – and their allies for most of their pre-trial and trial timelines. This article examines the grounds for and impacts of the neo-colonial narrative, which was central to the accused overcoming their ICC stigma. Shamed by the ICC's indictments, Kenyatta, Ruto and their allies formed the Jubilee Alliance, whose neo-colonial narrative dominated national and regional discourses on Africa–ICC relations. This article's discussion of the ICC's counter-shaming in Kenya supports previous analyses that demonstrate how international criminal justice (ICJ) is undermined in local spaces. The article contrasts Kenya's and Sudan's experiences, highlighting the salience of the former's neo-colonial narrative in departing from cooperation as opposed to Sudan's outright defiance after Omar al-Bashir's indictment. The article suggests a need for more sophisticated comparative analysis of various country strategies. It specifically posits that for the Jubilee Alliance, the neo-colonial narrative was salient in the Alliance's struggle against cooperation due to the narrative's multiple intentions and outcomes: persuading targeted local constituencies while delegitimizing the ICC; gaining concessions from some ICC sympathizers; and courting regional solidarity in battling the ICC. Given the Kenyan

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[∞] I am indebted to the University of Warwick Graduate School for funding my PhD research, which partly contributed to this article. I am also grateful to the British Institute in East Africa for the minor research grant that enabled me to pay for transport costs while conducting fieldwork in Kenya. Finally, I thank my supervisors, Gabrielle Lynch and Solange Mouthaan, for their comments on earlier versions of this article.

experience, the ICC and its supporters need to be aware of different ways in which local actors can manoeuvre the Court's moral authority and normative imperative.

<A>KEYWORDS: International Criminal Court, Jubilee Alliance, (non)cooperation, neo-colonialism, Kenya

<A>INTRODUCTION

There are emerging debates on the impacts of the International Criminal Court (ICC) since its creation in 2002. Carsten Stahn uses André Gide's rendition of the parable of the prodigal son to question the standards under which we should assess international criminal justice (ICJ).¹ Stahn argues that 'the legacies of international tribunals develop on external judgements and incrementally over time, rather than something that can be unilaterally construed or created.'² Hence, despite its normative imperative as a court of last resort and its moral authority,³ there are emerging narratives – such as neo-colonialism – on the ICC's interventions in Africa, the geographical location of most of the ICC's active situations.

Although some African leaders and groups portray the ICC's forays on the continent as attempts to foster neo-colonialism,⁴ others contest this framing. For example, human rights activists across the continent challenge this notion and instead call on African governments to

¹ Carsten Stahn, 'Editorial: Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' *Leiden Journal of International Law* 25(2) (2012): 251–282; André Gide, *The Return of the Prodigal Son*, trans. Aldyth Thain (Logan, UT: Utah State University Press, 1960).

² Stahn, *supra* n 1 at 275.

³ This derives from the ICC's demonstration of its ability/willingness to try heinous crimes in cases of domestic inaction and its lack of tolerance for impunity for such crimes. It also spans geographical boundaries, with membership from over 124 states across the world's regions.

⁴ Many African heads of state have articulated these positions in AU sessions. For instance, Hailemariam Desalegn, former AU chairman and Ethiopia's prime minister, lamented that the 'ICC process had degenerated into some kind of race hunting.' See, 'ICC Targets Africans on Race Basis: African Union Chair,' *Daily Nation*, 27 May 2013. Some African scholars, observers and citizens contend that the ICC unfairly targets Africa, as serious crimes in other regions do not attract close scrutiny. See, W. Douglas Smith, 'The International Criminal Court: The Long Arm of Neo-colonialism?' *International Affairs Review* (2009), <http://www.iar-gwu.org/node/87> (accessed 24 November 2016).

support the Court.⁵ Sulemana Braima argues that the limitations of national judicial mechanisms in Africa render ICJ mechanisms appropriate solutions for seeking justice for victims and for holding perpetrators accountable.⁶ Similarly, some states, such as Botswana, consistently differ from their African counterparts and voice support for the ICC.⁷

Nonetheless, the neo-colonial narrative is indicative of external judgements over time on the Court's record as well as on the interface between ICJ and national/regional contexts. The narrative was first applied to the UN Security Council (UNSC)⁸ referrals in Sudan and Libya, resulting in national and regional offensives against the Court.⁹ As Phil Clark states, 'Sudan's President, Omar al Bashir, regularly accused the ICC of neo-colonialist meddling to bolster his domestic political support.'¹⁰ For its part, the Africa Union (AU) pressed the UNSC to defer al-Bashir's case, expressing

its deep concern at the indictment...and cautions that, in view of the delicate nature of the peace processes underway in Sudan, approval of this application would seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.¹¹

However, the narrative gained unprecedented momentum in the region with the ICC's involvement in Kenya's 2007/2008 post-election violence (PEV). For most of the duration of the cases against Uhuru Kenyatta and William Ruto,¹² the Jubilee Alliance¹³ used various

⁵ Human Rights Watch, 'AU: Activists Challenge Attacks on ICC,' 6 July 2016, <https://www.hrw.org/news/2016/07/06/au-activists-challenge-attacks-icc> (accessed 24 November 2016).

⁶ Sulemana Braima, 'What AU Leaders Should Reflect on before Any Further Actions on ICC,' in *Reflections on the African Union ICC Relationship* (Nairobi: African Network on International Criminal Justice, 2014).

⁷ 'Botswana Calls on International Community to Respect ICC,' *ENCA*, 2 October 2015.

⁸ Article 13(b) of the Rome Statute provides for a UNSC referral.

⁹ State referral situations (as in Uganda, Central African Republic [CAR], Democratic Republic of the Congo [DRC] and Mali) did not appeal to the narrative.

¹⁰ Phil Clark, 'The ICC Is Only a Small Piece in the Justice Puzzle of Africa's Conflicts,' *East African*, 11 April 2011.

¹¹ 'Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan,' Decision No. Assembly/AU/Dec.221(XII) (February 2009), 1.

¹² *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

¹³ Kenyatta, Ruto and their allies formed the Jubilee Alliance as a political coalition between Kenyatta's party, The National Alliance (TNA), and Ruto's United Republican Party (URP).

national platforms – including anti-ICC prayer rallies,¹⁴ local vernacular radio stations, national TV talk shows and newspaper opinions¹⁵ – to attack the ICC as a neo-colonial institution. Additionally, it framed the 2013 elections as a referendum on the ICC and its attendant neo-colonialism.¹⁶ The Alliance subsequently won the elections, after which the neo-colonial narrative promoted by Kenya dominated regional discourses on Africa–ICC relationships.

Thus, in subsequent AU sessions, the ICC’s mission on the continent was questioned.¹⁷ There were demands for Kenyatta’s and Ruto’s cases to be deferred or terminated and renewed calls for al-Bashir’s case to be deferred.¹⁸ The AU also contemplated regional alternatives to the ICC¹⁹ or even mass African withdrawal from the Court.²⁰ Luke Moffett states that

the AU doubled its moves in 2011 at the start of the ICC cases against Kenyatta and Ruto...this was only compounded by Kenya’s claims that the ICC was being neo-colonial and targeting Africans.²¹

Similarly, Terence McNamee opines that ‘the controversies raised by the Court’s focus on Africa have been significantly amplified by the recent prosecutions of Kenya’s President and Deputy President.’²²

¹⁴ John Ngirachu and Oliver Musembi, ‘Uhuru, Ruto Hold Last Rally Ahead of Hague Visit,’ *Daily Nation*, 4 April 2011.

¹⁵ Peter Kagwanja, ‘ICC the Greatest Threat to Ideals of 2010 Constitution,’ *Daily Nation*, 29 August 2015.

¹⁶ See, ‘Did the ICC Help Uhuru Kenyatta Win Kenyan Election?’ *BBC*, 11 March 2013.

¹⁷ For instance, most African leaders agreed with Kenya’s neo-colonial labelling of the ICC and endorsed non-cooperation with the Court based on the Kenyan cases.

