



## Non-judicial battles: Kenyan politics and the International Criminal Court

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**In March 2013, Uhuru Kenyatta and William Ruto of the Jubilee Alliance were elected Kenya's President and Deputy President respectively. This victory was achieved against significant odds – both men face separate charges of crimes against humanity at the International Criminal Court (ICC) for their alleged role in organising post-election violence in 2007/8 against each other's support bases and communities.**

Indeed, one of the most remarkable aspects of the 2013 election was how this “alliance of the accused” turned the heavy burden of the ICC into part of a winning campaign strategy, as the Court's intervention was reframed as an example of injustice, neo-colonialism, and a threat to the country's peace and stability (Lynch 2013). Jubilee also presented the cases as inconsequential – if elected, Kenyatta and Ruto would govern the country, oversee development, guarantee security, and travel to and from The Hague to stand trial and clear their names. However, since their inauguration, a huge amount of time, money and energy has been expended to try and ensure that the cases are terminated, referred,

suspended, or, at the least, that Kenyatta and Ruto do not have to physically stand trial. As a result, the ICC's intervention has come to pervade and colour a wide range of political debates and decision-making processes – from analyses of terrorist attacks and state-civil society relations to the country's foreign and economic policy – as government officials engage in a non-judicial political battle against the ICC. This paper provides an overview of these strategies, which run parallel to the efforts of world-class legal teams in the Trial Chamber, and highlights some of the ways in which the ICC's intervention is shaping contemporary Kenyan politics often in unintentional and indirect ways.

### **THE ROAD TO THE HAGUE**

In December 2007, widespread claims that the incumbent president, Mwai Kibaki of the Party of National Unity (PNU) had “stolen” the election and denied victory to Raila Odinga of the Orange Democratic Movement (ODM) triggered unprecedented violence that led to the death of over 1,000 people and displacement of almost 700,000 others in two months. The violence took several forms including demonstrations, an over-zealous state security response, targeted attacks on

ethnic “others” – the epicenter of which was the Rift Valley where Kalenjin emerged as the main perpetrators of attacks on Kikuyu and Kisii neighbours – and counter-attacks by Kikuyu youth in Nakuru and Naivasha towns. It is the last two that constitute the focus of the ICC’s intervention.

In early 2008, the Kenya National Commission of Human Rights (KNCHR) began to investigate the scale, form, and causes of violence, a task that was later taken up by a government Commission of Inquiry into Post-Election Violence (CIPEV). This Commission concluded that, while the post-election violence “was spontaneous in some geographic areas and a result of planning and organisation in other areas”, in places “what started as a spontaneous violent reaction to the perceived rigging of the elections later evolved into well organised and coordinated attacks” (Kenya 2008: viii). In turn, the Commission recommended that a Special Tribunal be established to investigate and prosecute those most responsible and, if this did not occur, directed that the ICC’s Office of the Prosecutor (OTP) be requested to intervene.

After three unsuccessful attempts to establish a tribunal, the information collected by CIPEV was finally passed on to the OTP who, in December 2010, announced the names of six Kenyans under investigation. Confirmation of charges hearings followed in September 2011 with charges against Ruto, Kenyatta, Joshua arap Sang (a Kalenjin vernacular radio presenter), and Francis Muthaura (the former head of the civil service) confirmed in January 2012. Then, in March 2013, and a few days after Kenyatta and Ruto were announced President and Deputy President elect, charges against Muthaura were dropped – the OTP blaming the death, bribery and intimidation of

key witnesses. This left three accused in two separate cases.

In Case 1, Ruto and Sang face charges of crimes against humanity of murder, forcible transfer and persecution as an indirect co-perpetrator and contributor to the commission of crimes respectively. These crimes were allegedly committed by “Kalenjin warriors” against PNU supporters as part of a plan by ODM politicians to gain power, and to punish and drive out PNU supporters who predominately hailed from the Kikuyu and Kisii communities. In Case 2, Kenyatta faces charges as an indirect co-perpetrator of crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts, which were allegedly conducted in an attempt to keep PNU in power. According to the OTP, these crimes occurred during planned revenge attacks in Nakuru and Naivasha towns in the central Rift Valley at the end of January 2008 when Kikuyu gangs targeted ODM supporters, and in particular Luo but also Kalenjin residents (Lynch & Zgonec-Rozej 2013: 7-8).

