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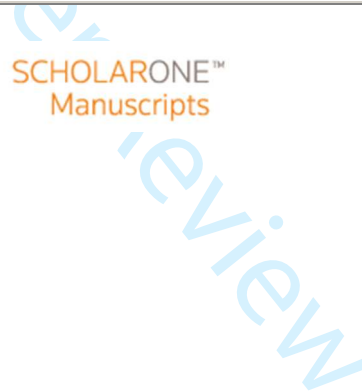
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**When Kings are Criminals: Lessons Learnt from ICC's
Prosecutions of African Presidents**

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When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents

Mattia Cacciatori*

ABSTRACT[∞]

The attempts by the International Criminal Court (ICC) to prosecute sitting heads of state have proven to be one of the thorniest issues for this new institution. These rest on the claim that there are crimes of such magnitude for which perpetrators should be prosecuted, regardless of their status. While it seems easy to sympathize with such claims, pragmatic considerations are often lost in debates of moral imperatives. This article derives insight from a comparative analysis of Sudan and Kenya. It unveils the existence of a triadic relationship between the ICC, governments under its scrutiny and local political contestants and nongovernmental organizations (NGOs). This indicates that when the ICC attempts to prosecute a sitting head of state, it not only fails to deliver, but also endangers local political contestants and NGOs. The solution to this impasse might be abandoning the idea of prosecuting sitting heads of state. However, this requires a reconsideration of the moral imperatives underpinning the idea of punitive justice that the ICC embodies.

KEYWORDS: International Criminal Court, international criminal justice, pragmatism, Sudan, Kenya

INTRODUCTION

When the International Criminal Court (ICC) was established in 2002, it fostered the idea that sitting heads of state are not immune from its scrutiny. This revolutionary idea was welcomed as the zenith of the international community's attempt to punish those culpable of genocide, war crimes and gross human rights violations.¹ However, some have already expressed criticism of the fact that the ICC seems to be inadequate to prosecute such powerful actors because of the agency that states retain over its provisions, and how this has generated a partial stalling of the justice debate.² Others have also hinted at the fact that prosecutions are particularly effective in pacifying conflicts when they target middle- and low-level actors, instead of high-ranked officials.³ Furthermore, these discussions are often conducted with little reference to previous experiences in which the court

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¹ See, William A. Schabas, 'International Criminal Court: The Secret of Its Success,' *Criminal Law Forum* 12(4) (2001): 415–428.

² Brett Edwards and Mattia Cacciatori, 'The Politics of International Chemical Weapon Justice: The Case of Syria, 2011–2017,' *Contemporary Security Policy* 39(2) (2018): 280–297.

³ 'Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict,' <https://www.pathwaysforpeace.org/> (accessed 13 August 2018).

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3 attempted to hold sitting heads of state accountable for their deeds.⁴ This article aims to highlight
4 the implications of ICC investigations against sitting heads of state in light of what happened during
5 the investigations into Omar Al Bashir⁵ in Sudan and Uhuru Kenyatta in Kenya.⁶ The case for
6 comparison rests on the idea that in both Sudan and Kenya the ICC faced the dilemmas arising from
7 prosecuting the most powerful actors in the country. However, before venturing into the analysis, it
8 is necessary to mention that Al Bashir and Kenyatta occupied different positions when the
9 investigations started. When the warrant of arrest against Al Bashir was released on 4 March 2009,
10 he had been the uncontested ruler of Sudan for 20 years. In contrast, when the Pre-Trial Chamber of
11 the ICC decided to initiate the investigation against Kenyatta, Kenya's president was Mwai Kibaki.
12 However, Kenyatta's presidential aspirations were clear even in 2009. In fact, when the ICC launched
13 the investigation, Kenyatta was the head of the Kenya African National Union (KANU) political party,
14 having defeated Nicholas Biwott with 2,980 votes against 622.⁷ KANU dominated Kenyan politics for
15 39 years after independence. The case for comparison rests on this. With Kenyatta being so popular
16 and given the historical and political importance of KANU, it seems hard to believe that the ICC did
17 not consider the fact that Kenyatta might win the political elections in 2013. Kenyatta eventually
18 defeated Raila Odinga, with 50.03 percent of the total votes cast, and became the fourth president
19 of Kenya since independence.⁸ Pragmatically, with the election of Kenyatta and the release of the
20 warrant of arrest against Al Bashir, the situations in Kenya and Sudan constituted the only times in
21 which the ICC actually investigated a sitting head of state.
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33 Other similarities between the two situations include the colonial past of both Sudan and
34 Kenya and the governmental grip on local media. Geoffrey Lugano notes that the infusion of
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38 ⁴ Pierre Bienaimé, 'We Asked Experts if Syrian President Bashar Assad Will Ever be Punished for War Crimes,'
39 *Vice*, 18 January 2016, [https://www.vice.com/en_us/article/jma43x/where-could-syrian-president-bashar-](https://www.vice.com/en_us/article/jma43x/where-could-syrian-president-bashar-assad-find-refuge)
40 [assad-find-refuge](https://www.vice.com/en_us/article/jma43x/where-could-syrian-president-bashar-assad-find-refuge) (accessed 13 August 2018); Widney Brown, 'Assad, Beware of the Long Arm of Justice,'
41 *HuffPost*, 13 April 2016, [https://www.huffingtonpost.com/widney-brown/assad-beware-the-long-](https://www.huffingtonpost.com/widney-brown/assad-beware-the-long-arm_b_9683254.html)
42 [arm_b_9683254.html](https://www.huffingtonpost.com/widney-brown/assad-beware-the-long-arm_b_9683254.html) (accessed 13 August 2018); Eric Posner, 'Assad and the Death of the International
43 Criminal Court,' *Slate*, 19 September 2013,
44 [http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/09/failing_to_prosecute_assad_](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/09/failing_to_prosecute_assad_will_be_the_death_of_the_international_criminal.html)
45 [will_be_the_death_of_the_international_criminal.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/09/failing_to_prosecute_assad_will_be_the_death_of_the_international_criminal.html) (accessed 13 August 2018).

46 ⁵ The Sudanese president was accused of orchestrating the genocide in Darfur, where Sudanese and state-
47 sponsored paramilitary forces carried out systematic attacks against civilians. On 4 March 2009 the ICC issued
48 a warrant of arrest against him for seven counts of crimes against humanity and war crimes. On 12 July 2010,
49 the court issued a second warrant, adding the genocide of Sudanese tribes to the charges.

50 ⁶ Kenyatta was indicted in connection with the postelection violence that plagued Kenya in 2007/2008. During
51 an unprecedented wave of brutality, 1,200 people died and 600,000 were displaced in the postelectoral
52 turmoil. In October 2011, he was charged with five counts of crimes against humanity and became, in 2014,
53 the first head of state to appear before the ICC.

54 ⁷ 'Kenyatta Wins Moi Party Election,' *BBC News*, 1 February 2005,
55 <http://news.bbc.co.uk/1/hi/world/africa/4222655.stm> (accessed 13 August 2018).

56 ⁸ International Crisis Group, 'Kenya's 2013 Elections,' 17 January 2013,
57 <https://www.crisisgroup.org/africa/horn-africa/kenya/kenya-s-2013-elections> (accessed 13 August 2018).

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3 anticolonial narratives was prominent among the various strategies deployed by the Al Bashir and
4 Kenyatta governments to hamper ICC actions in the two situations.⁹ This is corroborated in this
5 article, and seems to support the idea that countries with a strong colonial legacy are more
6 susceptible to the dynamics of the exposure cycle (discussed later). As noted by Alex de Waal, the
7 Sudanese colonial experience has been a peculiar one.¹⁰ In fact, British engagement with the country
8 'began as an adjunct to strategic interests in Egypt...to stop France controlling the Suez Canal and
9 hence the sea route to India.'¹¹ The antiwestern sentiment that underpinned colonial Africa from the
10 1920s helped forge an alliance between Sudan and Egypt against the British colonizers. So
11 anticolonial narratives have constituted a cornerstone of Sudanese politics since the 1920s.¹²
12 Similarly, anticolonial policies have been a crucial part of recent Kenyan history. Kenya formally
13 achieved independence from Britain in 1963, the culmination of a process that started in the 1950s
14 with the Mau Mau rebellion.¹³ The colonial past of the two countries constitutes fertile ground for
15 infusing anticolonial narratives in relation to ICC investigations, and hence sustains the comparability
16 of the two situations.
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26 Furthermore, the ability of a government to control and manipulate public media makes the
27 infusion of such narratives much more likely to be effective. In Sudan, freedom of the press was
28 nominally granted under the provisions adopted in the framework of the 2005 Comprehensive
29 Peace Agreement (CPA). However, in 2009 the Sudanese government passed the Press and
30 Publications Act, which allows for restrictions in the interests of national security. According to the
31 nongovernmental organization (NGO) Freedom House, the 2015 Freedom of Information Law
32 includes 12 categories of exemptions to protect information from public release. For example, the
33 case of the editor of the socialist newspaper *Al-Midan*, charged in 2015 with offences including
34 publishing false news, is exemplificative.¹⁴ The editor was eventually released on bail; if convicted,
35 she would have faced capital punishment.¹⁵ While in Kenya the situation is generally better, in
36 recent years even the Kenyatta government has tightened its grip on the public press. If the 2010
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45 ⁹ Geoffrey Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons
46 from Kenya,' *International Journal of Transitional Justice* 11(1) (2017): 9–29.

