

'Changing Faces' on Acceptance of International Criminal Intervention in Kenya

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INTERNATIONAL
NUREMBERG
PRINCIPLES
ACADEMY

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1. Introduction

The unprecedented violence during Kenya's 2007/8 post-electoral crisis unearthed deep ethnic divisions within the country's social fabric. As Njonjo Mue points out, 'Kenya had created a façade by externally projecting its alignment with Western democratic ideals, whereas internally, it was a country at war with itself'.² The PEV exposed weak institutional structures in Kenya that could not resolve the underlying group differences, which in turn led to violence. One example is the Orange Democratic Movement (ODM), which contested the presidential election results and subsequently called for mass action, with some supporters resorting to violence due to a lack of trust in the judiciary. Another is the Party of National Unity (PNU). A section of the ruling elite of the PNU resorted to state-sanctioned violence involving police brutality against protestors and the *Mungiki* militia in retaliation for attacks.³ Mue concludes that the 2007 PEV was a moment of reckoning, since the Kenyan state was dysfunctional, and had great internal contradictions. Kenya was initially perceived to be peaceful and democratic in a turbulent neighbourhood, whereas internally, group grievances were escalating with little being done to resolve them. The PEV provided a stimulus to rethink the transition from conflict to a more democratic and peaceful society.

The violence affirmed the view that beneath Kenya's peace lies deep ethnic resentment which political actors occasionally appropriate for their own ends.⁴ Politically instigated violence began in 1991 with the state suppressing demands for pluralism, and the advent of multi-partyism in 1992 was accompanied by ethnic cleansing in the Rift Valley to disenfranchise groups that were perceived as opponents.⁵ Similar trends of ethnic violence and displacement were seen in the 1997 elections in the Rift Valley and the Coast, with accompanying impunity (Oyugi, 2000). Despite the recommendations for criminal prosecution by commissions of inquiry, domestic authorities failed to act.⁶

The 2002 elections were surprisingly peaceful, due in part to dwindling support for the then ruling party, the Kenya African National Union (KANU), and the emergence of the National

¹ Geoffrey Lugano is a PhD candidate at the University of Warwick, United Kingdom.

² Personal interview with Njonjo Mue, Nairobi, October 9, 2015.

³ Waki Report on PEV and KNCHR report 'On the brink of the precipice'.

⁴ Kenya has over 43 different ethnic identities. Although they occupy distinct territories, there are also cosmopolitan locations. The 2009 national population census ranked the Kikuyu and Kalenjin among the largest ethnic groups.

⁵ For over two decades, Kenya operated as either a de jure or de facto one party state under the dictatorial KANU regimes of Kenyatta and Moi.

⁶ See Akiwumi Commission, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya* on investigations into the 1992 land clashes, and parliamentary report on the violence (Kiliku report).

Rainbow Coalition (NARC) on a platform of institutional reforms and redress for historical injustice. However, NARC's inability to embark on reforms saw the return of violence. This involved fragmentation along party lines, political mobilisation on ethno-regional patterns, and ethnicization of the state, which all fed into growing negative ethnic sentiments and tensions that grew in the run up to the 2007 elections: 'the 2007 election was as much about what one might call exclusionary ethnicity and who would not get power and control the state's resources as it was about who would' (Lynch, 2008, 557). The election campaign was hotly contested between Kibaki's PNU and Odinga's ODM, with Musyoka appearing a distant third in opinion polls.⁷ The Committee of Experts (2011, 16) concludes that 'a tragic result of the unfinished constitutional agenda was the 2007/8 PEV which brought the country to the edge and necessitated the intervention of the African Union (AU)'.

The Waki Commission estimated that about 1,300 civilians were killed and 350,000 people displaced (though this figure was adjusted by the Government in July 2009 to 663,921⁸), marking it the most severe incidence of violent conflict in Kenya's post-independence history.⁹ Consequently, several actors including victims, political leaders, a cross section of the non-affected population, and Civil Society Organisations (CSOs) raised concerns on the need for accountability to prevent any repetition. Some political leaders suspected of involvement in the violence were not keen on pursuing accountability. Likewise, Concerned Citizens for Peace (CCP) and some religious groups also desired peace as an end in itself.¹⁰ Kenyans for Peace with Truth and Justice (KPTJ), a coalition of human rights and governance groups, believed in peace as an outcome of truth and justice.¹¹ Consequently, part of KPTJ's victory over the peace group in the Kenya National Dialogue and Reconciliation (KNDR) process was its presentation of long term solutions to the crisis.¹² These included addressing historical injustices, unemployment, land issues, institutional reform, and criminal accountability for the PEV. The peace group's goal ended in Agenda Item 1 of the mediation process; namely, 'immediate action to stop the violence and restore fundamental rights and liberties'.¹³ KPTJ's vision for resolving the crisis was finally reflected in Agenda Item 4, 'Addressing long-term issues, including constitutional and institutional reforms, land reforms, poverty and inequalities, youth unemployment, national cohesion, transparency and accountability'. The significance attached to criminal accountability was realised in the establishment of the *Commission of Inquiry into the Post-election Violence* (Waki Commission) that recommended a special tribunal and the potential ICC intervention in case of domestic inaction.

