

# Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court

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## ABSTRACT

The Rome Statute creating the International Criminal Court (ICC) entered into force in 2002. Currently, the ICC faces its most significant challenge—the prospect of a mass exodus by African countries. Complaints of institutional bias against African leaders, supported by a general critique of western superintendency attaching to international law's long and close association with colonialism (the *mission civilisatrice*), haunt the future of atrocity accountability in Africa. Borrowing from the critique of the western juridical tradition, as framed by the spectral imagery of philosopher Jacques Derrida and applied as critique to international criminal law by legal anthropologist Kamari Maxine Clarke, this Article reshapes that conversation by situating the discussion of atrocity accountability also within the framework of the neopatrimonial state and the lingering ethnographic presence of the politicized Big Man. Post-colonial and ethnographic narratives are then set against the vibrant and less discussed backdrop of African civil society to forward cautious support for the progressive development of the ICC in Africa owing to effective modalities supporting the ICC's principle of complementarity below the formal structures of the state.

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## I. INTRODUCTION

Amid an International Criminal Court (ICC) preliminary investigation into human rights abuses following his decision to run for a third term,<sup>1</sup> itself an apparent violation of his country's constitution and a 2005 agreement that ended a twelve-year civil war,<sup>2</sup> Burundi's President Pierre Nkurunziza signed a decree on 18 October 2016<sup>3</sup> implementing his parliament's vote to withdraw immediately from the ICC. Withdrawal under the Rome Statute,<sup>4</sup> which governs the ICC, takes one year to come into effect<sup>5</sup> and does not obviate any duty to abide by its obligations in the meantime.<sup>6</sup> However, Burundi's very decision to opt out almost immediately created "the most

1. See *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Preliminary Examination into the Situation in Burundi*, INT'L CRIM. CT. (25 Apr. 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016> (announcing commencement of an examination into reports of 430 deaths, 3,400 arrests, 230,000 internationally displaced persons and other reports of human rights abuses since April 2015). Burundi's ruling party, the CNDD-FDD, chose President Pierre Nkurunziza to run for a third five-year term on 25 April 2015, sparking immediate violence. See Jonathan W. Rosen, *Burundi Tensions Rise After Court Backs President's Third Term Bid*, WORLD POL. REV. 6 May 2015 available at <http://www.worldpoliticsreview.com/articles/15700/burundi-tensions-rise-after-court-backs-president-s-third-term-bid>.
2. See Arusha Peace and Reconciliation Agreement for Burundi [the Arusha Accords], 28 Aug. 2000, available at [https://peaceaccords.nd.edu/sites/default/files/accords/Arusha\\_Peace\\_Accord\\_\\_\\_\\_.pdf](https://peaceaccords.nd.edu/sites/default/files/accords/Arusha_Peace_Accord____.pdf). See also Paul Nantulya, *Burundi: Why the Arusha Accords are Central*, AFR. CTR. STRATEGIC STUD. (5 Aug. 2015), available at <http://africacenter.org/spotlight/burundi-why-the-arusha-accords-are-central/> (noting the Arusha Accords provided the "political framework widely attributed with having brought Burundi out of its 1993–2005 civil war"). The Arusha Accords "decisively shaped" Burundi's Constitution of March 18, 2005 and the power-sharing agreement leading up to it. Stef Vandeginste, *Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error*, 44 AFR. SPECTRUM 63, 72 (2009). The 2005 Constitution of Burundi holds that the President is "elected by universal direct suffrage for a mandate of five years renewable one time." ["Le Président de la République est élu au suffrage universel direct pour un mandat de cinq ans renouvelable une fois"]. CONSTITUTION DE LA RÉPUBLIQUE DU BURUNDI, art. 96 (2005), available at <http://www.assemblee.bi/Constitution-de-la-Republique-du>.
3. See Aaron Maasho, *Burundi Leader Signs Decree to Quit the International Criminal Court*, REUTERS, 18 Oct. 2016, available at <http://www.reuters.com/article/us-burundi-icc-idUSKCN12I2EP> (noting President Nkurunziza's signed decree to quit the ICC).
4. See Press Release: Statement of the President of the Assembly of States Parties on the Process of Withdrawal from the Rome Statute by Burundi, INT'L CRIM. CT. (18 Oct. 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1244> (taking note of the decision and expressing concern about this development). See generally Rome Statute of the International Criminal Court, adopted 17 July 1998, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (entered into force 1 July 2002) [hereinafter Rome Statute]. The jurisdiction of the Rome Statute applies to genocide, crimes against humanity, war crimes, and crimes of aggression. *Id.*
5. *Id.* art. 127 (requiring written notification of withdrawal from the Statute "one year after the date of receipt of the notification").
6. International law provides no basis for unilateral modifications of declarations made in violation of a treaty commitment unless a right to do so has been expressly reserved. See *Military and Paramilitary Activities (Nicar. v. US)*, 1984 I.C.J. 392, ¶¶ 61, 65 (26 Nov. 1984).



serious diplomatic crisis in the court's history.<sup>7</sup> Discontent with the ICC had been brewing in Africa for some time,<sup>8</sup> perhaps as early as 2005.<sup>9</sup> A special 2013 African Union (AU) summit meeting in Addis Ababa raised the possibility that African states would withdraw *en masse* from the court.<sup>10</sup> No state withdrew, but the AU's Open Ended Ministerial Committee placed the prospect of collective withdrawal on its agenda.<sup>11</sup>

Burundi's change of course activated this agenda. In presenting its letter of intent to withdraw, Burundian Foreign Minister Alain Nyamitwe announced, "[T]here is no going back."<sup>12</sup> United Nations (UN) Secretary-General Ban Ki-moon admonished that Burundi's move "could send a wrong message."<sup>13</sup> Rome Statute Assembly President Sidiki Kaba, labeled Burundi's decision "a setback in the fight against impunity and efforts towards the objective of universality of the Statute."<sup>14</sup> Human rights organizations decried the decision as an "added injustice to victims."<sup>15</sup> Accounts of Burundi's poor human

7. Jean-Baptiste Jeangène Vilmer, *The African Union and the International Criminal Court: Counteracting the Crisis*, 92 INT'L AFF. 1319, 1320 (2016).
8. See, e.g., Decision on the International Jurisdiction, Justice and The International Criminal Court (ICC), *adopted* 26–27 May 2013, A.U. Assemb., 21st Ord. Sess., ¶¶ 4–5, A.U. Doc. Assembly/AU/13(XXI), available at [http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20482%20\(XXI\)%20\\_E.pdf](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20482%20(XXI)%20_E.pdf) (noting concerns about the misuse of indictments against African leaders dating to 2009 and the need to avoid perceptions of double standards). See also Kofi Annan, *Africa and the International Court*, N.Y. TIMES, 29 June 2009, available at <http://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html> (noting in the recent months leading up to the 2009 AU Summit Meeting that "some African leaders have expressed the view that international justice as represented by the I.C.C. is an imposition, if not a plot, by the industrialized West").
9. See Vilmer, *supra* note 7, at 1321 (pinpointing the root cause of African discontent with the ICC in "U.N.S.C. Res. 1593 (2005), referring the situation in Darfur to the ICC"). Cf. Kurt Mills, "Bashir is Dividing Us": *Africa and the International Criminal Court*, 34 HUM. RTS. Q. 404, 406 (2012) (noting the same Security Council resolution and the subsequent attempts by the OTP to arrest Sudan's President, Omar Al Bashir).
10. See Wonderer Freeman, *The African Union Summit on the International Criminal Court: In Whose Interest?*, AFRICLAW (25 Oct. 2016), available at <https://africlaw.com/tag/african-court-on-human-and-peoples-rights/> (noting the Addis Ababa meeting was called by the AU "to consider a possible withdrawal from the Rome Statute").
11. See Decision on the International Criminal Court, *adopted* 30–31 Jan. 2016, A.U. Assemb., 26th Ord. Sess., ¶ 10(iv), A.U. Doc. EX.CL/952(XXVIII), available at [https://au.int/sites/default/files/decisions/29514-assembly\\_au\\_dec\\_588\\_-\\_604\\_xxvi\\_e.pdf](https://au.int/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf) (deciding to include as part of its mandate "the urgent development of a comprehensive strategy including collective withdrawal from the ICC").
12. James Butty, *Burundi Officially Informs UN of Intent to Leave ICC*, VOA, 27 Oct. 2016, available at <http://www.voanews.com/a/burundi-icc-withdrawal/3568311.html>.
13. *Withdrawal from International Criminal Court Could Send "Wrong Message"—UN Chief*, UN NEWS CENTRE, 28 Oct. 2016, available at <http://www.un.org/apps/news/story.asp?NewsID=55427#.WGVMuULrLb0> (quoting the Secretary-General).
14. Press Release: Statement of the President of the Assembly of States Parties on the Process of Withdrawal from the Rome Statute by Burundi, INT'L CRIM. CT. (18 Oct. 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1244>.
15. Amnesty Int'l, *Burundi: ICC Withdrawal Must Not Block Justice for Crisis Abuses*, 12 Oct. 2016, available at <https://www.amnesty.org/en/latest/news/2016/10/burundi-icc-withdrawal-must-not-block-justice-for-crisis-abuses/>.



rights record<sup>16</sup> stimulated criticism of Burundi's "crude attempt" to shield internal human rights abusers from international justice.<sup>17</sup> Nonetheless, Burundi's first step towards exiting the ICC suggested an exodus of African countries was in the making.

South Africa, a "driving force behind the establishment of the ICC"<sup>18</sup> under its former President Nelson Mandela, drew much more attention<sup>19</sup> when it too announced shortly thereafter that it would withdraw.<sup>20</sup> Amnesty International described the decision as a "betrayal to millions of victims of the gravest human rights violations."<sup>21</sup> Many "African states remain[ed] silent bystanders,"<sup>22</sup> but Kenya restarted withdrawal conversations in 2013<sup>23</sup>

16. See *Report of the United Nations Independent Investigation on Burundi (UNIB) established pursuant to Human Rights Council Resolution S-24/1*, H.R.C. U.N. Doc. A/HRC/33/37 (2016) (finding "gross human rights violations have and are taking place, committed primarily by state agents"). See also Coalition for the ICC, *Civil Society Talks: ICC A Last Resort for Justice in Burundi?*, (12 Jan. 2017), available at <http://www.coalitionfortheicc.org/news/20170112/civil-society-talks-icc-last-resort-justice-burundi> [hereinafter Civil Society Talks](quoting Cyriaque Nibitegeka's condemnation of Burundi's National Police Force and armed youth wing of the ruling party—the *Imbonerakure*—for perpetrating widespread human rights abuses).
17. Param-Preet Singh, *Embracing Impunity in Burundi: Government Approves Withdrawal From International Criminal Court*, HUM. RTS. WATCH, (13 Oct. 2016), available at <https://www.hrw.org/news/2016/10/13/embracing-impunity-burundi>.
18. *Mandela Legacy on the Line as South Africa Moves to Leave ICC*, #GLOBALJUSTICE (22 Oct. 2016), available at <https://ciccglobaljustice.wordpress.com/2016/10/21/mandela-legacy-on-the-line-as-south-africa-moves-to-leave-icc/> (quoting William R. Pace). Former South African Judge and First Chief Prosecutor of the United Nations International Criminal Tribunal for the Former Yugoslavia, Richard Goldstone, called South Africa's announcement to withdraw "regrettable," "unconstitutional" and morally demeaning from the standpoint of "the inspiring legacy of the administration of President Nelson Mandela that so strongly supported the ICC." *Id.*
19. Oumar Ba, *Why is South Africa Withdrawing From the International Criminal Court? And Why Now?* AFRICA IS A COUNTRY, 23 Oct. 2016, available at <http://africasacountry.com/2016/10/why-is-south-africa-withdrawing-from-the-international-criminal-court-and-why-now/> (labeling South Africa's announcement of withdrawal stunning).
20. *SA Formally Withdrawing from ICC*, SOUTH AFR. GOV. NEWS AGENCY, 21 Oct. 2016, available at <https://www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc>. Although Burundi was the first country to announce formally its withdrawal, South Africa was the first country to submit to the U.N. Secretary-General its formal notification of withdrawal. On 22 February 2017, the North Gauteng High Court in Pretoria ruled "unconstitutional and invalid" former South African President Jacob Zuma's executive order to withdraw from the Rome Statue absent parliamentary approval. In the matter between: Democratic Alliance v. Minister of International Relations and Cooperation and Others, Case No. 83145/2016, ZAGPPHC 53, ¶1 (22 Feb. 2017), available at <http://www.saflii.org/za/cases/ZAGPPHC/2017/53.html>.
21. Amnesty Int'l, *South Africa: Decision to Leave International Criminal Court a "Deep Betrayal of Millions of Victims Worldwide"* 21 Oct. 2016, available at <https://www.amnesty.org/en/latest/news/2016/10/south-africa-decision-to-leave-international-criminal-court-a-deep-betrayal-of-millions-of-victims-worldwide/> (quoting Amnesty International's Africa Director, Netsanet Belay).
22. Vilmer, *supra* note 7, at 1326.
23. Thomas Obel Hansen, *What's At Stake As Kenya Weighs Withdrawal From the ICC*, MAIL & GUARDIAN AFRICA, 17 Nov. 2016, available at <http://mgafrica.com/article/2016-11-17-whats-at-stake-as-kenya-weighs-withdrawal-from-the-icc> (noting Kenya is "seriously considering joining the exit").



following charges lodged by the ICC against its President, Uhuru Kenyatta, and Deputy President, William Ruto.<sup>24</sup> Namibia and Uganda also threaten to withdraw.<sup>25</sup> The Gambia announced its decision to leave on state television while denouncing the ICC as the “International Caucasian Court.”<sup>26</sup> The Gambia’s derision embedded a deeper sense of institutional disdain—its former Justice Minister, Fatou Bensouda, heads the ICC’s Office of the Prosecutor (OTP).<sup>27</sup>

Inveighing against these signals, Kaba stressed the need for unity within the international community to stop the weakening of the only permanent international criminal court protecting against crimes committed by individuals that shock the conscience.<sup>28</sup> But is it too late? Complaints of bias haunt the

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24. See *Kenya Votes to Leave ICC Days Before Deputy President’s Hague Trial: William Ruto and President Uhuru Kenyatta Face Charges of Crimes Against Humanity*, GUARDIAN (Kenya), 5 Sept. 2013, available at <https://www.theguardian.com/world/2013/sep/05/kenya-icc-international-criminal-court> (discussing Kenya’s 2013 parliamentary vote to withdraw from the ICC, passed but not acted on, following ICC allegations of crimes against humanity facing the leaders in 2007–2008 post-election violence).
25. See Florian Deckers, *Shanghala Defends ICC Withdrawal*, THE NAMIBIAN, 7 Nov. 2016, available at <http://www.namibian.com.na/157868/archive-read/Shanghala-defends-ICC-withdrawal> (reporting on Namibian Attorney General Sacky Shanghala’s defense of the government’s decision to pull out of the ICC); Elsa Buchanan, *Ugandan President Museveni Praises African Nations for Withdrawing from “Useless” ICC*, INT’L BUS. TIMES, 26 Oct. 2016, available at <http://www.ibtimes.co.uk/ugandan-president-museveni-praises-african-nations-withdrawing-useless-icc-1588328> (quoting Ugandan President Yoweri Museveni as describing the ICC as “useless”).
26. *Gambia Leaves ICC*, THE POINT NEWSPAPER (Gambia), 26 Oct. 2016, available at <http://thepoint.gm/africa/gambia/article/gambia-leaves-icc> (quoting The Gambia’s Information Minister Sheriff Bojang’s announcement on GRTS, The Gambia’s state broadcasting company). The Gambia has reversed its decision following former President Yahya Jammeh’s election defeat in December 2016 followed by his decision to flee to Equatorial Guinea while facing the prospect of a military intervention to uphold the election result. See *The Chairperson of ECOWAS Speaks on the current Political Situation in The Gambia*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS), available at <http://www.ecowas.int/the-chairperson-of-ecowas-speaks-on-the-current-political-situation-in-the-gambia/> (calling The Gambian President’s decision not to honor the election results “unacceptable” and a threat to the peace in “the entire West African Subregion”).
27. Before elected as prosecutor of the ICC in 2011, Bensouda worked as Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda, in The Gambia as the general manager of a leading commercial bank, Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, and Attorney General and Minister of Justice, where in that capacity she served as Chief Legal Adviser to the President of The Gambia. See *Ms. Fatou Bensouda, Prosecutor, Biography*, INT’L CRIM. CT., available at <https://www.icc-cpi.int/about/otp/who-s-who/pages/fatou-bensouda.aspx>.
28. Press Release, President of the Assembly Regrets Withdrawal of any State Party from the Rome Statute and Reaffirms the Court’s Fight Against Impunity, INT’L CRIM. CT. (22 Oct. 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1248>; *Media Advisory: Press Conference by the President of the Assembly on Withdrawal from the Rome Statute, today at 15:00 (GMT) in Dakar*, INT’L CRIM. CT. (4 Oct. 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=ma206> (inviting countries to reconsider their positions and work together in fighting impunity).