47 ¹⁰ Alex de Waal, *Sudan: International Dimensions to the State and Its Crisis*, Crisis States Research Centre
48 Occasional Paper No. 3 (2007).

49 ¹¹ *Ibid.*, 3.

50 ¹² *Ibid.*

51 ¹³ See, Edmond J. Keller, 'A Twentieth Century Model: The Mau Mau Transformation from Social Banditry to
52 Social Rebellion,' *Kenya Historical Review* 3(2) (1973): 189–205.

53 ¹⁴ African Centre for Justice and Peace Studies, 'Journalist Madiha Abdalla Convicted of Defamation by Press
54 and Publications Court,' <http://www.acjps.org/journalist-madiha-abdalla-convicted-of-defamation-by-press-and-publications-court/> (accessed 13 August 2018).

55 ¹⁵ Committee to Protect Journalists, 'Sudan Arrests Journalists, Confiscates Papers for Reporting on Inflation
56 Protests,' <https://cpj.org/2018/01/sudan-arrests-journalists-confiscates-papers-for-r.php> (accessed 13 August
57 2018).

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3 constitution did indeed expand freedom of expression and the press by impeding state interference
4 with editorial independence, in 2014 the government passed the Security Laws (Amendment) Act.
5 This legislation 'allows for long prison sentences and fines for the unauthorised reporting of
6 information that undermines counterterrorism investigations.'¹⁶ While in 2015 the Kenyan High
7 Court found several parts of the legislation to be unconstitutional, the extended powers of security
8 forces over the press remain intact. Freedom House furthermore reports that several bloggers were
9 arrested for publishing 'offensive' and 'menacing' messages, and in 2015 alone there were at least
10 19 cases of threats to or violence against journalists. This peaked with the murder by unknown
11 attackers of John Kituyi, the editor of *Mirror Weekly* who took a particular interest in the ICC.¹⁷ All
12 these considerations hint at the fact that Sudan and Kenya share some preconditions for the
13 exposure cycle to be observable.
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21 Through a comparative analysis, this article reveals that two actors are most likely to be
22 vulnerable to governmental retaliation when the ICC attempts to prosecute sitting heads of state:
23 local political contestants and NGOs. The article focuses on prosecutions of sitting heads of state as
24 emblematic of the challenges that the ICC faces in prosecuting high-ranked officials. Given the
25 considerations above, its provisions are potentially valid for all prosecutions that target politically
26 sensitive figures because of the ability of such actors to manipulate the justice discourse and infuse
27 it with narratives of colonialism, nationalism and martyrization.
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35 PROSECUTING SITTING HEADS OF STATE: EVOLUTION 36 OF AN IDEA 37 38

39 The notion that sitting heads of state are not immune to the scrutiny of international tribunals is
40 now well recognized,¹⁸ and emerged in international jurisprudence in instances like the Charles
41 Taylor case before the Special Court for Sierra Leone (SCSL), and the Augusto Pinochet case before
42 the British House of Lords. Institutionally, the practice evolved along with the proliferation of the
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48 ¹⁶ Freedom House, 'Kenya,' 10 March 2016, <https://freedomhouse.org/report/freedom-press/2016/kenya>
49 (accessed 13 August 2018).

50 ¹⁷ Murithi Mutiga, 'Journalist's Murder Prompts Fears for Press Freedom in Kenya,' *Guardian*, 3 May 2015,
51 <http://www.theguardian.com/world/2015/may/03/journalists-prompts-fears-for-press-freedom-in-kenya>
52 (accessed 13 August 2018).

53 ¹⁸ Joanne Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State
54 in Foreign Courts,' 2011, <https://www.chathamhouse.org/publications/papers/view/179865> (accessed 13
55 August 2018); Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for
56 International Crimes? The Ghaddafi Case before the French Cour de Cassation,' *European Journal of
57 International Law* 12(3) (2001): 595–612.

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3 UN-sponsored ad hoc tribunals of the mid-1990s¹⁹ and encapsulates the idea of crimes of such
4 magnitude that they need to be addressed, regardless of where or by whom they were committed.²⁰
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6 The institutional zenith of this practice is the ICC. Article 27 of the underpinning treaty of the court,
7 the Rome Statute, clarifies that:
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10 1. This Statute shall apply equally to all persons without any distinction based on official
11 capacity. In particular, official capacity as a Head of State or Government, a member of a
12 Government or parliament, an elected representative or a government official shall in no case
13 exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself,
14 constitute a ground for reduction of sentence.
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18 2. Immunities or special procedural rules which may attach to the official capacity of a person,
19 whether under national or international law, shall not bar the Court from exercising its
20 jurisdiction over such a person.²¹
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24 While nowadays prosecutions are hardwired in international politics as the only means to redress
25 human rights violations, the subject was heavily contested in the 1980s and 1990s. Two schools of
26 thought, pragmatism and legalism, debated the mechanisms and policies that societies should
27 implement to cope with gross human rights violations.²² On one side, pragmatist arguments, which
28 emerged after the third wave of democratization in South America and Eastern Europe, were infused
29 with the idea that punishment for gross human rights violations could be postponed during
30 situations of delicate political transformation. Jack Snyder and Leslie Vinjamuri argue that
31 'pragmatists believe that justice, in its prosecutorial acceptance, could be more pursuable in a later
32 stage of the transitional process, when institutions are stronger.'²³ Instead of favouring a false sense
33 of justice achieved, pragmatists argue that the international community should prioritize the needs
34 of societies directly affected by gross human rights violations.²⁴
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46 ¹⁹ Cesare P.R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,' *NYU*
47 *Journal of International Law and Politics* 31(4) (1999): 709–751.

48 ²⁰ Larry May, 'Le Norme Dello *Jus Cogens* e il Diritto Penale Internazionale,' *Ars Interpretandi* 6 (2001): 223–
49 248.

50 ²¹ Rome Statute of the International Criminal Court, Pub. L. No. A/CPMF.183/9 (1998).

51 ²² Lucy Marie Keller, 'UNTAC in Cambodia: From Occupation, Civil War and Genocide to Peace,' in *Max Planck*
52 *Yearbook of United Nations Law* (vol. 9), ed. Armin von Bogdandy and Rüdiger Wolfrum (Heidelberg: Max
53 Planck Institute for Comparative Public Law and International Law, 2005).

54 ²³ Leslie Vinjamuri and Jack Snyder, 'Advocacy and Scholarship in the Study of International War Crime
55 Tribunals and Transitional Justice,' *Annual Review of Political Science* 7(1) (2004): 345–346.

56 ²⁴ Charles Chernor Jalloh, 'Africa and the International Criminal Court: Collision Course or Cooperation,' *North*
57 *Carolina Central Law Review* 34 (2012): 203–229.

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3 Diametrically opposed to the pragmatist approach, legalism has potentially argued against the
4 creation of impunity gaps for gross human rights violations since the mid-1990s.²⁵ Legalist literature
5 advances that the prosecution of perpetrators of gross human rights violations can redeem the
6 suffering of victims, have a significant effect on both preventing and deterring future reiterations of
7 violations, and serve as an educational example of rule of law for societies in transition to
8 democracies, and for authoritarian regimes and failed states.²⁶ As noted, the proliferation of ad hoc
9 tribunals in the 1990s declared legalism the victor of the pragmatist/legalist divide. The watershed in
10 this sense was 1994, the year when the last fully restorative mechanisms – the South African Truth
11 and Reconciliation Commission (TRC) and the International Criminal Tribunal for Rwanda – were
12 established.²⁷

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19 While it is easy to sympathize with the idea that sitting heads of state should be held accountable
20 for their actions, the legalist turn of the international arena tends to overlook the fact that the
21 consequences of international actions will live on in the societies in which investigations take place.
22 Traditionally, criticisms of the legalist approach focus on the fact that it is externally imposed, that it
23 creates divisions in situations of social engineering, and that it is a forceful imposition of westernized
24 justice in contexts where this concept is alien. The application of this concept seems to indicate that,
25 as happened in Sudan and Kenya, prosecutions against sitting heads of state are likely to trigger a
26 domino effect that endangers local political contestants and NGOs operating in the countries under
27 investigation. This claim is potentially valid for any investigation that aims to hold accountable those
28 in positions of power. This article's focus on sitting heads of state is rooted in the idea that these
29 actions constitute the most evident assault on sovereign statehood and, as such, the dynamics of
30 exposition encapsulated by the analytical model proposed are more likely to be observed.

