

ETHNIC MOBILISATION AND KENYA'S FOREIGN POLICY IN THE FACE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

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*Abstract*²

Until the issue of international criminal justice entered into Kenya's politics, following the violently disputed 2007 elections, Kenya's successive governments had never taken international diplomacy and foreign policy seriously or, at least, had never publicly appeared to do so. Never before had the two concepts been so ubiquitous in the country's political lexicon as when the Mwai Kibaki government mobilised locally, continentally and globally in an attempt to torpedo two cases facing prominent Kenyans, the highest profile being Uhuru Kenyatta and William Ruto, at the International Criminal Court (ICC). Kibaki, and later his successor Kenyatta, aggressively canvassed for support on the international stage against the ICC. Kenya featured prominently in regional summits, African Union summits, at the United Nations Security Council (UNSC), and within the Assembly of States Parties (ASP) of the Rome Statute as it tried to make a no-holds-barred onslaught against the ICC. This article considers whether this show of diplomatic force, which resulted in Kenya extracting concessions from the ICC, was consistent with a well thought out and coherent foreign policy or a cynical reaction meant to rescue indicted persons from the grip of the international criminal justice.

Keywords: Kenya; justice; diplomacy; foreign policy; impunity; International Criminal Court; plutocracy; kleptocrat; tribalism/ethnicity.

Sleutelwoorde: Kenia; geregtigheid; diplomacie; buitelandse beleid; straffeloosheid; Internasionale Kriminele Hof; plutokrasie; kleptokraat; stamverband/etnisiteit.

1. INTRODUCTION

Has Kenya's response to the International Criminal Court (ICC) seen a redefining of its foreign policy? This article sets forth two arguments. Firstly, the ICC issue had an overarching influence on Kenya's international relations, thrusting the country into the centre of international politics as efforts were made to save prominent government officials from facing justice for atrocities committed during the 2007-2008 post-election violence. Secondly, despite the diplomatic relationship

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between Kenya and the Western nations being strained at various stages of Kenya's post-colonial history, more so over the ICC cases controversy, Kenya remains an ally of the Western nations, especially of the United States of America (US) and Britain, owing to substantial Western capital in the country (Makinda 1983:314) and partnerships in defence, security and, particularly, the war against terror. This article grapples with the nexus between international criminal justice, impunity, sovereignty and accountability on the one hand, and ICC politics in Kenya, the rest of Africa and internationally on the other.³

The ICC, a judicio-political institution, has been enmeshed in Kenya's volatile ethnic politics since 2010 when Luis Moreno Ocampo, the then Chief Prosecutor, named six suspects, the "Ocampo Six", and, in a gung-ho style, vowed that, "the Kenyan case will be an example to the world" on how to deal with international crimes (*Standard Digital* 2009). Ocampo's announcement thrust Kenya's kleptocratic-plutocracy into panic.

The controversy elicited by the ICC charges against these prominent Kenyans became not only the centrepiece of Kenya's domestic politics in the lead up to the 2013 elections, but also of its international relations. Upon jointly, and controversially, winning the presidency, Uhuru Kenyatta and his running mate, William Ruto, picked up from where Mwai Kibaki left off with sustained diplomatic pressure mobilised against the ICC through ethnic, regional, continental and even global campaigns in an attempt to have cases facing them either deferred for one year or charges terminated altogether. Regional bodies, such as the Intergovernmental Authority on Trade (IGAD), the East African Community (EAC) and the African Union (AU), were the forums through which the Kenyan government lobbied and argued its case, invoking the Rome Statute. Internationally, Kenya pursued the matter through the United Nations (UN) and, specifically, the United Nations Security Council (UNSC) and the Assembly of States Parties (ASP). The latter brings together countries that have ratified the Rome Statute. These diplomatic efforts have not subsided given that, whereas charges against Kenyatta were dropped in December 2014, the case against Ruto is ongoing.

The article begins by tracing Kenya's foreign policy since 1963 before focusing on the ICC, its politics and the link with Kenya's 2013 elections. The subsequent sections analyse the Kenyan cases at the ICC and the attendant politics, and how this played out domestically and internationally.

2. KENYA'S FOREIGN POLICY

Until the publication of a document entitled "Kenya Foreign Policy" in 2014, Kenya had never spelt out its foreign policy in any document. Before then, various

³ This article was submitted prior to the ICC outcomes being announced.

official documents, executive pronouncements and circulars guided Kenya's foreign relations (Republic of Kenya 2014:20). According to the 2014 document, Kenya's foreign policy rests on five pillars, including peace diplomacy, diaspora diplomacy, environmental diplomacy and cultural diplomacy. Other than an attempt to devise a coherent foreign policy, the content of the document is not different from issues that have defined Kenya's international relations over the years. Peace and security under the peace diplomacy pillar, territorial integrity, participation in multilateral bodies, and the attraction of foreign capital feature prominently in the document and have been at the centre of the country's foreign relations throughout its post-colonial period. On the whole, the influence of Western capital on Kenya's domestic and international politics cannot be overemphasised. "Kenya's overwhelming dependence on Western capital is partly a result of her historical past and partly a function of the local ruling class. She inherited an economic infrastructure developed along capitalist lines; and those leaders who took power at independence worked for the consolidation of that system. In an effort to attract more foreign capital into the country, the new leaders passed a law guaranteeing protection to foreign investment" (Makinda 1983:302).