ICC,<sup>29</sup> merely fifteen years after UN Secretary-General Kofi Anan announced its coming into effect.<sup>30</sup> Moreover, Kaba's appeal to the international community seems 'thinly' metaphorical or aspirational.<sup>31</sup> Important powers and some 70 countries in total refuse to ratify the Rome Statute.<sup>32</sup> "Accusations of double standards, neo-colonialism, and 'white justice'" attach to the court's practices<sup>33</sup> further impugning the integrity of the international community.<sup>34</sup>

These critiques reflect criticisms about the intellectual compartmentalization of African anticolonial perspectives. Critics regard so-called transformative projects such as the ICC, or in a similar vein, the Responsibility to Protect,<sup>35</sup> or even more broadly, "the mainstream historiography of human rights discourse,"<sup>36</sup> as projects drawn narrowly from western models

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29. See Mark J. Osiel, *The Demise of International Criminal Law*, HUMANITY, (10 June 2014), available at <http://humanityjournal.org/blog/the-demise-of-international-criminal-law/> (noting the Rome Statute has not been ratified by the US, Russia, China, Iran, North Korea, India, Pakistan, Indonesia, Israel or Syria; but noting France and Britain have).
30. See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 53–54 (2008) (quoting Secretary-General Anan's 2002 claim that "[i]mpunity has been dealt a decisive blow"). The Rome Statute came into effect on July 1, 2002, after receiving more than sixty ratifications since the Statute was approved at a United Nations conference in Rome on 17 July 1998.
31. On "thin" and "thick" presentations of the idea of international community, see Hannes Peltonen, *In or Out? International Community Membership: Beliefs, Behavior, Contextuality and Principles*, 27 CAMBRIDGE REV. INT'L AFF. 475, 476 (2014).
32. See DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 5 (2014) (noting for instance the U.S., China, Russia, India, Turkey, Egypt, Israel, Saudi Arabia, Pakistan, and Indonesia have not signed the Rome Statute); GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 7–8 (2004) (discussing notable non-signatories). Of the 195 countries in the world, 123 are states parties to the Rome Statute, 72 are not. See The States Parties to the Rome Statute, International Criminal Court, available at [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).
33. Vilmer, *supra* note 7, at 1320.
34. Immi Tallgren, *Who are "we" in International Criminal Law? On Critics and Membership*, in CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 71, 72–74 (Christine Schwöbel ed., 2014) (presenting a critical view of the "we" component of the international community).
35. See, e.g., Noam Chomsky, *The Crimes of "Intcom"* 132 FOREIGN POL'Y 34, 34–35 (2002) (noting western powers have defined the emerging interventionist doctrine of humanitarian intervention in terms that make it inapplicable as against western powers. Chomsky's attack against excesses of the so-called international community implicate the Responsibility to Protect doctrine, which purportedly grants the international community a right to intervene against a state that is unable or unwilling to prevent atrocity within its borders); Christopher R. Rossi, *The International Community, South Sudan, and the Responsibility to Protect*, 49 N.Y.U. J. INT'L L. & POL. 129, 135 (2016) (noting complaints that the Responsibility to Protect has failed Africa). On the intended close working relationship between the ICC and the Responsibility to Protect, see Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91 INT'L AFF. 37 (2015).
36. KIRAN KAUR GREWAL, THE SOCIO-POLITICAL PRACTICE OF HUMAN RIGHTS: BETWEEN THE UNIVERSAL AND THE PARTICULAR 21 (2017) (drawing from Balakrishnan Rajagopal's argument that the West minimizes the Third World's contribution to human rights).



and traditions that affect the governance of others.<sup>37</sup> Here, according to the critique of the western view, Africa becomes the “veritable laboratory” of attempts to institutionalize international criminal justice reforms<sup>38</sup> in yet another iteration of the *mission civilisatrice*—the persistent western attempt to make sub-Saharan Africa more western.<sup>39</sup>

The *mission civilisatrice* dates to Portugal’s navigation of the Zambezi River in the early 1500s.<sup>40</sup> Centuries later, it provided a moral basis in support of the Scramble for Africa<sup>41</sup> that partitioned the continent along imperial lines based on the General Act produced by the Berlin West Africa Conference of 1884–1885.<sup>42</sup> This conference marked the symbolic “high-point of colonial expansion in the late 19<sup>th</sup> Century.”<sup>43</sup> It made a deep impress on the atlas of Africa that today largely reflects those imperial border drawings. The conference legitimated European colonialism by affixing to it international law’s moral insignia. As U. O. Umozurike concluded: the conference decided the fate of Africa while making most irrelevant the Africans themselves “who were neither consulted nor apprised of the conference.”<sup>44</sup>

Although the ICC projects universal jurisdiction, it requires a referral from the Security Council to investigate problems in non-party states.<sup>45</sup> The

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37. See, e.g., Isaac Kamola, *Steve Biko and a Critique of Global Governance as White Liberalism*, 13 AFR. IDENTITIES 62, 62, 72–73 (2016) (discussing “the intellectual compartmentalization of African anticolonial theory”).
  38. Gerhard Anders, *Bigmanity and International Criminal Justice in Sierra Leone*, in AFRICAN CONFLICTS AND INFORMAL POWER: BIG MEN AND NETWORKS 158, 158 (Mats Utas ed., 2012).
  39. See generally ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2007) (presenting a discussion of international law’s civilizing mission in different phases of the colonial encounter).
  40. Jeffrey Herbst, *The Creation and Maintenance of National Boundaries in Africa*, 43 INT’L ORG. 673, 674 (1989) (noting the first penetrations by Portuguese explorers of the Zambezi River in the early 1500s). For more on the earliest European colonies in Africa, see JAMES DUFFY, *PORTUGAL IN AFRICA* (1962).
  41. On the “Scramble of for Africa,” see generally HENRY M. STANLEY, *THE CONGO AND THE FOUNDING OF ITS FREE STATE: A STORY OF WORK AND EXPLORATION* (1885) (presenting the explorer’s personal account of his commission by Belgian King Leopold II to Head the *Comité d’Etudes du Haut Congo* and began the Scramble between 1879–1884); J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 532 (1970) (noting France’s interventions in response); A.C. MCEWEN, *INTERNATIONAL BOUNDARIES OF EAST AFRICA* (1971) (noting rivals’ reactions); THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: 1876–1912* (1991) (detailing the broad history).
  42. See generally E. HERTSLET, No. 128-Preamble, *General Act of the Conference of Berlin, Relative to the Development of Trade and Civilization in Africa; The Free Navigation of the Rivers Congo, Niger, & c.; The Suppression of the Slave Trade by Sea and Land; The Occupation of Territory on the African Coasts & c.* Signed at Berlin, 26 Feb. 1885, *reprinted in THE MAP OF AFRICA BY TREATY* (3d ed, 1967).
  43. Matthew Craven, *The Invention of a Tradition: Westlake, The Berlin Conference and the Historicism of International Law*, in *CONSTRUCTING INTERNATIONAL LAW: THE BIRTH OF A DISCIPLINE* 363, 368 (Luigi Nuzzo & Miloš Vec eds., 2012).
  44. U.O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* 26 (1979).
  45. Rome Statute, *supra* note 4, art. 13 (b) (conferring jurisdiction on the ICC if “[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”).



AU began voicing concerns about the abuse of this principle in 2008<sup>46</sup> and formally urged its members in 2012 to use the principle of reciprocity to defend against the abuse of universal jurisdiction.<sup>47</sup> The AU's criticisms now routinely condemn the principle<sup>48</sup> and debase the ICC as nothing more than an African Criminal Court,<sup>49</sup> an extension of the nineteenth century mindset that suppressed the voices of particular regions while asserting European liberal internationalism as the legal conscience of the civilized world.<sup>50</sup>

Mounting concerns of its legitimacy now paradoxically invite politicized recourse to it. Gabonese opposition leader, Jean Ping—a former fierce critic of the ICC<sup>51</sup>—joined Gabon's President Ali Bongo Ondimba in calling for an ICC investigation into post-2016 election violence,<sup>52</sup> with each side accusing

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46. See Christopher Gevers, *International Criminal Law and Individualism: An African Perspective*, in *CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION*, *supra* note 34, at 221, 229 (discussing the AU's indignation regarding ICC application of universal jurisdiction).
47. Decision on the Abuse of the Principle of Universal Jurisdiction, *adopted* 15–16 July 2012, A.U. Assemb., 19th Ord. Sess., ¶ 5, A.U. Doc. EX.CL/731(XXI).
48. Florian Jeßberger, "On Behalf of Africa": Towards the Regionalization of Universal Jurisdiction?, in *AFRICA AND THE INTERNATIONAL CRIMINAL COURT* 155, 159 (Gerhard Werle, Lovell Fernandez & Mortiz Vormbaum eds., 2014).
49. See, e.g., Kai Ambos, *Expanding the Focus of the "African Criminal Court"*, in *THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES* 499, 499 (William A. Schabas, Yvonne McDermott & Niamh Hayes eds., 2013) (noting criticisms of the ICC's focus on Africa).
50. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* 109–10 (2004). For critiques of the European colonial influence on the development of international law see, James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998); SIBA N'ZATILOULA GROVOGUI, *SOVEREIGNS, QUASI SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW* (1996); SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* (1996); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).
51. Mwangi S. Kimenyi, *The International Criminal Court in Africa: A Failed Experiment?*, OPEN DEMOCRACY (11 Nov. 2014), available at <https://www.opendemocracy.net/openglobal-rights/mwangi-s-kimenyi/international-criminal-court-in-africa-failed-experiment> (noting that Jean Ping, "while President of the African Union criticized the ICC saying that it appears that the Court exists solely for judging Africans"); Richard Lough, *African Union Accuses ICC Prosecutor of Bias*, REUTERS, 30 Jan. 2011, available at <http://www.reuters.com/article/ozatp-africa-icc-idAFJ0E70T01R20110130> (quoting Jean Ping's complaint [as AU President] that ICC Chief Prosecutor renders "justice with double standards"). Ping also served as UN General Assembly President from 2004–2005. Press Release: General Assembly Elects Jean Ping of Gabon as President of Fifty-Ninth Session, Decides on Officers for Main Committees (10 June 2004), available at <http://www.un.org/press/en/2004/ga10243.doc.htm>.
52. See Stephen Lamony, *Gabon Refers Itself to the ICC As Others Threaten To Withdraw*, JUSTICE IN CONFLICT (19 Oct. 2016), available at <https://justiceinconflict.org/2016/10/19/gabon-refers-itself-to-the-icc-as-others-threaten-to-withdraw/> (noting government and opposition leaders of Gabon supported self-referral to the ICC). See also Jean Ping Files Case at the ICC, AFRICANEWS, 12 Dec. 2016, available at <http://www.africanews.com/2016/12/16/jean-ping-sends-information-to-icc/> (noting Ping's case file sent to the ICC OTP accusing the government of crimes against humanity); Chief Charles Achaleke Taku, *International Politics and Policy Considerations for the Inappropriate Targeting of Africa by the ICC OTP*, in *CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT* 338, 338 (Richard H. Steinberg ed., 2016) (labeling the ICC referral process as "the new weapon of silencing opposition").





the other of crimes against humanity. Pieties associated with this double-edged self-referral prompted the cynical conclusion “that some states will criticize the court when it suits them, but utilize its investigations when it is in need of assistance to hurt their enemies.”<sup>53</sup> The oversimplification of the friend-enemy distinction implicates the work of the OTP, which operates in the fluid interstice between international law enforcement and criminal violence.<sup>54</sup> For example, the capture of Lord’s Resistance Army commander Dominic Ongwen by Seleka rebels in the Central African Republic in early 2015 and his transfer to the ICC<sup>55</sup> resulted in high praise from Chief Prosecutor Bensouda to the Governments of Uganda, the Central African Republic, and the African Union Regional Task Force for assistance in his capture.<sup>56</sup> She did not mention Seleka’s role as “itself subject to ICC investigation for many of the same crimes that the LRA stands accused of.”<sup>57</sup> Nor did she mention the “key part played by US Special Forces,”<sup>58</sup> a sensitive topic given the perception that the US also supports the ICC “when it advances US interests, in exchange for which the ICC avoids prosecutions that the US might oppose.”<sup>59</sup>

Other concerns note that the politicization of international tribunals obscures power relationships and normative underpinnings of the international justice system.<sup>60</sup> These underpinnings harbor hegemonic histories that

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53. Lamony, *supra* note 52. See also Sosteness Francis Materu, *A Strained Relationship: Reflections on the African Union’s Stand Towards the International Criminal Court from the Kenyan Experience*, in *AFRICA AND THE INTERNATIONAL CRIMINAL COURT* 224 (Gerhard Werle, Lovell Fernandez & Mortiz Vormbaum eds., 2014) (on ruling elites using the ICC to settle scores against political opponents in Africa); Mohammed Ndifuna, *In Their Own Words*, COAL. FOR THE INT’L CRIM. CT., available at <http://www.coalitionfortheicc.org/civil-society/africa/uganda/mohammed-ndifuna> (on leaders’ opportunistic use of the ICC to deal with political opposition). On the weaponization of ICC interventions as a politicized adaptation of Carl Schmitt’s friend-enemy distinction, where opposing factions seek recourse to the ICC by claiming to be a friend of justice while branding the other as *hostis humani generis* (enemies of mankind). See Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941 (2010).
54. See Adam Branch, *Dominic Ongwen on Trial: The ICC’s African Dilemmas*, 11 INT’L J. TRANS. JUST. 30, 31–33 (2017) (noting complications associated with maintaining a clean division between international law enforcement and criminal violence).
55. *Id.* at 30–31; *Case Information Sheet: The Prosecutor v. Dominic Ongwen*, INT’L CRIM. CT., Jan. 2017, available at <https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf>.
56. See Branch *supra* note 55, at 31 (quoting Bensouda on the capture of Ongwen).
57. *Id.*
58. *Id.* at 32. The US had offered a five million reward for Ongwen’s capture that it refused to pay, prompting protests by Seleka. *LRA’s Dominic Ongwen “Capture”: Seleka Rebels Want \$5m Reward*, BBC NEWS, 9 Jan. 2015, available at <http://www.bbc.com/news/world-africa-30743647>.
59. Branch, *supra* note 54, at 32.
60. See Kamari Maxine Clarke, *The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord*, 18 IND. J. GLOBAL L. STUD. 7, 8 (2011) (noting international tribunals as mechanisms for “radical types of politicization”); Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT’L J. HUM. RTS.



flatten structural causes of atrocity and elevate individuals as autonomous moral agents.<sup>61</sup> This flattening of history overvalues traditional linear narratives that burnish “the contemporaneous self-image of the Great Powers”<sup>62</sup> while obscuring the colonial antecedents that inculcate Great Power impediments to the development of African statecraft. Linear narratives also suggest a directional and progressive normative trajectory of the ICC. The impending exodus of African countries now calls this trajectory into question. These critiques emphasize the politicization and individuation of the ICC. They regionalize universal jurisdiction to atrocity and result in “low cost” prosecutions.<sup>63</sup> They feed the global consumption of rule of law spectacles, concentrate on the attenuated command responsibility of the single perpetrator, symbolically celebrate punishment rather than the regaining of victims’ losses, and fail to address root causes of conflict.<sup>64</sup>

The ICC faces an existential problem.<sup>65</sup> Hobbled by the legacy of international law’s close association with the *mission civilisatrice*,<sup>66</sup> this

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444, 458 (2014) (finding “a clear pattern of politiciz[ation] in the ICC’s prosecutions”); Tor Krever, *Unveiling (and Veiling) Politics in International Criminal Tribunals*, in *CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION*, *supra* note 34, 117–18 (noting critical denunciations “of international trials as political tools”); JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 149 (1986) (noting political trials and their characteristic “scorn the principle of legality”).

