

A decorative graphic consisting of a grid of small grey dots, with several larger red dots scattered throughout, primarily in the upper and lower right areas.

Kenya's Jubilee Hangover

Torn Between Domestic Turmoil and International Affairs

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- Regardless of the outcomes of the International Criminal Court (ICC) cases against Kenyan president Uhuru Kenyatta and the deputy president, William Ruto, the procedures have already negatively shaped relations between the ICC and African states. The politics of the cases jeopardise focusing on the atrocities and tremendous suffering the victims experienced after the disputed 2007 presidential elections.
- The anti-Western rhetoric framing the ICC cases as neo-colonialism reveals the long-lasting effects of a destructive colonial past, legacy of mistrust, and on-going identity construction within the international community.
- While the eyes of the international community focus on Kenya's systemic insecurity and counter-terrorism efforts, the country's democracy faces a steady decline. The National Assembly has passed a number of repressive bills. Critical journalists and human rights defenders face intimidation and harassment. Long-awaited and necessary reforms are stalled due to a lack of political will.



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1. The ICC Factor in Kenyan Politics

The Kenyan general elections of March 2013 raised fears of a repeat of the type of post-election violence seen after the disputed December 2007 presidential elections, but ultimately they were different. Not only were they the first to be held under the 2010 constitution—marking the transition from a central to a devolved system of government—most important, the nature of political alliances kept tensions low. The coalition of Kikuyus and Kalenjins was a political coup. Given that they had been the feuding constituencies in the 2007–2008 post-election violence, their cooperation seemed implausible. The formation of their so-called Jubilee Alliance—consisting of The National Alliance (TNA) party and the United Republican Party (URP)—ensured the numbers to elect the TNA's Uhuru Kenyatta, a Kikuyu, and the URP's William Ruto, a Kalenjin, as president and deputy president, respectively.

During the campaign, Kenyatta and Ruto's popularity rose despite the charges of crimes against humanity pending before the Hague-based International Criminal Court (ICC), and some observers contended that »Uhu-Ruto's« chance of winning had actually been boosted by the cases. Besides the electoral arithmetic which is traditionally based on voting along ethnic lines, the ICC's intervention in Kenya became the impetus for solidarity between the Kalenjin and Kikuyu communities. Mueller (2014) argues, »Winning the election was part of a key defense strategy to undercut the ICC by seizing political power« (p. 26) with the goal of then claiming immunity for high-level sitting officials. Kenyatta and Ruto mobilised their constituencies by playing the politics of victimisation, charging that the ICC represented the West's on-going dominance over Africa. The international community was dismayed to learn that Kenyans found this idea convincing. Kenyatta won by surpassing the 50 percent plus one mark with a tiny margin of some 8,400 votes. Apart from numerous technical hitches and numerical discrepancies, Kenyatta was still elected by more than six million voters, with the ICC cases helping forge the winning coalition.

More than a year after its inauguration in April 2013, the new government is yet to demonstrate a commitment to making long-overdue reforms. This is most striking in the areas of land ownership and the security sector.

Neither Kenyatta (covertly) nor Ruto (openly) were in favour of the reform movement that led to the 2010 constitutional referendum, but the sharp rise in insecurity in the country and long-standing perceived land injustices will continue to drive conflict and further threaten stability. Since the 1980s Kenyan politics has been characterised by a lack of trust and elite fragmentation. The situation today shows that the more the political elite are fragmented, the less they are interested in reform. Branch and Cheeseman (2008) declared that the two-track approach of democratisation and institutional reform had failed in Kenya, and »the Kenyan ›democracy‹ was ... neither as stable, nor as consolidated, as many had dared hope« (p. 2). Political opposition is absent, and internal disorder explains the daunting picture of inequality, declining living standards, inflation, debt burden, and all sorts of crime today.

