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THE PRESIDENT'S TWO BODIES: UHURU KENYATTA AT THE INTERNATIONAL CRIMINAL COURT

EDWIN BIKUNDO*

The medieval distinction between the official and the personal bodies of the state sovereign was recently played out before the International Criminal Court. This scenario involved the President of the Republic of Kenya willingly submitting to the jurisdiction of the International Criminal Court but only in his personal capacity and not as president. Essentially this argument is based on the medieval doctrine of the 'King's two bodies'. The distinction of describing two bodies united in one in its origins sits at the cross roads of legal theory and political theology. As such, it draws from a rich heritage of these traditions that are of necessity developed through reconciling practical imperatives to theoretical niceties. Seeing the ancient doctrine of the King's two bodies manifested in a contemporary context thus provides the opportunity to observe a longstanding (if dormant and obscure) legal theory applied to a novel factual situation. It demonstrates that this legal fiction remains stubbornly useful and effective in navigating between political imperatives and legal strictures. Moreover, that unusual irruption of an arcane legal and political practice into a modern day international courtroom shows that the practice still bears the unmistakable signature of its mystical foundation.

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I INTRODUCTION

On 8 October 2014 Uhuru Kenyatta, the President of the Republic of Kenya, became the first sitting Head of State in history to appear voluntarily in response to a summons before any international criminal court or tribunal. Or not. This paper examines whether, and if so how far his claims of attending in a personal capacity were sustainable as well as what its implications would be for sovereigns elsewhere. The charges against Kenyatta stem from the post-electoral violence that swept Kenya between the years 2007–08 following the national elections. An International Criminal Court ('ICC') Pre-Trial Chamber found that 'crimes against humanity had been committed on Kenyan territory'.¹

The basis for the case, in part, relies on the fact that Kenya signed *the Rome Statute of the International Criminal Court* ('Rome Statute') on 11 August 1999, then deposited its instrument of ratification on 15 March 2005 and passed it into domestic law by legislation giving effect to the Statute through the *International Crimes Act*.² That Act of Parliament makes provision for the punishment of genocide, crimes against humanity and war crimes, as well as to both enjoin and to enable Kenya's co-operation with the ICC.

Consequently Kenyatta had found himself in a legal and political double bind outlined below. The ICC case against him — which was the first and to date the only one initiated by the ICC prosecutor acting on his own volition as opposed to a United Nations Security Council ('UNSC') or State referral — was floundering for a lack of evidence. The prosecutor

¹ *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (International Criminal Court, Pre-Trial Chamber II, Case ICC-01/09-19, 31 March 2010) [73] <<http://www.iccpi.int/iccdocs/doc/doc854287.pdf>>.

² *International Crimes Act* (No. 16 of 2008).

had continuously cited lack of cooperation from the Kenyan authorities as a key issue and was backed in this by the court.³ The ICC Office of the Prosecutor ('OTP') even stated on the record that the evidence available was insufficient to prove the charges.⁴

II UHURU KENYATTA'S TWO BODIES: PERSONAL AND PUBLIC

Ordinarily, such a state of affairs regarding insufficient evidence would lead to a withdrawal of the charges or, perhaps in the alternative, to even permanently stay the charges as an abuse of the criminal process.⁵ But these were no ordinary circumstances from the prosecution's perspective because they viewed the accused (through the State he headed) as being responsible for their lack of evidence by not providing it to them.⁶ Consequently, the prosecution requested a *sine die* or perpetual adjournment until the cooperation sought was fulfilled.⁷ The court in its part found Kenyatta's physical presence to be necessary at the hearing of that application given its serious subject matter,⁸ notwithstanding that — as only the dissenting judge pointed out — audio and video link technology was both available and had even been previously utilised by the court.⁹

Earlier moreover, the African Union ('AU') in response to high level Kenyan diplomatic lobbying, passed a resolution that affirmed personal, which is to say procedural and not official, immunity from prosecution before the ICC for Heads of State and Government as long as they remained such.¹⁰ It therefore called for the trial of President Uhuru

³ See *Prosecutor v Kenyatta (Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date)*, (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11-908, 31 March 2014) <<http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf>>.

⁴ *Prosecutor v Kenyatta (Prosecution notice regarding the provisional trial date)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 5 September 2014) [2] <<http://www.icc-cpi.int/iccdocs/doc/doc1826503.pdf>>.

⁵ Andrew LT Choo, *Abuse of process and judicial stays of criminal proceedings* (Oxford University Press, 2008) 80.

⁶ *Prosecutor v Kenyatta (Prosecution notice regarding the provisional trial date)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 5 September 2014) [3] <<http://www.icc-cpi.int/iccdocs/doc/doc1826503.pdf>>.

⁷ *Ibid.*

⁸ *Prosecutor v Kenyatta (Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 30 September 2014) [20].