As a party to the Rome Statute,¹⁴ Kenya voluntarily submitted to the Rome system of justice. Burke-White (2008, 57) observes that the Rome system commits both domestic and

⁷ For example, in the Steadman poll, Odinga was placed at 46 percent compared to Kibaki's 42 percent. Similarly, Consumer Insight and Strategic Research showed Odinga had 43 percent while Kibaki had 39 percent. Finally, Infotrak Harris revealed that Odinga was ahead with 43.7 percent and Kibaki 39.2 percent, see Mail and Guardian, 2007.

⁸ See for example Lynch, 2009.

⁹ See the *Commission of Inquiry into Post election violence report* (Waki Commission) on the account of the 2007/8 post electoral crisis in Kenya.

¹⁰ Personal interview with former KPTJ official, Nairobi, 22 September 2015.

¹¹ According to KPTJ, there is no peace without truth and justice - truth and justice for the failed presidential election and ensuing violence.

¹² Personal interview with former KPTJ official, Nairobi, 22 September, 2015.

¹³ Ibid.

¹⁴ Kenya ratified the Rome statute in March, 2015.

international levels of governance to interrelated obligations of accountability for heinous crimes. Thus, under the principle of complementarity, Kenya was obliged to commence domestic investigations and trials for the violence, and failure to do so would transfer jurisdiction to the ICC. Since the ICC's intervention in 2010, its acceptance in the country can perhaps be assessed through the changing legal and political actions that reflect the elite's tolerance of, commitment to, and compliance with the obligations of the Court. For the purposes of this discussion, acceptance implies legal and political actions that reflect tolerance of, commitment to, and compliance with the obligations of ICJ. Rather than being seen as a final outcome, acceptance here is observed at certain points in time, is contingent, and can therefore change depending on circumstances.

This chapter seeks to assess the ICC's acceptance by the political elite. First, the immediate post-conflict phase was accompanied by acceptance wherein several actors, including political leaders, tolerated the ICC's jurisdiction. Second, the pre-trial and trial phase was accompanied by a reversal of this acceptance by some (the accused and their allies), while others (in the ODM) contested this reversal. The reversal was characterised by a raft of overt political and legal options that negated commitment to the ICC. Commitment was shifted to case termination, without the domestic prosecutions that complementarity demands. To justify reversal, two of the accused (Kenyatta and Ruto) opted for what Subotic (2009) refers to as the 'politics of hijacked justice', negating compliance with the Rome system of justice. They formed the Jubilee Alliance that reframed the ICC intervention as neo-colonialism and a performance of injustice (Lynch, 2013). These contradictions then beg the questions of how the acceptance has changed over time, and how and why the dominant discourse on ICJ is informed by the interests of political leaders.

This chapter argues that in Kenya, dynamics of acceptance depend on the individual interests of political leaders. Current dominant discourses occasioned by the 'politics of hijacked justice'¹⁵ are parallel to formal state compliance. The argument builds on Subotic's (2009) politics of hijacked justice. She argues that, in domestic spaces, international institutions are simply adopted to show compliance with international norms although there is often the absence of propagating normative domestic changes. Consequently, Subotic argues, the original goals of international norms are subordinated to ulterior state strategies, as justice becomes hijacked, with a preference for domestic political mobilisation. International norms diffuse into existing domestic political culture with local political actors as the promoters of the norms, communicating them to domestic audiences. Thus, the adoption of norms in the domestic space is susceptible to appropriation by those actors for various motives. Consequently, international norms and resultant institutional models form part of domestic political struggles as local actors use them for narrow political gains.

