



IMPUNITY RESTORED?

Lessons learned from the failure of the Kenyan
cases at the International Criminal Court



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Abbreviations and Acronyms

ASP	Assembly of States Parties
AU	African Union
CIPEV	Commission of Inquiry into the Post-election Violence
GoK	Government of Kenya
ICC	International Criminal Court
ICCPP	International Criminal Court Protection Programme
IDP	Internally displaced person
ODM	Orange Democratic Movement
OTP	Office of the Prosecutor
PEV	Post-election violence
PIDS	Public Information and Documentation Section
PNU	Party for National Unity
TFV	Trust Fund for Victims
UNSC	United Nations Security Council
VPRS	Victims Participation and Reparations Section
VWU	Witness and Victims Unit

Summary

The termination of the ICC cases against Kenya's president Mr Uhuru Kenyatta and his deputy, Mr William Samoei Ruto in 2015 and 2016 marked the end of the quest for justice for the victims of the 2007/2008 post-election violence in Kenya. This paper traces the evolution of these cases, critically analyses what went wrong and draws lessons for the ICC, civil society and the international community for the future. In the main, the report concludes that achieving international justice is extremely challenging, if not impossible, without supportive state institutions; that regional bodies, such as the African Union, can play a negative role that hinders the quest for justice; that in the face of complicity by the political elite in criminal conduct, state co-operation with the ICC is difficult, no matter what the law says; that the international framework for protecting victims is weak and clearly needs to change; and finally, that the international framework for holding states accountable for violations under the Rome Statute, through both the Assembly of States Parties and the United Nations Security Council, is extremely vulnerable to geopolitical pressures and calculation.

In light of pervasive violence in Africa – particularly in connection with elections, most recently seen in Gabon, Burundi, Zambia and the Democratic Republic of Congo – coupled with the obstructionist role that the African Union has played in the Kenyan cases, this report draws sober conclusions about the prospects of international justice for victims of violence in the continent. The waters have recently been muddied by the notice of withdrawal from the Rome Statute of South Africa, Gambia and Burundi. All this threatens to continue to complicate Africa's relationship with the ICC in the coming years.

I: Background, Indictment and Termination of the Kenya Cases

Overview

On 5 April 2016 the charges against Kenya's Deputy President Mr William Samoei Ruto and journalist, Mr Joshua Arap Sang, at the International Criminal Court (ICC) were terminated, less than a year and a half after similar charges against President Uhuru Kenyatta had gone the same way. They were discharged, but not because they were innocent: they escaped sanction because of alleged widespread witness tampering and intimidation, which had hindered the evidence gathering by the Office of the Prosecutor. Presiding Judge Chile Eboe-Osuji laconically noted the 'troubling incidences of witness interference' as well as 'intolerable political meddling'. Many witnesses had in fact recanted their testimony and others had disappeared, perhaps died. All along, the Kenya government claimed that it was co-operating with the Court but mostly it was erecting barriers to the Prosecutor's inquiries; withholding the financial records of Uhuru Kenyatta; refusing to execute ICC warrants for three Kenyans suspected of witness-tampering and, generally, using the accused persons' control of the instruments of the state to frustrate Kenya's discharge responsibilities to the ICC. The effect was that it was never likely that the court would be able to establish Uhuru Kenyatta's and William Ruto's culpability for the 2007 post-election violence in which over 1,000 people were killed, 300,000 more displaced, women raped and sexually abused and scores of citizens forced to flee into neighbouring Uganda.

This paper is in three parts. Part 1 details the events from the initiation of these cases to their termination, including both the role of domestic politics and international diplomacy in the way the cases evolved. Part 2 sets out the lessons learnt and key messages from these cases. The second part deals with three issues in an integrated way: one, the politics of ICC cases in the 2013 presidential elections in Kenya; two, the diplomacy and geopolitics of those cases at the level of the African Union (AU) and subsequently at the Assembly of States Parties; and three, the legalities arising from the initiation, prosecution and termination of the Kenyan cases. Part 3 gives recommendations for the Court, the Prosecutor, the African Union, the Government of Kenya, the Assembly of States Parties and civil society.

Background to the Kenyan cases

Following a deeply divisive election in 2007, the then Electoral Commission of Kenya bungled the transmission, tallying and announcement of presidential results. Hastily – and behind closed doors – the Commission declared President Mwai Kibaki of the Party for National Unity (PNU) the victor in that election, even though early results showed that his rival, Mr Raila Odinga of the Orange Democratic Movement (ODM) was in the lead. Violence then flared in towns and villages across the country. A subsequent investigation, by the Commission of Inquiry into the Post-Election violence (CIPEV or 'Waki Commission'), established that the violence had broken

out in waves. The first spate of violence, perpetrated by angry ODM supporters, expressed itself in spontaneous, violent street protests and also targeted individuals thought to belong to groups that supported PNU, principally the Kikuyus, Kambas and Kisiis.

A second and third wave of violence ensued: violence was perpetrated mainly by members of the ‘Mungiki’ gang against perceived ODM supporters allegedly under instruction from, and with the support of PNU politicians, ostensibly as a response to the first wave; there was also excessive use of force by security forces. In fact, the Commission of Inquiry found that the security forces had over-reacted: their violence was often indiscriminate, disproportionate and politically biased. A fourth wave of organised violence swept through the Rift Valley, aiming to punish and expel those populations seen as supportive of the PNU, principally the Kikuyu, who were perceived as usurpers of ‘native communities’ land rights. When it was over, more than 1,000 people were dead, over 300,000 people were internally displaced and others had fled to neighbouring Uganda. Rape and other forms of sexual and gender-based violence were rife across all waves of violence: gang rapes were reported and, most troubling, especially in the slums, many of the rapes were committed by the security forces. Perceived ODM male supporters living in PNU strongholds were forcibly circumcised, often with crude objects, a crime with ethnic overtones¹. Looting and theft were pervasive² indicating that what initially began as outrage at electoral theft had morphed into opportunistic profiteering and robbery.³

At the end of the inquiry, the Commission issued a detailed report cataloguing the crimes and the abuses, spelling out which groups were culpable for what types of violations and identifying areas of action. To deal with high-level perpetrators of violence, the Commission recommended that the government establish a hybrid special tribunal, composed of international and local judges. But it inserted a fail-safe trigger in the recommendation: if Kenya failed to set up the proposed tribunal, the evidence that it had collected would be handed over to the Office of the Prosecutor at the ICC. In February 2009, a bill to establish the special tribunal was defeated.⁴ A second attempt, much later on, met the same fate⁵ and the materials collected by CIPEV were handed over to the Office of Prosecutor, along with a sealed envelope containing the names of persons who the Commission thought were the alleged high-level perpetrators of the violence.