61. See Gevers, *supra* note 46, at 221 (discussing international criminal law’s relationship with its own history and the history it produces).
62. Gerry Simpson, *Linear Law: The History of International Criminal Law*, in *CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION* 159, 170 (Christine Schwöbel ed., 2014).
63. Faßberger, *supra* note 48, at 171 (defining low cost defendants in terms of the political and enforcement resources their prosecutions require, and noting Africans’ inclusion in this group).
64. See Clarke, *supra* note 60, at 12–13 (on root causes). See also KAMARI MAXINE CLARKE, *FICCTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* 98–112 (2009) (detailing command responsibility and the ICC’s betrayal of victims by focusing on the punishment of chief commanders) [hereinafter CLARKE, *FICCTIONS OF JUSTICE*].
65. See, e.g., Dire Tladi, *The African Union and the International Criminal Court: The Battle for the Soul of International Law*, 34 *S. AFR. YEARBOOK INT’L L.* 57 (2009) (discussing questions posed by the AU about the validity of the ICC); MARK KERSTEN, *JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT’S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE* (2016) (framing the existential question in terms of the pursuit of peace versus the quest for justice); Marieke de Hoon & Kjersti Lohne, *Negotiating Justice at the ASP: From Crisis to Constructive Dialogue*, *EJIL: TALK!* (29 Nov. 2016), available at <http://www.ejiltalk.org/negotiating-justice-at-the-asp-from-crisis-to-constructive-dialogue/> (discussing the ICC’s existential crisis following withdrawal pledges). Luis Moreno Ocampo, the ICC’s first Chief Prosecutor, stated the problem differently: “The existence of the court is not at stake . . . But its relevance is a different matter.” Peter Ford, *After South Africa’s Withdrawal, How Does the ICC Stay Relevant?* *CHRISTIAN SCI. MONITOR*, 24 Oct. 2016, available at <http://www.csmonitor.com/World/Africa/2016/1024/After-South-Africa-s-withdrawal-how-does-the-ICC-stay-relevant-video>.
66. See generally SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011); ANGHIE, *supra* note 39 (on colonialism and international law); KOSKENNIEMI, *supra* note 50, at 109; noting the particular internationalizing mindset of European jurists who formed the first professional



Article takes the position that the ICC now encounters another formidable challenge from an Africa in transition, where democratization efforts and institutional norm creation within civil society confront the neopatrimonial clientelism embedded in Africa's pseudo-democracies.<sup>67</sup> Here, autocratic patrons combine the modern bureaucratic state with personalized, traditional brokerage practices to cultivate dependencies and fealties, often ethnically based,<sup>68</sup> where private rewards accrue to the benefice and substitute for state-sponsored public goods<sup>69</sup> and where "political administration, too, is treated as a purely personal affair."<sup>70</sup> The patrimonialized post-colonial African state presents an impediment to the ability of the state "to transform allocated public resources into intended policy aims."<sup>71</sup> The Organization for Economic Cooperation and Development (OECD), a forum of democratic states with developed market economies accounting for 63 percent of world GDP,<sup>72</sup> differentiates expressions of patrimonialism in terms of development principles needed to end state fragility.<sup>73</sup> Its principles recognize that the fragile state combines weak governance, limited administrative capacity, chronic humanitarian crisis, and social tension and violence connected to

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international legal journal, the *Revue de droit international et de législation compare* (1868); Amin George Forji, *International Law, the Civilizing Mission and the Ambivalence of Development in Africa: Conceptual Underpinnings*, 6 J. AFR. & INT'L L. 191, 192–93 (2013) (discussing particularized notions of universality); David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT'L L. 137, 139 (2001) (discussing the imposition of western international law on non-western countries).

67. See LARRY DIAMOND, IN SEARCH OF DEMOCRACY 252 (2016) (discussing problems of governance in Africa). On neopatrimonialism, see Günther Roth, *Personal Rulership, Patrimonialism, and Empire-Building in the New States*, 20 WORLD POL. 194 (1968); John Duncan Powell, *Peasant Society and Clientelist Politics*, 64 AM. POL. SCI. R. 411 (1970); René Lemarchand & Keith Legg, *Political Clientelism and Development: A Preliminary Analysis*, 4 COMP. POL. 149 (1972); POLITICAL CLIENTELISM, PATRONAGE AND DEVELOPMENT (S.N. Eisenstadt & René Lemarchand eds., 1981); Jean François Medard, *The Underdeveloped State in Tropical Africa: Political Clientelism or Neo-Patrimonialism?*, in PRIVATE PATRONAGE AND PUBLIC POWER: POLITICAL CLIENTELISM AND THE MODERN STATE 162 (Christopher Clapham ed., 1982).
68. See Kennedy Ochieng Opalo, *Ethnicity and Elite Coalitions: The Origins of "Big Man" Presidentialism in Africa* (26 May 2011), available at <https://ssrn.com/abstract=1853744>.
69. See *id.* at 259 (noting that neopatrimonial governments concentrate on producing private rewards rather than public goods).
70. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY*, Vol. 3, 1028–29 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968).
71. See, e.g., Thomas M. Callaghy, *The State and the Development of Capitalism in Africa: Theoretical, Historical, and Comparative Reflections*, in THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA 67, 82 (Donald Rothchild, & Naomi Chazan eds., 1988) (quoting Crawford Young).
72. United States Mission to the Organization for Economic Cooperation and Development: What is the OECD?, available at <https://usoecd.usmission.gov/our-relationship/about-the-oecd/what-is-the-oecd/>. (detailing the structure, history, and activities of the OECD's thirty-four members states, which account for 63 percent of World GDP, three-quarters of world trade, and 95 percent of world official development assistance).
73. *Principles for Good International Engagement in Fragile States & Situations*, OECD (Apr. 2007), available at <https://www.oecd.org/dac/governance-peace/conflictfragilityandresilience/principlesforgoodinternationalengagementinfragilestates.htm>.



the legacy of civil war.<sup>74</sup> Overcoming these impediments is necessary to achieve the OECD's central objective of state-building. This Article construes elements of neopatrimonialism as a central impediment to the development of the ICC within Africa.

No clear bureaucratic separation of "private" and "official" spheres exists<sup>75</sup> within these pseudo-democracies. Informal institutions dominate these weak state settings leading to less restrained political associations based on leadership, charisma, and personal rule.<sup>76</sup> Here, the political order results from the patrimonial adaptation of capitalism<sup>77</sup> and decentralized wealth exchange.<sup>78</sup> This adaptation of capitalism—disaggregated capitalism—prefers the logic of personal association, not the logic of the marketplace.<sup>79</sup> It equates the social space of the local community with the level of the state, and relies on investments in personal reciprocity that lay beyond the jurisdiction of a court,<sup>80</sup> but in the circle of "political entrepreneurs" who conform to the ethnographic archetype of Africa's Big Man.<sup>81</sup>

This article assesses the African exodus threat from the ICC in terms of the *mission civilisatrice* and the way select African elites ably have relied on the neopatrimonial state to threaten the ontology of the court. A disruptive narrative invokes the near-homonym hauntology of international law's inglorious past and it now intrudes into discussions of Africa and the ICC.<sup>82</sup>

74. *International Engagement in Fragile States: Can't we do better?*, OECD 3 (2011), available at <https://www.oecd.org/countries/somalia/48697077.pdf>.

75. See *id.* at 45.

76. GORAN HYDEN, *AFRICAN POLITICS IN COMPARATIVE PERSPECTIVE* 94–96 (2006). For in depth treatment of charismatic elements of patrimonial rule, see WEBER, *supra* note 70, at 1006–69.

77. See Callaghy, *supra* note 71, at 82.

78. For a classical anthropological study of wealth exchange comparing the Polynesian chief and Melanesian Big Man, see Marshall D. Sahlins, *Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia*, 5 *COMP. STUD. SOC. & HIST.* 285 (1963). For general adaptations and discussions within an African context, see *AFRICAN CONFLICTS AND INFORMAL POWER: BIG MEN AND NETWORKS* (Mats Utas ed., 2012).

79. See Callaghy, *supra* note 71, at 86 (discussing patrimonial capitalism and the dominance of political logic).

80. HYDEN, *supra* note 76, at 114.

81. Jean-François Médard, *Le "Big Man" en Afrique: Esquisse d'analyse du Politicien Entrepreneur*, 42 *L'ANNÉE SOCIOLOGIQUE* 167, 168 (1992) (referring to Big Men "comme d'entrepreneurs politiques, au sens le plus large du terme."). See generally Rena Lederman, *Anthropology of Big Man*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* 1162 (Neil J. Smelser & Paul B. Baltes eds., 2001) (reviewing anthropological literature on the Big Man). See also *infra*, II (C).

82. Derrida construed hauntology as "this logic of haunting." JACQUES DERRIDA, *SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL* 10 (1994). When introducing the term, he twinned it with the End of History thesis—liberalism's triumphant claim of outdistancing Marxism (writing: "Staging for the end of history. Let us call it a *hauntology*;" and "After the end of history, the spirit comes by *coming back* [revenant]."). *Id.* Derrida confessed he had not reread Marx's *Manifesto* for decades, but he "knew very well there was a ghost waiting there." *Id.* at 4. He wrote the lesson imparted by the *Manifesto* "seemed more urgent today" than could be found in perhaps any other philosophical text, and that few texts "have shed so much light on law, international law,



A haunting of the ICC is underway, a haunting of atrocity accountability.<sup>83</sup> Individualized or collectivized assessments of the wrongdoer (and victim)—be they directed toward historical forces or individual misrule—cast a spectral shade over the ICC and its future in Africa. The frequenting of the out-of-time apparition of the *mission civilisatrice* intermixes with congeries of the presidential politics of the African Big Man to cast doubt on the accountability project of the ICC. Mindful of the considerable post-colonial challenges facing African states, this Article argues that the pathway for the court involves the separation of Africa's punishing colonial history from reworkings of that narrative by the Big Man. And indeed, this Article notes that a separation is taking place—more so in the inventive soft law space of African civil society than through appeals of support for the ICC through the phantom-like international community. Arresting the exodus of African countries from the ICC is an African project, perhaps more sustaining than the threatened exodus of African countries, yet less visible in a transnational legal space dominated by vestiges.

To address the *mission civilisatrice's* haunting of the ICC, and its discursive cooptation by blameworthy African elites in the neopatrimonial semi-state, this Article will proceed in Part II with a brief examination of the background leading up to the current prospect of a mass exodus of African countries. This discussion will connect to the anthropological presentation of the Big Man, but first it draws from the idea of hauntology forwarded by Jacques Derrida<sup>84</sup> and explicitly connected to international criminal law by Kamari Maxine Clarke.<sup>85</sup> More ambitious than this project, Clarke's work presents a rethinking of criminal responsibility and a deeper interrogation of how it is defined in order to break free of the social location of the rule of

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and nationalism." *Id.* at 13. See also Colin Davis, *Ét at Présent: Hauntology, Spectres and Phantoms*, 59 *FRENCH STUD.* 373, 373 (2005) (noting Derrida's coined the term hauntology and that it has imparted extraordinarily broad usages in critical literary circles).

83. See Mark Osiel, *Choosing Among Alternative Responses to Mass Atrocity: Between the Individual and the Collectivity*, *ETHICS & INT'L AFF.* (18 Sept. 2015), available at <https://www.ethicsandinternationalaffairs.org/2015/choosing-among-alternative-responses-mass-atrocity-individual-collectivity/> (contrasting the problem of achieving a systemic or structural understanding of mass atrocity against a Western legal framework disposed toward moral assignments based on individualism).
84. See generally DERRIDA, *supra* note 82.
85. See generally CLARKE, *FICIONS OF JUSTICE*, *supra* note 64, (discussing apparitions and fictions of justice and temporal frameworks of international criminal law relating to post-colonial Africa). See also Mark Goodale & Kamari Maxine Clarke, *Introduction: Understanding the Multiplicity of Justice*, in *MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA* 1, 1–27 (Kamari Maxine Clarke & Mark Goodale eds., 2010) (adapting the metaphor of the mirror to discuss reflections and refractions of justice); see generally Kamari Maxine Clarke, *Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap*, 19 *INT'L J. HUM. RTS.* 592 (2015) (developing problems of temporality and the idea of the ICC's impunity gap—the gap between the individualized assignment of guilt and the underexplored long history of root causes that go beyond the individual).



law movement in criminal deterrence.<sup>86</sup> She argues the ICC's interventionist solution to African impunity expresses shortcomings in terms of addressing root causes.<sup>87</sup> These shortcomings cannot be explained away by the liberalist value of pluralism, where differences in social regulation coexist and reflect homogeneous core values adapted to variations in cultural and contextual landscapes.<sup>88</sup> In her view, the legal pluralist perspective presents "[n]orthern" discursive refractions of justice that express different core values<sup>89</sup> and contribute to presentations of international justice as myth, apparition, and fiction.<sup>90</sup> Tethered to "boosting indexes" measuring good governance, adherence to international treaties, and renewal of debt-ridden obligations to International Monetary Fund loans—western apparitions of democratization—African participation in the ICC treaty concretized fictions of justice more appropriate for incentivizing western superintendency than inculcating a continent-wide capacity for fighting impunity.<sup>91</sup>

Although mindful of this critique, and the views of others who construe African pre-colonial pluralism as fundamentally fluid and adaptive, as opposed to western liberalism's homogeneous, consensual, and rationalist constructs,<sup>92</sup> Part III locates efforts within African contexts that strengthen the work of the court and counter presentations of the ICC as a visitation of western injustice. Part IV concludes this discussion with observations about the future of the ICC in Africa and the utility of relying on tropes such as the *mission civilisatrice* and the international community to counter the politics of Big Man presidentialism<sup>93</sup> in the dynamic landscape of African democratization.

86. She seeks a rethinking of criminal responsibility and a deeper interrogation of how it is defined in order to break free of the social location of the rule of law movement in criminal deterrence. See CLARKE, *FICCTIONS OF JUSTICE*, *supra* note 64, at xviii-xix.

87. See *id.* at xviii.

88. See CLARKE, *FICCTIONS OF JUSTICE*, *supra* note 64, at 5. See also Goodale & Clarke, *supra* note 85, at 9.

89. CLARKE, *FICCTIONS OF JUSTICE*, *supra* note 64, at 5.

90. *Id.*

91. Kamari Maxine Clarke, *Why Africa?*, in *CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT*, *supra* note 52, at 326, 332.

