Elections, Violence and International Criminal Justice: The Case of Kenya

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The March 4 general elections in Kenya attracted much international attention. The victory of Uhuru Kenyatta/William Ruto by the slimmest of majorities took most observers by surprise. Though widespread violence did not break out, potential for conflict remains. Soon after assuming office, Kenyatta and Ruto will head to The Hague to face charges at the International Criminal Court (ICC) for crimes against humanity committed in the aftermath of the 2007 elections. These events raise numerous questions on the actions of the international community and domestic actors since the crisis in 2007/2008, as well as on how the scenario will play out under very tense circumstances. To follow this unfolding situation, the first Käte Hamburger Dialogue, organised in cooperation with the German Development Institute (DIE), brought together German and international experts to discuss the process and outcome of Kenya’s 2013 elections as an example of the possibilities and limits of democracy promotion and violence prevention by the international community. In particular, it focused on the relationship and possible trade-offs between domestic stability, democratic elections and international justice.

The first Käte Hamburger Dialogue between Dr Ekuru Aukot, Advocate at the High Court of Kenya, former Chair of the selection panel that recruited the Independent Electoral and Boundaries Commission (IEBC) and former Director and ex-officio member of the Committee of Experts on the Review of the new Constitution of Kenya, Prof Stephen Brown, Associate Professor of Political Science at the University of Ottawa and Senior Fellow at KHK/GCR21 and Dr Gabrielle Lynch, Associate Professor of Comparative Politics at the University of Warwick was a lively discussion on the recent political events in Kenya and their potential implications for the international community. Chaired by Dipl. Pol. Angelika Spelten, Senior Researcher at the Institute for Development and Peace (INEF), the dialogue mainly centred on the questions of:
- whether Kenya is transitioning into a new period of political stability
- how to avoid a trade-off between peace and democracy
- and how to reconcile democracy with international criminal justice.

A political shift in Kenya

With regard to the first kick-off question, whether April 9th, the inauguration of the newly elected president Kenyatta, meant a new beginning for Kenya, Dr Aukot stated that the country has been in a state of renewal for two years now. Since the promulgation of a new constitution in 2010, which instituted a new governance structure, Kenya is undergoing a twofold transformation. This legal and political transition has led to high expectations among the population and entailed that both excitement and uncertainty currently prevail. Prof Brown
concurred that a political shift is taking place in Kenya. However, he equally sees potential for further violence in the future, in particular on the local level.

As to the topic of violence in Kenya, Dr Aukot expressed his astonishment about the degree of surprise in the international community at the relative peacefulness of the elections. Prof Brown and Dr Lynch, however, stated that the concern about post-elections violence was very well founded and that not only the international community but Kenyans themselves were worried about a new conflict. The outbreak of violence in 2007/2008, which caused the death of around 1,500 people and the displacement of more than 600,000, took many by surprise – as a result, this time, everyone prepared for the worst. Dr Lynch emphasised that some election-based violence did occur, particularly after the Supreme Court ruling on 30 March. However, a number of factors ensured that the elections were relatively peaceful, for instance, the new regulations on hate speech and incitement and the effective positioning of security forces.

**Peace vs. democracy?**

In response to the chair’s second question on whether there are lessons to be learned from Kenya’s elections, Dr Lynch asserted that the close monitoring of hate speech and the strategic location of security forces are important for other countries. However, she emphatically stressed that peace is not the only criterion for successful elections. The credibility of the elections is of equal importance. In Kenya’s recent elections, clear problems with the voting process emerged, in particular with regard to technology and vote counting. Yet, since everyone was very concerned with not destabilising the country, only few dared to ask critical questions. As a result, many Kenyans doubt that the elections were free and fair. They feel disappointed, disillusioned, and disenfranchised. Dr Aukot agreed that peace should not be ranked higher than democracy and Prof Brown added that the elections were not satisfactory just because they were relatively peaceful.

**Democracy vs. international criminal justice?**

While the three panellists agreed on the fact that peace should not be promoted at the expense of democracy, they presented slightly different views on the topic of the International Criminal Court (ICC). Prof Brown thought it was deplorable that it is possible to be credibly accused of crimes against humanity and still be elected president. He regretted that Kenyatta had not been held accountable for the post-election violence of 2007/2008 earlier, which could have prevented this situation. Dr Aukot in turn maintained that the elections in Kenya demonstrated that the international community cannot prescribe to a people who to vote for. The pending cases against Kenyatta and Ruto did not prevent the Kenyans from voting for their coalition. Dr Lynch
understood the international surprise about two ICC indictees getting elected but saw a possible explanation for this outcome in the fact that the Jubilee Coalition of Kenyatta and Ruto ran a much better campaign than the Coalition for Reforms and Democracy (CORD) of Raila Odinga and Kalonzo Musyoka. Jubilee conveyed an anti-ICC, anti-Western message and presented themselves as more dynamic than their opponents. Therefore, Jubilee was in control of the central narratives and was able to mobilise more people to register and to vote.