¹ Members of the main ethnic group perceived as having supported the ODM do not traditionally practice male circumcision, as opposed to the perpetrators belonging to the main ethnic group perceived as supporting the PNU.

² For an in-depth analysis and break-down of crimes that occurred during the post-election violence refer to the Inquiry into the Post-Election violence or Waki Report as it is commonly known. Available at: http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

³ *Ibid*, Executive Summary, Part viii.

⁴ On the 27 January 2009, the Report of the Waki Commission was adopted by the National Assembly. However, on the 12 February 2009, the Constitution of Kenya Amendment Bill, 2009, which would have paved the way for the establishment of the Special Tribunal, was defeated in the National Assembly.

⁵ On 24 August 2009, Member of Parliament, Mr Gitobu Imanyara introduced a Private Members Bill to establish a Special Tribunal to try the perpetrators of the post-election violence. The bill was boycotted three times and was never passed. See the Parliament of Kenya, 20106. Doc. Hansard 16.12.110P, p. 22-25.

The charges are confirmed

On 5 November 2009, the ICC Prosecutor sought the Court's authority to investigate the Kenya cases pursuant to article 15(3) of the Rome Statute. A pre-trial chamber – Pre-Trial Chamber II – consisting of Judges Ekaterina Trendafilova (presiding judge), Hans-Peter Kaul and Cuno Tarfusser, was established on 6 November 2009. On 31 March 2010, by a majority vote (Judge Hans-Peter Kaul, dissenting), Pre-Trial Chamber II granted the Prosecutor permission to open the Kenya investigation. On 15 December 2010, the ICC Prosecutor asked the Court to issue summonses to six Kenyans – William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali – on the basis that there were reasonable grounds to believe that they had committed crimes against humanity. On 8 March 2011, the Chamber issued the summons and required the six – commonly referred to as the Ocampo Six – to appear before the Court in April 2011. In March 2011, the Government of Kenya challenged the admissibility of the case before the ICC but on 30 May 2011, Pre-Trial Chamber II rejected the application. The Kenyan cases against the six were set in motion when the decision of Pre-Trial Chamber II was affirmed by the Appeals Chamber on 30 August 2011.

The Ruto and Sang cases

The hearing to confirm the charges against William Ruto was held from 1 to 8 September 2011. The Prosecutor's pre-trial brief in the case against Mr Ruto, heard alongside that against Mr Sang, set out the chilling details of the case against Mr Ruto. He was one of the most influential politicians in the Rift Valley, the Prosecutor's brief claimed, and was the key player in a 'network' of high ranking ODM officials, traditional elders, businessmen, and civil servants⁶ at the heart of conducting meetings, rallies, fundraisers and other events to drive the attacks in the post-election violence (PEV). During these 'network' rallies, Mr Ruto incited the crowds obliquely, through Kalenjin proverbs and local metaphors – in effect asking that non-ODM supporters be evicted from the Rift Valley. Kikuyus, he was alleged to have said, were 'birds whose nests needed to be destroyed', 'weeds growing near Kalenjin houses which needed to be removed', or 'witches who should be burned'.⁷ The call to immolate – so reminiscent of similar happenings in the 1994 Rwandan genocide – received chilling confirmation in the New Year's Day 2008 burning down of Kiambaa Church, inside which, perhaps as many as 50 people who had sought refuge, were burnt to death.

On 23 January 2012, Pre-Trial Chamber II confirmed the charges against Mr Ruto and Mr Sang and committed them to trial before an ICC Trial Chamber, which started on 10 September 2013.

⁶ Ruto Pre-Trial Brief, para. 23.

⁷ Ruto Pre-Trial Brief, para. 59.

The Kenyatta case

The hearing to confirm the charges against Mr. Uhuru Kenyatta was held from 21 September to 5 October 2011. The charges related to the support that Mr Kenyatta was alleged to have given to the PNU's attacks against perceived ODM supporters, in retaliation for the attacks in the Rift Valley. These attacks took place in the PNU strongholds of Nakuru, and Naivasha, as well as in the ODM stronghold of Kibera in Nairobi. The Prosecutor's case was that from mid-2007, Mr Kenyatta's agents and the PNU contacted senior leaders of the Kikuyu gang, 'Mungiki'⁸ to solicit the gang's support in the presidential election later in the year. One objective was that should the election turn violent, gang members would be ready to hand. In the immediate post-election period, Mr Kenyatta was said to have given large quantities of money to intermediaries, intending that it be funneled down to those who would perpetrate the post-election violence in Nakuru and Naivasha. These funds allegedly facilitated criminal acts: rape, forcible circumcision, murder and forced displacements. In one of the most affected towns, Naivasha, alleged PNU supporters and Mungiki mobs hunted down perceived ODM supporters, burning alive 17 people, amongst whom were eleven children.⁹

Cases not confirmed

On 23 January 2011, the Judges declined to confirm the charges against Mr Hussein Ali, and on 23 January 2012, the Judges declined to confirm the charges against Mr Henry Kosgey. Although the charges against Mr Francis Kirimi Muthaura had been confirmed together with those against Uhuru Kenyatta, on 18 March 2013 the charges against Mr Muthaura were withdrawn.

To arrest or to summon suspects? A never ending debate

Authorised by article 58 of the Rome Statute of the International Criminal Court ('Rome Statute'), warrants of arrest and summons are issued when a Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the persons named have committed the crimes alleged in the Prosecutor's application. Summons are issued, rather than warrants of arrest, if they are considered sufficient to ensure that the persons summoned are not a flight risk and – most important – that they will turn up in court.¹⁰ Indeed, Pre-Trial Chamber II, in its 'Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali' stated as much, noting that 'nothing currently indicates that they would evade personal service of the summons or refrain from cooperating if summoned to appear'.¹¹ On 15 December 2010, the ICC Prosecutor requested Pre-Trial

⁸ Mungiki is a banned ethnic militia organisation that also acted as a protection racket. The name means "A united people" or "multitude" in the Kikuyu language. For further reading on the Mungiki see: Ruteere, Mutuma, Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya (August 27, 2009). Available at SSRN: <http://ssrn.com/abstract=1462685> or <http://dx.doi.org/10.2139/ssrn.1462685>

⁹ See, Jeffrey Gettleman '19 Burned to Death in Violence in Kenya', 28 January 2008, The New York Times, available at: http://www.nytimes.com/2008/01/28/world/africa/28kenya.html?_r=0

¹⁰ See Article 58 (7) of the Rome Statute which states that: 'As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear.'