92. Giselle Corradi, *Justice Sector Aid in Legally Plural Africa*, in *INTERNATIONAL ACTORS AND TRADITIONAL JUSTICE IN SUB-SAHARAN AFRICA: POLICIES AND INTERVENTIONS IN TRANSITIONAL JUSTICE AND JUSTICE SECTOR AID* 121, 121-22 (Eva Brems, Giselle Corradi, & Martien Schotsmans eds., 2015) (canvassing scholarly views on African pre-colonial forms of pluralism and social organization).

93. African presidentialism has been discussed in terms of authoritarian regimes structures based on personal rule and insufficient constitutional, political, and social restraints on power. See GÜNTHER ROTH, *POLITISCHE HERRSCHAFT UND PERSÖNLICHE FREIHEIT: HEIDELBERGER MAX WEBER Vorlesungen* 1983, 18 (1987) (attaching personal rule to definition of neopatrimonialism); Gero Erdmann & Ulf Engel, *Neopatrimonialism Revisited—Beyond a Catch-All Concept*, (GERMAN INSTITUTE OF GLOBAL AND AREA STUDIES IGA Working Papers No. 16, 2006), available at [https://www.giga-hamburg.de/en/system/files/publications/wp16\\_erdmann-engel.pdf](https://www.giga-hamburg.de/en/system/files/publications/wp16_erdmann-engel.pdf); Oda Van Cranenburgh, *"Big Men" Rule: Presidential Power, Regime Type and Democracy in*



## II. THE HAUNTINGS OF THE INTERNATIONAL CRIMINAL COURT

Jacques Derrida revitalized conversations on spectrality in a colloquium on the question “Whither Marxism?,”<sup>94</sup> his long-awaited reading of Marx<sup>95</sup> which turned into his influential book *Specters of Marx* (1994).<sup>96</sup> His book title bears intentional association with the first noun in Marx’s famous opening to the *Manifesto of the Communist Party* (1848): “A specter is haunting Europe—the specter of communism.”<sup>97</sup> In critical ways, Derrida conjured up this spirit of Marx (more precisely, a plurality of spirits)<sup>98</sup> to impugn liberalism’s triumphant “End of History” thesis,<sup>99</sup> following the collapse of the Soviet Union, and to address “hasty postmortems of Marxism.”<sup>100</sup> Perhaps a plurality of spirits embedded in African associational life below the level of the neopatrimonial state will align to forestall authoritarian efforts to minimize the ICC’s relevance in Africa.

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30 *African Countries*, 15 DEMOCRATIZATION 95 (2008) (presenting an overview of sub-Saharan African countries and the political consequences of high concentrations of presidential power); Nicolas van de Walle, *Presidentialism and Clientelism in Africa’s Emerging Party Systems*, 41 J. MOD. AFR. STUD. 297 (2003) (investigating the retention of power among sub-Saharan African parties that won founding elections); Muna Ndulo, *Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power*, 26 VT. L. REV. 769, 769–70 (2002) (noting inadequate checks on presidential power across Africa and comparing South Africa’s framework for checks and balances); ROBERT H. JACKSON & CARL G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA: PRINCE, AUTOCRAT, PROPHET, TYRANT* (1982) (presenting a seminal study on personal rule systems in civilian and military regimes in Africa).

94. The conference was organized by Bernd Magnus and Stephen Cullenberg and organized by the Center for Ideas and Society at the University of California, Riverside on 22–23 April 1993. See Note on the Text in DERRIDA, *supra* note 82, at xiii.
95. See Peggy Kamuf, *The Time of Marx: Derrida’s Perestroika*, L.A. REV. BOOKS, (23 Apr. 2013), available at <https://lareviewofbooks.org/article/the-time-of-marx-derridas-perestroika/#!> (noting Derrida’s perceived silence on the subject of Marx dated to at least 1965 and was perceived “in certain circles as a lacuna, or even a gaping hole.”).
96. See generally DERRIDA, *supra* note 82. The book first appeared in French, *SPECTRES DE MARX*, in 1993.
97. *Id.* at 4 (quoting Marx).
98. Hence the plural reference to *Specters of Marx*. On his usage of the plural, see *id.* at 3. On the torment of translating this problematic phrase, mindful of the French idiom that connotes both “more than one” and “other than one” [*plus d’un*]. PEGGY KAMUF, *BOOK OF ADDRESSES* 219 (2005).
99. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (praising as victorious liberal democratic capitalism as the end point in history’s ideological evolution). See also Susan Marks, *The End of History?: Reflections on Some International Legal Theses*, 8 EUR. J. INT’L L. 449, 459 n.39 (noting Derrida’s criticism that Fukuyama is attempting to conjure away the specter of Marx that haunts liberalism).
100. Bernd Magnus & Stephen Cullenberg, *Editors’ Introduction*, in DERRIDA, *supra* note 82, at vii–viii.



## A. Spectrality

Spectrality deals with apparitions and ghostly forms and defies reduction into singular entity.<sup>101</sup> It impressively influenced psychoanalytic circles,<sup>102</sup> film and media studies,<sup>103</sup> and literary salons involving criticism and storytelling.<sup>104</sup> These latter camps employ the trope of the revenant in visitations of the ever present past.<sup>105</sup> As Clarke noted, spectrality has its allegorical place in international criminal law, too, particularly in liberalist conceptions of justice that emit apparitional and fictional qualities while assigning guilt and responsibility.<sup>106</sup> Clarke's assessment bears resemblance to Derrida's observation: "Haunting belongs to the structure of every hegemony."<sup>107</sup>

Specters also deal with the act of returning;<sup>108</sup> of beginning a story by reappearing;<sup>109</sup> and of disrupting the ordered "comings and goings" of "real time" presented in linear succession.<sup>110</sup> This frequenting of memory serves as a reminder that "[t]ime is out of joint."<sup>111</sup> Imagined in this way, spectrality is originary.<sup>112</sup> A specter "*begins by coming back.*"<sup>113</sup>

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101. DERRIDA, *supra* note 82, at 6 (describing specters as "neither soul nor body").
102. See generally SIGMUND FREUD, *PSYCHOPATHOLOGY OF EVERYDAY LIFE* (A.A. Brill trans., 1914) (detailing unconscious pathologies of the psyche and the restoration of memories); SIGMUND FREUD, *THE UNCANNY* (1919) (presenting essays on anxiety, things frightening but once familiar, repression, and resurfacing); Jan De Vos, *The Academy of Everyday Life—Psychology, Hauntology, and Psychoanalysis*, 13 *EDU. INSIGHTS* 1 (2009) (discussing hauntology in terms of internal academic psychologizing).
103. See, e.g., *CINEMATIC GHOSTS: HAUNTING AND SPECTRALITY FROM SILENT CINEMA TO THE DIGITAL ERA* (Murray Leeder ed., 2015); JACQUES DERRIDA, *PAPER MACHINE 158* (Rachel Bowlby trans., 2005) (noting spectrality's widespread presence, including in photography and cinema); Mark Fisher, *What is Hauntology*, 66 *FILM Q.* 16 (2012) (discussing hauntology in cinema).
104. See, e.g., *THE SPECTRALITIES READER: GHOSTS AND HAUNTING IN CONTEMPORARY CULTURAL THEORY* (Maria del Pilar Blanco & Esther Peeren eds., 2013) (presenting elaborations on spectrality across the humanities and social sciences).
105. Rosario Arias & Patricia Pulham, *Introduction*, in *HAUNTING AND SPECTRALITY IN NEO-VICTORIAN FICTION: POSSESSING THE PAST* xi, xvi (Rosario Arias & Patricia Pulham eds., 2010).
106. See Clarke, *FICTIONS OF JUSTICE*, *supra* note 64, at 6, 22–23 (discussing fictions and specters of justice in international criminal law).
107. DERRIDA, *supra* note 82, at 37.
108. Referencing Shakespeare's *Hamlet*, and noting its relevance to the *Communist Manifesto* [*Ein Gespenst geht um in Europa—das Gespenst des Kommunismus*], Derrida noted "As in *Hamlet*, the Prince of a rotten state, everything begins by the apparition of a specter. More precisely by the *waiting* for this apparition." DERRIDA, *supra* note 82, at 4.
109. See Nchamah Miller, *Hauntology and History in Jacques Derrida's Spectres of Marx*, at 2–3, available at [https://www.nodo50.org/cubasigloXXI/taller/miller\\_100304.pdf](https://www.nodo50.org/cubasigloXXI/taller/miller_100304.pdf).
110. DERRIDA, *supra* note 82, at 39. Debunking liberalism's linear and teleological ordering of time, Derrida pondered: "How can one be late to the end of history?" *Id.*
111. WILLIAM SHAKESPEARE, *HAMLET*, act. 1, scene 5, 186–90 (stated by Hamlet after meeting the ghost of his father). Derrida makes explicit this connection. See, e.g., DERRIDA, *SPECTERS OF MARX*, *supra* note 82, at xxi, 19, 24, 29, and 49 (referencing Hamlet and the phrase).
112. DERRIDA, *supra* note 82, at 15.
113. *Id.* at 11.





Spectrality's originary nature presents a starting point for criticisms of the ICC in Africa. The spectral framing of ICC investigations cannot escape from the hauntings of nineteenth century European colonialism, nor should any proper critique dismiss that history. Hauntology is about forces that act at a distance;<sup>114</sup> and they now reappear at the outset of any new ICC investigation in Africa. Reconstructions of Africa's landscape—the colonial dissection of human geographies, ethnicities, kingdoms, and familial and kinship relationships—came about through the application of *uti possidetis* (as you possess, so you may possess).<sup>115</sup> This principle began as an evidentiary principle of the private law of Rome.<sup>116</sup> It reworked into a principle of Roman property law<sup>117</sup> and then reworked again into a principle of international law that operated to freeze title and limit further violence and land grabs after Luso-Spanish imperial retreat from the New World.<sup>118</sup> In effect, *uti possidetis* quieted title and stabilized the post-colonial situation on the ground following the retreat of metropolitan powers. Its later importation into Africa during decolonization made sense to African elites.<sup>119</sup> They legitimized the principle in the Charter of the Organization of African Unity (OAU),<sup>120</sup> in the African Union's Constitutive Act,<sup>121</sup> and in the 1964 OAU Cairo Declaration.<sup>122</sup> Notwithstanding the great damage that had been

114. Fisher, *supra* note 103, at 20.

115. See generally Jan Klabbers & René Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 37 (Catherine Brölmann, René Lefeber & Marjoleine Zieck eds., 1993) (detailing tensions in the application of the doctrine in Africa); SAADIA TOUVAL, THE BOUNDARY POLITICS OF INDEPENDENT AFRICA 3–17 (1972) (discussing the history and politics of colonial boundary drawing in Africa).

116. See THE COMMENTARIES OF GAIUS 324–25 (J.T. Abdy & Bryan Walker trans., 1870) (noting its use as a preliminary means of establishing the burden of proof). See also LORD MACKENZIE, STUDIES IN ROMAN LAW WITH COMPARATIVE VIEWS OF THE LAWS OF FRANCE, ENGLAND, AND SCOTLAND 361–63 (John Kirkpatrick ed., 4th ed., 1876) (relating to its application originally to the person in possession of immovable property).

117. See W.W. BUCKLAND & ARNOLD D. McNAIR, ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE 394 (2d ed., 1952) (noting use of the principle in Roman law as a possessory *interdictum*).

118. See GIUSEPPE NESI, L'UTI POSSIDETIS IURIS NEL DIRITTO INTERNAZIONALE 1–3 (1996) (discussing the application of the doctrine in the former Spanish and Portuguese territories of the New World); JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS (2003) (on the historical development of the doctrine).

119. See Achille Mbembe, *At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa*, 12 PUB. CULTURE 259, 267 (Steven Rendall trans., 2000) (noting *uti possidetis'* appeal to African elites).

120. Charter of the Organization of African Unity, art. III (3), adopted 25 May 1963, 479 U.N.T.S. 39 (entered into force 13 Sept. 1963), reprinted in 2 I.L.M. 766 (1963), available at [http://hrllibrary.umn.edu/africa/OAU\\_Charter\\_1993.html](http://hrllibrary.umn.edu/africa/OAU_Charter_1993.html) (respecting “the sovereignty and territorial integrity of each Sta[t]e and for its inalienable right to independent existence”).

121. Constitutive Act of the African Union, art. 4, adopted 11 July 2000 (entered into force 26 May 2001) [hereinafter Constitutive Act] (calling for “respect of borders existing on achievement of independence”).

122. *Resolution on the Intangibility of Frontiers* AGH/Res. 16 (I), (1964), reprinted in DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 49 (Gino J. Naldi ed., 1992).



done by the *mission civilisatrice* and Europe's partitioning of Africa,<sup>123</sup> *uti possidetis'* adoption preserved the status of African elites.<sup>124</sup> It conformed Africa's porous and historically overlapping temporal pluralities to western Euclidean boundary principles<sup>125</sup> and created the dogma of intangibility and legitimacy<sup>126</sup> that required a politicized modification of the Big Man archetype to defend the dogma. *Uti possidetis* is the *mission civilisatrice's* confederate. Wherever a new ICC investigation in Africa takes place, both principles reappear as revenants to haunt the intentions of the ICC, and indeed, the motivations of the Big Man.