There is an urgent need to proceed with political reforms to end the gridlock in Kenya, but the government is instead preoccupied with raising barriers to the consolidation of democratic achievements. In October 2013, the National Assembly hastily passed the Media Council Bill and the Information and Communication Bill, which were later enacted with minor changes. Under the new law, journalists could face fines for critical media coverage so they might be particularly careful in reporting on the ICC cases. Other indices for the shrinking democratic space are the intimidation and harassment of human rights defenders and activists, especially those advocating for victims' rights and criminal justice. Proposed amendments to the 2013 Public Benefit Organisations Act appeared to be aimed at curtailing human rights work. Although they were withdrawn, it seems likely they will be re-introduced in the National Assembly. After a demonstration in Nairobi in February 2014 protesting wastage of public funds and insecurity, officials of the US Agency for International Development were summoned over allegations that they had planned to destabilise the government by sponsoring the activists, illustrating how thin-skinned the Kenyan government is when it comes to protest. It, above all, underestimates home-grown civic engagement in Kenya.

The government's efforts to undermine the ICC and have the Kenyan cases dismissed has distracted from its public service delivery performance. While a public sector payroll crisis looms, and Kenya's public debt burden

threatens economic growth, an entourage of Kenyan parliamentarians accompanied Deputy President Ruto to The Hague in September 2013 in a show of solidarity. The ICC trials, however, are private matters, meaning the defendants do not travel in their official capacity. Yet, public opinion in Kenya is tending to find the trials themselves a waste of money and time. A March 2014 Ipsos Synovate poll found that an ever-increasing number of Kenyans (44 percent) want the ICC proceedings terminated (p. 16).

2. The Politics of Insecurity

Kenya's looming insecurity points to a protracted political crisis. The state no longer has control over violence. Instead, security has become a personal matter. The Somali militant group al Shabaab remains a serious security threat and, in fact, controls both sides of the porous border in southern Somalia and northeast Kenya. After Kenya deployed troops to southern Somali regions in October 2011, it made itself susceptible to retaliatory attacks by armed groups. Human rights groups raised concerns over violations of human rights and humanitarian law by the Kenya Defence Forces. The likelihood of attacks in neighbouring countries, including Kenya, increases as al Shabaab is driven out of its strongholds in Somalia by Somali government forces with the backing of African Union (AU) troops. Some observers had warned that whatever al Shabaab's motivation, Kenya's intervention could backfire and drag it into Somalia's civil war (International Crisis Group 2012).

Kenya's Somalia problem is long-term and in part home-made. Youth radicalisation and recruitment by militia groups, including al Shabaab, also is taking place in fragile socio-economic areas in Kenya. Negotiations over the repatriation of Somali refugees were a popular step after the deadly terror attack on Nairobi's Westgate shopping mall in September 2013, but they only temporarily diverted attention from Kenya's unsettled security sector. Crime, insecurity, and political violence have risen sharply over the last year.

Branch and Cheeseman (2008) have argued, »when the centre fragments, the 'instrumentalisation of disorder' may come into play« (p. 14). The post-election violence of 2007–2008 revealed the use of violence for political

ends, so maybe Kenya's ICC cases did indeed help to prevent a reoccurrence of violence in 2013. At the same time, however, persistent ethnic tensions, clan rivalries, and inter-communal violence remain major security issues that need to be mitigated. Organized crime, which includes violent cattle rustling, increasingly plays a role in local political struggles (IRIN 2014). One of the biggest challenges of the internally divided government of the Jubilee Alliance is to address such longstanding conflict drivers, such as land, which are usually ethnicised.

Part of the problem lies in that Kenyan authorities have been reluctant to investigate and prosecute the thousands of suspects responsible for political violence. The violence was found to have been organized by rival politicians as a strategy to obtain control of the state. For instance, during the post-election violence of 2007–2008, the police allegedly received a shoot-to-kill order. An estimated 405 victims of fatal police shootings were reported (Human Rights Watch 2011: 4). Former police commissioner Mohammed Hussein Ali was apparently following instructions issued by Francis Muthaura, former head of the civil service. Both were being investigated by the ICC, but have not been prosecuted. The police reform that was part of the 2008 power-sharing agreement has been watered down, and efforts to make the police, army, and security forces accountable have been frustrated. The Anti-Terrorist Protection Unit continues to be criticised for extraditions and other disappearances, torture, and targeted killings of suspects. There is a thin line between the fight against impunity and counter-terrorism.