For instance, Kenya ratified the Rome Statute and the National Assembly went on to pass implementing legislation. However, domestic authorities were unable or unwilling to explore complementarity as a first resort to the 2007/8 PEV. Essentially, they were unwilling or unable to comply with Waki's recommendations and the Office of the Prosecutor's (OTP) requests to

¹⁵ For politics of hijacked justice, see Subotic, 2009.

begin domestic trials. The ICC's intervention resulted in the state's determination to lapse the cases. In the end, ICJ was reinterpreted by the affected political leadership into dominant neo-colonialism discourses and brought into Kenya's political culture of ethnicity and Horowitz's 'alliances of convenience'.¹⁶ It is clear that the ICC's intervention was an instrumental factor in bringing the co-accused (and their communities) together in an alliance 'against a history of a divided Kalenjin/Kikuyu vote and election-related violence (Lynch, 2013).

The chapter draws on extensive fieldwork in Kenya from September to November 2015. The author conducted more than 20 interviews with political leaders, civil society activists, journalists, and government officials. Evidence was also drawn from previous observation of political campaigns, as well as from secondary literature, government and non-government publications, and media reports. To ascertain changing public perception of the ICC over time, the research relied on data from the KNDR monitoring project by South Consulting. The monitoring project aimed at 'assisting in objective and independent monitoring of how each agenda item was being implemented' (South Consulting, 2009, 2).

The first part of this chapter maps formal state compliance with the obligations under ICJ. It then examines the internal contradictions on acceptance orchestrated by the political leadership. This begins with the initial tolerance of the ICC's potential role in the PEV by several actors, including the political elite. Acceptance was reversed and the cases terminated, with suggestions of alternatives to the ICC, and finally the Court's deligitimization using national and regional neo-colonialism discourses.

2. State Compliance

The Kenyan state demonstrates formal compliance with the obligations of ICJ.¹⁷ Kenya ratified the Rome Statute in March 2015, after which the National Assembly passed its implementing legislation, the International Crimes Act 2008. The Act defined core crimes in domestic legislation and enabled Kenya's cooperation with the ICC. The ICC Assembly of State Parties (ASP) report of the Committee on Budget and Finance (2015) lists Kenya, alongside Ghana, Namibia, South Africa, and Madagascar, as the only African countries that settled their 2014 financial dues. Moreover, Kenya consistently engages with the ASP and files applications with the ICC. The CICC (2006) observes that Kenya publicly rejected the US's offer of the Bilateral Immunity Agreement (BIA) despite the risk of losing \$9.8 million in aid. Kenya also allows the ICC's investigators inside the country and had it establish an outreach office in Nairobi. Kenyan suspects also comply with the Court's summonses to appear for trials and engage defence counsel.

Despite formal state compliance, the political leaders' interests at particular moments provide insights into the extent to which the ICC is accepted in the country, with implications for acceptance amongst the wider population. Thus, in Kenya, acceptance is signalled by mixed perceptions of their tolerance of, commitment to, and compliance with, the obligations of the

¹⁶ See Horowitz, 2008.

¹⁷ Personal interview with Chris Gitari, Nairobi, 7 October 2015.

ICC. These can be described as shifting position, with acceptance in the immediate post conflict phase and then reversal in the pre-trial and trial phases.

3. Immediate Post-Conflict Phase - Acceptance

The immediate post-conflict phase revealed the reality of the scale of atrocities that had been committed. Memories were still fresh, as were detailed accounts of the nature of the violence as documented by the Waki Commission and the Kenya National Commission for Human Rights (KNCHR).¹⁸ As a result, concerns from various groups (victims, politicians, non-affected populations, CSOs) for criminal accountability to prevent recurrence encouraged acceptance of the ICC. Various actors were tolerant of the potential role of the ICC in the crisis, partly due to the perceived inability or unwillingness on the part of domestic authorities to prosecute the perpetrators. In this regard, the KNDR review report for October to December 2009 concludes that Kenyans were generally supportive of prosecution, including by the ICC, of those who were responsible for PEV (South Consulting, 2010). More importantly, almost half of the population living in violence hotspots (57 percent of respondents) indicated their support for trials even if senior community members were indicted.

For their part, political tolerance of the ICC's intervention was reflected in National Assembly and other debates on the potential role of the Court vis-à-vis a special hybrid tribunal. In the end, efforts to establish the tribunal failed, partly due to political calculations at the time.¹⁹ To some, the tribunal was too expensive and was thus not a priority, whereas others argued that it could be used to shield some powerful individuals from prosecution. It was also argued that it would be used to target political opponents.²⁰ There were also concerns over whether the tribunal would be effective, mindful of the previous instances of impunity and manipulations in ordinary national courts.²¹ Some members of the political elite (including Kenyatta and Ruto) prioritised international intervention over a local process (NTV Kenya, 2011). In their preference for the ICC, they adopted the slogan 'don't be vague, go to The Hague'.

