

HOW THE GLOBAL WAR ON TERROR KILLED THE PROSPECT OF JUSTICE FOR KENYAN VICTIMS OF VIOLENCE

Karen Allen

Abstract

This article assesses the dynamics of resistance and cooperation by Kenyan elites to the International Criminal Court (ICC) and the ongoing pressure for reform to Kenya's security services, which were heavily implicated by a commission of inquiry into the post-election violence (PEV) of 2007/08.¹ This article highlights the specific context of the global war on terror (GWOT) and Kenya's role as a strategic partner in fighting the Somali Islamist group al-Shabaab, al-Qaeda's African affiliate, as well as being a victim of al-Shabaab attacks. The terrorism narrative served to reinforce Kenya's existing strategies of opposition. This does not imply that conflating justice and security issues was a strategy intentionally adopted from the outset. However, this article suggests that over time the utility of doing so became apparent. Moreover, the response of Kenya's leaders to events at the ICC and Kenya's resistance to security sector reform are worthy of close scrutiny. They highlight what appears to be an international realignment of principles of justice, driven by pragmatism. They also demonstrate the fragility of international justice mechanisms and how it is virtually impossible to divorce them from political contexts.

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¹ Government of Kenya, 'Commission of Inquiry into Post Election Violence' (CIPEV), Final Report, 16 October 2008.

Keywords—*International Criminal Court, strategic communications, Kenya, global war on terror, GWOT, al-Shabaab*

About the Author

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Introduction

When judges at the International Criminal Court (ICC) confirmed in March 2015 that they were ‘terminating’ the case against Kenya’s serving President Uhuru Kenyatta,² and the following year that of William Ruto,³ for their alleged roles in the 2007/08 post-election violence (PEV),⁴ it exposed the limitations of a court heavily reliant on state co-operation to function. It also threw into sharp relief the constraints of indicting a man who would become the sitting head of state, and his future deputy, in a country that is a key player in the global war on terror (GWOT). In a statement at the time, Fatou Bensouda, the Chief Prosecutor of the ICC, lamented that the people of Kenya had been ‘deprived of justice’ because of the ‘severe challenges’ associated with the case, including witness intimidation; bribery; and the withholding of information. She publicly lambasted the Kenyan government for their ‘failure to fully cooperate’.⁵ Despite this statement, there has been a noticeable absence of any long-term consequences for Kenya’s powerful political class.

This article examines the factors which helped to drive resistance by Kenyan elites to the ICC, and the extent to which Kenya’s role in fighting regional and international terrorism protected it from sanction. There is no attempt to assign a value to the apparent privileging of security over justice issues. But I conclude

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2 International Criminal Court Case № ICC-01/09-02/11, Decision on the Withdrawal of Charges Against Mr Kenyatta, 13 March 2015.

3 Questions and answers arising from the decision of no-case to answer in the case of Prosecutor v Ruto and Sang, International Criminal Court Case № ICC-01/09-01/11, [n.d].

4 The CIPEV Report documented how more than 1,100 individuals were killed many more displaced following disputed elections.

5 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges against Mr. Uhuru Muigai Kenyatta, International Criminal Court, 5 December 2014.

that Kenya's contribution to the GWOT appears to have bought it significant political capital at a critical time.

Does International Relations Theory Provide an Explanation?

The principles that underpin international justice mechanisms are frequently framed through pragmatism rather than through the paradigm of legalism.⁶ Legalism is founded on the normative belief that the principle of holding alleged criminals to account is entrenched in states with shared liberal values. In contrast, pragmatism or 'prudentialism'⁷ conceives that support for international tribunals is inconsistent, and is based on balancing 'politics, pragmatism, and normative beliefs'.

Another tool of analysis is balance of power theory which helps explain how states such as Kenya respond to power and power vested in institutions, such as the UN and ICC,⁸ by holding them in check through non-military means. This article also seeks to explain the apparent contradictions in that states such as Kenya publicly resist ICC investigations, whilst at the same time remaining party to its founding ethos, The Rome Statute.⁹ Compliance and resistance are conceived in terms of 'soft balancing', using non-military means to project power.¹⁰

It has also been instructive to examine the deterrent effect of tribunals when assessing the dynamics of opposition, or what Sikkink and Lutz describe as 'justice cascade' theory.¹¹ This idea rests on the assertion that successful human rights prosecutions shape the direction of future politics by entrenching the norm of individual criminal accountability.¹² Yet emerging scholarship, including Jelena Subotic,¹³ reveals how states are able to appropriate justice mechanisms for their own domestic agendas, thereby limiting any deterrent or justice cascade effect.

6 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton University Press, 2000).

7 Zachary D. Kaufman, *United States Law and Policy on Transitional Justice: Principles, Politics and Pragmatics* (Oxford University Press, 2012), p. 5–158.

8 Beth Elise Whitaker, 'Soft Balancing in Weak States: Evidence From Africa', *International Affairs* Vol. 86, No 5 (2010): 1109–27.

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

10 Whitaker, 'Soft Balancing'.

11 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W. W. Norton Company, 2011).

12 *Ibid.*, p. 5.

13 Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell University Press, 2016).

The current literature lacks scholarship on African agency and how domestic policy factors help to shape policies of resistance.¹⁴ This paper seeks to investigate the influence of one particular component, Kenya's active participation in the global war on terror (GWOT), and probe whether it acted as a re-enforcement mechanism for domestic strategies of opposition.

This article draws on the author's experience as a foreign correspondent for an international media platform during the time of the PEV, and the years following the ICC case. It is built on primary and secondary sources, to establish the theoretical basis upon which transitional justice functions in practice, defined by the United Nations as the 'full range of processes and mechanisms, associated with a society's attempt to come to terms with a legacy of large-scale abuses'. Primary sources, including court documents, speeches, and UN and government papers, were used as evidence of Kenya's conduct throughout the ICC process, and of the shifting responses of the international community. These sources also provide evidence of the ongoing security relationship between Kenya, Somalia, and key Western security partners. Secondary sources were used to set out the debates over established theoretical paradigms relating to transitional justice. These resources were supplemented with media commentary, blogs, and analyses to establish a descriptive narrative of events as they happened. Elite interviews, including those with diplomats, government officials the security services and members of civil society, were conducted to substantiate the findings from primary sources and shed light on the decision-making process, which often occurred behind closed doors. Elite interviews were also conducted with recipients of justice i.e. victims. A number of Freedom of Information requests were also submitted but responses were limited and vague. It is also worth noting that as strategic allies, the US and the UK adopted policies on Kenya and Somalia and terrorism that were broadly aligned but not identical. However, for the purpose of this paper they are referred to generically as 'Western powers'.

14 Stephen Brown and Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya', *African Affairs* Vol. 111, Issue 443 (April 2012): 244–60; Thomas Obel Hansen and Chandra Sriram, 'Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies', *International Journal of Transitional Justice* Vol. 9, Issue 3 (2015): 406–27; Whitacker (2010) Stephen Brown and Rosalind Raddatz, 'Dire Consequences of Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya', *Journal of Eastern African Studies* Vol. 8, Issue 1 (2014): 43–62; Gabriel Lynch, 'Electing the "Alliance of the Accused": the Success of the Jubilee Alliance in Kenya's Rift Valley', *Journal of Eastern African Studies* Vol. 8:1 (2013): 93–114; Veit Bachmann, *European External Action: The making of EU Diplomacy in Kenya*, (London: Routledge, 2018); Mueller, 'Kenya and the ICC'.

Kenya's Experience of Terrorism

When Islamist militants staged a dramatic shopping mall siege in the centre of Nairobi in 2013, Kenya's strategic links to the global war on terror (GWOT) were played out on a world stage.¹⁵ Many Kenyans described Westgate as their '9/11', underscoring Kenya's status as both a victim of terrorism regionally and internationally, and an important actor in seeking to combat it. In 2019 an attack on a prominent international hotel in Nairobi,¹⁶ which had some features of the Westgate siege, sought to remind the world of Kenya's continuing vulnerability to terrorist attacks.