## B. Targeting

Complaints about the intentions of the ICC hover around the claim that the ICC is too Africa-centric. The four ongoing cases (including appeals) before the ICC all concern African countries—Côte d'Ivoire, Democratic Republic of Congo, and the Central African Republic.<sup>127</sup> All four convictions by the Court are of Africans.<sup>128</sup> All thirty-two indictments issued have been against Africans.<sup>129</sup> Although preliminary investigations have begun elsewhere, including Afghanistan, Colombia, Iraq/UK, Palestine, Ukraine, and Venezu-

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123. See generally DIRDEIRY M. AHMED, *BOUNDARIES AND SECESSION IN AFRICA AND INTERNATIONAL LAW: CHALLENGING UTI POSSIDETIS* 17–32 (2015) (discussing the incompatibility of *uti possidetis* with the concept of the intangibility of frontiers).
124. Chief Charles Achaleke Taku, expressed a similar view: “Regrettably many African leaders are mere puppets of neo-colonial interest that has helped them to eternalize power in exchange for defending the neo-colonial economic and hegemonic agenda.” Taku, *supra* note 52, at 338.
125. Mbembe, *supra* note 119, at 259–60.
126. *Id.* at 259–62.
127. *Trial Stage*, INT'L CRIM. CT., available at <https://www.icc-cpi.int/Pages/trial.aspx>; *Appeals Stage*, INT'L CRIM. CT., (accessed 15 Feb. 2018), available at <https://www.icc-cpi.int/Pages/Appeal.aspx>.
128. See *Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo*, INT'L CRIM. CT., (26 July 2016), available at <https://www.icc-cpi.int/car/bemba/Documents/bembaEng.pdf> (Central African Republic; guilty of two counts of crimes against humanity and three counts of war crimes; on appeal); *Case Information Sheet: The Prosecutor v. Ahmad Al Faqu Al Mahdi*, INT'L CRIM. CT., (17 Aug. 2017), available at <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf> (Mali; guilty of war crimes; sentenced to nine years' imprisonment); *Case Information Sheet: The Prosecutor v. Germain Katanga*, INT'L CRIM. CT. (27 March 2014), available at <https://www.icc-cpi.int/drc/katanga/Documents/KatangaEng.pdf> (Democratic Republic of the Congo; guilty as an accessory to one count of a crime against humanity, four counts of war crimes; sentenced to twelve years' imprisonment); *Case Information Sheet: The Prosecutor v. Thomas Lubanga Dyilo*, INT'L CRIM. CT., (Nov. 2017), available at <https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf> (Democratic Republic of the Congo; guilty of the war crime of conscripting children for active participation in hostilities; sentenced to fourteen years' imprisonment).
129. E. Van Trigt, *Africa and Withdrawal from the ICC*, PEACE PALACE LIBRARY (28 Oct. 2016), available at <https://www.peacepalacelibrary.nl/2016/10/africa-and-icc-withdrawal/>.



ela<sup>130</sup> the OTP also has opened investigations in Gabon (in 2016), Guinea (in 2009), and Nigeria (in 2010).<sup>131</sup> Following conclusion of preliminary investigations, the OTP launched full scale investigations of gross human rights abuse in Burundi (in 2017), the Central African Republic (in 2007 and 2014), Mali (2013), Côte d'Ivoire (2011), Libya (2011), Kenya (2010), Darfur (2005), Uganda (2004), Democratic Republic of the Congo (2004), and Georgia (2016).<sup>132</sup> In a move that subsequently may have colored continental opinion,<sup>133</sup> the OTP's first invocation of its special prosecutorial power to initiate investigations *proprio motu* (on its own motion),<sup>134</sup> leveled charges against Kenya's then Deputy Prime Minister and Minister of Finance and later President, Uhuru Muigai Kenyatta, the son of Kenya's first president, Jomo Kenyatta.<sup>135</sup> He was accused of suborning ethnic groups to murder, as was his rival, William Samoei Ruto along with others,<sup>136</sup> before charges

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130. Pertaining to “[a]lleged crimes against humanity and war crimes committed since 1 May 2003” (Afghanistan); “[a]lleged war crimes committed since 1 November 2009, and crimes against humanity since 1 November 2002” (Colombia); “[a]lleged war crimes committed by UK nationals in the context of the Iraq conflict and occupation from 2003 to 2008” (Iraq/UK); “[a]lleged crimes committed in the occupied Palestinian territory, including East Jerusalem since 13 June 2014” (Palestine); “[a]lleged crimes committed in the context of the “Maidan” protests since 21 November 2014, and other events in Ukraine since 20 February 2014” (Ukraine); and “[a]lleged crimes committed since at least April 2017, in the context of demonstrations and related political unrest” (Venezuela). See *Preliminary Examinations*, INT’L CRIM. CT., available at <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>.
131. *Id.*
132. See *Situations Under Investigation*, INT’L CRIM. CT., available at <https://www.icc-cpi.int/pages/situations.aspx>.
133. See James Verini, *The Prosecutor and the President*, NY TIMES, 22 June 2016, available at [http://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html?\\_r=0](http://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html?_r=0) (noting the Kenyatta case came to “define the court;” “many would say. . . permanently discredit it”).
134. See *Kenya: Situation in the Republic of Kenya*, ICC-01/09, INT’L CRIM. CT., available at <https://www.icc-cpi.int/kenya>; *Ruto and Sang Case*, ICC-01/09-01/11, INT’L CRIM. CT., available at <https://www.icc-cpi.int/kenya/rutosang> (noting in both cases combined that “[t]his was the first situation in which the Prosecution opened an investigation *proprio motu*, rather than by receiving a referral.”). The ICC may exercise its jurisdiction by means of a referral by a state party or the Security Council or by the OTP, acting on its own motion. See Rome Statute, *supra* note 4, art. 13. ICC jurisdiction extends to crimes committed by nationals of a state party on the territory of a non-state party (art. 12 (2) (b)) and in cases where a non-state party has voluntarily accepted the jurisdiction of the ICC (art. 12(3)). Article 17 of the ICC establishes the principle of complementarity, whereby the ICC will refuse to assume jurisdiction in cases that have been investigated or are under investigation in domestic settings and where the State Party is willing and able to prosecute. *Id.*
135. See *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, INT’L CRIM. CT., available at <https://www.icc-cpi.int/kenya/kenyatta>.
136. The chief ICC Prosecutor at that time, Luis Moreno-Ocampo leveled six indictments, dividing the suspects into two camps, one consisting of Francis Muthaura, Gen. Hussein Ali, and Uhuru Kenyatta of the Party of National Unity, and the other consisting of William Ruto, Henry Kosgey, and Joshua Arap Sang of the rival Orange Democratic Movement Party. See Macharia Gaitho, *Key Mistakes That Doomed Ocampo, Bensouda*



against both of them imploded due to lack of evidence.<sup>137</sup> The OTP strategy intended that the rivals inculcate or cross-prosecute each other, but instead they aligned.<sup>138</sup> They found another place to bury the hatchet other than into each other<sup>139</sup>—the ICC. The OTP quickly revealed itself to be poorly prepared to manage the case with its limited investigative machinery<sup>140</sup> hampered as it was by widespread allegations of witness tampering and government interference.<sup>141</sup>

Human rights advocate, Ken Roth noted other ICC growing pains, for instance, two prosecutorial missteps in Congo and one in Sudan, where arrest warrants “have been withdrawn, dismissed or led to an acquittal.”<sup>142</sup> Moreover, the UN Security Council’s first referral under Article 13 of the Rome Statute,<sup>143</sup> indirectly but unquestionably targeted Sudan’s Big Man,

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*Case at the ICC*, DAILY NATION (Kenya), 6 Apr. 2016, available at <http://allafrica.com/stories/201604070268.html>. See generally *Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, ICC-01/09–30-Red, INT’L CRIM. CT. (15 Dec. 2010), available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09–30-Red>. See also *Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09, INT’L CRIM. CT. (15 Dec. 2010), available at <https://www.icc-cpi.int/pages/record.aspx?uri=985621>.

137. See *Decision on the Withdrawal of Charges Against Mr. Kenyatta*, ICC-01/09–02/11–1005, INT’L CRIM. CT. (13 Mar. 2015), available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09–02/11–1005>; *Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal*, ICC-01/09–01/11–2027-Red-Corr, INT’L CRIM. CT. (5 Apr. 2016), available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09–01/11–2027-Red>.
138. Gaitho, *supra* note 136 (noting the prosecutorial strategy).
139. Osiel, *supra* note 29 (noting “devil’s bargains” among stalemated belligerents of uniting from prosecuting the other’s crimes).
140. Gaitho, *supra* note 136 (noting strategic prosecutorial miscalculations and investigative limitations).
141. See Peter Leftie, *My Life in Danger over ICC Cases: Maina Kiai*, DAILY NATION (Kenya), 20 Sept. 2013, available at <http://www.nation.co.ke/news/My-life-in-danger-over-ICC-cases-Maina-Kiai/1056–2000700–2ak358z/index.html> (noting [UN Special Rapporteur on Rights to Freedom of Peaceful Assembly and Association and Kenya’s former Chairman of the National Human Rights Commission] Maina Kiai’s allegations of a sustained campaign of intimidation waged against witnesses in the cases at the ICC); LIONEL NICHOLS, THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA 243 (2015) (noting threats against key prosecution witnesses and deficiencies in Kenya’s witness protection program); SERENA K. SHARMA, THE RESPONSIBILITY TO PROTECT AND THE INTERNATIONAL CRIMINAL COURT: PROTECTION AND PROSECUTION IN KENYA (2016) (discussing Kenya’s limited accountability efforts addressing the violence following the 2007 elections).
142. Kenneth Roth, *Africa Attacks the International Criminal Court*, N. Y. REV. BOOKS (6 Feb. 2014), available at <http://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/>.
143. See S.C. Res. 1593, U.N. SCOR, 5158th mtg., U.N. Doc. S/RES/1593 (2005), available at <https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8–4EC4–9566–48EDF-55CC587/283244/N0529273.pdf> (taking note of violations of international humanitarian law in Darfur established by the International Commission of Inquiry and acting under Chapter VII of the Charter of the United Nations to refer threats to the peace by the Bashir government to the ICC OTP). The Security Council also referred the situation in Libya to the ICC in February 2011. See S.C. Res. 1970, U.N. SCOR, 6491st mtg., art. 4,



President Omar Al Bashir for orchestrating human rights abuses in Darfur.<sup>144</sup> That action—against a sitting African Head of State—constituted a “flash-point,”<sup>145</sup> setting into motion a series of events that lead to Libya, Senegal, Djibouti, and Comoros to call for the withdrawal of African states from the ICC in 2009.<sup>146</sup> The AU Assembly concluded at its 2009 Sitre summit that it would not cooperate with the ICC arrest warrant against the Sudanese Head of State.<sup>147</sup> In consultation with the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights it began examining the implications of sub-contracting African problems to a remote court in The Hague.<sup>148</sup> The AU Assembly probed the redesign of the African Court to include, in addition to jurisdiction over General Affairs and Human Rights, subjects involving international crimes such as genocide, crimes against humanity, and war crimes.<sup>149</sup> African Ministers of Justice and Attorneys General produced a Draft Protocol amending the Protocol on the Statute of the Court.<sup>150</sup> That process, described as “hurried” and

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U.N. Doc. S/RES/1970 (2011), available at [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2011\\_02/20110927\\_110226-UNSCR-1970.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_02/20110927_110226-UNSCR-1970.pdf) (deciding to refer the situation in Libya since 15 Feb. 2011 to the ICC OTP).

144. Tladi, *supra* note 65, at 57. (Noting that the Security Council’s referral of the situation in Darfur to the ICC in 2005 set the AU and the ICC on a “collision course,” which in 2009 resulted in the ICC’s Pre-Trial Chamber issuing an arrest warrant against Al Bashir).
145. MAX DU PLESSIS, *THE INTERNATIONAL CRIMINAL COURT THAT AFRICA WANTS* vi (2010); Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, 60 NETH. INT’L L.REV. 27, 28 (2013) (noting that the ICC’s issuance of arrest warrants against sitting African heads of state and senior government officials induced AU “retaliatory measures”).
146. See Philomena Apiko & Faten Aggad, *The International Criminal Court, Africa and the African Union: What Way Forward?* 10 (EUROPEAN CENTER FOR DEVELOPMENT POLICY MANAGEMENT [ECDPM], Discussion Paper No. 201, 2016), available at <http://ecdpm.org/publications/international-criminal-court-african-union/> (noting 2009 calls for withdrawal).
147. AU Assembly, *Decision on the Meeting of African States Parties to the Statute of the Rome Statute of the International Criminal Court, (ICC,)* ¶ 10, Doc. Assembly/AU/Dec. 245(XIII) Rev. 1 (July 2009), available at [https://au.int/web/sites/default/files/decisions/9560-assembly\\_en\\_1\\_3\\_july\\_2009\\_auc\\_thirteenth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion\\_0.pdf](https://au.int/web/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf)
148. According to Tim Murithi, the sub-contracting of judicial process to The Hague forms part of the general African critique against judicial imperialism and neo-colonial encroachment into African national jurisdictions. See Tim Murithi, *Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court*, in *AFRICA AND THE INTERNATIONAL CRIMINAL COURT* 179, 190 (Gerhard Werle, Lovell Fernandez & Mortiz Vormbaum eds., 2014).
149. AU Assembly, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction* ¶ 9, Doc. Assembly/AU/3(XII), Assembly/AU/Dec. 213(XII) (Feb. 2009) available at [https://au.int/sites/default/files/decisions/9559-assembly\\_en\\_1\\_3\\_february\\_2009\\_auc\\_twelfth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion.pdf](https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf).
150. See *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* 7–11, 14–15, A.U. Exp/Min/IV/Rev.7 (May 2012), Addis Ababa, Ethiopia [hereinafter Draft Protocol]. Draft Article 3 invests the Court with international criminal jurisdiction; draft Article 28A-E, *inter alia*, lists and defines international crimes;



“flawed,”<sup>151</sup> stalled over substantive and financial concerns involving the unusual and vastly expanded conjoining of civil, criminal, transnational, and treaty *ratione materiae*.<sup>152</sup> Nevertheless, the prospect of reforming the African regional courts system<sup>153</sup> to include “international crimes portends some

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draft Article 28E includes within such crimes “The Crime of Unconstitutional Change in Government,” which includes “Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections.” *Id.* On 27 June 2014, the African Union Assembly of heads of states adopted Draft Protocol, which became known as the Malabo Protocol, *infra*, which expanded the mandate of the African Court of Justice and Human Rights, drawing immediate criticism, particularly from civil society, for heads of state and public official immunity (Art. 46 A bis), and for its complementarity provision “between the court and states but also between the court and sub-regional courts created by regional economic communities such as ECOWAS, SADC, and the East African Community.” Godfrey M. Musila, *New Posture and Old Rhetoric?: The Role of African Union in International Criminal Justice*, in *AFRICA AND THE INTERNATIONAL CRIMINAL COURT* 1, 31 (forthcoming), available at [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2782871](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2782871).

151. Max Du Plessis, *A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, EUR. J. INT'L L. TALK! (27 Aug. 2012), available at <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.
152. The Summit of the Assembly of African Heads of State tabled adoption of the Draft Protocol in January 2013, remanding to the AU Commission further consideration of “popular uprising,” which was excluded from the jurisdiction of the court and further consideration of financial and structural problems associated with extending the court’s jurisdiction to cover international crimes. See Mbori Otieno H., *The Merged African Court of Justice and Human Rights (ACJ&HR) as a Better Criminal Justice System than the ICC: Are We Finding African Solution to African Problems or Creating African Problems Without Solutions?*, at 3 (2014), available at [http://www.academia.edu/7237572/The\\_merged\\_African\\_Court\\_of\\_Justice\\_and\\_Human\\_Rights\\_ACJ\\_and\\_HR\\_as\\_a\\_better\\_criminal\\_justice\\_system\\_than\\_the\\_ICC\\_Are\\_we\\_Finding\\_African\\_Solutions\\_to\\_African\\_problems\\_or\\_creating\\_African\\_problems\\_without\\_solutions](http://www.academia.edu/7237572/The_merged_African_Court_of_Justice_and_Human_Rights_ACJ_and_HR_as_a_better_criminal_justice_system_than_the_ICC_Are_we_Finding_African_Solutions_to_African_problems_or_creating_African_problems_without_solutions). In June 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol). See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.529(XXIII) (2014) [hereinafter Malabo Protocol]. The following countries have signed the Malabo Protocol: Benin, Chad, Congo, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, São Tomé & Príncipe, and Uganda, but not one of the countries have ratified the Protocol. For information on the status of signatories, see *List of Countries Which have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, AFR. UNION, available at [https://au.int/web/sites/default/files/treaties/7804-sl-protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_19.pdf](https://au.int/web/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf) [hereinafter Protocol Signatory List].
153. Part of the reform measures included merging the African Court on Human and Peoples’ Rights, established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights (2004), with the African Court of Justice, established under the 2003 Protocol establishing an African Court of Justice but never operationalized. Under the terms of merger (established by the 2008 Protocol to the African Charter on the Establishment of the African Court of Justice and Human Rights), the merged Court requires fifteen signatures of protocol to take effect. In the interim, the AU initiated the process to add an international criminal law component to the jurisdictional



troubling times for the [ICC]."<sup>154</sup> In 2011, the AU again refused to cooperate with the ICC after it issued arrest warrants against Libya's Muammar Gaddafi and two others.<sup>155</sup> When the Security Council later refused the AU's petition to defer an ICC investigation of Kenyan leaders,<sup>156</sup> allowable under Article 16 of the Rome Statute,<sup>157</sup> the armature of tension began to disform already strained relations between the AU and ICC.<sup>158</sup> A clash of allegiance arose between treaty commitments of Africa's thirty-four members of the ICC and the AU,<sup>159</sup> a non-signatory to the Rome Statute that through its Constitutive

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undertakings of the merged Court. For more, see Frans Viljoen, *AU Assembly Should Consider Human Rights Implications Before Adopting the Amending Merged African Court Protocol*, *AFRICLAW* (23 May 2012), available at <https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>.

154. Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 *EUR. J. INT'L L.* 933, 934 (2013).
155. The ICC issued arrest warrants in June 2011 against Libyan leader Gaddafi, his son, Saif al-Islam, and Libya's head of military intelligence, Abdullah Senussi for crimes against humanity. *Union Rejects Gaddafi Warrant*, *SYDNEY MORNING HERALD*, 4 July 2011, available at <http://www.smh.com.au/world/union-rejects-gaddafi-warrant-20110703-1gxb5.html>. See Thomas Obel Hansen, *Africa and the International Criminal Court*, in *HANDBOOK OF AFRICA'S INTERNATIONAL RELATIONS* 165, 171 (Tim Murithi ed., 2014).
156. See *Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining*, SC/11176, (15 Nov. 2013), UNITED NATIONS, available at <https://www.un.org/press/en/2013/sc11176.doc.htm> (noting the motion failed to achieve the requisite nine affirmative votes, with Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo voting in favor, Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, and United States abstaining).
157. Rome Statute, *supra* note 4, art. 16 (pertaining to the deferral of investigation or prosecution. It holds: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council . . . has requested the Court to that effect; that request may be renewed by the Council under the same conditions")
158. The AU attempted to amend the Rome Statute to grant the U.N. General Assembly power to defer cases. See generally Kamari Maxine Clarke & Sara-Jane Koulen, *The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise*, 7 *AFR. J. LEGAL STUD.* 297 (2014) (discussing Article 16 powers to refer and defer cases to the ICC and the geopolitics involved in Security Council decisions). See also Manuel J. Ventura & Amelia J. Bleeker, *Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, in *THE INTERNATIONAL CRIMINAL COURT AND AFRICA: ONE DECADE ON* 441 (Evelyn A. Ankumah ed., 2016) (noting the AU's sharp turn away from the ICC); Makau W. Mutua, *The International Criminal Court in Africa: Challenges and Opportunities*, 1- 6 (Norwegian Peacebuilding Centre NOREF Working Paper No.2011-003, 2010) (noting polarizations caused by the Sudan and Kenya interactions with the ICC).
159. See, e.g., *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, INT'L CRIM. CT. (12 Dec. 2011), ¶ 5, 47, available at [https://www.icc-cpi.int/CourtRecords/CR2011\\_21722.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_21722.PDF) (holding the Republic of Malawi failed to comply with obligations of the Rome Statute to comply with requests to arrest Sudanese President Al Bashir when he had visited Malawi in October 2011 to attend the Common Market for eastern and



Act “determine[s] the common policies of the Union.”<sup>160</sup> According to Ademola Abass, the rupture in relations was “a disaster waiting to happen.”<sup>161</sup>

The ICC meant to serve as a court of last resort for victims denied justice within their own countries.<sup>162</sup> Despite the fact that individual states or the Security Council referred seven of the ten ongoing investigations to the ICC,<sup>163</sup> narratives deride the OTP as a revamped repository of western moral conservatorship. Some scholars noted the targeting of Africans *per se* did not appear to indicate institutional bias until the ICC pinpointed “politically powerful Africans.”<sup>164</sup> Only then did an array of institutional adjutants foment denunciation discussions regarding the Rome Statute. Former Zimbabwean President Robert Mugabe, an accused human rights abuser himself,<sup>165</sup> claimed while chair of the AU that it was high time Africa established its own criminal

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Southern Africa). Malawi had based its defense on the status of Al Bashir as “a sitting Head of State not Party to the Rome Statute” and on Malawi’s decision to fully align itself with “the position adopted by the African Union.” *Id.* ¶ 13 (i), (ii). See also Konstantinos D. Magliveras & Gino J. Naldi, *The International Criminal Court’s Involvement with Africa: Evaluation of a Fractious Relationship*, 82 *NORD. J. INT’L L.* 417, 422 (2013) (discussing the question: What is the Nature of the AU’s Relationship with the ICC?). In addition to Malawi, Chad, Djibouti, Malawi, and Kenya played host to Al Bashir and took no action against him. See *id.* at 428. South Africa authorities refused to detain Al Bashir pursuant to the ICC’s arrest warrant and an interim travel ban order issued by the High Court (Pretoria, Gauten Division) when he attended a 2015 AU summit meeting in Johannesburg. See *Southern Africa Litigation Centre v. The Minister of Justice and Constitutional Development & others*, 24 June 2015, (5) SA 1 (GP). South Africa’s Supreme Court of Appeal ruled the government action unlawful and denied the government’s leave to appeal. See *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 Mar. 2016). The government appealed the case to South Africa’s highest court, the Constitutional Court. See *In the Matter between Minister of Justice and Constitutional Development and Others and Southern Africa Litigation Centre and Peace and Justice Initiative and Centre for Human Rights*, CCT 75/16 (13 Oct. 2016), available at <http://www.peaceandjusticeinitiative.org/wp-content/uploads/2016/10/20-20161013-Third-Amicus-PJI-CHR-Practice-Note-Written-Submissions-and-List-of-Authorities.pdf>.

160. Constitutive Act, *supra* note 121, art. 9.

161. Abass, *supra* note 154, at 946.

162. See M. Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 *J. INT’L CRIM. J.* 421, 422 (2006) (noting the ICC was intended to preserve the primacy of national legal systems).

163. The International Criminal Court lists self-referrals coming from the Central African Republic (2007 and 2014), Mali (2012), Uganda (2004), and the Democratic Republic of Congo (2004). The Security Council referred two cases to the ICC: Darfur (2005) and Libya (2011). The OTP is currently investigating three countries under its own authority: Georgia (2016), Côte d’Ivoire (2011), and Kenya (2010).

164. Ventura & Bleeker, *supra* note 158, at 4.

165. Max Fisher, *How Bad is Robert Mugabe? The Answer, in Three Scathing Paragraphs*, *WASH. POST*, 1 Aug. 2013, available at [https://www.washingtonpost.com/news/worldviews/wp/2013/08/01/how-bad-is-robert-mugabe-the-answer-in-three-scathing-paragraphs/?utm\\_term=.7c23614c608e](https://www.washingtonpost.com/news/worldviews/wp/2013/08/01/how-bad-is-robert-mugabe-the-answer-in-three-scathing-paragraphs/?utm_term=.7c23614c608e) (noting Philip Gourevitch’s devastating 2002 profile of Mugabe and how so little has changed during his autocratic misrule).





court to try western leaders for colonial crimes against humanity.<sup>166</sup> If that suggestion has not gained traction, a possible mass African exodus has.<sup>167</sup>

### C. The Metonym of the Big Man

The Big Man is a metonym. It is a shorthand expression of prestige characteristics derived from anthropology's field of ethnography. Its taxonomy originally emphasized personal power independent of political title or association with political groups, and the metonym connected to status-conferring qualities of leadership, wealth, kinship, and other renown-making qualities that lifted the Big Man above "a coterie of loyal, lesser men."<sup>168</sup> It has been presented in ways conjoining unequal (non-equivalent) transactions involving kinship and economy.<sup>169</sup> Ironically, its attachment to Africa comes by way of a different expression of the *mission civilisatrice*—the eighteenth and nineteenth century European exploration of Oceania.<sup>170</sup> There, explorers such as England's Captain James Cook,<sup>171</sup> perplexed by first encounters with Melanesian leadership systems in places like Tanna (Vanuatu), New Guinea, and the Solomon Islands, searched in vain for a "chief" who satisfied European expectations of king-like or singular political authority.<sup>172</sup> Locating or even comprehending an alternative logic to the western construct of ruler in Melanesian society became the object of attention for anthropologists as well. Ethnographers

166. See Ameh Comrade Godwin, *Mugabe Wants Africa to Establish Its Own International Court To Try Europeans*, DAILY POST (Nigeria), 20 Apr. 2016, available at <http://dailypost.ng/2016/04/20/mugabe-wants-africa-to-establish-its-own-international-criminal-court-to-try-europeans/>.

167. Although not a topic of consideration here, it appears serious discussion, matched by Kenya's pledge of one million dollars in funding, is trending toward establishment of an International African Court of Justice and Human Rights, a parallel court system to handle matters now within the jurisdiction of the ICC. See John Ngirachu, *Uhuru Kenyatta: Let's have an African-funded Court*, DAILY NATION (Kenya), 31 Jan. 2015, available at <http://www.nation.co.ke/news/politics/Uhuru-Kenyatta-African-Court-of-Justice-and-Human-Rights/1064-2609206-yfrpg4z/index.html>. See also [http://au.int/en/sites/default/files/treaties/7804-slprotocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_19.pdf](http://au.int/en/sites/default/files/treaties/7804-slprotocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf).

168. Sahlins, *supra* note 78, at 298.

169. See generally BIG MEN AND GREAT MEN: PERSONIFICATIONS OF POWER IN MELANESIA (Maurice Godelier & Marilyn Strathern eds., 1991) (presenting essays on typological distinctions between Big Men and Great Men). See also MARVIN HARRIS, OUR KIND: WHO WE ARE, WHERE WE CAME FROM, WHERE WE ARE GOING 366 (1989) (discussing the economics of redistribution of figures such as Big Men).

170. See Sahlins, *supra* note 78, 288 (noting the "intense European cultural pressure" brought to bear by late eighteenth-nineteenth century among "[a]lmost all of the native peoples of the South Pacific").

171. See generally MARSHALL SAHLINS, ISLANDS OF HISTORY (1985) (providing historical analysis to the structure of anthropology).

172. See Lamont Lindstrom, "Big Man:" A Short Terminological History, 83 AM. ANTHROPOLOGIST 900, 901 (1981).



struggled into the twentieth century to develop an agreed upon description or vernacular leadership label<sup>173</sup> until Marshall Sahlins popularized the term Big Man in 1963.<sup>174</sup> Construed originally as an analytical oddity, the term has achieved a common currency among anthropologist,<sup>175</sup> and it has been “absorbed into other projects”<sup>176</sup> including sub-Saharan African scholarship<sup>177</sup> and the anthropology of human rights and transnational law.<sup>178</sup>

In the African context, the concept transmuted into a type of personal *political* rule via informal relationships and exchange systems reinforced by ethnicity and kinship “that bind leaders to their followers and serve as a heuristic cue for both sides in the intricate exchange of resources for loyalty.”<sup>179</sup> The archetype retains non-political applications<sup>180</sup> and presents usages directly incorporating African rulers. These usages embrace a new form of Weberian clientelism,<sup>181</sup> melding patronage, corruption, and Big Man

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173. See *id.* (canvassing usages such as chief, chef (owing to French anthropological usages), rich man, *bigfala man*, *bos*, *masta*, and more).
174. See Sahlins, *supra* note 78. See also Lindstrom, *supra* note 172, at 902 (acknowledging that Sahlins’ usage “won” “virtually every contemporary ethnographic description of Melanesian political systems both uses and indexes the term.”). Sahlins imparted a specific meaning to the term, as adapted to Melanesian societies, which he contrasted to the idea of the ‘chief’ in Polynesian societies. Sahlins, *supra* note 78.
175. Lindstrom, *supra* note 172, at 903.
176. Lederman, *supra* note 81, at 571 (citing gender and class studies).
177. See, e.g., CULTURAL ENTREPRENEURSHIP IN AFRICA (Ute Röschenhaler & Dorothea Schulz eds., 2016) (presenting discussions on entrepreneurship and economic aspects of Big Men); Leena Hoffmann, *Big-Man Politics and Legitimacy Production in Africa* (Conference paper on (Re)Claiming Big-Man: Affirming and Contesting Big-Man Power in African Contexts, 6th European Conference on African Studies, July 2015), available at <http://www.ecas2015.fr/reclaiming-big-man-affirming-and-contesting-big-man-power-in-african-contexts/>; John F. McCauley, *Africa’s New Big Man Rule? Pentecostalism and Patronage in Ghana*, 112 AFR. AFF., 1 (2012), (noting prominent descriptions of this typology in sub-Saharan research); AFRICAN CONFLICTS AND INFORMAL POWER: BIG MEN AND NETWORKS (Mats Utas ed., 2012) (presenting essays on African Big Manity); 1 Albert A. Trouwborst, *The “Big-Man”: A Melanesian Model in Africa*, in PRIVATE POLITICS: A MULTI-DISCIPLINARY APPROACH TO “BIG-MAN” SYSTEMS 48 (Martin A. van Bakel, Renée R. Hagensteijn & Pieter van de Velde eds., 1986) (contesting the application of the Big Man construct outside Melanesian culture).
178. I take this point from Richard Ashby Wilson, who notes the vibrant, relatively recent discursive adaptation of an ethnography of human rights, cautioning, however that legal aspects of human rights should not be overlooked. See Richard Ashby Wilson, *Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 342 (Mark Goodale & Sally Engle Merry eds., 2007).
179. McCauley, *supra* note 177, at 1–2.
180. See Lederman, *supra* note 81, at 569–72 (noting Bigmansip’s presence in wider socio-cultural anthropological settings).
181. See generally WEBER, *supra* note 70, at 1006–69 (on patriarchalism and patrimonialism); see also René Lemarchand, *Political Clientelism and Ethnicity in Tropical Africa: Competing Solidarities in Nation-Building*, 66 AM. POL. SCI. REV. 68 (1972).



presidentialism into behavior types that now appear “so ingrained in African political life as to constitute veritable political institutions.”<sup>182</sup>

#### D. Neopatrimonialism’s Effect on Complementarity

This neopatrimonialism complicates the workings of the ICC, and compounds in significance given the engrained tenure of African rulers.<sup>183</sup> The ICC’s complementarity principle<sup>184</sup> that developed to overcome sovereignty concerns and settle disputes about overlapping competencies<sup>185</sup> created a classical division of labor separating the primary jurisdiction of national courts from the residual jurisdiction of the ICC.<sup>186</sup> Classical complementarity emphasized the threat-based function of the ICC.<sup>187</sup> Fully functioning national criminal investigations precluded the necessity of the Rome Statute’s residual universal powers to investigate or prosecute.<sup>188</sup> The unwillingness of some African leaders to cede power, however, has inculcated a particular logic of neopatrimonialism that now affects government institutions, including domestic courts.<sup>189</sup> This logic impedes their development, compromises their

182. Michael Bratton, *Formal Versus Informal Institutions in Africa*, 18 J. DEMOC. 96, 98 (2007).

183. For instance, Uganda’s President Yoweri Museveni has ruled for more than two decades (since 1986); Omar Bongo of Gabon ruled for four decades—following his death, he was succeeded by his son; Robert Mugabe, recently deposed, ruled in Zimbabwe for more than a quarter-century; the presidents of Angola, Cameroon, and Guinea have ruled for more than twenty years; Sudan’s Hassan Al Bashir has held power since 1993. The president of Ethiopia has ruled for more than one decade. See Diamond, *supra* note 67, at 260. The Gambia’s Yahya Jammeh ruled for more than two decades.

184. Rome Statute, *supra* note 4, art. 1 (holding that the ICC’s jurisdiction over persons for the most serious crimes of international concern “shall be complementary to national criminal jurisdictions”). Additionally, art. 17 details questions of admissibility before the ICC. *Id.* For other questions pertaining to admissibility, see art. 18 (relating to preliminary rulings on admissibility), art. 19 (on challenges to determinations of ICC jurisdiction), art. 20 (prohibiting prosecutions in breach of *ne bis in idem* [double jeopardy]), *id.* art. 53 (governing prosecutorial investigations) of the Rome Statute. *Id.*

185. See Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L. FORUM 87, 88, 90 (2008) (“overcome sovereignty fears,” “overlapping competencies”).

