THE ICC UNDER POLITICAL PRESSURE

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- In 2010, the International Criminal Court (ICC) launched investigations into the 2007–2008 post-election violence in Kenya, in which some 1,200 people were killed and several hundred thousand displaced. The ICC is breaking new ground with the Kenyan cases; for the first time sitting heads of state are facing charges before the Court.

- Kenya's response to the proceedings has involved a number of political and judicial measures. It has obstructed the work of the Court; it has sought deferral of the cases by the Security Council; and it has threatened the ICC with mass withdrawals.

- Kenya's objection to the trials has gained regional support and renewed strength for the claim that the Court has an anti-African bias. Its claims that the Court should not prosecute state leaders because of concerns over regional peace and security have been met with understanding. The Security Council has, however, refused to suspend the trials.

- The political attack against the ICC will have broader implications for the Court. The Court will need to reconsider how it protects witnesses, safeguards evidence, and selects cases for prosecution. It may even have to retreat from the principle of prosecuting sitting heads of state.

- The expectations placed upon the ICC as an institution of global justice have been unrealistic. The current international political climate will not further this goal. Major powers remain outside the Court and the current Ukrainian crisis will make it hard to agree upon Security Council referrals.

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In March 2014, when the International Criminal Court (ICC) delivered its second-ever judgment during its twelve years of operation with the conviction of the Congolese rebel leader Germain Katanga for war crimes and crimes against humanity, it did so amidst severe criticism. The Court's legitimacy and efficacy have been questioned ever since its establishment, but the recent cases against Kenyan leaders, including Kenya's sitting President Uhuru Kenyatta and Deputy President William Ruto, have brought renewed relevance to these claims. The Court is facing serious attempts to undermine its work and to politicize the rendering of justice. Its first trials against sitting heads of state have turned into a trial against the ICC itself, in which it is argued that the failure of the Court to conduct the trial and deliver a possible judgment on Uhuru Kenyatta will seal the destiny of the ICC rather than that of the Kenyan leaders.

In the aftermath of the elections in 2007–2008, widespread ethnic violence resulted in the deaths of approximately 1,200 people and displaced several hundred thousand. The violence went uninvestigated and unpunished by Kenya, despite the calls by an international inquiry commission led by former Secretary-General Kofi Annan to establish a special tribunal to deal with the violence. Kenya's failure to act gave the ICC the right, in accordance with the complementarity principle, to start investigations into the violence. It named six Kenyans as the masterminds behind the violence, the most prominent being Uhuru Kenyatta and William Ruto. The former was elected President of Kenya in 2013, and the latter Deputy President.

The purpose of this briefing paper is to examine how the cases against the Kenyan leaders have affected the debate on the International Criminal Court as an institution of global justice. Kenya, along with some other African states, has sought to politicize the trials because it alleges that prosecuting sitting heads of state obstructs the running of affairs of state and efforts to secure regional peace. Their attempts to politicize justice have been partially successful, and have opened up many questions about the future of the ICC.

International criminal justice: Between law and politics

International criminal justice, and the International Criminal Court in particular, have had great expectations to fulfill. With the establishment of the ICC, a permanent institution was created for the first time in history with the task of holding individuals accountable for the worst crimes against humanity. The Court's pledge is that no one is above justice; everyone, irrespective of formal status or where the atrocities took place, should be held accountable for his or her deeds.

As an institution seeking global justice, the ICC faces many constraints, however. Jurisdiction is essentially consensual, which means that the Court can investigate situations only where the nationals and territory of those states that have ratified the ICC Statute are concerned. Alternatively, the Security Council can refer cases for investigation or the Prosecutor can herself launch investigations. It is, however, far from an institution that all human beings would likely be subject to.

The jurisdictional and institutional links to the Security Council highlight the political character of the pursuit of international justice. To start with, the Security Council, the main international political institution charged with the task of maintaining and restoring international peace and security, has had an immense role in furthering international criminal justice. It firstly created the International Criminal Tribunal for the former Yugoslavia in 1993, and secondly the International Criminal Tribunal for Rwanda in 1994.[1] It was also a UN organ, namely the International Law Commission, which sketched the outline for the Statute of the International Criminal Court, later revised and approved by an international conference of plenipotentiaries in 1998, leading to the establishment of a permanent International Criminal Court.