After independence in 1963, Kenya's foreign policy was described as "ambivalent" (Howell 1968:29), "pragmatic and pro-West" (Khaponya 1980:25), and "quiet diplomacy" (Okumu 1977:136 in Makinda 1983:300). According to Khaponya (1980:25), "Kenya tended to wait and see what other nations were going to do before taking a position on most issues". Kenya's economic interests and the security of its borders were the cardinal planks of its foreign policy in the immediate post-colonial period (Makinda 1983:300). "Indeed, from the beginning Kenya's foreign policy was shaped by the need to attract more foreign capital, maintain commercial links with neighbouring states, ensure security of her borders, and consolidate the domestic political power base" (Makinda 1983:301-302). In as much as the country professed non-alignment with regard to the East-West bipolar politics of the time and was active in the Organisation of African Unity (OAU), non-alignment and pan-Africanism were subsidiary issues (Makinda 1983:300).

Security has impacted on Kenya's international relations throughout its post-colonial period. The security issue in the north-eastern part of the country began in 1962 when 80% of the Somali ethnic group voted in a referendum to join Somalia, but were denied the right by the British who did not want to hive off the area. This angered Kenya's nationalists who had opposed the referendum, and so Kenya attained independence with her territory intact (Makinda 1983:306-307). Tensions between Nairobi and members of the Somali ethnic group rose and the situation escalated into an insurgency, popularly known as the Shifta War, in which Kenya's forces fought against irredentist Somali insurgents backed by the Somali government. Makinda (1983:307) argues that this war, "tended to undermine

Kenya's territorial integrity and threatened her survival as a national entity" (also see Howell 1968:37-41). The threat subsided when Somali attacked Ethiopia in 1964 with the intention of annexing the Ogaden region into the "Greater Somalia"; upon which Kenya and Ethiopia signed a pact and devised a common strategy of dealing with Somalia, stipulating that either country could call upon the other for assistance in the event of an external attack (Makinda 1983:307).

In 1980, Kenya lost all pretence to non-alignment when it formally entered into a military treaty with the US that offered the latter air and naval facilities, "military bases", in exchange for military aid (Khaponya 1980:26-27; Makinda 1983:312; Barkan 2004:88). The decision earned Kenya the label of "American satellite" (Khaponya 1980:26) and was attributed to, what Makinda described as, "Russophobia"; that is, the morbid fear of Soviet influence that a section of the country's politicians inherited from the colonialists; so much so that within a few years of independence all leftist elements in the country were silenced as the ruling elite associated any criticism of government policies with soviet-inspired communism or Marxism to justify a crack-down against dissidents (Makinda 1983:311-312). Under Daniel arap Moi, Kenya tried to "liberate" itself from Britain, its traditional ally, and openly identified with the US (Makinda 1983:315). Britain and the US have identified with each other as allies for years; so for Moi to have regarded identifying with the US as a significant diplomatic shift smacked of naiveté. The signing of a military treaty with the US marked Kenya's shift from a cautious approach to international issues to an open identification with the US. As Khaponya (1980:27) notes, "Moi has only shown greater forcefulness and candor in declaring Kenya's interests and positions. But this does not represent any substantive change."

Kenya's neutrality in African affairs gave her the gravitas to lead mediation processes in places, such as the Congo and Angola under the OAU aegis (Makinda 1983:309; Howell 1968:45-48). Kenyatta did not side with either the radicals or conservatives in Africa (Makinda 1983:304). The neutrality approach remained intact under Moi, which enabled the country to play a mediation role within the East African region, especially in Sudan.

The US and Britain stood by Moi in the 1980s, at the height of the single party dictatorship, as an ally in Cold War politics until after the collapse of the Berlin Wall when the US and the donor community reinforced local pressure that compelled Moi to accede to multiparty politics in 1991 under the rubric of democracy and human rights. The US ambassador, Smith Hempstone, openly criticised Moi, identified with the opposition, and even offered some of them sanctuary at the US embassy (*The New York Times* 1991). Senior US government officials, led by former president George W Bush, met Moi on various occasions between May 2001 and November 2002, asking him to retire and to hold elections

when it came into doubt that he would leave office at the end of his second and last term in 2002 (Barkan 2004:90).

The bombing of the US embassy in Nairobi in 1998 by the Al Qaeda terror group plunged Kenya headlong into the global war on terrorism and shaped its foreign relations. The government recognises the threat posed by terrorism in the foreign policy document, noting that, “[w]ith international terrorism now elevated into a foremost threat to global security, combating this scourge has become a crucial agendum of Kenya’s external relations and a subject of its strategic partnerships” (Republic of Kenya 2014:16). The Al Qaeda attack on an Israeli-owned hotel in the port city of Mombasa and two surface-to-air missiles, fired at an El Al plane carrying mostly Israeli tourists as it left an airport in the port city in 2002, accentuated the terrorism challenge in Kenya.

Mwai Kibaki succeeded Moi in 2002 and his administration was essentially defined by the global war on terrorism, owing to prompting from the US, which aroused anti-American sentiment and put the government on a collision course with Muslims, especially in the coastal region. The Muslim community accused security forces of unfairly targeting them and blamed this on the government embracing draconian anti-terrorism laws at the behest of the US (Barkan 2004:97-98).

