

The Challenges of the Kenyan Cases at the International Criminal Court

Written for AMICC by Laura van Esterik on June 17th 2014

The Kenyan cases confront the International Criminal Court with complex challenges and provoke questions about the legitimacy of the Court, especially among African states. In a time of heavy critique and a threatening loss of support from African states, the outcomes of the Kenyan cases are essential for international perceptions of the Court. Consequently, these outcomes will also affect U.S. opinion about and support for the Court. This paper will clarify why these cases are crucial for the perceived legitimacy of the Court and the support it receives from states. It will thereby examine the development of the Kenyan cases, their current status and how we can expect them to develop in the future.

Background to the Kenyan cases

The Kenyan cases deal with the post-election violence that occurred between December 2007 and February 2008, following the presidential elections in Kenya. The post-election violence killed over 1,200 and displaced 600,000 people. The violence erupted between groups supporting the Party of National Unity (PNU), winner of the elections, and those supporting the Orange Democratic Movement (ODM). Both political parties are perceived to have contributed to inciting the violence.

Three cases concerned with the crimes committed during this episode of violence are currently before the Court. The case against Kenyan Deputy President William Ruto and broadcaster Joshua Arap Sang charges them with planning and organizing crimes against humanity against supporters of PNU during the post-election violence. Their trial started on 10 September 2013.

Kenyan President Uhuru Kenyatta is similarly charged with planning and organizing crimes against humanity, in his case against supporters of the ODM, carried out by a criminal gang called Mungiki allegedly under his control. His trial will start on 7 October 2014.

At the time of the post-election violence in 2007-2009, both Kenyatta and Ruto were senior political figures within their respective political parties: Kenyatta at the PNU and Ruto at the ODM. Therefore, they were allegedly in

control of the crimes committed during the violence incited by their political parties. The charges by the ICC against Kenyatta and Ruto were confirmed in January 2012 and the Court decided to proceed with the trials. Both of them only gained their current positions as Kenyan state officials afterwards, when they were voted into office in March 2013 – i.e. Kenyatta and Ruto were not heads of state at the moment of their indictment.

Finally, the Court issued an arrest warrant in August 2013 against Walter Barasa, for the intimidation of witnesses in the Kenyan cases.

Challenges to the Kenyan cases

The investigations into the Kenyan situation were the first ones to be initiated ‘*proprio motu*’ by the Court’s former Prosecutor, Mr. Ocampo – meaning that the Prosecutor initiated the investigations himself, without any referral from a member state or the UN Security Council. Ever since the beginning of the investigations up until the current trials, the cases have presented the Court with numerous difficulties.

At the initial stage of the investigations in 2011, the jurisdiction of the Court over the alleged crimes was challenged a number of times. First by the Kenyan government, claiming that the government intended to genuinely investigate and prosecute the cases domestically, which would render the case inadmissible based on the complementarity principle. Later on, the Court’s jurisdiction was challenged by Kenyatta’s defense, claiming the alleged crimes did not reach the required level for crimes against humanity under the Rome Statute. All of these challenges were rejected by the Court.

Trying sitting heads of state

As soon as Kenyatta became the President of Kenya in 2013, the Court was confronted with its first trial against a head of state. Kenyatta standing trial as a President has evoked much resistance and criticism, especially among African states. Their criticism became most apparent during the 12th session of the Assembly of States Parties (ASP) in November 2013. The ASP convenes annually to discuss and decide on the central issues of the Court’s operations. During the session last November, the African Union (AU) requested a special segment dedicated to *Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*. According to AU, standing trial as a sitting head of state is particularly troublesome because of

their demanding duties. The AU argued the absence of the Kenyan President and Deputy resulting from their required presence at the ICC would constrain them from attending the domestic security situation in Kenya after the attack of a Nairobi shopping center on 21 September 2013. In the attempt to have their critique heard, the AU had also requested the UN Security Council in October 2013 to defer the two Kenyan cases pursuant to Article 16 of the Rome Statute, which was denied by the Council. Several African states also threatened to withdraw from the Court, including Kenya itself. All of these actions portray the tense relationship between the AU and the Court that cumulates in the Kenyan cases. It should be noted that although the AU represents African states, their actions do not necessarily represent the general African opinion. Numerous African civil society groups actively advocate the Court's work in responding to (post) conflict situations. Moreover, not all African states share the critical attitude towards the Court that the AU endorses.

Despite these African efforts, the ASP refused to consider *if* a sitting head of state should stand trial, as this would undermine the entire purpose of the Court and its Statute to try those most responsible. It would be inconsistent with Article 27 of the Statute, which emphasizes the irrelevance of official capacity for establishing criminal responsibility under the Statute. Instead, the ASP tried to be responsive to the Kenyan government considering its request that sitting heads of state should not have to attend their trials. It therefore discussed when and under what conditions the trial of a sitting head of state should take place. As a result of these discussions, States Parties agreed to expand the Rules of Evidence and Procedure regarding the presence requirement. The ASP added Rule 134(bis) which allows the accused to request to attend the proceedings through video technology instead of in person. Moreover, Rule 134(quater) allows an accused who has the duty to fulfill "extraordinary public duties at the highest level" to request to be exempted from parts of the trial, under the condition of a strict range of criteria. The Prosecutor has made an appeal to this change in the rules – the Appeals Chamber may therefore decide that the change is in conflict with the Rome Statute and thus is invalid.