186. See *id.* at 90.

187. *Id.* at 89 (noting the threat-based aspect of complementarity is designed to foster compliance through application of inducements and punishments).

188. Rome Statute, *supra* note 4, arts. 17, 19. See also Nirej S. Sekhon, *Complementarity and Post-Coloniality*, 27 EMORY. INT’L L. REV. 799, 809 (2013) (noting reward inducing and threat based aspects of complementarity, as originally conceived).

189. See Diana Cammack, *The Logic of African Neopatrimonialism: What Role for Donors?* 25 DEV. POL. REV. 599, 604 (2007) (discussing African institutional dysfunctionality through the lens of neopatrimonialism, where the judiciary and public prosecutor offices are kept deliberately under-resourced and tame due to politicized appointments). Cf. Civil Society Talks, *supra* note 16 (quoting Nibitegeka on obstructions to democratic transition resulting in failure of judicial independence).



integrity and independence,<sup>190</sup> and undermines the principle of complementarity.

The Waki Commission, established after ethnic violence in Kenya in 2007 left 1,133 people dead and 350,000 displaced,<sup>191</sup> concluded the personalization of presidential power intentionally weakened Kenya's democratic institutions, specifically noting the diminished capacity and resolve of Kenya's security sector, civil service, and judiciary.<sup>192</sup> The Commission identified the problem as one of impunity and called for the creation of a special tribunal composed of international jurists and prosecutors, or referral to the ICC,<sup>193</sup> in order to break the cycle of impunity. Kenya did nothing owing to what the Kenyan Section Director of the International Commission of Jurists claimed was a lack of will and weakness on the part of Kenya's institutions committed to law enforcement.<sup>194</sup> Moving beyond classical complementarity, the ICC articulated a more dynamic policy of "positive"<sup>195</sup> or "proactive" complementarity.<sup>196</sup> Here, the ICC bears a shared responsibility

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190. For an account of individual country reports discussing the increasing frequency of attacks against the independence of the judiciary in Africa and elsewhere, see *Special Rapporteur on the Independence of Judges and Lawyers*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, available at <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>.
191. See The Commission of Inquiry into Post-Election Violence, 345, 351 (2008), available at [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf) [Waki Commission Report (named after Chairman Judge Philip Waki, of Kenya's Court of Appeal)].
192. See *id.* at 28 (noting the "checks and balances normally associated with democracies are very weak in Kenya and are deliberately so").
193. See *id.* at 18 (recommending the creation of a special tribunal with an international component or in default of setting up the Tribunal, forwarding names of perpetrators to the ICC).
194. See John Mukum Mbaku, *International Justice: The International Criminal Court and Africa*, BROOKINGS INSTITUTION AFRICAN GROWTH INITIATIVE, 9, 11 (2014), available at <https://www.brookings.edu/wp-content/uploads/2016/07/03-foresight-international-criminal-court-africa-mbaku-1.pdf>. The ICC's OTP brought charges against Kenyatta, exposing a fundamental problem the ICC faces in the fight against impunity: How to prosecute a head of state when his country controls the evidence needed to prosecute? See Adam Taylor, *Why Kenya's President Came to the International Criminal Court—And Why That's a Problem for the ICC*, WASH. POST, 8 Oct. 2014, available at [https://www.washingtonpost.com/news/worldviews/wp/2014/10/08/why-kenyas-president-came-to-the-international-criminal-court-and-why-thats-a-problem-for-the-icc/?utm\\_term=.5f720aa6bc53](https://www.washingtonpost.com/news/worldviews/wp/2014/10/08/why-kenyas-president-came-to-the-international-criminal-court-and-why-thats-a-problem-for-the-icc/?utm_term=.5f720aa6bc53) (posing the question).
195. See INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY, 4–6 (14 Sept. 2006), available at [https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf). The report adopts positive complementarity, meaning the OTP "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation." *Id.* at 5; NICHOLS, *supra* note 141, at 29–46 (discussing the origins and strategy of positive complementarity).
196. For discussions of proactive complementarity, see generally Burke-White, *supra* note 30; Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002); MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE (2008).



with domestic jurisdictions for upholding international community standards against impunity by enhancing the “effective investigation and prosecution of crimes”<sup>197</sup> or assisting states in undertaking domestic prosecutions.<sup>198</sup> Supporting national criminal justice reform occupies a prominent place on the post-conflict reconstruction agenda,<sup>199</sup> but developing a proactive complementarity function may be out of its time or ahead of its time—a dislocated liminal presence challenged by Africa’s juridical neopatrimonialism. Similarly, a restructured African regional court system, even if it can be made financially functional, will not “discharge the *ultimate ratio* of international criminal justice” (ending impunity) if the “*genocidaires* and culpable heads of state” oversee its African expression.<sup>200</sup> This proposed reform itself may be an apparition of justice.

A different fate for proactive complementarity unfolded in Colombia. The OTP opened a preliminary examination of Colombia’s war-torn conflict with the *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia: FARC) rebels in 2004, making Colombia one of the earliest and longest-running prosecution investigations of the court.<sup>201</sup> The greater confidence placed in the Colombian domestic judicial system, supported in part by a compromised but functioning security sector, led to Colombia’s passage of its 2005 Justice and Peace Law (*Ley de Justicia y Paz*)<sup>202</sup> and the December 2015 Agreement on a Special Jurisdiction for Peace. Despite criticisms that those persons most responsible for injustice remain at large, almost one thousand soldiers have been tried and convicted for civilian atrocities.<sup>203</sup> These improvements to transitional justice resulted in greater deference to the complicated peace process<sup>204</sup> and to domestic

197. Stahn, *supra* note 185, at 92.

198. See Burke-White, *supra* note, 30 at 92 (discussing carefully targeted international assistance by the OTP states unable to undertake investigations due to domestic constraints on national judiciaries).

199. Martien Schotsmans, *The Policy of International Actors on Traditional Justice in Transitional Justice*, in INTERNATIONAL ACTORS AND TRADITIONAL JUSTICE IN SUB-SAHARAN AFRICA: POLICIES AND INTERVENTIONS IN TRANSITIONAL JUSTICE AND JUSTICE SECTOR AID 31, 36 (Eva Brems, Giselle Corradi, & Martien Schotsmans eds., 2015).

200. Abass, *supra* note 154, at 936, 935 (casting doubt on African regional court reform based more on interferences by heads of state as opposed to the desire for such a court).

201. Lesley-Ann Daniels, *Peace with Justice In Colombia: Why the ICC Isn’t the Guarantor*, JUSTICE IN CONFLICT (13 Oct. 2016), available at <https://justiceinconflict.org/2016/10/13/peace-with-justice-in-colombia-why-the-icc-isnt-the-guarantor/>.

202. See generally Kai Ambos, THE COLOMBIAN PEACE PROCESS AND THE PRINCIPLE OF COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT: AN INDUCTIVE, SITUATION-BASED APPROACH (2010) (discussing Colombia’s restorative justice initiative to disarm, demobilize and reintegrate irregular armed groups).

203. *What is Complementarity?*, ICTJ, available at <https://www.ictj.org/complementarity-icc/>.

204. A negotiated peace referendum failed to win popular approval in October 2016, but Colombia’s Congress then approved a revised peace plan that bypassed approval by referendum. See Nicholas Casey, *Colombia’s Congress Approves Peace Accord With FARC*, N.Y. TIMES, 30 Nov. 2016, available at [https://www.nytimes.com/2016/11/30/world/americas/colombia-farc-accord-juan-manuel-santos.html?\\_r=0](https://www.nytimes.com/2016/11/30/world/americas/colombia-farc-accord-juan-manuel-santos.html?_r=0).



capacity-building efforts of local political actors resulting in the ICC's sustained involvement in Colombia without yet opening a formal investigation.<sup>205</sup> Less encumbered by the hauntings of neopatrimonialism, Colombia and the ICC show fitful but progressive movement toward positive complementarity in ways now existentially put at risk in Africa.

### III. THE RESPONSE OF AFRICAN CIVIL SOCIETY

Efforts to end juridical neopatrimonialism are central to the future of the ICC in Africa.<sup>206</sup> African civil society plays a key role in leading these efforts<sup>207</sup> and in ancillary ways builds capacity for domestic systems,<sup>208</sup> facilitates "locally focused and culturally relevant" legal and judicial means to fight impunity, and enhances traditional mechanisms for conflict resolution.<sup>209</sup> Significantly, Article 15 (2) of the Rome Statute provides a role for civil society,<sup>210</sup> granting NGOs standing, unlike in other such treaties, to "participate in the bringing of prosecutions by providing the [OTP] with information that might lead to the initiation of a prosecution."<sup>211</sup> South African international lawyer, John Dugard noted that by 2016 the OTP had received over 10,700 art. 15 communications from civil society organizations.<sup>212</sup> Although many of them

205. Branch, *supra* note 54, at 36–37.

206. See Traoré Drissa, *Understanding the Principle of Complementarity in Côte d'Ivoire*, INTERNATIONAL JUSTICE MONITOR (18 Aug. 2016), available at <https://www.ijmonitor.org/2016/08/understanding-the-principle-of-complementarity-in-cote-divoire/> (noting the need to strengthen national judicial systems to win the fight against impunity).

207. See Benson Chinedu Olugbo, *Implementing the International Criminal Court Treaty in Africa: The Role of Nongovernmental Organizations and Government Agencies in Constitutional Reform*, in MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA 106, 106–107, 125–126 (Kamari Maxine Clarke & Mark Goodale eds., 2010) (noting the importance of NGOs and government agencies in effectively implementing the work of the ICC in Africa).

208. See Africa Group Justice Talks: Angela Mudukuti, Africa Group for Justice and Accountability (24 Nov. 2016), available at [https://www.youtube.com/watch?v=yZgJ012k7\\_c](https://www.youtube.com/watch?v=yZgJ012k7_c) (0:50 second mark) (on the role of domestic capacity building for civil society agents).

209. John Mukum Mbaku, *supra* note 195, at 11. See also David-Ngendo Tshimba, *Beyond the Mato Oput Tradition: Embedded Contestations in Transitional Justice for Post-Passacre Pajong, Northern Uganda*, 2 J. AFR. CONFLICTS & PEACE STUD. 62 (2015) (discussing the crucial role of civil society and NGOs in advocating transitional justice schemes of accountability and reconciliation such as the Acholi reconciliation rite of *Mato Oput*, the *Gacaca* courts in Rwanda, the *Magamba* spirits in central Mozambique, the *Ngele Gbaa* rite in Sierra Leone and the *Obushingatahe* institution in Burundi).

210. Rome Statute, *supra* note 4, art. 15 (2) holds:

The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

211. John Dugard, *International Criminal Law, the International Criminal Court and Civil Society*, in CIVIL SOCIETY AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: CHALLENGES AND OPPORTUNITIES 3, 5–6 (Sarah Williams & Hannah Woolaver eds., 2016) (noting the significance of Article 15 (2)).

212. *Id.* at 10.



failed to state a claim within the jurisdiction or temporal framework of the ICC, he claimed it would be misleading “to suggest that serious complaints are summarily rejected by the Prosecutor.”<sup>213</sup>

An inventive strategy of African civil society also has been to adopt the international justice agenda as part of a separate, individuated project.<sup>214</sup> Professional legal bodies in Africa promote transitional justice through local adjudicatory mechanisms.<sup>215</sup> One such expression facilitates the development of positive complementarity—resulting in *proactive* complementarity—by pursuing strategic litigations below the level of the ICC but within the structure of select, mature African domestic legal systems. For instance, the Johannesburg-based Southern Africa Litigation Centre submitted a dossier in 2008 to the Priority Crimes Litigation Unit of South Africa’s National Prosecuting Authority (NPA). The dossier contained evidence of widespread torture by high-ranking Zimbabwean security sector members against Zimbabwean opposition party members committed in Zimbabwe, which is a non-party to the Rome Statute. The NPA refused to order an investigation by the South African Police Service pursuant to its interpretation of South African domestic act implementing the Rome Statute.<sup>216</sup> This refusal prompted the NGO to align with the Zimbabwe Exiles Forum (later supported by seven “friends of the court” briefs),<sup>217</sup> to appeal to South Africa’s judicial system.<sup>218</sup> In a landmark 2014 decision—the *Zimbabwe Torture Docket* case<sup>219</sup>—South Africa’s Constitutional Court High Court held that South Africa’s domestic

213. *Id.*

214. See Hugo van der Merwe & Jasmina Brankovic, *The Role of African Civil Society in Shaping National Transitional Justice Agendas and Policies*, in *CIVIL SOCIETY AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: CHALLENGES AND OPPORTUNITIES* 225, 230 (Sarah Williams & Hannah Woolaver eds., 2016) (discussing civil society organizations as local implementers of a shared international agenda).

215. See *id.* at 230–31.

216. *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*, (16 Aug. 2002), available at <http://www.justice.gov.za/legislation/acts/2002-027.pdf> [hereinafter *Implementation of Rome Statute*].

217. The petition found additional civil society support from seven *amicus curiae* briefs submitted by academics and organizations such as the Tides Center, the Peace and Justice Initiative, and the Centre for Applied Legal Studies. See Max Du Plessis & Christopher Gevers, *Civil Society, “Positive Complementarity” and the “Torture Docket” Case*, in *CIVIL SOCIETY AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: CHALLENGES AND OPPORTUNITIES* 158, 164 n.28 (Sarah Williams & Hannah Woolaver eds., 2016). For more on the direct role of civil society in ICC *amicus curiae* submissions to the ICC, see Sarah Williams & Emma Palmer, *Civil Society and Amicus Curiae Interventions in the International Criminal Court*, in *CIVIL SOCIETY AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: CHALLENGES AND OPPORTUNITIES* 40 (Sarah Williams & Hannah Woolaver eds., 2016).

218. See National Commissioner, South African Police Service and Another v. Southern African Human Rights Litigation Centre and Another [2013] ZASCA 168; 2014 (2) SA 42 (SCA) (Supreme Court of Appeal judgment).

219. National Commissioner of the South African Police Service v. Southern Africa Human Rights Litigation Centre and Another, [2014] ZACC 30 (30 Oct. 2014), available at <http://41.208.61.234/uhtbin/cgiisirs/20141030161730/SIRSI/0/520/J-CCT02-14> [Zimbabwe Torture Docket case].



and international legal commitments compelled investigations in South Africa of the alleged crimes committed against humanity in Zimbabwe. At the outset, the Court attributed this ruling to the spirit of Nelson Mandela.<sup>220</sup> Civil society's intervention in this matter clarified "the scope of South Africa's universal jurisdiction" that previously had not been subject to judicial interpretation.<sup>221</sup>

In 2012, a group called the Association of the Martyrs of Antananarivo Merrina Square secured an official South African action against Madagascar's former President Marc Ravalomanana for crimes against humanity based on allegations taking place in Madagascar before a *coup d'état* forced Ravalomanana to seek safe haven in South Africa.<sup>222</sup> The High Court imposed travel restrictions (which he later circumvented) on Ravalomanana pursuant to South Africa's Rome Statute enabling legislation.<sup>223</sup> According to University of Cape Town international law lecturer, Hannah Woolaver, "[d]espite the ultimate outcome . . . , the civil society action had a considerable impact on the course of events."<sup>224</sup> South African civil society effectively prompted authorities to enforce the universal jurisdiction provisions of the Rome Statutes domestic incorporation act.<sup>225</sup>

Based upon these proactive complementarity rulings, an amalgam of opposition and civil society organizations filed suit against former South African President Jacob Zuma's executive order to withdraw from the Rome Statute. On 22 February 2017, South Africa's North Gauteng High Court in Pretoria ruled the executive order "unconstitutional and invalid" absent parliamentary approval.<sup>226</sup>

Challenges remain, however. In April 2016, the Open-Ended Committee of African Ministers announced demands for ending the AU's call for withdrawal from the ICC, including immunity from ICC prosecution for sitting heads of state and senior government officials, recognizing the primacy of African judicial mechanisms and AU decision making organs over the ICC,

220. *Id.* ¶ 1 (quoting Mandela *South Africa's Future Policy: New Pillars for a New World*, 72 FOR. AFF. 86 (1993)).