Unlike Moi, Kibaki pursued business links with China, as opposed to Kenya’s traditional trading partners in the West. Consequently, China underwrote infrastructural development programmes, specifically road construction under the so-called “Look East Policy”. However, the influence of the West in the country was manifested during the 2007 disputed presidential elections. The US, Britain and the European Union were instrumental in brokering a power sharing deal between Kibaki and Raila Odinga. Odinga accused Kibaki of stealing his victory with the connivance of the electoral body, the judiciary and the security forces. A dispute ensued that degenerated into ethnic violence.

In 2011, Kenya’s coalition government dispatched soldiers to Somalia in pursuit of Al Shabaab Islamists who had attacked tourist points in the coastal region. Al Shabaab kidnapped two Spanish women working for *Médecins Sans Frontières* in the Daadab refugee camp in the north-eastern region bordering Somalia. Much as Kenya cited the need to defend its territorial integrity against Islamists and to protect the tourism industry, it was not lost on analysts that this decision was consistent with Kenya’s participation in the US led global war on terrorism.

Uhuru Kenyatta succeeded Kibaki in 2013 and so inherited the terrorism challenge. However, more than anything else, the ICC charges against him and his deputy, William Ruto, have defined Kenya’s foreign policy since the two controversially won the elections (Shilaho 2013). Kenyatta signed a raft of bilateral agreements with China, the most prominent being the Standard Gauge Railway (SGR) Project from the port city of Mombasa to the hinterland and into

neighbouring countries, which reinforced the perception of a greater shift towards the East. This was interpreted as a snub of the West; that is, the US, Britain and France, three of the five permanent members (P5) of the UN Security Council that endorsed the trial of Kenya's cases at the ICC and opposed either deferral or referral of the cases to Kenya.

Despite the perception, Kenya's foreign policy has not shifted significantly. It is still influenced by foreign capital from the Western nations and power is still locked in the most conservative section of the country's political elite in power since 1963. President Barack Obama made a historic official state visit to Kenya in July 2015, the first by a sitting US president. Apart from the emotion it evoked, given that most Kenyans viewed it as "homecoming" owing to Obama's ancestral ties with the country, the visit reinforced the historical relations between the two countries. Significantly, Obama conferred a sense of legitimacy on the Kenyatta government that had been dogged by illegitimacy issues stemming from the ICC legal challenge and the disputed 2013 elections. This excerpt from the foreign policy framework published in 2014 shows that although Kenya constantly finds new partners in pursuit of its national interests, it will not abandon its traditional allies. "In order to strategically place the country in the international arena, the architects of Kenya's foreign policy charted a pragmatic approach, informed by several principles; which have stood the test of time. This approach ensured that Kenya successfully forges mutually beneficial alliances with the West while constructively engaging the East through its policy of positive economic and political non-alignment" (Republic of Kenya 2014:15).

3. KENYA AND THE ICC

Kenya became one of the countries with cases at the ICC, following the adoption by parliament of the recommendations by the Commission of Inquiry into Post-Election Violence (CIPEV), also known as the Waki Commission. In its report, the Commission called for further investigations and the prosecution of the masterminds of the atrocities committed in the wake of the disputed elections in 2007 by a special tribunal mirroring a hybrid court composed of local and international judges; failing which the ICC would then take up the matter (Republic of Kenya 2008).

Justice Philip Waki, Chair of the Commission, separately handed over an envelope to Kofi Annan, the former UN Secretary General, containing the names of people suspected of organising and funding the violence. Annan was head of the African Union sponsored mediation team of African Eminent Personalities that brokered a power-sharing pact among the protagonists of the post-election violence. Until the Waki Report recommended prosecution of the masterminds of

post-election violence, no senior government official or politician had been brought to justice, despite many being adversely mentioned in previous official reports in connection with the ethnic clashes that afflicted Kenya following its return to multiparty politics in 1991 (Brown and Sriram 2012; Human Rights Watch 2011).

After a divided parliament opted for The Hague by defeating a motion of amendment for a Kenya Bill meant to pave the way for a Special Tribunal and to anchor the tribunal in the Constitution, Kenyan MPs did not set up the special tribunal to prosecute the masterminds of the atrocities committed in the aftermath of the disputed elections (*The Star* 2011). Despite strict time lines given by the Waki Commission, Annan gave a grace period to parliament to set up the special tribunal and to address post-election violence atrocities locally, but this extension period lapsed. In 2009, it compelled him to hand over the envelope to the then ICC Chief Prosecutor, Luis Moreno Ocampo, together with preliminary evidence gathered by the CIPEV. Ocampo launched investigations in Kenya under the power of *proprio motu*, “that allows the prosecutor to start investigations on the basis of information obtained from any source” (Politi 2001:13) and, following permission from the Pre-trial Chamber, this culminated in the naming of six suspects on 15 December 2010 (BBC News 2010). Uhuru Kenyatta, Francis Muthaura, and Mohammed Hussein Ali were from the Kibaki government side, while William Ruto, Henry Kosgey and Joshua Sang were from Odinga’s side. After the confirmation of charges hearings in September 2011, Uhuru Kenyatta, Francis Muthaura, William Ruto and Joshua Sang were indicted. Charges against Mohammed Hussein Ali and Henry Kosgey were not confirmed for lack of evidence. Kenyatta and co-accused formed case one, while Ruto and co-accused formed case two. Following the collapse of the case against Muthaura and Kenyatta, Ruto and Sang remain the only individuals facing trial in connection with atrocities committed during post-election violence in the Rift Valley in which they were accused of orchestrating an “organisational policy” to violently drive out members of the Kikuyu tribe from the Rift Valley region (ICC 2012a; ICC 2012b).