¹¹ Para. 55, 'Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', 08 March 2011, ICC-01/09-02/11-1

Chamber II to issue six Kenyans said to have masterminded the post-election violence with summonses to appear.¹²

The decision of the court to issue summonses rather than warrants of arrest on the basis that the indicted persons were not a flight risk would appear to have been vindicated by the fact that all of them honoured the summons and attended court without fail when required. However nothing seems to have prepared the court for an even worse outcome: that two of the accused would use their relative freedom to unite forces, run for office and then use the full machinery of the state to mount a global campaign against the court. The outcome of the Kenyan cases should therefore give the court pause in future situations when a determination has to be made as to whether to substitute summonses for arrest warrants. In any case, the practice at the ICC needs to more closely mirror that in domestic jurisdictions where bail is usually denied suspects where there is reason to believe not only that they are a flight risk, but that they might use their freedom to interfere with evidence and intimidate witnesses.

The ICC cases in Kenya's presidential politics, 2013

The confirmation of the charges at the ICC in late 2011 and early 2012 conveyed both the gravity of the situation, as well as the legal peril that Mr Kenyatta and Mr Ruto were now in. In addition, though the ICC charges may be only one among the many reasons that spurred the two to run for high office, no doubt the confirmation of the charges hardened their resolve to stay in the race and, more important, to carry out an aggressive campaign to delegitimise the ICC in Kenya, the home of the victims. In a strange ironical reversal, Mr Kenyatta and Mr Ruto now presented themselves as victims, the hapless targets of an imperialistic plot against Africans. A plot, moreover, that would ultimately undermine democracy in Africa by blocking reconciliation efforts, such as those that the political alliance headed by Uhuru, representing the Kikuyus, and Ruto, representing the Kalenjins was purportedly trying to achieve.

In turn, the ICC was cast as the pliant tool of a Western conspiracy against Kenya's sovereignty. At the same time, though, and somewhat inconsistently, the accused also messaged the ICC charges as personal problems, suggesting – as presidential candidate Kenyatta memorably and unambiguously did during the 2013 presidential debate – that the case would not have any bearing on his duties as president, if elected.¹³

Thus it was that by the time President Kenyatta and Deputy President Ruto took office in 2013, the first part of politicising the ICC cases was over. In sum, the new narrative went, the two – Kenyatta and Ruto – were the real victims; the cases themselves were an imperialist

¹² See 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', 8 March 2011, ICC-01/09-01/11-1 and 'Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', 15 December 2010, ICC-01/09-31-Conf-Exp and its Annexes. <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-1> and <https://www.icc-cpi.int/pages/record.aspx?uri=985621>

¹³ Indeed, Mr Kenyatta during this debate stated that: 'I will be able to deal with the issue of clearing my name while at the same time ensuring the business of government is implemented.' See G. Kegoro, 'Why Uhuru and Ruto must attend trials in The Netherlands', 7 September 2013, published in The Daily Nation, for an example of how things began to change once Mr Kenyatta and Mr Ruto were elected as President and Deputy President, respectively. Available at: <http://www.nation.co.ke/oped/Opinion/Why-Uhuru-and-Ruto-must-attend-trials-in-The-Netherlands-/440808/1983426/-/8nvfxgz/-/index.html>

conspiracy; the victims and perpetrators were now seeking reconciliation but the ICC, a stooge of the West, was blocking those reconciliation efforts. They would now take the same message to the international stage.

The first diplomatic shot in the war of attrition against the ICC cases was fired by Kenya's Permanent Representative to the UN, Ambassador Macharia Kamau. In a letter to the UN Security Council dated 2 May 2013, Mr. Kamau called for the immediate termination of the ICC Kenya cases arguing that this demand was predicated upon the premise that the absence from Kenya of indictees Uhuru Kenyatta and William Ruto, who had been recently confirmed in office as President and Deputy President of Kenya by a Supreme Court decision, would endanger peace and security in Kenya and the region. The letter went on to state that:

*'The security in the Horn of Africa region would be compromised by instability in Kenya if the cases continued to be prosecuted. The implications for the viability and continuity of the state should be self-evident. What this delegation is asking for is not deferral. What this delegation is asking for is immediate termination of the case at the Hague without further ado.'*¹⁴

The call for termination of the cases was vigorously opposed by Kenyan civil society.¹⁵ Even so, the Council opened the window for an in-principle dialogue with Kenya on possible deferral under article 16 of the Rome Statute. This was probably the reason Kenya decided to frantically mobilise the AU for support for its call for a deferral.

The ICC cases in pan-African politics: developments at the African Union, 2013

Upon Kenyatta and Ruto assuming office, the campaign to delegitimise the ICC – using the same anti-imperialist trope – was escalated to the African Union. The National Assembly, in which the ruling party had a majority, quickly passed a second motion calling on Kenya to withdraw from the Rome Statute.¹⁶ This soon resulted in a whistle-stop tour across the continent by the Deputy President, Mr William Ruto, to drum up support for either one or both of two options: one, make a request to the United Nations Security Council (UNSC) to defer the Kenya cases under article 16 of the Rome Statute or, two, instigate a mass African states' walk-out from the Rome Statute.

When the 21st Ordinary Session of the Assembly of Heads of State and Government of the African Union met in Addis Ababa, Ethiopia on 26 and 27 May 2013 Kenya rehashed many of these arguments. And when the AU adopted its Decision on International Jurisdiction, Justice and the International Criminal Court¹⁷ its conclusions mirrored those of Kenya: Mr Kenyatta's

¹⁴ Kenya asks UN to halt ICC charges against Kenyatta, BBC Africa, 9 May 2013 <<http://www.bbc.com/news/world-africa-22472242>>

¹⁵ See for example, Kenyans for Peace with Truth and Justice Memo Responding to Kenyan Ambassador's letter to the UNSC on ICC Cases, <<http://kptj.africog.org/kptj-memo-responding-to-kenyan-ambassador-s-letter-to-the-unsc-on-icc-cases/>>

¹⁶ On September 5, 2013 the Kenyan Parliament adopted a motion to repeal the International Crime Act, which domesticates the Rome Statute.