At the moment, a fragile Kenyan state faces a challenge in terrorist violence while also struggling to deal with the complexities of transition dynamics, such as institutional rearrangements and political uncertainties under the new constitution. All indications are that more than a year after the 2013 general elections, the Kenyan state is approaching a tipping point. Either the reversal of reforms, use of coercion, and reduction of democratic space will result in a certain political stability through a semi-authoritarian system of government or the Kenyan state will manage to successfully proceed with the implementation of the constitution and institutional reforms to finally overcome underlying causes of tension and inter-communal conflict.

3. The ICC Cases and Foreign and Diplomatic Relations

Although the international community stresses that its engagement with the Jubilee government depends on Kenya's cooperation with the ICC, Western diplomats would actually prefer a return to normal diplomatic relations. When Kenyatta was elected in March 2013, diplomats were puzzled over how to maintain critical military and business ties while keeping contacts with the ICC defendants to »essential matters.«

Before the March 2013 polls, some diplomats had made statements indicating that they would prefer Kenyans not to vote for UhuRuto. A remark by US Assistant Secretary of State for African Affairs Johnnie Carson that »choices have consequences« elicited allegations that foreign powers were behind the ICC charges. Statements made in a February 2014 interview of former ICC prosecutor Luis Moreno Ocampo, played right into the hands of those claiming that the ICC is fixated with prosecuting Africans. Ocampo (2014) was quoted as saying that »some diplomats« had asked him to »prevent Kenyatta or Ruto to run in the elections.« The ICC was thus accused of having fallen prey to politics. The nomination and election of the ICC defendants certainly affected diplomatic relations.

For the Kenyan government, the ICC trials of Kenyatta and Ruto are a time-consuming exercise. Since the election of the two men, major diplomatic efforts have been expended in an attempt to delay their trials. Such lobbying fell on fertile ground on the continent. In October 2013, the AU convened a summit in Addis Ababa to discuss Africa's relations with the ICC. The heads of state called for immunity for the highest state officials in general and in particular for the trials of Kenya's president and deputy president to be halted, along with the prosecution of Sudan's Omar Hassan al-Bashir. They also expressed concern that the cases were a threat to regional stability, cited double standards, and accused the court of »race-hunting« in its indictments of African leaders (BBC 2013). President Kenyatta portrayed the ICC as a »toy of declining imperial powers« (ibid.) and accused it of neo-colonial meddling in sovereign affairs.

An initial proposal to have AU member states withdraw from the ICC did not pass at the AU summit, but the

leaders' backing of immunity for sitting heads of state undermined the AU's founding document, the 2000 Constitutive Act, which includes the »condemnation and rejection of impunity.« The AU had acted similarly in 2008, when it passed a resolution advising member states not to cooperate with the ICC in its efforts to indict Bashir for genocide in Darfur (Hellwig-Bötte 2014). Diplomatic maneuvering to defer the Kenyan trials peaked in November 2013, when Rwanda, as a temporary member of the UN Security Council, drafted a resolution to suspend them. Russia and China offered strong support. The resolution was of great symbolic value in that its rejection was later portrayed as a »vote against Africa.« In short, »What we are seeing is that it has become as if it is almost the ICC on trial,« said Macharia Gaitho, chair of the Kenya Editor's Guild (IWPR 2014).

To be sure, the ICC only opened its investigations into the post-election violence in March 2010 because the government and parliament had dismissed several proposals to establish a special tribunal in Kenya. Authorities were either unwilling or unable to ensure the prosecution of alleged perpetrators of crimes against humanity and to provide justice to victims, including compensation. The process at The Hague was not the first choice and was never conceived to be as per the Rome Statute's incorporation of the principle of complementarity. Rather, the ICC »is a court of last resort« (Human Rights Watch 2011). Even more, of the 122 signatories of the Rome Statute, 34 are African. The ICC's »Africa problem« is that even though African states comprise 28 percent of all state parties, there is not much interest in compliance. Additional efforts to discredit the court, along with a revival of »African solutions to African problems« sloganeering, indicate that there is little confidence in the ICC's ability to deliver justice.