¹⁸ ‘Decision on the Implementation of the Decisions on the International Criminal Court (ICC),’ AU Doc. EX.CL/639(XVIII), Assembly/AU/Dec.334(XVI).

¹⁹ Although there had been talks of expanding the protocol of the African Court of Human and People’s Rights (AfCHPR) to include international crimes, these efforts were rejuvenated with the onset of the Kenyan cases. For example, while condemning the ICC’s prosecution of Kenyatta and Ruto, the AU arrived at several decisions, including ‘To fast track the process of expanding the mandate of the AfCHPR to try international crimes, such as genocide, crimes against humanity and war crimes.’ See, ‘Decision on Africa’s relationship with the International Criminal Court (ICC),’ Ext/Assembly/AU/Dec.1(Oct.2013), 2.

²⁰ Walter Menya, ‘African States Threaten to Leave ICC,’ *Daily Nation*, 10 April 2011.

²¹ Luke Moffett, ‘Al-Bashir’s Escape: Why the African Union Defies the ICC,’ *Conversation*, 15 June 2015.

²² Terence McNamee, ‘The ICC and Africa: Between Aspiration and Reality: Making International Justice Work Better for Africa,’ http://www.thebrenthurstfoundation.org/Files/Brenthurst_Commissioned_Reports/Brenthurst-paper-201402-ICC-and-Africa.pdf (accessed 24 November 2016), 4.

This article's arguments on counter-shaming the ICC in Kenya build on Victor Peskin's conceptualization of international trials as 'virtual trials' or 'trials of cooperation' to show how international criminal tribunals struggle for cooperation with state authorities.²³ As Peskin argues, 'The idea of a "trial of cooperation"...helps illuminate the features of the power struggles beyond the courtroom...that pits the tribunal against the state and state leaders.'²⁴ Significantly, given the lack of executive power and a police force of its own, the ICC is limited to relying on shaming and soft power to persuade states to cooperate, which opens the space for trials of cooperation.

In a keynote address at Salzburg Law School on International Criminal Law in 2011, former ICC judge Hans-Peter Kaul cited the ICC's reliance on state cooperation as one of the main challenges facing the Court.²⁵ Similarly, Hyun Song, a former ICC president, reiterated that cooperation is among the Court's main challenges.²⁶ According to an ICC official,

since the court depends on mature state responsibility, there is little the court can do if leaders orchestrate non-cooperation and there is an absence of UN pressure...The ICC depends on states living to their international responsibilities...an equivalence of expecting politicians to prioritize the rule of law as opposed to their interests.²⁷

Of course, as elsewhere, the affected Kenyan political elites prioritized their interests vis-à-vis the ICC's mission in their local spaces, resulting in their struggles for and against cooperation. This article supports previous analyses that demonstrate how ICJ can be

²³ Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan,' *Human Rights Quarterly* 31(3) (2009): 660.

²⁴ *Ibid.*

²⁵ International Criminal Court, 'The International Criminal Court: Current Challenges and Perspectives,' <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf> (accessed 24 November 2016).

²⁶ International Criminal Court, 'Promoting Accountability for Human Rights Violations: Forging Effective and Efficient Litigation of International Atrocity Crimes,' 10 December 2014, <http://www.icc-cpi.int/iccdocs/presidency/141210-President-Human-Rights-Accountability.pdf> (accessed 24 November 2016).

²⁷ Personal interview, ICC official, The Hague, The Netherlands, 22 July 2015.

undermined in local spaces,²⁸ but at the same time shows how this can be done more subtly than was the case in Sudan, with different effects. I contrast Kenya, the ICC's first *proprio motu* situation,²⁹ and Sudan, the first UNSC referral, as they demonstrate the struggles for and against cooperation. I discuss Kenya's neo-colonial narrative, which appealed to local and regional constituencies, in departing from cooperation, as well as Sudan's outright defiance after al-Bashir's indictment, and posit the need for more sophisticated comparative analyses of various country strategies in undermining ICJ.

Specifically, I argue that for the Jubilee Alliance, the neo-colonial narrative was salient in the Alliance's struggle against cooperation given the narrative's multiple intentions and outcomes: persuading targeted local constituencies while delegitimizing the ICC, gaining concessions from some of the Court's sympathizers and courting regional solidarity in battling the ICC. The narrative was instrumental in overcoming some of the obstacles associated with Kenyatta's and Ruto's ICC stigma, their quest for the country's leadership and their dealings with the Court thereafter. The obstacles included local contestations over ICJ and competing conflict narratives between Kenyatta's Kikuyu and Ruto's Kalenjin communities.³⁰

Although considerable attention has been given in the literature to the success of the Jubilee Alliance in the 2013 elections,³¹ it doesn't explain how the accused overcame their ICC stigma and other obstacles. This article therefore offers novel insights into how the Jubilee Alliance counter-shamed the Court's intervention as neo-colonial, and provides a more nuanced analysis of the struggle against cooperation in Kenya.

²⁸ Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca: Cornell University Press, 2009); Victor Peskin, *International justice in Rwanda and the Balkans: Virtual trials and the struggle for state cooperation*, (Cambridge: Cambridge University Press, 2008).

²⁹ The ICC's ability to initiate its own investigation, enshrined in arts. 13(c), 15 and 53(1) of the Rome Statute.

³⁰ The Kikuyu and Kalenjin communities have dominated Kenyan politics since independence. They are two of the largest voting blocs and fought in the elections violence of 1992, 1997 and 2007.

³¹ Gabrielle Lynch, 'Electing the "Alliance of the Accused": The Success of the Jubilee Alliance in Kenya's Rift Valley,' *Journal of Eastern African Studies* 8(1) (2014): 93–114; Thomas P. Wolf, 'From Sinners to Saints? The ICC and Jubilee's Triumph in Kenya's 2013 Election' and Joyce Nyairo, 'The Circus Comes to Town: Performance, Religion and Exchange in Political Party Campaigns,' in *Kenya's 2013 General Election: Stakes, Practices and Outcomes*, ed. Peter Wafula Wekesa and Kimani Njogu (Nairobi: Twaweza Communications and Heinrich Böll Stiftung, 2015); Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law,' *Journal of Eastern African Studies* 8(1) (2014): 25–42.

The arguments in this article build upon fieldwork conducted between July 2015 and May 2016 in The Netherlands, Kenya and Uganda.³² I conducted over 80 key informant interviews with officials from the ICC and international nongovernmental organizations (NGOs), political elites, civil society activists, journalists, religious leaders and government officials. Interviewees were promised anonymity due to the sensitivity of discussions on the ICC in Kenya. In addition, I evaluated secondary literature, government and nongovernment reports as well as media reports. The primary data collected were analyzed, themes drawn as they emerged and then triangulated with additional secondary data.

In the remainder of this article I start by briefly discussing Kenya's ethnic divisions, recourse to violence and the ICC's interventions as critical contexts. I then look at the shaming of alleged perpetrators of the 2007 PEV with ICC indictments, highlighting the stigma the accused faced. After exploring the challenges the accused faced in their political ambitions from some of their supporters, western diplomats, civil society and their political opponents, I turn to the Jubilee Alliance's struggle for and against cooperation with the ICC. Contrary to expectations that they would skip trials, the accused attended the Court's summonses even after their election into government. Besides, they sought the UNSC's deferral and challenged their cases through legal submissions at the ICC. Thereafter, I discuss their struggle against cooperation, using the neo-colonial narrative. Specifically, I discuss the narrative's multiple intentions and impacts nationally and regionally, including managing norm contestations over ICJ and delegitimizing the court's moral authority. I conclude by questioning the implications of counter-shaming ICJ.

<A>KENYA'S POLITICAL CONTEXT AND THE 2007/2008 VIOLATIONS

The modern Kenyan state owes its creation to British colonialism, under which different ethnic communities were united to form a nation state. Established in the absence of a social

³² The arguments in this article obtain from a larger PhD project, 'Politicization of International Criminal Intervention: A Comparative Study of Uganda and Kenya,' for which interviews were conducted in the three countries.

contract, the colonial administration was brutal and indigenous African communities were subjected to discrimination in social, political and economic spheres. Under colonialism, Africans were confined to hard labour, highly taxed and denied free movement and political representation.³³ As a result, several ethnic communities resisted colonial rule although some collaborated with the British.