¹⁷ A copy of this Decision may be found at: Decision Assembly/AU/Dec.482 (XXI) on International Jurisdiction, Justice and the International Criminal Court.

and Mr Ruto's trials were a threat to the country's efforts to promote peace, national healing, reconciliation, the rule of law and stability, both at home and in the region. Failing to get the reaction it expected from the UNSC, the AU upped the ante, reconvening in an Extraordinary Summit on the ICC on 11 and 12 October, 2013, principally to discuss Africa's relations with the ICC and debate a possible mass withdrawal from the Court.¹⁸

The AU wanted to force a Security Council vote on the Kenyan cases. In its final resolution from the Extraordinary Session, the Union lamented what it called the 'politicisation and misuse of indictments against African leaders', unanimously resolving that sitting Heads of State and other high-ranking officials be granted immunity from ICC prosecution during their tenures.¹⁹ In the AU's own words,

*'... to safeguard the constitutional order, stability, and integrity of Member States, 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 in office'.*²⁰

This argument was bolstered by an anti-terrorism make-weight: Kenya was a frontline state in the fight against terrorism and a constant target of terror attacks, including the one on the Westgate shopping mall in Nairobi, which was still fresh in the news, having happened the previous month, on 21 September 2013.

With the backing of Togo and Morocco, Rwanda, (not an Assembly of States Parties member) pushed a Security Council resolution asking that the Kenyan cases be deferred. On 15 November, 2013, the UNSC voted. Rwanda's resolution failed: seven members voted in favour and the other eight members abstained.²¹

As noted below, these machinations were meant to, and probably did, eventually influence the Court and may, partially, have contributed to the eventual collapse of the Kenyan cases. But there was also more permanent change wrought to the ICC process by the AU intervention on behalf of Kenya, in the form of proposed amendments to the Rome statute. The AU's aggressive diplomacy eventually pressured the ASP to soften the effect of article 27 (1). That article, which the AU wanted changed – to immunise sitting heads of state against trial while in office – allows the trial of all accused no matter their official capacity.²² The AU proposal was eventually defeated, partly because of a marked lack of enthusiasm from other States parties and partly because of robust opposition from civil society. However, AU pressure did force the

¹⁸ The relevant letters to the UNSC as well as the 'Decision on Africa's Relationship with the International Criminal Court ("ICC") may be found at: <http://www.securitycouncilreport.org/un-documents/kenya/>

¹⁹ Ext/Assembly/AU/Dec.1 (Oct.2013)

²⁰ Para 10 (i), Ext/Assembly/AU/Dec.1 (Oct.2013)

²¹ Members who voted in favour: Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo. Members who abstained: Argentina, Australia, France, Guatemala, Luxembourg, the Republic of Korea, the United Kingdom, and the United States.

²² ASP, 'Statements in General Debate of the Twelfth Session of the ASP', 20-26 November 2013, statements by Botswana, Congo, DRC, Gambia, Ghana, Kenya, Ivory Coast, Namibia, Nigeria, Seychelles, South Africa, Tanzania, Tunisia and Uganda (on behalf of the AU).

ASP to adopt Rule 134*quater*²³, which now excuses an accused from continuous presence at trial, if he or she has ‘to fulfill extraordinary public duties at the highest level’.²⁴ Two more changes were introduced: 134*bis* allows accused persons to participate in the trial via video link and 134*ter* allows the accused to seek to be excused from trial and to be presented in court by an attorney.

It is not a stretch of imagination to argue that these amendments were intended to outflank the ICC in the Kenyan cases. As earlier noted, upon election as president and deputy president respectively, Kenyatta and Ruto applied to be excused from attending the trial hearings, requests to which both Trial Chambers acceded. However, the Appeals Chamber had subsequently reversed this decision in the Ruto case, meaning that at one level, these amendments to the Rome statute had, in effect, interfered with a matter live before the court, an attack on its independence.

It could also be argued that these changes are not consistent with the spirit of article 27, which treats all accused as equal, irrespective of their official capacities. By accepting the importance of Uhuru and Ruto’s official capacities, the Trial Chambers has, as Thomas Obel Hansen has argued ‘opened the door to treating prominent officials in a privileged manner’.²⁵ The changes introduced by the ASP have now cemented this principle. This must be a matter of trepidation to the victims participating in ICC proceedings: when the ASP and the Trial Chambers appear to go to such extraordinary lengths to accommodate accused persons, the prospect of justice must begin to look vanishingly small.

Count-down to termination of the ICC cases

The strident tone adopted by Mr Kenyatta and Mr Ruto in their campaigns amongst their peers on the continent contrasts with their often adroit manipulation of the court process at The Hague in order to secure the most lenient court attendance conditions possible. Even though Kenyatta had said that the ICC was personal rather than public business, once he got elected he and his deputy now argued that their public duties would be impaired by any requirement that they be continuously available at trial. On 18 June, 2013 Trial Chamber V(a) of the ICC agreed on a majority decision that it was not necessary for Mr Ruto to be continuously present at The Hague, given the exceptional nature of his position as deputy president. On 18 October, 2013 Trial Chamber V(b) ruled, again on a majority decision and for reasons similar to those that Chamber V(a) had given in Ruto’s case, that Mr Uhuru Kenyatta also need not be continuously at The Hague for his trial.

The trials then began in sequence: Mr Ruto’s and Mr Sang’s trials were initially scheduled to start on 10 April 2013 but they were postponed to 28 May and then to 10 September 2013 on the defence’s plea for more time to prepare.

²³ Resolution ICC-ASP/ 12/ Res. 7

²⁴ Rule 134*quater*, Rules of Procedure and Evidence.

²⁵ See ‘Case Comment, Caressing the Big Fish? A Critique of ICC Trial Chamber V(A)’s Decision to Grant Ruto’s Request for Excusal from Continuous Presence at Trial’, Cardozo Journal of International and Comparative Law, 2013. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298603>

Uhuru Kenyatta's trial had a more chequered history, partly to do with a dearth of evidence – a matter caused in part by the non co-operation of the state. On 19 December 2013, the Prosecution asked for a three-month postponement, hoping for a start date of 5 February 2014. However, on 23 January 2014, just a fortnight before the trial was to begin, the Trial Chamber V(b) provisionally rescheduled the case to 7 October 2014. Even this did not work: on 19 September 2014, Trial Chamber V(b) again rescheduled, this time to 3 December 2014. The Prosecution wanted a further adjournment but Trial Chamber V(b) would not grant it. Out of adjournment options and unable to proceed on the evidence that it had on 5 December 2014, the Prosecutor filed a notice to withdraw, without prejudice to a future indictment, all the charges against Mr Kenyatta, citing the state of the evidence that they had. Thus it was that on 13 March 2015, Trial Chamber V(b), terminated the case against Uhuru Kenyatta and cancelled the earlier summons for him to appear.

