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KENYA AND THE ICC: A BOOMERANG EFFECT?

Chantal Meloni

One of the most troublesome situations pending at the ICC is the Kenyan case. A crucial battle is going on between the Court and the Kenyan state, which embodies most of the contrasts and tensions which emerged during this decade of activity of the Court with regard to the African countries. A sort of "boomerang effect" can be observed: the prosecution of Uhuru Kenyatta and William Ruto, the current President and Deputy President of Kenya, which had initially a deflagrating impact in the country, is now shaking the Court in The Hague to its fundaments and risks of having little, if any, impact in terms of retribution on the perpetrators of the grave crimes committed during the 2007-2008 post-electoral violence. However, albeit not immediately measurable in terms of accountability, the ICC intervention in Kenya was all but irrelevant, and for several - both substantive and procedural – legal aspects the Kenyan proceedings will serve as important precedents for the work of the Court and international justice in general.

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Kenya's response to the post-electoral violence of 2007-2008 and the opening of the proceedings before the ICC

There are several reasons why, as we will see, the Kenya situation before the ICC is of particular importance: one of these is certainly that Kenya represented the first investigation initiated *motu proprio* by the Prosecutor, i.e. on his own initiative. Until that moment, and in fact also later with just one exception (the Côte d'Ivoire), all investigations have been triggered by a referral either of the state concerned (the so called self-referral) – as in the cases of Uganda, DRC, CAR and Mali –, or of the UN Security Council - as in the Darfur and Libya cases.

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With regard to Kenya, the ICC began examining the situation already in 2008, at the time of the eruption of violence after the December 2007 presidential election, which saw the victory of the incumbent President Mwai Kibaki of the Party for National Unit (PNU). Ethnically motivated grave crimes were committed in various parts of Kenya, with the Rift Valley Province as the epicentre of the violence. On the one side the supporters of the PNU and President Kibaki, mainly Kikuyus, were targeted; on the other side, the supporters of the defeated Orange Democratic Movement (ODM) with its candidate, Raila Odinga, of Luo and other ethnic groups, were targeted for retaliation. It is alleged that over 1,200 people were killed, thousands injured and more than 600,000 persons displaced during this widespread attack. The conflict was terminated by a power sharing agreement between the two rival factions: a Coalition Government with Kibaki as President and Odinga as Prime Minister was formed.

The then-ICC Prosecutor (the Argentinian Luis Moreno Ocampo) decided to open an investigation in Kenya at the end of 2009, after having determined the failure to ensure liability at the local level. For the first two years he had preferred to engage in what he used to call a "positive complementarity" strategy: in practice, a form of "dialogue" with the authorities of the concerned State aimed at getting the national judicial system to deal with the investigation and prosecution of the alleged crimes of international concern. Indeed, the whole architecture of the ICC is based on the assumption that, as affirmed in the ICC Preamble, it is the duty of the States to prosecute the international crimes committed by their own nationals or on their own territory. According to the complementarity principle, the ICC intervention is only possible if the State concerned is not already investigating/prosecuting the case, and is unwilling or unable to do so in a genuine way (cf. art. 17 ICC Statute).

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In fact, following the 2007-2008 post-electoral violence, Kenya had ensured to be willing to investigate the responsibilities for the criminal episodes. A Commission of Inquiry into the Post Election Violence, known

as the *Waki Commission*, was appointed. Upon recommendation of this Commission, it was initially agreed to establish a special tribunal at the local level to prosecute the alleged crimes against humanity committed after the elections. However, such an initiative failed for political reasons, and only few prosecutions have been so far conducted in domestic courts, just for ordinary crimes (thus not for crimes against humanity or other international crimes) and only with regard to low-level perpetrators.[1]

Moreover, under the auspices of the Panel of Eminent African Personalities, the Kenya National Dialogue and Reconciliation Committee (KNDR) was set up, in which context it was agreed to put in place also non-prosecutorial mechanisms in addition to the criminal proceedings. As one of the key institutions under this umbrella, the Coalition Government established a Truth, Justice and Reconciliation Commission (TJRC). The TJRC was in fact tasked with a much broader mandate than the ICC investigation, covering both economic crimes and gross violations of human rights starting from 1963 – the independence of Kenya - to February 2008 – the end of the post-electoral violence. The Commission was dissolved last year, after having submitted its final report, which indicated that more than 40,000 witnesses were heard. It is unclear, however, if and how the TJRC results should be coordinated with the criminal proceedings (if any); in particular whether it will be possible to use the information collected and produced by the TJRC, as there seems to be no mechanism of coordination or information sharing between the Commission and the national courts.