Towards the second half of the 20th century, Kenyan nationalists formed trade movements and political parties and jointly fought for independence. Despite efforts at democratic consolidation in the post-independent state, ethnic fissures persisted in Kenya as observed in political mobilization, distribution of economic resources, cultural and linguistic differences as well as in geographic locations.³⁴

Evidence of Kenya's deep ethnic divisions was evident in the 1992, 1997 and 2007 general elections, where perceived ethnic opponents were targeted. Some were killed and others displaced or their property destroyed.³⁵ Antagonistic communities rationalized war against others as being justified since they were enemy nations fighting for control of political power and economic resources.³⁶

The 2007/2008 PEV marked the worst incidents of human rights violations in post-independent Kenya. Violence ensued after the disputed presidential election results between the Party of National Unity (PNU) led by Mwai Kibaki and the Orange Democratic Movement (ODM) under the leadership of Raila Odinga. As the Commission of Inquiry into Post-Election Violence (CIPEV) reveals,³⁷ the violence followed ethno-regional patterns of party affiliations,

³³ Francesca Bates, 'British Rule in Kenya,' Washington State University, 19 January 2015, <https://history105.libraries.wsu.edu/spring2015/2015/01/19/british-rule-in-kenya/> (accessed 23 November 2016).

³⁴ In the post-independence order, administrative units consisted of provinces and districts which were occupied by distinct tribes. The 2010 constitution reorganized Kenya's governance structure into 47 counties and sub counties, all with distinct ethnic nationalities (although there are some cosmopolitan locations).

³⁵ The 2007 PEV was widespread – it was experienced in the slums of Nairobi, parts of Western, Nyanza, Coast and Rift Valley. The 1992 and 1997 PEVs were localized in the Rift Valley and some parts of the Coast.

³⁶ See, Sarah Ann Jenkins, 'Understanding Ethnic Violence: The 2007–2008 Post-Election Crisis in Kenya' (PhD thesis, Aberystwyth University, Wales, 2012).

³⁷ For an account of the PEV, see, 'Kenya: Commission of Inquiry into the Post-Election Violence (CIPEV) Final Report,'

with official figures indicating the death of approximately 1,300 civilians and the displacement of about 663,921 people.³⁸

As Elisabeth Lindenmayer and Josie Kaye reveal, the magnitude of the atrocities indicated that Kenya's governance crisis needed the world's attention.³⁹ As a result, the Kenya National Dialogue and Reconciliation (KNDR) team, with the assistance of the AU and international actors, negotiated a power-sharing transitional PNU/ODM government. This government earmarked a raft of measures – including institutional reforms, lustration, truth telling and criminal accountability for the PEV – to confront Kenya's past and to address the root causes of the violence.⁴⁰

On criminal accountability, CIPEV recommended the creation of a special tribunal within 60 days, failing which the ICC's jurisdiction would be triggered. However, as Godfrey Musila notes, 'The transitional government lacked a unified stand on accountability for PEV, and wavered on its position on the special tribunal.'⁴¹ Furthermore, efforts to establish the tribunal were thwarted in the National Assembly by Kenyatta's and Ruto's allies, with the slogan 'Don't be vague go to The Hague.'⁴²

Thus, with the lapse of the deadline due to domestic inaction, the Office of the Prosecutor (OTP) issued summonses for six individuals to appear: Kenyatta (deputy prime minister and minister for finance), Francis Muthaura (head of civil service), Mohammed

http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf (accessed 24 November 2016).

³⁸ Gabrielle Lynch, 'Durable Solution, Help or Hindrance? The Failings and Unintended Implications of Relief and Recovery Efforts for Kenya's Post-Election IDPs,' *Review of African Political Economy* 36(122) (2009): 604–610.

³⁹ Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya* (New York: International Peace Institute, 2009).

⁴⁰ See, Kenya National Dialogue and Reconciliation, 'Statement of Principles on Long-Term Issues and Solutions,' 2008,

http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080523_Kenya%20National%20Dialogue%20and%20Reconciliation%2C%20Statement%20of%20Principles%20on%20Long-term%20Issues%20and%20Solutions.pdf (accessed 24 November 2016).

⁴¹ Godfrey Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions,' *International Journal of Transitional Justice* 3(3) 2009: 450.

⁴² The MPs were apprehensive that the special tribunal would become a reality, thus preferring a distant ICC that was less active at the time. See, Stephen Brown and Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya,' *African Affairs* 111(443) (2012): 244–260.

Hussein Ali (police commissioner), Ruto (minister for education), Henry Kosgey (minister for industrialization) and radio journalist Joshua arap Sang. The six suspects became popularly known as the 'Ocampo six' after their indictment by the then ICC prosecutor, Luis Moreno Ocampo. The Hague Trials, a website dedicated to monitoring Kenya's ICC trials, reveals that Ocampo's 15 December 2010 announcement of the list of six suspects 'shook Kenya to its core.'⁴³

<A>SHAMING THE 'OCAMPO SIX'

The 2007 PEV was catastrophic and almost submerged the nation in civil strife. Warring communities' reasons for the violence were based on their specific interests and circumstances. For example, the Kalenjin explained the violence perpetrated against Kikuyu communities as revenge for encroaching on their ancestral land in the Rift Valley.⁴⁴ The Kikuyu, on the other hand, explained that retaliatory attacks helped stop the violence and were justified as they had been provoked.⁴⁵ For the Luo, their violence was spontaneous because they were contesting stolen presidential election results.⁴⁶

However, the ICC's indictment of suspects added a rider to the local conflict narratives – international crimes were committed and had to be punished under international law. Thus, the ICC's intervention challenged the rationalization of the violence within local contexts. Moreover, being accused of committing the worst crimes against humanity was horrific and came with a stigma for the suspects. Kenyatta speaks of his lowest ICC moments thus: 'I felt it was better to stop what I was doing at the time and go and watch television...it is part of life,

⁴³ The Hague Trials, 'ICC Prosecutor Names the "Ocampo Six",' 15 December 2010, <https://thehaguetrials.co.ke/timeline/icc-prosecutor-names-ocampo-six> (accessed 2 July 2016).

⁴⁴ Nearly all Kalenjin interviewees articulated this position.

⁴⁵ Nearly all Kikuyu interviewees advanced this argument.

⁴⁶ See the CIPEV report, supra n 37.

there will be challenges.⁴⁷ For Sang, the Ocampo Six list 'turned his world upside down and was terrifying.'⁴⁸ According to Kosgey,

The ICC nightmare was traumatising and difficult...because of the magnitude of the charges, the reaction of Kenyans and how to explain the turn of events to his family.⁴⁹

Speaking of his 'ICC nightmare',⁵⁰ Muthaura recalled how 'the career-threatening charges, which saw him quit his job as head of the civil service, caused him and close family members a lot of pain,'⁵¹ and Hussein Ali 'wishes no one ICC pain.'⁵² Overall, Kenyatta 'cannot narrate quite accurately the calculated humiliation and stigma the prosecution has inflicted on [them] at every turn, within and outside the proceedings.'⁵³

However, the ICC's intervention was at odds with dominant local attitudes around how these events were interpreted and managed, as espoused in phrases such as 'forgetting' and 'moving on.'⁵⁴ After the 1992 and 1997 PEV, Kenyans 'forgot' and 'moved on' after domestic inaction on the human rights violations. The entry of ICJ into the domestic realm in the post-2007/2008 events therefore defined a fundamental departure from the past. According to Ndun'gu Wainaina, a prominent human rights activist, the ICC changed the equation of political crimes enterprise by expanding the avenues for accountability.⁵⁵

Shamed by the ICC's indictment, Kenyatta, Ruto, Kosgey and Muthaura resigned from their cabinet positions on the grounds of integrity. However, Kenyatta resigned only from his position as finance minister and not as deputy prime minister.⁵⁶ Sang resigned from his KASS FM station because 'it was very painful to broadcast internationally as an ICC suspect and co-

⁴⁷ Paul Ilado, 'President Uhuru Speaks of His Lowest ICC Moment: When the News Broke', *Star*, 18 June 2016.