Just over a year later, after a trial bedevilled with missing witnesses and retracted testimony, a similar fate befell the case against Mr William Samoei Ruto, and Mr Joshua Arap Sang. On 5 April 2016, Trial Chamber V(a) issued its 'Decision on Defence Applications for Judgments of Acquittal'²⁶ in which it ruled that the charges against the accused, be vacated and the accused be discharged without prejudice to a fresh prosecution in the future.

²⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Public redacted version of Decision on Defence Applications for Judgments of Acquittal", 5 April 2016.

II: Lessons Learned, Key Messages

The ICC cannot confront impunity without the support and co-operation of state agencies

The collapse of the Kenya cases left many people – especially the victims of post-election violence – deeply sceptical. But the cases are also a good learning point. They illustrate three ways in which lack of supportive domestic mechanisms undermines justice at the international level. One, as a matter of Kenya's constitutional law, Uhuru Kenyatta and William Ruto, should not – as individuals facing the most serious charges known to law – have been able to run for president and deputy president of a country that is a member of the Assembly of States Parties, and a signatory to the Rome statute. Second, once in power the two were able to use the instruments of state power to obstruct all attempts by the Office of the Prosecutor to collect evidence from state agencies in Kenya: the office of the attorney general in effect acted like counsel for the accused, rather than a state law officer. Third, being president and deputy president the two accused were able to use the machinery of the state to identify and then target witnesses; to compromise them, to intimidate them and, some allege, even to eliminate them. Even the witnesses they failed to reach would have noted this and this almost certainly played a part in the many retractions that eventually undermined the cases at The Hague.

The inter-play of these three factors doomed the cases ab initio. Part 9 of the Rome Statute, especially article 86, requires states parties to co-operate and offer judicial assistance to the ICC ‘in its investigation and prosecution of the crimes within the jurisdiction of the Court’, but without a police force or an enforcement mechanism, the ICC is vulnerable to state delinquency. A rogue state is unlikely to pay much heed to article 93(1) (a)-(j) which lays out the specific obligations that states have under the Rome Statute, including obligations ‘to identify and track persons or things; take evidence and testimony under oath as well as produce evidence; question individuals; examine places or sites, and exhume and examine grave sites; execute searches and seizures; provide records and documents and preserve evidence’. There are abundant examples that Kenya failed to discharge most if not all of these obligations.

The refusal to disclose Uhuru’s money trail to Mungiki

Central to the case against Uhuru Kenyatta was the alleged money trail that linked him to Mungiki intermediaries and through them to the revenging forces that targeted ODM supporters living in PNU strongholds. The Prosecution asserted that there is a ‘substantial body of evidence’ showing that Mr Kenyatta had in fact been a financer of the violence. To establish the nexus between Mr Kenyatta and these illicit finances the Prosecution told the court that identifying the companies in which Mr Kenyatta had an interest would be a ‘central part of its investigations’.²⁷

²⁷ See Decision on the Prosecution’s revised cooperation request, ICC-01/09-02/11-937; see para, 14 where the Chamber refers to confidential Prosecution submissions on the matter.

The Kenya government denied knowing which companies Mr Kenyatta had an interest in. Similarly, it is almost certainly a result of the Kenyan judiciary's failure to facilitate the interview of ten senior police officers that undermined the case against former police commissioner Hussein Ali and eventually led to the decision of the Pre-Trial Chamber not to confirm charges against him.

The releasing of information sporadically with the intent to obstruct proper evidence gathering

When the charges against Muthaura were withdrawn in 2013, the Prosecution set out the ways in which the Government of Kenya's (GoK) obstructionism had affected its case:

'...since the beginning of the OTP's investigations in April 2010, the GoK has constructed an outward appearance of cooperation, while failing to execute fully the OTP's most important requests. Indeed, while the GoK has provided some cooperation and has complied with a number of OTP requests, the most critical documents and records sought by the OTP remain outstanding The individual and cumulative effect of the GoK's actions has been to undermine the investigation in these cases and limit the body of evidence available to the Chamber at trial'.²⁸

A failure to execute the ICC's warrant of arrest against three persons suspected of tampering with witnesses

The government's obstructionism was even more blatant with respect to the three warrants of arrest for witness tampering that the ICC had issued against Mr Walter Osapiri Barasa²⁹, Mr Paul Gicheru and Mr Philip Kipkoech Bett.³⁰ The Prosecutor alleged that the three had been involved in a criminal scheme to systematically corrupt and influence witnesses scheduled to testify in the Ruto case, so that they might withdraw or recant their statements in order to undermine the Prosecution's case. Bribery is a serious crime, both under Article 70 of the Rome Statute and under Kenya's Penal Code, especially when bribes are used to influence witnesses to change or recant their testimony. Not one suspect has been arrested and surrendered to the Court. Even worse, President Kenyatta has announced publicly that no Kenyan will be handed over to the ICC, a sentiment that the Attorney General, Prof. Githu Muigai, seems to have endorsed³¹. It is clear that Kenya is in breach of its article 87 obligations: States Parties must assist the court in the arrest and surrender of persons to the Court; they must provide evidence for use in proceedings; relocate witnesses as needs be and enforce the sentences of those convicted.³²

²⁸ ICC-01/09-02/11-733-Red, 13 May 2013, paras 1-4.

²⁹ 'Warrant of arrest for Walter Osapiri Barasa', 26 September 2013, ICC-01/09-01/13-1-Red2.

³⁰ 'Order unsealing the warrant of arrest and other documents', 10 September 2015, ICC-01/09-01/15-11.

³¹ See for example, <http://www.standardmedia.co.ke/article/2000198499/uhuru-i-will-never-allow-another-kenyan-to-be-tried-at-the-icc>

³² See 'All Bark and No Bite: State Cooperation and the International Criminal Court', a KPTJ report for a detailed discussion of the Kenyan Government's cooperation with the ICC, available at: <http://kptj.africog.org/all-bark-no-bite-state-cooperation-and-the-international-criminal-court/>

