

The ICC and its Deteriorating Relationship with Africa in Light of the Kenya Cases: What Should the EU Position be?

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Background to the Kenya Cases

The current situation in Kenya rises out of a proprio motu investigation¹ initiated by the Office of the Prosecutor (OTP) of the ICC in 2010 aimed at holding accountable the individuals believed to be responsible for crimes against humanity during the 2007-2008 post-election violence, which killed over 1200 and displaced more than half of million individuals. After more than a year of legal wrangling and political pressure from the Kenyan government which challenged the admissibility of the cases before the Court on the basis of the principle of complementarity and requested unsuccessfully that the suspects be tried in a Kenyan court rather than in The Hague, the Pre-Trial Chamber of the ICC confirmed charges against four individuals. One of those, the former head of civil service, Francis Muthaura, was released due to lack of evidence resulting from the withdrawal of key witnesses or their unwillingness to testify. For the other three— Uhuru Kenyatta, William Ruto, and Joshua Sang—the Court has decided to continue with the trial, albeit in a modified format to accommodate the requests of Kenyatta and Ruto not to be tried at the same time in line with the constitutional responsibilities of their offices.

Given the high profile of this case, the prosecution of Kenyatta and his deputy, Ruto, was always going to prove troublesome for the Court. However, it was not until the most recent 2013 presidential elections which saw Kenyatta and Ruto win the Presidency, that the real magnitude of the challenge lying before the ICC Prosecutor became evident. Kenyatta and Ruto assiduously used to their advantage what was perceived by many as an attempt by Western countries to interfere with the Kenyan elections and secured an electoral victory against the incumbent Prime Minister and a favourite of the West, Raila Odinga. Since then, Kenyatta and his deputy have done their best to appear as if they are cooperating with the Court, while at the same time using all judicial and diplomatic means to

The African Union (AU), a union consisting of 54 African States, held an Extraordinary Summit on 11-12 October 2013, to discuss its relationship with the International Criminal Court (ICC or the Court). The meeting took place just weeks before the trial of Kenya's President Uhuru Kenyatta is scheduled to begin, and was clearly intended to voice discontent and put on hold the ongoing ICC proceedings against Kenyatta as well as his deputy, Vice-President William Ruto. Before the Summit, there were even widespread rumors that the Assembly of the AU would call for a mass withdrawal of African States Parties from the ICC Statute. Eventually, the Assembly did not go that far and took two important, but less controversial decisions. It called for the granting of immunities to Heads of States from prosecutions by international criminal tribunals and requested a deferral of the ICC cases against Kenyatta and Ruto through a resolution adopted by the UN Security Council (UNSC). After providing a background to the Kenya cases, this policy brief aims to evaluate what the position of the EU and its Member States as outspoken supporters of the ICC and the fight against impunity should be, especially given the fact that France and the UK, as permanent UNSC members, could block a UNSC deferral at any time.

avoid their presence in the courtrooms in The Hague and to grind the cases against them to a halt. They have both argued that they cannot attend trials in The Hague and effectively run a country at

the same time.

Furthermore, the terrorist attacks in Nairobi by al-Shabaab have put the need for stability and order in Kenya under the international community's microscope and seemed to have had the effect of bolstering the argument of Kenyatta and Ruto.²

Judicial Means Used By Ruto and Kenyatta to Avoid Continuous Presence in The Hague

For the time being, both Kenyatta as well as Ruto have been able to carry out their official duties, while also appearing in The Hague when asked by the Court to do so. However, both the Defense of Ruto and Kenyatta have filed judicial submissions to avoid presence in The Hague.

Firstly, both Ruto's and Kenyatta's defense team lodged a request to be excused from being physically present continuously throughout the trial. In two decisions, issued on 18 June and 18 October 2013, the competent Trial Chambers in the Ruto and Kenyatta cases conditionally granted Ruto's and Kenyatta's request to be excused from being physically present continuously throughout the trial, with the exception of a number of sessions such as: the opening and closing statements of all parties and participants; when victims present their views and concerns in person during the trial; the delivery of judgment in the case and, if applicable, sentencing and reparations.³ The Trial Chambers stated that the decisions were taken purely as a matter of reasonable accommodation of the demanding functions of President and Vice-President.⁴ Moreover, for the Trial Chamber in the Kenyatta case, the attack on the Westgate Shopping Mall highlighted why it was important to balance the requirement of an accused being present in Court with the functions of State that Kenyatta as President would be required to perform.⁵