Kenya has long been a key strategic partner for the West and for the UK and US in particular. During the Cold War it was an important buffer to Communist influences in East Africa and the Horn of Africa.¹⁷ By the late 1990s Kenya's role as an anchor state was cemented by virtue of its 'geopolitical position, its proximity to the Horn of Africa and to Somalia in particular.'¹⁸

In the wake of the fall of the Siad Barre regime in 1991 in Somalia, Kenya's neighbour was widely characterised as a 'lawless society where crime and radical ideologies flourished', making the region a priority for the wider GWOT.¹⁹ Over the next two and a half decades, what was initially conceived as a regional conflict²⁰ acquired features of what are called 'New Wars'—ideologically driven warfare, unconstrained by borders; attracting foreign fighters and presenting a global threat.²¹ That threat has seen Kenya, an important Western ally, become both a battleground and a recruiting pool for a new generation of Islamist fighters who associate themselves with al-Shabaab.²² Kenya's involvement as a regional policeman deepened with its military intervention into Somalia in 2011 designated '*Operation Linda Nchi*' ('Protect the Nation').²³ Kenya Defence Forces (KDF) were subsequently absorbed into the African Union Mission in Somalia (AMISOM) in 2012. The Kenyan government failed to predict the level of 'blowback' that its

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15 The siege resulted in 67 deaths.

16 '*Gunmen storm Nairobi's Dusit Hotel*' *Washington Post*, 2019.

17 Charles Hornsby, *Kenya: A History Since Independence* (I.B Tauris, 2013), p. 89.

18 The *National Security Strategy of the United States 2002*, p. 11, names Kenya as a key 'anchor' requiring 'focused engagement'.

19 Samuel Aronson, '*Kenya and the Global War on Terror: Neglecting History and Geopolitics in Approaches to Counterterrorism*', *African Journal of Criminology and Justice Studies* Vol. 7, No 1&2 (November 2013): 24-34.

20 Mary Harper, *Getting Somalia Wrong: Faith War and Hope in a Shattered State*, (Zed Books, 2017).

21 Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era*, (Stanford University Press, 2012).

22 Anneli Botha, 'Radicalisation in Kenya: Recruitment to al-Shabaab and the Mombasa Republican Council' (Institute of Security Studies, 2014).

23 Colonel Pius T. Migue et al., *Operation Linda Nchi: Kenya's Military Experience in Somalia*, (Kenya Literature Bureau, 2016).

military adventures into Somalia would deliver. Al-Shabaab justifies its escalated activity as a response to the presence of KDF on Somali soil. This in turn has contributed to growing concern about terrorism in the region.²⁴

Kenya is vulnerable to attack and presents an 'attractive target' for terrorists because of its 'geography, ethnic composition, political stability, unstable neighbours, poverty, Islamic fundamentalism and lax law enforcement'.²⁵ The KDF has received extensive training, finance, and hardware from the US, the UK, and other regional players to boost its capacity to respond to this threat.²⁶ Such close 'linkages' in fighting terrorism appear to have provided Kenya with a degree of leverage in withstanding international and domestic pressure to address challenges at home.²⁷ This 'African agency', may help us understand how Kenyan politicians seized upon Western officials' fear of violence and disorder '...to resist Western pressure for democratization and accountability for large scale political violence.'

Following the collapse of the Siad Barre regime in 1991, the United States' military footprint in Somalia was part of a wider humanitarian and peacekeeping effort under President H.W. Bush to protect relief workers.²⁸ The operation came to an abrupt end after a failed US attempt to kidnap a prominent warlord. It ended in tragedy when 18 Americans were killed, and scores of others injured in the so-called 'Black Hawk Down' incident. This led to wholesale US withdrawal from Somalia, leaving behind a power vacuum which enabled extremism to flourish.²⁹

American interest in Somalia was revived five years later after the twin attacks on the US embassies in Nairobi and Dar Es Salaam in 1998, which changed the course of US foreign policy.³⁰ As links to an emerging global terror network involving al-Qaeda's Osama Bin Laden became more apparent,³¹ Kenya itself began 'a more concerted counter terrorism strategy'.³²

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24 *Global Terrorism Database (2011–2016)*.

25 'Managing the Disruptive Aftermath of Somalia's worst Terrorist Attack', Briefing No. 131/AFRICA, International Crisis Group, 20 October 2017.

26 According to the US Congressional Research Service, 'the U.S. provides Kenya with over \$8 million in anti-terrorism law enforcement support annually. Lauren Ploch Blanchard *'Kenya, In Focus'*, Congressional Research Service, July 6, 2011

27 Brown and Raddatz, *'Dire Consequences'*, p. 46.

28 Under the principle of humanitarian intervention President Bush sanctioned the deployment of 25,000 US troops to Somalia.

29 Aronson, *'Kenya and the Global War on Terror'*, p. 28.

30 *Ibid.*, p. 24

31 Documents seized during the operation to arrest Osama Bin Laden also reveal his ties to al-Shabaab

32 Aronson, *'Kenya and the Global War on Terror'*, p. 26; After 1998 Kenya established the National Security Intelligence service to supplement the \$100 million East African Counter Terrorism Initiative. Whitaker, *'Reluctant Partners: Fighting Terrorism promoting Democracy in Kenya'*, *International Studies Perspectives* Vol. 9, Issue 3 (2008): 254–71, p. 257.

By 2003 President George W. Bush was stating publicly that ‘stabilizing Somalia is essential in sustaining the war against terrorism’,³³ as part of a wider strategy post 9/11. It led to a significant increase in political attention and resources by the United States to East Africa and the Horn of Africa to help train and equip Somali and Kenyan forces.³⁴ US terrorism funding ‘increased roughly 15 times its previous value in the immediate year following the [9/11] attack’.³⁵

At the same time, Kenya faced legal challenges and demands for greater government accountability, when in 2010 ICC indictments were issued against key leadership figures, singled out for their alleged role in Kenya’s 2007/08 PEV. There is a wealth of literature on the tension between democracy and security. Here we are concerned with the dynamics of how the two ideals have jostled for primacy during the ICC cases and the years that followed.

From the security perspective, a defining moment came in 2013 with the Westgate shopping mall attack, the biggest terrorist attack on the Kenyan homeland to date. Using social media, Al-Shabaab representatives claimed it was in retaliation for Kenya’s incursion into Somalia in 2011 but also highlighted concerns about impunity by ‘baiting the Kenyan leadership for their rampant corruption and collective targeting of the entire Muslim community in Kenya’.³⁶ Thus Al-Shabaab sought to link perceived injustices in Kenya and Somalia to issues of security.³⁷

Westgate was a catalyst that boosted bilateral ties between Kenya and its Western partners. Whilst the US has been engaged in increasing the capacity of the regional force AMISOM, it has launched drone attacks on key Somali targets from a rapidly expanding base in Djibouti.³⁸ The UK has focused its efforts on police training, especially counter terrorism police training with funding of around £18.6 million.³⁹ This has entrenched Kenya’s role as a key security partner. However, allegations of impunity directed in particular at the Kenyan police open up questions as to how committed Kenyan state actors are to improving security and professionalising the Kenyan police and intelligence services.⁴⁰

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33 Mogire and Ade, 2011 quoted by Aronson, *Kenya and the Global War on Terror*, p. 28.

34 *National Security Strategy of the United States 2002*, p. 17.

35 Aronson, ‘United States Aid to Kenya: A Study on Regional Security and Counterterrorism Assistance Before and After 9/11’, *African Journal of Criminology and Justice Studies* Vol. 5, No 1 (2012): 119–26, p. 119.

36 Muriithi Mutiga, ‘Corruption a key plank in Shabaab’s quest to sow chaos and state failure’, *Daily Nation*, 5 October 2013.

37 Human Rights Watch ‘Death and Disappearances: Abuses in Counterterrorism operations in Nairobi and Northeastern Kenya’, 19 July 2016.