⁹ *Prosecutor v Kenyatta (Partially Dissenting Opinion of Judge Kuniko Ozaki)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 30 September 2014) [4]–[5] <<http://www.icc-cpi.int/iccdocs/doc/doc1842119.pdf>>.

¹⁰ *Extraordinary Session of the Assembly of the African Union of 12 October 2013 on Decision on Africa's Relationship with the International Criminal Court (ICC)* [2013] Ext/Assembly/AU/Dec.1-2 (October 2013), 1, art 10(ii) <http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf>.

Kenyatta to be suspended until the completion of his term of office.¹¹ As a stratagem for evading the horns of the dilemma made out of these competing imperatives of the ICC summons and the AU resolution, Kenyatta claimed that he only appeared in his *private* capacity and not as president.¹² Indeed the Deputy President William Ruto (likewise facing a similar case before the same court and subject to the identical resolution) was sworn in as acting president and the Kenyan State's functionaries resorted to elaborate lengths of public political choreography to treat him as such and emphasise the diminished status of Kenyatta.¹³

By asserting that he was attending only in his personal capacity it would appear that Kenyatta sought to fulfil the letter of the AU resolution, if not be quite faithful to its spirit of defiance. Kenyatta himself put it that he took this 'extraordinary and unprecedented step' in order 'to protect the sovereignty of the Kenyan republic'. Adding, 'to all those who are concerned that my personal attendance of the Status Conference compromises the sovereignty of our people, or sets a precedent for the attendance of presidents before the court — be reassured, this is not the case'.¹⁴ By Kenyatta's reckoning this unprecedented factual situation did not set a legal precedent for sovereigns appearing before the ICC. How far, if at all, is this correct?

Of course the idea of a distinction between private citizen Kenyatta and Head of State Kenyatta is not exactly a Kenyan innovation, indeed it goes back at least four centuries to *Calvin's Case*.¹⁵ This famous English decision would be the relevant historical, logical and legal starting point under Kenyan law.¹⁶ The relevant extract of the applicable *Judicature Act 2012* (Laws of Kenya) contains the English Common Law reception clause which states that the jurisdiction of all Kenyan courts shall be exercised in conformity with (in order of descending priority) the Constitution. All written laws and 'so far as those written laws do not extend or apply, the substance of the common law, the

¹¹ Ibid (emphasis supplied).

¹² Walter Menya, 'Uhuru Kenyatta arrives in The Hague as private citizen', *Daily Nation* (online), 7 October 2014 <<http://www.nation.co.ke/news/politics/Uhuru-Kenyatta-The-Hague-ICC/-/1064/2478628/-/ljlplcnz/-/index.html>> (emphasis added).

¹³ Mike Pflanz, 'Kenya's President steps aside while International Criminal Court considers crimes against humanity charges', *Brisbane Times* (online), 7 October 2014 <<http://www.brisbanetimes.com.au/world/kenyas-president-steps-aside-while-international-criminal-court-considers-crimes-against-humanity-charges-20141007-10r4tr.html?skin=text-only>>.

¹⁴ Menya, above n 12.

¹⁵ *Calvin's Case* (1572–1616) 7 Co.Rep. 1a, 77 E.R. 377, 389.

¹⁶ *Judicature Act 2012* (Laws of Kenya) ch 8 ss 3(1)(c).

doctrines of equity and the statutes of general application in force in England on 12 August 1897, and the procedure and practice observed in courts of justice in England at that date'.¹⁷

III THE DOCTRINE OF THE KING'S TWO BODIES

In the *Calvin Case*, the court found that there were distinct and separate political and personal capacities united in the King — a natural body and a political body.¹⁸ As a result his '[d]ignity never dies' but is passed on seamlessly to the next mortal body that is crowned sovereign.¹⁹ This dignity is of juridical origin and enables the perpetuity of political power by emancipating the immortal sovereign persona from its mortal bearer.²⁰ As a legal and political doctrine it is completely ambiguous in that even as it distinguishes the office and the person of the sovereign, it simultaneously extinguishes any notion of their separate existence.²¹ No less an authority than Frederick Maitland considered this legal fiction to be illogical nonsense.²² That has, however, neither hindered its durability nor diminished its utility. Indeed in keeping with the doctrine, the ICC Trial Chamber emphasised at the outset of the hearing that Kenyatta was before it not in his official capacity, but only as an accused.²³ Carl Schmitt, the German jurist and political thinker first popularised the term 'political theology'.²⁴ In common terminology with but without direct reference to Schmitt, Ernst Kantorowicz referred to this doctrine of the King's two bodies (modelled upon the mystical body of Christ whose divine person doubles his physical body) as an issue from the marriage of law and religion — political theology.²⁵ Elsewhere he has used it as synonymous with another Schmittian

¹⁷ Ibid.