Finding Kenya guilty of article 87(7) non-compliance

There is now, in fact, a finding that Kenya has failed to co-operate with the ICC. When the Prosecution first asked Trial Chamber V(B) on 3 December, 2014 to rule that the Government of Kenya should be referred to the ASP under article 87(7) for failing to co-operate, the Chamber had demurred, noting, unpersuasively, that its power to make such a finding was a discretionary one.³³ On appeal, fifteen months later, the Appeals Chamber reversed the decision of the Trial Chamber on 19 August 2015 and remanded the case for fresh decision. On 19 September 2016, nearly two years later, Trial Chamber V(B) held that Kenya had not complied with its obligations to co-operate with the ICC. It referred the matter to the ASP, which, according to the Trial Chamber, ‘would be best placed to address the lack of co-operation, in order to provide an incentive for the Kenyan Government to cooperate with the Court’.³⁴ The Trial Chamber noted that, though 18 months had passed, no further progress had been made to implement the Prosecutor’s request. The Chamber lamented the fact that the lack of *bona fides* by the government of a situation country, as shown by the Kenyan government here, would have a serious impact on the functions of the Court in future proceedings.³⁵

The vulnerability of the Court to domestic politics and international diplomacy, especially where high-level persons are the accused

Uhuru Kenyatta’s and William Ruto’s masterly propaganda and self-serving manipulation of both local and continental politics, first, to outflank and second, to diplomatically undermine both the Office of the Prosecutor and the Court, shows that there is a major gap in the Court’s communication machinery. The ASP should, in theory, provide the political cover for the Court but the ASP is often riven with dissension on matters crucial to the court. For instance, this year (2016) three African states, Kenya, Djibouti and Uganda, have been referred to the ASP for non-cooperation with the ICC – Uganda and Djibouti for failing to arrest Mr Omar Al Bashir when he visited.³⁶ However, these referrals have neither affected state behaviour nor acted as a deterrent, which suggests that the ASP cannot – or perhaps it will not – provide the political riposte that the ICC needs when a state party refuses to co-operate and launches aggressive anti-ICC propaganda campaigns.

The Court is even more vulnerable where, as in this case, a continental body such as the AU deliberately and overtly exerts political pressure on the Court. Did this pressure work? It is hard to say, but it may well have. It is probable, for example, that the decision of the two Trial Chambers to excuse both Kenyatta and Ruto from continuous presence at trial was a concession to this pressure. Moreover, the recently announced intentions to withdraw from the Rome Statute by a number of African states – South Africa, Burundi and Gambia – suggests

³³ Para. 39, ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’, https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ See ‘Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute’, 11 July 2016, ICC-02/05-01/09-267 and ‘Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute’, 11 July 2016, ICC-02/05-01/09-266.

that there is already some fall-out from the AU's high profile attacks on the ICC. There may be wider ramifications: in January this year, the AU backed a Kenyan proposal to withdraw from the ICC. This would allow the AU to move from rhetoric to action and develop a roadmap for the withdrawal of African states from the Rome Statute³⁷.

Behind the AU's vociferous campaign is the charge that the ICC unfairly targets African countries.³⁸ Though that claim has little factual basis, it has much emotional traction with African leaders, but it is also one that the court cannot answer in the crescendo of racist posturing. There is no doubt that race and geopolitical inequalities are salient to global politics, but that is not a coherent basis for stating as fact that the ICC is targeting Africans. The irony is that the most vociferous in condemning the court have themselves referred the situations in their countries to the ICC. Both Sudan and Libya were referred to the ICC by the UNSC, and yet not a single African state in the UNSC at the time objected. Côte d'Ivoire and Kenya present similar situations: prior to the ICC indictments, the governments of both countries were in favour of the ICC. Before the indictments against the 'Ocampo 6', the clamour from politicians – including William Ruto – soon to become the ICC's most implacable opponent – was for the cases to go to The Hague. It was Ruto who coined and popularised the incantation: 'Don't be vague, let's go to The Hague'.³⁹ The striking paradox about the Kenya situation is that the referral arose out of an AU mediation effort conducted by Kofi Annan. The remaining situations in Africa, including investigations and cases in Uganda, the Democratic Republic of Congo, Mali and the Central African Republic (CAR) – have come to the Court by referrals by these States themselves. In an ironical reversal on 21 September 2016, the Office of the Prosecutor (OTP) received a referral from the Government of the Gabon, reporting the situation in Gabon since May 2016 and requesting the Prosecutor 'to open an investigation without delay'. Gabon was a signatory to the letter from the AU requesting that the ICC's work in Kenya be deferred. Even more interesting is that Jean Ping, who was declared to have lost the presidential election in Gabon resulting in the violence that led to the request for the ICC to intervene, is a former chairperson of the AU Commission. He vehemently opposed ICC investigations in Africa when he was at the AU but now supports the call for the ICC to investigate alleged atrocities committed in Gabon. This clearly shows that what African states seek in the ICC is a court that will be at their disposal when it suits them, but that they will demonise and undermine it when it does not.

The most perverse part of the AU political posturing is the way in which its rhetoric shifted attention away from those who need protection – the victims of mass violence – to those who need to be held to account – the alleged perpetrators of post-election violence. Mr Kenyatta and his deputy were able to pose as victims, first to win the presidential election in Kenya and second, to spread their perceived victimhood as the victimisation of the black race. At one point, Mr Kenyatta took to the podium of the AU summit to describe the ICC as a 'pantomime'

³⁷ See, http://www.africa-confidential.com/article/id/11818/More_talk_talk_than_walk_walk, which expresses scepticism about the possibility of a mass African walk-out but warns that the threat may be used to blackmail and weaken the ICC.

³⁸ See 'African Union Members back Kenyan plan to leave ICC', 1 February 2016, The Guardian Newspaper, available at: <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court>

³⁹ See for example, <https://www.youtube.com/watch?v=IdZh5HZk5hw>

and a ‘toy of declining imperial powers’.⁴⁰ The Prime Minister of Ethiopia, then chair of the AU agreed, accusing the ICC of being a bastion of imperialism intent on ‘race-hunting’.⁴¹

In all of the AU’s posturing, the victims of state violence have hardly had a look-in nor has any state sought to know where the populace stands with reference to the ICC. Such evidence as there is, suggests that most Africans feel alienated from the AU, which risks appearing as a protection racket for human rights violators and election fraudsters, if the recent run of contested elections in Kenya, Uganda, Burundi, Gabon or Zambia is anything to go by⁴². The victims who participated in the Ruto, Sang and Kenyatta cases always looked up to the ICC for justice, never feeling that their interests were not represented by the ICC, or that they were better represented in domestic courts. It is not credible that they would see the Court as a racist, anti-African tool of imperialists.⁴³

The inadequate investigations in Kenya by the Office of the Prosecutor

In retrospect, the Prosecution could have done a much better job in the Kenya situation. Part of the problem was the Prosecution’s naïve appraisal of the determination with which the accused would obstruct the investigations once the indictments were issued. That, coupled with inadequate investigations, failures to secure evidence before indictments and poor evidence gathering – including single sourcing information – all compounded the subsequent weaknesses that emerged in the cases. This part of the report takes a closer look at each of these weaknesses.