The ICC Prosecutor filed its appeal against the decision in the Ruto case on 29 July 2013. On 25 October 2013, in a unanimous decision, the Appeals Chamber reversed the decision of the Trial Chamber and held that Ruto is required to continuously attend his trial, with exceptions to be granted only in exceptional circumstances.⁶ The decision is limited to Ruto, but its legal findings clearly apply to Kenyatta as well. From a legal perspective, the decision of the Appeals Chamber seems correct. Article 63(1), the provision in the ICC Statute dealing with the presence of the accused, is clear: "the accused shall be present during the trial".⁷

From a policy perspective, the Decision of the Appeals Chamber is probably less to be welcomed, because it will probably ensure

that Ruto and Kenyatta will stop cooperating with the Court and will step up their efforts to bring the cases diplomatically to a halt. If Ruto and Kenyatta actually cease to cooperate with the Court, the ICC Prosecutor will most probably request the ICC Trial Chambers to issue an arrest warrant to ensure their presence at trial.

The AU Extraordinary Summit and Its Outcome

Indeed, apart from exhausting all possible judicial means, Ruto and Kenyatta, as an alternative, used all diplomatic efforts to bring the cases against them to a halt. At the initiative of Kenya's Foreign Minister Amina Mohammed and masterminded by Uganda's President Museveni⁸, the AU convened an Extraordinary Summit on 11 and 12 October 2013, officially entitled "Africa's relationship with the International Criminal Court". It is clear however from the Declarations and Decisions adopted during the Extraordinary Summit that its main purpose was to find a way to stall the ICC proceedings against Ruto and Kenyatta. Before the Summit, there were even widespread rumours that the Assembly of the AU would call for a mass withdrawal of African States Parties from the ICC Statute. Eventually, the AU Assembly took two less controversial Decisions.

Firstly, the Assembly decided that "no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office"⁹ and "that African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute".¹⁰

Secondly, the Assembly decided "(t)hat Kenya should send a letter to the United Nations Security Council requesting for deferral, in conformity with Article 16 of the Rome Statute, of the proceedings against the President and Deputy President of Kenya that would be endorsed by all African States Parties".¹¹

What Should the EU Position be towards the AU Extraordinary Summit Decisions?

The full-time presence of Kenyatta and Ruto in The Hague, be it because they both decide despite everything to comply with the Appeals Chambers ruling, or, otherwise, should the ICC Prosecutor in fact be able to secure it through an arrest warrant, is likely to cause chaos and instability in Kenya. Following the Westgate terrorist attacks, the situation in the country is already tense and there are indications that al-Shabaab is preparing to strike again. Moreover, the inconsistency of the EU and its Member

States in the run-up to, and following the Presidential elections has made it difficult for them to be perceived as unbiased.¹²

Such are the stakes. The question then becomes, what can be done to demine the situation, while at the same time ensure that justice will not be denied to the victims of the 2007-2008 post electoral violence? More in particular, what should the position of the EU and its Member States as outspoken supporters of the ICC and the fight against impunity be towards the Decisions adopted at the AU Extraordinary Summit? Determining the EU Position towards the AU's stance on ICC matters is essential. Indeed, it is no wonder that the ICC is sometimes dubbed as the "European Court of African Affairs".¹³

The EU and its Member States have from the outset been rhetorical, diplomatic and financial supporters of a Court that has, until now, only prosecuted crimes that occurred on the African continent. In this particular case, the EU and its Member States are key players, given the fact that France and the UK, as permanent UNSC members, could block a UNSC deferral at any time.

Recommendations

We urge the EU and its Member States to pursue a two-pronged strategy, which guarantees the Court's legitimacy and functionality while obviating any concerns of instability or violence in Kenya.

a. Strongly Reject Call for Immunities for Heads of States, But Support A One Year Article 16 Deferral By The UNSC

Firstly, the EU and its Member States should strongly reject the AU Assembly proposal to grant immunities to sitting Heads of States from prosecution by international criminal tribunals. Supporting such a proposal would be entirely contradictory with the EU and its Member States' commitment to the fight against impunity for international crimes, crimes which are very often orchestrated by people in positions of power such as Heads of States. Furthermore, by virtue of Article 27 of the ICC Statute, all African States Parties to the ICC Statute, including Kenya, have consensually accepted the jurisdiction of the ICC to prosecute Heads of State. If African States Parties table a proposal for amendment of Article 27 during the upcoming Assembly of States Parties of the ICC at the end of November, EU States Parties should take concerted action and unequivocally renounce the proposal.