So far, the trials have been characterised by delays and the withdrawal of numerous witnesses, and currently look close to total collapse. Case 1 was initially meant to begin on 10 April 2013, but began on 10 September. However, on 22 November, the case was suspended until 13 January 2014 after the Court had heard from eight witnesses, on the basis that a number of witnesses had become “unavailable”. Case 2 was initially meant to begin on 11 April 2013, but was then rescheduled to 5 February 2014. However, on 19 December 2013, the OTP requested an adjournment so that her office could garner new witnesses on the basis that the loss of two further witnesses meant that available evidence did not ‘satisfy the high evidentiary

standards required at trial' (Daily Nation 20 December 2013).

Until this point, one of the recurring debates in and outside of the courtroom has been whether the accused need to be physically present for all, parts, or none of the trial. The argument against continuous presence was strengthened in September 2013 by a terrorist attack on a Nairobi mall, and the Court's decision that Ruto, as Deputy President, could return home to concentrate on official duties. Subsequently the Court clarified that absences were only allowed in exceptional circumstances to be decided on a case-by-case basis.

However, on 27 November, the Assembly of State Parties to the Rome Statute (ASP) adopted several amendments to the Rules of Procedure and Evidence. This included the option for accused persons to submit written requests to the Trial Chamber "to be allowed to be present through the use of video technology during part or parts of his or her trial", and "to be excused and to be represented by counsel only during part or parts of his or her trial". While the latter is only to be granted in "exceptional circumstances", the ASP also resolved that an accused "who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only"<sup>1</sup>. These amendments mean that, for the first time, an international trial is recognising that persons with state duties should be treated differently, and could pave the way for a blanket excusal to be issued to both Kenyatta and Ruto – if

<sup>1</sup> Resolution ICC-ASP/12/Res.7 adopted at the 12th plenary meeting of the Assembly of State Parties on 27 November 2013 by consensus < [http://www.icc-justice.org/doc/asp\\_docs/Resolutions/ASP12/ICC-ASP12-Res-7-ENG.pdf](http://www.icc-justice.org/doc/asp_docs/Resolutions/ASP12/ICC-ASP12-Res-7-ENG.pdf) >  
For example see the letter from Fergal Gaynor, Legal

the OTP can garner sufficient witnesses for either case to proceed.

The issue of Kenyatta's appearance in Court was of particular importance during the year given a perception that, if forced to go to The Hague, Kenyatta would refuse, opting instead for the "nuclear option" of non-cooperation. If this happened, the Court would likely issue an arrest warrant, and Kenyatta would be unable to travel to many countries around the world for fear of arrest. In addition, Western donors would likely follow the precedent set in Sudan where – following the issuance of an ICC arrest warrant for President Bashir in March 2009 – aid is directed through line ministries and non-governmental organisations, with donors having minimal interaction with the President. However, while such consequences might appear to be relatively insignificant, "Kenyans will not enjoy being international pariahs and Kenyatta's carefully constructed statesmanlike image will be tarnished. The country is likely to take a hit in terms of foreign direct investment and consumer confidence" (Africa Confidential 2013).

Given the importance attached to Kenyatta's ability to avoid personal attendance at his trial, the Kenyan government hailed amendments secured at the ASP as a "major victory" (Weekend Star 30 November/1 December 2013). But how has Kenya managed to effect such a change in international legal procedures?

### **FROM SHUTTLE DIPLOMACY TO A COLD WAR**

With the OTP's announcement in December 2010 of the six people under investigation, the politics around the ICC witnessed a significant shift as leading figures moved from arguing "don't be vague, let's go to The Hague" to trying to bring the process back to Kenya or to the region, or to halt it entirely. In turn, the

beginning of 2011 saw months of “shuttle diplomacy” as government officials – led by the then Vice President Kalonzo Musyoka – travelled around the world seeking new allies. This diplomatic drive declined as election campaigns heated up in 2012 and 2013, but witnessed a resurgence following Kenyatta and Ruto’s inauguration in April 2013. During both periods, efforts have included the submission of challenges to the ICC on the admissibility of cases or judicial procedures; efforts to garner support for the direct intervention of the United Nations Security Council (UNSC) to bring about a deferral; and the lobbying of other African states through the African Union (AU) in an attempt to build support for a mass withdrawal from the Rome Statute and, failing that, for a united stand on the ICC in The Hague and at the UN.