⁴⁸ Cate Mukei, 'The "Ocampo Six" List Turned My Life Upside down – Joshua Arap Sang,' *Standard*, 10 June 2016.

⁴⁹ Emeka Mayaka Gekara, 'Kosgey: My ICC Nightmare,' *Daily Nation*, 4 August 2012.

⁵⁰ Isaack Ongiri, 'Muthaura Speaks out on His ICC "Nightmare",' *Daily Nation*, 13 March 2013.

⁵¹ *Ibid.*

⁵² John Ngirachu, 'I Wish No One ICC Pain, Says Ali,' *Daily Nation*, 25 January 2012.

⁵³ 'President Uhuru Hits out at the West over ICC,' *Daily Nation*, 12 October 2013.

⁵⁴ These phrases are popular in Kenya, indicating that people are used to impunity.

⁵⁵ Personal interview, Ndun'gu Wainaina, Nairobi, Kenya, 8 October 2015.

⁵⁶ 'Uhuru: I Will Not Quit as Deputy PM,' *Daily Nation*, 28 January 2012.

workers would be uncomfortable.⁵⁷ The KNDR monitoring survey⁵⁸ revealed that ‘Kenyans are generally supportive of prosecution – including by the International Criminal Court (ICC) – of those who bear the greatest responsibility for the post-election violence.’⁵⁹ Specifically, the national average in support stood at 57 percent, with Central (Kikuyu) recording 55 percent, Nairobi (cosmopolitan) 75 percent, Kisumu (Luo) 46 percent, Eldoret (Kalenjin) 48 percent and victims 75 percent.⁶⁰

With Kenyans’ support for prosecutions and the shame accompanying the ICC charges of committing crimes against humanity, Kenyatta’s and Ruto’s 2013 presidential ambitions faced challenges from many quarters. Furthermore, given that the outgoing president, Mwai Kibaki, was a Kikuyu, the idea of another Kikuyu president was problematic for many as this reinforced the Kikuyu’s political supremacy in Kenya’s multi-ethnic society. There were public discussions around the probability of sanctions and Kenya’s isolation if Kenyatta and Ruto succeeded, as well as the possibilities of imprisonment during their terms in office and whether they would step down if convicted. As a result, Uhuruto (as Kenyatta and Ruto became popularly known) considered options for a compromise candidate, Musalia Mudavadi.⁶¹

Moreover, the Kikuyu and the Kalenjin (Uhuruto’s support bases) had competing narratives about the 2007 violations. The two communities were in opposing camps in the 2007 conflict, and their leaders were accused of committing crimes against each other’s supporters. According to the Kalenjins, the violence was spontaneous.⁶² They accused the Kikuyu of settling on their land, thus justifying targeting them in the PEV. For instance, a Kalenjin youth talked of the Kikuyu as ‘unstoppable and almost becoming exploitative.’⁶³ Conversely, the Kikuyu community had experienced attacks and displacements in the Rift

⁵⁷ Mukei, *supra* n 48.

⁵⁸ The KNDR mandated South Consulting to monitor Kenya’s reform process.

⁵⁹ South Consulting, ‘The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project: Review Report for October–December 2009,’ January 2010, http://south.co.ke/images/south/KNDR_Reports/5threviewreport.pdf (accessed 23 November 2016), vi.

⁶⁰ *Ibid.* 42

⁶¹ Mosoku Geoffrey, ‘Leaders Prop Mudavadi as Compromise Candidate,’ *Standard*, 6 December 2012.

⁶² Nearly all the Kalenjin interviewees articulated this position.

⁶³ Personal interview, Kalenjin youth, Nakuru, Kenya, 21 November 2015.

Valley in 1992, 1997, 2002, 2005 and again in 2007.⁶⁴ They lost land, property and community members, and hence felt that their leaders could not be blamed for retaliatory attacks. For the Kikuyu, justice was necessary. As a Kikuyu politician observes, 'Although people had different opinions, pro-ICC people thought Kenyan courts would not deliver justice to victims.'⁶⁵

Furthermore, some Kikuyu and Kalenjin voters were also confronted with the difficulty of whether or not to vote for ICC suspects. Dominic Burbidge notes that 'a key area of tension for middle class Kikuyu voters was the dilemma of voting in Kenyatta and Ruto while their status as suspects at the ICC remained unresolved.'⁶⁶ Similarly, Donald Kipkorir, a prominent Kalenjin lawyer, argued that 'Uhuru and Ruto should not lure Kenyans to tempt the gods...their participation [in the election] will imperil our path to prosperity and realisation of our Vision 2030.'⁶⁷ Kipkorir continued,

For sure, we will be a pariah state and Kenya will be reduced to trading and having relationships with Eritrea, Sudan, North Korea, Zimbabwe and Syria only. Is this a path that Uhuru and Ruto want us to walk?

For the Jubilee Alliance's main rivals in the Coalition for Reforms and Democracy (CORD), the two were unelectable given their ICC cases.⁶⁸ CORD's presidential candidate, Raila Odinga, called on the suspects on numerous occasions to first clear their names before running for elections. Further, in a televised presidential debate in February 2013, Odinga chided Kenyatta's presidential bid, stating that 'it would pose a challenge to run a government via Skype from The Hague.'⁶⁹ For their part, civil society stakeholders filed a court petition (which was dismissed) challenging Uhuru's eligibility to run for elections based on integrity clauses in Chapter 6 of the new constitution. For western diplomats, Kenyans' 'choices had

⁶⁴ Nearly all Kikuyu interviewees articulated this.

⁶⁵ Personal interview, Kikuyu politician, Nairobi, Kenya, 29 September 2015.

⁶⁶ Dominic Burbidge, "'Can Someone Get Me Outta This Middle-Class Zone?'" Pressures on Middle Class Kikuyu in Kenya's 2013 Election,' *Journal of Modern African Studies* 52(2) (2014): 218.

⁶⁷ Donald Kipkorir, 'Uhuru and Ruto Should Not Lure Kenyans to Tempt the Gods,' *Standard*, 4 November 2012.

⁶⁸ Personal interview, CORD official, Nairobi, Kenya, 1 October 2015.

⁶⁹ Clar Ni Chonghaile, 'Kenya Tunes in as Uhuru Kenyatta and Raila Odinga Promise Peaceful Elections,' *Guardian*, 11 February 2013.

consequences,' as the US assistant secretary of state asserted in a telephone conversation with journalists,⁷⁰ and, according to a UK diplomat in Eldoret, there would be 'minimum contacts with ICC suspects should they win elections.'⁷¹

Scholars also weighed in on Uhuruto's momentous task in seeking elective offices despite their ICC predicaments. This was captured in phrases such as Gabrielle Lynch's 'electing the "alliance of the accused",'⁷² Tom Wolf's 'from sinners to saints'⁷³ and Susan Mueller's depiction of Kenya as an 'outlier' for electing the ICC accused.⁷⁴

Despite their 'outlier' status, Kenya's accused did not opt for outright rejection of the ICC's jurisdiction, as Sudan's al-Bashir and his allies did after their indictments. Instead, Kenyatta, Ruto and the rest of the 'Ocampo Six' obeyed Court summonses. Nonetheless, the two power elites also employed strategies against cooperation, including publicly condemning the ICC as a neo-colonial institution, attempting to withdraw Kenya from the Rome Statute and fighting human rights activists who supported the Court. The OTP described the Kenyan cases as

Fraught with cooperation challenges and obstacles relating to the security of witnesses. Many victims and witnesses have been too scared to come forward, others have...sought to withdraw from the process, citing intimidation or fear of harm. Worrying evidence has also emerged of attempts to bribe witnesses to withdraw or recant their evidence.⁷⁵

Sudan similarly accused the ICC of neo-colonialism while at the same time cooperating by allowing the ICC to establish an office in the country. Sudan also established its own Special Criminal Court on the Events in Darfur in order to prevent the ICC's intervention under the

⁷⁰ Gabe Joselow, 'US Official Says Kenya's Elections Have "Consequences",' *Voice of America*, 7 February 2013, <http://www.voanews.com/content/us-official-says-kenya-elections-have-consequences/1599063.html> (accessed 24 November 2016).