38 Discussions with Rashid Abdi (ICG).

39 Foreign and Commonwealth statistics referenced in Elite interview with British government official.

40 Independent Medico-legal Unit (Kenyan NGO) Report on *Deaths From Police Bullets 2017*, 29 March 2018.

Kenya and the ICC

Although Kenya has a long history of violence associated with elections,⁴¹ the use of systematic violence reached its pinnacle following disputed elections in late 2007. Subsequent prosecutions at the ICC⁴² resulted from failed attempts to find a domestic solution. The Commission of Inquiry into Post-election Violence (CIPEV) recommended a ‘special tribunal’ with an ‘international component’ to investigate the attacks. However, it had a provision that in the event of a tribunal not being established, ‘the special prosecutor shall be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons’.⁴³

On 9 July 2009, a sealed envelope with the names of suspects, which had been entrusted to former UN Secretary General Kofi Annan, who was serving as chairman of the AU Panel of Experts,⁴⁴ was handed to the ICC Chief Prosecutor Luis Moreno Ocampo.⁴⁵ In March 2010 the Chief prosecutor opened his investigation using his *proprio motu* powers.⁴⁶ Then, in 2012, charges of crimes against humanity were confirmed against six individuals, but this number was later reduced to four.⁴⁷

Following this unprecedented use of prosecutorial powers,⁴⁸ the ICC case against the Kenyan leadership began to collapse steadily. By December 2014, the Chief Prosecutor of the ICC dropped charges against President Uhuru Kenyatta.⁴⁹ In April 2016 the court subsequently ‘terminated’ the case against his deputy William Ruto,⁵⁰ who, at the time of the 2007/08 violence, had been Kenyatta’s arch rival. However, with the threat of ICC indictments hanging over

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41 CIPEV Report, p. 26.

42 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute in the Case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, International Criminal Court Case № ICC-01/09-01/11-373, 4 February 2012; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute in the Case of The Prosecutor v. Uhuru Muigai Kenyatta, International Criminal Court Case № ICC-01/09-02/11-382, 29 January 2012.

43 CIPEV Report, p. 473.

44 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, August 2009).

45 Mueller, *‘Kenya and the ICC’*, p. 30.

46 *proprio motu*, trans. ‘on his own initiative’.

47 Indictments were issued against William Ruto, Uhuru Kenyatta, Joshua Sang, Francis Muthaura.

48 Previous ICC cases had been referred by the UN Security council or the states themselves.

49 Decision on the Withdrawal of Charges Against Mr Kenyatta, International Criminal Court Case № ICC-01/09-02/11, 13 March 2015.

50 Charges Vacated in the Case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, International Criminal Court Case № ICC-01/09-01/11, 5 April 2016.

both men, Ruto and Kenyatta struck a deal and became running mates in the 2013 Presidential elections.⁵¹

The dynamics of the court's relationship with Kenya's ruling establishment were exposed after the halting of the cases. One judge publicly blamed the 'troubling incidence of witness interference and intolerable political meddling' by the Kenyan authorities as a key factor, as well as the withholding of key information including official telephone records.⁵² Those authorities have faced limited sanctions as a result of this documented non-cooperation.⁵³

Steven Brown offered perhaps the best description, observing that Kenya pulled off an extraordinary bluff as it 'appeared to frustrate the court's endeavours while giving just enough of an impression of co-operation to keep donors at bay'.⁵⁴ Other commentators blame the structural limitations of the ICC for the collapse of cases, and a legitimacy deficit due to the absence of key powers, such as the US, as signatories to the Rome Statute.⁵⁵ Critics also blame 'the failure on the part of the prosecution to take appropriate steps to verify the credibility and reliability of evidence on which it intended to rely at trial'.⁵⁶

Notwithstanding these structural criticisms, Kenya's role in the GWOT provides an important context in which the ICC cases were held. Justice did not operate in a politics free bubble. Indeed, Ruto sought to conflate justice and security in the wake of the Westgate attack in 2013.⁵⁷ Furthermore an attempt to invoke Article 16 of the Rome Statute (see below) also sought to link the two issues.

Kenya's security operations in Somalia increased substantially between the end of the PEV period and the halting of the ICC cases. Whilst the court cases stood and fell on their own merits, this security context sheds light on the utility of pragmatism in the face of Kenyan defiance of the court. It also highlights the tension between politics and the law.

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51 'Uhuru Kenyatta and William Ruto Seek Kenyan Alliance', *BBC News Online*, 27 November 2012; Also Hanson (2015) suggests the ICC case influenced when this coalition was formed and it is 'not impossible' that they 'would have joined forces' prior to the election, p. 20.

52 'Kenya's William Ruto's case dismissed by ICC', *BBC News Online*, 5 April 2016.

53 The ICC issued arrest warrants in 2013 and 2015 against three Kenyans accused of witness tampering. The cases are on-going.

54 Brown and Raddatz, 'Dire Consequences', p. 53.

55 David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014).

56 Patrick Gathara, 'Did Kenya get justice at the ICC?', *Al Jazeera*, 7 December 2014.

57 'Shock: Ruto Claims Westgate Mall Attack was Arranged to Fix Him and President Kenyatta', *Kenya Today*, 23 September 2013.

The Kenyan leadership in 2013 attempted to link the ICC case to growing security concerns in the region.⁵⁸ The African Union, acting on behalf of Kenya, lobbied the UN Security Council heavily to defer Kenyatta's case as sitting head of state under Article 16 of the Rome Statute.⁵⁹ It argued that the presence of the President and Vice President in Kenya was vital to national security because an escalation of insecurity in Somalia was being projected into Kenya.⁶⁰ Kenya's Ambassador to the UN argued for a deferral to 'prevent an aggravation of the situation' and to 'provide time...to consider how best to respond to the threat to international peace and security in the context of the Kenyan situation.'⁶¹ It may not have been a deliberate threat, but the ambassador's words served as a potent reminder to Kenya's Western allies of the strategic importance Kenya played in security matters.⁶²

With news that the cases had 'collapsed', elite interviews for this article capture a clear sense of 'relief' that this 'inconvenient' diplomatic and legal hurdle had been removed, enabling the restoration of normal relations to focus on fighting terrorism and promoting bilateral trade.⁶³ The extent to which Kenya's external role as a key security partner provided some form of 'insulation' from sustained international pressure to address accountability deficits during the ICC case and its aftermath (particularly pressure to address police impunity) is hard to quantify. Nevertheless, even if the privileging of global security over justice for Kenyan victims of PEV was unintended, it suggests that neorealism, and with its belief in the primacy of security, appears to have won the day.⁶⁴

Explaining the Dynamics between Kenya and the West

A number of theories of international relations may assist us in understanding (i) the strategies of opposition by the Kenyan government to the ICC, as well as (ii) the responses of international actors. Whilst none provides a definitive explanation, I argue that each helps to shed light on what was a dynamic relationship.

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58 Mark Kersten, 'A Brand New Low Ruto Blames the ICC for Westgate Tragedy', *Justice in Conflict*, 23 September 2013.

59 Article 16 provides for deferral of an investigation or prosecution for up to 12 months; Interview with a Western source revealed that Britain was heavily lobbied by Kenya to support the push for an Article 16 deferral.

60 UN Security Council Resolution Seeking Deferral of Kenyan Leaders Trial, SC/ 11176, 15 November 2013.
61 UN SC document S/2013 Letter from Kenyan Ambassador Seeking to defer case invoking Article 16, Overview of Security Council Letters on Deferral of Kenyan Cases, UN Document S/2013/624, 22 October 2013.

62 This is discussed in more detail at the end of this article.

63 Elite interviews with Western sources with knowledge of Kenya expressed this sentiment adding that following election in 2013 it was only 'a matter of time' before the ICC cases 'went away'.

64 For an in-depth discussion on realism and international tribunals, see Kaufman, *United States Law and Policy on Transitional Justice*.

Pragmatism Versus Legalism

The pragmatism versus legalism paradigm is defined by Judith Shklar as the tension between legalism, a normative belief by liberal states that ‘moral conduct is to be a matter of rule following and moral relationships’, and pragmatism, which considers the consequences of imposing a set of rules and is less rigid in its application.⁶⁵ International tribunals are conceived as part of a ‘growing universality of norms’.⁶⁶ Indeed, when in March 2010 Luis Moreno-Ocampo, Chief Prosecutor of the ICC, opened an investigation into the PEV, he maintained in an interview for this article that his decision was driven by rigid legalist principles rather than political beliefs ‘I followed the rules of my job, hoping that the political situation would adjust to my job.’⁶⁷ His actions were guided by what some scholars such as Snyder call a ‘logic of appropriateness’.⁶⁸ Furthermore, proponents of legalism consider it a static principle that cannot be ‘bartered’ for political expediency.⁶⁹ Yet in the Kenyan case, arguably just such ‘barter’ took place.