The political element was given a notable, albeit unexclusive role in the ICC Statute. The Security Council is granted both the right to refer cases to

1 UNSC Resolution 827 (1993) 25 May, 1993 on the establishment of the International Criminal Tribunal for Former Yugoslavia, and UNSC Resolution 955 (1994) 8 November, 1994 on the establishment of the International Criminal Tribunal for Rwanda.

and defer cases from the ICC. The Security Council has duly made use of its competencies and has hitherto exercised its right of referral twice; in 2005 it referred the investigation of crimes in Darfur to the ICC in its Resolution 1593 (2005), and in 2011 the Security Council invited the ICC to investigate the crimes in Libya with Resolution 1970 (2011). So far, the Security Council has not temporarily suspended a single case despite attempts thereto. The Prosecutor's right to launch investigations into a situation independently of the Security Council is nevertheless a guarantee which balances the political element and the role of the Security Council.

The broader discussion, which shows the intersection of law and politics, relates, however, to the desirability of international criminal justice to begin with. The goal of justice is often contrasted with the political need to achieve peace in conflict areas; the idea of retribution, which is inherent in international criminal justice, is claimed to stand in the way of attempts to reach a political compromise and to start reconciliation processes. Justice is allegedly an impediment to peace, which often involves amnesties for the leaders involved. Ending violence has taken precedence over concerns for justice.

Although this rhetoric is still used, understandings of transitional justice, and international criminal justice as a part of it, have gained broader acceptance. The United Nations has emphasized the intersection of peace and justice, and questioned the supposition that a choice should have to be made between the two. This is reflected in the world organization's policy as well. For example, according to the 2009 UN Rule-of-Law Tools for Post-conflict States on amnesties, UN negotiators or personnel should never support amnesties that prevent the prosecution of international crimes. Yet, the Kenyan cases have revealed that the dichotomized discourse has not been completely buried.

Africa's political attack upon the ICC

The most recent attempts to highlight the political consequences of international criminal trials and to make use of the Security Council to influence investigations by the ICC were made by Kenya in order to defer the cases against its national leaders, which culminated in October 2013. Kenya has, while seemingly cooperating with the ICC since becoming a 'situation state', launched a political campaign against the Court in order to have the cases against its leaders deferred. It has sought to present the Court as an imperialistic institution which targets African states and their leaders; it has claimed that charging Kenyatta and Ruto, who are serving heads of state, makes it impossible to govern the state and to attend to vital concerns of peace and security; and finally it has sought to obstruct the ICC's concrete work by refusing to hand over evidence, and by threatening and bribing witnesses.[2]

In its relations with the ICC, Kenya has, despite formal declarations of cooperation, pursued a policy of obstructionism. According to the ICC, Kenya has blatantly tampered with witnesses, and refused to provide access to evidence, in addition to which it has used questionable legal argumentation to support its stances. This policy has proved to be effective; the ICC Prosecutor has been forced to close cases, and in February 2014 she asked the ICC's Trial Chamber to suspend the trial against President Kenyatta indefinitely, while waiting for Kenya to produce the requested evidence.

Notwithstanding the Court, President Kenyatta has used the African Union (AU) as a platform for delivering and disseminating his claims concerning the ICC's anti-African bias. At a special African Union summit convened in Addis Ababa in October 2013 for the purpose of addressing African leaders' concerns over the ICC, President Kenyatta accused the ICC of targeting Africa. According to the president, the Court 'stopped being a home of justice the day it became the toy of declining imperial powers'.[3] The AU threatened mass withdrawals from the Court unless the concerns of African leaders were heard in the Security Council. It further passed a resolution advancing immunity for African heads of state.

Another key tactic employed by Kenya's leaders to undermine the ICC has been to resort to the counterargument of peace and to combine this with the duties of a sitting head of state. President Kenyatta has underscored how difficult it is for a sitting

2 See e.g. ICC-01/09-2/11, Status Conference, 5 February 2014, p. 35.

3 BBC (2013): *African Union Urges ICC to Defer Uhuru Kenyatta Case*, 12 October 2013. Available at: www.bbc.com/news/world-africa-24562337. Accessed 4.4.2014.

president to maintain and advance peace and security while being obliged to appear before the Court in The Hague. The president's rhetoric has emphasized his role as a regional leader, saying that the need to secure peace and anti-terrorist operations in Kenya, and throughout the Horn of Africa in general, calls for his presence on the home front. The crisis in South Sudan, the anti-terrorist operations in Somalia and the attack by al-Shabab on the Nairobi mall which killed 60 persons have been mentioned in particular. The situation culminated in the playing of the peace card in November 2013 when Togo, Morocco and Rwanda, as non-permanent members of the Security Council, sponsored a resolution to the Security Council seeking the deferral of the Kenyan leaders' trial on the basis of concerns for international peace and security in accordance with Article 16 of the Rome Statute.