⁷¹ Luke Anami, 'UK to Avoid Contact with ICC Suspects,' *Standard*, 16 January, 2013.

⁷² Lynch, *supra* n 31.

⁷³ Wolf, *supra* n 31.

⁷⁴ Mueller, *supra* n 31.

⁷⁵ International Criminal Court, *The Case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Opening Statement, The Hague (10 September 2013), 5.

complementarity regime,⁷⁶ and signed a cooperation agreement on the Lord's Resistance Army case.⁷⁷ Nonetheless, Sudan's cooperation stopped almost two years after the UNSC referral when the OTP issued summonses for Sudanese suspects to appear. Relations waned significantly when the ICC issued arrest warrants for al-Bashir in March 2009, after which Sudan 'unsigned' from the Rome Statute.⁷⁸

Thus, for Sudan, al-Bashir's rejection of the ICC's jurisdiction considerably affected the progress of the cases. Consequently, the OTP cited the challenges as 'lack of access to the territory of Sudan; resource constraints and non-execution of the long outstanding arrest warrants that have all contributed to the slow progress in investigations.'⁷⁹ Conversely, for Kenya, the cases progressed as the Jubilee Alliance opted to comply with some of the ICC's obligations while departing from this compliance in equal measure.

<A>THE JUBILEE ALLIANCE'S STRUGGLE FOR AND AGAINST COOPERATION

The Jubilee Alliance employed a calculated mix of both cooperation and non-cooperation, centred on balancing their commitment risks and their noncompliance risks: apprehensions around the reach of ICJ, and appreciation of international norms.

Given that non-compliance with the Court's summonses would damage personal reputations and portray the suspects as fugitives of justice and averse to international norms, Kenyatta and Ruto cooperated with the ICC, contrary to speculations that they would skip pre-trial briefings and subsequent trials.⁸⁰ Although they were later elected as president and

⁷⁶ Alex de Waal, 'Darfur, the Court and Khartoum: The Politics of State Non-Cooperation,' in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddell and Phil Clark (London: Royal African Society, 2008).

⁷⁷ Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

⁷⁸ Ibid.

⁷⁹ International Criminal Court, 'Statement of ICC Prosecutor Fatou Bensouda to the United Nations Security Council on the Situation in Darfur, Sudan Pursuant to UNSCR 1593 (2005),' 9 June 2016, <https://www.icc-cpi.int/pages/item.aspx?name=160609-otp-stat-unsc> (accessed 24 November 2016).

⁸⁰ Kenyatta and Ruto only skipped trials with the Court's permission and after Kenya successfully pushed for amendments to the Rome Statute's rules of evidence and procedure. See, 'Kenya's President Kenyatta "Excused Most of ICC Trial",' *BBC*, 18 October 2013; International Criminal Court, 'The Assembly of States Parties Concludes Its Twelfth Session,' 29 November 2013, <https://www.icc-cpi.int/Pages/item.aspx?name=pr967> (accessed 24 November 2016).

deputy president, respectively, Kenyatta and Ruto complied with the Court's summonses despite calls for defiance from their supporters⁸¹ and AU resolutions on non-cooperation.⁸² Peter Kagwanja, a former senior government adviser, notes that Kenyatta pursued the compliance strategy even after his election, despite the options of al-Bashir's open defiance strategy and withdrawing Kenya from the ICC.⁸³ According to Kagwanja, defiance

would have triggered an automatic warrant of arrest and possible sanctions against the country...Kenyatta's hobbling as a fugitive president and Kenya would have almost certainly joined Zimbabwe in the West's list of 'rogue' states.⁸⁴

For Kenyatta, the continued cooperation even after forming the government was 'the only means to achieve personal vindication and also to protect our country from prejudice.'⁸⁵ A senior official in the Jubilee administration notes, 'They won elections and also cooperated with the Court...people thought it would be a crazy state, and that immediately after inauguration the government would repeal law.'⁸⁶

As the possibility of convictions was feasible, Kenyatta and Ruto were also active agents in circumventing justice, which included seeking political power to shield them from the ICC. A Kalenjin interviewee from the Rift Valley, from where Ruto hails, notes, 'Their strategy was to get into government and use it to get their people out of the ICC.'⁸⁷ Similarly, some Jubilee Alliance members of parliament (MPs) opined that 'the state tends to act with zeal to protect heads of state from international justice.'⁸⁸

Several events outside the courtroom amounted to non-cooperation despite the accuseds' compliance with the Court summons. First, the OTP complained about witness

⁸¹ John Karume and Adow Jubat, 'Jubilee MPs Agonise over President Uhuru Kenyatta International Criminal Court Summon,' *Standard*, 21 September 2014.

⁸² African Union, *Decision on Africa's Relationship with the International Criminal Court* (2013).

⁸³ Peter Kagwanja, 'Kenyatta Is Free at Last, but ICC Poised to Haunt Jubilee Power,' *Daily Nation*, 6 December 2014.

⁸⁴ *Ibid.*

⁸⁵ Presidential Strategic Communication Unit (PSCU), 'Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union,' *Standard*, 13 October 2013, 3.

⁸⁶ Personal interview, senior official in the Jubilee administration, Nairobi, Kenya, 21 November 2015.

⁸⁷ Personal interviewee, Kalenjin politician, Nairobi, Kenya, 22 September 2015.

⁸⁸ Tobias Chanji, 'URP MPs Want DP William Ruto to Become President in 2017 to Combat ICC,' *Standard*, 5 September 2015.

intimidation and interference, non-cooperation in turning over crucial evidence and politicization of the Kenyan cases. For example, in one of her statements on Kenya's cooperation, Fatou Bensouda decried Kenya's failure to cooperate and identified some of the challenges her office faced:

A steady and relentless stream of false media reports about the Kenya cases; an unprecedented campaign on social media to expose the identity of protected witnesses...; concerted and wide-ranging efforts to harass, intimidate and threaten individuals who would wish to be witnesses.⁸⁹

Second, running parallel to the trials, Kenyatta, Ruto and their allies in the PNU wing of the coalition government attempted several options for case termination, some of which were within the Rome system of justice. Uhuruto's allies in the National Assembly passed a motion in parliament seeking to repeal the International Crimes Act.⁹⁰ Since their action had no bearing on ongoing cases, their PNU allies sought deferral from the UNSC under Article 16. The UNSC rejected the request and advised on challenges to admissibility under Article 19,⁹¹ which they did in March 2011.⁹² Pre-trial Chamber II dismissed the admissibility case,⁹³ which was appealed. The appeal was dismissed as well, in June 2011.⁹⁴

Third, in public vituperations, the Court's intervention was reframed as neo-colonialism, a performance of injustice and an affront to Kenya's sovereignty.⁹⁵ For example, in one of the many anti-ICC prayer rallies, more than 50 Jubilee Alliance MPs declared the Court an enemy

⁸⁹ International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta Case,' 4 December 2014, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014> (accessed 24 November 2016).

⁹⁰ Geoffrey Mosoku, 'Historic Vote as House Debates International Criminal Court Withdrawal,' *Standard*, 5 September 2013.

⁹¹ Security Council, 'Update Report: Kenya and the ICC,' Report No. 1, 6 April 2011, <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%206%20April%202011%20Kenya.pdf> (accessed 24 November 2016).

⁹² International Criminal Court, *Situation in the Republic of Kenya In the Case of Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, Joshua arap Sang and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, No.: ICC-01/09-01/11 and ICC-01/09-02/11 (2011).

⁹³ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Müigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11-425 (24 May 2012).