Pragmatists, in contrast to legalists, ‘take a firmly consequentialist view’.⁷⁰ If we accept Bass’s assertion that ‘the war crimes policy of liberal states is a push and pull of idealism and selfishness’,⁷¹ it follows that ideas of transitional justice stand in direct competition with international policy priorities such as security or trade. Therefore, the tension between legalism and pragmatism is essentially one between the law and politics.⁷² As the Kenyan ICC cases got underway, two factors propelled the pragmatist agenda: the emerging political consequences of indicting individuals who would become the head and future deputy head of state, and the growing international concern about the security situation in the region. Lord Mark Malloch-Brown,⁷³ who worked closely with Kofi Annan, the UN Secretary General when the ICC was created, describes how the court

65 Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964), p. 1.

66 *Ibid.*; Norms that relate to individual criminal responsibility.

67 Elite Interview with Luis Moreno-Ocampo former Chief Prosecutor ICC (May 2018).

68 Jack Snyder and Leslie Vinjamuri ‘Trials and Errors Principle and Pragmatism in Strategies of International Justice’ *International Security* Vol. 28, No 3 2003–04

69 Bassiouni (2002) as cited by Leslie Vinjamuri and Jack Snyder, ‘Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice’, *Annual Review of Political Science* Vol. 7 (2004): 345–62, p. 347.

70 *Ibid.*, p. 353.

71 Bass, *Stay the Hand*, p. 8.

72 Bassiouni as cited by Vinjamuri and Snyder, ‘Advocacy and Scholarship’, p. 347. Kenneth Waltz argues that ‘war in international relations is the analogue of the state in domestic politics’ in *Man the State and War: A Theoretical Analysis* (Columbia University Press, 1959/2001), p. 96.

73 Former UK Minister for Africa and Deputy Secretary General of the UN Lord Mark Malloch-Brown hereafter referred to as MMB.

was ill prepared and not designed to deal with such conflicts, ‘pursuing a case against people who are still in government ...was out of the space contemplated by the drafting of the Statute... The ICC is legalism, but it has to operate in a highly political environment’.⁷⁴ This apparent shift away from principled legalism coincided with the growing influence of external factors, in particular the threat of insecurity posed by non-state actors in neighbouring Somalia. It was this threat that the Kenyan elites exploited. Lord Malloch-Brown observed that ‘it wasn’t a plot from day one’ to undermine the court with a number of narratives, including the security narrative; [however] the broader security relationship with the UK⁷⁵ was always a drumbeat in the background’.⁷⁶ The extent to which this ‘drumbeat’ drowned out other noises is beyond the scope of this paper, and, despite freedom of information requests, much of the documentation from this time remains classified.

What is established beyond question by public statements at the time, is that there was a gradual shift in the commitment of external actors to hold Kenya’s elites to account through the ICC.⁷⁷ For example, US President Obama originally offered his endorsement of the court in 2010 when the ICC cases were opened, declaring that Kenya was ‘on a path towards an era of accountability and equal opportunity’.⁷⁸ However, by late 2013 the international messaging appeared to waver with telephone calls from the Oval Office directly to President Kenyatta, expressing sympathies at the security situation. Whilst this is normal diplomatic practice, the public messaging was at the very least, confusing. Furthermore, despite President Kenyatta still being indicted on charges of crimes against humanity, UK Prime Minister David Cameron took the controversial step of inviting Kenya’s new Head of State to the London conference on Somalia—a high profile security event. The invitation, diplomatic sources insist, was consistent with the policy of maintaining only ‘essential contact’.⁷⁹ However, activists described it as a ‘betrayal’ because it diluted the international narrative that alleged atrocity perpetrators should be held to account.⁸⁰

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74 Elite Interview MMB (April 2018).

75 This included access to Kenya-based training facilities for British troops, which MMB felt may have been ‘overstated’ by the British Ministry of Defence.

76 Elite Interview MMB (April 2018).

77 Notwithstanding criticism of the ICC’s own administrative shortcomings.

78 Statement by President Obama on the International Criminal Court, The White House, Announcement from the Office of the Press Secretary, 15 December 2010.

79 The term ‘essential contact’ was used by US Assistant Secretary of State to warn Kenya’s leadership before the 2013 polls, that ‘actions have consequences’.

80 ‘Kenya’s Uhuru Kenyatta to meet UK’s David Cameron’, *BBC News*, 6 May 2013; UK justification was that Kenyatta was ‘co-operating and was not the subject of an arrest warrant’.

Further security concerns added momentum to the pragmatic agenda. Four months after Kenyatta's London visit came the Westgate shopping mall siege, Al-Shabaab's most audacious attack on its neighbour.⁸¹ William Ruto, like Kenyatta an ICC indictee at the time, used the moment when the global spotlight was shining on Kenya to conflate Kenya's security challenges with the quest for justice at the ICC. In a series of press interviews, Ruto stated that the ongoing cases at the ICC were compromising Kenya's security and asserted that he believed the Westgate attack was specifically linked to his presence at the ICC.⁸² Despite Ruto's public efforts to undermine the court, the UK remained silent. Moreover, its military assistance to Kenya was increased.⁸³ At the same time growing concerns about witness intimidation and bribery were being raised in court by lawyers, civil society, and the press.⁸⁴ Yet these serious allegations against Kenya's elite and security services were being met with apparently little diplomatic consequence.⁸⁵ Given such awkward trade-offs, there has been much commentary on whether the compromises made at that time 'destroyed' the ICC. There has also been debate about whether in retrospect, it was a misjudgement to bring the cases to court at all.⁸⁶ In the future the eventual declassification of further documentation would provide an opportunity for further scrutiny of the shifting position of Western elites.

The Justice Cascade

Justice cascade theory enables us to examine whether the ICC experience has delivered any lasting legacy for Kenya.⁸⁷ The theory, developed by Kathryn Sikkink and Ellen Lutz, represents a shift in societal norms 'towards holding individual state officials, including heads of state, criminally accountable for human rights violations.'⁸⁸ What divides proponents and opponents of this

81 Daniel Howden, 'Terror in Nairobi: The Full Story Behind the Al-Shabaab Mall Attack', *The Guardian* 04 October 2013.

82 'Shock: Ruto Claims Westgate Mall Attack was Arranged to Fix Him and President Kenyatta', *Kenya Today*, 23 September 2013.

83 Elite interviews with Western sources indicated an escalation in support by the UK for border security and police training in the immediate aftermath of Westgate. Exact details remain classified.

84 Briefing Paper by Open Society Justice Initiative 'Witness Interference in Cases Before the International Criminal Court' and discussion on Article 70 cases: November 2016. At the time of writing, so-called Article 70 cases were still on-going; Walter Menya, 'ICC-Wanted-Man Walter Barasa Ready to Surrender' *Daily Nation*, 4 March 2018.

85 In contrast with the UK's imposition of visa bans on Kenyan nationals as part of targeted sanctions, e.g. in 2005 former Security Minister Chris Murungaru was the first Kenyan banned from travelling to the UK because of corruption allegations.

86 Michela Wrong, 'Has Kenya Destroyed the ICC?', *Foreign Policy*, 15 July 2014.

87 Sikkink describes human rights prosecutions as 'high profile symbolic events that communicate and dramatize norms' in Sikkink, *The Justice Cascade*, p. 257.

88 Sikkink, *The Justice Cascade*, p. 5.

theory is the key question of sequencing. Namely, does justice or politics shape behaviour in entrenching and diffusing norms? Sikkink cites the Pinochet case as a landmark moment.⁸⁹ She argues that this event ‘socialized’ citizens to the ‘normative process of observing trials’.⁹⁰ However, critics believe certain political conditions are a prerequisite for legal precedents to have force in shaping future behaviour. Put simply, courts and their judiciaries need to be perceived as independent and fair by the public for such norms to be diffused.⁹¹ Given that the ICC was portrayed by its opponents as a political court representing ‘white man’s justice’, this article argues that its potency to effect durable domestic behavioural change is highly nuanced.