Investigative failures The Rome Statute does not specify how investigations are conducted, leaving that to the Prosecutor’s discretion. In Kenya, the Prosecutor seems to have relied too much on the reports of human rights organisations. The weakness lies in the fact that a human rights monitoring report is not written to convict, but to convince authorities that violations have occurred; the point being that these reports should trigger criminal investigations that lead to indictment and conviction. Noting the weak investigations, Judge Christine Van den Wyngaert, chastised the OTP for failing ‘to investigate properly’ prior to confirming the charges against Uhuru Kenyatta. Of particular concern, the judge noted, were the ‘grave problems in the Prosecution’s system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff’.⁴⁴ The OTP relied on individuals and organisations

⁴⁰ Available at: <http://allafrica.com/stories/201310130080.html>

⁴¹ The Ethiopian Prime Minister Hailemariam Desalegn, the then chairman of the African Union, accused the International Criminal Court of racial bias and targeting Africans for prosecution, during an AU Summit in May 2013, available at: <http://www.reuters.com/article/us-africa-icc-idUSBRE94Q0F620130527>

⁴² Cf Afrobarometer, August 2015: http://afrobarometer.org/sites/default/files/publications/Policy%20papers/ab_r6_policypaperno23_kenya_anti_corruption.pdf Perceptions of official impunity are widespread in Africa. On average, 56% of Africans say that officials “always” or “often” go unpunished. In Kenya, 76% report the same. A majority do not feel that the AU helps their countries significantly.

⁴³ For example, in a submission to the Chamber, the Legal Representative for Victims in the Kenyatta case, Fergal Gaynor, highlighted that the victims participating in the case did not feel represented by the AU. See “Victims’ response to the ‘Prosecution’s notice of withdrawal of the charges against Uhuru Muigai Kenyatta’, 9 December 2014, ICC-01/09-02/11-984, p.6.

⁴⁴ See Concurring Opinion of Judge Christine Van de Wyngaert, ICC-01/09-02/11-728-Anx2, available at: <https://www.scribd.com/document/138245541/26-04-2013-Annex-II-ICC-Decision-on-Defence-Application-Pursuant-to-Article-64-4-and-Related-Requests>

who were non-core ICC staff, which had the double infirmity of limiting the veracity of the evidence and exposing such individuals and organisations to potential backlash by the state since they did not enjoy immunity.⁴⁵

Failure to confirm charges against Ali The Pre-Trial Chamber decision not to confirm charges against the former police commissioner Hussein Ali, underlined much that was weak in the OTP approach to investigations. The Prosecution had alleged that Ali had provided safe passage to the Mungiki to travel from Nairobi to Nakuru and Naivasha, to carry out attacks on ODM supporters in those two areas. Ali, assisted by Mr Muthaura ‘in his capacity as Chairman of the National Security Committee’, of which Ali was also a member, ‘ensured that the Kenya Police did not intervene before, during or after the attacks, despite having prior knowledge of the attacks’.⁴⁶

The gravamen, the essence, of the charge was that by omission, essentially, Mr Ali had facilitated Mungiki’s trips to commit crimes in Nakuru and Naivasha by:

- (i) ‘instruct[ing] the Kenya Police and other security forces that were under his effective control not to obstruct the movement of the Mungiki and pro-PNU youth into the Rift Valley’ for attacks on ODM supporters
- (ii) ‘ensur[ing] that the police response to the attacks in Naivasha and Nakuru was inadequate’
- (iii) ‘fail[ing] to arrest or initiate the prosecution of any of the main perpetrators of the attacks in Nakuru and Naivasha’.

The Chamber held that the evidence before it did not provide substantial grounds to believe that the Kenya Police participated, by their inaction, in the attacks in Nakuru and Naivasha.⁴⁷ The Prosecutor’s efforts to prove police inaction included making a request for information from Kenya in 2010, yet by the time the charges were confirmed in January 2012, Kenya had not complied. To date, there is a court order in Kenya preventing the ICC Prosecutor from conducting interviews with senior officers who would be able to confirm whether in fact there was an active order from Ali that they not interfere with Mungiki’s movement. The lawyer for the victims has wondered several times⁴⁸, why the Prosecution has still not filed an application for non-compliance for this request.

⁴⁵ The OTP has too often failed to integrate their concerns and priorities into the investigative process and, in certain cases, to properly oversee their work in the field. - CHRISTIAN M. DE VOS (2013). Investigating from Afar: The ICC’s Evidence Problem. Leiden Journal of International Law, 26, pp 1009-1024 doi:10.1017/S0922156513000526

⁴⁶ ‘Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali’, 15 December 2015, ICC-01/09-02/11-35-Red2.

⁴⁷ ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 26 January 2012, ICC-01/09-02/11-382-Red.

⁴⁸ Para. 73, ‘Victims’ request for review of Prosecution’s decision to cease active investigation’, 2 August 2016, ICC-01/09-154.

Inadequate investment by the OTP in investigating the crimes committed by the police

There is a wealth of information relating to the crimes perpetrated by the Kenyan police during the post-election violence, from various sources, including eyewitnesses and victims themselves. However, the Prosecutor's attempt to prove police instigated violence in Kisumu and Kibera fell flat at the first hurdle. According to the Waki Report, as well as the Prosecutor's initial Pre-Trial Brief, the police were responsible for carrying out attacks on ODM supporters in these two areas, with women even reporting being gang raped by police officers. The Office of the High Commission for Human Rights (OHCHR) in its fact-finding mission report, noted that,

'[C]redible evidence suggests that there was a consistent pattern of police using firearms and live ammunition to respond to demonstrations and related violence in Kibera, Eldoret and Kisumu and that the police failed to abide by the principle of proportionality and of necessity'.⁴⁹

Once the Pre-Trial Chamber declined to confirm charges for crimes committed by the police in Kisumu and Kibera, it appears that the Prosecution was all too ready to throw in the towel and no steps were taken to provide the Chamber with any additional evidence. This was a massive shame for the victims in Kibera, Kisumu, and elsewhere, many of whom continue to suffer in silence from their injuries.