These efforts have gradually built momentum leading, most recently, to the amendment of ICC procedures at the ASP. Before that, an AU summit in January 2011 endorsed Kenya’s efforts to have the ICC defer proceedings – although lobbyists then failed to convince permanent members of the UNSC that the ICC endangered peace and security and that trials should be conducted in Kenya following the inauguration of a new constitution and associated judicial reforms (Brown & Sriram 2012: 256). At the same time, the Kenyan government challenged the admissibility of the cases before the ICC arguing that, following the inauguration of a new constitution and associated legal reforms, Kenya was able to conduct its own prosecutions. This argument was rejected by the Pre-Trial Chamber in March 2011 on the basis that Kenya had yet to initiate substantive investigations (Lynch & Zgonec-Rozej 2013: 9).

The second spurt of diplomatic energy has enjoyed greater returns. In large part, this is because cases now involve Kenya’s sitting

President and Deputy President. First, an extraordinary summit of the AU in October 2013 declared its support for the deferral of all cases against incumbent heads of state, and agreed that Kenya should request a deferral through the UNSC. When this request was subsequently defeated, the government turned its attention to the ASP where it failed to stop cases against all sitting presidents, but did effectively lobby for other procedural changes. Looking forward, it now seems unlikely that Kenyatta’s trial will go ahead due to a lack of evidence, while the suspension of Case 1 suggests Ruto’s trial could suffer the same fate. In the meantime, Ruto’s lawyers have applied for him to be represented by their counsel only so that he can fulfill his public duties. However, officials have also announced that they will continue seeking an amendment of Article 27 of the Rome Statute so that “serving heads of states, their deputies and anybody acting or is entitled to act as such may be exempted from prosecution during their current term of office” (Weekend Star 23/24 November 2013). Many have criticised such an approach – stating, for example, that Kenyatta and Ruto assumed office in full knowledge of their obligations, while a lengthy suspension would risk further witness withdrawal.<sup>2</sup> Nevertheless, Kenya is slowly building up support for such a suspension. This includes a recent declaration by the African Caribbean and Pacific Parliamentary Assembly that no sitting president or head of government should be tried at the ICC, which reiterates the earlier position taken by the AU (Daily Nation 28 November 2013).

In seeking to avoid the ICC, the Kenyan government – through the President and

<sup>2</sup> For example see the letter from Fergal Gaynor, Legal Representative of Victims The Prosecutor v. Uhuru Muigai Kenyatta, ICC to the H. E. Mr Liu Jieyi, President of the Security Council, 3 November 2013 < [http://www.iccnw.org/documents/Letter\\_to\\_UNSC\\_from\\_the\\_Victims\\_Lawyer\\_in\\_the\\_Kenyatta\\_case.pdf](http://www.iccnw.org/documents/Letter_to_UNSC_from_the_Victims_Lawyer_in_the_Kenyatta_case.pdf)>

Deputy President, but also the Foreign Affairs Secretary, Attorney General, and other state officials – have focused on a number of issues. These include the argument that the indictments are political and have been driven by Western powers who, in the face of a continent “on the rise”, have become “more desperate” in their attempts to “control and exploit” Africa and its citizens.<sup>3</sup> This argument draws on a number of factors including comments by the international community during the 2013 election campaigns – such as the US Secretary of State for Africa’s infamous “choices have consequences” comment – which are cited as evidence of how the West campaigned for Raila Odinga and unsuccessfully threatened Kenyans to not elect the Jubilee Alliance (Lynch 2013: 14).