Second, the EU and its Member States should support the AU Assembly proposal for a UNSC Resolution under Article 16 of the ICC Statute, deferring the current trial of Kenyatta and Ruto for one year, subject to renewal, as foreseen in Article 16. This should allow Kenyatta and Ruto to play an important role in facing

the security threats in Kenya and in the East African region more broadly. Indeed, the whole quandary surrounding the Kenyatta and Ruto cases is precisely what Article 16 aims to address. Article 16 is the acknowledgement of the fact that a dilemma can exist between peace and justice, by allowing the UNSC to defer ICC investigations and prosecutions when they compromise on the maintenance of international peace and security.¹⁴ We are aware that the involvement of the UNSC in what should be a strictly judicial process is one that the EU and its Member States would have rather done without. But the case before the Court is no longer a strictly judicial one and in any case, the preservation of the Court's legitimacy and functionality would more than compensate for such involvement. An Article 16 deferral would furthermore have the benefit of using an instrument foreseen in the ICC Statute and would provide a political solution to what has become a political question. For Kenyatta and Ruto, the decision will provide some breathing space, although it will not give them what they ultimately want, i.e. a dismissal of their cases. Meanwhile, the victims, their representatives, and the OTP will take comfort in the thought that Kenyatta and Ruto are on borrowed time, and that they may yet be held accountable for the alleged crimes they are suspected to have committed. It is often said that "justice delayed is justice denied" but it is also true that justice can be patient. Since other trials related to the 2007-2008 post electoral violence will still go forward, an Article 16 deferral should be seen simply as a tactical withdrawal which will not ultimately affect the overall strategic gains made by the EU and its Member States in their fight against impunity.

b. Stepping Up Diplomatic Pressure To Ensure Africa's Commitment to the Court

The ICC-Africa relationship has been deteriorating in the last couple of months, and it seems like things will only get worse in the near future. Indeed, the Decision of the Appeals Chamber, requiring Ruto to continuously attend his trial, will likely upset the AU. Moreover, there is a rather slim chance that the requests formulated in the AU Summit Decisions will be met, in case which AU members indicated that they would convene another Extraordinary Summit in November. It is anticipated that AU Member States, particularly those with strong sentiment against ICC, would escalate their mobilisation against ICC. This may result in the adoption of far-reaching decisions, which may at that point include withdrawal, albeit even then it would not be mass withdrawal.¹⁵ To prevent this from happening, the EU and its Member States should step up diplomatic pressure to ensure Africa's commitment to the Court. After all, the EU's own 2011

Action Plan on the ICC counts universality and integrity of the Rome Statute and cooperation with the ICC, among its main foci.¹⁶

The EU and its Member States have the necessary tools at their disposal. Next spring, the EU and AU delegations will meet in Addis Ababa for their fourth AU-EU Summit. The purpose of the summit is to enhance economic and political cooperation between Europe and Africa, focusing in particular on “peace and security, democratic and economic governance and respect for human rights” as prerequisites of development.¹⁷ The EU could remind its African partners that interference with the ICC, or worse, a withdrawal from the ICC Statute, would have an adverse impact on the success of the negotiations, since weakening the Court would run counter to the premise of the Summit itself. Moreover, EU officials should remind them that the Cotonou agreement, which, among others, regulates the EU’s relations with African countries, explicitly references the mainstreaming of the ICC Statute provisions regarding cooperation in all of the EU’s economic and diplomatic dealings with AU member states.¹⁸

Conclusion

It is clear that the current situation offers no easy solutions. Neither of the alternatives before us—continuing prosecution of Kenyatta and Ruto or the withdrawal of African States from the ICC—are savoury ones. Both will lead to the weakening of the Court as an institution and diminish it as an instrument against impunity. That is why in our opinion the best alternative is a combination of a UNSC deferral under Article 16 of the ICC Statute combined with a diplomatic push from the EU and its Member States to remind the African States of their obligations as ICC States Parties.