Ruto and Sang are both Kalenjin, and the fact that they are the only ones being tried for the atrocities committed in the 2007-2008 post-election period is significant in a country in which public life and politics are marred by tribalism. It has the potential to destabilise the country, especially if they are convicted, since it could cement accusations of selective justice pervasive among the Kalenjin. It is this fear that has seen renewed diplomatic efforts to try and extricate the two from the ICC legal threat.

The Kenya situation at the ICC polarised the country in the lead up to, during, and after the 2013 elections. Initially, the near countrywide support for the ICC stemmed from Kenyans’ hope that the court would serve as a deterrent against impunity, deliver elusive justice for victims of post-election atrocities, and act as

a catalyst for accountability. Indeed the ICC, as a permanent international criminal court, was set up to address genocide, war crimes, and crimes against humanity; egregious crimes that ought to offend the human conscience, irrespective of where they occur (Politi 2001:8). However, the issue of justice was caught up in the eddy of tribally divisive politics. Kenyatta and Ruto astutely and cynically turned the ICC issue spectacularly on its head and politically exploited it to cement their stranglehold on Kikuyu and Kalenjin, their respective ethnic groups, and to recast themselves as ethno-regional barons and victims under siege from an “imperial” court. The ICC or simply “the Hague”, as Kenyans preferred to call it, became an axis for rallying support for the political ambitions of the two politicians and, in the process, fanned ethnic animosity and exacerbated ethnic fault lines through incitement that forced the court to issue a warning against the suspects (*The Standard* 2011).

4. THE FIGHT FOR FREEDOM AND POLITICAL SURVIVAL

Soon after Ocampo named Kenyatta and Ruto in December 2010, the highest profile among “the Ocampo Six” and suspected of bearing the greatest responsibility for the post election violence, the two began to ethnically politicise the matter (*The Star* 2012a). They embarked on a series of political rallies in their respective backyards of the Central and Rift Valley regions. These rallies were disguised as prayer meetings for divine intervention over the ICC challenge, but in actual fact were highly charged political gatherings in which the “bogeymen” were Ocampo, the then face of the ICC, and Odinga, their political nemesis. The rallies were characterised by incandescent language and hate speech directed at Odinga (*The Standard* 2011). The aim was to whip up tribal sentiment and to galvanise Kikuyu and Kalenjin tribes under the Jubilee coalition, remove the political initiative from Odinga, win elections, take over the state apparatus and use it as leverage over the unprecedented ICC challenge.

Under cross examination during the confirmation of charges hearings, Kenyatta told the court that Odinga bore political responsibility for the violence that ensued after the 2007 disputed elections by calling his supporters to mass action (*Standard Digital* 2011). This remark underscored and reinforced the dominant narrative during the 2013 elections campaigns that Odinga, in concert with “imperialists”, “fixed” the duo. Odinga was accused of conspiring with the West to have Kenyatta and Ruto indicted by the ICC on fabricated charges. The courtroom showdown between Ocampo, the straight talking Argentine lawyer on the one hand, and Kenyatta, an offshoot of Kenya’s kleptocratic-plutocracy on the other, patently showed how deeply embedded into the matrix of Kenya’s politics the ICC was in the lead up to the 2013 elections. In due course, the significant nationwide support

for the ICC plummeted among Kikuyu and Kalenjin communities and turned into outright hostility.

After the naming of the six suspects, support for the ICC judicial process dropped in the central region, inhabited by Kikuyu, from 73% to 36%, while in the Rift Valley, a predominantly Kalenjin region, it declined from 61% to 37% (Synovate Research Reinvented 2011; *Daily Nation* 2011b). Support for the Court among the Orange Democratic Movement (ODM) supporters who voted for Odinga in 2007 and were predominantly drawn from amongst the Luo and Luhya residing in Western Kenya, remained high at 72% (Synovate Research Reinvented 2011; *Daily Nation* 2011b). Even Internally Displaced Persons (IDPs) from the Kikuyu ethnic group turned against the Court, accusing it of bias and proclaimed their support for the indictees. They asserted that the ICC had charged the “wrong people” and accused the Office of the Prosecutor for not having carried out “thorough” investigations (*Daily Nation* 2011a). The ICC cases helped in sharply delineating battle lines in the 2013 elections and reinforced an already existing schema; that of tribalism.