In turn, the ICC is cast as a political court that wanted “to use the Kenyan cases to make itself legitimate as a meaningful global institution” (Wainaina 2013). In this vein, much has been made of the Court’s limited achievements and prior criticism faced; of how the cases initially took ODM/PNU figures in equal number, which looked political and calculated; and the undeniable fact that all of the ICC’s cases are in Africa (Lynch 2013: 13).

These negative messages are increasingly intertwined with those that highlight Kenya’s importance to regional and international peace, security, and development. With particular attention given to: Kenya’s inauguration of a new constitution in 2010 and ongoing reforms; narratives of peace-building and reconciliation and the fact that the 2013 election was relatively peaceful despite

widespread fears of renewed violence; Kenyatta and Ruto’s achievement of a first round victory in the 2013 election with 50.07% of the vote; the importance of Kenya to the region’s economy and to peace-building and development efforts in neighbouring countries; and Kenya’s position as a “frontline state in the fight against terrorism”<sup>4</sup>. The argument throughout is that, for Kenyans, the region, and the world, Kenyatta and Ruto need to focus on running a country of great economic and geo-strategic importance with cases at the ICC cast as an outdated distraction that threaten to throw this now peaceful country back into a state of turmoil, and to consequently destabilise the region as a whole.

These arguments have gained headway for a number of reasons. First, the fact that all of the ICC cases are in Africa – together with criticisms of its cases to date, Kenyatta and Ruto’s standing as democratically elected leaders, Kenya’s position as an economic and political hub for the East African region, and its geo-strategic role in the “war on terror” as Somalia’s neighbour and site of various terrorist attacks – ensures that the image of the ICC as a politicised Court and as an unhelpful distraction for the country’s leadership finds resonance with many people around the world. At the same time, the image of the Court as a neo-colonial imposition has proved particularly appealing across much of the sub-continent.

Second, the possibility that, at some point, Kenyatta and Ruto will opt for the nuclear option of non-cooperation with the ICC, or that the AU will call for a mass walkout from the Rome Statute, significantly raises the

<sup>3</sup> Speech made by President Uhuru Kenyatta at the extraordinary session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, Ethiopia, 12th October, 2013. <<http://www.citizennews.co.ke/news/2012/local/item/14250-president-kenyattas-speech-at-the-au-summit>>

<sup>4</sup> Decisions and Declarations, Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia <[http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20\\_E.pdf](http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf)>

stakes. Since, on the one hand, the international community and individual donor countries do not want to walk away from Kenya, while, on the other hand, people do not want the Kenyan case to further erode the legitimacy and capacity of the ICC. As a result, while the UNSC's decision to not defer the cases shows a general desire for the cases to continue and for impunity to be tackled in ways that do not water down international jurisprudence to the point of irrelevance, the agreement to change ICC procedures by consensus at the ASP shows a pragmatic approach to trying to make it as easy as possible for Kenya to continue to cooperate with the ICC.

But how are these concerted efforts to deal with the ICC intervention at the international level impacting upon political debates and policies more generally? The following sections provide initial thoughts on some emerging ramifications.

### **OF NEO-COLONIALISTS AND THEIR AGENTS**

In seeking to tackle the ICC, government officials have presented it as neo-colonial and as acting at the behest of Western masters. To make matters worse, not only did the West allegedly “take” Kenya to the ICC, but also these same purported allies now “refuse” to support a push for the cases to be deferred. The consequent demonisation of “the West” has strained relations with international donors at home, but also helped to shape the country's foreign policy more broadly by reinforcing a partial turn to “the East” and other African countries.

The government's rejection of “the West” is in part rhetorical, but it is also performed through daily slights. This includes Kenyatta's failure to find time to receive the credentials from a number of ambassadors including the ambassador for Germany, France, Austria and

Italy until early December 2013; Tanzania's rejection of Kenya's outgoing German Ambassador, which many believe is at the behest of the Kenyan government; and a scene involving British High Commission staff and the local deputy governor in Eldoret in November 2013. In and of themselves, such occurrences are unlikely to alter the dynamics of international relations, however collectively, they contribute to an image of a country that is increasingly difficult for donors – and in turn investors – to work with, and in. As a result, over time, such actions and omissions could contribute to a downsizing of aid projects, especially by those countries that lack deep historical relations, and to an international image that discourages some foreign direct investment (Branch 2013).