Notes

¹The jurisdiction of the ICC can be triggered in four possible ways. When a State has ratified the ICC Statute, there are two possible options. Firstly, every State Party to the ICC Statute can refer crimes committed on its territory or by its nationals to the ICC. Secondly, the ICC Prosecutor can decide on its own initiative (*proprio motu*) to investigate crimes committed on the territory or by nationals of State Parties. When a State did not ratify the ICC Statute, a situation can come under the jurisdiction of the ICC through a Security Council referral or through an ad hoc acceptance of the jurisdiction of the ICC by a non-State Party.

²Kersten, Mark “Putting the ICC’s Kenya Cases on Ice”, accessed 28 October 2013 <<http://justiceinconflict.org/2013/10/22/putting-the-iccs-kenya-cases-on-ice/>>

³ICC, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11, 18 June 2013, para. 3; ICC, Prosecutor v. Uhuru Muigai Kenyatta, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11, 18 October 2013, para. 5.

⁴ICC, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11, 18 June 2013, para. 71; ICC, Prosecutor v. Uhuru Muigai Kenyatta, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11, 18 October 2013, para. 6.

⁵ICC, Prosecutor v. Uhuru Muigai Kenyatta, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11, 18 October 2013, para. 62.

⁶ICC, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, ICC-01/09-01/11 OA 5, 25 October 2013, para. 2.

⁷Lynch, Gabriele and Miša Zgonec-Rozej “The ICC Intervention in Kenya” AFP/ILP 2013/1, Chatham House.

⁸Kalinaki, Daniel K., “Now African states in aggressive diplomatic efforts to halt ICC trials against three Kenyans, TheEastAfrican, accessed 17 October 2013 <<http://www.theeastafrican.co.ke/news/How-Museveni-Kagame-tried-to-stop-Ruto-going-to-Hague/-/2558/1992676/-/item/2/-/1r4b8d/-/index.html>>

⁹Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia, Decision No. 1, Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa’s Relationship with the International Criminal Court (ICC), para. 10, (i), <http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20%20Dec1%20_E.pdf>

¹⁰Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia, Decision No. 1, Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa’s Relationship with the International Criminal Court (ICC), para. 10, (vi), <http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20%20Dec1%20_E.pdf>

¹¹Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia, Decision No. 1, Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa’s Relationship with the International Criminal Court (ICC), para. 10, (ix), <http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20%20Dec1%20_E.pdf>

¹²Hansen (fn. 3) for example points out that “the UK envoy to Kenya, Christian Turner, made it clear that the UK, in accordance with the EU Action Plan on the ICC, only has ‘essential’ contact with indicted ICC individuals... But as Kenyatta was elected, the UK no longer spoke about ICC indictments or ‘essential contact only’. Instead Prime Minister David Cameron congratulated Kenyatta on his victory and the British envoy attended Kenyatta’s swearing-in ceremony. Other European major states, including Germany and Italy, also relayed their congratulatory messages to Kenyatta, absent any indications of continued support for the ICC process.”

¹³Nouwen, Sarah “The International Criminal Court. A Peacebuilder in Africa?” in Curtis, Devon and Dzinesa, Gwinyayi A. (eds.), *Peacebuilding, Power and Politics in Africa*, Athens, Ohio University Press, 2012, pp. 171-192.

¹⁴Nerlich, Volker, “ICC (Deferral)” in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, 348.

¹⁵Dersso, Solomon Ayele, “The AU’s Extraordinary Summit Decisions on Africa-ICC Relationship”, accessed 29 October 2013 <<http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/>>

¹⁶Council of the European Union “Action Plan to follow-up on the Decision on the International Criminal Court” accessed 7 October 2013 <<http://register.consilium.europa.eu/pdf/en/11/st12/st12080.en11.pdf>>

¹⁷Joint Africa EU Strategy: Action Plan 2011-2013, accessed 7 October 2013 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/dpap/dv/jeas_action_plan/_jeas_action_plan_en.pdf>

¹⁸Article 11.6 of the Agreement includes a provision obliging States parties to: (a) Share experience on the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and (b) Fight against international crime in accordance with international law, giving due regard to the Rome Statute. The parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments. Accessed 7 October 2013 <<http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/>>



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