Kenyatta and Ruto, through sheer temerity and realpolitik, turned, what initially appeared as the greatest threat to their political careers and freedom, into political capital. As the son of Kenya’s first president, Kenyatta is a plutocrat by birth, while Ruto is by co-optation. Daniel arap Moi, Kenya’s second president and the one party autocrat, mentored both of them and unsuccessfully tried to have Kenyatta succeed him in 2002. They are his protégé. The realisation that they could not manipulate and interfere with The Hague based judicial process, as is the case with the national judiciary, evoked panic. Embedded in the ICC controversy was a vicious contestation for control of the state by the exploitation of, what Claude Ake (1996:5) calls, “centrifugal tendencies” by way of manipulating ethnic and communal loyalties. The ICC duo and, by extension Kenya’s kleptocracy, feared losing power to their rivals. It would have posed serious consequences with regard to control of local capital. At a personal level, Kenyatta and Ruto would have lost leverage over the judicial process without the weight of state apparatus, thus risking incarceration. It was for this reason that the 2013 elections were a question of political survival. Efforts to counter The Hague threat, which began under Kibaki, moved a notch higher after the controversial election of Kenyatta. Kenya’s kleptocratic-plutocracy spared no effort to fend off the ICC challenge against Kenyatta, the core of Kenya’s capital, and in the process dented the institution’s capacity to fight impunity at the highest state level. Thus, “Kenyatta conveniently interpreted his narrow victory as a mandate to ignore the legitimate demands for justice for the victims and survivors of 2007-2008 violence” (Roth 2014).

Before charges against Kenyatta were withdrawn in December 2014, the government expended state resources in assisting him to “wriggle” out of the ICC

predicament. The case against Ruto and Sang became dicey, following the decision by the ICC judges to admit prior recorded testimony by five witnesses who had recanted and thus termed hostile by the ICC judges. This was in line with the amended Rule 68 of the Rules of Procedure and Evidence, “that facilitates the use of prior recorded testimony in a trial” (American Society of International Law 2013) which Ocampo’s successor, the Gambian Fatou Bensouda, invoked in her petition (*The EastAfrican* 2015). At the 14th Session of the ASP at The Hague in November 2015, Kenya’s delegation unsuccessfully tried to lobby for the non-application of Rule 68 in the Ruto Case (*Standard Digital* 2015). The Kenya government argued that the rule, amended during the 12th Session in 2013, should not apply retroactively while civil society, the ICC, the majority of the ASP members and the victims held that ICC indictees have no right to benefit from interference with witnesses. Although Kenyan language was included in the final report, it is not legally binding to the states or the ICC because it was left out of, “the catch-all omnibus resolution that provides guidance on strengthening the ICC and ASP” (Global Justice 2015). The ASP left the interpretation of Rule 68 to the ICC appeals judges, given that Ruto and Sang have appealed the ruling in favour of the Chief Prosecutor. Civil society, under the umbrella of the Coalition for the ICC, condemned ASP’s capitulation to Kenya by agreeing to discuss a matter before the court. They warned that the trend, also witnessed during the 12th Session of the ASP, portrayed the Assembly as weak and threatened the independence of the ICC and its attempt to fight against impunity (Global Justice 2015). Ruto and Sang, scored a victory when the Appeals Chamber rejected the admission of unsworn evidence by the five witnesses (*Saturday Nation* 2016).

5. LOBBYING THROUGH THE AU AND UNSC

In the case of Kenya’s engagement at the ICC, Kibaki sent the then Vice President, Kalonzo Musyoka, in what the media erroneously described as “shuttle diplomacy” where he tried to lobby individual African countries such as Nigeria, South Africa, and the African Union as a collective, to endorse Kenya’s bid to have the two cases deferred for a year by the UNSC. Kenya received the backing of the AU on various occasions (18 March 2011, 8 April 2011, 23 May 2013 and 23 October 2013) to have the cases deferred, but on the first three occasions the UNSC did not act on the deferral request. However, in October 2013 the AU endorsed deferral bid failed to garner at least nine votes from the 15-member UNSC (Reuters 2013a). Eight members, including Britain, France and the US, abstained to ensure the bid failed with only seven votes (*Capital News* 2013c). The Kenyan government could not prove, as required under Article 16 of the Rome Statute, that the cases posed a threat to international peace and security in the event the suspects were subjected to trial, a

clause that the government invoked (Rome Statute of the ICC 2002). Previously, the ICC judges dismissed a jurisdiction challenge lodged by the Kenyan government after the pre-trial chamber passed a verdict that the atrocities committed met the Rome Statute definition of crimes against humanity (*The Star* 2012b). The reasons for the lobbying and court applications ranged from the notion that the cases were a threat to peace and security in the country, and even to the East African region, particularly following a terrorist attack in a Nairobi mall in 2013, to one that Kenya promulgated a Constitution in 2010 and had apparently followed up with judicial reforms resulting in an impartial and independent judiciary, capable of trying the perpetrators of the post-election violence.

However, as per the complementarity principle, Kenya was deemed “unable and unwilling” to investigate and prosecute the masterminds of the post-election atrocities and so the cases were admissible before the ICC. The government lacked political will to bring to justice those who bore the greatest responsibility for the atrocities, given that all the suspects, except Sang, were high ranking government officials. There was no evidence that parallel trials for similar charges involving the same individuals indicted were ongoing in Kenya, the basis on which the court would have referred the cases to Kenya’s judiciary (*The Hague Justice Portal* 2011).

The claim by the government that it intended to set up a local legal mechanism to resolve the issue was spurious and belated. It was aimed to forestall the ICC process, but not to genuinely bring to book the perpetrators of the post-election violence. Article 17 of the Rome Statute permits the ICC to take over a case, “not only when there are no national courts in place or a national proceeding appears to be from the beginning a false and simulated one; but even whenever the way in which the proceeding is carried out or has been carried out shows the absence of a true legal process” (Dascalopoulou-Livada 2001:15; Rome Statute of the International Criminal Court 2002. See Article 17(2) (a)). When diplomatic and legal challenges against the ICC failed in the sense that the cases were neither deferred nor referred to Kenya, the 2013 elections became the last line of defence. Kenyatta and Ruto had to win the elections in order to have some bargaining power over the ICC.