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39 The remaining argument unfolds in three parts. First, the exposure cycle is conceptualized. The
40 article then looks at how ICC investigations influenced domestic political dynamics in the contexts of
41 the prosecutions of Al Bashir and Kenyatta. This section outlines how these court actions justified
42 the marginalization of political contestation by enabling both governments to politicize the
43 investigations and blame political contestants for cooperating with neo-imperialist forces. The article
44 then elucidates how the creation of this neo-imperialist narrative set the basis for massive

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49 ²⁵ Geneviève Parent, 'Reconciliation and Justice after Genocide: A Theoretical Exploration,' *Genocide Studies*
50 *and Prevention* 5(3) (2010): 277–292.

51 ²⁶ Phil Clark, 'Hybridity, Holism, and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide
52 Rwanda,' *George Washington International Law Review* 39(4) (2007): 765–837.

53 ²⁷ While the experiences in Sierra Leone and Liberia still had a restorative dimension, they also had a very
54 strong punitive component. In Sierra Leone, the SCSL was tasked with adjudicating those responsible for war
55 crimes and crimes against humanity that occurred after the civil war of 1996. The Liberian TRC, unlike the
56 South African one, only had the power to recommend amnesties to the Liberian government and not to
57 directly grant them.

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3 retaliatory practices against NGOs in the two countries. It also briefly reviews the history of the
4 relationship between the two countries and NGOs, in order to show that more than just generating
5 hostility, ICC investigations sustained and amplified it. Lastly, the article concludes that the Sudanese
6 and Kenyan experiences should be considered when debating the possibilities of prosecuting sitting
7 heads of state. In this sense, a comparative analysis of the Sudanese and Kenyan situations should
8 constitute the basis for understanding the challenges that this practice faces. It is hoped that future
9 discussions about prosecuting sitting heads of state will not be stalled by principled assumptions
10 about international justice but will benefit from the analytical and empirical considerations
11 advanced in this article.
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20 THE 'EXPOSURE CYCLE' AND THE ICC'S DILEMMA

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22 This article contends that there are three major actors involved *directly* in prosecutions against
23 sitting heads of state: the ICC, governments under investigation, and political contestants and NGOs
24 that operate in the country under scrutiny. Bridging these three elements of international society
25 provides for a deeper understanding of the influence that prosecutions of sitting heads of state
26 might have on domestic contexts. The record of the ICC's implementation of this practice is
27 worrying: out of three situations (Al Bashir in Sudan, Kenyatta in Kenya and Muammar Gaddafi in
28 Libya),²⁸ the court was unable to finalize a single one. The triadic conceptualization offered in this
29 section should be seen as a first step to inquire into the potential consequences that this assault on
30 Westphalian sovereignty might hold for domestic actors.
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37 To understand why the exposure cycle can lead to disastrous humanitarian consequences, it
38 is necessary to stress that human rights scholarship has valued the existence of a heterogeneity of
39 political voices and the work of NGOs in the protection of civilians for at least the past 15 years.²⁹
40 Bruce Bueno de Mesquita and colleagues, for instance, argue that the existence of political
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45 ²⁸ The Libyan situation is not unpacked in detail here because the article aims at understanding the
46 development of an intersubjective practice that takes time to develop. The 2011 events in Libya resulted from
47 very swift international action in which the warrant of arrest by the ICC was coupled with military strategies.
48 This is on the one hand problematic in terms of decoupling the ICC from North Atlantic Treaty Organization
49 bombings. On the other, the speediness of the action makes it hard to observe the construction of more
50 complex social dynamics such as the marginalization of political contestants or NGOs.

51 ²⁹ Steven C. Poe and C. Neal Tate, 'Repression of Human Rights to Personal Integrity in the 1980s: A Global
52 Analysis,' *American Political Science Review* 88(4) (1994): 853–872; David Beetham, *Democracy and Human
53 Rights* (Cambridge: Polity, 1999); Jack Donnelly, 'Human Rights, Democracy, and Development,' *Human Rights
54 Quarterly* 21(3) (1999): 608–632; Zehra F. Arat, *Democracy and Human Rights in Developing Countries* (Lincoln,
55 NE: iUniverse, 2003); Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia, PA:
56 University of Pennsylvania Press, 2013); Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed.)
57 (London: Cornell University Press, 2013).
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3 contestation, even when minimal, is the most important institution in reducing human rights
4 violations.³⁰ Similarly, authors like Claire Mercer as well as Larry May and Stacey Hoffman advance
5 that the supposed independence from states' political calculations makes NGOs a quintessential
6 institution for democratization and human rights.³¹ This article does not formally distinguish
7 between local and international NGOs, because the Sudanese and Kenyan governments targeted
8 both these actors after the ICC initiated operations in the two contexts. It is, however, important to
9 note that, because of their outreach capabilities, international NGOs are more likely to draw the
10 international community's attention to human rights violations and are hence more likely to become
11 the targets of authoritarian practices aimed at silencing them. However, this article shows that
12 national NGOs are not immune to governmental retaliation either, especially when they voice their
13 concerns on the legitimacy of the sitting government. In a sort of 'trickle down' effect, the work of
14 both local and international NGOs becomes especially problematic for governments under ICC
15 investigation, and hence both become prime targets of retaliation.

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24 Political pluralism and NGOs are not only related directly to the protection of human rights,
25 but are also instrumental for the operations of the ICC. Within contexts of established pluralism,
26 governments are more subject to domestic critiques of their behaviour, for instance when
27 representatives of moderate forces in nondemocratic contexts signal the proliferation of war crimes
28 or human rights violations.

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The existence of political pluralism can sustain the efforts of prosecution by providing
evidence, victims and witnesses to the ICC. Similarly, NGOs like Amnesty International and Human
Rights Watch also act as a system of checking by releasing annual reports that can sustain the claims
for humanitarian intervention in a specific country (as happened in Kenya and Sudan).³² In this
sense, both political contestants and NGOs are crucial components for implementing the ICC's
decisions.

The exposure cycle bridges three sets of actors that enter a moment of high intersubjectivity
when the ICC attempts to prosecute a sitting head of state. The relationship is visualized in Figure 1.

³⁰ Bruce Bueno de Mesquita, George W. Downs, Alastair Smith and Feryal Marie Cherif, 'Thinking inside the Box: A Closer Look at Democracy and Human Rights,' *International Studies Quarterly* 49(3) (2005): 439–457.

³¹ Larry May and Stacey Hoffman, *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage, MD: Rowman & Littlefield, 1991); Claire Mercer, 'NGOs, Civil Society and Democratization: A Critical Review of the Literature,' *Progress in Development Studies* 2(1) (2002): 5–22.

³² Human Rights First, 'The Role of Human Rights NGOs in Relation to ICC Investigations,' September 2004, https://www.humanrightsfirst.org/wp-content/uploads/pdf/NGO_Role_Discussion_Paper.pdf (accessed 12 August 2018).

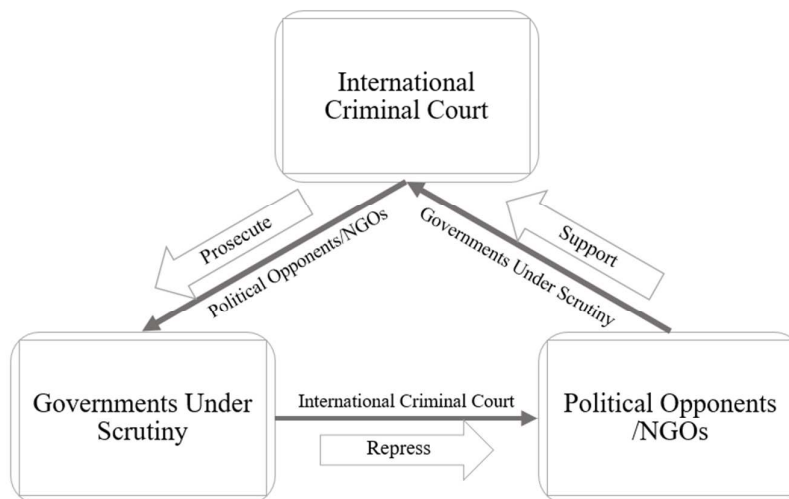


Figure 1. Exposure cycle

Political contestants and NGOs expose nondemocratic governments to the scrutiny of the ICC and, by doing so, they support the work of the court. Similarly, the ICC, by prosecuting nondemocratic governments, exposes the role that political contestants and NGOs played in setting up the investigation. This exposure cycle leads to the repression of political contestants and NGOs, revealing the dangers of cooperating with the court for these two actors. The analysis that follows focuses on the last moment of relation between nondemocratic governments, political contestants and NGOs.³³ Because local political contestants and NGOs also contribute to the ICC's evidence-gathering mechanism, the existence of the exposure cycle creates a quasi-paradoxical situation in which: i) local political contestants and NGOs are essential instruments for the ICC to attempt to prosecute sitting heads of state; and ii) the mere possibility of an ICC action against a sitting head of state endangers political contestants and NGOs.