4. Case Scenarios

Halakhe (2014) has developed three scenarios for Kenya's current ICC cases. Recognising the relevance of his observations, this paper builds on the three scenarios and adds another outcome to his »not guilty« scenario—the termination of proceedings. As Halakhe rightly concludes, each possible outcome will have an impact on domestic policy, international relations, the ICC's reputation, and the fate of international criminal justice.

4.1 Convictions

The first scenario would see all Kenyan suspects convicted of crimes against humanity. It is the most unlikely of all possible outcomes. Of the six Kenyans initially named by Ocampo in 2010 as »most responsible« for the post-election violence, only three face trial today. The trial in the case of Ruto and former radio presenter Joshua Arap Sang opened in September 2013 and is currently on-going. The start of Kenyatta's trial has been postponed several times. The Pre-Trial Chamber declined to issue charges against Ali, former police commissioner, and Henry Kosgey, former minister for industrialisation, and the Office of the Prosecutor (OTP) withdrew those against Muthaura, former head of the civil service. The case against Muthaura was dropped because witnesses »have either been killed, or have died since those events, and other witnesses refuse to speak with the Prosecution,« said ICC prosecutor Fatou Bensouda (International Criminal Court 2014: 7).

Witnesses seem to be the ICC's greatest challenge since the OTP opened investigations in 2010. In Kenyatta's case, the OTP found that »witness four« was bribed to withdraw his or her testimony (Brownsell 2013). It is known that in some cases, witnesses and their families were threatened. Given witnesses' fear for their safety, attempts by Kenyan media to disclose their identities has been particularly disturbing. In addition, defence lawyers claim that some witnesses were coached to provide false testimony (Halakhe 2014).

If issued, guilty verdicts could increase the ICC's legitimacy enormously. Kenyatta would be the first sitting head of state to be convicted. It would make clear that the political elite—regardless of their power, influence, and wealth—can be held accountable. Before the ICC opened its official investigations, Ocampo declared that he wanted to make Kenya a »world example on managing violence« (RNW 2009). The statement subjected him to sharp criticism for allegedly trying to use the Kenyan cases to boost his personal career. Regardless, the trial is a high-stakes gamble for the ICC as well as the accused.

A guilty verdict would not end impunity for political violence in Kenya. It is unthinkable that Kenya will comply with what such a decision by the ICC would entail. Kenyatta, whose father was imprisoned for nine years under colonial rule, will certainly not surrender to the court

(Dowden 2013). Economic sanctions and international isolation would typically follow, but the international community would be hesitant to give up its strategic partnership with Kenya, especially because of fears of Nairobi »looking East« for trade and strategic relations. Moreover, several African heads of state will do everything in their power to avoid a conviction and create a hostile environment for international criminal justice. A verdict of guilty would cause diplomatic turmoil.

Most important, how would Kenyans react to a guilty verdict? One should not forget that many Kenyans support the victims obtaining justice for the horrific violence they suffered. It should also be considered that human rights advocates increasingly face threats and arbitrary arrest, which might explain why ICC supporters in Kenya are perceived to be less vocal than anti-ICC campaigners. Yet, the Kenyan government will simply frame any conviction as a racist and neo-colonial project. Given the public's waning support for the ICC trials, it becomes more likely that Kenyans will turn their frustration with disorder and uncertainty on the ICC. It is a widely held opinion that the successful prosecution of a few top-level individuals will not provide justice but will instead threaten Kenya's stability.

Will the ICC »bend to the demands of diplomacy and political stability« as Simons (2013) suggests? In the 2104 interview, Ocampo (2014) said, »There was a lot of pressure because as soon as Kenyatta became president, the international community wanted to please him.« Kenya's geographic location makes it a key partner country for international counter-terrorism efforts and probably explains Kenya's heightened self-confidence vis-à-vis Western states.