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Looking backwards, it can be certainly assessed that Kenya's judicial response to the post-electoral violence of 2007-2008 was a failure and a malicious strategy of the Government to gain time and to delay the possible ICC intervention. Interestingly, the ICC investigation in Kenya not only was very popular among the ordinary people – according to polls conducted in 2010, the ICC had strong local support and around 68% of Kenyan population wanted the prosecution in The Hague –, but also it seemed to have the support of the State authorities, which had initially ensured the ICC Prosecutor of their full cooperation. However, things dramatically changed when the names of the suspects became public and the two most prominent indictees run for, and eventually won, the Kenyan 2013 Presidential elections. It shall not be overlooked that Uhuru Kenyatta, a Kikuyu, and William Ruto, a Kalenjin, far from being allies as in their current positions of President and Deputy President, were

[1] S. Materu, *Prosecution of International Crimes in Relation to Post-Election Violence in Kenya*, PhD thesis, 2014

actually opposing each other during the 2007 elections and in the ensuing riots.

The indictment of Uhuru Kenyatta and William Ruto

The second reason for the exceptional importance of the ICC Kenyan cases is that, although not the only ones involving a sitting head of State[2], they represent the most advanced stage ever reached by the ICC against state authorities. President Kenyatta is formally accused of crimes against humanity, and if it were not for the innumerable delays of the last months, he would be already facing trial in The Hague, as his Deputy, William Ruto, who has been tried since last autumn. More precisely, Kenyatta is accused of being criminally responsible for the crimes against humanity of: murder; deportation or forcible transfer; rape; persecution; and other inhumane acts. Similarly, Ruto is accused of being criminally responsible for the crimes against humanity of: murder; deportation or forcible transfer of population; and persecution (under article 7[1] ICC Statute).

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Both of them are accused as "indirect co-perpetrators", pursuant to article 25(3)(a) of the Rome Statute. Indirect (co-)perpetration is a mode of liability that entails the maximum degree of culpability: although not accused of having materially committed the crimes with their own hands (thus, not to have personally raped, murdered, or tortured), because of their control over the material perpetrators and over the entire crime, it is considered as they had committed the crimes themselves. This form of commission "through another person" has been combined in the recent jurisprudence of the ICC with the "joint commission" or "co-perpetration" form, thus giving rise to the new figure of indirect co-perpetration, which is able to reach out to a broader set of responsibilities than the classical direct commission "as an individual".

The Prosecutor alleged that Kenyatta, together with others, "agreed to pursue an organizational policy to keep the PNU in power through every means necessary, including orchestrating a police failure to prevent the commission of crimes" and that he "devised a common plan to commit widespread and systematic attacks against perceived ODM supporters by: (i) penalizing them through retaliatory attacks; and (ii) deliberately failing to take action to prevent or stop the retaliatory attacks".[3] Kenyatta

[2] Indeed the ICC also pressed charges against Omar Al-Bashir, the Sudanese President, for his alleged responsibility in the genocide and crimes against humanity committed in Darfur. However, Al-Bashir was never arrested, due to the lack of cooperation of Sudan itself as of other states, and the charges against him were never confirmed, so that technically speaking he is not an "accused", but just a "suspect" before the ICC.

[3] Confirmation of Charges Decision of 23 January 2012 (ICC-01709-02/11), par. 288.

is also accused of being responsible for rape and other inhumane acts – including forced circumcision and penile amputation – carried out by the Mungiki, a criminal gang allegedly under his control.

But let's have a look back at the procedural steps that brought to the accusation of the current President and Deputy President of Kenya. The ICC Pre-Trial Chamber had authorised the investigation into the Kenya situation on 31 March 2010, upon a request lodged by the Prosecutor in November 2009. Differently than for the investigations triggered by a State or Security Council referral, the ICC Prosecutor needs to seek the judges' authorisation in order to open an investigation *motu proprio*: notably, this represents one of the significant "check an balances mechanisms" that was introduced by the drafters of the Rome Statute to counterbalance the discretional powers of the Prosecutor. In the Kenya case the decision to authorise the investigation was taken by majority: one of the three Pre-Trial Chamber members, the German Judge Hans Peter Kaul, had in fact objected to the opening of the investigation, maintaining that the facts did not meet the threshold to amount to crimes against humanity and therefore were not under the jurisdiction *ratione materiae* of the ICC, but just ordinary crimes to be judged by the Kenyan courts. In his view, the crimes would not have been committed in pursuit of a state or "organisational policy", as required by art. 7 of the Rome Statute, but spontaneously, thus lacking the contextual element typical of crimes against humanity.

