

*Pirate Trials, the ICC and Mob Justice: Postcolonial Forms of Sovereignty in Kenya*

Mateo Taussig-Rubbo \*

*Introduction*

Jurisdiction is typically understood in relation to territory or nationality.<sup>1</sup> This conceptualization complements a global order of separate sovereign states, each enjoying the power to judge within its territory and to create law for its citizens. Universal jurisdiction, by contrast, entails the ability to judge offenders that have no connection to the state sitting in judgment. Decoupled from territory and nationality, the exercise of universal jurisdiction raises the question of whether it undermines a global order of sovereign states by allowing one state to reach into the affairs of another. This question is underscored by the crimes that, in the twentieth century, were found to give rise to universal jurisdiction, such as crimes against humanity. We can easily envisage a tension between a global order of state sovereignty and the exercise of universal jurisdiction, a tension that either promises to curb sovereign abuses or threatens imperial meddling.

There are, however, other ways in which the relation between sovereignty and universal jurisdiction might be construed. Indeed, the pirate, the original object of

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\* Associate Professor of Law, University at Buffalo, State University of New York.

<sup>1</sup>For discussion of recent themes in the U.S., see José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660 (2009).

universal jurisdiction, suggests a completely different relationship. Since the pirate acts in a zone beyond sovereignty—the high seas—and does not act on behalf of a sovereign, the exercise of universal jurisdiction in prosecuting pirates seems to complement a global order of territorial states. The pirate was *hostis humani generis*, the enemy of all mankind, or at least the enemy of the state system. Presented thus, we have two distinct conceptions of the relation between sovereignty and universal jurisdiction.

Over the past few years in Kenya, two stories have unfolded side by side that provide a more nuanced illustration of the ways that sovereignty and universal jurisdiction can interact. Kenya has been unable to establish a process to punish the political and business elites said to be behind the vicious outbreak of ethnic violence occasioned by a stolen election in 2007. In response, the prosecutor of the International Criminal Court has initiated proceedings on his own motion and asserted his intention to prosecute a handful of perpetrators for crimes against humanity. Over roughly the same time period, starting in 2006, Kenya has accepted delivery of and begun prosecuting Somali pirates captured by the naval forces of various wealthy states on the high seas, asserting its universal jurisdiction over them. It is worth noting, then, that for a moment we have in Kenya both the oldest and one of newest objects of universal jurisdiction. Kenya seems able to import the original “enemy of all”—the pirate—but seems set to export to the Hague, or have extracted from it, the new enemy of all, the new “pirate”—the perpetrator of crimes against humanity.

How are we to understand this conjunction? Are we seeing in Kenya a profound tension if not fully formed contradiction in this dual appearance of figures from such different historical moments? Are the two stories expressive of different understandings

of sovereignty and global order, or do they fit together as a coherent whole? What do they tell us about the much-discussed nature of the postcolonial state? Drawing on brief visits to Kenya in 2008 and 2009, including first-hand observation of the pirate trial proceedings, underway in the port city of Mombasa, I take up these questions. The abstract problem of the relation between universal jurisdiction and state sovereignty should be localized and theorized, I suggest, in relation to the postcolonial African sovereign state, its relations with more wealthy states, and its relation to its own citizenry. To evaluate how the twentieth century extension of universal jurisdiction from piracy to crimes against humanity impacts state sovereignty, that extension should itself be mapped onto the roughly contemporaneous transformations in the meaning of sovereignty after WWII and decolonization. That transformation was from a regime of formal inequality between sovereigns and various others—colonies, trusteeships, etc.—to a formal UN order of sovereign equality. But the legal transformation did not entail a transformation in the global distribution of many aspects of social, military and economic power: critically, legal sovereignty became decoupled from actual capacity and power. Decolonization was by no means the simple extension of Westphalian sovereignty to previously colonized peoples. For many scholars, the postcolonial state is one that retains important features from its colonial heritage—some go as far as to suggest that the state is an alien entity in these contexts, imposed and supported from abroad.<sup>2</sup>

Between the stories of pirate trials and the ICC, I insert a third feature of law and punishment in Kenya: “mob justice,” which consists in the beating and sometimes killing

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<sup>2</sup>See, for example, Makau wa Mutua, *Justice Under Siege: the Rule of Law and Judicial Subservience in Kenya*, HUMAN RIGHTS QUARTERLY, 23,1: 96-118, 97 (2001). “In spite of the liberal Constitution, the post-colonial state was autocratic at its inception because it wholly inherited the laws, culture, and practices of the colonial state.”

of criminals by a spontaneously assembled group. I use mob justice to evoke some of the texture of everyday life in much of Kenya, where individuals feel beset by crime but receive little protection from public authorities. Like the ICC, mob justice asserts its legitimacy as arising from the failure of the Kenyan state; like the pirate trial, it claims the right of any actor to punish the “enemy of all.” Bringing together the pirate trials, the ICC and mob justice, I tentatively explore forms of sovereignty and the question of who has jurisdiction—that is, the right to speak the law—in Kenya. Given the turn by ordinary Kenyans to forms of self-help such as mob justice, in what way does the Kenyan state have jurisdiction over Kenya? Is it plausible to think of mob justice itself as a form of universal jurisdiction?

Reflecting on these examples, the two distinct conceptions of the relation between an order of sovereign states and universal jurisdiction with which I began seem inadequate. Perhaps the universal jurisdiction stories from Kenya serve as a pithy articulation of the complex position of the postcolonial state, at once a sovereign who can loan out its “sovereign” powers for a fee; an entity vulnerable to the oversight of ICC; and a polity unable to provide basic security for its citizens, who then themselves take up the task of accusing, judging and punishing.

### *Pirate trials*

Historian Marcus Rediker describes the British-led campaign to eradicate piracy in the 18<sup>th</sup> Century as an “international campaign of terror.”<sup>3</sup> In London, New York,

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<sup>3</sup>Marcus Rediker, *The Pirate and the Gallows*, in JERRY BENTLEY, RENATE BRIDENTHAL, AND KÄREN WIGEN, eds., *SEASCAPES: MARITIME HISTORIES, LITTORAL CULTURES, AND TRANSOCEANIC EXCHANGES*,

Boston, Port Royal, Providence, Cape Coast Castle, and Salvador “authorities staged spectacular executions of those who had committed sea banditry.” Arriving in port, one would see the “gibbeted corpse of one who had sailed under the black flag, flesh rotting, crows picking at the bones.” In their struggle against Iberian supremacy and its assertion of trade monopoly in the Americas and the East, it had been common practice by the British and the Dutch to make use of pirates. When operating with a license from a sovereign, pirates were, at least according to that sovereign, not pirates, but privateers or corsairs.<sup>4</sup> But those who had been useful to the weak and developing English polity without funds to pay up-front for sufficiently large navy became less so with the consolidation of British sea power—hence the spectacle of the superfluous rotting pirate.<sup>5</sup>

The latest outbreak of piracy to have caught the world’s attention, this time around the Horn of Africa, is provoking a different response. The collapse of the Cold War-financed Somali military state in 1991 is one central factor in the rise of piracy in the area. The chains of causation are complex and speculative, but it seems that state collapse led to incursions into Somali waters by foreign fishing vessels, which depleted fish stocks. The fishing sometimes involved the use of prohibited nets and underwater

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239-250, 243, 244 (2007).

<sup>4</sup>STEFAN ELKOF, *PIRATES IN PARADISE: A MODERN HISTORY OF SOUTHEAST ASIA’S MARITIME MARAUDERS*, 7 (2006). Elkof writes that “privateering—essentially piracy sanctioned by the state—was an important instrument of war since few of the principalities and nascent nation-states in Europe at the time could afford” large naval forces. Issuing “‘letters of marque’ to private ship-owners, which allowed them to attack and plunder enemy vessels for private gain, thus considerably expanded the naval capacity of England, the Netherlands and other European powers in the seventeenth and eighteenth centuries.”

<sup>5</sup>JAMES G. LYDON, *PIRATES, PRIVATEERS AND PROFITS*, 260 (1970). Describes the parting of ways between the pirate and the privateer: “At the close of the seventeenth century, the maritime nations of Europe faced a choice: either abandon the *guerre de course* or crush out piracy and control privateering. The latter action was taken.” The pirate’s alter ego, the privateer would remain in service until 1856, when through the Treaty of Paris, European nations (but not the U.S.) repudiated the privateer as well.

lighting systems, turning the “Somali seabed into a wasteland.”<sup>6</sup> Despite the collapse of the Somali state, some foreign vessels purchased licenses, often printed on old Somali government letterhead, from “various local administration leaders and warlords” for up to \$150,000 per year per boat.<sup>7</sup> Even so, with much modification that is the subject of varying interpretations, these interactions transitioned into piracy. The rise of piracy is also connected to the instability of the Somali state, as evidenced by the distinctions among different parts of Somalia. Somaliland, to the North, has declared itself independent, but has not been internationally recognized as a sovereign.<sup>8</sup> This region is relatively stable, holds elections, and is said to be helping with counter-piracy efforts. Puntland, on the Horn, has been accused of supporting piracy.<sup>9</sup> To the South, the severe law-and-order government of the Union of Islamic Courts suppressed piracy, but this group’s overthrow by the U.S. and Ethiopia in 2006 led to an increase in piracy. The overthrow of the ICU has lead to the rise of al-Shabaab, a group said to be allied

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<sup>6</sup> Peter Lehr and Hendrick Lehmann, *Somalia—Pirates’ New Paradise* in PETER LEHR, *VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM*, 13 (2007). The foreign fishing vessels were from France, Spain, Kenya and Japan, among others, and extracted about \$300 million per year.

<sup>7</sup> *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1630* (2005) S/2006/229, 24, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/305/15/PDF/N0630515.pdf?OpenElement>. “Various local administration leaders and warlords have long realized that commercial exploitation of Somalia’s fisheries and the granting of permits to foreign fishing organizations and individuals are a lucrative income-generating activity. Some permits are typed out on the previous Government’s letterhead, while others bear the personal seals of warlords.” “... fishing permits can cost as much as \$150,000 per year, per boat..”. And see *Report of the Monitoring Group on Somalia Pursuant to Security Council resolution 1724* (2006) S/2007/436, 24, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/383/15/PDF/N0738315.pdf?OpenElement>. “Foreign fishing vessels operate in the Somali exclusive economic zone under the protection of a ‘license’ issued by one or another faction in control of the area. The fishing grounds are analogous to a naval engagement, with fishing vessels openly displaying mounted guns...to ward off rivals for the best spot for casting the nets.”