A divided Security Council

The deferral resolution sponsored by African states failed to secure adequate support and was duly rejected, with seven states voting in favour and eight abstaining.[4] This clearly represented a small victory for the ICC and the pursuit of justice. Although the Security Council rejected the political request to postpone the trials by 12 months, the Council members showed understanding for Kenya's alleged security concerns. Russia in particular, which voted in favour of deferral, held that Kenyan leaders played a crucial role in the fight against terrorism, particularly in Somalia. In similar terms, China emphasized Kenya's long-lasting role in the fight against terrorism and in strengthening African peace and security.

Several SC member states voiced their regret over the push to put the issue to a vote because it revealed a divided Security Council, but also because it was considered to deepen the existing divisions. Disagreement prevailed on two important questions: what is the appropriate forum for dealing with Kenya's concerns, and what is the threshold for security concerns that motivate deferral from the ICC? The Council's Western member states together with Latin American states and South Korea held that Kenya's concerns were best dealt with within the confines of the ICC, and the Assembly of State Parties in particular. According to them, the Security Council was not the proper body for resolving such concerns. The danger of setting a precedent for interference with the Court was recognized. Moreover, it was held that the criterion for deferral, namely the existence of a threat to international peace and security, was not met in Kenya's case.

The split in the Security Council concerning the approach towards international criminal justice and the ICC seems to have become entrenched. The United Kingdom and France, which have both ratified the Rome Statute, have consistently been in favour of the ICC and its fight against impunity. This means that those permanent members of the SC that have remained outside the ICC will play a key role in those outcomes of the Security Council that concern the pursuit of international justice. China is basically willing to accept ICC involvement only with the consent of the state that is itself under investigation, while Russia seems open to political concerns, and the United States has chosen not to stand in the way of international criminal justice of others.

Implications for international justice at large

In 2007, the then Prosecutor of the ICC, Luis Moreno-Ocampo stated: 'It is time for political actors to adjust to the law'.[5] This has, however, not yet materialized. The politicization of the international trials against the Kenyan leadership has on the contrary highlighted the position of the ICC between law and politics.

The political pressure put on the Court has succeeded at least in part: the Court has not been able to move forward with the trial of President Kenyatta. In February 2014, the Prosecutor asked the Court to suspend the trial of the president indefinitely until the requested evidence from Kenya had been acquired, whereas Kenya demanded the trial to be terminated altogether. In the event, the Trial Chamber decided to adhere to neither request. Instead, it set a new date for the commencement of the trial – 7 October, 2014.

4 See UN Doc. SC/11176, 15 November 2013 for background, action, and statements.

5 Luis Moreno-Ocampo: 'The International Criminal Court: Seeking Global Justice'. *Case Western Reserve Journal of International Law* 40(2007–2008): 215–225.

The Prosecutor of the ICC Fatou Bensouda (left) and the former Prosecutor Luis Moreno-Ocampo. Photo: Estonian Foreign Ministry/Flickr.

This decision indicates on the one hand that Kenya's concerns over how to govern a state from The Hague have been taken seriously. On the other hand, it underlines the duty of a state party to cooperate with the Court. But as the Court cannot balance different interests endlessly, it looks as if the battle for the ICC's credibility will come to an end in autumn 2014. At that point in time, the Court will either proceed with realizing its pledge to deliver justice, or it will be forced to concede. In the event of the latter, the Court will be left a weakened institution.

Effectiveness and credibility of the Court

The political pressure that the Kenyan cases have exerted on the ICC has revealed weaknesses in the way in which the Court functions. The Court has difficulties in witness protection, in sealing evidence, and in broadening justice to continents other than Africa. The reliance on cooperation from contracting states leaves the Court toothless, as demonstrated by the example of Kenyan non-cooperation, which is by no means unique. For instance, the arrest of Sudan's President Omar Al-Bashir has yet to materialize.

In addition to general concerns about effectiveness, the Kenyan cases have shown that the issue of the immunity of government leaders is perhaps not conclusively settled. One of the main stated goals for the ICC from the beginning has been to go after those who bear the greatest responsibility for atrocities. Eradicating the impunity of government leaders and sitting heads of state has thus been at the forefront of the Court's activity. The Rome Statute indeed represented a significant step away from general international law by recognizing that there can be no immunity for those in the highest offices.

Kenya's arguments that serving heads of state must be able to attend to the affairs of running a state have not been dismissed. The ICC's Assembly of State Parties tried to alleviate these concerns by changing the Rules of Procedure and Evidence so as to accept the absence of the leaders from trials in exceptional circumstances and allowing them to participate through video technology. This manifestly contradicted the Rome Statute under which the accused must be present in court.