⁹⁴ *Ibid.*

⁹⁵ Lynch, *supra* n 31.

of the Kenyan people, claiming that it worked to destabilize the country.⁹⁶ Moreover, some MPs claimed that the ICC charges were fixed and based on a witch hunt and on compromised witnesses.⁹⁷ Furthermore, Uhuruto declared the end of Kenya's cooperation with the Court⁹⁸ and renewed calls for ICC withdrawal⁹⁹ after the collapse of the Kenyan cases. The Jubilee administration also fought prominent human rights activists who were seen to be supportive of ICJ. Notable was the idea of an 'evil' civil society in the run-up to the election and threats to change laws regulating the funding of civil society organizations (CSOs) after the election.¹⁰⁰

Despite these affronts against the ICC, I argue that the neo-colonial narrative was salient in the Alliance's struggle against cooperation due to its multiple intentions and impacts in local and regional contexts. It exploited local and regional historical and political contexts, thus gaining prominence in national and regional discourses on Africa–ICC relations and Africa's place in the global political economy. Moreover, the narrative set the Court up against collective communal and regional interests. Other forms of non-cooperation (witness intimidation and interference, seeking withdrawal from the ICC, not turning in crucial evidence, false media reports) were more localized and thus less prominent.

<A>THE NEOCOLONIAL NARRATIVE: INTENTIONS AND IMPACTS

Besides Uhuruto's struggle for and against cooperation, they also faced domestic normative contestation over the ICC's discourse. Notably, their rivals in CORD expressed support for the ICC trials and rejected the Alliance's legal manoeuvres to terminate the cases and withdraw from the ICC.¹⁰¹ Moreover, civil society activists were consistently engaged in national and

⁹⁶ Michael Olinga, 'Jubilee Accuses ICC of Plot to Ignite Violence in Kenya,' *Standard*, 21 December 2015.

⁹⁷ 'Big Question: ICC Fixing Debate,' Citizen Digital video, 27:40, 13 October 2015, <https://citizentv.co.ke/newsshows/big-question-icc-fixing-debate-103088/> (accessed 24 November 2016).

⁹⁸ Caroline Wafula, 'Never again, vow Uhuru, Ruto as ICC is criticised,' *Nation*, 17 April, 2016.

⁹⁹ Alphonse Shiundu, 'President Uhuru Kenyatta formally asks House to dump ICC,' *Standard*, 20 April 2016.

¹⁰⁰ Nearly all civil society activists articulated these positions. See also, FIDH/KHRC, 'One Year in Office for Uhuru Kenyatta and William Ruto,' <https://www.fidh.org/IMG/pdf/kenya631a2014bassdef.pdf> (accessed 24 November 2016).

¹⁰¹ Personal interview, CORD official, Nairobi, Kenya, 1 October 2015.

international advocacy in which they challenged the Jubilee Alliance's narratives on cooperation.¹⁰² Additionally, western diplomats expressed their support for the ICC as a policy position from their home countries.¹⁰³

Despite their ICC tribulations, Kenyatta and Ruto won the elections. Although many question the credibility of the results,¹⁰⁴ Lynch argues that it was clear that 'the majority of Kikuyu and Kalenjin voted for the Jubilee Alliance and were happy with the results.'¹⁰⁵ More importantly, they had a clear majority in the National Assembly and a slim majority in the senate.

A discussion of the intentions and impacts of the neo-colonial narrative accounts for how the Jubilee Alliance 'knocked off the ICC from its moral pedestal.'¹⁰⁶ I argue that the neo-colonial narrative was central in appealing to targeted local and regional constituencies while alienating the Court's sympathizers from Uhuruto's support base. As a result, the narrative achieved multiple outcomes: persuading targeted local constituencies while delegitimizing the ICC, gaining concessions from some of the Court's sympathizers and courting regional solidarity in battling the ICC.

Persuading Targeted Constituencies and Delegitimizing the ICC

As a Kikuyu politician noted, 'The 2013 elections campaign was not about who was going to do a good job, but [about] preventing Uhuru from going to The Hague...The election recorded the highest turnout.'¹⁰⁷ For a Kalenjin youth, the 'ICC is present-day colonialism. [People] were not ready to be taken back by a white man. Nobody understood what ICC stands for.'¹⁰⁸ These

¹⁰² Personal interviews, civil society activists, Nairobi, Kenya, August 2015–April 2016.

¹⁰³ Stephen Brown and Rosalind Raddatz, 'Dire Consequences or Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya,' *Journal of Eastern African Studies* 8(1) (2014): 43–62.

¹⁰⁴ The elections results were contested by a section of the civil society and CORD at the Supreme Court. See also, Seema Shah, 'Free and fair? Citizens' assessments of the 2013 general election in Kenya,' *Review Of African Political Economy*, 42 (143) (2015):44-61.

¹⁰⁵ Lynch, *supra* n 31 at 94.

¹⁰⁶ Peskin, *supra* n 23 at 677.

¹⁰⁷ Personal interview, Kikuyu politician, Nairobi, Kenya, 23 September 2015.

¹⁰⁸ Personal interview, Kalenjin youth, Nairobi, Kenya, 2 October 2015.

sentiments show that attitudes were already formed before the election and affected people's decisions.

With conflicting and divergent Kikuyu/Kalenjin narratives and sceptical middle-class and other Kenyan voters, the Jubilee Alliance's neo-colonial narrative presented a viable option for overcoming the ICC stigma. Against the backdrop of the ICC's focus in Africa,¹⁰⁹ the West's visible support for the Court financially, logistically and in policy positions abroad,¹¹⁰ and Africa's history of western domination (colonialism and slavery), neo-colonialism found new relevance with the ICC's intervention in Kenya.

Neo-colonialism presented a safe 'space' in which the Jubilee Alliance could maximize on opportunities for public vituperation of the Court while minimizing threats of antagonizing enemy (Kikuyu and Kalenjin) communities. As such, the narrative united a majority of sceptical Kikuyus and Kalenjins under the banner of victimhood at the hands of the ICC and a waning national sovereignty due to western interference. The Alliance invoked Kenya's suffering under British colonialism as well as the struggle for independence under notable nationalists – the Kapenguria Six (Jomo Kenyatta, Achien'g Oneko, Kung'u Karumba, Fred Kubai, Bildad Kaggia and Paul Ngei) – who were likened to the Ocampo Six. The colonial powers incarcerated the six nationalists at a Kapenguria prison. As Tee Ngugi notes, 'Kapenguria represented the struggle for independence and dignity of the Kenyan people,' and the Ocampo Six 'purported an equivalence between their circumstances and those of Kenyatta and his colleagues at Kapenguria.'¹¹¹

Of appeal to the Kikuyu was that the neo-colonial narrative was a reminder of the independence struggle that the Mau Mau (freedom fighters) staged under Jomo Kenyatta (Uhuru's father) to fight British rule. Besides gross human rights violations under colonialism,

¹⁰⁹ All the ICC's active situations were from Africa until the ICC's consideration of Georgia in 2015. See, International Criminal Court, 'Situations under Investigation,' <https://www.icc-cpi.int/pages/situations.aspx> (accessed 24 November 2016).

¹¹⁰ The European Union states that it is one of the staunchest ICC supporters. See, European Union, *The European Union and the International Criminal Court* (Brussels: European Commission, 2008).