Dr Aukot went on to stress that international criminal justice should not work at the expense of democracy. He considered international criminal law and democracy to be like ‘oil and water’ and emphasised the need to construct democratic processes to accompany procedures of international criminal justice. He further asked whom the ICC is actually targeting. He wondered whether the ICC is looking only one way, not holding Western leaders accountable – for example Tony Blair or George W. Bush, for the crimes committed in Iraq. This debate is of high relevance not only for Kenya but for the entire continent. If the ICC exclusively prosecutes cases in Africa, it will lose its legitimacy and the confidence of Africans. Agreeing with Dr Aukot on this point, Dr Lynch emphasised the need for a constructive debate on the purpose of the ICC. However, she also pointed out that it was the Kenyan Parliament that went to The Hague. Prof Brown expanded on this point by stating that a hybrid tribunal consisting of international and Kenyan judges had been discussed as an alternative to the ICC after the post-election violence of 2007/2008. This proposal had been endorsed by the Kenyan Parliament unanimously. Yet, when the institution of such a hybrid tribunal became more probable, the ICC was argued to be more suited to deal with the crimes committed during the conflict. When the ICC solution became more probable in turn, a hybrid tribunal was favoured. Because of this seesaw, Prof Brown described the debate about the ICC as a hypocritical discourse being used in local politics.

Finally, the chair Angelika Spelten asked the three panellists whether they had any recommendations for Kenya. Dr Lynch was hesitant to give any concrete recommendations as she considered it problematic to give advice from the outside. She equally stressed that it is important to have multiple priorities and not to solely focus on one topic, such as peace. Other than that, she considered land reform, job creation, redistribution and devolution important steps to take. The latter constitutes one of the areas in which assistance could be useful, e.g. through capacity-building. Dr Aukot thought it was important to implement the spirit of the constitution and to evaluate the costs of the constitution and the new political system it builds. Many Kenyans have very high expectations but are not really aware of the costs a political reform entails. Prof Brown emphasised that donors should listen to what Kenyans have to say. In the same vein, they should be attentive to who claims to be speaking in the name of Kenya and who is actually speaking. He suggested working together with local
civil society and considering the checks and balances that are anchored in the constitution.

Discussion

After the lively dialogue between Dr Aukot, Prof Brown and Dr Lynch, the discussion was opened to the floor. Three main questions were raised during this session:

- Which role do donors play in Kenya?
- How do Kenya’s institutions perform?
- What is Kenya’s significance for the ICC?

On the role of the donor community, Prof Brown confirmed that we can observe the general pattern that in cases of violence and conflict, organisations that previously worked on democratisation shift to projects on peace-building. In a similar vein, donors often make empty threats, leaving their statements without consequences. Thereby, they lose credibility in the eyes of the Kenyans. For instance, Western donor countries threatened not to cooperate with Kenya’s President in case Kenyatta got elected. Once he had been confirmed as newly elected President, however, many Western representatives attended his inauguration. This diminishes the leverage of Western donors in particular.

Concerning Kenya’s institutions, Prof Lynch stated that we can observe disappointment in the judiciary among the population and Dr Aukot agreed that respect for the judiciary has to be restored. With regard to the Independent Electoral and Boundaries Commission (IEBC), Prof Lynch critically noted that although it conducted the registration process fairly well, many flaws and holes occurred during the election process. As a result, we still do not know the exact outcome of the elections. Besides the IEBC, she criticised the media, which probably should have questioned the elections more. Due to their role in the conflict of 2007/2008, they were very careful not to report on anything that could exacerbate the violence.

As regards the ICC, Dr Aukot stated that it has to be more equitable as to what counts as a crime against humanity and that the people have to consider it a fair institution. He also posed the question of to whom the court is actually accountable. Subsequently, it was agreed among the panellists that not only does the ICC have importance for Kenya, but Kenya is also a very important case for the ICC. If the Kenyan case ends without convictions, the ICC will be decisively damaged.
Wrap-up

After the Q&A session, Dr Julia Leininger wrapped up the panel and floor discussion by picking out three central points. First, she retained from this dialogue that politics in Kenya has to be reformed. A crucial point in this context is that the focus of reform should not lie exclusively on matters of peace. Similarly, it is important to listen to what Kenyans have to say and moreover, the costs of the new Constitution should be calculated and made known among the population. Second, she highlighted the importance of considering the potential relation between peace and security in Kenya. The third key theme of the Dialogue was the ICC and the question of what happens when a democratically elected President is simultaneously sought by the ICC.

In sum, the first Käte Hamburger Dialogue was a very fruitful and insightful discussion among the three experts on the panel and the group of around 90 participants which included German as well as many international policy-makers, practitioners, students and academics. As the panel took the form of a dialogue and did without long introductory remarks, a very lively discussion emerged, which allowed for both personal insights from the Kenya experts and critical analyses of the current political situation.