In the concrete case of Deputy President Ruto, in June 2013 the Court's Trial Chamber accepted the request by the accused not to be physically present at every session, a decision which the Appeals Chamber later revoked. The Kenyan cases have demonstrated that the official status of government leaders has called into question equality before the

law. The prospects for the prosecution of government leaders in the future look bleak. It seems likely that the Court in its practice will have to revert to the traditional international legal standing that while in office, state leaders enjoy immunity. This would be a setback for international criminal justice.

Globalizing justice will have to wait?

In order to prove credibility and legitimacy, the criticism concerning the African focus of the Court needs to be taken seriously. The claim that the ICC has targeted Africa is neither new nor unfounded. As of April 2014, there are 122 parties to the Rome Statute. Yet, all of the cases in the Court have concerned African conflicts and Africans; Uganda, Democratic Republic of Congo, the Central African Republic, Sudan, Kenya, Libya, Côte d'Ivoire and Mali. Admittedly, the ICC has looked into situations outside of Africa, such as Iraq, Colombia and Georgia. However, it has not proceeded with these cases.

Prosecutor Fatou Bensouda of the ICC has firmly denied any anti-African biases by stressing the fact that many cases from Africa have been self-referrals in which the states themselves have referred the investigation to the Court. A further explanation from the ICC for selecting African situations is the vast number of state parties to the ICC on the African continent. Investigating African situations is also explained by the large number of complex African conflicts, and consequently the large number of victims that have remained without justice.

Although these explanations carry some weight, they do not fully explain the focus on Africa. The Prosecutor is not duty-bound to accept self-referrals, and she is completely free to look into situations outside Africa. African prosecutions do not preclude investigations into other situations, and Africa is certainly not the only continent where violence is used. Thus, a greater geographical balance would be called for. The reluctance to deal with violence in Palestine, for example, has therefore been interpreted as selective prosecution based on political considerations, such as the Court's relations with the United States.

Yet, it is difficult to envisage any substantial changes in the future emphasis of the Court. There are no prospects of major powers such as the United States, China, Russia or India recognizing the jurisdiction of the Court, which would be crucial in developing the ICC into a truly global institution of justice. Furthermore, states with a disputed record themselves, such as Israel, Pakistan and North Korea are hardly inclined to become parties to the Court.

A further factor hindering the realization of global justice relates to the hardening of the international climate between the permanent members of the Security Council caused by the situation in Ukraine. Their internal divisions in other matters will probably have repercussions for the ICC as well. It will be increasingly difficult to achieve unanimity when it comes to referring cases to the Court, and the general tension between the Council's permanent member states will likely relegate considerations of justice to the background. For instance, the chances of bringing Syrian atrocities under the investigation of the Court remain remote. Instead, the Council may come up against demands to defer the case of Sudan's President Al-Bashir, as the trial may be seen as an obstacle to combating the spread of the conflict.[6]

Situations concerning non-African states will possibly be referred to and investigated by the ICC if atrocities take place in a state whose activities are condemned by all major powers. But potential black sheep are hard to find: even North Korea finds political support in China. Against this background, it is highly likely that the vast number of complex conflicts on the African continent as well as the broad ratification of the ICC Statute will ensure that Africa remains the central focus of the ICC. The consequences of ratifying the ICC Statute are becoming increasingly clear for many African states, and it is to be hoped that the Court will not face new threats about mass withdrawals from the African continent. Should such threats materialize, the ICC would be seriously crippled.

Conclusion

The triumphal march of international criminal law and the corresponding international institutions which the international community has witnessed during the past decade is over. The Kenyan cases

6 International Crisis Group (2014): *Sudan Spreading Conflict (III): The Limits of Darfur's Peace Process*, Africa Report No 211, Brussels, 27 January, 2014.

have highlighted the procedural and political constraints faced by the ICC. The Court and international criminal justice is at a turning point: The ICC has come to a point where it will either rise to the challenge of investigating, prosecuting and punishing state leaders according to its goals, or it will submit to the demands of international politics.

The ICC has proved to be unable to fulfill all the high expectations placed upon it, and in the near term one should expect it to make progress primarily in developing the substance of international criminal law, and in shortening the length of proceedings through increasingly routine-based work.

The international justice project should not be abandoned, however. Kenya's reactions show that the ICC matters, and that African leaders regard it as a threat to impunity. But unrealistic expectations of what this judicial institution can and cannot do should be buried. Questions that the political pressure on the Court has brought to the forefront should be permitted and critically examined. At the same time, the Court's recent challenges have provided an outstanding opportunity to re-commit to both the fight against impunity in general, and to the International Criminal Court in particular, while acknowledging the Court's internal and external limitations.

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