However, the political elite's tolerance for the ICC was not entirely premised on genuine concerns for accountability. Some affected members of the political elite prioritised the ICC because it was a distant reality, due to little activity at the ICC at the time with few investigations and few suspects in custody.²² Some were also unfamiliar with how the Court works and hence did not understand its implications.²³

Due to Kenya's choice of The Hague and failure to establish a local tribunal, the OTP announced intentions to open investigations, and the Kenyan government promised to cooperate with the ICC (Human Rights Watch, 2011). In November 2009 the OTP filed a 'Request for authorisation of an investigation pursuant to Article 15', requesting the chamber 'to authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the

¹⁸ See 'On the brink of the precipice'.

¹⁹ See Hansard report, 2011 for more debates on setting up a domestic mechanism for PEV.

²⁰ Personal interview with KANU youth leader, Nairobi, 22 September 2015.

²¹ Personal interview with ODM politician, Nairobi, 23 September 2015.

²² Personal interview with ODM politician, Nairobi, 23 September 2015.

²³ Personal interview with Central Kenya politician, 23 September 2015.

PEV of 2007/8' (ICC, 2010, 4). Then on March 31, 2010, Pre-Trial Chamber II, in a majority decision, allowed the Prosecutor's request to open an investigation *proprio motu* in Kenya (ICC, 2010).

4. Pre-Trial and Trial Phase - Reversal of Acceptance

In December 2010, the OTP submitted two applications under Article 58 of the Rome Statute requesting the issue of summonses for six individuals in Kenyan. These were: Joshua Sang (radio journalist), William Ruto (minister), and Henry Kosgei (minister) (case1, ODM); and Hussein Ali (Police Commissioner), Uhuru Kenyatta (Deputy Prime Minister and Minister for Finance), and Francis Muthaura (Head of Civil Service and Secretary to the Cabinet) (case2, PNU) (ICC, 2010). The summonses were issued on March 8, 2011, and all six suspects appeared before the Pre-Trial Chamber II on April 7 and 8, 2011 (ICC, 2010).

Despite perceived compliance by obeying the summonses, the indictment occasioned the reversal of earlier acceptance, wherein the PNU leadership opted for a raft of overt political and legal options intended to terminate the cases. However, this reversal was contested by the ODM, and the accused employed Subotic's (2009) 'politics of hijacked justice' to justify the reversal. Perhaps, the initial indication of Kenya's commitment to its obligations to the ICC was the invitation to Sudanese President Omar al-Bashir to attend the 2010 Constitution promulgation ceremony. With an ICC indictment, Kenya was obliged to arrest al-Bashir and hand him over to the Court. It failed in this duty, since al-Bashir was a state guest received by cabinet ministers and his security was guaranteed (Lulechi and Otieno, 2010). The al-Bashir question hinted at the extent of Kenya's commitment to and compliance with its obligations under the Rome system of justice. It thus provided an early indication of future engagement with the ICC on the part of the state and the affected political leadership.

5. Options for Case Termination

The state and the affected political leaders considered a raft of overt political and legal options that negated their commitment to the ICC. The intention shifted to terminating the cases, but without domestic prosecutions. The first effort to terminate the cases was made in the National Assembly, where a motion to repeal the International Crimes Act was passed to sever Kenya's ties with the ICC. The motion sought to 'release Kenya from implementing any obligation of the Rome Statute' (Hansard, 2010, 30). Nonetheless, the state did not act on Parliament's advice, perhaps because even after withdrawal the trials would still have proceed and the measure would take a year to be effective.

Owing to the unhelpfulness of attempts at termination, Kenya explored the possibility of a deferral (stipulated in Article 16 of the Statute) with the help of regional and international actors. The first resort was shuttle diplomacy to the African Union (AU), individual African countries, and the UN Security Council (UNSC) to support Kenya's deferral agenda (Daily Nation, 2011). President Kibaki wrote to the UNSC in February 2011 arguing that two of the Kenyan ICC suspects (Kenyatta and Ruto) were front-runners in the Presidential race and hence their prosecution posed a 'real and present danger' to the country's security (Gekara, 2012). Referring to Article 16 of the Rome Statute, his petition appealed to the UNSC for a one year

deferral to enable the country to organise local judicial mechanisms to try the cases. The ODM (allied to Odinga) also wrote to the UNSC, but advising against acting on Kenya's deferral request. The UNSC rejected the request, having found no evidence of a threat to international peace and security (UNSC, 2011). Instead, it advised Kenya to challenge the admissibility of the case and the jurisdiction of the Court under Article 19 of the Rome Statute (ibid).

