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INTERNATIONAL INVESTIGATION

## The secret double-dealing in Kenyatta 'crimes against humanity' case

OCTOBER 6, 2017 | BY STÉPHANIE MAUPAS

In 2010, the International Criminal Court began proceedings against six Kenyan officials, including the country's current president, Uhuru Kenyatta, of crimes against humanity over their responsibility in the deaths of more than 1,100 people, the displacement of an estimated 350,000 others, and rapes and persecutions which followed contested presidential election results in late 2007. But, as revealed by confidential documents obtained by Mediapart and analysed together with its media partners in the European Investigative Collaborations consortium, the ICC cases fell apart due in large part to the weakness of the investigation led by chief prosecutor Luis Moreno Ocampo who, after bringing charges against Kenyatta, subsequently campaigned behind the scenes for the Kenyan leader to escape prosecution. **Stéphanie Maupas reports.**

**K**enyans are due to return to the polls on October 26th in a re-run of presidential elections held on August 8th, after Kenya's supreme court in September annulled sitting president Uhuru Kenyatta's victory over longstanding rival Raila Odinga, which it ruled was invalidated by "illegalities and irregularities".

The opposition National Super Alliance movement is demanding an overhaul of the east African country's electoral commission, and rolling demonstrations in the capital Nairobi (<https://www.bloomberg.com/news/articles/2017-10-05/kenya-to-tighten-security-for-opposition-protests-on-friday>) in support of the call have been marred by clashes with police.

Tensions are running high, and many fear a repeat of the tragic events that followed the disputed presidential elections in December 2007, when Odinga narrowly lost to Mwai Kibaki (who Kenyatta succeeded in 2013). Over a period of two months, protests over the results led to widespread violence which left more than 1,100 people dead and hundreds of others injured, with an estimated 350,000 people displaced from their home regions.



The violence, marked by killings, rapes, deportations and persecutions, prompted the opening in 2010 of an investigation into suspected crimes against humanity by the International Criminal Court (ICC) in The Hague, and among the principal suspects was Uhuru Kenyatta.

That investigation has now been effectively shelved. Documents obtained by Mediapart (see the 'Boîte Noir' section at the bottom of this page), and analysed together with its media partners in the journalistic collective European Investigative Collaborations (EIC), now throw a light on what became a major judicial fiasco, and notably reveal the role of the ICC's former chief prosecutor, Luis Moreno Ocampo, in failing to bring to account the instigators of the horrific events in Kenya in early 2008. Moreover, they reveal that Ocampo, after he left the ICC, campaigned in secret to offer Kenyatta what he described as an "honorable exit" from the ICC procedure.

In December 2010, Ocampo, now 65, a former prosecutor in his native Argentina and who was the ICC's first chief prosecutor from 2003 until 2012, identified six suspects in the case, equally comprised of members of the opposing parties: Uhuru Kenyatta, ministers William Ruto and Henry Kosgey, civil service head Francis Muthaura, radio station director Joshua Arap Sang and former police commissioner Mohammed Hussein Ali. Charges were later

issued by the ICC against four of the six, while it dropped proceedings against Kosgey and Ali after deciding the cases against them were too weak.

In 2013, despite their indictment by the ICC for crimes against humanity, Uhuru Kenyatta and William Ruto teamed up to run on a joint ticket in new presidential elections in Kenya in that year, bidding respectively to become president and vice-president as part of a “Jubilee Alliance” of political parties backing Kenyatta. The pair represented the two dominant ethnic groups in Kenya, with Kenyatta a member of the Kikuyu and Ruto a member of the Kalenjin.



Kenyan leader Uhuru Kenyatta on August 11th 2017, days after his contested, and finally annulled, victory in the country's presidential elections. © Thomas Mukoya/Reuters

In a jibe at Kenyatta’s indictment by the ICC, Raila Odinga, Kenyatta’s opponent in the 2013 elections, as again in those this year, suggested that if his rival won the election he would have to run Kenya from the defendant’s box in The Hague via Skype. Kenyatta, meanwhile, proclaimed himself to be the guarantor of Kenya’s independence.

In December 2012, the office of new ICC chief prosecutor Fatou Bensouda, who had replaced Luis Moreno Ocampo in June that year, was busy with preparing its pre-trial report due in early January 2013, ahead of the opening of hearings due four months later, on April 15th. But the prosecution services had concluded that their principal witness – identified as “P0014” – in the case against Francis Muthaura lacked credibility, and advised that the charges be dropped. Bensouda appeared uncertain on what course to follow.

Since leaving the ICC, Ocampo joined a New York-based legal practice, but continued to follow events within the ICC where a jurist, who herself later left the court to become Ocampo’s personal assistant, kept him informed of the progress of the Kenya case.

After learning of the developments in late 2012, Ocampo contacted Sara Criscitelli, a former US Justice Department official who had joined the ICC as a prosecution lawyer and urged her to keep the case open, and to demand a postponement of the trial on the basis of Kenya’s lack of official cooperation with the ICC. “Blame them before they blame the prosecutor,” Ocampo advised her, in correspondence seen by Mediapart. “We need to defend the office of the prosecutor. If they filed before us that the case should be dismissed for lack of evidence we will be badly exposed.”

Just weeks earlier, on December 18th 2012, Mathieu Ngudjolo Chui, a rebel leader from the Democratic Republic of Congo, was acquitted by ICC judges at the end of his trial on charges of war crimes and crimes against humanity in 2003 because of insufficient evidence to establish his guilt “beyond reasonable doubt”.

Criscitelli was uncertain of Ocampo’s advise, and told him that, “If we file something that suggests that a State can defeat the court simply by refusing to cooperate, that will be the death of the Court as a whole”. But Decampo was concerned with saving both the prosecution case that he had initiated, along with his reputation. Between 2010 and 2012, he had largely personalised the procedure, becoming something of a star figure among many Kenyans pleased with his targeting of the country’s political elite. But Ocampo’s preparation of the case, like others during his time as ICC chief prosecutor, was considered weak and amateurish, barely convincing pre-trial judges.

At the end February 2013, his successor at the ICC, Fatou Bensouda, decided to contact him “before taking a decision”. Questioned by Mediapart on behalf of the EIC, Bensouda’s principal private secretary insisted that “prosecutor Bensouda did not seek the former prosecutor’s advice on any of these matters”. However, according to information gained by Mediapart, Bensouda consulted with Ocampo about the case on at least two occasions.

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#### KEYWORDS

‘THE SECRETS OF THE COURT’ • FATOU BENSOU DA • ICC • INTERNATIONAL CRIMINAL COURT • KENYA • KOFI ANNAN • LUIS MORENO OCAMPO • THE HAGUE  
• THE ICC • UHURU KENYATTA

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‘The Secrets of the Court’ is the result of six months of investigation carried out by six media organisations who are members of the consortium European Investigative Collaborations (<http://eic.network/>) (EIC), of which Mediapart is a founding member. More than 40,000 confidential documents – diplomatic cables, bank information, various correspondence – were obtained by Mediapart and analysed by the EIC. For the first time they allow a spotlight to be shone on certain practices of the International Criminal Court, which is based at The Hague in Holland.



Together with Mediapart, the EIC partners involved in the project are *Der Spiegel* (Germany), *NRC Handelsblad* (Holland), *The Sunday Times* (Britain), *El Mundo* (Spain), *L'Espresso* (Italy), *Le Soir* (Belgium), ANCIR (South Africa), *Nacional* (Serbia) and *The Black Sea*, an online publication created by the Romanian Centre for Investigative Journalism which reports on Eastern Europe and Central Asia.