This gives birth to the 'ICC's dilemma.' On the one hand, moderate political formations and NGOs could support the ICC in an attempt to expose governments under scrutiny and gain political relevance. On the other, they are aware that any form of cooperation with the ICC is likely to result in their marginalization.

³³ The other relational moments emerge implicitly from the analysis. They entail highlighting how political contestants exploited human rights narratives to undermine the party subject to ICC investigation; how NGOs tried to alert the international community to human rights violations; and how this sustained calls for prosecution by the ICC.

SILENCING CONTESTATION: THE ICC AND DOMESTIC POLITICAL DYNAMICS

Sudan: Closing the Ranks behind Al Bashir

The history between Al Bashir and the ICC can be traced back to early 2005, when a UN report accused the Sudanese government of systematic abuses in Darfur.³⁴ Following the publication of the report, the UN Security Council referred those accused of war crimes in Darfur to the ICC. The first signs of an embryonic tension between Sudan and the ICC appeared when, in 2007, ICC judges issued their first arrest warrants for Ahmed Haroun and Ali Muhammad Ali Abd-Al-Rahman, with Al Bashir claiming that the court did not have jurisdiction over Sudan. Shortly after this, members of the Sudanese People's Liberation Movement (SPLM) that were included in the government of national unity as a result of the peace deal brokered in 2005, and that historically supported the ICC,³⁵ suspended their participation in the government.³⁶ Representatives of rebel forces in Sudan continued in their support for the ICC even when they themselves were faced with allegations. Illustrative is the case of Abu Garda, who voluntarily went to The Hague and was dismissed by the judges of the ICC because of insufficient evidence.³⁷

In 2008, tensions between the Sudanese government and the ICC escalated when the then prosecutor, Luis Moreno Ocampo, asked the judges of the court for an arrest warrant for Al Bashir. The warrant was eventually released on 4 March 2009, charging Al Bashir with seven counts of war crimes and crimes against humanity, making the Sudanese president the first sitting head of state to be indicted. Shortly after the release of the arrest warrant, many leaders of the African Union stated that they would not have cooperated with the court on the matter. In 2010, along with the peace deal signed between the Justice and Equality Movement and the Al Bashir government, the Sudanese president faced a second arrest warrant that included charges of genocide. The spillover effects of these dynamics between the ICC and Al Bashir are outlined below, with particular reference to the fact that the 'internationalist' and *comparatively* more moderate line within the National Congress Party (NCP) was marginalized as it jarred with Al Bashir's strategy to derail the investigation.

³⁴ ICC, 'Darfur, Sudan,' <https://www.icc-cpi.int/darfur> (accessed 13 August 2018).

³⁵ Sarah M.H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan,' *European Journal of International Law* 21(4) (2010): 941–965.

³⁶ Sudan Tribune, 'SPLM Withdraw from Sudan National Unity Government,' <http://sudantribune.com/spip.php?article24184> (accessed 13 August 2018).

³⁷ 'Decision on the Confirmation of Charges,' ICC-02/05-02/09-243-Red, Pre-Trial Chamber I (8 February 2010).

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3 The influence of ICC proceedings on Sudanese politics is not limited to the different positions
4 of the leaders of Darfuri movements and Sudanese authorities.³⁸ Mohamed el-Shabik notes that, in
5 the 2010s, 'the National Congress Party (NCP) gradually shifted away from permitting small degrees
6 of openness to adopting the tyranny of absolutism.'³⁹ In fact, after the expiration of the CPA in
7 2010⁴⁰ and the release of the second arrest warrant against Al Bashir,⁴¹ the more 'international' line
8 within the NCP was progressively marginalized. The figure that most embodied a will to engage more
9 proactively with international actors was Sudan's vice-president, Ali Osman Taha. Einas Ahmed,
10 associate researcher at Les Afriques dans Le Monde, argues that Taha 'has a reputation of a
11 statesman, with a distinguished history in the National Islamic Front (NIF), and with good
12 communication skills and rapport with international actors.'⁴² Taha was incredibly popular after the
13 signing of the CPA agreement,⁴³ having been described by many observers as the true mind behind
14 it.⁴⁴ The 'New Sudan' envisioned by him would encompass being more open to international actors
15 as well as transforming the structure of the NCP to allow for more contestation of Al Bashir's rule.⁴⁵
16 Taha's stance is best exemplified by his critiques of the Al Bashir government for not cooperating
17 with international forces to solve the Darfur crisis.⁴⁶ The *Sudan Tribune* noted that the CPA lay at the
18 heart of the differences between Taha and Al Bashir, with the former pushing to appoint ministers
19 loyal to the CPA, and the latter de facto appointing ministers hostile to it.⁴⁷ If Taha's internationalism
20 was an asset for the CPA, it became a problem after the release of the arrest warrants. It is worth
21 noting that Taha, unlike members of the SPLM, has consistently opposed the ICC. But Taha's
22 international outlook clashed with the infusion of antiwestern narratives so central to Al Bashir's
23 strategy against the ICC.
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41 ³⁸ For a full account of these positions, see, Nouwen and Werner, supra n 35.

42 ³⁹ Mohamed el-Shabik, 'Omar Al-Bashir's Cabinet Reshuffle and Absolute Rule in Sudan,' <https://elshabik.blogspot.com/2013/12/omar-al-bashirs-cabinet-reshuffle.html> (accessed 13 August 2018).

43 ⁴⁰ In 2005, members of the government of Sudan and of the SPLM signed a CPA to end the second Sudanese civil war. The plan, among other things, called for the withdrawal of northern troops from the south, national elections, a census and the sharing of oil revenues. It also called for power sharing and set the time for the independence referendum for southern Sudan.

44 ⁴¹ ICC, 'Al Bashir Case,' <https://www.icc-cpi.int/darfur/albashir> (accessed 13 August 2018).

45 ⁴² Gunnar M. Sørbø and Abdel Ghaffar M. Ahmed, eds., *Sudan Divided: Continuing Conflict in a Contested State* (New York: Springer, 2013), 82.

46 ⁴³ 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).

47 ⁴⁴ Watts Roba Gibia Nyirigwa, 'Why All These Dispute between Bashir and Taha?' *Sudan Tribune*, 30 March 2006.

48 ⁴⁵ Ibid.

49 ⁴⁶ 'Sudan's Taha Criticises Al-Bashir Rejection of Darfur UN Force,' *Sudan Tribune*, 26 July 2006, <http://www.sudantribune.com/spip.php?article16801> (accessed 13 August 2018).

50 ⁴⁷ Ibid.

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3 In 2011, some months after the release of the second warrant of arrest⁴⁸ and one year after
4 South Sudan formally parted from the North, Taha started to progressively lose influence in tandem
5 with Al Bashir's boost in popularity. This eventually led to Taha's resignation in 2013, and the
6 strengthening of the alliance between his historical rival Nafie Ali Nafie and Al Bashir.⁴⁹ While the
7 official position is that Taha stepped down 'voluntarily because he supported the change to open
8 more opportunities to the new generations,'⁵⁰ many have speculated that in fact he was forced out
9 of office because of his international stance.⁵¹ The resignation of Taha, at least symbolically, echoes
10 what Al Bashir said earlier in 2013:

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16 the decision of the ICC prosecutor is already solidifying our internal front, the internal front
17 of our Sudanese people, and that is the source of our power and we will fight their actions.⁵²
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20 This solidification manifested in the appointment of ministers who were loyal to him, like Nafie,
21 and the appointment as vice-president of Lieutenant General Bakri Hassan Salih, a loyalist of the Al
22 Bashir regime.⁵³ The appointment of Salih and the solidification of the Al Bashir–Nafie relationship,
23 as well as the marginalization of oppositional leaders like Taha, are strongly linked. As noted by
24 Patrick Wegner:
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28 The rally effect for al Bashir can be measured in the loss of influence of the comparatively
29 moderate Vice President Ali Osman Taha, who was very powerful between 2005 and 2007
30 after the CPA agreement. He was eclipsed by hardliner Nafie Ali Nafie, a hardliner and one of
31 the major supporters of the violent governmental strategies in Darfur.⁵⁴
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38 ⁴⁸ The release of the second warrant of arrest is of particular significance. Before 2009, no sitting head of state
39 had ever been prosecuted by an international tribunal, so it was unclear how serious and credible the ICC was.
40 However, the release of the second warrant of arrest against Al Bashir, the opening of the investigation in
41 Kenya, and the indictment of Gaddafi by the ICC signalled that the ICC really had the intention of bringing
42 sitting heads of state to justice. As such, the second warrant of arrest against Al Bashir has to be considered
43 the first sign of a credible commitment by the court to deliver on this new mandate.