¹⁸ *Calvin's Case* (1572–1616) 7 Co.Rep. 1a, 77 E.R. 377, 389.

¹⁹ Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, 1997) 387.

²⁰ Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive* (Zone Books, 2000) 66.

²¹ Michael Paul Rogin, 'The King's Two Bodies: Abraham Lincoln, Richard Nixon, & Presidential Self-Sacrifice' (1979) 20(3) *The Massachusetts Review* 553, 553–573.

²² Frederic Maitland, 'The Crown as Corporation' (1901) 17 *Law Quarterly Review* 131, 134–135.

²³ *Prosecutor v Kenyatta (Prosecution notice regarding the provisional trial date)* (International Criminal Court, Trial Chamber V (B), Case No ICC-01/09-02/11, Status Conference Transcript Courtroom 1, 4, lines 4–5 <<http://www.icc-cpi.int/iccdocs/doc/doc1846715.pdf>>.

²⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press, 1985).

²⁵ Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, 1997) 59. The term is broader than just with reference to Kingly bodies see Ernst H Kantorowicz, *Laudes Regiae* (University of California Press, 1946).

term *arcana imperii* or mysteries of State.²⁶ Political arcana are secret modes of the exercise of political power ordinarily either hidden or obscured or at any rate veiled from full public view.²⁷ What is interesting legally speaking, is the origin outlines and provenance of this arcane political practice as it was evidenced in the appearance of Kenyatta before the ICC. Of all political theorists writing today, perhaps Italian philosopher Giorgio Agamben's work is most equal to the task of identifying, cataloguing, and critiquing the fairly recent and intensifying global phenomena of sovereign Heads of State being treated as international criminals.²⁸ Furthermore, he has devoted part of his study to the phenomenon of the King's two bodies.²⁹ In 1991 Agamben stated that since the First World War we have witnessed at least one positive development in the gradual intensification of sovereign police power:

What the heads of state, who rushed to criminalize the enemy with such zeal, have not yet realized is that this criminalization can at any moment be turned against them. *There is no head of state on Earth today who, in this sense, is not virtually a criminal.* Today, those who should happen to wear the sad redingote of sovereignty know that they may be treated as criminals one day by their colleagues.³⁰

In the event Kenyatta's appearance was literally just that. He merely *appeared* but spoke not a word except through counsel. The ritualistic aspects of these proceedings as pageantry were therefore impossible to miss. That is to say apart from political theatre his physical presence did not seem otherwise necessary.

IV CONCLUSION

Moreover his appearance, precedential or not, is as Agamben notes above, a template in fact if not law relevant and applicable to *all* other heads of state and government. The court's ruling in the end ordered the prosecutor to either prosecute the case or

²⁶ Ernst H Kantorowicz, 'Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins' (1955) 48(1) *The Harvard Theological Review* 65 and Carl Schmitt, *Dictatorship* (Michael Hielzl and Graham Ward eds. and trans, Polity Press, 2014).

²⁷ Peter Samuel Donaldson, *Machiavelli and Mystery of State* (Cambridge University Press, 1988) xiv, 227, 86.

²⁸ See Giorgio Agamben, *Means Without End: Notes on Politics* (Cesare Cesarino and Vincenzo Binetti trans, University of Minnesota Press, 1st ed, 2000) 103–107.

²⁹ Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life* (Stanford University Press, 1998) viii, 199, 91–103.

³⁰ Agamben, above n 28, 127 (emphasis in original).

withdraw the charges.³¹ The Chief Prosecutor complied by withdrawing the charges without prejudice to filing them later should new evidence come to light in the interim.³² As it stands however, the ICC in facing down the AU won the contest of wills regarding the appearance of a private citizens' body that is united with the public office of president. That legal victory can be expressed as a double negative: Heads of State and Government *cannot not appear* before the ICC. Phrased like that it covers the global category of sovereigns, not just Uhuru Kenyatta (despite his protestations) in Kenya, or even in Africa, but the world at large. We need no reminding however that even King Pyrrhus won the Pyrrhic War but only at a prohibitive cost. Likewise, the ICC in securing a sitting president's attendance and subsequently withdrawing his prosecution may have won a decidedly pyrrhic victory. That is, until we see the next sovereign in its dock.

³¹ *The Prosecutor v. Uhuru Muigai Kenyatta* Situation in the Republic of Kenya Public Court Records (Trial Chamber V(b) Decision: 03/12/2014 Phase: Trial Decision on Prosecution's application for a further adjournment ICC-01/09-02/11-981, 9 December 2014).

³² *The Prosecutor v. Uhuru Muigai Kenyatta* Situation in the Republic of Kenya Public Court Records (Office of the Prosecutor Notice: 05/12/2014 Phase: Trial Notice of withdrawal of the charges against Uhuru Muigai Kenyatta ICC-01/09-02/11-983, 5 December 2014).

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