Pursuant to Article 19, Kenya filed an admissibility challenge against its two cases in March 2011. It is clear that the decision to file the admissibility challenge was not made in good faith, being an afterthought after the UNSC declined the deferral request and its subsequent advice. This lack of good faith is also apparent in Kenya's argument in its admissibility challenge that it had enacted a new Constitution and embarked on institutional reforms, hence it had the ability to conduct domestic trials (ICC, 2011a). Despite the reforms, there was still domestic inaction and no realistic prospect of trying Kenyatta and Ruto in domestic courts. Kenya also argued that under the principle of complementarity it had primacy of jurisdiction, but MPs resisted efforts to establish a local tribunal with the slogan 'don't be vague, go to The Hague'. Pre-Trial Chamber II came to the same conclusion when determining the admissibility challenge, concluding that:

'The Government of Kenya relied mainly on judicial reform actions and promises for future investigative activities. At the same time, when arguing that there are current initiatives, it presented no concrete evidence of such steps.' (ICC 2011b, 23)

The Chamber reported that, out of the 29 annexes presented, only three seemed to bear direct relevance to the investigative processes. Kenya demonstrated its commitment to case termination by appealing the decision in June 2011. The Appeals Chamber arrived at the same conclusion as Pre-Trial Chamber II, and dismissed the appeal (ICC, 2011c).

The commitment of the cases to full trial rejuvenated interest in domestic and regional alternatives to the ICC that were inapplicable (and still are) to jurisdiction on international crime. First, Kenya announced its intention to create an International Crimes Division (ICD) within the High Court to deal with the PEV. However, a former judiciary official revealed that the government was quite dishonest and only arrived at the decision to help them transfer the cases to the country.²⁴ Similarly, Ndun'gu Wainaina opined that the government was insincere and only reacted to the ICC because, despite having evidence, it had shown no will to address the issue earlier (cited in Aluanga, 2012). The ICD is not yet operational, notwithstanding its initial expectation of trying close to 5,000 PEV cases.²⁵ Second, Kenya considered transferring the cases to the East African Court of Justice (EACJ). However, as Murungu (2009) argues, Articles 1 and 17 of the Rome Statute confer complementarity to national institutions, but not to regional ones. In this case, the ICC and the EACJ would be competing for jurisdiction, which begs the question of how Kenya would comply with its obligations to the ICC vis-à-vis, the EACJ. The KNCHR challenged the move, citing it as a ploy by the Government to protect 'politically influential suspects' (Jamah and Ogutu, 2012). The move to add additional protocols to the EACJ

²⁴ Personal interview with former Judiciary official, Nairobi, 22 September 2015.

²⁵ Ibid.

for only four suspects was not in the interest of justice, besides the fact that Kenya had earlier challenged the Court's jurisdiction on a case of human rights abuses by its security forces (ibid).

All these legal and political options demonstrate commitment to case termination, beginning with severing Kenya's ties with the ICC, the deferral request, the challenge to admissibility, and finally considering domestic and regional alternatives to the ICC. However, both alternatives to the ICC (ICD and EACJ) were abandoned, and the suspects continued to appear at the ICC hearings.

The two omissions are perhaps indicative of acceptance of the ICC as an institutional framework with the ability and willingness to try domestic actors for international crimes. The KNDR monitoring report for January 2012 concludes that the public perception was that the government was unwilling to conduct genuine investigations, explaining their considerable support for the ICC processes. Parallel to the commitment to case termination was an active phase of politicisation of the ICC's intervention as neo-colonialism to justify the politicians' change of view on acceptance.

6. Politics of Hijacked Justice

As the state sought legal and political options to terminate the cases, Kenyatta and Ruto employed what Subotic (2009) referred to as the 'politics of hijacked justice' to justify their reversal of acceptance, negating compliance with the Rome system of justice. By hijacking justice at The Hague they (at least within their constituencies) blurred the distinction between a judicial process and a political issue.²⁶ Thus, in the pre-trial and trial phases, the Court became part of the domestic political struggles; it formed an agenda item in political campaigns and was used to mobilise ethnic constituencies and form a coalition, the Jubilee Alliance. After forming a government, the Jubilee Alliance embarked on a national and regional agenda to delegitimise the ICC and circumvent justice, again negating compliance with the obligations of the ICC.