Of more immediate concern is the associated battle being waged against prominent civil society organisations (CSOs) and activists who have been dubbed as the “evil society” or “agents of neo-colonialism”. At one level, this confrontation is a war of words that seeks to delegitimise civil society as consisting of elitist Nairobi-based organisations who lack a constituency and instead act as lackeys for “the West”. For example, according to one of Kenyatta's chief advisors: “These NGO people have something in common, they are fluent, they know how to hold the fork, and they attend cocktails and are given a platform in big forums which they use to undermine their country and its institutions...What is clear is that they get their funding from one source that technically owns them. They are agents of neo-colonialism. They are agents of creating the impression that African systems don't work” (The Standard 20 October 2013).

At another level, such personalised attacks are critical as they feed into a context where vocal CSOs are increasingly perceived as isolated from politicians, ordinary citizens, and even

the donor community who tend to shy away from further rocking the diplomatic boat. This isolation then facilitates more direct efforts to curtail civil society activity, which could have significant ramifications for the size and nature of Kenya's democratic space. Most notable is the unsuccessful tabling of a Public Benefits Organizations Bill by the National Assembly, which sought to limit the amount of foreign funding that PBOs can receive to 15% of their overall budget. The immediate impact that this would have had if successful – given that many of the prominent human rights organisations are registered as societies or trusts, rather than as PBOs – is unclear. However, the message is not: steps will be taken to deal directly with CSOs that are perceived to be unpatriotic and an obstacle to government policy.

This message becomes even clearer when the unsuccessful PBO Bill is considered in conjunction with a new Media Act that could have far-reaching implications for press freedom. The Act includes new punitive measures; most notably the provision for a new tribunal that would be able to issue fines of up to Sh20 million for media houses and Sh1 million for individual journalists for violating the Code of Conduct. Significantly, Kenyatta sent the initial bill back to parliament with a number of amendments that increased the state's regulatory powers – most significant was the transfer of control of the media tribunal from the National Assembly to the Presidency (Daily Nation 2 December 2013).

This onslaught against the media follows critical reports of the government's response to the terrorist attack on Westgate Mall in central Nairobi in September 2013. More specifically, it follows reports that the "siege", which started on Saturday 21 September, may actually have ended the next day rather than in

the late hours of Tuesday as initially reported, with "extra" days then used by the military to loot the mall of all valuable contents. Such stories are potentially extremely damaging for the Kenyan government given the importance placed on this incident in their struggle against the ICC on the grounds that Kenya is on the frontline of the war against terror with the President and his Deputy as central actors in ensuring regional peace and security.

These attacks on the media, NGOs, and "the West" are paralleled with a turn to "the East", and to greater attention being given to regional bodies. The latter could have the unintended consequence of strengthening institutions such as the AU, which could prove to be a positive development.

#### **THE NEED TO ENACT REFORMS, AND PERFORM STATE CAPACITY AND REGIONAL SIGNIFICANCE**

A window of opportunity is also provided by the government's interest in displaying its reformist credentials. Since, as the Foreign Affairs Secretary Amina Mohamed noted: "Kenya must ensure its institutions, including the judiciary, function effectively so that the country can avoid relying on international intervention" (The Star 25 November 2013). This motivation to perform a particular kind of state extends to economic development and security at the national and regional level.

It is currently too early to tell how significant these performances will prove in practice, especially now that Ruto's case has been suspended and Kenyatta's case adjourned. However, there is already some evidence that Kenya's political response to the ICC's intervention is having some positive impact in the areas of governance and development. This includes the establishment of a new International Crimes Division of the High Court as well as the government's

commitment to new infrastructure projects – most notably the Lamu Port and South Sudan Ethiopia Transport (LAPSSET) Corridor Project and new railway from Mombasa to Kisumu and on to Rwanda and the Democratic Republic of Congo. Unfortunately, these latter projects have already been marred by claims of mass corruption and insufficient attention being given to local communities, and it will take time to see how costs and benefits weigh out overall.