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Judge Kaul objected again, for the same reasons, to the request of the Prosecutor to issue summons to appear for the suspects. Nevertheless, in March 2011 the Chamber decided to grant the Prosecutor's request, and issued summons to appear directed to six individuals, for their alleged direct responsibilities in the commission of crimes against humanity, such as murder, forcible transfer of population, rape, persecution, torture and other inhumane acts within the meaning of art. 7(1) of the Rome Statute. All of them were high profile officials and politicians and also close to President Kibaki. The suspects were divided in two "cases", according to their role in the post-electoral violence of 2007-2008, which in turn was linked to their ethnicity and political affiliation at the time of the elections.

More in detail, the six suspects included, on the one hand: William Ruto – former Minister of Education; Henry Kosgey – then Minister of Industrialization; and Joshua Sang, head of operations and Radio presenter at Kass FM, for the crimes committed by the Kalenjin against the population (mainly Kikuyus) considered to be affiliated with the President Kibaki's party, the PNU (*case 1*). On the other hand: Francis Muthaura - then head of the public service and secretary to the cabinet; Uhuru Kenyatta – then deputy Prime Minister and Minister of Finance;

and Mohammed Ali - then Chief executive of the postal corporation, for the crimes committed by the Kikuyu militia allegedly in retaliation against the violence coming from the detractors of President Kibaki (*case 2*).

The issuance of less restrictive "summons to appear" instead of "warrants of arrests" is the third reason that marks the exceptionality of the Kenyan cases: notably, pre-trial detention, exceptional before national courts, is the norm before international tribunals, even just to ensure the appearance of the suspect before the Court and the presence at trial. The Prosecutor in this case had instead opted for the less impacting summons to appear, confident of the good cooperation with the Kenyan authorities. Sharing the Prosecutor's view, the Chamber found that there was no need to order the arrest of the suspects, as "nothing currently indicates that they would evade personal service of the summons or refrain from cooperating if summoned to appear".[4] The suspects were thus summoned to appear before the Court on 7 April 2011 where they were formally informed of the charges against them, and of their rights.

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The "confirmation of charges"[5] hearings for the two cases were held in September 2011. As a result, the charges were confirmed with regard to four out of the six suspects. As explained in the Pre-Trial Chamber's decisions of 23 January 2012, the judges did not find sufficient evidence with regard to Mohammed Ali and Henry Kosgey, and therefore terminated the proceedings in their regards. The charges against William Ruto and Joshua Sang, in case 1, Francis Muthaura[6] and Uhuru Kenyatta, in case 2, were confirmed by majority (again with Judge Kaul dissenting); at this stage the suspects formally acquired the status of accused and were sent to trial. This was back in January 2012: more than two years have since passed, but the proceedings are not advancing as expected. Actually the trial against Kenyatta hasn't properly started yet, for the reasons that we will try to outline here below.

Delaying tactics and Kenya's obstructionism vis-á-vis the ICC

The obstruction strategy put in place by Kenya is multifaceted and is based on a number of techniques. Initially the state conveyed the message to be willing to deal with the post electoral-violence in a serious way and

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[4] Pre-Trial Chamber II Decision of 8 March 2001 (ICC-01/09-02/11-01), par. 55.

[5] See art. 61 Rome Statute. The purpose of the confirmation of charges at the end of the investigation phase is to check the solidity of the cases that shall be sent to trial on precise charges, and block those which in the view of the judges are not sufficiently substantiated in order to stand trial. It is designed as a guarantee for the defendant in the first place of course, but also as a filter for the Court, not to engage in long and unsuccessful criminal prosecutions.

[6] The Prosecutor eventually dropped the charges against Muthaura; see below.

showed its readiness to cooperate with the ICC Prosecutor. As already mentioned, the Government established the Waki Commission to investigate the post-electoral violence, and it promised to promptly set up a special tribunal or find another judicial mechanism to deal with the alleged crimes. An agreement was even signed with the ICC Prosecutor, whereby Kenya was committing itself either to prosecute domestically, or to self-refer the situation to the ICC. The agreement also included that, in case of failure at the local level, Kofi Annan would have turned over to the ICC the confidential material produced by the Waki Commission in his possession. It took some time, and three missed deadlines, for Annan and the Prosecutor to conclude that nothing of what the Government had promised was actually going to happen. This is when, at the end of 2009, the Prosecutor finally asked the authorization to open a *motu proprio* investigation at the ICC and Annan provided the ICC with the Waki Commission's material. From that moment the obstruction strategy of the Kenyan Government changed.