Soft Balancing

The third prism through which we can examine the Kenyan experience is balance of power politics, in particular, soft balancing.⁹² The prominent realist scholar Steven Walt observes that weaker states adopt non-military strategies to ‘manage and limit’ US power.⁹³ This may include asserting their independence internationally at the UN whilst remaining allies with hegemons.⁹⁴ This ‘two level game’⁹⁵ has seen Kenyan leaders dismiss Western criticism of their internal affairs but continue to remain firm allies with respect to security.⁹⁶ Kenya’s leaders were clearly the focus of a 2013 speech by President Obama in which he affirmed that the US is ‘interested and invested not in strongmen but in strong institutions...honest police forces that can protect the peoples’ interests instead of their own’.⁹⁷ Kenya’s governing elite responded to this public dressing down by portraying the President’s speech as tacit US support for opposition challenger Raila Odinga.⁹⁸ It accused the West of ‘lawfare’ or the ‘use of legal means for political and economic ends’,⁹⁹ yet in spite of this public denunciation of apparent Western meddling, the relationship between Kenya and the US

89 This challenged the idea of sovereignty by issuing an arrest warrant in Britain seeking the Chilean leader’s extradition to a Spanish court to be tried for crimes allegedly committed in Chile.

90 Sikkink, *The Justice Cascade*, p. 258

91 This point was confirmed in an elite interview with Kenya’s former Chief Justice Willy Mutunga. ‘In any society politics and the political leadership are critical... they have the resources they are backed by machinery to support or undermine the courts’.

92 Whitaker, ‘Soft Balancing’, p. 1110.

93 Stephen M. Walt, ‘Taming American Power’, *Foreign Affairs* Vol. 84, No 5 (September/October 2005): 105–20.

94 Whitaker, ‘Soft Balancing’, p. 1113–14.

95 *Ibid.*, p. 256.

96 ‘The Prodigal Grandson Returns: Barack Obama is popular in Africa but has not paid continent enough attention’, *The Economist*, 25 July 2015.

97 President Obama University Cape Town Speech, 30 June 2013

98 Lynch, ‘Electing the “Alliance of the Accused”’, p. 106.

99 *Ibid.*

has remained strong.¹⁰⁰ Moreover, the Western funds have kept on flowing. Furthermore, China, now Africa's largest trading partner,¹⁰¹ is asserting itself beyond the economic sphere by increasing its military presence in the Horn of Africa.¹⁰² This has enabled Kenyan elites to play the US off against China as part of a soft balancing policy, tacitly supported by China's policy of keeping its nose out of its allies' internal affairs.¹⁰³

Domestic Influences

A key question is whether by its very existence, the ICC has 'shaped' domestic political dynamics in Kenya. Has it helped to entrench elites who have created new alliances? Or has it been a catalyst for change, forcing actors to 'think twice' before embarking on potentially violent courses of action? This article suggests it has achieved all these to varying degrees at different points in time.

The Kenyan experience at the ICC, although unique, has some parallels with cases where elites sought to sabotage, frustrate, or hijack the legal process. Jelena Subotic's research on the Balkans¹⁰⁴ demonstrates that states exhibit markers of compliance with tribunals but 'pursue quite localized political agendas'.¹⁰⁵ They, in effect, seek to 'hijack' the tribunal process to protect their own interests when threatened. It is interesting to observe that Kenya exhibited many such 'markers of compliance' with the ICC, for example by seemingly co-operating with initial requests for information, yet as time passed, evidence suggests that it used court cases to 'withhold diplomatic access' and frustrate everyday business for key international players at a critical time.¹⁰⁶

Initially, Kenya was a public supporter of the ICC when in 1999 it signed the Rome Statute, ratifying it six years later despite US pressure not to do so.¹⁰⁷ Kenya did not challenge the legitimacy of the ICC until the court was turned against its own political elite following the PEV. As the political stakes were raised, opposition narratives to the court increased and it was seen as a threat to Kenyan sovereignty.

100 IPSOS Opinion poll foreign relations trend April 2015–July 2017 slide presentation shared by IPSOS Kenya.
101 Chris Alden, 'China in Africa the relationship matures', *Strategic Analysis* Vol. 36, № 5 (September 2012): 701–07.

102 'China formally opens first overseas military base in Djibouti', *Renters*, 1 August 2017.

103 Walt, 'Taming American Power', cites 'blackmail' as a tactic as part of soft balancing.

104 Subotic, *Hijacked Justice*, p. 6.

105 *Ibid.*, p. 167.

106 Interview with Dr Muthoni Wanyeki of the Open Society Foundation (April 2018).

107 Kenya resisted pressure to sign bilateral immunity agreements with the US, despite threats of reduced aid. These would have given US service personnel immunity from prosecution. Kenya ratified the Rome Statute in March 2005.

This explains the apparent contradiction of Kenya being both a signatory to the ICC's founding statute and also a vocal critic of the court.

More specifically, Kenyan elites exhibited compliant behaviour. They initially appeared to co-operate with the court's timelines; they also sought to retain international legitimacy by remaining a signatory to the Rome Statute.¹⁰⁸ They further appeared to indulge in public displays of co-operation such as consenting to proceedings that the court be televised. Yet gradually, Kenya's *de facto* non-cooperation with the ICC was captured in the ICC court papers.¹⁰⁹ It amounted to a carefully crafted 'defence strategy'.¹¹⁰ This included Kenyan elites mobilising international organisations against the ICC, introducing legal challenges to delay the court and intimidating, discrediting, or bribing witnesses and infiltrating human rights organisations.¹¹¹ They further used technical amendments to impede access to statements of witnesses who had recanted their testimony out of fear.¹¹²

ICC indictments against two of the most powerful figures in Kenyan politics almost certainly helped shape the political landscape in Kenya, in a way that might not otherwise have happened. Thus the external actor—the ICC—had an influencing effect on Kenya's internal domestic behaviour.¹¹³ Furthermore, it appears the ICC case helped to shape the narrative of conflict,¹¹⁴ through its selectivity and targeting of potential indictees.¹¹⁵ In turn, this selectivity helped nurture a potent counter-narrative which Ruto and Kenyatta used as a broader defence strategy.

The pair were rivals during the 2007 presidential campaign and represented different ethnic groups, which broadly, although not exclusively, mirrored the

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108 The African Union would later pass a resolution for collective withdrawal from the ICC. '[African Union Backs Mass Withdrawal from the ICC](#)', *BBC News*, 1 February 2017.

109 [Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to File Observations Pursuant to Rule 103\(1\) of the Rules of Procedure and Evidence](#), International Criminal Court Case No ICC-01/09-01/11-670 09-04-2013, 8 April 2013, p. 7.

110 Mueller, '[Kenya and the ICC](#)', p. 26.

111 The prosecution alleges that 16 witnesses stopped cooperating or refused to testify. Also the defence team for Ruto claims one defence witness was murdered in 2015. There is also extensive reportage on the use of social media to expose the identity of witnesses. Human Rights Watch, '[Recent International Criminal Court Developments on Kenya, South Africa: Questions and Answers](#)', 27 January 2016.

112 For more on the debate over Amending Rule 68 of the Rome Statute see '[Kenya Cases at the ICC: Understanding Rule 68 Controversy through 15 Dates](#)', International Federation for Human Rights, 12 February 2016.

113 Rather than a causal link Hansen argues it was a tool 'adding fuel to existing tensions', Thomas Obel Hansen, '[Transitional Justice in Kenya—An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns](#)', *California Western International Law Journal* Vol 42, 2011, p. 19.