<sup>8</sup> MARK BRADBURY, *BECOMING SOMALILAND* (2008).

<sup>9</sup> It was accused in a UN report of being in league with the pirates, a charge its President rejected. Garowe Online, *Somalia: Puntland's Leader Says UN Report is 'Politically Motivated,'* Mar. 22, 2010, [http://www.garoweonline.com/artman2/publish/Somalia\\_27/Somalia\\_Puntland\\_s\\_leader\\_says\\_UN\\_report\\_is\\_politically\\_motivated.shtml](http://www.garoweonline.com/artman2/publish/Somalia_27/Somalia_Puntland_s_leader_says_UN_report_is_politically_motivated.shtml). See *UN Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853* (2008) S/2010/91 (2010), 39 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/246/89/PDF/N1024689.pdf?OpenElement>.

with al-Qaeda.<sup>10</sup> There are speculations that al-Shabaab profits from piracy, but there are also cases where it has attacked pirates for interfering with trade from the ports it controls.<sup>11</sup>

In a typical episode, ship and crew are captured, and brought back to shore and held for ransom—thus this is neither snatch and grab piracy common in the Malacca straights, nor capture for resale or personal use. Cicero’s claimed that reneging on a promise to pay a ransom to a pirate would not be wrong, “for a pirate is not included in the number of lawful enemies [*perduellium*], but is the common foe of all the world; and with him there ought not to be any pledged word nor any oath mutually binding.”<sup>12</sup> As a matter of everyday practice, deals with the Somali pirates are carried out in a business-like manner—although the pirates do receive their payment upfront, perhaps heeding Cicero after all. In any case, piracy now seems to have evolved into a far-reaching enterprise, with up-front costs provided from the Somali diaspora, and a “business model” in which pirates receive payment based on different kinds of “shares” and formalized system of rewards.<sup>13</sup> Some of the profits, according to many Kenyans in

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<sup>10</sup> *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1676* (2006) S/2006/913, 39-40, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/627/40/PDF/N0662740.pdf?OpenElement>. “The spreading control of ICU over the southern and central parts of Somalia has had a severe dampening effect on the activities of maritime piracy in the waters off the Somali coast. After declaring piracy illegal, ICU took over Harardheere (central coast), which has been the pivotal area for the main group of Somali pirates—the Somali Marines, also referred to as the Defenders of Somali Territorial Waters — which had been the principal threat to maritime shipping in Somali coastal waters. Since the elimination of that pirate group, there have been no acts of piracy along the central and southern coastal area.”

A later report by the same entity contends that: “Since the ousting of ICU, there has been a drastic increase in the frequency of piracy in waters off Somalia.” *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1724* (2006) S/2007/436, 24, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/383/15/PDF/N0738315.pdf?OpenElement>.

<sup>11</sup> Alisha Ryu, *Somali Pirates Flee Possible al-Shabab Attack*, 26 April 2010, VOICE OF AMERICA, <http://www1.voanews.com/english/news/africa/Somali-Pirates-Flee-Possible-al-Shabab-Attack-92099944.html>.

<sup>12</sup> CICERO, *DE OFFICIIS*, II. xxxix, 107-08 cited in RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE*, 40 (1999).

<sup>13</sup> A UN report describes the pirate “business model”: “When ransom is received, fixed costs are the first to

Nairobi, are fueling a real estate boom in Eastleigh, a Somali neighborhood in Nairobi.

At the time of writing, there are about 20 vessels being held in Somalia,<sup>14</sup> and the price of release is often in the USD 1-2 million range, although higher sums have been reported.<sup>15</sup>

An international naval flotilla has congregated off the Somali coast and dealing with pirates can serve as a coming out party for newly prominent states. For the first time since the 15<sup>th</sup> Century, Chinese naval vessels were seen outside of East Asia. In addition, the UN Security Council has passed a number of resolutions under Article VII, under which the Council may act to preserve peace and security.<sup>16</sup> The resolutions might be read as redefining Somali sovereignty, something that clearly worries other states with piracy problems, such as Indonesia.<sup>17</sup> The resolutions contemplate, for instance, that the fight against piracy will be conducted not only on the high seas, but “in” Somalia, that is, in its territorial sea and on land. The resolutions do require the consent of Somalia, but

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be paid out. These are typically: Reimbursement of supplier(s); Financier(s) and/or investor(s): 30% of the ransom; Local elders: 5 to 10 % of the ransom (anchoring rights); Class B shares (approx. \$15,000 each): militiamen, interpreters etc. The remaining sum — the profit — is divided between class-A shareholders [those individuals in the eight-twelve man crew on the pirate boat who provide their own firearm]” (internal bullet points removed). So far as rewards, the UN report includes a seized pirate document: “Gaanburi (pirate name) has qualified for it and the company has promised him \$2000...The company will continue its reward system and it is open to all. As the saying goes ‘the parents initially love their children equally but it is the children who make them love some more than the others’. So does the company. It is up to your abilities to qualify this easy-to- earn reward.” Appendix B, *UN Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853* (2008) S/2010/91 (2010), 98, 97, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/246/89/PDF/N1024689.pdf?OpenElement>; see also *Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1811* (2008) S/2008/769, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/604/73/PDF/N0860473.pdf?OpenElement>.

<sup>14</sup>Reuters, *Ships held by Somali pirates-FACTBOX*, May 14, 2010,

<http://www.forexyard.com/en/news/Ships-held-by-Somali-pirates-2010-05-14T083604Z-FACTBOX>.

<sup>15</sup>Scott Baldauff, *Somali Pirates Fight Over Record Ransom*, Jan. 18, 2010,

<http://www.csmonitor.com/World/Africa/2010/0118/Somali-pirates-fight-over-record-ransom>. Baldauff recounts a \$3 million ransom for Saudi tanker *Sirius Star* and record \$5.5 million to \$7 million ransom dropped on deck of Greek-flagged oil tanker *Maran Centaurus*. On the other hand, the ransom for less-august vessels—such as Yemeni fishing vessel or an Indian dhow—is presumably adjusted downwards.

<sup>16</sup>For discussion of significance of acting under Art. VII see Kim Lane Schepple, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in SUJIT CHOUDHRY (ED.), *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2007).

<sup>17</sup> UNSCR 1851, at 6 (“...States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG”).



the Somali government, the Transitional Federal Government, is itself largely the creation of the international community and has little power in Somalia. It appears that the number of attacks has declined in the last year, although the pirates have increased their range up to 1,000 miles into the Indian Ocean, more than halfway to India.<sup>18</sup>—The solution, in the longer term, is assumed to be the reconstitution of the Somali state—a sensibility with powerful historical echoes, since European interest in Somalia begins with a maritime raid on European shipping.<sup>19</sup>

While the flotilla is no doubt an impressive sight, there is much concern about what is to be done with captured pirates. The absence of a functioning government in Somalia to which to send the pirates precludes sending them back to Somalia, although apparently China has done so. There has been some discussion of creating an international court for piracy, or extending the jurisdiction of the ICC to include piracy.<sup>20</sup> Some countries have brought pirates home for trial, but many have expressed concern

<sup>18</sup>Reuters, *Piracy Attacks Down By a Third in Q1 2010: Watchdog*, Apr. 21, 2010, [http://www.nytimes.com/reuters/2010/04/21/world/international-us-piracy.html?\\_r=1&scp=7&sq=piracy&st=cse](http://www.nytimes.com/reuters/2010/04/21/world/international-us-piracy.html?_r=1&scp=7&sq=piracy&st=cse). Noting drop around Horn of Africa from six year high of 406 attacks in 2009, having recorded 41 in Q1 2009 and 17 Q1 2010); Inside Somalia, *Somali Pirates Extend Their Reach Towards India*, Mar. 23, 2010, <http://insidesomalia.org/201003232913/News/Travel/Somali-pirates-extend-their-reach-towards-India.html>.

<sup>19</sup>The first treaty, according Mark Bradbury, between a European and a Somali clan was signed by the British East India Company to ensure safe passage for ships along the Somali coast following an attack on a British ship in 1825. It was not until 1886, with the scramble for Africa underway, that Britain approved the occupation of Somaliland—now a breakaway region of Somalia—a job it delegated to the government of India. The threat to trade led to the establishment of a garrison in present-day Yemen in 1839, which led to further dealings with Somalis to provision the garrison. The opening of the Suez Canal in 1869 further increased the importance of the area. See MARK BRADBURY, *BECOMING SOMALILAND*, 25 (2008). For a discussion of the Portuguese approach, which entailed repeating sacking and burning of Mombasa and Mogadishu, and the attempt to disrupt and destroy overland from the East to the West through the Middle East, a trade organized by Muslim merchants, see JUSTUS STRANDES, *THE PORTUGUESE PERIOD IN EAST AFRICA*, Trans. J. Wallwork (1989[1899]). On the internationally recognized government in Somalia see Kirsti Samuels, *Constitution-Building During the War on Terror: The Challenge of Somalia*, INT'L L. AND POLIT. (2008) 40: 597.

<sup>20</sup>This approach received a significant boost with the approval of Russian sponsored UN Security Council Resolution request the Secretary General to report on “options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements.” Para. 4. Resolution 1918 (2010) 27 April 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/331/39/PDF/N1033139.pdf>.

that Somalis could qualify for refugee status and that it would be impossible to deport them because of obligations against *refoulement*. Indeed, the lack of a forceful response to pirates, and the common practice of letting pirates go—“catch and release”—is interpreted by many as indicative of how international law, and post-war human rights commitments in particular, have constrained the once proud sovereign state. The supposed “enemy of all” turns out to enjoy a panoply of rights. As Douglas Guilfoyle and Andrew Murdoch write: “despite some classical writers’ rhetoric suggesting that pirates are at war with all humankind, we cannot assume we are at war with pirates.”<sup>21</sup>

The status of pirates of earlier eras is a complex topic: but in many formulations they were distinct from criminals, and from enemies, *hostis*.<sup>22</sup> If the pirate once played the role of the person neither criminal nor enemy, the one to be treated like “Beasts of Prey” (Pufendorf),<sup>23</sup> this no longer seems to be the case. And yet, powerful states’ reluctance to try pirates themselves, and the policy of transferring pirates to a third country (about which more in a moment), or simply letting them go, suggests that all may not be quite so tidy in the house of international law. Perhaps the ancient crime cannot be completely digested by more recent law.