44 ⁴⁹ El-Shabik, supra n 39.

45 ⁵⁰ Mohammed Amin, 'Sudan First VP Resigns,' *Daily Monitor*, 8 December 2013,
46 <http://www.monitor.co.ug/News/Sudan-first-VP-resigns/688324-2103162-mkrrajz/index.html> (accessed 13
47 August 2018).

48 ⁵¹ IEnough, 'What the Warrant Means: Justice, Peace, and the Key Actors in Sudan,' 12 February 2009,
49 <https://enoughproject.org/reports/what-warrant-means-justice-peace-and-key-actors-sudan> (accessed 21
50 August 2018).

51 ⁵² Thomas Grove, 'Sudan's Bashir Says Strengthened by Arrest Bid,' *Reuters*, 20 August 2008,
52 [https://www.reuters.com/article/us-warcrimes-sudan-bashir-exclusive/sudans-bashir-says-strengthened-by-](https://www.reuters.com/article/us-warcrimes-sudan-bashir-exclusive/sudans-bashir-says-strengthened-by-arrest-bid-idUSLK18080420080820)
53 [arrest-bid-idUSLK18080420080820](https://www.reuters.com/article/us-warcrimes-sudan-bashir-exclusive/sudans-bashir-says-strengthened-by-arrest-bid-idUSLK18080420080820) (accessed 21 August 2018).

54 ⁵³ 'Sudan Appoints New Central Bank Governor,' *Reuters*, 15 December 2013,
55 [https://uk.reuters.com/article/uk-sudan-centralbank/sudan-appoints-new-central-bank-governor-](https://uk.reuters.com/article/uk-sudan-centralbank/sudan-appoints-new-central-bank-governor-idUKBRE9BE0AU20131215)
56 [idUKBRE9BE0AU20131215](https://uk.reuters.com/article/uk-sudan-centralbank/sudan-appoints-new-central-bank-governor-idUKBRE9BE0AU20131215)(accessed 21 August 2018).

57 ⁵⁴ Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace–*
58 *Justice Divide* (Cambridge: Cambridge University Press, 2015), 141.

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3 To summarize, the infusion of antiwestern sentiments in the Sudanese society eased the
4 solidification of the ranks of the NCP, and the marginalization of those who promoted more
5 cooperation with international actors. In fact, some argued that the warrants of arrest issued by the
6 ICC increased Al Bashir's motivation to remain in power.⁵⁵ Furthermore, the prosecution justified the
7 potent revival of longstanding antiwestern narratives.⁵⁶ Evidence of this can be found, for example,
8 in a statement made by a presidential advisor to Al Bashir who said 'that the Western media
9 campaign around the Darfur conflict served to cover up the US failure in Iraq.'⁵⁷ Al Bashir himself
10 sustained this view in 2010, claiming that 'Crusaders and Zionists were targeting Muslims all over the
11 world.'⁵⁸ Al Bashir's desire to hamper the ICC's investigation via the promotion of antiwestern
12 narratives jarred with Taha's international profile and comparatively moderate stance. The
13 combination of these factors resulted in more and more people starting to support Al Bashir after
14 the start of the investigations.⁵⁹ As testimony to this, huge demonstrations with thousands rallying in
15 Khartoum followed the announcement by the ICC of the indictment of Al Bashir,⁶⁰ with the army and
16 several tribe members swearing oaths of allegiance to the Sudanese president.⁶¹ As a result, the ICC
17 progressively lost legitimacy in Sudan, as demonstrated by the numerous manifestations of solidarity
18 that many Sudanese pledged to their president. In a context in which any foreign meddling with
19 Sudanese affairs has been effectively depicted as neo-imperialism, the ICC warrants of arrest
20 solidified Al Bashir's accusations against the more internationalist forces within the NCP, such as
21 Taha.
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36 **Kenya: Formation of the Jubilee Alliance**

37 Tracing the history of the pre-2007 coalition strategies explains how William Ruto and Kenyatta, who
38 became, respectively, vice-president and president of Kenya in 2013, at the time stood on opposite
39 sides. Kenyan electoral preferences are still largely determined by ethnicity and kinship, with the
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46 ⁵⁵ Jonathan Steele, 'The ICC Should Not Indict Omar Al-Bashir,' *Guardian*, 11 July 2008,
47 <https://www.theguardian.com/commentisfree/2008/jul/11/sudan.unitednations> (accessed 23 August 2018).

48 ⁵⁶ Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial
49 Romanticism with Political Realism,' *Human Rights Quarterly* 31(3) (2009): 624–654.

50 ⁵⁷ Wegner, supra n 54 at 140.

51 ⁵⁸ *Ibid.*, 140–141.

52 ⁵⁹ Richard Cockett, *Sudan: Darfur and the Failure of an African State* (New Haven, CT: Yale University Press,
53 2010).

54 ⁶⁰ 'Thousands Protest for Bashir in Khartoum,' <http://www.alarabiya.net/articles/2009/03/06/67859.html>
55 (accessed 3 December 2015).

56 ⁶¹ 'Warrant Issued for Sudan's Leader,' *BBC News*, 4 March 2009,
57 <http://news.bbc.co.uk/1/hi/world/africa/7923102.stm> (accessed 15 August 2018).

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3 most prominent tribes being the Kalenjin, the Kikuyu and the Luo.⁶² At the time of the 2007
4 elections, Kibaki represented the dominant Kikuyu ethnic group, particularly dominant in central
5 Kenya. His main contestant, Odinga, stood for the Luo ethnic group. Odinga was especially popular in
6 western Kenya, in the Rift Valley and in the Coast Province, and represented the Luhya and the
7 Kalenjin groups, as well as Muslims from the Coast Province. At the time of the electoral campaign,
8 the Orange Democratic Movement (ODM)-Kenya coalition, led by Odinga, was widely considered the
9 fiercest opponent of Kibaki. Among those who left the ODM, the present-day president, Kenyatta,
10 turned from opposing Kibaki to supporting him. The new coalition that formed on the ashes of the
11 ODM-Kenya alliance, the Party of National Unity (PNU), encompassed members of Kibaki's political
12 party and former members of the opposition like Kenyatta, and drew support from ethnic groups
13 such as the Kalenjin and the Luo. The opposition to the PNU was composed mainly of members of
14 the original ODM, including Ruto. Kenyatta and Ruto were not just politically opposed, but also came
15 from different cultural backgrounds – Kenyatta represented the Kikuyu, while Ruto represented the
16 Kalenjin.⁶³

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26 From this perspective, it is interesting to question the extent to which it is possible to claim
27 that the ICC sustained a coalition between the two, embodied in the formation of the Jubilee
28 Alliance. When the widely contested Electoral Commission of Kenya declared Kibaki the winner of
29 the 2007 election, it fuelled widespread tension over the fairness of the electoral process. In this
30 context, Kenya experienced an unprecedented wave of violence. Over a period of two months, after
31 the presidential elections of 27 December 2007, more than 1,000 people were killed and at least
32 700,000 were displaced.⁶⁴ As a consequence of international pressures, the ICC opened an
33 investigation *proprio motu* to shed some light on the violent events that characterized the formation
34 of the Jubilee Alliance that eventually won the 2010 elections.

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40 On 31 March 2010, two years after the wave of violence had ended, the Pre-Trial Chamber II
41 of the ICC opened the investigation following serious allegations of governmental involvement in the
42 violence. In early April 2011, six suspects (the 'Ocampo six,' named after the head prosecutor of the
43 ICC at that time) appeared voluntarily before the court, including the deputy prime minister, two
44 cabinet ministers and the former head of the police force.⁶⁵ The investigation was split into two

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50 ⁶² Mba Chidi Nmaju, 'Violence in Kenya: Any Role for the ICC in the Quest for Accountability?' *African Journal*
51 *of Legal Studies* 3(1) (2009): 78–95.

52 ⁶³ Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law,'
53 *Journal of Eastern African Studies* 8(1) (2014): 25–42.

54 ⁶⁴ Gabrielle Lynch and Miša Zgonec-Rožej, 'The ICC Intervention in Kenya,' Chatham House Programme Paper
55 AFP/ILP 1 (2013), 2.