In the wake of the 2013 elections, a terrorist attack in a Nairobi mall on 21 September 2013 provided an opportunity for Uhuru Kenyatta, as president, to launch another round of diplomatic efforts as a follow up to the Kibaki “shuttle diplomacy” through the AU and the UNSC for yet another bid for a one year deferral on grounds that, as head of state and deputy respectively, Kenyatta and Ruto needed to be spared the legal encumbrances so as to focus on combating terrorism which, they argued, posed a threat to peace and security in Kenya and the East African region (Reuters 2013b). Kenyatta exploited antipathy against the ICC within the AU to pile pressure and extract concessions from the court. In 2013, the Kenyan

government mobilised the African bloc in the ASP 12th session in The Hague to effect amendments to the Rome Statute, following the set back at the UNSC. As a result, Kenyatta and Ruto, as individuals with “extraordinary public duties at the highest national level” and not subject to the arrest warrant, were allowed to skip trial and be represented by lawyers upon requesting permission from the ICC judges. A second amendment removes the need for mandatory appearance before the court for a defendant with a “summons to appear” and makes provision for the suspect to follow the trial proceedings via video-link, rather than being physically present in the courtroom (IWPR 2013b).

These amendments made a distinction between defendants who are senior state officials and those who are not. Sang, unlike Kenyatta and Ruto, remained at The Hague throughout the trial. He was the only small man, not only physically, but also socially among the “Ocampo Six” and often the invisible one in the high stakes legal challenge. The amendments went counter to the core of the treaty that was founded on the notion that the ICC rules, “apply equally to all persons without any distinction based on official capacity” (Rome Statute of the ICC 2002). Much as the application of the rules was subject to the discretion of the judges, these new rules showed the interface between politics, law and realpolitik in international criminal justice.

Kenya successfully lobbied and mobilised the AU member states before and during the AU summit to support the deferral of the cases. The AU held an extraordinary summit in Addis Ababa, Ethiopia in October 2013 where, with the exception of Botswana, they passed a resolution that sought to accord immunity against prosecution for sitting heads of state and government accused of crimes envisaged under the Rome Statute, and urged Kenyatta not to appear at The Hague for trials in the event of the ICC ignoring the resolution. This resolution breached Kenya’s laws that do not accord immunity to the country’s president accused of crimes covered by the Rome Treaty under Article 143(4) of the Constitution of Kenya. “The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity” (Republic of Kenya 2010:88-89).

The AU extraordinary summit was held, following a request by Kenya after refusal by the ICC to accede to the AU requests that the cases against Kenyatta and Ruto be referred to Kenya under the principle of complementarity. The Kenyan government argued that the cases could be prosecuted in the country, owing to a supposedly reformed judiciary under a new constitution. In its second letter to the ICC, the AU stated that, unless the request was considered, the cases should not proceed, but schizophrenically requested the court, “to allow the Head of State of Kenya and his Deputy to choose the sessions they wish to attend in accordance

with the constitutional obligations and duties that they are required to fulfil and for which they are accountable to the people of Kenya who elected them" (African Union 2013).

As in the case of the earlier letter sent by the AU to the ICC, the court was dismissive of issues raised in the second letter, arguing that they did not fall within the legal framework set out by the Rome Statute. The Court further stated that no case had been filed before the chambers petitioning the ICC to refer the cases to Kenya's jurisdiction. In summation, the Second President of the ICC addressed the AU thus, "Allow me to reiterate in the clearest terms that the matters raised in your letters-or in the Decision of the Assembly of the African Union-can only be considered by the Court in the context of concrete proceedings if they are properly raised before the relevant chambers in accordance with the procedures laid down in the Rome Statute and other relevant documents" (ICC 2013).

The extraordinary summit was billed as a mass withdrawal from the Rome Statute by African membership, but that was never to be. Nevertheless, the anti-imperialist rhetoric continued as the AU relentlessly accused the ICC of targeting African rulers (Reuters 2013c). These accusations were made despite the fact that five of the nine cases involving Africans are self-referral in the sense that the countries in question requested the ICC to intervene following egregious human rights violations. Of note is that Kenyatta and Ruto were indicted before occupying the presidency. In January 2016, the AU adopted a proposal by Kenyatta to develop a roadmap to withdraw from the Rome Statute during its 26th Summit in Addis Ababa, Ethiopia (*Sunday Nation* 2016). This was illustrative of a resurgence of diplomatic pressure to try and terminate the case against Ruto and Sang, assuage the Kalenjin voting bloc and hopefully save the Kikuyu-Kalenjin tribal alliance in the lead up to the 2017 elections.