114 *Ibid.*

115 In Kenya's case, criticism has focused on the ICC's failure to indict Raila Odinga, a key Presidential challenger in the 2007 elections.

two main sides of the violent clashes during the PEV. The ICC case appeared to have provided a catalyst for forging a political alliance between the two men and their respective ethnic communities to secure electoral victory in 2013.¹¹⁶

The purpose of this political coupling was more than simply securing electoral power. It sought to 'deflect the court and to insulate the indicted men from its power once they won the election.'¹¹⁷ Thereafter they could exploit the tools of state to frustrate the court process and threaten witnesses.¹¹⁸ This deal enabled them to craft an anti-ICC narrative across a broad alliance of Kenya's 42 ethnic groups and to neutralise the opposition, which they portrayed as allies of outsiders seeking to assault Kenya's sovereignty.¹¹⁹ Secondly, this political 'marriage' enabled the allies to portray the ICC as having 'chosen sides', denting its legitimacy and portraying it as an institution which 'casts itself as the interpreter and enforcer of justice'.¹²⁰

However, despite the court being under fire by many politicians, opinion poll data two years after the PEV, indicated that 68% of Kenyans supported the ICC in its early stages.¹²¹ The possibility of an alternative, in the form of a special tribunal in Kenya as recommended in the CIPEV report,¹²² continued to be an important line of argument deployed by ICC critics as a tool to mobilise opposition to the court. This continued even as the ICC pre-trial hearings got underway. In reality, an alternative court never materialised, but that didn't halt the anti-ICC narrative.¹²³ Kenya's allies on the continent maintained the ICC was being used as a neo-colonial weapon to 'punish Africa as a whole', despite many African cases having been self-referrals.¹²⁴ This line of argument regarding

116 Ruto and Kenyatta, announced in December 2012 they would stand together in the 2013 election. Hansen argues the alliance may have happened anyway but the presence of the ICC indictments, influenced when this coalition was formed. Hansen, 'Transitional Justice', p. 20.

117 Mueller, 'Kenya and the ICC', p. 29.

118 *Application for a Ruling on the Legality of the Arrest of Mr. Dennis Ole Itumbi*, International Criminal Court Case ICC-01/09-105 21-09-2012, 21 September 2012; *Decision on the Withdrawal of Charges Against Mr Kenyatta*, International Criminal Court Case No ICC-01/09-02/11, 13 March 2015.

119 Media reports reveal the role played by foreign firms like Cambridge Analytica in shaping Uhuru's political campaigns in 2013 and 2017. See Larry Madowo 'How Cambridge Analytica Poisoned Kenyan Democracy' *Washington Post*, 20 March 2018.

120 Adam Branch, 'ICC and Human Rights Enforcement' in *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford University Press, 2011), Chapter 6.

121 Steadman Poll quoted in 'Most Kenyans want violent suspects tried by ICC', *Reuters*, 20 July 2009.

122 CIPEV Report, p. 429–41.

123 See Lynch, 'Electing the "Alliance of the Accused"', p. 30, for a detailed description of the stalling in the establishment of a special tribunal and pressure from Kenya's Attorney General to try the cases at the East African Court of Justice (EACJ).

124 Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan', *Human Rights Quarterly* Vol. 31, No. 3 (2009): 655–691; REF State which ICC Africa cases are self-referrals.

selectivity and alleged anti-African bias almost certainly provided a catalyst for states like Gambia, Burundi, and later South Africa, to threaten withdrawal from the Rome Statute.¹²⁵

At the same time as this anti-Western sentiment was gaining traction, there is evidence that international voices of criticism over Kenya's conduct grew softer. Western sources interviewed for this paper described their realisation that speaking out was simply making matters worse and impeding diplomatic access to key Kenyan contacts. Mark Malloch-Brown observed that 'countries like the Netherlands still wanted to do the right thing, in terms of exerting pressure on Kenya to fully cooperate with the court, but they lost the firepower to do so with Britain and the US peeling away.'¹²⁶ It begs the question why weren't internal and external actors able to deploy counter-narratives to rebut those from Kenyan elites? Two factors emerge. The first was a lack of coherence: divisions within the international donor community were an 'impediment to influence'.¹²⁷ Those interests included strategic interests. Secondly, divisions among the Kenyan public about who was most culpable for the PEV, made it hard to address a single audience. Human rights activists on the ground described a polarised ethnic discourse. Ordinary Kenyans wanted 'justice but only for their own survivors...and it served the government to perpetuate this myth'.¹²⁸

Nevertheless, ICC optimists, including Moreno-Ocampo, argue that cases against members of Kenya's elite did provide a legacy helping to drive forward institutional change.¹²⁹ Kenya's new Constitution was an important development insofar as it established in law international human rights norms and the rights and responsibilities of Kenyan citizens and the state.¹³⁰ Would this have happened anyway? It is impossible to say. However this entrenchment of democratic values has been tempered by a failure to address historically rooted impunity in Kenya, which has a history of using political violence as a means of control.¹³¹ It exposes the limits to political transformation and democracy in Kenya, explained partly by the fact that many individuals associated with

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125 For a good overview see Tim Muriithi, 'Pan-Africanism and the Politicization of the International Criminal Court', *Journal of African Union Studies*, Vol 3, Issue 1 (January 2014): 61–82.

126 Elite Interview MMB (April 2018).

127 Brown and Raddatz, *Dire Consequences*, p. 49; Interviews with Western officials reveal divergent positions between, for example, the Netherlands and Britain on how forceful their criticism should be of Kenya's apparent non-cooperation.

128 Ibid.

129 Elite Interview Moreno-Ocampo (May 2018).

130 *Constitution of Kenya, 2010*

131 Bachmann, *European External Action*, p. 131, gives examples of State of Emergency imposed under Moi.

past acts of violence remain in positions of power and have a vested interest in maintaining the status quo.¹³²

Is Terrorism the Trump Card?

A critical question is whether the security context and Kenya's role in the GWOT was weaponised to oppose the ICC or simply became one of many issues that provided an important context but little else?¹³³

Did this deepening security relationship render the presence of ICC indictments an 'inconvenience'¹³⁴ to international diplomats 'because it was fingering people who they felt they had to do business with in the fight against terrorism'?¹³⁵ Or did Kenya over-state its importance in counter-terrorism activities (as some UK government officials suggest), extracting political capital from this domestically and regionally, but failing to materially alter the West's position on the ICC?¹³⁶

The record shows there was a temporal association between fighting a growing terrorist threat in Kenya and the wider region and the unfolding diplomatic, judicial and political drama at the Hague. The immediate aftermath of the 2013 Westgate attack saw an increase in the flow of US and UK commitment and funding to fighting terrorism.¹³⁷ According to the US Congressional Research Service, 'the U.S. provides Kenya with over \$8 million in anti-terrorism law enforcement support annually, the largest such allocation to any sub-Saharan African country'.¹³⁸ It continues, 'Funding to the KDF particularly for counterterrorism-related training and equipment, has increased more than three-fold since 2013, and will reach over 120 million USD in financial year 2016'.¹³⁹

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132 Academics frequently cite the example of Henry Kosgey who was summoned to hear before the ICC's pre-trial chamber but whose case was later dropped. At the time of writing he was the second-longest serving member of the Kenyan parliament.

133 'Country Reports on Terrorism 2016', US Bureau of Counter-Terrorism (July 2017)

134 In an elite interview, John Githongo argues that by 2013 the ICC had become a 'massive inconvenience'. (April 2018).

135 Ibid.

136 Elite interview with a Western official revealed that UK foreign Secretary William Hague was 'utterly adamant' in his support for the court but feared a threatened mass-walkout by African states could fatally wound the court. (May 2018).

137 Lauren Ploch Blanchard, 'Kenya: In Focus', Congressional Research Service, 6 July 2011, Updated 29 August 2018.

138 Elite interviews with Western officials confirm that UK stepped up its border security in the immediate aftermath of the Westgate attack, but precise details remain classified.