56 ⁶⁵ The confirmation of charges hearings in *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and*
57 *Joshua Arap Sang* ICC-01/09-01/11 took place from 1 to 8 September 2011; the confirmation of charges

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3 cases. In the first group the ICC accused Ruto, Henry Kosgey and Joshua Sang. These three all
4 belonged to the Kalenjin community, accused of targeting Kikuyu supporters of Kibaki in the north of
5 the Rift Valley.⁶⁶ These crimes were 'allegedly committed against PNU supporters as part of a plan to
6 gain power in the northern parts of Rift Valley Province, and to punish and drive out PNU
7 supporters.'⁶⁷ The second case was directed against Francis Muthaura, Kenyatta and Muhammed
8 Hussein Ali for allegedly hiring a Kikuyu militia to retaliate against ODM's anti-Kikuyu preelectoral
9 violence.⁶⁸

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14 Echoing what happened in Sudan, the inquiry raised the stakes for those under investigation
15 to access power. As Susanne Mueller notes, 'winning the election was part of a key Defense strategy
16 to undercut the ICC by seizing political power, flexing it to deflect the ICC, and opening up the
17 possibility of not showing up for trial if all else failed.'⁶⁹ In this sense, the investigation fuelled the
18 formation of the Jubilee Alliance between Kenyatta and Ruto for the 2013 elections⁷⁰ because, as
19 noted by Christine Bjork and Juanita Goebertus, winning the elections in this context meant also
20 being able to derail the investigation.⁷¹

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26 Along with the alliance signed by Kenyatta and Ruto, the most prominent oppositional figure
27 to the Jubilee Alliance, Odinga, started losing credibility. Questions about him being left out of the
28 Ocampo six, or about a radio station leader being indicted (Sang) while others remained free to
29 voice their concerns, strengthened the view that the trial was as politicized as Kenyatta and Ruto
30 claimed.⁷² With the two explicitly accusing Odinga of conspiring with foreigners against them,⁷³ once
31 the court named and charged suspects, support for the ICC dropped, particularly in the heartlands of
32 the accused, the Central Province and the Rift Valley. In 2010,

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40 hearings in *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Muhammed Hussein Ali* ICC-
41 01/09-02/11 took place from 21 September to 5 October 2011. However, one of the three Pre-Trial Chamber
42 judges issued a dissenting opinion, arguing that it was not clear that the alleged crimes against humanity were
43 committed as part of a calculated 'organizational policy' to attack civilians, as stipulated in the Rome Statute.
44 See, 'Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's
45 Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang",'
46 ICC-01/09-01/11-2, <https://www.icc-cpi.int/pages/record.aspx?uri=1039488> (accessed 13 August 2018); art.
47 7(2)(a) of the Rome Statute; L. Muthoni Wanyeki, 'The International Criminal Court's Cases in Kenya: Origin
48 and Impact,' Institute for Security Studies Paper No. 237 (2012).

49 ⁶⁶ Mueller, *supra* n 63.

50 ⁶⁷ Lynch and Zgonec-Rozej, *supra* n 64 at 6.

51 ⁶⁸ Mueller, *supra* n 63.

52 ⁶⁹ *Ibid.*, 26.

53 ⁷⁰ Lynch and Zgonec-Rozej, *supra* n 64.

54 ⁷¹ Christine Bjork and Juanita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in
55 Rule of Law Strengthening in Kenya,' *Yale Human Rights and Development Law Journal* 14(1) (2011): 205–229.

56 ⁷² International Crisis Group, *supra* n 8.

57 ⁷³ *Ibid.*

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3 68% of the country wanted the ICC to prosecute the suspects, including 73% in Central
4 Province and 61% in the Rift Valley...By mid-July 2013, only 39% of those polled wanted trials
5 to take place in The Hague, falling to only 7% in Central Province and 24% in Rift Valley.⁷⁴
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8 As a consequence of this decreased support for the ICC, and the progressive scepticism that
9 plagued Odinga's reputation, Kenyatta and Ruto both gained popularity. This was due to a
10 commonly expressed opinion that the ICC's intervention was a political ploy by Odinga and his
11 purported 'western allies' to ensure the electoral victory of the Coalition for Reform and Democracy
12 (CORD). In this narrative, Odinga is seen to bear greater responsibility for the 2007/2008
13 postelection crisis. As noted by Gabrielle Lynch and Miša Zgonec-Rožej, the formation of the Jubilee
14 Alliance, and the investigations against Kenyatta and Ruto 'boosted their popularity among parts of
15 the Kenyan electorate that dispute ICC allegations that the post-election violence of 2007–08 was
16 pre-planned by organized ethnic networks.'⁷⁵ This echoes what happened in Sudan, when Taha
17 progressively lost support in concomitance with the increasing antiwestern sentiment in the country,
18 resulting in a boost of popularity for Al Bashir.
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26 So the ICC fuelled the creation of the Jubilee Alliance among two forces that had historically
27 opposed each other, while undermining the only other credible candidate. In fact, the partiality of
28 the ICC investigation in Kenya, which made clear a priori that Odinga was not to be investigated,
29 allowed members of the Jubilee Alliance to rally against the former president and blame him for
30 cooperating with neocolonialist western powers. The marginalization of Odinga, and the
31 normalization of the relationship between Kenyatta and Ruto, led to the victory of the Jubilee
32 Alliance in 2013. Since the Jubilee Alliance won by a very narrow margin, it seems legitimate to
33 speculate that this would not have happened without the formation of the 'Uhuruto' coalition. Here
34 lies the most evident difference between the two cases. Because of the diverse electoral
35 apparatuses of the two countries, Al Bashir politicized the operations of the ICC, not to build an
36 alliance to win the elections (he did not need to), but rather to close the ranks behind him. Through
37 instrumentalizing the court, Kenyatta got rid of Odinga. Concurrently, he ensured that the leader of
38 the CORD and Ruto did not form a winning coalition by offering Ruto a safe way to escape
39 prosecution through the formation of the Jubilee Alliance.
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49 In summary, the two situations illustrate the relationship between political pluralism and ICC
50 investigations against heads of state in two ways: first, these are likely to raise the stakes for those
51 under investigation to maintain or access power (and, by doing so, to derail prosecutions). Second,
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55 ⁷⁴ Mueller, *supra* n 63 at 29.

56 ⁷⁵ Lynch and Zgonec-Rožej, *supra* n 64 at 2.
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3 investigations can influence the creation or disaggregation of political alliances by providing the
4 discursive structures to justify the infusion of neo-imperialist discourses in the electoral process.
5 Along with the deterioration of the ICC's credibility, this marginalized Taha in Sudan and Odinga in
6 Kenya.
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10 **BACKLASHES ON NGOs**

11 **Sudan and NGOs: 'First-Class Espionage'**

12 Wegner argues that the Al Bashir government's opposition to NGOs is not something that emerged
13 in 2009, after the issuing of arrest warrants. He details three moments that clearly illustrate the
14 Sudanese president's longstanding animosity towards NGOs. As early as 28 October 2004, the
15 president called western aid agencies 'enemies of Sudan'⁷⁶ and in March 2005 the government
16 accused 'Oxfam, MSF [*Médecins sans Frontières*/Doctors without Borders] and the Norwegian
17 Refugee Council of conducting a political campaign on rape in Darfur and arrested MSF staff
18 members.'⁷⁷
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26 After the opening of the investigation by the ICC in June 2005, governmental hostility
27 towards NGOs became particularly evident. The case of the International Rescue Committee (IRC) is
28 indicative of how NGOs found themselves in a difficult situation after 2005. Protection programme
29 coordinator Joseph Aguezzant circulated a memorandum in 2005 that outlined guidelines for IRC
30 cooperation with the court, justifying cooperation 'because the ICC's work would help Sudan's
31 people and bring criminals to justice.'⁷⁸ IRC spokeswoman Melissa Winkler at first acknowledged the
32 IRC's serious consideration of Aguezzant's proposal but later denied that the memorandum was
33 given any serious consideration.⁷⁹ 'The draft document was reviewed by IRC senior management and
34 rejected as IRC policy,' Winkler said, commenting further that 'the policy that was later adopted
35 specifically directs IRC staff members not to communicate in any way with the ICC and not to
36 support ICC investigations.'⁸⁰ On 21 February 2006, the Al Bashir government 'passed the
37 Organization of Humanitarian and Voluntary Work Act, requiring NGOs to register with the
38 Humanitarian Aid Commission (HAC), which started obstructing the work of the agencies by different
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49 ⁷⁶ Wegner, *supra* n 54 at 184.

50 ⁷⁷ Frank Chalk and Danielle Kelton, 'Mass-Atrocity Crimes in Darfur and the Response of Government of Sudan
51 Media to International Pressure,' in *The World and Darfur: International Response to Crimes against Humanity
52 in Western Sudan*, ed. Amanda F. Grzyb (Montreal: McGill-Queen's University Press, 2009), 115.