¹¹¹ Tee Ngugi, 'Comparing Suspects to Kapenguria Six Is Historical Sacrilege,' *East African*, 25 April 2011.

the Kikuyu's fertile highlands were expropriated for white settlement and indigenous Africans were relocated to unproductive reserve lands. The neo-colonial narrative called upon the Kikuyu to resist the reincarnation of colonialism through the ICC – a *mzungu*¹¹² court – which was targeting Kenyatta's son in a new affront on Kenya's sovereignty. A Kiambu resident observes that according to the people's narratives, they fought off the colonialists and

the ICC intervention was a reminder that we are still under western rule...Fighting the ICC amounted to fighting the *mzungu* as they did a long time ago and this is a reminder of colonialism, and has to be fought at all costs.¹¹³

Similarly, the Kalenjin were appeased with the linking of Ruto's tribulations to those of the famous leader of the Nandi rebellion – Koitalel arap Samoei, whom some even suggested hailed from Ruto's Talai clan.¹¹⁴ A Kalenjin youth noted that 'Kalenjins think the ICC is an extension of colonialism...and [is] manipulated by outside powers and interested partners in Kenya.'¹¹⁵

Essentially, the Jubilee Alliance linked the ICC intervention to the re-emergence of the western domination of Africans (through targeting their leaders while ignoring other serious conflicts) and therefore the need for Kenyans to safeguard their sovereignty. In this regard, statements by western envoys were reframed as undue external interference in domestic affairs, and, by default, support of their main rival – Odinga. Specifically, the statement from the US assistant secretary of state¹¹⁶ was problematic given that the US is not a party to the Rome Statute, commits atrocities globally and was demanding Kenyans' fidelity to the ICC. A CORD official notes that 'the statement showed that unlike Jubilee, CORD had the goodwill of the international community and that progressive Kenyans would believe this to attract international investments and improve international relations.'¹¹⁷ He observes that the Jubilee

¹¹² *Mzungu* is a Swahili word meaning 'white man,' implying European.

¹¹³ Personal interview, resident, Kiambu, Kenya, 30 November 2015.

¹¹⁴ Personal interview, Kalenjin youth, Nakuru, Kenya, 22 February 2016.

¹¹⁵ Personal interview, Kalenjin youth, Nairobi, Kenya, 22 September 2015.

¹¹⁶ Joselow, *supra* n 70.

¹¹⁷ Personal interview, CORD official, Nairobi, Kenya, 28 September 2015.

Alliance 'used it [the statement] to entrench propaganda that Raila, CORD and the West wanted to take Ruto and Uhuru to the ICC.'¹¹⁸

Consequently, the neo-colonial narrative resonated with a majority of the Jubilee Alliance's domestic constituencies. Reflecting on the narrative's effects on public perceptions, a Kalenjin youth remarked:

Kenyans would easily understand it [the ICC] wasn't here for a good assignment, but as other assignments to subject them to present-day colonization through a judicial process. Many people reacted by making them president and deputy president.¹¹⁹

Likewise, according to Walter Menya, a journalist who followed the ICC discourses, 'The question this begs is, where does politics end and where does judicial process begin in this case?'¹²⁰ In the same vein, a prominent civil society activist observes that 'Jubilee's neo-colonial narrative made it difficult for the Court to project itself as balanced.'¹²¹ He claims that the framing of the 2013 election as a referendum on the ICC¹²² helped to mobilize the Alliance's support base. Moreover, in February 2013, just before the elections, the KNDR monitoring report concluded that

the debate has since become politicised and ethnicised...The image of the ICC has gradually shifted and impunity as a campaign theme has been clouded by allegations of political witch-hunts.¹²³

Notably, national support for the ICC remained high (at 66 percent) but low in the home regions of the accused.¹²⁴ Thus, Kenyatta speaks of his election victory:

¹¹⁸ Ibid.

¹¹⁹ Personal interview, Kalenjin youth, Nairobi, Kenya, 2 October 2015.

¹²⁰ Personal interview, Walter Menya, Nairobi, Kenya, 29 September 2015.

¹²¹ Personal interview, human rights activist, Nairobi, Kenya, 7 October 2015.

¹²² Rasna Warah, 'How the ICC Helped, Rather Than Hindered, the Uhuru–Ruto Election,' *Sunday Nation*, 10 March 2014.

¹²³ South Consulting, 'Kenya's 2013 General Election: A Review of Preparedness, February 2013 Report,' http://south.co.ke/images/south/KNDR_Reports/QuarterlyreportFeb2013.pdf (accessed 24 November 2016), vii.

¹²⁴ Ibid.

My government's decisive election must be seen as a categorical rebuke by the people of Kenya of those who wished to interfere with our internal affairs and infringe our sovereignty.¹²⁵

Gaining Concessions from ICC Sympathizers

In attempts to overcome normative contestations, the Jubilee Alliance's neo-colonial narrative gained some concessions from the Court's support base. With support for the ICC being construed as pro-neo-colonialism, some ICC sympathizers embraced a more cautious approach in public discourses on the Court. First, after the backlash against their statements, western diplomats refrained from making bold pronouncements in support of the trials. The head of a Nairobi-based international NGO recounts her cautious approach to the Court: 'If I am pro-ICC in the field, I can be seen as pro-West...I am careful not to be seen as a puppet of the West.'¹²⁶

Second, in the run-up to the 2013 elections, CORD also developed a more cautious approach to the ICC 'because of the surge in portraying the [CORD] coalition as pushing for ICC prosecutions.'¹²⁷ A former Odinga ally and party official remarks that 'the ICC became his [Odinga's] Waterloo in the Rift Valley...Ruto had managed to mobilize the Kalenjin around the ICC and this occasioned his [Odinga's] change of tune.'¹²⁸ For example, during a campaign rally in Eldoret, Odinga promised to bring the Kenyan cases back home,¹²⁹ further reinforcing the Jubilee Alliance's views that the ICC trials were unwarranted and unnecessary disruptions in Kenya's domestic affairs. On successive Ruto's fixing debate that the Jubilee Alliance orchestrated to claim that the cases were based on a witch hunt and ought to be halted, CORD took a more pragmatic approach and also supported case termination.¹³⁰ During the debates,

¹²⁵ PSCU, supra n 85 at 2.

¹²⁶ Personal interview, head of an international NGO, Nairobi, Kenya, 10 March 2013.

¹²⁷ Personal interview, CORD official, Nairobi, Kenya, 1 October 2015.

¹²⁸ Personal interview, former Odinga ally and party official, Kisumu, Kenya, 11 November 2015.

¹²⁹ Personal interview, CORD official, Nairobi, Kenya, 1 October 2015.

¹³⁰ See, 'Big Question,' supra n 99; 'Opinion Court - Who Fixed Who,' Citizen Digital video, 25:16, 8 October 2015, <https://www.youtube.com/watch?v=iDTZjD47QS8&t=274s> (accessed 28 November 2016).

for example, some CORD MPs signed the Jubilee Alliance's petitions to terminate the cases,¹³¹ and Odinga offered to testify in favour of Ruto.¹³²

Although CSOs were branded as 'evil' and as puppets of the West, they remained unbowed and continued national and international advocacy to support the ICC trials. Nonetheless, as Thomas Hansen and Chandra Sriram reveal, the narratives on CSOs as agents of imperialism undermined their pro-accountability message.¹³³ As such, CSOs found themselves on the defensive and had difficulty in countering the narrative. Furthermore, with the Jubilee Alliance in power, they no longer felt they could push as actively for accountability, and especially for the ICC.¹³⁴

Bringing 'Africa in'

Given the ICC's global stature, the neo-colonial narrative was also instrumental in courting regional solidarity in battling the Court. As a Jubilee Alliance activist explains, the Alliance could not confront the ICC on its own, despite forming the government, because 'the ICC is a big giant, and hence the need to Africanize the problem and get the help of African leaders.'¹³⁵ Africanizing their ICC predicament was thus useful in consolidating regional support, which would be instrumental in demanding concessions from the Court. As John Heathershaw and Daniel Lambach contend, the regional community is an elite solidarity group that either facilitates or resists global governance.¹³⁶ Specifically, the AU is a regional solidarity group that was created to resist colonial invasion on the African continent.¹³⁷

¹³¹ '190 MPs Sign Petition to UN Seeking End of Ruto Case,' *Standard*, 3 November 2015.

¹³² Rushdie Oudia and Tobias Chanji, 'Raila Odinga Offers to Testify for William Ruto in ICC, as DP Exudes Confidence He Will Be Vindicated,' *Standard*, 2 February 2015.

¹³³ Thomas Obel Hansen and Chandra Lekha Sriram, 'Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies,' *International Journal of Transitional Justice* 9(3) (2015): 407–427.

¹³⁴ *Ibid.*

¹³⁵ Personal interview, Jubilee Alliance activist, Nairobi, Kenya, 25 September 2015.