It is also important to note the impact of trends in the shipping industry on jurisdictional issues: nowadays, crews are often from non-Western and poorer countries, such as the Philippines; and about half of merchant ships fly so-called “flags of convenience,” typically Panama, Liberia or the Bahamas, states said to have more lenient

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<sup>21</sup>Douglas Guilfoyle and Andrew Murdoch, 2010 [forthcoming], *The Use of Lethal Force in Counter-Piracy Operations off Somalia*,” 12 (on file with author).

<sup>22</sup>DANIEL HELLER-ROAZEN, *THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS*, 116 (2009). “Neither *inimicus* nor *hostis*, neither private nor public, and neither criminal nor political, this antagonist can hardly be represented in the dominant terms of the modern law of nations...”.

<sup>23</sup>Pufendorf, while otherwise arguing for restrictions on European colonialism, with respect to the pirate wrote: “it will be necessary for other Men to shew them no more Mercy than they do Beasts of Prey.” PUFENDORF, *THE LAW OF NATURE AND NATIONS*, 802 (VIII. 4.5) cited in TUCK, *WAR AND PEACE*, 162.

requirements with regard to labor and safety regulations and hence lower costs.<sup>24</sup> This distribution of crew and ship nationality towards marginal states, and the fact that naval power is the possession of more wealthy states, increases the likelihood that the naval forces capturing pirates will not have nationality or extraterritoriality jurisdiction.<sup>25</sup> Where there is such a mis-match, the capturing country then may employ universal jurisdiction. But capturing states have been hesitant to exercise universal jurisdiction, perhaps not convinced that they should pay for an exercise in universal jurisdiction on behalf of, say, a Panamanian vessel with a Korean crew. Universal jurisdiction in this context thus might appear more as a burden, as a kind of self-sacrifice for a public good, than an opportunity. The reluctance to try pirates may also reflect a judgment that the very term “*pirates*” evokes a drama that is not warranted, that simply calling ordinary criminals by the same title enjoyed by the great Blackbeard (if not Johnny Depp) is something of a false historical linkage. From this perspective, universal jurisdiction might seem as disproportionate to the Somalis’ actions as the naval vessels are to their skiffs. Universal jurisdiction might also raise concerns about relations with other sovereigns, either because a sovereign has an interest in the pirate (one Somali government official, who happens to reside in the U.S., has indicated that he would like to see Somalis tried in Somalia),<sup>26</sup> or because a sovereign may claim an interest in the

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<sup>24</sup>These trends are not mirrored in ship ownership. Containerization and mechanization have significantly reduced the number of crew, presumably making vessels more vulnerable. A “Very Large Crude Carrier,” a ship a quarter of mile long, can operate with just over 20 crew.

<sup>25</sup> UNCLOS provides in Art. 91 that: “Ships have the nationality of the State whose flag they are entitled to fly”; and in Art. 94: “Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”

<sup>26</sup>BBC News, *Somalia Criticises US for Putting Pirate on Trial*, May 19, 2010, <http://news.bbc.co.uk/2/hi/world/africa/10126248.stm>. Jamaal Cumar told the BBC that “We felt that it was an exercise in extrajudicial practice of the law and we asked the US to return those pirates back to Somalia.” According the BBC, he wanted to see a “UN-backed international tribunal to deal with piracy cases.”

victim. And there are the concerns of the legal stickiness of the Somalis already mentioned: that it may not be possible to send them home post-punishment. Some of these concerns seem reflected in U.S. conduct: the U.S. indicted in federal district court the one surviving pirate who attacked a U.S. flag ship, the *Maersk-Alabama*, and, more recently, eleven pirates who attacked, remarkably enough, U.S. naval vessels. But when universal jurisdiction applied, as with an Indian vessel recovered from pirates in 2006, the U.S. sent the pirates to Kenya.

Most of the pirates captured off the Horn of Africa who have not been released have been delivered to Kenya (about 120). Kenya has begun trials in the port city of Mombasa, on the famed Swahili Coast.<sup>27</sup> Thus we have not a theatre of legal terror, as Rediker saw with the British, but a novel legal innovation, centered around the transfer of pirates from one sovereign to another. Kenya's ability to prosecute the Somali pirates even where there is no nexus to Kenya is explained as an exercise of universal jurisdiction—and by occasional invocations of the phrase that piracy is a crime against “mankind.”<sup>28</sup> Yet this is the jurisdiction that that some other state had just declined to exercise. One scholar has questioned whether the courts hearing the pirate cases, Kenya's

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<sup>27</sup> See James R. Brennan, *Lowering the Sultan's Flag: Sovereignty and Decolonization in Coastal Kenya*, COMPARATIVE STUDIES IN SOCIETY AND HISTORY (2008) 50 (4): 831-861. Mombasa is Kenya's main port, but quite marginal in relation to the inland capital, Nairobi. Settled over a millennia ago, not long after the advent of Islam, the predominantly Muslim and Arab traders of the coast long mediated between the Middle East and the interior, supplying slaves and goods from inland. The city was burnt to the ground various times by the Portuguese as they set to monopolize the competing trade network, and was then retaken from them in 1730 and became part of the domain of the Sultan of Zanzibar, and leased to the British. It only became part of Kenya at independence in 1963.

<sup>28</sup> Trial transcript, *Republic v. Hasan Mohamud Ahmed* [et. al.], Chief Magistrate's Court at Mombasa, Criminal Case No. 434 of 2006. The trial court found that “any act of piracy *jure gentium* is a crime against mankind which lies beyond the protection of any state.” 155. See the single appellate decision we have from Kenya regarding the trial of a group of Somali's delivered in 2006 by the U.S. Responding to a jurisdictional challenge on appeal, the High Court of Kenya at Mombasa opined that even if Kenya had not ratified UNCLOS and had not provided for punishment of piracy in its criminal law, the lower court was “bound to apply international norms and Instruments since Kenya is a member of the civilized world and not expected to act in contradiction to expectations of member states of the United Nations.” See, *Hassan M. Ahmed v. Republic*, Crim. App. No. 198, May 12, 2009, High Court of Kenya at Mombasa.

lowest courts, the Magistrate's courts, actually are empowered to exercise extraterritorial jurisdiction since he finds no grant of original jurisdiction in the Constitution and no statutory basis for the exercise.<sup>29</sup> In court, the Somalis I saw objected that Kenya had no business trying them, mere fisherman who had never harmed Kenya. Piracy, according to the UN Convention on the Law of the Sea (UNCLOS) (1982), more or less reflected in Kenyan criminal law, takes place on the "high seas," "outside the jurisdiction of any State" and is "committed for private ends."<sup>30</sup>

In court, I also heard Kenyan prosecutors say jurisdiction was based on various secret and public MOU's that Kenya has signed, an intriguing part of this story.<sup>31</sup> The use of an MOU, instead of a treaty or other more formal instrument, certainly allows executive branch officials to act with less oversight, especially so when it is secret. In this sense, it is one small part of a struggle over sovereignty within a constitutional order.

The U.S. MOU provides that it is not a "binding international agreement." The

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<sup>29</sup> James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured By Third States Under Kenyan and International Law*, LOYOLA OF LOS ANGELES INT'L. AND COMP. L. REV. (2010) ("Such an extension of extraterritorial jurisdiction by subordinate courts does not however rest on a very sound legal basis in Kenya's judicial system, particularly for the crime of piracy *jure gentium* under Kenya's Penal Code").

<sup>30</sup>"More or less" because Kenya includes attacks in territorial waters in its definition of piracy. Section 69 of the Penal Code (Chapter 63 of the Laws of Kenya). Kenya ratified UNCLOS in 1989. The U.S. and Somalia have not ratified the Convention; the U.S. recognizes it as expressing customary law (as it did in its MOU with Kenya). Piracy is not a crime under Somali law. Piracy is defined in the Convention on the High Seas (HSC) Art. 15, (1958) and in UN Convention on the Law of the Sea (UNCLOS) Art. 101, (1982).

<sup>31</sup> Kenya signed agreements with the US, UK, EU, Canada, China and Denmark. In the US MOU, Kenya agrees to "Accept custody of and finish appropriate storage of the remains of any person deceased as a result of or incident to a covered act [i.e. piracy or armed robbery against ships]." Kenyan ports and airspace are also to be accessible to US warships, planes, and military personnel engaging in counter-piracy. Provision is made for "technical support, expertise, training and other assistance." See "Memorandum of Understanding Between the United States of American and the Republic of Kenya Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea." Signed in Washington, DC, Jan. 16, 2009. The EU agreement covers much of the same ground but is more emphatic and detailed regarding the process to which pirates will be subject. See "Exchange of Letters between the European Union and the Government of Kenya," March 6, 2009. Published in OFFICIAL JOURNAL OF THE EUROPEAN UNION 25.3.2009. For discussion of US use of MOU's and other non-treaty instruments, see Oona Hathaway *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, YALE L.J. (2008), 1236, 1249-1250.

agreements I have seen do not purport to confer jurisdiction, but the notion that they could is interesting. Could Kenya be exercising jurisdiction transferred *from* the U.S., delegated by a secret agreement, in addition to or instead of universal jurisdiction? Even if implausible and not relied upon, this sense of jurisdiction as transferable does capture something about the overall program, posing the question of whether we think Kenya is acting as a sovereign, or on behalf of one; whether we think we are studying separate sovereigns, or, rather, entities nested one within the other. It is not one sovereign acting against the pirate, but a group, and universal jurisdiction facilitates their coordination, allowing the hand-off. There is some doubt—but not one I heard raised in court nor raised in the single appellate opinion issued thus far—over whether UNCLOS permits the transfer. Article 105 provides that “courts of the State which carried out the seizure” determine punishment—although the Security Council resolutions seem to contemplate the transfer idea.<sup>32</sup> All of the coastal states—Kenya, Somalia, Djibouti—lack vessels to catch pirates themselves. But, as one UN representative diplomatically framed it, “Some countries provide a navy, others can help with prosecution.”<sup>33</sup> Universal jurisdiction allows everyone to “help,” even if they don’t have any naval “assets.”