221. Hannah Woolaver, *Partners in Complementarity: The Role of Civil Society in the Investigation and Prosecution of International Crimes in South Africa*, in CIVIL SOCIETY AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: CHALLENGES AND OPPORTUNITIES 129, 140 (Sarah Williams & Hannah Woolaver eds., 2016).

222. See Joseph Alfred Rakoto and Others v. Ravalomanana and Others, North Gauteng High Court Case No. 52268/12, 19/11 [Ravalomanana case].

223. Implementation of Rome Statute, *supra* note 216 (establishing jurisdiction of a South African court over persons who committed a crime outside South Africa if that person is "present in the territory of the Republic").

224. Woolaver, *supra* note 221, at 143.

225. See *id.* (noting the role of civil society in prompting South African authorities into enforcing domestic law).

226. In the matter between Democratic Alliance and Others v. Minister of International Relations and Cooperation and Others, High Court of South Africa (Gauteng Division, Pretoria), Case No. 83145/2016 (22 Feb. 2017), ¶ 77.





and reducing OTP powers<sup>227</sup>—demands that directly conflict with the ICC’s *raison d’être*. These demands reinforce the paradox that besets the ICC’s work in Africa: States parties to the Rome Statute must cooperate with investigations that put at risk leaders who operationalize the duty to cooperate.<sup>228</sup> The AU’s Open-Ended Committee serves as a vehicle for suggesting a “peace” for “impunity” exchange<sup>229</sup>—offering a tenuous counter-construction to its demonization argument that important components of African civil society view as a smokescreen. While the AU is the first regional organization to propose an international criminal chamber at the regional level—in the form of transforming the African Court of Justice and Human and Peoples’ Rights (the Malabo Protocol, adopted at the AU Malabo Summit in Malabo, Equatorial Guinea, 2014)<sup>230</sup>—critics note ulterior motives may stand behind the Court’s expansion.<sup>231</sup> A “lack of political will” among the AU membership may also be reflected by the Malabo Protocol’s inclusion of an immunity provision for sitting heads of state and senior government officials, in addition to the unwillingness of any AU member state to ratify the protocol.<sup>232</sup>

An array of African agencies, below the state level, worked to instantiate a culture of democratic institutionalization and transitional justice. Justice Richard Goldstone credited African civil society groups such as the Southern African Development Community with driving the campaign to ratify the Rome Statute. He noted African civil society assisted in creating in 2015 the Extraordinary African Chambers to try the former President of Chad, Hissène Habré for atrocities; he credited the oversight functions of more than 400 African NGOs with the limited successes achieved by the African Commission on Human and Peoples’ Rights. This effort resists the ideological weaponization of the *mission civilisatrice* as a subterfuge against African

227. Ministry of Foreign Affairs Kenya, *Africa Union Open-Ended Ministerial Committee on International Criminal Court (ICC) Attended by Cabinet Secretary Amb. Amina Mohamed*, (11 Apr. 2016), available at <https://www.facebook.com/ForeignOfficeKE/posts/1191646804179063>.

228. See Makau W. Mutua, *Closing the “Impunity Gap” and the Role of State Support of the ICC*, in CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 99, 103 (noting the paradox ensnaring the ICC in its Africa work).

229. See *id.* at 103 (questioning the idea of a trade-off between peace and impunity).

230. Malabo Protocol, *supra* note 152.

231. See, e.g., Elise Keppler, *Challenges for International Criminal Justice in Africa and the Role of Civil Society*, in CIVIL SOCIETY AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: CHALLENGES AND OPPORTUNITIES 66, 70–71 (Sarah Williams & Hannah Woolaver eds., 2016) (noting the range of views as to the driving forces behind the Court’s expansion and noting Kenya’s leading role favoring the Court’s expansion and its negative stance on the ICC); Amnesty Int’l, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, 5–6 (22 Jan. 2016), available at <https://www.amnesty.org/en/documents/afr01/3063/2016/en/>.

232. Richard Goldstone, *Foreword*, CIVIL SOCIETY AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: CHALLENGES AND OPPORTUNITIES, at ix, xii (Sarah Williams & Hannah Woolaver eds., 2016). See also Protocol Signatory List, *supra* note 152 (on the accession to or ratification of the Malabo Protocol).



efforts to end impunity. The Coalition for the ICC, a global network of 2,500 non-governmental organizations (NGOs), includes more than 800 organizations committed to the Court in Africa.<sup>233</sup> Cross-continental, mass-endorsed documents, and statements in support of the ICC have become a “significant feature” civil society advocacy efforts.<sup>234</sup> The Elders, under the chair of Kofi Annan, called on states announcing or contemplating their intention to quit the ICC to reverse course and work for reforming the Rome Statute from within.<sup>235</sup> The African Network on International Criminal Justice and Kenyan Section of the International Commission of Jurists proposed strengthening the ICC in accordance with the AU Constitutive Act while enhancing national level judiciaries and domestic law enforcement systems.<sup>236</sup> The African Group for Justice and Accountability, consisting of leading lawyers, prosecutors, judges, advocates, and academics,<sup>237</sup> helped counter former Gambian President Yahya Jammeh’s attempt to hold on to power following his election defeat.<sup>238</sup> These efforts led to The Gambia reversing its decision to exit the Court following the presidential election of Adama Barrow.<sup>239</sup> Jammeh’s

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233. #GlobalJustice Weekly—Action Needed Over Al-Bashir, COALITION FOR THE INTERNATIONAL CRIMINAL COURT (26 June 2015), available at <http://www.coalitionfortheicc.org/es/node/210>. See also *African Civil Society Calls on the AU and African States for ICC Support*, AFRICA EUROPE FAITH AND JUSTICE NETWORK (11 Feb. 2009), available at <http://archives.aefjn.org/index.php/crisis-watch/articles/african-civil-society-calls-on-the-au-member-states-for-icc-support.html> (listing 164 African organizations calling for AU support of the ICC).
234. See Keppler, *supra* note 231, at 79–80 (reviewing between 2009–2014 mass declarations organized by African civil society groups favoring the ICC).
235. See *The Elders Urge All States to Commit to Universal, Impartial International Criminal Court*, THE ELDERS (26 Oct. 2016), available at <http://theelders.org/article/elders-urge-all-states-commit-universal-impartial-international-criminal-court>. See also *Elder Kofi Annan Says African Exodus From The International Criminal Court Must Be Stopped*, CAMEROON INTELLIGENCE REPORT (22 Nov. 2016), available at <http://www.cameroonintelligence.com/elder-kofi-annan-says-african-exodus-from-the-international-criminal-court-must-be-stopped/>.
236. See AFRICAN NETWORK ON INTERNATIONAL CRIMINAL JUSTICE AND ICJ KENYA, REFLECTIONS ON THE AFRICAN UNION ICC RELATIONSHIP 2 (Jan. 2014), available at <http://www.icj-kenya.org/jdownloads/Publications/reflections%20on%20the%20african%20union%20icc%20relationship.pdf> (listing key objectives to better AU-ICC relations).
237. Members include, inter alia, Oxford International Law Professor, Dapo Akande (Nigeria), Former Chief Prosecutor for the International Criminal Tribunal for Rwanda and the former Yugoslavia, Richard Goldstone (South Africa), Botswana Attorney General Athaliah Molokomme, Tanzanian Chief Justice Mohamed Chande Othman, former UN High Commissioner for Human Rights Navi Pillay (South Africa), former President of the Central African Republic Catherine Samba-Panza, Penn State University School of Law Professor, Tiyanjana Maluwa (Malawi), and Open Society Initiative for West Africa Director Abdul Tejan-Cole (Sierra Leone).
238. See *Africa Group Statement on the Restoration of Democracy and Rule of Law in The Gambia*, AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY (21 Dec. 2016), available at [http://www.wayamo.com/archives/gambiastatementdec2016\\_2/](http://www.wayamo.com/archives/gambiastatementdec2016_2/) (demanding that Jammeh concede the presidency and respect election results).
239. See *The Africa Group for Justice and Accountability Welcomes President Elect’s Pledge for The Gambia to Remain in the International Court*, AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY, (8 Dec. 2016), available at <https://www.scribd.com/document/333635882/The-Africa-Group-for-Justice-and-Accountability-Welcomes-The-Gambia-s-Decision-to-Remain-in-the-International-Criminal-Court>.



vanquished attempt to override democratic process signaled an increasing recognition of civil society efforts by a coalition of West African states and ECOWAS to fight impunity. At the 27<sup>th</sup> AU summit, Nigeria, Senegal, Côte d'Ivoire, Tunisia, and subsequently Cabo Verde and the Democratic Republic of Congo joined Botswana, which previously was a lone voice,<sup>240</sup> in opposing the AU call for withdrawal.<sup>241</sup> In late January 2017, the AU voted to award its top position to the pro-ICC Chadian Foreign Minister, Moussa Faki Mahamat, dealing a defeat to Kenyan attempts to install its Foreign Affairs Cabinet Secretary, Amina Mohamed.<sup>242</sup>

The evidentiary basis for complaints about bias on the part of the ICC, were labeled “weak,”<sup>243</sup> and “misleading.”<sup>244</sup> Concerns about “vexatious or erroneous prosecution” have been dismissed and “hardly seem legitimate,”<sup>245</sup> and “not the view of the majority of Africans,”<sup>246</sup> African governments or the UN Security Council referred most of the investigations in Africa to the ICC. Jurisdictional constraints on prosecutions require that the ICC take up only those cases involving crimes committed by citizens of a member state or on the territory of a member state, when not referred to the court by the Security Council. And while many of the judges and the chief prosecutor are Africans, the hauntology of the *mission civilisatrice* constructs an adulterated counter-narrative that elevates important voices of bias from within the AU, making more political the sensitive question of whether the ICC needs Africa, rather than the reality, which is that “Africa needs the ICC.”<sup>247</sup>

#### IV. CONCLUSION

Burundi's promised exodus from the ICC exposes the Court's double-bind in Africa. The revenant of the *mission civilisatrice* conjurs up hauntings of

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240. See Mark Kersten, *Backing the ICC: Why Botswana Stands Alone Amongst AU States*, JUSTICE IN CONFLICT (13 June 2013), available at <https://justiceinconflict.org/2013/06/13/backing-the-icc-why-botswana-stands-alone-amongst-au-states/>.
241. See *Africa Group Justice Talks: Elise Keppler, Africa Group for Justice and Accountability* (5 Nov. 2016), available at <https://www.youtube.com/watch?v=9z8wwiVhsc8> (3:20 mark).
242. See Patrick Vidija, *Amina Loses African Union Commission Chair Vote to Chad's Mahamat*, THE STAR (Kenya), 20 Jan. 2017, available at [http://www.the-star.co.ke/news/2017/01/30/amina-loses-african-union-commission-chair-vote-to-chads-mahamat\\_c1497321](http://www.the-star.co.ke/news/2017/01/30/amina-loses-african-union-commission-chair-vote-to-chads-mahamat_c1497321) (labeling her loss a “big blow” to Kenya's spirited campaign to elect her).
243. Margaret M. deGuzman, *Is the ICC Targeting Africa Inappropriately? A Moral, Legal, and Sociological Assessment*, in CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 333.
244. Ambos, *supra* note 49, at 507.
245. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 734 (2010).
246. *Is Africa on Trial?*, BBC NEWS, 27 Mar. 2012, available at <http://www.bbc.com/news/world-africa-17513065> (quoting Abdul Tegan-Cole, former prosecutor at the Special Court for Sierra Leone).
247. Peter Ford, *After South Africa's Withdrawal, How Does the ICC Stay Relevant? (+Video)*, CHRISTIAN SCIENCE MONITOR, 24 Oct. 2016, available at <http://www.csmonitor.com/World/Africa/2016/1024/After-South-Africa-s-withdrawal-how-does-the-ICC-stay-relevant-video>.



bias on the part of the international community—hauntings that cast spectral shades of duplicity and western superintendency over the continental fight against impunity. Diminishing the project of the Court in Africa exposes the dangers of a counter-narrative, one that succumbs to the apparitions of justice promised by the neopatrimonial quasi-state and the capricious, ensconced workings of the African archetype of the Big Man. The Big Man's presidential politics affect and infect machinations of justice and organization at the level of the AU and in problematic reformulations of regional justice systems, which threaten to water down atrocity accountability. Constructing an African continental solution as suggested by expanding the jurisdiction of an African regional court to merge civil and criminal complaints (the Malabo Protocol)—in addition to transnational and international crimes such as money laundering, piracy, terrorism, human rights treaty compliance, and war crimes—is a non-starter for reasons of cost alone, much less the unworkable enlargement of jurisdiction covering 14 crimes.<sup>248</sup> Creating the façade of a credible regional instrument for prosecuting international crimes would not only promote an impunity gap by leaving unaddressed the victims of crimes while shielding responsible patrimonial elites, it would undercut purposeful forces within the AU, the community of West African states, and various domestic legal systems that have demonstrated advancements against impunity.

The *mission civilisatrice* intrudes as an ethical deconstruction of the project to expand and even preserve the ICC; it hovers over African conversations about the future of the court, particularly in the AU. The *mission civilisatrice* is a specter, a revenant of the colonial past, both present and absent, alive and dead,<sup>249</sup> that now haunts the project of international criminal law in various African incarnations. The *mission civilisatrice* frequents conversations about the project of the Court, making “established certainties vacillate,”<sup>250</sup> eroding its institutional credibility and complicating the ICC's prosecutions, especially as they incline toward the misrule of select African Big Men. Separating historical memory and the post-colonial consequences of the *mission civilisatrice* from apparitions of institutional injustice conjured

248. Africa Group for Justice and Accountability, *Africa Group Justice Talks: Stephen Rapp* (5 Feb. 2017 (5:39 mark)), available at <https://www.youtube.com/watch?v=1iEV2ghXQYE> (expressing pessimism about the establishment of an African regional court due to cost and over-stretching its jurisdictional reach). If the Malabo Protocol comes into effect, the African Court of Justice and Human Rights will have jurisdiction over genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.

249. See DERRIDA, *supra* note 82, at 6 (labeling the specter “this non-present present;” noting “[o]ne does not know if it is living or if it is dead”).

250. Davis, *supra* note 82, at 376.



up by the politics of Big Man presidentialism will determine the fate of the ICC. However, the role of African civil society appears as a revenant, returning not to haunt the Court but rather atrocity accountability at the outset of authoritarian steps to re-write advancements made on behalf of victims at levels lower than the international. The dynamic and key feature of Africa's response to atrocity vests within the organic and layered workings of African civil society. This response provides nuanced examples of associational strategies that promote stop gap measures to resist the spread of neopatrimonial impunity and support normative domestic and transnational organizations that do the same. The ICC benefits from the work of African civil society. Its modest case load necessarily indicates that its function as a court of last resort, doubtless important, is more visceral in terms of the institutional norm construction taking place at levels below the formality of the ICC. At these lower levels, it appears that hauntology in Africa has taken a different form in ways not easily recognized or understood. Time indeed is out of joint; the fight against impunity may bury its undertakers but not in a temporal framework suggested by the formal or referential structure of complementarity. Consociational dynamics in support of select domestic juridical institutions play a key role in strengthening continental accountability and reinforcing the belief that while Africa needs the ICC, the ICC most certainly needs African civil society.



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