¹³⁶ John Heathershaw and Daniel Lambach, 'Introduction: Post-Conflict Spaces and Approaches to State Building,' *Journal of Intervention and Statebuilding* 2(3) (2008): 269–289.

¹³⁷ African Union, 'History of the OAU and AU,' <http://www.au.int/en/history/oau-and-au> (accessed 24 November 2016).

With imminent trials at The Hague, the Jubilee administration influenced the convening of an Extraordinary Session of the Assembly of the AU in October 2013 in which Kenya's ICC cases topped the agenda. In the session, Kenyatta made a moving speech on the African renaissance that was premised on the ICC's intrusion into Africa at the behest of colonial powers. He implored for African solidarity:

Kenya looks to her friends in time of need. We come to you to vindicate our independence and sovereignty...This is the forum for us to unite and categorically vindicate our sovereignty...I have utmost confidence that this Assembly's voice will be clear to the entire world.¹³⁸

In rebuking the ICC, Kenyatta argued,

The ICC stopped being the home of justice for the fact that all the cases currently before it arise from Africa, yet Africa is not the only continent where international crimes are being committed.¹³⁹

Heeding Kenya's solidarity calls, the AU arrived at non-cooperation policy decisions on Kenya's ICC charges. Among the decisions was that 'President Uhuru Kenyatta will not appear before the ICC'¹⁴⁰ until the UNSC and the ICC address the AU's concerns. The AU also decided that cases on Kenyan leaders 'should be suspended until they complete their terms of office.'¹⁴¹ Besides, the Assembly reaffirmed earlier decisions on Sudan and decided that

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.¹⁴²

¹³⁸ PSCU, supra n 85 at 4.

¹³⁹ Ibid, 4.

¹⁴⁰ 'Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia: Decisions and Declarations,' AU Docs. Ext/Assembly/AU/Dec.1-2 and Ext/Assembly/AU/Decl.1-4 (Oct.2013), 3.

¹⁴¹ Ibid., 2.

¹⁴² Ibid.

Though the AU policy positions were unsuccessful in terminating the cases, regional solidarity helped to moderate the ICC's dealings in respect of the Kenyan charges. As Walter Menya reveals,

The AU summit was making the ICC restless...the ICC registrar appealed to Africa not to take any drastic measures...and hold onto any issues they may have against the court or the conduct of the proceedings until the Assembly of State Parties (ASP) set for next month [November] rather than at the summit.¹⁴³

Further, at an ASP meeting in 2013, the AU succeeded in pushing through amendments to the Statute's rules of procedure and evidence to allow Kenyatta and Ruto to be excused from continuous appearance at the Court due to their state responsibilities.¹⁴⁴ The AU's joint front also enabled them to effectively resist the OTP's attempts to use the amended Rule 68, which allowed admission of recanted evidence in cases of witness interference, in Ruto and Sang's case.¹⁴⁵

Moreover, the AU heads of state adopted Kenya's proposal to exit the ICC. However, a Jubilee Alliance insider reveals that 'some things are done for the moment and Kenya does not want to exit the ICC.'¹⁴⁶ He believes the recent AU posturing around Africa withdrawing was more about influencing decisions. As such, despite a commanding majority in the National Assembly and control of government, the Jubilee Alliance has not taken active steps to withdraw from the ICC despite its perceived neo-colonial agenda. Probed on withdrawal, Kenya's foreign affairs minister claimed that 'Kenya is not keen on leaving the ICC, but reforming it.'¹⁴⁷ Similarly, Kenyatta has on numerous occasions called for the ICC's reform.¹⁴⁸

¹⁴³ Walter Menya, 'My Memories Covering ICC Cases in The Hague', *Daily Nation*, 10 April 2016.

¹⁴⁴ 'Amendments to the Rules of Procedure and Evidence,' Resolution ICC-ASP/12/Res.7 (27 November 2013).

¹⁴⁵ #globalJustice, 'ASP 14 Day 8: ICC Independence at Center of Final ASP Day,' 26 November 2015, <https://ciccglobaljustice.wordpress.com/2015/11/26/asp-14-day-8-icc-independence-at-the-center-of-asp-last-day/> (accessed 24 November 2016).

¹⁴⁶ Personal interview, key informant, Nairobi, Kenya, 9 February 2016.

¹⁴⁷ Paul Ilado, 'Kenya Not Keen on Leaving ICC, but in Reforming It, Says Foreign Affairs CS,' *Star*, 13 May 2016.

¹⁴⁸ Patrick Smith and Mark Anderson, 'Kenya: We Have Been Vindicated – Uhuru Kenyatta,' *Africa Report*, 13 May 2016.

After a mistrial ruling on the Sang and Ruto case and the final collapse of all the Ocampo Six cases, Kenyatta thanked the AU for 'standing in solidarity with Kenya as the country battled the ICC cases facing its citizens.'¹⁴⁹ In the same vein, the chairman of the Defence and Foreign Affairs Committee in parliament, Ndung'u Gethenji, remarked that 'Kenyatta celebrated the 2013 election as a moment where the Kenyan people had stood up to foreign interference, rekindled the Pan-African spirit and reconceptualised African solidarity.'¹⁵⁰ In his view, Kenyatta's approach paid dividends in the face of the worries that the ICC cases presented, such as international isolation.¹⁵¹ Gethenji concludes that under similar circumstances, 'Most African presidents getting into power would have grovelled at the feet of the international community and begged to be accepted into the community of world leaders.'¹⁵²

<A>CONCLUSION

The Jubilee Alliance's struggle for and against cooperation eventually succeeded in managing commitment risks as well as noncompliance risks. The ICC terminated the cases on the grounds of non-cooperation, which the OTP attributed to the government's reluctance to turn in crucial evidence and threats to some witnesses, some of who later withdrew from the cases.¹⁵³ On the other hand, the Alliance's compliance with Court summonses and the eventual termination of their cases lent credence to their narratives of innocence, adherence to international norms and denial that they were fugitives of justice.¹⁵⁴

More importantly, the Jubilee Alliance recast the ICC's intervention as neo-colonial, which was instrumental in Kenyatta and Ruto overcoming the ICC stigma and associated obstacles in their quest for the country's leadership, as well as in their dealings with the Court afterwards. The narrative had several impacts, such as persuading domestic constituencies

¹⁴⁹ 'Uhuru Thanks the African Union for Support over the ICC Cases,' *Star*, 7 April 2016.

¹⁵⁰ Ndung'u Gethenji, 'President Uhuru's Approach Now Paying Dividends,' *Sunday Nation*, 28 February 2016.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ International Criminal Court, *Kenya, Situations and Cases* (2016).

¹⁵⁴ Smith and Anderson, *supra* n 147.

while delegitimizing the ICC, gaining concessions from the Court's supporters and pursuing regional solidarity in battling the ICC.

Furthermore, the ICC's 'detachment from domestic constituencies and partial deviation from domestic traditions and legal structures'¹⁵⁵ enabled local actors to maximize their agency vis-à-vis the ICC. The Jubilee Alliance's ability to counter-shame the ICC was partly due to the Court's reliance on shaming and soft power to encourage cooperation, as well as the local historical and political contexts that political actors exploited. Although strong states such as the US and Israel can use their financial, military and economic power to orchestrate non-cooperation, local actors in weaker states can leverage domestic historical and normative traditions to orchestrate non-cooperation. As this article has shown, this non-cooperation might not be outright defiance as in Sudan's case. Rather, as the Kenyan case illustrates, non-cooperation may be subtler and more nuanced.

Nonetheless, the Jubilee Alliance's ability to counter-shame the ICC raises fundamental questions, given the inextricable link between ICJ and transitional justice practice.¹⁵⁶ For example, how does counter-shaming the ICC feed into other transitional justice frameworks that post-conflict societies use to redress the past?

¹⁵⁵ Stahn, *supra* n 1 at 258.

¹⁵⁶ Naomi Roht-Arriaza, 'Editorial Note,' *International Journal of Transitional Justice* 7(3) (2013): 383–392.