Since the initial appearance of the suspects, the Court has been seized of a variety of procedural and legal issues. At the time of the confirmation hearing, the Chamber had already received over 280 filings. Most notably, on 31 March 2011, few days before the date set for the appearance of the suspects, the Government of Kenya challenged for the first time the jurisdiction of the Court, by filing an application pursuant to art. 19 of the ICC Statute, whereby it requested the Court to find the cases against the suspects inadmissible on the ground that Kenya was alredy investigating the crimes itself. Notwithstanding the over 900 pages of additional material with which the Government sought to reinforce its initial challenge, on 30 May 2011 the Pre-Trial Chamber rejected the challenge and determined that the case against the Kenyan suspects was admissible. Following the appeal lodged by the Government of Kenya, on 30 August 2011, this decision was upheld by the Appeals Chamber.

It shall be noted that the attitude of Kenyan authorities was at least ambiguous: on the one hand the Government allowed the ICC to open a liaison-office in the country, and the suspects, when summoned, spontaneously appeared before the Court in The Hague, while, on the other, the Government was doing its best not only to stop the proceedings but also to delegitimize the Court as a whole. It has been contended that Kenya's strategy to undermine the ICC - branded as a neo-colonialist institution that only targets Africans – was the necessary pre-requisite of the Kenyatta-Ruto alliance, ultimately also a defensive strategy against the ICC.[7]

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[7] See S. D. Mueller, *Kenya and the International Criminal Court (ICC): politics, the election and the law*, in Journal of Eastern African Studies, 2014, p. 25-42.

Indeed it is abnormal that Kenyatta and Ruto could run and win the Presidential elections while being indicted for crimes against humanity before the ICC; the result could only be achieved through a well-orchestrated campaign of delegitimation and attacks against the ICC, which heavily penetrated in the local discussion inside the public media channels. Already during electoral campaign the Court was accused of making a political use of justice and being biased against African leaders. The relevant national institutions did not ban the two candidates from running for office although they were accused of the gravest crimes against mankind. The ICC, in turn, declared that decisions on the eligibility of Presidential candidates was an internal affair, and therefore the Court was not competent to comment upon. As a matter of fact the 2013 election of Kenyatta and Ruto as President and Deputy-President of Kenya had a big impact on the ongoing cases and on the relations between Kenya and the ICC in general.

In September 2013 Kenya's Parliament voted to pull out of the ICC. The government sponsored motion to "suspend any links, cooperation and assistance" to the Court was overwhelmingly approved by the National Assembly. Local newspapers reported that Kenya had the support of the African Union (AU) and that many other African countries were ready to stand united and back the state's move against The Hague Court. However the facts of the last years tell a slightly different story. A special summit of the AU was convened on 11-12 October 2013 with just one item on the agenda, i.e. to discuss a mass pull out of the ICC by African countries. The summit resulted in a failure, with just a few Heads of African States participating and general disinterest by most African countries. In the end a motion was passed, which contained two main points: first, the AU took the stance that Heads of State should enjoy immunity before the Court (which, by the way, is contrary to the dictate of art. 27 of the Rome Statute); second, the AU asked the United Nations Security Council (UNSC) to defer the situation before the ICC for one year.

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The deferral of ICC investigations by the UNSC is a mechanism provided for by the ICC Statute (art. 16): despite the fact that the ICC is not an organ of the UN, the Statute indeed contains some mechanisms both to trigger and to suspend the jurisdiction of the Court in particular situations, under Chapter VII of the UN Charter. In the case at stake, the AU wanted the UNSC to suspend the proceedings against Kenyatta, on the ground that being an impediment for the President to exercise his duties properly (including with regard to the anti-terrorist activities in the wake of the Westgate Mall attack in Nairobi), they constituted a threat to international peace and security. Last November the UNSC rejected this argument: the AU-proposed resolution demanding to suspend the ICC

Kenya proceedings for one year did not pass for 7 to 8 votes, with no need even for a veto by the permanent members of the UNSC.

The Ruto/Sang case started on 10 September 2013. In fact, following the Westgate Mall attack of 21 September, the ICC granted Deputy President Ruto's application for adjournment of the trial to allow him to deal with the ensuing crisis. Kenyatta's trial, which was due to commence on 12 November 2013, had also been postponed (initially until 5 February 2014).

The judicial battle for the presence requirement and witnesses withdrawal

The delaying and obstruction technics changed form and became more sophisticated after the winning of the elections by Kenyatta and Ruto. Notably, the Rome Statute does not afford any form of immunity based on official capacity (art. 27 of the Statute). However, as expected, the accused made use of their political status to impede or at least delay the continuation of the proceedings. In particular, a judicial battle is taking place over the "presence requirement" at trial.