Earlier, we speculated that, with respect to piracy, universal jurisdiction and state sovereignty could be mutually supportive. Is that what we see here—with respect to Kenya, with respect to other states? The speculation seemed plausible because in acting against the pirate a state would not—by the UNCLOS definition of piracy as being for

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<sup>32</sup>The ILC Commentary on the same provision in the 1958 Convention (which the U.S. has ratified) *rejects* the idea of transfer. “This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. *This right cannot be exercised at a place under the jurisdiction of another State.* The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts.” YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol II.

<sup>33</sup>Catharine Houreld, A.P. *Warships Fill Up With Pirates after Kenya Balks*, Apr. 15, 2010, <http://news.yahoo.com/s/ap/piracy>.

“private” ends—implicate the interests of other sovereigns. But because of the transfer program, that is not quite the full story we confront in Kenya, for Kenya is acting as part of an order of sovereign states, one where some kinds of tasks—trying pirates—are apparently better left to some sovereigns than others. Thus while our initial conception left sovereign equality undisturbed, the transfer program does not: it at least raises an interesting question about a global division of adjudicatory labor, if not more substantial inequality.

One problem that Kenya confronted was that when the pirates were transferred, the various wealthy states continued to supervise Kenya. As international consultants and embassy staff started giving Kenyan prisons and courts a close look, the theatre of law started to look like one in which it was the *Kenyan* courts, as much as the pirates, who would be on trial. Instead of being treated as a “hero” to the international community, as one Kenyan prosecutor said should be happening at a training session I attended, Kenya was hearing that its prisons and courts were perhaps not good enough—for Somalis, who now happened to be vehicles of international standards. Instead of a dumping program, was this to be a program to elevate Kenya to world standards?<sup>34</sup> A group of international lawyers all the way from Paris, Lawyers of the World, came to Mombasa to help the pirates<sup>35</sup> and condemned the transfer program for depriving the pirates of their rights. Kenya was caught in this cross-fire, this split consciousness of the international order. To make matters worse, while Kenya clearly wanted financial support in exchange for

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<sup>34</sup> For discussion of significance of Kenyan prison conditions and judicial process upon ability of state’s subject to European Convention on Human Rights to transfer pirates to Kenya, see Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, INT’L. AND COMP. L. Q., vol. 59: 141-169, 163-67 (January 2010).

<sup>35</sup> Voice of America, *Paris-Based Group Says Accused Somali Pirates Denied Rights*, Aug. 27 2009, [www1.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html](http://www1.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html).

undertaking the pirate trials, the “donor” states monitored their assistance closely, clearly concerned about corruption. One consultant working in Mombasa spoke of Kenyan officials as “children seeking candy.” A representative of a naval mission described how annoyed the local detectives were that he would not buy them a new vehicle, but rather was planning to provide a maintenance contract at a local mechanic to fix the many broken down vehicles in their lot instead. Before signing its agreement with the EU, Kenya is said to have “presented a 12-page wish-list of expensive items and money for retreats.” It was not only the Kenyans who looked a bit awkward: “One of the officials described diplomats running around Nairobi buying up color printers — one of the least expensive items requested.”<sup>36</sup>

Donor states thus transfer pirates to Kenya, yet seem unable to let them go. Is this a transaction between distinct entities, or is Kenya embedded in a broader order, a mere vehicle for the donor? The exercise of universal jurisdiction can be read as an altruistic act—why, after all, should a state expend its resources prosecuting individuals who have no nexus to it? But this act was subject in Kenya to a variety of other readings: that Kenya was sacrificing itself as a hero for the international community, that it was being exploited as a dumping ground by wealthy states; that Kenya had negotiated a good deal for itself and was exploiting the other states too squeamish to kill pirates and too indifferent to try them.

Reflecting the instability of these readings, Kenya began to rethink the deal it had struck. The media speculated that Kenya had been “coerced” and, in the words of a

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<sup>36</sup>Catherine Houreld, *Warships Fill Up with Pirates After Kenya Balks*, Apr. 15, 2010, <http://news.yahoo.com/s/ap/piracy>.



government minister, “short-changed.”<sup>37</sup> Speaking in April 2010, Kenyan Attorney General Wako announced the end of the pirate program. He described an “inherent contradiction” in the use of Kenya to try pirates, saying of the foreign nations that “They keep on rubbing our judicial system... Why then are these countries afraid to prosecute the pirates, arrested by their naval forces in the high seas?”<sup>38</sup> He continued: “As soon as they give us the pirates, they dump them here and forget about what happened.” Instead of leading an international charge against the “enemy of all,” Kenya found itself, as the AG put it, standing “alone.”<sup>39</sup> And it was not standing alone with just any Somali. Rather it had possession of a human being deserving of a legal process up to an international benchmark, something Kenya, it is often said, does not typically provide for its own citizens. Kenya had imported a struggle over the pirate previously internal to the capturing states—the struggle, we might say, over whether the pirate was really no longer the enemy of all, whether he truly had been assimilated to the twentieth century. And we may wish to distinguish the different degree of struggle which different states faced—the US as compared to the EU, and those as compared with Russia, India and China or Yemen. We see, that is, states struggling with that transformation in public law, the assertion that despite the classical writers’ “rhetoric,” “we cannot assume we are at war with the pirate.” I believe we can interpret the pirate transfer plan as an attempt to

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<sup>37</sup> Walter Menya, *Deal on Piracy Trials skewed, say Ministers*, June 26, 2010, DAILY NATION, [HTTP://WWW.NATION.CO.KE/NEWS/-/1056/947196/-/W9H9NU/-/INDEX.HTML](http://www.nation.co.ke/News/-/1056/947196/-/W9H9NU/-/INDEX.HTML).

<sup>38</sup> Fred Mukinda and Alphonse Shiundu, *Kenya Laments Pirates’ Burden*, Mar. 30, 2010, DAILY NATION, [www.nation.co.ke/News/-/1056/889976/-/vrw9dl/-/index.html](http://www.nation.co.ke/News/-/1056/889976/-/vrw9dl/-/index.html). The AG told a Parliamentary committee on Defense and Foreign Relations that he had not been “part of the policy determination or decision to enter into memorandum of understanding to prosecute piracy cases, it was all done by the ministry of foreign affairs.” “My anxiety,” he said, “is that we can’t hide under the sun anymore, our cases are taking longer than required.” The article continues: “The about-turn on the external obligations to fight piracy and the push by Parliament to flex its muscles in the name of protecting the country’s sovereignty comes after the ‘baits’ used to entice the country into signing the agreements were not delivered.”

<sup>39</sup> <http://www.nation.co.ke/blob/view/-/890588/data/148462/-/36xn9tz/-/download-icc.pdf>

displace the tension that that transformation creates. But it seems that the tension was exported to Kenya along with the pirates. This is hardly the deal, one suspects, that Kenya had in mind.

Kenya's withdrawal prompted more talk of an international tribunal and there are some signs that capturing states are again thinking about trying pirates at home. It is also noteworthy that Kenya's announcement came within days of the decision of the ICC to permit the ICC prosecutor to proceed with an investigation in Kenya. One rumor was that the Attorney General himself was on the list of possible perpetrators.<sup>40</sup> But a month later, in June 2010, Kenya announced that it was back in the pirate trial business—the EU had pledged more funding and paid for a new courtroom at the prison where the pirates were being held outside of Mombasa.<sup>41</sup>

#### *The international criminal court*

The judges decided. There will be justice in Kenya. To contribute to the prevention of crimes during the next election we must proceed promptly.

--ICC Prosecutor Luis Moreno-Ocampo<sup>42</sup>

While Kenya was busy importing apparently impoverished Somali pirates, it seemed likely to begin exporting to the Hague well-to-do perpetrators of crimes against humanity. In the December 2007 election, Kenya seemed set for a rare event, a peaceful

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<sup>40</sup>Philip Alston had earlier described Wako as the “embodiment in Kenya of the phenomenon of impunity.” Statement of Feb. 25, 2009, Office of the High Commissioner for Human Rights, [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E).

<sup>41</sup>Associated Press, *UN: Donors to Spend \$9.3 Million to Prosecute Somali Suspects in Kenya, Seychelles*, June 15, 2010; see also Jasper Fakkert, *Kenya Opens Pirate Court*, THE EPOCH TIMES, JUNE 24, 2010, [www.theepochtimes.com/n2/content/view/38023/](http://www.theepochtimes.com/n2/content/view/38023/).

<sup>42</sup>OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, 1 April 2010, [www.icc-cpi.int/NR/exeres/6B518FB1-C68F-405A-887C-19CEACF91C05.htm](http://www.icc-cpi.int/NR/exeres/6B518FB1-C68F-405A-887C-19CEACF91C05.htm).

electoral transition.<sup>43</sup> The opposition party was leading the vote count by a large margin. But at the last minute, the incumbent was declared the winner and hastily sworn in. Ethnically organized or “tribal” violence broke out as opposition party supporters attacked those of the incumbent, which were followed by reprisals. Over one thousand people were killed, widespread sexual assaults took place, and hundreds of thousands were displaced from their homes based on ethnicity. As Kenya spiraled out of control and some commentators saw genocide looming, former UN Secretary General Kofi Annan negotiated a deal in February 2008. There would be a coalition government in which the incumbent would be president, and the opponent would fill the newly created post of prime minister. But would those who instigated and lead the violence be punished? On this question, the Kenyan political class has been unable to establish a way forward. It seems likely that the ICC will prosecute a few of the key perpetrators for crimes against humanity.

In opposite ways, the pirate trials and the ICC prosecution blur the relationship between universal jurisdiction and sovereignty. Universal jurisdiction over piracy seems easily to complement an understanding of jurisdiction based on territory or nationality—the pirate is by definition not attached to any sovereign. And yet the pirate program in Kenya not only underscored certain inequalities between sovereigns but caused us to wonder if we could maintain the fiction of sovereign separateness. The more recently conceived crimes of universal jurisdiction— genocide, war crimes, and crimes against humanity—appear on their face to pose a challenge to the neat boundaries of the

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<sup>43</sup>See Adam Ashforth, *Ethnic Violence and the Prospects for Democracy in the Aftermath of the 2007 Kenyan Elections*, in *PUBLIC CULTURE*, 21: 1 (2009) 9-19, 14; see also, Kenya National Commission on Human Rights, *ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA’S POST-2007 ELECTION VIOLENCE* (Aug. 15 2008).

sovereign order. Don't they permit one sovereign to judge events and actors that have no connection to it but which may be of central concern to another state? But the ICC, like the pirate trials, does not admit a clear answer, for its jurisdiction is, at least in part, premised on Kenyan consent. In part, this blurring requires that we reconsider normative ideas about sovereignty, taking into account the particularities of postcolonial sovereignty and its relationship to post-WWII changes in the global order.