They portrayed the ICC as unjust, an affront to Kenya's sovereignty, and a tool of Western neo-colonialism (Lynch 2013). The discourse of neo-colonialism became dominant owing, at least in part, to the West's visible support for the Court financially, logistically, and in policy positions abroad, and Africa's history of domination by the West through colonialism and slavery. This 'alliance of the accused' (Lynch, 2013) recounted historical narratives of British colonialism in Kenya that was bedevilled with injustice, and the struggle of African people for independence.²⁷ Essentially, the ICC intervention was linked to the re-emergence of Western domination of Africa through targeting its leaders while ignoring other serious conflicts, and portrayed a need for the Kenyan people to safeguard their withering sovereignty. The Jubilee Alliance framed the 2013 election as a referendum on the ICC to rally their supporters²⁸ and to show the population's defiance of the ICC and its neo-colonialism.²⁹ Any voices in support of the ICC intervention (foreign diplomats, CSOs, or political leaders) were accused of propagating the

²⁶ Personal interview with Walter Menya, Nairobi, 29 September 2015.

²⁷ Personal interview with CORD official, Nairobi, 1 October 2015.

²⁸ Personal interview with Chris Gitari, Nairobi, 7 October 2015.

²⁹ Personal interview with Kericho youth leader, Nairobi, 5 October 2015.

neo-colonialist agenda. Public statements by foreign diplomats such as 'choices have consequences' (the US Deputy Assistant Secretary of State for African affairs) and 'minimal contact with the ICC suspects' (a UK diplomat) played into Jubilee's arguments of Western interference.³⁰ As Lynch (2013) argues, Jubilee's main challenger in the Presidential election, Raila Odinga of the Coalition for Reforms and Democracy (CORD), was also portrayed as advancing the neo-colonialist agenda because of his support for the ICC, and because his party (the ODM) had written to the UNSC advising against acting on Kenya's deferral request.³¹ Similarly, civil society activists supporting the ICC were labelled the 'evil society' and 'agents of neo-colonialism'.³²

The neo-colonialism discourse was furthered by the African grievance of the selective reach of the ICC on the continent. Despite the global spread of armed conflicts and the associated commission of heinous crimes, all nine cases before the ICC were from Africa: Uganda, Democratic Republic of Congo, two Central African Republic situations, Kenya, Ivory Coast, Mali and Libya. A study by Straus (2008) reveals that large scale politically instigated conflicts in Sub-Saharan Africa are on the decline, and the data relieves the region of the tag of the most war endemic area, both in duration and intensity. Evidence points to Asia and the Middle East as the most conflict prevalent areas. For example, the repercussions of the recent Syrian, Palestinian, and Yemeni conflicts were worse than most of the African conflicts. On its website, the ICC also lists Colombia, Nigeria, Georgia, Guinea, Honduras, Iraq, and Ukraine as under preliminary examination, although it is still unclear whether it will proceed with these cases. However, most of the African situations met the admissibility test of inability or unwillingness to prosecute the most serious crimes, and hence the suitability of international criminal intervention. As Bosco (2014) argues, given the initial US aggressive policy to delegitimize the Court, the ICC avoided situations that implicated the US and other powerful states to avoid confrontation and entanglement as part of institutional legitimation. Consequently, the ICC was cautious and restrained, and focused on situations in African countries that would accept the Court's jurisdiction.³³ The limitations of the ICC provided potential entry points for the calculations of domestic political leaders. They had incentives to politicise the ICC intervention in Kenya as neo-colonialism, including communicating to domestic audiences the skewed focus of the Court as targeting Africans while ignoring other serious conflicts. These arguments gained currency amongst targeted audiences who were unaware of the constraints on the ICC.³⁴

The affected politicians also used their ICC predicament to mobilise ethnic constituencies, and consequently strengthened their domestic support base. Kenyatta, Ruto and their allies formed the Kikuyu, Kalenjin, and Kamba (KKK) Alliance in which they mobilised ethnic constituencies in 'prayer rallies' (ICG, 2012). The KKK Alliance was later transformed into the G7 Alliance to accommodate more fringe groups. This 'alliance of the accused' finally went into the elections as the Jubilee Alliance, with Kenyatta and Ruto as President and Deputy, and the ICC as the

³⁰ The statements were meant to caution Kenyans against electing the ICC accused.

³¹ Odinga previously supported a local tribunal, but after the ICC intervention, he voiced his support for the court process.

³² Personal interview with Ndun'gu Wainaina, Nairobi, 8 October 2015.

³³ Africa presented situations that would both fail the admissibility test and offer relative ease of access to ICC.