139 Ibid.

In response to the growing threat posed by Al-Shabaab inside Kenya, in October 2011 the KDF began operations in neighbouring Somalia under the codename *Operation Linda Nchi*—‘Protect the nation’.¹⁴⁰ The ‘invasion’ (it is extensively referred to as invasion in the academic literature) would be cited by Al-Shabaab as one reason for launching the attack on the Westgate Mall two years later.¹⁴¹ Based on available evidence, it seems highly plausible that the primacy given to the terrorism narrative (even if presumed rather than overt) appears to have provided a re-enforcement mechanism to Kenya’s domestic strategies of opposition to the ICC and subsequent calls for security sector reform. UK officials maintain in interviews that attempts at conflating justice and security by Kenya did not influence their own stance towards ICC cases. One Western source said the more substantial counter-terrorism conversations with Kenya came in 2014–15. The implication is that no trade-off took place. Yet on several occasions the Kenyan government explicitly attempted to conflate security and international justice. Most notably when it took the matter of the ICC investigations to the UN Security Council, attempting to invoke Article 16 of the Rome Statute. Kenya countered that pursuing cases against Ruto and Kenyatta represented a ‘threat to security’. It further argued that indicting such senior figures would be a ‘distraction’ from the regional and international task of fighting terrorism.¹⁴²

Kenya failed to win the argument at the Security Council but by conflating security and justice, Kenyan elites were appealing to a domestic and African regional audience, already sensitive to perceptions of Western bias at the UN.¹⁴³ The response from the UK was reportedly unequivocal. Despite attempts by the Kenyans to use backdoor methods to strong-arm the British government into supporting Article 16,¹⁴⁴ which included the circulation of fabricated letters purporting to be from UK government officials,¹⁴⁵ the UK position remained steadfast: pursuing the case posed no threat to international peace and security, a threshold requirement for Article 16.¹⁴⁶ A separate Western source described

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140 Col Oscar Migue et al., *Operation Linda Nchi*.

141 Al-Shabaab spokesman Ali Mohamud Rage stated ‘Kenya will not get peace unless they pull their military out of Somalia’—quoted on multiple social media platforms at the time including ‘[Al-Shabab Locks Kenya into an Endless Circle of Death](#)’, *Mail and Guardian*, 7 November 2014

142 *Draft resolution on a deferral of the ICC proceedings against President Uhuru Kenyatta and his deputy*, UN Security Council Document S/2013/660, 15 November 2015.

143 For background see N. Waddell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008).

144 Elite interview with Western source with close knowledge of Kenya described numerous attempts at lobbying the UK to back Article 16. (April 2018)

145 Detail provided by a Western official (May 2018).

146 Detail provided by a Western official who attributed this tactic to a UK-based public relations firm.

‘urgent’ discussions about the need to respect the ICC on the one hand and work with Kenya on security issues on the other. These he said, ‘were discussed at the highest level of British government’,¹⁴⁷ adding that although the presence of the ICC cases gave ‘acuteness’ to the trade-offs, nevertheless support for the ICC remained a ‘bedrock of UK policy’.¹⁴⁸

Notwithstanding the UK insisting it was being consistent in its support for the ICC, some scholars suggest that attempting to invoke Article 16 at the UN had a more nuanced purpose for Kenyan elites, designed to strike a chord with voters. That is to say the process of invoking Article 16 was more important than the end result. Scholars argue that such showcasing at the UN acted ‘as a secular pulpit through which Kenya and its allies could express concerns about the ICC and its interventions’ in general. It further emphasised the point that it was African troops, rather than Americans, fighting the al-Qaeda affiliate Al-Shabaab in Somalia.¹⁴⁹

Whitaker is among a number of prominent scholars¹⁵⁰ who argue that the critical role countries such as Kenya play in the GWOT strengthened the hand of incumbents by giving them ‘tools and justifications to resist democratic pressures’.¹⁵¹ Established civil society voices in Kenya argue the security narrative was significantly ‘elevated’ after the Westgate attack, and forced ‘a recalibration of security and intelligence ties’ between Kenya and its Western allies.¹⁵² Kenya’s apparent appropriation of the security narrative in the light of the Westgate attack, has almost certainly contributed to a greater unchecked ‘securitisation’ of the Kenyan state in the aftermath of the ICC cases, further deepening concerns about impunity’.¹⁵³ ‘The Kenyan government as the main securitisation actor, has justified security focused policies based on the threat posed by al-Shabaab, yet some scholars¹⁵⁴ suggest the bigger threat to security in Kenya may be internal, driven by an entrenched accountability deficit.’¹⁵⁵ Furthermore, the state security machine’s ‘collective punishment’ of the

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147 Elite interview with a Western diplomatic source (April 2018).

148 Referring to Britain’s position in April 2012 the source affirmed that Britain would be a ‘robust supporter’ of the ICC.

149 Discussion with Dr Mark Kerston—Editor *Justice and Conflict* (April 2018).

150 Whitaker, ‘*Reluctant Partners*’, p. 255.

151 *Ibid.*

152 Elite interview with Maina Kiai—veteran Kenyan human rights activist and lawyer (May 2018).

153 The *National Security Strategy of the United States 2002* stresses the need to work with African states to ‘help build up the law enforcement and intelligence infrastructure to deny havens for terrorists’, p. 10.

154 The UN estimates 50% of Al-Shabaab fighters are Kenyan.

155 Bachmann, *European External Action*, p. 134.

Muslim community following terrorist incidents, may be fuelling insecurity.¹⁵⁶ Even if the impact is marginal, evidence of extrajudicial killings, harassment, and the rounding up of large numbers of ethnic Somali Kenyans in the name of counter-terrorism, has supported the argument that a lack of accountability may have fuelled radicalisation and ‘facilitated the spread of Al-Shabaab in the country and the broader region’.¹⁵⁷

The terrorism context has also provided a ‘justification’ for Kenyan elites to resist security sector reform in the wake of the ICC experience. A key question persists whether such emboldening would have occurred in the absence of the ICC cases. The ICC provides a link because, although no members of the police force were indicted, the finding of the CIPEV report, which informed the ICC prosecution, was clear in its assessment that the police bore the heaviest burden of the deaths following the PEV.¹⁵⁸ That report concluded the need for reform was urgent.¹⁵⁹ That members of Kenya’s elite were able to help derail the very mechanism designed to achieve accountability suggests the ICC experience constitutes an important ‘victory’ from which Kenyan elites continue to draw strength. Whilst it is true that resistance to security sector reform in Kenya is historically deep-rooted,¹⁶⁰ the increased threat of global terrorism has elevated the ‘central position of traditional state security institution’ as part of ‘security governance’.¹⁶¹ Furthermore, in positioning itself as the legitimate securitisation actor, the Kenyan government has advanced policies that surely raise questions about its democratic credentials.¹⁶² These include the proposed closure of the Dadaab refugee camp in the face of widespread international criticism¹⁶³ and wholesale rounding up of ethnic Somali Kenyans and Swahili Muslims as apparent collective punishment following the Westgate siege. A subsequent report estimated that one third of those killed died at the hands of the police.¹⁶⁴ State machinery, including the military and police, has been positioned as

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156 Elite interview with JG ‘Kenyans are very sensible about terrorism, they know it exists but the most dangerous thing is the Kenyan government as expressed by the Kenyan police’. (April 2018)

157 On forced detentions and summary deportations see Human Rights Watch, *World Report 2014: Kenya*.

158 Ibid.

159 Brown and Raddatz, ‘*Dire Consequences*’, p. 46.

160 Bachmann, *European External Action*, p. 139.

161 Ibid.

162 Human rights campaigners cite examples of detention without trial and in an elite interview WM spoke of the police’s failure to implement court decisions releasing detainees (May 2018).

163 Ruto declared Dadaab a ‘Centre for Radicalization’ in a speech to the World Humanitarian Summit in 2016.

164 ‘The Swahili Muslim community is assumed to be far more radicalized than current information suggests.’ Aronson, ‘*Kenya and the Global War on Terror*’, p. 29.

a ‘protector’ of citizens in the face of terrorist attacks.¹⁶⁵ Yet that same state machinery continues to be implicated in extrajudicial killings and abductions.¹⁶⁶ Furthermore, a report in 2017 from the International Centre on Transitional Justice examining police reform in Kenya¹⁶⁷ found ‘a seeming inability to vet senior police officers’ who had been involved in corruption, torture, and other human rights allegations.¹⁶⁸ It concluded that ‘there is now a sense that the police are insulated from accountability demands for which the vetting process was supposed to achieve’.