In an essay on the arrest of Augusto Pinochet, Paul Kahn offers a critique of the use of universal jurisdiction, seeing it as possibly in stark conflict with sovereignty.<sup>44</sup> For Kahn, law divorced from sovereignty is law divorced from self-rule: “in a democratic regime in particular, sovereignty and law are tightly linked: the sovereign people govern through the rule of law; and by following the law, citizens participate in popular sovereignty and achieve self-government.” Conceived thus, we can say that, for Kahn, sovereignty and law are real, actual lived practices. By contrast, looking to international law, Kahn sees little of this: “there is as yet no world community with a sovereign will,” and no citizenship in a “world sovereign.” There is no “sacrifice” within international law—the UN cannot institute a draft. Moreover, Kahn notes, international norms are the “project” of elites, not “an expression of individual and community self-formation.” In these ways, Kahn urges, international human rights law, has “not been part of a legal regime.”

What happens to this conceptualization of law and sovereignty when deployed in the postcolony, in Kenya? For many writers, the postcolonial state evokes an inverted genealogy to what Kahn describes, one where sovereignty was initially foreign and

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<sup>44</sup> Paul W. Kahn, *On Pinochet*, BOSTON REVIEW (1999).

colonial, and in critical ways that are the subject of much debate, has remained so.<sup>45</sup> In Robert Jackson's framing, these new sovereigns enjoy "negative" and juridical sovereignty, not "positive" and actual sovereignty.<sup>46</sup> For Jackson, the postcolonial state is best thought of as a "quasi-state," an entity enjoying the legal trappings of sovereignty which are secured by the international order, but which does not possess the empirical features of sovereignty, such as genuine power, the ability to govern, or to defend itself. Reflecting on Carl Schmitt, we can approach the postcolonial sovereign in a related way—Schmitt rejected the notion that the sovereign state could truly be understood as an immanent actor, a creature of law, which had succeeded in excising divinity and the sacred.<sup>47</sup> Sovereignty, he urged, was necessarily transcendent since it was defined in a moment of decision, the decision of the exception, the moment when law would be suspended.<sup>48</sup> Whether located in the sovereign people or state, sovereignty could not rest on law alone. The claim that crimes against humanity are subject to criminal legal sanction, seems, from a vantage like Schmitt's a false attempt to reassert law over sovereignty. To Schmitt, himself arrested as a suspected war criminal by the Nuremburg Tribunal, this appears as bad faith, dressing up a political judgment as a legal one; for it will invariably be victor's justice. The claimed supremacy of law over sovereignty too

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<sup>45</sup> See Nic Cheeseman, *Introduction: Political Linkage and Political Space in the Era of Decolonization*, AFRICA TODAY, 3 (2006) (quoting Ranger "colonial Africa was much more like post-colonial Africa than most of us have hitherto imagined"); Mahmood Mamdani, CITIZEN AND SUBJECT (1996); John L. Comaroff, *Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions*, SOCIAL IDENTITIES (1998), 4, 3: 321-361.

<sup>46</sup> See ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD, 61 (1990). For a critique of Jackson as interpreting decolonization through the lens of post-Cold War period, see Christopher J. Bickerton, *State Building: Exporting State Failure*, in Christopher J. Bickerton, Philip Cunliffe, and Alexander Gourevitch, eds., POLITICS WITHOUT SOVEREIGNTY: A CRITIQUE OF CONTEMPORARY INTERNATIONAL RELATIONS, 93-112, 103 (2007).

<sup>47</sup> CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY, 36 (Trans. George D. Schwab) (2004 [1922]) ("all significant concepts of the modern theory of the state are secularized theological concepts...").

<sup>48</sup> CARL Schmitt, THE CONCEPT OF THE POLITICAL.

can be read as a further false secularization and juridification.

But Schmitt's theological sovereign is refigured, diminished after the war—with the important exception of a few states such as the U.S.<sup>49</sup> While the postcolonial state becomes formally a sovereign, this is also the moment of the rise of the UN and the Cold War—the period when many poor countries come to be governed as sovereigns. However we wish to characterize the change, we are not confronted with the simple extension of Westphalian sovereignty through decolonization—rather we find a decoupling of legal sovereignty—among some states—from various forms of economic, cultural and military power. Thus, in contrast to the characterization we find in Kahn, we confront a context rather more complex than one of real, lived national sovereignty and thin, empty international law.

The rise of “humanity” is another aspect of this post-war transformation and recalibration in the meaning of postcolonial sovereignty. “Humanity” is a presence beyond the immanent order of the state—in this sense, like Schmitt's theological sovereign.<sup>50</sup> It is the new sacred value. Even if humanity is not present and visible, it becomes more so, perhaps paradigmatically so, through violations against it. States, we know, can act against offenders under universal jurisdiction. The UN Security Council has imposed prosecutions for offenses against humanity in Rwanda and Bosnia, among other states.

The ICC offers another composition, another institutional arrangement for who can represent the interests of humanity. It has, under the Rome Statute, independent

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<sup>49</sup>Schmitt's *THE NOMOS OF THE EARTH* seems more relevant to an analysis of postcolonial sovereignty (about which more below).

<sup>50</sup> Bruce Rosentock, *Sovereign Impunity: The Theologico-Political Horizon of the International Criminal Court*, in W. Sullivan, R. Yelle, and M. Taussig-Rubbo, eds., *LAW AND RELIGION AFTER LEGAL SECULARISM* (forthcoming).

international legal personality, and thus is not only a creature of the UN or the state system. States “accept” the ICC’s jurisdiction over crimes of universal jurisdiction by becoming a party to the Statute.<sup>51</sup> Under its Statute, the Court’s jurisdiction is “limited to the most serious crimes of concern to the international community as a whole,” that is, genocide, crimes against humanity, war crimes, and the crime of aggression—not, we might note, piracy or stealing an election.<sup>52</sup> Thus the ICC provides an interesting answer to who can act on behalf of humanity, and in the interests of “justice.”

Are we to think that Kenya is being denied its ability to engage in an act of self-creation and self-governance by the ICC? The stealing of the election itself is little mentioned as an act of violence, and certainly not of concern to the ICC. But if we understand elections as the manifestation of sovereign will, isn’t this also a terrible violation? One can imagine that for the elite actors who got their seat at the table in the power sharing deal, though not for their murdered, raped and displaced supporters, the entire interchange—stolen election, violence, power-sharing—could be seen as, for the time being, resolved. This is analogous to Kahn’s questions about the Spanish involvement with Pinochet: who is Spain to question the deal Chile struck to get Pinochet

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<sup>51</sup> By becoming a party to the Statute, a state “accepts the jurisdiction” of the ICC with respect to those “most serious crimes.” Rome Statute, 12.1. The prosecutor may bring a case before the court based the referral of State, by a referral from the UN Security Council Acting under Chapter VII, or by the Prosecutors own motion. 13.a-c. There is some dispute as to whether a non-signatory can be subject to the court’s jurisdiction by referral from the Security Council. See Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: a Critique of the U.S. Position*, LAW AND CONTEMPORARY PROBLEMS, January, 2001, 67-117. “No one at the Rome Diplomatic Conference disputed that the core crimes within the ICC’s jurisdiction--genocide, crimes against humanity, and war crimes--were crimes of universal jurisdiction under customary international law (although there were debates about the scope and definitions of those crimes). Thus, the drafters did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court.”

<sup>52</sup>Rome Statute, Art V. Crimes against humanity include murder, rape, or forcible population transfer when “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” 7.1.

out of power? Who is the ICC Prosecutor to seek to intervene?<sup>53</sup> Alternatively, we might speculate that the political class is relying on the ICC to act, since Kenya did, after all, ratify the ICC treaty. Were this the case, it is not that the ICC is interfering in Kenyan self-government; rather we might worry whether Kenya has abdicated self-government, sovereignty in Kahn's robust sense. In Kenya, the President and Cabinet contemplated withdrawal from the ICC (an option which other African countries have considered in protest of the arrest warrant for Bashir, but then perhaps backed away from because some donor support is tied to ICC membership).<sup>54</sup> Thus the conflict is not simply one between the internal life of a sovereign political community and an external international domain—which seems to be the structure Kahn confronted with Spain's invocation of universal jurisdiction. Rather, Kenya is, in some respect, outside of itself; or the ICC is, conversely, inside Kenya.

This structure seems aptly captured in Kenya's posture to the ICC Statute at the time of the violence: it had acceded to the ICC Treaty in 2005, but, as a dualist state, Kenya needed to pass implementing legislation, which it failed to complete before the 2007 elections. Thus the international crimes were not violations of Kenyan law.<sup>55</sup> The government's initial efforts to punish offenders was rejected by Parliament in February 2009, which led the Commission of Inquiry—a body established after the violence, and

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<sup>53</sup> For further discussion of impact of international prosecution on local politics see Julian G. Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* WASHINGTON UNIVERSITY LAW QUARTERLY, Vol. 84 (2007); available at SSRN: <http://ssrn.com/abstract=931567>. "Indeed, to date, almost all the current efforts by the ICC to investigate and prosecute war crimes risk destabilizing ongoing peace processes or undermining preexisting political bargains that granted amnesties to alleged war criminals."

<sup>54</sup> *African Countries Back Away from ICC Withdrawal Demand*, June 10, 2009, SUDAN TRIBUNE, <http://www.sudantribune.com/spip.php?article31443>. "It is likely that African ICC members [contemplating withdrawal from ICC in protest of warrant for Bashir] are more concerned about the risk of losing access to millions of dollars in aid from the European Union (EU) as some bilateral agreement link it to ratification of the Rome Statute."