³⁴ Personal interview with TNA Activist, Nairobi, 25 September 2015.

adhesive that held its leadership together on a neo-colonialist ideology.³⁵ They also appropriated traditional authorities to legitimise their leadership in their respective communities. In March 2012, the Gikuyu Embu Meru Association (GEMA) held a consultative conference of GEMA communities and endorsed Kenyatta as the region's flag bearer in the forthcoming elections (Kariuki, 2012). The group, at least in the media, also petitioned the ICC to postpone the Kenyan cases. It resolved to collect over two million signatures from Kenyans to support their petition and, if necessary, refer the matter to the UN General Assembly. Similarly, the Kalenjin, Maasai, Turkana and Samburu Alliance (KAMATUSA) converged appointed William Ruto as the group's spokesman and endorsed his political ambitions (Komen and Koech, 2012). This group resolved to collect three million signatures to petition the ICC for a deferral.

The KNDR 2013 monitoring report concluded that although there was considerable public support for the ICC prosecutions, it had declined significantly in the home regions of the accused (South Consulting, 2013). The report also observed that, over time, the high demand for prosecutions before the ICC indictment was alternated with politics and ethnicity, thus obfuscating debates on accountability.

7. National and Regional Discourses on the International Criminal Court

After winning the 2013 elections and consequently forming the government, the Jubilee Alliance embarked on nationalism and regional Pan Africanism to delegitimize the ICC and circumvent justice. First on the agenda was restricting the voices in civil society that were championing accountability. Efforts included the government's promotion of legislation that restricted funding to CSOs. Although Parliament rejected the bill following national and international pressure, 'it illustrates the political environment in which CSOs [were] henceforth operating in Kenya' (FIDH/KHRC, 2014, 6). Similarly, Hansen and Sriram (2015, 11) opine that with two of the ICC suspects in power, activists had little resolve to pursue international justice. Second, in September 2013 the National Assembly (with a Jubilee majority) again passed a motion requiring Kenya to withdraw from the Rome Statute. Although the vote did not halt the cases, Gabriel Gatehouse notes that 'it sent a powerful signal of defiance to The Hague – a sentiment that is becoming increasingly popular, in Kenya and across much of Africa' (cited in BBC, 2013). The motion to withdraw Kenya from the Rome Statute read in part:

'Aware that the Republic conducted its general elections on the 4th of March 2013 at which the President and Deputy President were lawfully elected in accordance with the Constitution of Kenya; further aware of a resolution of the National Assembly in the Tenth Parliament to repeal the International Crimes Act and to suspend any links, cooperation and assistance to the ICC; this House resolves to introduce a Bill within the next thirty days to repeal the International Crimes Act and that the Government urgently undertakes measures to immediately withdraw from the Rome Statute of the ICC' (Nation, 2013, 1).

³⁵ Personal interview with key informant, Eldoret, 4 November 2015.

Second, in public spaces the ICC is consistently attacked as a Western institution that is unnecessarily intruding in Kenya's sovereign space. It is argued that, since Kenyans had elected the Court's suspects, they should be 'left alone and move on'.³⁶ In the same vein, the political elite continues to hold 'ICC prayer rallies' in which the dominant discourse is how the Court is a neo-colonial tool, an affront to Kenya's sovereignty, and a demonstration of injustice. For example, in one of the rallies in Kuresoi in September 2015, almost 100 Jubilee MPs expressed their 'shock at the conduct, mischief and machinations at the ICC' (Kiplangat, 2015). At the rally the Senate majority leader Kithure Kindiki vowed that they would fight the cases 'in the land, sea, air, in the forest and deserts' (ibid.). The arguments that the ICC is unjust an unnecessary intrusion are best illustrated in recent debates on who saw to it that Ruto faced trials and lost on *why* and *how* Kenyan cases found their way into the ICC, and the significance of the trials in confronting Kenya's past and preventing repetition (see, for example, Citizen TV, 2015; NTV, 2015; Leftie, 2015; The Standard, 2015; Wafula, 2015; Shiundu, 2015; Otieno, 2015).

The regional pan-Africanism against the ICC holds the view that the Court is unfairly targeting Africans because of their race. This argument is advanced within the East African Community that brings in Kagame and Museveni in dismissing the Court,³⁷ as well as the AU and some individual African states. Due to Kenya's influence, an Extraordinary Session of the Assembly of the AU was convened in October 2013 before President Kenyatta and his Deputy resumed their ICC trials. Consequently, the AU arrived at a non-cooperation policy with decisions from with the ICC. In this vein, the AU resolved 'to undertake consultations with UNSC, concerning AU-ICC relationships, including the deferral of the Kenyan and Sudanese cases' (AU, 2013). Furthermore, the Assembly observed that 'no serving AU head of state should appear before any international Court [...] to safeguard stability and integrity of member states, and therefore, the trials of Kenyan leaders could undermine the country's sovereignty, stability, and peace' (AU 2013). In early 2014 the AU expressed 'its deep disappointment that the deferral to the UNSC was unsuccessful' and decided that 'African ASP members reserved the right to make further decisions to safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent' (AU, 2014). The effects of such policy positions were observed in Sudan's al-Bashir visits to Kenya, Malawi, South Sudan, Nigeria, and South Africa, and the lack of will to enforce his ICC arrest warrant. On the same note, the AU recalled the idea of extending the African Court of Justice and Human Rights' jurisdiction to try international crimes.