### *Troubles in the Alliance?*

Politics around the ICC could also affect the future unity of the Jubilee Alliance, which could have serious consequences for inter-ethnic relations. The 2013 election was peaceful, at least in part, because the Jubilee Alliance brought together the Kikuyu and Kalenjin communities who have been the most closely affected and implicated in election-related violence respectively. However, while the majority of Kikuyu and Kalenjin came together behind the Jubilee Alliance in March 2013 in the interests of peace and development, and against the ICC and Raila Odinga's candidacy, it is clear that ethnic stereotypes, narratives of difference, competition, and mistrust continue to be a feature of day-to-day relations at the local level. In turn, there is a fear that, if the Jubilee Alliance collapses at some point in the future, this could lead to heightened tension and even renewed conflict between Kalenjin and Kikuyu residents, especially in the troubled Rift Valley. Violence that could be even worse, for example, if local stereotypes regarding the Kikuyu's "arrogance of their right to rule" and the Kalenjin's "untrustworthiness" are further reinforced (Lynch 2013: 18).

Moreover, while such an eventuality is far from inevitable, there are clear signs of tension between members of Kenyatta's The National Alliance (TNA) and Ruto's United

Republican Party (URP). This includes claims by Charles Keter, Kericho Senator, that a number of government officials had coached witnesses in an attempt to "fix" Ruto at the ICC. These allegations were quickly denied by Jubilee (Daily Nation 14 November 2013), but tensions will likely increase if the ICC process begins to affect Kenyatta and Ruto differently. For example, if Kenyatta's case collapses due to lack of evidence and Case 1 continues.

### *From opposition to opting out?*

The ICC issue and, more specifically, the government's political positioning also has the potential to further strengthen a sense of political marginalisation and powerlessness amongst opposition politicians and their supporters. This is potentially problematic for a sense of political inclusion and democracy, but also for inter-communal relations given the strong ethnic patterns of support for the Jubilee Alliance and the Coalition for Reform and Democracy (CORD) in the 2013 election – an ethnic divide that carries through into popular perceptions of the election's credibility and evaluation of key institutions.

Thus, while 72.2 percent of Kenyans regard the 2013 election as free and fair according to a May 2013 opinion poll, this figure rises to 95.2 and 94.1 percent for Kikuyu and Kalenjin respondents respectively, and falls to just 20.5 percent for Luo (Shah 2013). Indeed, many CORD supporters feel that Raila Odinga was denied victory for a second time – this is important as it not only renders the Jubilee government illegitimate in their eyes, but has also undermined public confidence in key institutions that oversaw and then endorsed the election; namely the Independent Electoral and Boundaries Commission (IEBC) and Supreme Court. This is particularly troubling given that CORD support is concentrated in the historically marginalised parts of the country, as this could have deleterious



consequences for people's engagement with formal democratic politics and, in the worst case scenario, strengthen support for more violent forms of political activity such as the Mombasa Republican Council at the Coast (Cheeseman, Lynch & Willis forthcoming).

## CONCLUSIONS

The ICC's intervention in Kenya has thus become about much more than the trials of three individuals for their alleged role in the post-election violence of 2007/8. Instead, now that two of the accused are the sitting President and Deputy President – and given their desire to avoid being seen in Court let alone risk conviction – the government's non-judicial battle has come to pervade every aspect of Kenya's national, regional and international engagements and policy-making. The impact of this politicking is mixed, however, overall it appears to be shaping politics in ways that are likely to narrow the democratic space and foster a sense of political marginalisation in opposition strongholds. It also fosters an unpredictable economic situation, as positions and policy decisions that are not in the government or country's interests may nevertheless be taken to try and save these two individuals from the courtroom and from jail. What is clear, however, is that there are now only very few aspects of contemporary Kenyan politics that can be analysed without consideration being given to the role of the ICC's intervention and the government's response. Whether this will continue to be the case in 2014, however, remains uncertain. Since, if the cases collapse, the need for a non-judicial battle will come to an end, and the Jubilee government will likely be emboldened by what it could cast as an unprecedented victory against the ICC, its 'Western supporters', and 'local agents'.

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