<sup>55</sup> Kenya signed the ICC Treaty in 1999 and ratified it in 2005.



which had found there might have been crimes against humanity—to transmit an envelop of names of possible perpetrators to the ICC in July 2009. Seeing the ICC process moving forward, the government sent a delegation to Hague to meet with the ICC Prosecutor – where they agreed that within 12 months they would either establish some accountability or refer the matter to the ICC. Some weeks later, the government announced that it had a plan, but one that seemed to fall far short.<sup>56</sup> Thus for the first time, the Prosecutor has sought to bring a case without a referral from a state or the Security Council. In these hectic negotiations, we see the strange location of the Prosecutor, Moreno-Ocampo, in Kenyan government, as both outside and inside. The tension with state sovereignty is not generated by another state reaching into the internal affairs of another, as we initially framed the possible conflict between state sovereignty and universal jurisdiction. Rather, an independent entity, the ICC, that is doing so; and, in some undeniable sense, with the consent of the sovereign, even while that consent may be bought by donor states.

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<sup>56</sup> In somewhat more detail: in response to the Commission’s findings, a Special Tribunal was proposed to prosecute offenders from the post-election violence. Because the law would apply retroactively, and to ensure that the provisions taken from international law were not found unconstitutional, it was also deemed necessary to amend the Kenyan Constitution to empower Parliament to create the Special Tribunal. This entire effort was rejected by Parliament in February 2009. Since it then seemed like there might be no action against perpetrators, pressure mounted for the Commission to transmit the envelop of names to the ICC, which it did in early July 2009. At the same time, the government sent a delegation to Hague to meet with the ICC prosecutor – where they agreed that within 12 months they would either establish some accountability or refer the matter to the ICC. Some weeks later, the government announced that it had a plan: to seek accountability through a newly created reconciliation commission which was also to look into a variety of abuses dating back to the independence of the state in 1963. Unfortunately, that body did not have the power to prosecute, but only to offer recommendations, which, as we have seen, had already been done. The government also announced that it would prosecute offenders in local courts—aside from the “glaring incapacity” (Okuta, *infra*) of the court system, there is an even more basic problem in that there is no international criminal law in effect in Kenya for crimes in 2007 to apply. The government had agreed to refer the matter to the ICC if it did not act, but it did not do so. This discussion is drawn from Antonina Okuta, *National Legislation for Prosecution of International Crimes in Kenya*, 7 J. INT’L CRIM. JUST. 1063 (2009). For further discussion of the difficulty in ensuring that “people at top of the apex of the triangle of criminal responsibility bear the heaviest sanctions,” see Kenya National Commission on Human Rights, ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA’S POST-2007 ELECTION VIOLENCE, 152 (Aug. 15 2008).

Thus neither of our two stories, the pirate trial or the ICC intervention, clearly confirm our initial speculation about how universal jurisdiction and state sovereignty might interact. But if Kenyan sovereignty does not live up to an idealized conception of sovereignty as a kind of autonomous self-creation, neither does it appear as a mere appendage or colony of larger imperial states and global structures.

*Interlude: mob justice*

Justice became an item for sale leaving it inaccessible to a majority of poor Kenyans. One consequence of the many years of corruption was the increasing resort by many Kenyans to what has been popularly called ‘mob justice’ – that is lynchings of criminal suspects.

Mutuma Ruteere, writing about President Moi’s years in office<sup>57</sup>

Our two stories about universal jurisdiction draw our attention to external actors and funders, even while they problematize who is “outside” the Kenyan state, and in what sense we should think of the state as sovereign. But what about the internal relations between state and population? Both of our stories concerned, in part, the shortcomings of the Kenyan justice system. Apparently it is unable to bring to justice the planners of the post-election violence. And the pirate trials generated some concern about Kenya’s ability to handle the cases. But what about more everyday offenses? Unfortunately, many commentators suggest that the Kenyan courts and police do not provide basic security. Earlier, we saw how the Kenyan government held out for a higher payment for the use of its courts to try pirates. In that context, this kind of bargaining does not

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<sup>57</sup>Mutuma Ruteere, *Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya*, 13 (2009).

necessarily seem objectionable. But Mutuma Ruteere, quoted above, evokes the more disturbing possibility that such bargaining and demand for payment takes place not only between Kenya and foreign states, but with its own citizens. One response, among those who cannot pay, says Ruteere, has been a form of self-help: mob justice. In this section I wish to use a discussion of mob justice as a way to provide some context for our juxtaposition of the pirate trial and the ICC. The mob captures a context where citizens routinely but spontaneously form groups and publically, under a claim of justice, take lethal punishment into their own hands. Most simply, it poses the question of whether the Kenyan state has jurisdiction over Kenya, or whether, in mob justice, we see another nascent kind “universal jurisdiction” in which ordinary people are empowered to act.

In Kenya, what is called (in English) “mob justice” is a socially recognized form of action. It is widely explained, by scholars and participants, as a response to state incapacity to provide law and order. One report summarizes that:

The average period of a case in Kenya is 4-5 years. This has led to lack of confidence in the judicial machinery, with people often giving up their rights after weighing the time and money costs of the whole process. It has also led to the development of some alternative undesirable extra-legal phenomena that is antithetical to the rule of law such as ‘*mob-justice*’, where communities seek justice for themselves by communally executing suspects on the spot. This has been attributed to repeated failure of system to work with the result of criminals finding their way back to the streets and communities shortly after arrest.<sup>58</sup>

Writing about vigilantism more generally, David Anderson describes it as a response to steeply rising crime since the 1980s, “a period of rapid growth in the urban population, combined with acute housing shortages, declining economic prosperity, rising urban

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<sup>58</sup> CONNIE NGONDI-HOUGHTON, ACCESS TO JUSTICE AND THE RULE OF LAW IN KENYA (2006), [www.undp.org/LegalEmpowerment/reports/National%20Consultation%20Reports/Country%20Files/15\\_Kenya/15\\_3\\_Access\\_to\\_Justice.pdf](http://www.undp.org/LegalEmpowerment/reports/National%20Consultation%20Reports/Country%20Files/15_Kenya/15_3_Access_to_Justice.pdf).

unemployment and the collapse of many institutions of municipal government.”<sup>59</sup>

Mob justice raises the question of whether many Kenyans, facing severe personal and property crime, are themselves in some sense outside the Kenyan state. It poses a fundamental question about jurisdiction—who is that really speaks the law in Kenya? In the pirate trials is it the U.S. or another donor state using Kenya? In the ICC, is it Moreno-Ocampo? And in the streets of Nairobi, is it the petty criminals, and on the rare occasion they are apprehended, the “mob”?

Between the mob and the ICC are a range of other actors in Kenya, who also rely on the same justification as the mob and the ICC, that is, the failure of the state, even when they are themselves state officials. “The justification is often given,” writes Philip Alston, UN Special Rapporteur on extrajudicial executions, about the Kenyan police, that “the failures of the justice system leave the police with no alternative but to administer ‘justice’ directly by executing those who they ‘know’ to be guilty and who, if arrested, would either never be prosecuted or, if charged, would be acquitted.”<sup>60</sup> The same claim is made for the gangs now hunted by the police but previously deployed by politicians, such as the *Mungiki*—part criminal vigilante group, part religious sect, part cultural youth movement—which emerged in urban slums.<sup>61</sup> In mob justice we encounter a fragment, although perhaps the least institutionalized, of a larger constellation of non-state violence—or, more to the point, violence that blurs the lines between state and non-state action.

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<sup>59</sup>David M. Anderson, *Vigilantes, Violence and the Politics of Public Order in Kenya*, AFRICAN AFFAIRS, 2002, 101: 535-555, 542-3.

<sup>60</sup> Statement of Feb. 25, 2009, Office of the High Commissioner for Human Rights, [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E).

<sup>61</sup> Mutuma Ruteere, *Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya*, 13 (2009).

### *The ICC and the mob*

The degree to which violence is organized is an important issue in the ICC's claim that crimes against humanity occurred in Kenya. Unauthorized violence became central to the electoral process as soon as Kenya agreed to hold multi-party elections in 1992, and this lead directly to the matter before the ICC. Adam Ashforth writes that President Moi

organized squads of young men to attack Kikuyu residents in the Rift Valley...to drive out potential opposition voters and intimidate those who remained. Their strategy, by all accounts supported by the president himself, was successful. Moi won himself ten more years as president by means of 'clashes' such as these (though he also bribed voters and officials, repressed dissenters, and rigged his way through elections). At each election since 1992—1997, 2002, and 2007—ethnic clashes have occurred in the Rift Valley.<sup>62</sup>

What distinguished the post-election violence of 2007-08, in Ashforth's estimation, was that it was deployed not only to win the election, but also to reshape national space, to create ethnically cleansed regions. "'This is Kalenjin territory,' was a steady refrain," Ashforth writes.<sup>63</sup> In Ashforth's view, it is not obvious that the violence was orchestrated by the state or any organization.<sup>64</sup> Rather, an incoming group of politicians took advantage of the violence, riding it into positions of more secure authority.

The ICC Pre-Trial Chamber faced the issue, to put it too crudely, of whether the

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<sup>62</sup> Adam Ashforth, *Ethnic Violence and the Prospects for Democracy in the Aftermath of the 2007 Kenyan Elections*, in *PUBLIC CULTURE*, 21: 1 (2009) 9-19, 14.

<sup>63</sup>*Id.*, 16.

<sup>64</sup>For a similar reading of the distinctiveness of the recent post-election violence, see John Githongo, *Fear and Loathing in Nairobi: the Challenge of Reconciliation in Kenya*, *FOREIGN AFFAIRS*, July/August 14. Vol. 89, 4: 2-9, 6 (2010). "In the past, political violence in Kenya was almost always carried out by young men taking orders from political actors. This changed in the 2007 election, when violence served as a hugely empowering event for many poor, young Kenyans." "The country's rulers had lost control, and the state was totally overwhelmed..."

violence was that of the state or the mob. It had to determine whether there was the requisite degree of organization in the violence in Kenya to permit the Prosecutor to proceed with his investigation after the Kenyan government refused to refer the matter to the ICC. Were the violations were a result of a “State or organizational policy” as the ICC Statute requires?<sup>65</sup> In a dissent, Judge Kaul, saw an “overall picture...characterized by chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies.”<sup>66</sup> There was not “an ‘organization’ meeting the prerequisites of structure, membership, duration and means to attack the civilian population.”<sup>67</sup> The Kenya National Commission on Human Rights was of a similar opinion.<sup>68</sup> The judges in the majority, by contrast, approved the Prosecutors’ request, and determined that a “number of the attacks were planned, directed or organized by various groups including local leaders, businessmen and politicians associated with the two leading political parties, as well as by members of the police force.”<sup>69</sup> The violence was organized, but it is not clear that even the majority thinks there was a “State or organizational policy.” Ashforth notes that it will surely be debated at great length just what degree of organization was present in the post-election violence. But we can pause and note that there is something comforting in Moreno-Ocampo’s and the majority’s view that there is someone in charge who can be held accountable.