Regardless of the changes made to the Rules of Evidence and Procedure, the African Union continues to push for changes to the Rome Statute that include the granting of complete legal immunity to sitting heads of state. Kenya proposes to include that sitting presidents and their deputies "may be exempt from prosecution during their current term office". However, pushing

through changes to the Statute requires a much longer and strenuous process than a change in the Rules of Evidence and Procedure – as it involves ratification by 87.5 percent of the State Parties. It seems highly unlikely that the ASP will accept the proposed changes by such a majority.

The critical attitude of the African Union towards the Court is not merely formed by their concerns about the Kenya cases, but is part of their generally skeptical attitude towards the proceedings of the ICC. As all situations currently before the Court are African, African states accuse the Court of neo-colonialism and interference with African state sovereignty. Within that context, the criminal prosecution of President Kenyatta is misunderstood as an attack on the State of Kenya, instead of the criminal prosecution of an individual that it is. This misperception results from the failure to grasp that the ICC is about *individual* responsibility instead of the responsibility of Kenyatta as a head of state. Especially when the leader is strongly identified as *being* the State, such as President Kenyatta, it can be hard for many to understand this crucial difference between individual and state responsibility. However, it is further clear that the Prosecutor was not charging the government of Kenya because, as many seem to forget, both President Kenyatta and Deputy President Ruto were not sitting heads of state at the time of their crimes or at the time of indictment by the Court.

The AU also argues that the Kenyan situation of peace and political stability is at stake when its President faces criminal trial in a post-conflict context. According to the AU, the ICC Prosecutor should take the security situation in Kenya into consideration when proceeding with the trial. However, it is not up to the Court to deal with such political issues, as the ICC is a *judicial* and not a political institution – a concept that is often misunderstood. Instead, the Rome Statute designates the Security Council to address such political issues. According to Article 16, the Security Council can defer a situation at the ICC under Chapter VII of the UN Charter, when it perceives a case to constitute a threat to international peace and security. Finally, it is doubtful whether President Kenyatta and Deputy Ruto are indispensable to ensuring peace and stability in the country, as the government apparatus has the competence to take over such tasks and the Kenyan Constitution provides for succession to the President and Vice President. Nevertheless, supporters of President Kenyatta who perceive him as embodying the State will maintain that the President is in fact vital to ensuring peace and stability in Kenya.

Intimidation and withdrawal of witnesses

Apart from political challenges by the African Union and the State of Kenya, the Court is faced with the intimidation and subsequent withdrawal of witnesses in the Kenyan cases. The withdrawal of these witnesses and their testimonies faces the Prosecutor with a major setback in the collection of evidence. Nevertheless, in her determination to pursue the Kenyan cases, the Prosecutor responded by compelling the attendance of the eight withdrawn witnesses in the Ruto case, through issuing a subpoena that was approved by Trial Chamber V(A). In the case against President Kenyatta, where two key witnesses withdrew, the Prosecutor requested the adjournment of the trial date to provide her with more time to “complete efforts to obtain additional evidence”¹. Trial Chamber (V)b decided to adjourn the trial until October 7, 2014, in order to give the Government of Kenya an opportunity to provide the Prosecution with access to certain records, and to provide the Prosecution with more time to collect sufficient evidence.

In taking action against those corruptly influencing witnesses, the Prosecutor requested Kenya to arrest Walter Barasa, who allegedly tried to bribe potential witnesses in the case against Mr. Ruto. These actions would make him criminally responsible for several offences against the administration of justice under Article 70 of the Rome Statute, in particular for corruptly influencing witnesses under Article 70(1)(c). On May 14, 2014, Kenyan Principal High Court Judge Richard Mwongo ordered that an arrest warrant be issued against Mr. Barasa. However, the accused continues to attempt to block his extradition to the ICC by appealing the decision. As a result, on May 29, Kenya’s Court of Appeal decided to suspend the arrest warrant.

Conclusion

The drafters of the Rome Statute were well aware of the difficulties that would arise from trying sitting heads of state. The resistance that the Court currently faces is therefore no surprise, yet it requires determination and persistence in order to achieve what the Court was established for: holding those in powerful positions accountable for their crimes. Allowing immunity for heads of state in order to maintain political support would therefore undermine the entire purpose of the Court and only strengthen claims that the Court is ‘politicized’. The irrelevance of official capacity before the ICC cannot be emphasized enough in understanding that the Court is about

¹ <http://www.bbc.com/news/world-europe-25455664>

individuals and not *states* – and that prosecutions of sitting heads of state do not constitute attacks on a state as such. Instead, these prosecutions aim to end impunity for those individuals most responsible for the most atrocious crimes, who are often shielded from prosecution due to their high-level status.

The request for the subpoenas and the arrest warrant for Mr. Barasa show the Prosecutor's determination to push firmly ahead with the Kenya cases despite any skepticism about the Court's ability to try sitting heads of state. As she emphasized herself, she is determined to pursue the cases and going all out to obtain fresh evidence without giving up.

The subpoenas and the arrest warrant constitute a strong message that the Court is determined and competent to pursue the prosecution of sitting heads of States, without conceding to their power to intimidate witnesses. It also demonstrates the clear and unified strategy and tactics employed by the Court in carrying out its central purpose of trying high-ranked state officials. In these decisions, the Court has established an important precedent in its determination to end the impunity of individuals involved in the commission of atrocities, regardless of their official status.