The Court was faced with a legal issue raised by the Defence – whether the Rome Statute requires an accused to be continuously present at trial. According to the text of art. 63(1) of the Statute: "The accused shall be present during the trial". However, it was contended that this did not imply an "absolute presence requirement". Already in June 2013 the Trial Chamber conditionally granted the request of William Ruto to be excused from being continuously physically present throughout the trial, which was scheduled to start in September 2013. The permission was granted by majority, to accommodate the demanding functions of Ruto's office as Deputy President of Kenya, and not to – as the judges put it – merely gratify the dignity of his own occupation at that office. A similar permission was later granted also to President Kenyatta. While granting absence permission, the Trial Chamber required the accused to be present during particularly important hearings and session, as the opening and closing statements of all parties and when the victims appeared before the Court to present their views and concerns.

The Prosecutor and the victims' representatives strongly opposed the Trial Chamber's decision. On 25 October 2013, the Appeals Chamber unanimously reversed the Trial Chamber's conclusions and held that the accused are required to continuously attend their trials, with exceptions to be granted only in exceptional circumstances. According to the Appeals Chamber: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; and (ii) the decision must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for

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Following this decision, however, the ICC Assembly of the States Parties (composed by the 122 member states) agreed to change the Court rules to make it easier to be absent from trial "due to extraordinary public duties" (see Rules 134*bis* to 134*quater* of the Rules of Procedure and Evidence).[8] The Trial Chamber was subsequently able to issue a fresh ruling on the matter, excusing Ruto from continuous presence at trial: he is due to appear before the Court at specific hearings or upon specific order by the Trial Chamber. The Prosecutor already announced her appeal against this latest move.

As if this was not enough, the most worrying and serious part of Kenya's strategy to disrupt the ICC proceedings is certainly the corruption of evidence including, but not limited to, the intimidation of potential witnesses. The Court had to deal repeatedly with threats and attacks against witnesses and their consequent retracted statements and withdrawals. The campaign to silence key witnesses, which started already during the investigation and intensified once the trial started, included bribing, intimidating, and even killing them. In October 2013 the Court issued a warrant of arrest against Walter Barasa, a Kenyan journalist suspected of bribing three witnesses in the Ruto case.

After all, there seems to be no need for political or procedural obstructionism anymore. Recent events indicate that the cases are about to collapse for lack of evidence. The Prosecutor had already to take, months ago, the hard and unprecedented decision to drop the charges against Kenyatta's co-defendant, Muthaura, for lack of evidence, following the withdrawals of several witnesses. The Trial Chamber will now have to decide with regard to the Kenyatta case, after that the Prosecutor announced, in December 2013, the removal from its list of a key witness, who admittedly provided false evidence, and of a second one, who informed the Prosecution to be no longer willing to testify. "In light of these developments, the Prosecution considers that it has insufficient evidence to proceed to trial at this stage", and therefore is seeking for an indefinite adjournment of the trial date with regard to President Kenyatta.[9] The Defence, on the other side, is seeking for the termination of the proceedings and the acquittal of the defendant.[10]

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[8] Resolution ICC-ASP/12/Res.7Adopted at the ASP 12th plenary meeting, on 27 November 2013

[9] Prosecutor's Notification of the removal of a witness, 19 December 2013 (ICC-01/09-02/11-XXX), par. 3.

[10] See the Defence response to the Prosecution submissions, 17 February 2014 (ICC-01/09-02/11-XXX).

Lately the Prosecutor has unequivocally termed Kenya's behaviour *vis-á-vis* the Court as "pure obstructionism". If Kenya keeps not cooperating with the Court, there is a possibility that the summons to appear be replaced by warrants of arrest. On the one hand, the ICC member States would then be under a legal obligation to arrest Kenyatta and Ruto, which implies – at the least – that the accused could not travel anymore in many countries. On the other hand, however, the diplomatic implications of arresting the sitting Head of state of a country like Kenya are such that it can be well anticipated that many states would hardly comply with such obligation. Moreover, the ICC is already in a very fragile situation in Africa and in need of legitimacy and political support: whether the Court has an interest in pursuing such a challenging path is still unclear. The boomerang effect risk is indeed very high. What is sure is that the current Prosecutor (the Gambian Fatou Bensouda), is seriously considering to file an application for a finding of non-compliance against the Government of Kenya before the Assembly of States Parties, for Kenya's failure to comply with its co-operation obligations: it would be then for the ICC member states to determine whether and what action to take with respect to Kenya's failures.

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