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<sup>65</sup>Rome Statute, 7(2)(a).

<sup>66</sup>International Criminal Court, Pre-Trial Chamber II, Situation in the Republic of Kenya, Mar. 31 2010, at 79.

<sup>67</sup>*Id.* at 78.

<sup>68</sup> Kenya National Commission on Human Rights, ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA’S POST-2007 ELECTION VIOLENCE, 156 (Aug. 15 2008). The Commission found that it would difficult to “prove that [the violence] was part of a state or organizational policy.” 156. It did find, however, that under customary international law the “presence of a policy to commit crimes against humanity does not have to be formalised in a manner directly attributable to a state” and that, under this more forgiving standard, crimes against humanity had taken place, *at* 157.

<sup>69</sup>International Criminal Court, Pre-Trial Chamber II, Situation in the Republic of Kenya, Mar. 31 2010, at 46.

Attempting to include mob justice in our conversation echoes many formulations about the right to punish crimes against humanity. David Luban and Kahn suggest that there is something about asserting universal jurisdiction over crimes against humanity that pushes beyond our usual understandings of law. For Luban, the offended party, humanity, is not an institutionalized actor. Since it is human beings, not states, who are offended by crimes against humanity, we should recognize a “vigilante jurisdiction” over the offender, which “carries the implication that criminals against humanity are anyone’s fair target.” Fearing “lynch-mob justice,” Luban would delegate this jurisdiction to national or international tribunals.<sup>70</sup> Kahn also raises the issue of extralegal violence in asking whether there is any legal difference, in the case of Spain’s case against Pinochet, between asserting universal jurisdiction and sending a “hit squad.”<sup>71</sup>

Mob justice does breach the institutional form of the state and formal legal judgment—and obviously, it literally, actualizes Luban’s fears of the “lynch mob.” It entails a strange kind of individual and communal empowerment, premised on anyone’s ability to punish the criminal. The potential symmetry between the mob (bringing accountability to the petty criminal) and the ICC (bringing accountability to the elite perpetrator), underscores the point that both pose the fundamental question of what kind of state, what kind of “sovereign,” we find in Kenya. Both purport to be against impunity and to advance justice. Does this mean we should conceive, as liberal theory might have it, of mob justice as expressive of a state of nature, a context where everyone has the right to avenge a violation?<sup>72</sup> But thinking of a state of nature does not seem accurate: instead,

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<sup>70</sup>David Luban *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 92 (2004).

<sup>71</sup>Kahn, *supra*.

<sup>72</sup>See, for example, John Locke, the SECOND TREATISE OF GOVERNMENT (Ch. 2.7): “And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect

the conditions that make the mob possible are the weakness and illegality of the state combined with its continued presence—that is, the state is not simply absent, it has not retreated to leave a “state of nature.”

We may wonder if there is an important difference in the targets selected: that mob justice is directed, most typically, against the poor, against street criminals, while the ICC pursues elite actors within a society. On the other hand, if we shift the frame of analysis from the national (the Kenyan street criminal v. the Kenyan President) to the international (the President of an African state v. the President of a powerful state), there seems to be more of a parallel. It is often observed that the ICC’s docket is focused on Africa and relatively weak states. This selection criteria, perhaps a prudent aversion to going after the powerful, raises another important parallel: the uncertainty in the moment of accusation. Just how is it that the accusation from an individual becomes effective, and rallies others standing nearby to the aid of the one who throws “the first stone”?<sup>73</sup> The ICC Prosecutor faces a similar quandary: will the accusation affirm broad support for the Court, or will it undermine the Court and the Prosecutor’s standing? The Prosecutor, much like the first accuser in the mob, has very thin institutional backing at his direct command.

The question about mob justice, and the other deployments of extra-legal violence by the police, gangs and parties in the electoral cycle, is whether it is accurate or relevant to see these acts of violence as simply or only expressing the failure of the Kenyan state to achieve a Weberian ideal in monopolizing legitimate violence over territory. Many of

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equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.”

<sup>73</sup> See Rene Girard’s analysis of this Biblical parable. Girard, *The First Stone*, RENASCENCE, 52, no. 1 (1999): 5-17.



these actors are not simply criminals enjoying impunity. Some assert a link to or license from formal and state authority—pirates of an earlier era would often claim to be licensed, to be privateers, not pirates, a blurriness seems relevant here. Indeed, some of them—according to the ICC—are running the government. I suspect that we must take the term *justice* as seriously as the term *mob*. For example, in one of the incidents I encountered in downtown Nairobi, I walked towards the center of the crowd, only then realizing what was happening—the beating of a man. Thinking back on the encounter, I wonder why it never occurred to me to intervene, and why I felt safe among the crowd. One answer, I think, is that the action seemed, to me, to be presented as a public act of justice, not a shameful act or murder—it was done with authority, but not anyone’s authority in particular. I was not the only person who was present but not wishing to be *of* the mob, while perhaps unwittingly lending support by my mere presence. Standing further back, a group of private security guards told me that the man was caught stealing the side-view mirror of a parked car. The guards are a large presence in Nairobi, stationed in front of every important building and well to do residential compound. Didn’t they have some responsibility here? No they had not intervened. But nor were they, at least in this instance, participating in the beating: their responsibility was for the building they were paid to protect, not the public street. It was Saturday, so there would be no police or ambulance today either, they told me.

The notion of sovereignty as the ability to exercise violence with legal impunity is a core, but limited, idea of sovereignty. It can also refer to the capacity to found, maintain and transform a political and legal order. With respect to this conception it is harder to see mob justice or the ICC as a form of sovereign power, for it is not clear that

there is any longer-term institutional result of their intervention. Perhaps both are fleeting responses to injustice, rather than generative, productive deployments of power, and in this sense, they are sovereignty-less forms of action.

A further reflection provoked by the victim of mob justice is that perhaps it is here that we find the new “enemy of all,” the one who is beyond the law of the state, and perhaps encompassed by some other form of law. Mob justice reproduces the structural relation of all against one that we see asserted with respect to pirates by the state system. But the pirate is a creature of the sea, so surely we cannot find him on land, either on the street, in the slum, or in the well-tended estates of the political elite? The law of the sea, articulating as it does the sovereignty-free high seas, is suggestive for thinking about security on land in postcolonial states where the sovereign interior has various sea-like, sovereignty-free aspects. Indeed, mob justice challenges the dichotomy between the sovereign land and the sovereignty-free sea. A more empirically accurate conceptualization of both land *and sea* might be—as Lauren Benton says of the geography of empire—that there are pathways, “corridors” and moments of sovereignty.<sup>74</sup>

### *Postcolonial piracy*

Piracy provided an “analogy” for the post-WWII extension of universal jurisdiction

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<sup>74</sup>Laura Benton, *Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism*, in *COMPARATIVE STUDIES IN SOCIETY AND HISTORY*, October Vol. 47, 4 (2005): 700-724, 700. “Though empires did lay claim to vast stretches of territory, the nature of these claims was tempered by control that was exercised mainly over narrow bands, or corridors, of territory and over enclaves of various sizes and situations.”

over war crimes and crimes against humanity.<sup>75</sup> The analogy relies, Eugene Kontorovich has argued, on “heinousness” as the unifying theme between piracy and new subjects of universal jurisdiction.<sup>76</sup> As Kontorovich notes, however, piracy does not seem to have been seen as especially heinous, since piratical acts were undertaken with state license by privateers. Thus piracy, he concludes, is a “hollow foundation” for more recent versions of universal jurisdiction. Heinousness, as Kontorovich notes, is not invariably the way the link between old and new is conceived. For instance, on the high seas and during war, there is often a “lack of any adequate judicial system operating on the spot where the crime takes place--in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war.”<sup>77</sup> Schmitt, certainly no advocate for the newer crime of crimes against humanity, asserts a another similarity between the pirate and the ruler: “For the order of the land, the tyrant was the common enemy, just as, for the order of the sea, the pirate was the enemy of the human race.”<sup>78</sup> The larger question that Kontorovich evokes is whether there is a disjuncture between piracy and the new subjects of universal jurisdiction.

Universal jurisdiction with respect to piracy seems a clear expression of an international order based on state sovereignty over territory. The enemy of all is outside the state. The new universal jurisdiction, by contrast, seems to be about finding the enemy of all at the heart of the state. Thus at first glance, we may wish to concur with

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<sup>75</sup> Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, LAW AND CONTEMPORARY PROBLEMS ARTICLE, January, 2001, 67-117, 83.

<sup>76</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*. 45 HARV. INT'L. L.J. 183, 200, 204 (2004).

<sup>77</sup> See also, Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33CAL.L.REV.177,194 (1945); cited in Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, LAW AND CONTEMPORARY PROBLEMS, Jan., 2001, 67-117, 83.

<sup>78</sup> SCHMITT, NOMOS OF THE EARTH, 65 (2006).

Kontorvich in seeing a disjuncture between old and new, between the pirate and the perpetrator of crimes against humanity. One articulated state sovereignty; the other seems to undercut it.

But how are we to integrate into our analysis the restructuring of sovereignty after decolonization? Interestingly, the idea of piracy we have assumed—high seas, private ends—is only codified in the post-war period.<sup>79</sup> Before that, piracy was deployed in a variety of other ways. If we did want to see a story of continuity, it might be this: that both forms of universal jurisdiction can be read about preserving the international order. It is just that the role of sovereignty in the international order has changed—from a global regime where sovereignty and power were tightly linked, to one where they have little necessary connection.