The introduction of tough new anti-terrorism laws in Kenya, which extended the right to detain suspects and restrict media reporting of security issues, received widespread support from the US and UK with limited caveats about human rights issues.¹⁶⁹ Yet the legislation had the consequence of demonising opposition voices and entrenching powerful elites by providing cover for the Kenyan security forces to squeeze Kenya’s democratic space. As the bill was still in its early stages, the Kenyan government ‘de-registered’ more than 500 non-government organisations, a handful of which it claimed had links to terrorism. Yet it was widely seen as a move to silence dissent.¹⁷⁰ This neutralised the ability of civil society to check the abuse of power.

Whilst the external terrorism threat from across the border in Somalia should not be minimised, critics question whether Kenyan elites have overstated the situation and suggest that a greater threat is in fact the absence of meaningful security sector reform in Kenya.¹⁷¹ Corruption and impunity alone cannot account for the complexities of terrorism and insurgencies.¹⁷² Sarah Chayes in ‘Thieves of State’,¹⁷³ argues they provide an enabling environment and ‘increase the likelihood of a severe international security event’.¹⁷⁴ Kenya as the target

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165 For an in depth investigation of security narratives in Kenya see N. A. A. Voppen, ‘The Securitization of Somali Refugees in Kenya’, Masters thesis, Utrecht University (2017), p. 18.

166 Human Rights Watch, ‘Kenya: Killings, Disappearances by Anti-Terror Police’, 18 August 2014; Independent Medico-legal Unit (Kenyan NGO) Report on Deaths From Police Bullets 2017, 29 March 2018.

167 Police reform was a requirement stipulated in the CIPEY Report, p. 470.

168 Christopher Gitari Ndungu, ‘Failure to Reform: A Critique of Police Vetting in Kenya’, ICTJ Briefing, 21 November 2017, p. 2.

169 ala Abdelgadir, ‘Kenya’s Troubling New Anti-terrorism Legislation’, Council on Foreign Relations, Guest Post on Africa in Transition, 31 December 2014 ; Human Rights Watch, ‘Kenya: Security Bill Tramples Basic Rights’, 13 December 2014.

170 ‘Kenya “deregisters” NGOs in anti-terror clampdown’, BBC News, 16 Dec 2014.

171 Human Rights Watch ‘Death and Disappearances’.

172 Edward Mogire and Kennedy Mkutu Agade, ‘Counter-Terrorism in Kenya’, *Journal of Contemporary African Studies* Vol. 29, Issue 4 (2011): 473–91, p. 479.

173 Sarah Chayes, ‘Corruption the Unrecognised Threat to International Security’, *Carnegie Endowment for International Peace*, 6 June 2014, p. 21. cites examples of Al-Shabaab bribes to security personnel the Westgate Mall.
174 *Ibid.*, p. 23.

of terrorist acts, exercises its constitutional right to act in self-defence.¹⁷⁵ But at times it has continued to do so in a manner that violates international obligations with apparently little consequence.¹⁷⁶

Conclusion

Kenya's strategies of opposition to the ICC were dynamic, highly context-specific, and continued as further accountability reforms, such as police reform, were advocated by civil society after the halting of the cases.¹⁷⁷ These strategies reflected political developments in Kenya and the accumulation of power by Kenyatta and Ruto, whose supporters were able to appropriate or 'hijack' the justice process whilst still rhetorically co-operating with the court. These strategies shifted as the global context changed and the global security agenda appeared to gain primacy over justice issues. Willy Mutunga, Kenya's former Chief Justice, suggests that security and Kenya's role as a key strategic ally of the West, were important factors in the resistance by Kenyan elites to cooperate with the ICC: 'but whether it was a decisive factor is hard to pin down' he admits, simply because the context kept changing. It is difficult to disaggregate security imperatives from other factors such as bilateral trade and the influence of China, yet to disregard the security context and its leveraging potential would surely be an oversight.

Were Kenya not a strategic partner, would it have been able to 'get away' with the level of resistance it showed to the ICC? Other African states investigated by the court have not had the same strategic importance (with the possible exception of Uganda),¹⁷⁸ making a direct comparison hard. Other factors like the UK's concern that isolating Kenya would increase the threat of mass African withdrawal from the ICC, would appear to have contributed to pragmatism prevailing. It suggests a constant recalibration of interests over time, among both Kenyan elites and international parties.¹⁷⁹ The absence of consequences for Kenya's limited rhetorical co-operation at the ICC, would seem to suggest an ongoing

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¹⁷⁵ *Constitution of Kenya, 2010*

¹⁷⁶ HRW accuses Kenya of countless violations of international humanitarian law, Human Rights Watch, *World Report 2014: Kenya*.

¹⁷⁷ CIPEY Report, p. 470–78.

¹⁷⁸ Uganda US Marine corps has been delivering training and equipment to the Ugandan military

'US Marines strengthen Uganda capabilities for AMISOM', Marine Corp Forces Africa 9 December 2015

¹⁷⁹ Elite interview with Foreign Office official suggests a mass walkout from the ICC was the greater concern prior to Westgate.

reticence by the international community to publicly condemn impunity.¹⁸⁰ From the British standpoint the absence of consequences may be driven by a reluctance to re-awaken anti-neo-colonialist narratives of the kind articulated during the ICC case out of fear of further damaging the strategic relationship. ‘Kenya still hasn’t forgiven us for not supporting them more at the ICC’ observed one Western source.¹⁸¹

Has the failure to explore other legal mechanisms to hold Kenyan elites accountable resulted in the norm of individual criminal responsibility being undermined? One survivor of physical and sexual violence during the PEV, who was interviewed for this article,¹⁸² said she was ‘demoralized’ by the outcome of the ICC cases. For her and other ICC witnesses,¹⁸³ compensation is now the priority, a concept which appears to reflect what this author characterises as ‘transactional’ justice rather than criminal justice.¹⁸⁴

However in other settings it is worth noting that there have been recent successes in war crimes prosecutions in regional and national courts in Africa, such as in Chad where the former leader Hissène Habré was convicted of war crimes and crimes against humanity in a Senegalese court.¹⁸⁵ This suggests the appetite for justice exists but the mechanism by which it is delivered divides opinion, with a hybrid court of the kind used to try Habré being touted as a potential model for the future.¹⁸⁶

The long-term consequences of failing to address domestic impunity, and fears that it could fuel insecurity, has become a theme of recent study. The experience of Afghanistan is a case in point and parallels can be made with Kenya.¹⁸⁷ Furthermore, research on Al-Shabaab’s cross-border recruitment reveals that the appeal of terrorist organisations to some potential recruits is closely linked to their concerns about impunity.¹⁸⁸

180 Increasingly, criticism has been channelled through multinational organisations such as the EU. For a broad discussion on this issue see Bachmann, *European External Action*.

181 Elite interview with a Western source with close knowledge of Kenya.

182 Elite interview PEV victim ‘Ms P’ (June 2018)

183 *Victims’ response to the Prosecution’s notice of withdrawal of the charges against Uhuru Muigai Kenyatta*, International Criminal Court Case № ICC-01/09-02/11, 9 December 2014.

184 *Ibid*.

185 Celeste Hicks, *The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice* (Zed Books, 2018).

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187 Chayes, *Thieves of State: Why Corruption Threatens Global Security* (W.W Norton and Company, 2015), p. 14–15 referencing the ‘abusive behaviour of the Afghan government’ discusses the notion of ‘corruption as a critical threat to the stability and security of the realm’.

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The Kenyan experience has revealed how justice and accountability for ordinary Kenyan citizens appears to have been subordinated to the ‘bigger prize’ of preserving global security’.¹⁸⁹ Given the fragility of international justice mechanisms, should proponents of international tribunals be more conscious of political context in the future? I concur with the hypothesis that ‘the greater the apparent threats to national security...the more deeply entrenched the rules of exception’.¹⁹⁰ That exceptionalism was a potent weapon which Kenyan elites deployed and continue to deploy. Pre-empting such strategies and assessing the risk of indicting individuals who are still serving in positions of state authority and have the backing of powerful allies,¹⁹¹ could benefit the ICC’s sponsors as they seek to project the court as an effective institution.

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