6. INTERNATIONAL PRESSURE, SOVEREIGNTY AND “ANTI-IMPERIALIST” RHETORIC

The ICC elicited anxiety among Kenya's politicians and captivated the imagination of Kenyans. Never in Kenya's post-colonial history had impunity been so directly confronted. Never had the country's political elite found space for political manoeuvre so circumscribed. The indictees and allies could frustrate the ICC through interference with witnesses and, indeed, the government frustrated it through non-cooperation by refusing to avail requested evidence that could have been used to incriminate Kenyatta (ICC 2015). This was as far as they could go because they could not directly influence the Court by way of intimidating judges or making dockets disappear as is the norm with the local judiciary. The independence of the ICC relative to the local judiciary is the reason why initially

Kenyans supported it across the ethnic divide before it was sucked in the maelstrom of the country's ethnic politics.

The international community, through some of the Western envoys in Nairobi and other influential personalities in global affairs, piled pressure on Kenyans not to vote for the joint presidential candidature of Kenyatta and Ruto in the 2013 elections. Kofi Annan, the former UN Secretary General and broker of a truce between the 2007 elections disputants, cautioned Kenyans against voting in a manner that would compromise Kenya's international relations by electing a politician not trusted by the international community and not able to freely travel and meet world leaders. "There must be confidence and trust by other nations and the international community. When you elect a leader who cannot do that, who will not be free and who will not be easily received, it is not in the interest of the country concerned, and the population, I am sure, should understand that" (IWPR 2012).

The then US Undersecretary for African Affairs, Johnnie Carson, too warned about the implications of dealing with a president facing egregious charges at The Hague, "It is [...] important to know that the choices have consequences. We live in an interconnected world and people should be thoughtful about the impact their choices have on their nation and the world. Individuals have reputations, images, histories and are known for who they are, what they do, what they say, and how they act" (IWPR 2013a).

The British High Commissioner, Christian Turner, too weighed in and said, "We cannot meet ICC indictees, except for essential business", underscoring the diplomatic conundrum that was at the time thought to face Kenya in the event of the ICC duo winning the elections (IWPR 2013a).

Kenyatta and Ruto were emboldened by these veiled threats and responded by invoking a nationalist rhetoric during campaigns. They portrayed themselves as defenders of Kenya's sovereignty and victims of imperialism, a reference to the ICC and its Western backers. In an attempt to stave off the pressure, they resorted to "anti-imperialist" rhetoric and tried to whip up a sense of nationalism and told "foreigners" off with regard to Kenya's internal affairs. Kenyatta dismissed the ICC at the AU Summit in October 2013, asserting that the ICC, "stopped being the home of justice the day it became the toy of declining imperial powers" (*Capital News* 2013a). The irony was that Kenyatta, as part of the plutocracy that is traditionally allied to the West through economic and diplomatic ties, brazenly appropriated pan-Africanism, an age-old ideological rallying call for black people's unity for self-empowerment, for cynical politics and self-preservation. Kenyatta and Ruto are extensions of the dominant Kenyan post-independence oligarchy that hardly had time for Pan-Africanism once Kenya attained independence, and so recasting themselves as victims of imperialism was political chicanery and bravado. For instance, Kenya did not join Africa's progressive forces in combating the last frontier

of colonialism in Southern Africa and apartheid in South Africa (*Daily Nation* 2013). However, the ethnic mobilisation couched in nationalistic rhetoric resonated with Kikuyu and Kalenjin tribes because this reactionary section of Kenya's political elite has balkanised the country into ethnic enclaves to maintain stranglehold on the state for political and economic gain.

Kenyatta and Ruto framed the elections as a referendum on the ICC cases. Thus the Court was the single most defining factor of the 2013 elections. It belied the Jubilee coalition manifesto. They urged their supporters to turn out in numbers and vote for them and for candidates running under their coalition as a show of defiance against what they perceived as foreigners' attempt to influence the presidential results in the 2013 elections and to impose upon Kenyans their preferred president. In this connection, Raila Odinga, their major opponent during the 2013 presidential elections, was portrayed as a lackey of the West out to reap political gain from the two politicians' legal woes.

7. KENYA'S ETHNO-REGIONAL PLUTOCRATS IN PANIC

Kenyatta and Ruto marshalled their co-ethnics and accused Odinga of colluding with "imperialists" in a scheme to eliminate them from the presidential race. After attempts to either defer the cases, refer them to Kenya, or to terminate them altogether failed, Kenyatta, Ruto, and the entire plutocracy and their respective ethnic communities found themselves on the back foot, and that is why they could not contemplate anything short of victory during the 2013 elections. Defeat had potentially serious political, legal and economic ramifications for the two, and the entire kleptocratic-oligarchy. Almost the entire Kenya's plutocracy hailed from Kikuyu and Kalenjin tribes; the only ones to have had an opportunity to "eat" – a colloquial reference to the exploitation of state power for corruption for the benefit of a tiny clique in control of the state (Wrong 2009).

Out of the country's four presidents since independence in 1963, three are Kikuyu, while the other is Kalenjin. The corollary is that the bureaucracy, government, politics and society are ethnicised. After the 2013 elections, appointments in the cabinet, state corporations key in the collection of rents, diplomatic postings in geostrategic stations in Europe, the US, and Oceania and other bureaucratic positions disproportionately went to Kikuyu, followed by Kalenjin in keeping with the practice by previous governments that were biased towards elites belonging to the tribe from which the president hailed. Mount Kenya and the Rift Valley regions, code names for Kikuyu and Kalenjin respectively, held a combined 57,5 % of the 87 appointments that the Jubilee regime made within its nine months in office (*The Standard* 2014). This skewed distribution of positions in the government in favour of the elite from the two tribes did not change in subsequent appointments.