The UNCLOS definition of piracy—high seas, private motive, two boats—conceals a complex history. For piracy was a term usefully hurled at various opponents, and a category into which many additional acts—the slave trade for example—might be placed. In the dissenting opinion by Mr. Moore in the *Lotus*, the basic distinction is noted:

[i]n the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say ‘piracy by law of nations,’ because the municipal laws of many States denominate and punish as ‘piracy’ numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations.<sup>80</sup>

Thus the fit we detected between the UNCLOS definition of piracy and a global order of states is thus rather more complicated when we take into account national definitions. In those national usages, piracy is often deployed to address particular issues. The Spanish

<sup>79</sup> Malvina Halberstam, *Terrorism on the High Seas: the Achille Lauro, Piracy And The IMO Convention On Maritime Safety*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW, 269, 276-78 (1988); see also RUBIN, *THE LAW OF PIRACY*, 2<sup>ND</sup> ed. 331-372 (1998).

<sup>80</sup> Permanent Court of International Justice [1927].

and Portuguese called other Europeans in the New World or in the East “pirates.” Grotius first articulated his notion of the free sea in response to charges of piracy against the captain of a private Dutch trading company by the Portuguese.<sup>81</sup> Piracy also referred to non-European “indigenous” coastal communities who resisted the European imposition of trade monopoly in their waters.<sup>82</sup> Likewise, the Barbary “pirates” which the U.S. confronted shortly after independence, acted on behalf of various Muslim North African cities, and hence could be thought of as *corsairs* or privateers (a point of dispute between Gentili and Grotius, between a “positivist” and “naturalist” posture).<sup>83</sup> Additionally, the British captured slave traders and tried them for piracy—and asserted that this could be done under the “law of nations,” but this innovation was also disputed. Slavers, after all, had had long been integral parts of the global system.<sup>84</sup> One thing we see in these examples is that piracy is part of the struggle to define a global order, a working out of whose violence is that of a sovereign, and whose is piratical and private. Rather than simply complementing an order of states, it seems as much to help constitute it.

Recalling that the global order prior to decolonization was structured around formal inequality, we can ask how “piracy” reflects that order. At a minimum, we can see that the easy answer with which we began—that piracy supports and crimes against humanity may undercut state sovereignty—is not so clear. Schmitt bemoaned the collapse of the European “*nomos* of the earth” around 1914, that legal and sociological reality, dividing

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<sup>81</sup> Peter Borschberg, *Hugo Grotius, East India Trade and the King of Johor*, JOURNAL OF SOUTHEAST ASIAN STUDIES (1999) 30, 2: 225-48; Jennifer Gaynor, *Maritime Histories, Littoral Cultures and Transoceanic Exchanges*, in JERRY BENTLEY, RENATE BRIDENTHAL, AND KÄREN WIGEN, EDs., SEASCAPES: MARITIME HISTORIES, LITTORAL CULTURES, AND TRANSOCEANIC EXCHANGES, 53-68 (2007).

<sup>82</sup> For discussion of shifting lines between raiding and piracy in Southeast Asia with the rise of the colonial state see JAMES FRANCES WARREN, IRANUN AND BALANGINGI: GLOBALIZATION, MARITIME RAIDING AND THE BIRTH OF ETHNICITY 414 (2002); see also ESTHER VELTHOEN, *Sailing in Dangerous Waters: Piracy and Raiding in Historical Context*, IIAS NEWSLETTER, no. 36 (March 2005).

<sup>83</sup> Rubin, LAW OF PIRACY (on positivist conceptions, 19-21; on naturalist CONCPETIONS, 26-30).

<sup>84</sup> See ALFRED P. RUBIN, THE LAW OF PIRACY, 2<sup>ND</sup> ed. 149, 203 (1998).

land and sea, sovereign states and others. He describes the “firm land, the soil of European states” as distinct from “the soil of overseas possessions, i.e., colonial lands.” “This was important,” Schmitt tells us, “for the definition of colonial war. The bracketing of war pertained only to European land wars among states, pursued on European soil or on soil having the same status.”<sup>85</sup> Beyond the line, in the colonies, there were no such restrictions, Schmitt contends. The international legal order mapped reality, it was both a legal structure and lived order. It is this overlap between legal order and lived reality that seems obviously absent after decolonization and in relation to the postcolonial, especially the African postcolonial, sovereign state.

Thus when we attempt to trace the lineage between piracy and crimes against humanity, we are presented with two very different points of departure: do we look to the relations among Europeans, or between Europeans and non-Europeans? Let us take up the second option for a moment. Why could the sea not be a zone of sovereignty? Grotius described a natural right to travel the seas, and a right to visit and trade, and make compacts with non-Christian sovereigns—at least at first while the Dutch were still underdogs. Prior understanding was that while the sea could not be owned as property, a state could exercise jurisdiction over it. Grotius broke with this view, and instead conflated property and jurisdiction, and claimed that there could be no jurisdiction over the seas as it could not be property.<sup>86</sup> A fisherman may rightfully claim the fish he caught, but not the sea itself—for this would do him no good and deprive others.

This same argument was to recur in a more aggressive guise as the Dutch shifted from trade to colonization. Richard Tuck writes that Grotius “perceived that if the sea

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<sup>85</sup>SCHMITT, *NOMOS*, 172.

<sup>86</sup>TUCK, *WAR AND PEACE*, 91-2.

could not be owned by the men who hunted on it, neither presumably could the land.”<sup>87</sup> The land, in local hands, was a waste-land—like a sea. The difference being, of course, that the Dutch could make use of it without waste and thus their possession was proper. We perhaps remember Grotius more for the notion of the free seas—but we should not forget the other half of his conceptualization, the free land, what Tuck describes as Grotius’ claim that the “alleged owners of a territory” “must allow anyone to possess things which are of no use to the owners.”<sup>88</sup> And any local leader who does not see the matter this way, Grotius wrote, having “violated a law of nature” “may be punished by war made against them.”<sup>89</sup> Our analogy between land and sea with respect to Kenyan sovereignty on land, then, is not far-fetched—it simply repeats a core colonial idea.<sup>90</sup> One may make war, Grotius writes, against “those are inhuman to their parents,” those “who eat human flesh,” and “against those who practice Piracy” not because one has been “injured himself, or in his State, or that he has some Jurisdiction over the Person against whom the War is made.” Rather, the “Power of Punishing” comes not from “Civil Jurisdiction” but from the “Law of Nature.”<sup>91</sup> There is a right to make war, to “punish,” without having suffered an offense—over piracy and crimes against the law of nature. We may reject this as irrelevant, for it concerns war, not jurisdiction—but I think that this is just the question that must be confronted, namely, whether to seek the origins

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<sup>87</sup>TUCK, WAR AND PEACE, 104.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* 106.

<sup>90</sup><sup>90</sup>A diagram of Schmitt’s “presents the various soil statuses of the *jus publicum Europaeum* (1713-1914)”, NOMOS, 184. The pie-chart, about three-quarters of which is white and labeled “Free Sea.” The other quarter is labeled “Firm Land,” and is divided into five smaller slices that change hue from black to white. The first two are black: State Territory; Colonies. Partially shaded are Protectorates. Slightly shaded are Exotic Countries with European Extraterritoriality. The last is the same color as the free sea—white, “Free Occupiable Land.” Schmitt envisions, this is to say, a gradual slope, as land slowly merges into sea.

<sup>91</sup>GROTIUS, DE IURE BELLI AC PACIS II, 20, 40; quoted in TUCK, WAR AND PEACE, 103.

of the right to punish crimes against humanity in Europe, or abroad.

### *Conclusion*

It is hard to imagine a greater gulf than that between the Somali pirate and those likely to be in the ICC's cross-hairs. The pirates are non-elite foot soldiers, the ICC's suspects important public figures. We might take the simultaneous appearance of our two stories to signify that the oldest and newest conception of universal jurisdiction can co-exist, and that pirate and tyrant have finally been recognized as the "enemies of all," properly punished for their heinous acts. By contrast, perhaps the common thread of universal jurisdiction tracks major transformations, inversions even, in our ideas of universal jurisdiction, our global spatial order and the meaning of sovereignty. Indeed, the Kenyan decision to withdraw from the piracy program as the ICC moved forward, seemed to support the view that there was some core contradiction between the two usages of universal jurisdiction in the same political space—that is, that the Kenyan government could not simultaneously cooperate with the international community on piracy while allowing some of its own members to be subject to the ICC. And yet, for additional financial support, Kenya was back to work, supporting the international order. For the moment, we have both processes underway in Kenya.

I have claimed that to properly evaluate the changes in universal jurisdiction from piracy to crimes against humanity, that change must itself be mapped onto the roughly contemporaneous transformations in the meaning of sovereignty after WWII and decolonization. This interpretation likely implies a continuity with colonialism: just as the colonial power could exercise jurisdiction over subjects, the newer universal



jurisdiction preserves that possibility—at least for the ICC. Thus the old and new may fit together, but in a complex way. We might then see the two universal jurisdiction stories from Kenya as a pithy articulation of the position that those kind of states enjoy—useful to wealthy states as a place to dump pirates, a sovereign who can loan out its “sovereign” powers for a fee; while, with respect to matters of higher politics, subject to the oversight of ICC. But the analogy to colonial structures is, I suspect, too easy. It fails to confront Schmitt’s provocation, that there is no *nomos* of the earth, that law and lived practices are not commensurate. The colonial analogy offers a perverse comfort, thinking that nothing has changed, that there is an order—however offensive. Are we certain that the boundaries of the “Kenyan” sovereign should or do not include Moreno-Ocampo and those other agents of justice, the mob? And when we look at the other actors, such as the states dropping off the pirates, how are we to see their “sovereignty”? They too seem bound to law, simply seeking an easy route to compliance, and this undercuts any simple neo-colonial reading.

How to describe the current order of land and sea? With respect to the seas, many authors point to a “reterritorialization”<sup>92</sup> as states seek to extend their control further into the seas with exclusive economic zones, new rules for archipelagic states, longer definitions of territorial waters, and in the case of the U.S., a military presence around the globe. Going in the other direction, what we might call “oceanification,” many postcolonial states are seen as sovereignty-less “ungoverned spaces,” in language adopted by the U.S. Department of Defense, much like the sea. These dynamics are at play in Somalia and, in less obvious ways, in Kenya as well. Somewhat poetically, can we think

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<sup>92</sup>Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AMER. J. INT’L. L. 830-51 (2006).

of current conjuncture of events in Kenya as the international law version of global sea level rise, the sovereignty-less sea swallowing up the sovereign on land? Floating in on that tide, preserving the sovereignty-free status of the seas, is the U.S. navy and, now, at least off the Coast of Somalia, the Chinese navy as well.