

OPINION

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Kenya's politicians scramble to avoid justice

The heat is on as the ICC wades into the battle to end impunity after the post-election violence

Two years after the violence that wracked Kenya, the country continues on a knife's edge. A decision is due soon from the International Criminal Court's (ICC) Pre-Trial Chamber on whether to allow Prosecutor Luis Moreno-Ocampo to open investigations into those believed to be responsible for mass killings and expulsions. All of this is happening as Kenya battles with the complex and uncoordinated political agenda that has marked the post-election period.

Politicians are clamorously preparing for the 2012 elections while striving to outmanoeuvre justice, accountability and any real reform of a failed system. This year will be decisive for the protracted constitutional reform process. Despite people's realisation that much more unites Kenya's manipulative political class than divides it, ethnicity continues to be the country's most potent instrument for political mobilisation.

The 2008 agreement brokered by former UN Secretary-General Kofi Annan created a 'ceasefire government'. In a clear demonstration of its priorities, the political class settled into a coalition, which, while fractious, is firmly bound by greed and expediency. Politicians have become adept at foiling external pressure by going through the motions of reform: the passage of laws that go unenforced, the endless allowance-fuelled meetings and portentous pronouncements, all the while avoiding accountability for the disasters they have repeatedly visited on the country.

COMMISSIONS OF INQUIRY reported on the violence and the elections. The Truth, Justice and Reconciliation Commission is gearing up and an interim electoral commission has replaced the discredited old one. In a departure from the ineffectual tradition of commissions of inquiry, the Waki Commission built a delayed-action detonator into its recommendations, entrusting to Annan a secret list of powerful personalities suspected of having masterminded the violence. Failure to establish a local tribunal to try these individuals triggered the involvement of Moreno-Ocampo and the ICC.

Leading politicians, who have reason to believe their names are on it, are very worried as they contemplate the possibility of being held to account. Their increasingly desperate and erratic stratagems have careened



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from intense horse-trading in parliament, to sabotaging the local tribunal, to trying to stop the looming prospect of ICC engagement. The threadbare 'African solutions to African problems' mantra was also predictably belaboured by senior government functionaries. Most recently, two US-based scholars have emerged from nowhere to challenge the legal admissibility of Kenya's case before the ICC.

Intimidation of potential witnesses proceeds apace, with at least two killed so far. The state, whose security agents were implicated in the violence, has offered no protection to potential witnesses. Civil society, with donor support, has had to step in, placing some people in safe-houses or sending others out of the country. Highlighting the dysfunctional nature of the justice system, only 19 investigations have been opened into the 1,133 homicides documented by the Waki Commission, with four prosecutions and only one conviction which involved the killing of state officials.

In the areas most seriously affected by the violence, unrepentant local communities gear up for 'next time', egged on by politicians and businessmen intent on trading peace for their immunity from external scrutiny. Fanned by sensationalist media reporting and some ICC grandstanding, hopes are high that the ICC will be a real game-changer, capable of dealing a decisive blow to the impunity which characterises Kenya's public life. But these hopes may be punctured by a result that will fall short of the fantasised showdown. Meanwhile, thousands wary of Kenya's history of impunity for large-scale crimes committed in the pursuit of power and its lucrative benefits are voting with their feet, moving their families and investments away from contested areas in fear of the fires of 'next time'. ●