Kikuyu and Kalenjin kleptocrats, mostly former mandarins in previous regimes and operating under the aegis of Kikuyu and Kalenjin elders, endorsed the Jubilee coalition and mobilised their respective communities to support it, despite the two communities having intermittently fought over land in the Rift Valley region during Kenya's multiparty period; the most damaging being after the 2007 disputed presidential elections. It shows how economic interests and quest for political survival transformed personal legal challenges into burdens of entire communities and greatly influenced the trajectory of national politics. This was a classic illustration of political instrumentalisation of disorder defined as, "the process by which the political actors in Africa seek to maximise their returns on the state of confusion, uncertainty, and sometimes even chaos" (Chabal and Daloz 1999:xviii). In the run up to the elections, Kenyatta described the ICC legal woes as "a personal challenge" (*Capital News* 2013c), but once in office he turned it into a Kenyan issue, making it appear as if the country was on trial.

Why was victory for Kenyatta and Ruto so significant during the 2013 elections to the extent that they had to apparently forget in a hurry the violence of 2007-2008 and close ranks? This amnesia is not aberrant in the sense that it is deliberately institutionalised in the country's body politic.

Firstly, had they lost the elections, they would have found themselves at the mercy of their nemesis, Odinga, an opponent who accused Kibaki and the electoral body of acting at the behest of fellow plutocrats and robbing him of victory in the 2007 elections. In return, Kenyatta and Ruto accused Odinga of framing them at the ICC.

Secondly, an electoral loss would have exposed Kenyatta and Ruto to influential global actors, notably the US, Britain and France, three among the five permanent members of the UNSC that supported the ICC trials. A potentially hostile government and less friendly international community would have drastically robbed Kenyatta and Ruto of political space for manoeuvre with regard to the ICC cases. Therefore, they could not contemplate a situation in which they confronted the ICC challenge without control over state apparatus.

Winning the elections, in effect, was not an option, but a must, even if by fair or foul means. This rendered the electoral contest uneven, bearing in mind support from the incumbent, Kibaki, whose interest in the cases was not in doubt. He was adversely mentioned during the confirmation of charges hearings at the ICC in connection with alleged State House meetings in which retaliatory attacks against Orange Democratic Movement (ODM) supporters drawn predominantly from Luhya, Luo, and Kalenjin tribes were planned (ICC 2012; ICC 2015). Mamdani's observation summed up how high the stakes were in Kenya's 2013 elections, "[I]ed by individuals who stand charged before the ICC, one side of the electoral contest could not contemplate defeat; if defeated, they would lose all" (*Sunday Nation* 2013).

8. CONCLUSION

The ICC cases got enmeshed in Kenya's tribal politics, brought the country to the fore in international relations, and forced the country's embattled plutocrats to engage in diplomacy in a manner hitherto not witnessed before. It even forced the Kenyan government to devise a foreign policy framework, the first in the country's postcolonial history. However, Kenya's foreign policy has not substantially changed since independence in 1963. Domestically, this foreign policy is undermined by divisive tribal politics, thus Kenya's inability to make headway at the UNSC save for pyrrhic victories at the ASP.

The article argues that the ICC legal challenge posed a threat to Kenya's indigenous capital since Kenyatta, one of the indictees, represents the local plutocracy that has exploited state power to gain kleptocratically. Power in Kenya is still locked within the conservative section of country's political elite that has had strong ties with the West, and this is not about to change despite an alliance with the East, a byword for China. Coupled with ethnicity, the ICC issue will continue influencing Kenya's politics for years to come, even after the cases have been concluded. Pointedly, Kenyatta was not acquitted and so, in the event new evidence is found, the case against him could be revived. The article has demonstrated that the ICC issue was exploited for political expediency by a section of Kenya's politicians in a polity in which political competition is not anchored in crosscutting ideological parameters other than the ideology of tribalism.

The ICC was initially hailed across Kenya's ethnic divide as a welcome, if not, revolutionary intervention in the country's violently disputed presidential elections during 2007-2008. However, international criminal justice nestled in tribalism, trumped efforts towards attainment of sustainable peace, justice, healing and reconciliation. Kenyatta and Ruto exploited the ICC cases and took them to the court of public opinion composed of Kikuyu and Kalenjin supporters, their respective ethnic groups. It paid off after they controversially won the disputed 2013 elections running under the "coalition of the accused".

Although the Rome Statute established the ICC as a permanent legal institution to address the highest forms of crimes, that is war crimes, crimes against humanity, and genocide, the court has to grapple with realpolitik and geopolitics. The controversial election of Kenyatta and Ruto on a joint presidential ticket, despite facing the most heinous of crimes, the first the world over, exposed the limitations of international criminal justice, especially as envisaged under the ICC, until then viewed not only in Kenya, but also elsewhere in the world as the bulwark against impunity. Kenya's plutocracy have exhibited the capacity to fight back against international criminal justice by diplomatically canvassing support across Africa against the ICC through a specious form of Pan-Africanism,

thus underscoring the daunting task that confronts Kenyans with regard to state restructure and reform. Kenyatta and Ruto won the propaganda war against their rivals at home and abroad by being controversially elected into the presidency. As to whether the ICC albatross, coupled with ethnicity, is enough to sustain their regime, only time will tell.

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