53 ⁷⁸ Louis Charbonneau, 'NGO Expelled from Darfur Considered ICC Cooperation,' *Reuters*, 16 March 2009,
54 <http://www.reuters.com/article/2009/03/16/us-sudan-warcrimes-ngo-idUSTRE52F6SX20090316> (accessed 13
55 August 2018).

56 ⁷⁹ *Ibid.*

57 ⁸⁰ *Ibid.*

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3 bureaucratic means,⁸¹ and in 2007 'president Al Bashir started to encourage attacks on
4 humanitarian aid workers.'⁸² In the weeks following the opening of the investigation, Al Bashir
5 intensified the 'surveillance of opposition and human rights organizations.'⁸³ In this sense, much like
6 the revival of colonial narratives, what happened after the issuing of the arrest warrants in 2009
7 seems an amplification of longstanding tensions. The argument is not so much that prosecuting
8 sitting heads of state creates tensions with NGOs *ex novo*. Rather, as soon as the ICC gets too close
9 to the most powerful, tightening the governmental grip on NGOs becomes even more important in
10 the authoritarian playbook. If from 2005 to 2009 the tension between the government and NGOs
11 manifested in the form of threats (or expulsions of single agencies), since 2009 the government has
12 implemented the threats in the form of a mass expulsion.
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19 In fact, hours after the warrant of arrest against Al Bashir was issued, the government of
20 Sudan immediately expelled 14 international aid agencies.⁸⁴ Well-known NGOs expelled from Darfur
21 include the French aid organization MSF, Britain's Oxfam and the American NGO CARE. The IRC was
22 one of the initial foreign humanitarian NGOs expelled by Sudan's government for allegedly
23 cooperating with the ICC.⁸⁵ Despite the 2005 controversy outlined above, the IRC continued to
24 operate in Sudan until the ICC released the warrants of arrest. Kurt Tjossem, who oversees IRC
25 programmes in the Horn and East Africa, declared in 2009 that:
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31 The final IRC staff have now left northern Sudan following an exhausting, distressing and
32 frustrating two-month process, which included the forced closure of our offices, seizure of
33 assets and termination of staff contracts.⁸⁶
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36 Accusations against them by Sudan's UN envoy Abdalmahmood Abdalhaleem ranged from
37 assisting the ICC investigation to 'first-class espionage.'⁸⁷ Al Bashir echoed these words by saying that
38 he would act 'decisively' against anyone threatening the country's stability.⁸⁸ This is an interesting
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44 ⁸¹ Wegner, *supra* n 54 at 185.

45 ⁸² Julie Flint and Alex de Waal, *Darfur: A New History of a Long War* (London: Zed Books, 2008), 197.

46 ⁸³ Wegner, *supra* n 54 at 140.

47 ⁸⁴ Alex de Waal and Gregory H. Stanton, 'Should President Omar Al-Bashir of Sudan Be Charged and Arrested
48 by the International Criminal Court? An Exchange of Views,' *Genocide Studies and Prevention* 4(3) (2009): 329–
49 353.

50 ⁸⁵ Charbonneau, *supra* n 78.

51 ⁸⁶ 'IRC Officially Leaves Darfur, North and East Sudan,' *ReliefWeb*, 16 May 2009,
52 <https://reliefweb.int/report/sudan/irc-officially-leaves-darfur-north-and-east-sudan> (accessed 13 August
53 2018).

54 ⁸⁷ Charbonneau, *supra* n 78.

55 ⁸⁸ Xan Rice and Tania Branigan, 'Sudanese President Omar Al-Bashir Expels Aid Agencies,' *Guardian*, 5 March
56 2009, <http://www.theguardian.com/world/2009/mar/05/sudan-aid-agencies-expelled> (accessed 21 August
57 2018).

dynamic because it highlights that, in the grammar of the Al Bashir government, NGOs became spies of the West that should be expelled.

The remarks from high-ranked members of the NCP, coupled with the timing of the expulsions, seem to leave little room for doubt regarding the relationship between the ICC's investigation and the government's tightening grip on NGOs. Even by assuming that the warrants of arrest merely provided a justification for Al Bashir to harshen longstanding policies, it is legitimate to ask if the governmental stance towards NGOs would have developed in the same way without the ICC's involvement, and also without the ICC going after Al Bashir.

Kenya and NGO 'Terrorism'

Comparatively, the situation in Kenya for civil society groups followed a similar pattern to the one in Sudan. Many analysts claim that civil society groups, and among them a plethora of NGOs, which

had been highly effective in voter education and electoral observation over the previous 15 years did not perform as well in 2007, perhaps because they now found themselves divided in their political loyalties.⁸⁹

In Kenya as well, governmental hostility towards NGOs can be traced back to well before the ICC investigations. Cecelia Lynch identifies three rounds characterizing the tension between the Kenyan government and NGOs since the early 1990s.⁹⁰

That said, the investigations against Kenyatta and Ruto in 2009 revived the debate about the role of NGOs in the country and led to the perception that some of those groups represented 'illegitimate external interference in Kenyan politics.'⁹¹ Peter Aling'o and Sebastian Gatimu have no doubt about the relationship between the ICC and the expulsion of NGOs. They argue that the Public Benefits Organizations' Act was nothing more than governmental retaliation. This is particularly evident in a report they wrote for the Institute of Strategic Studies in Nairobi, where they claim that:

the current siege on NGOs can be traced back to the 2007/8 post-election violence and the subsequent indictment by the International Criminal Court (ICC) of President Kenyatta and his Deputy, William Ruto. NGOs are perceived by the ruling Jubilee coalition and its supporters to

⁸⁹ Department for International Development, 'Elections in Kenya in 2007,' <https://www.gov.uk/government/publications/elections-in-kenya-in-2007> (accessed 21 August 2018), 3–4.

⁹⁰ Cecelia Lynch, 'Kenya vs. NGOs: Round 3?' *CIHA Blog*, 11 February 2015, <http://www.cihablog.com/kenya-vs-ngos-round-3/> (accessed 13 August 2018).

⁹¹ Chandra Lekha Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact,' *International Criminal Law Review* 12(2) (2012): 224.

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3 have provided critical help to the ICC in collecting evidence and preparing witnesses in the
4 ongoing Kenyan ICC cases, and consistently advocating for accountability and justice through
5 the continuation of the cases.⁹²
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8 The Act resulted in the suspension of the registration of 525 NGOs in the country and the freezing
9 of their accounts.⁹³ The Kenyan NGOs Coordination Board executive director, Fazul Mahamed Yusuf,
10 declared that 15 of these 525 were linked to 'criminal activities including terrorism. The
11 investigations are being finalised and the people behind them will be prosecuted soon.'⁹⁴ Aling'o and
12 Gatimu claim that 'this kind of clampdown on civil society is the hallmark of authoritarian
13 governments with a low tolerance for independent critical voices.'⁹⁵ According to the British
14 Broadcasting Corporation, 'many fear that the government is using the threat posed by al-Shabab to
15 curb democratic freedoms.'⁹⁶ The clampdown on NGOs, as happened in Sudan, impacted on both
16 local and international agencies.
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23 But the link between the ICC's actions and governmental retaliation against NGOs is even clearer
24 in Kenya than it was in Sudan. In fact, NGOs and humanitarian agencies led (and in many ways
25 continue to lead) the process for demanding accountability from the Kenyatta government. A press
26 release issued by the Kenyan International Commission of Jurists reads:
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30 we...call upon these accused persons [including Kenyatta and Ruto] to vacate office of their
31 own volition in pursuant to the statements they issued also on the 15th December 2010 to
32 cooperate with the ICC.⁹⁷
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35 Similarly, Gladwell Otieno, Africa Centre for Open Governance executive director, voiced
36 concerns about electoral irregularities in attempting to bring the case in front of the court. The
37 tension between NGOs and the Kenyatta government reached the international stage at the
38 Assembly of State Parties in The Hague, where a coalition of local and international NGOs sustained
39 the ICC's claims that the Kenyatta government was tampering with evidence. Otieno claimed that
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44 ⁹² Sebastian Gatimu and Peter Aling'o, 'Democracy and Development under Siege in Kenya,' Institute for
45 Security Studies, <https://www.issafrica.org/iss-today/democracy-and-development-under-siege-in-kenya>
46 (accessed 21 August 2018).

47 ⁹³ Ally Jamah, 'Jobs to Go as Uhuru Administration Revokes Registrations of 525 NGOs in Kenya, Freezes Their
48 Accounts,' *Standard Digital*, 18 December 2014, <https://www.standardmedia.co.ke/article/2000144966/jobs-to-go-as-uhuru-administration-revokes-registrations-of-525-ngos-in-kenya-freezes-their-accounts> (accessed 13
49 August 2018).
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51 ⁹⁴ *Ibid.*

52 ⁹⁵ Gatimu and Aling'o, *supra* n 92.