In November 2013, the ICC's Assembly of States Parties adopted new rules that allow for »the use of video technology, excusal from presence at trial and excusal from presence at trial due to extraordinary public duties.« This represented a major victory for Kenyatta and Ruto, who will not be required to be physically present at their trials. In light of the crisis surrounding the Westgate attack, the court postponed the start of Kenyatta's trial, which had been scheduled for November 2013. Victims' rights advocates rightly asked whether such exceptions symbolise a bending to pressure by the powerful.

4.2 Mixed Verdict

In the second scenario, the trial could lead to a mixed verdict, with one of the Kenyan suspects cleared, and another found guilty. The likelihood that Kenyatta's case will collapse has increased significantly in the past months. Even the ICC prosecution has publicly expressed doubts that the evidence will suffice. First, the Kenyan government had not released Kenyatta's bank records and other important documents to the OTP. Although the government is compelled to cooperate, its inaction and purposeful delays thus far point to very little cooperation. Second, key witnesses have withdrawn for security reasons, presumably because they were intimidated. A steady string of murders and unexplained incidents of disappearances since UhuRuto assumed office has created an atmosphere of fear. All these factors point to a possible strategy adding up to »get the cases dropped for lack of evidence« (Mueller 2014). In short, the evidence against Kenyatta was perceived as weak from the beginning, and as increasing numbers of witnesses have withdrawn, it is questionable whether Kenyatta will ever face trial. The trial commencement date has been moved several times, and was postponed indefinitely in February 2014, upon Bensouda's request for more time to obtain additional evidence. Kenyatta's trial is now set to begin 7 October 2014.

Meanwhile, the trials of Ruto and Sang began in September 2013. If Sang is found guilty, it will not have an impact on Kenya's political stability, but will demonstrate the ICC's ability to deliver. It would also confirm the court is most successful in prosecuting mid-level individuals but, again, would call into question the effectiveness of the court in prosecuting political leaders who allegedly pull the strings. Another uneasy fact for Kenyans is the failure of complementarity. Kenya lacked the political will and domestic courts to convict the low-level individuals who committed the actual crimes and therefore are directly linked to the victims.

If Ruto is found guilty but Kenyatta is not, the political alliance of the two could fracture. The tricky part is the timing: The trial for Ruto and Sang has already begun, and a court judgement is expected earlier than in Kenyatta's case. A highly charged situation in the period between Ruto's theoretical conviction and Kenyatta's theoretical acquittal would need to be managed wisely

or could devolve into chaos. The question is whether the Kalenjin community would focus their blame for Ruto's fate on the ICC or on Kenyatta.

In the first (and more likely) case of a Ruto conviction, Kenyatta would frame the outcome as further proof of Western neo-colonial interference in Kenyan affairs. He would then allow members of the Kalenjins' inner circle to occupy some sensitive or lucrative political offices as part of a co-optation strategy to preserve the governing alliance. Such an approach might work because the Kalenjin elite is fragmented. Typically, this kind of conflict management is not violent, but the use of co-optation tactics is an expensive exercise. In Kenya, state resources are seen as an avenue to achieving personal wealth. Hence, additional appointments would increase the scale of looting of public funds. Systematic white-collar crime on top of a high debt burden would further reduce the government's ability to deliver public services. It will then be critical whether a coalition for political dissent can be mobilised. In the 1990s, a deep economic crisis of this kind led to civil unrest challenging the state. The second possible outcome of a Ruto conviction will see a deepening of inter-communal conflict. Kenya remains a divided country. Interethnic animosities persist, so there is widespread fear that if Ruto is convicted while Kenyatta is acquitted, the country will experience another outburst of ethnic violence. The system's inherent fragility is particularly vulnerable to internal violence. The Kenyan ICC cases will prove that delivering justice requires more than the international prosecution of criminals.