Despite the AU's call for non-cooperation, President Kenyatta and his Deputy continued to attend ICC trials, although they were excused from continuously attending Court sessions. Although Kenya initially pushed for immunity, it managed to lobby the ASP to amend the rules of procedure for that concession.³⁸ This reflects efforts to comply with the obligations of the Rome Statute. Despite this compliance, the OTP continuously complained about lack of state cooperation in turning over crucial evidence, and witness intimidation and interference in case 1 (involving President Kenyatta). Consequently, the OTP terminated Kenyatta's case, citing these reasons for not building a strong case. Similar concerns surround case 2 (involving the

³⁶ Personal interview with Kericho youth leader, Nairobi, 5 October 2015.

³⁷ Personal Interview with TNA Activist, Nairobi, 25 September 2015.

³⁸ Personal interview with former Judiciary official, 25 September 2015.

Deputy President), thus prompting the OTP to request the Court to use recanted evidence, part of the amendments to the rules of evidence and procedure.³⁹ The political elite of the Jubilee Alliance and their allies were also committed to Ruto's case termination, with the President lobbying the UNSC to terminate the case and over 190 MPs signing a petition to the UN seeking an end to the case (The Standard, 2015). The ICC judges finally passed a verdict on Sang/Ruto's 'no case to answer' motion as a mistrial, citing political interference and witness tampering (ICC, 2016)

In sum, the political and legal actions of Kenya's political leaders in relation to the ICC indicate mixed opinions on the Court's acceptance. On the one hand is outright defiance to the ICC including determination to see case termination, suggestions of alternatives to the ICC, and efforts to delegitimize the Court. On the other, they accommodate the ICC's demands in their actions of prudence and calculations within the confines of ICJ to minimise future damage to personal and political interests. Essentially, they play by the rules by appearing for hearings (despite AU resolutions on non-cooperation for which they lobbied), promise complementarity (national institutions like the ICD to try heinous crimes), and they were not quick to enforce Parliament's decision to withdraw from the Rome Statute.

8. Conclusion

From the Kenyan experience, it can be seen that to assess the acceptance of the ICJ we should ask the following questions. Is there formal compliance with the obligations of the ICJ at state level? If there is formal compliance, do actors tolerate international criminal intervention? If so, to what extent is there a commitment to and compliance with the obligations of the ICJ? How does elite commitment to and compliance with the obligations of the ICJ impact public perceptions on interventions?

As the Kenyan experience demonstrates, acceptance is contingent, and perhaps must be observed over time to ascertain how domestic actors interact with and react to international justice norms. Kenya is formally compliant with the obligations of ICJ, and ICC intervention was initially tolerated by many actors, including the political leadership, thus boosting the confidence of non-affected populations in the ICJ. However, after the ICC indictments, the state reversed its acceptance, seeking case termination in the absence of complementary domestic trials. Finally, the affected politicians hijacked proceedings and consequently changed the domestic discourse from international criminal intervention as accountability to it being neo-colonialism. The neo-colonialism discourse managed to change the perceptions of the ICC of a substantial proportion of the Kenyan population.

The ICJ can potentially be hijacked and consequently ensnared in domestic political struggles since the political leaders are the principal actors in opinion forming, having influence on acceptance amongst the wider population. In Kenya, despite earlier support for the ICC amongst the non-affected population, the Jubilee Alliance managed to reinterpret international criminal intervention as neo-colonialism, partly due to the selective reach of ICJ in Africa, the West's

³⁹ See Amendments of Rule 68.

history of colonialism, and Kenya's pervasive political culture of ethnicity. In the end, public perception on the ICC was altered (at least within their constituencies), as reflected in their election as President and Deputy despite the ICC cases.

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The opinions expressed in this publication are solely those of the author and do not necessarily reflect the views of the International Nuremberg Principles Academy.

To cite this chapter: Lugano, Geoffrey. 2016. "Changing Faces' on Acceptance of International Criminal Intervention in Kenya.' In *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, edited by Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa. Nuremberg: International Nuremberg Principles Academy.