53 ⁹⁶ BBC News, 'Kenya "Deregisters" NGOs in Anti-Terror Clampdown,' 16 December 2014,
54 <http://www.bbc.co.uk/news/world-africa-30494259> (accessed 13 August 2018).

55 ⁹⁷ 'Africog Seeks Non-Compliance Ruling against Kenya at ICC,' *Daily Nation*, 16 May 2015,
56 <https://www.nation.co.ke/news/politics/Africog-Kenya-International-Criminal-Court/1064-2718922-1u6w6lz/index.html> (accessed 13 August 2018).
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3 'the Kenya case has run into unprecedented challenges, with eight witnesses dead/disappeared in
4 one case [Kenyatta's], and another 16 out of 42 prosecution witnesses in another case
5 withdrawing/recanting their testimony.'⁹⁸ In this sense, Otsieno Namwaya, Africa researcher at
6 Human Rights Watch, argues convincingly that the government's tightening grip on NGOs should not
7 have taken anyone by surprise. Precisely because of the active role of NGOs and civil society groups
8 in advocating in favour of the ICC, 'the Jubilee party had made it very clear that it would seek to
9 control NGOs [if] it comes to power.'⁹⁹ In essence, as soon as Kenyatta and Ruto had the power to do
10 so, they immediately sent a message to those who supported their indictments.
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16 All in all, the Sudanese and Kenyan cases support the idea that ICC investigations against
17 heads of state are likely to trigger authoritarian retaliation on civil society groups. This view finds
18 echoes in the 2009 Sudanese expulsion of roughly 20 NGOs, as well as the deregistration of more
19 than 500 organizations in Kenya. While international NGOs are generally more likely to attract the
20 interest of the government because of their international outreach, retaliation against local NGOs
21 was present in the two situations and followed very similar dynamics. In fact, both international and
22 local NGOs can help the ICC in sustaining cases against the most powerful in a country, by publishing
23 reports and acting as red lights in times of humanitarian crisis. Precisely for this reason, when the ICC
24 gets too close to the highest circles of power, the government's tightening grip on NGOs becomes
25 essential for those who want to derail the investigation. The consequences of NGO expulsions are, of
26 course, not just political. According to the Integrated Regional Information Networks, halting NGO
27 operations would leave 1.1 million Sudanese without food, 1.5 million without healthcare and at
28 least one million without drinking water.¹⁰⁰ Similarly, in the mid-2000s, NGOs and their networks
29 provided roughly 70 percent of healthcare assistance and promotion of secondary education in
30 Kenya.¹⁰¹
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47 ⁹⁸ 'Kenya in Showdown with NGOs at The Hague, Ruto's Fate Now Lies with ASP Bureau,' *WardheerNews*, 21
48 November 2015, [http://www.wardheernews.com/kenya-in-showdown-with-ngos-at-the-hague-rutos-fate-
49 now-lies-with-asp-bureau/](http://www.wardheernews.com/kenya-in-showdown-with-ngos-at-the-hague-rutos-fate-now-lies-with-asp-bureau/) (accessed 13 August 2018).

50 ⁹⁹ Simon Allison, 'THINK AGAIN: Civil Society in Kenya Is Down, but Not Out,' 5 January 2016,
51 <https://issafrica.org/iss-today/think-again-civil-society-in-kenya-is-down-but-not-out> (accessed 13 August
52 2018).

53 ¹⁰⁰ 'NGO Expulsion to Hit Darfur's Displaced,' *IRIN*, 9 March 2009,
54 <http://www.irinnews.org/news/2009/03/09/ngo-expulsion-hit-darfurs-displaced> (accessed 15 August 2018).

55 ¹⁰¹ Rose Calnin Kagawa, Andrew Anglemeyer and Dominic Montagu, 'The Scale of Faith Based Organization
56 Participation in Health Service Delivery in Developing Countries: Systemic Review and Meta-Analysis,' *PLoS
57 ONE* 7(11) (2012): e48457, <https://doi.org/10.1371/journal.pone.0048457>.

CONCLUSIONS

To conclude, it seems that ICC investigations in Sudan and Kenya helped write another page in the authoritarian playbook. Two propositions advanced in this article bear consideration. First, after seven years of contestation, the prosecutions against both Al Bashir and Kenyatta have reached an impasse. On the one hand, the ICC blames the UN Security Council for not assisting the court to follow up the Al Bashir case. With several African countries refusing to arrest the Sudanese president, the court is currently powerless to effectively continue with the investigation.¹⁰² On the other hand, the ICC has suspended the investigation in Kenya because of the lack of cooperation by the Kenyatta government. Both Al Bashir and Kenyatta remain at the head of their respective governments, and have in fact enjoyed a boost in popular support because of the actions of the ICC. This article has shown, however, that in prosecuting sitting heads of state, the ICC is likely to trigger an exposure cycle that ultimately backfires on those who cooperate with the court: NGOs and political contestants.

Sudan has a history of authoritarianism that can be traced back to the early 1960s, and this suggests that the ICC's warrants of arrest were part of a mosaic that made it possible for Al Bashir to justify the marginalization of Taha and the expulsion of NGOs. Recent Kenyan history, on the other hand, has been characterized by political contestation which, despite its often-violent nature, signals a certain attitude towards political competition. However, the ICC's investigation coupled with the power structures in Kenya significantly raised the stakes of the 2013 elections. In this respect, the prosecutions of Kenyatta and Ruto justified the formation of the Jubilee Alliance, which enjoyed the support of the two most influential ethnic groups in the country, the Kalenjin and the Kikuyu. Kenyatta and Ruto had competed over governmental positions since the late 1990s, and it seems unlikely that the ICC had no impact on their impromptu friendship. Many in fact regarded the formation of the Jubilee Alliance as part of a strategy of the Uhuruto duet to escape international prosecution.

The two cases presented in this article highlight the dangers for NGOs and political contestants of prosecutions of sitting heads of state. However, according to Geoff Dancy and colleagues:

¹⁰² Tim Murithi, 'Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan,' *Africa Development* 40(2) (2015): 73–97.

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3 research is beginning to show that human rights prosecutions are associated with
4 improvement in core human rights over the intermediate term, and, at a minimum, do not
5 exacerbate conflict or undermine democracy.¹⁰³
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8 Thus, on a global scale, the ICC is having a sought-after deterrent effect on human rights
9 violations, while hampering (or at least slowing down) democratization in specific cases, as in Sudan
10 and Kenya. This sparks discussion on the politicization of the ICC, which has been central to
11 academic narratives since the establishment of the court and continues to dominate research in the
12 field.¹⁰⁴ While most commentators warn about the dangers of using the court as a political tool,
13 Sarah Nouwen and Wouter Werner state that 'defining away the ICC's political dimensions
14 eventually undermines the Court by making it look either hypocritical or utopian.'¹⁰⁵ In line with the
15 argument presented in this article, a more political court should be aware of the impossibility of
16 prosecuting sitting heads of state in the current international arena, as well as of the consequences
17 of this practice on actors such as political contestants and NGOs. The ICC should also consider the
18 possibility that the spillover effects that emerged in Sudan and Kenya might manifest in all
19 prosecutions that target high-ranked political figures.
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27 If the court acknowledges the relevance of this scenario, situations as in Sudan and Kenya
28 should be avoided for the benefit of political contestants and NGOs, as well as for the ICC's own
29 sake. Solutions to the ICC dilemma outlined in this article will be shaped by the compromises that
30 the international community is willing to consider. One of these compromises might be abandoning
31 the idea of prosecuting sitting heads of state, but this requires reconsidering those moral
32 imperatives that underpin the idea of punitive justice that the ICC embodies.
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50 ¹⁰³ 'The ICC's Deterrent Impact – What the Evidence Shows,' *OpenGlobalRights*, 3 February 2015,
51 [http://www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-](http://www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-sikkink/icc%E2%80%99s-deterrent-impac)
52 [sikkink/icc%E2%80%99s-deterrent-impac](http://www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-sikkink/icc%E2%80%99s-deterrent-impac) (accessed 13 August 2018).

53 ¹⁰⁴ Hans Köchler, 'Global Justice or Global Revenge? The ICC and the Politicization of International Criminal
54 Justice,' <http://www.i-p-o.org/koechler-ICC-politicization-2009.pdf> (accessed 21 August 2018); Alana
55 Tiemessen, 'The International Criminal Court and the Politics of Prosecutions,' *International Journal of Human*
56 *Rights* 18(4–5) (2014): 444–461.

57 ¹⁰⁵ Nouwen and Werner, *supra* n 35 at 946.
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