4.3 Acquittal or Termination of the Proceedings

In the third case, the trials would end with a termination of the proceedings or acquittals after fair and full trials. Such an outcome represents the worst case for both the ICC and the victims. If the lengthy judicial process ends without punishment for the alleged perpetrators of the most serious violations of human rights, it could be a major blow to the ICC's *raison d'être*. The slow pace of the investigations and delays have already eroded public confidence and interest in the judicial process. Acquittals or termination would be viewed as the court's inability to provide justice. It would send the message to Kenyan

victims that the court cannot live up to its promises and send a signal to political leaders who have also possibly committed crimes that political power trumps justice. Above all, the opportunistic Jubilee Alliance would prove successful in demonstrating that winning an election comes with opportunities to avoid conviction.

As noted, the OTP had requested a postponement to obtain additional evidence and give the government of Kenya more time to provide Kenyatta's financial records. So far, Kenyan authorities have employed a myriad of political and legal tactics to delay and obstruct the investigation by allegedly withholding or tampering with evidence. Observers therefore fear that the proceedings will eventually be terminated on the grounds of insufficient evidence. This is the first of two negative outcomes that could compromise the ICC's effectiveness.

To terminate the case, Bensouda would have to withdraw the charges and the Trial Chamber would need to approve the withdrawal. Prior to this, Bensouda would submit a motion citing a policy of non-cooperation by the Kenyan government, and obstruction of justice, to at the least send a strong message to the international community. The same procedure would apply to terminate the proceedings in the Ruto and Sang case currently underway. In the fight against impunity, the ICC's highest-profile trial against a sitting head of state marks a watershed. The Kenyan cases will ultimately determine the ICC's fate as either an actor in the international justice system or as an onlooker in the political arena.

The second and equally negative outcome, from the victims' perspective, would find the accused regarded as not guilty in all respects. The court would be seen as having seriously failed the victims awaiting justice. The failure to ensure the successful prosecution of individuals who orchestrated killings, rapes, arson, and theft would be a major setback for international criminal justice.

5. Where to Go from Here?

While analysts rack their brains about the ICC's role in Kenyan politics and possible outcomes and consequences of the trials at The Hague, widespread ICC fatigue has gained ground in Kenya. Victims are being asked to »move on«. There is a general sense of wanting to

leave the past behind. It is not clear whether this is a sign that Kenyans fear a reoccurrence of violent conflict or whether other problems, such as the rising cost of living, are more pressing or whether there is no confidence in international justice as a measure of accountability. It is important to note, however, that the anti-ICC agenda is driven by political leaders and »is almost certainly not the view of the majority of Africans« (BBC 2012).

As much as judicial accountability for the post-election violence is essential, there is no denying that the ICC trials could affect Kenya's political stability. This has fuelled the perception that the ICC plays a political role. Even so, it is not a coincidence that two political leaders are charged with crimes against humanity. It was Kenya's political dynamics within the context of impunity for political violence that led to the ICC investigations. Also, the Kenyan government failed to create its own tribunal to deal with the accusation. Indeed, with the charges pending, Kenya faces some ambiguity. The outcome of the ICC trials may reshuffle political alliances and influence the distribution of power. For example, if Ruto is found guilty, it could prevent him from running for president in the 2018 elections. Regardless, it does not mean that the cases are politically motivated.

Besides endangering stability, another narrative put forward by ICC-sceptics is the »peace vs. justice« argument, which asserts that ethnic communities involved in the violence after the 2007 elections have already successfully overcome their animosities in the Jubilee Alliance. The coalition surprised those in the international community who stress that there is no peace without justice. While the ICC's focus is on so-called serious crimes during the 2007–2008 post-election violence, national non-prosecutorial elements are as important. Herein lies the weakness of the Kenyan system. Kenya is still ethnically polarised, and the dynamics of the power struggles that caused the post-election violence remain. Social cleavages over access to land and political offices are still ethnicised. Under these somewhat unstable circumstances, Kenya must handle the threat of al Shabaab and regional instability. Clearly, these are not favourable conditions for the consolidation of democratic achievements.

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