Gathering the evidence The Prosecution failed to appreciate the impact of having accused persons who controlled government, being out on summonses in the context of a long lead-time between indictment and trial. In both trials, the trial dates were nearly three years from the date of indictment against the six individuals. Coupled with the fact that in the Kenyatta case the Prosecutor was still carrying out investigations in the post-confirmation period, the dangers of obstruction increased manifold. Judge Christine Van Wyngaert justly excoriated the Prosecution for this saying that,

'... there are serious questions as to whether the prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation. I believe that the facts show that the prosecution had not complied with its obligations at the time when it sought confirmation and that it was still not even remotely ready when the proceedings before the Chamber started'.⁵⁰

⁴⁹ The Independent Medico-Legal Unit conducted scores of autopsies in February 2008 and confirmed a significant number of deaths attributable to gunshot wounds (43%), through probable excessive police action. See <http://www.pambazuka.net/actionalerts/images/uploads/Forensicrep.pdf>

⁵⁰ See Concurring Opinion of Judge Christine Van de Wyngaert, ICC-01/09-02/11-728-Anx2, available at: <https://www.scribd.com/document/138245541/26-04-2013-Annex-II-ICC-Decision-on-Defence-Application-Pursuant-to-Article-64-4-and-Related-Requests>

The Judge further lamented that,

'... the Prosecution offers no cogent and sufficiently specific justification for why so many witnesses in this case were only interviewed for the first time post-confirmation. The mere invocation by the Prosecution of generic problems with the security situation in Kenya, without explaining how this situation affected each of the individuals involved, does not adequately justify the extent and tardiness of the post-confirmation investigation'.⁵¹

This lack of adequate preparation was evident in the collapse of the case against Francis Muthaura on 18 March 2013. The key witness proved unreliable. The Prosecutor complained that,

'... witnesses who may have been able to provide evidence concerning Mr Muthaura's role in the events of 2007 and 2008 have either been killed, or have died since those events, and other witnesses refuse to speak with the Prosecution. In addition, Madam President, despite assurances of co-operation with the Court, the Government of Kenya has provided only limited assistance to the Prosecution and they have failed to provide the Prosecution with access to witnesses, or documents, that may shed light on Mr Muthaura's case. Further, and as the Chamber is aware, it came to light after the confirmation hearing that a critical witness for the Prosecution against Mr Muthaura had recanted part of his incriminating evidence after receiving bribes'.⁵²

From the above, it can be gleaned that the Office of the Prosecutor seems to have based its entire case on the testimony of one insider witness, who after receiving a bribe decided to recant his testimony. Usually persons who were close to the accused, known as 'insider witnesses', can provide the court with evidence about their actions and state of mind. The evidence gained from their testimony is often crucial to establish the degree of responsibility of the accused. However, the testimony of insider witnesses is, by its very nature, tricky and can be unreliable. Furthermore, building a case against an individual for the commission of crimes against humanity and other international crimes is always an uphill task. A strong foundation is necessary, and forensic evidence and other non-human testimony is imperative to buttress the case. Witness testimony alone, by its nature, can be unreliable. Memories fade with the passage of time, witnesses can recant their accounts, and therefore in modern times there has been a shift to gather other types of evidence. The fact that the entire case against Mr Muthaura was based on the testimony of one insider witness would be derisory if it did not have such serious repercussions on the victims and the quest for justice in Kenya in general. Though the Office of the Prosecutor eventually announced a shift in investigation strategy in October 2013,⁵³ which moved investigatory focus from witness testimony to other types of evidence, such as forensic data, this came too late to be of value in the Kenyan cases.

⁵¹ *Ibid.*

⁵² ICC-01/09-02/11-T-23-ENG ET WT 11-03-2013 1-28 NB T, 11 March 2013, page 4.

⁵³ See the OTP Strategic Plan 2013, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>

Weaknesses surrounding ICC witness management

The problem of witness tampering and bribery Perhaps the most poignant aspect of both the Kenyatta and Ruto cases was witness management: by the time of trial many had recanted their evidence, others turned out to have lied and some were too scared to testify, accusing the ICC of failing to provide them with adequate protection. For example, two witnesses allegedly claimed that they were not convinced that they would be safe after giving their testimony, and thus decided to withdraw from testifying.⁵⁴

Even though the Prosecution told the Chamber of egregious witness interference, the OTP seemed reluctant to file charges under article 70, relating to crimes against the administration of justice against those manipulating or bribing witnesses. The Prosecutor had explicitly stated that,

'... individuals attempted to persuade Witnesses 4, 11 and 12 to recant their testimony and/or to withdraw their cooperation with the Prosecution. On some occasions, money was offered to them'.

The Prosecutor's Pre Trial Brief of 26 August 2013,⁵⁵ made the following remarkable admission:

*'Shortly after the Prosecution disclosed the identities of Witnesses 11 and 12 in August 2012, the witnesses informed the Prosecution "that intermediaries of Uhuru Kenyatta had attempted to locate them and offer a "deal" for them not to testify. One of the intermediaries was Ferdinand Waititu, a sitting Member of Parliament and an associate of Mr Kenyatta. In a series of controlled telephone conversations recorded by the Prosecution with the witness's consent, Mr Waititu told Witness 12 that he wanted to meet with him to discuss assisting Mr Kenyatta to "solve this fight" and the "lump of money to be given". Mr Waititu indicated that he had spoken of this to Mr Kenyatta and was keeping him informed. He explained that Mr. Kenyatta wanted to avoid "direct" involvement because he was worried about "getting caught tampering with evidence"'.*⁵⁶

Although the Prosecution ultimately stood down Witnesses 4 and 12 for reasons that had nothing to do with tampering, the OTP could surely have done much more to investigate the bribery claims and invested more resources in the safety of its witnesses.

The problem of witness security The principle concern that arises from the discussion above is that the intermediaries of the accused were able to reach ICC witnesses at all. It puts into question the role and responsibility of the Victims and Witnesses Unit (VWU). This unit exists to provide 'protective measures and security arrangements, counselling and other

⁵⁴ For example, see Blake Evans-Pritchard, Simon Jennings, 'Action Urged on ICC Witness Protection Program', <https://iwpr.net/global-voices/action-urged-icc-witness-protection> where one witness states as follows: "I lived in Tanzania for six months waiting for [the ICC] to communicate details on what was to happen to me as a witness, but no information was forthcoming," she said. "Just hanging [around] for long in Tanzania exposed me greatly, because many people came to know that I was there." She too eventually decided to withdraw her evidence."

⁵⁵ Released to the public on the 19th of January 2015.

⁵⁶ 'Public Redacted Version of "Second updated Prosecution pre-trial brief", ICC-01/09-02/11-796-AnxA-Red, para .95.

appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk', on account of the testimony that they give.⁵⁷ It is also its duty to advise the Court on the appropriateness of such measures.⁵⁸ The VWU also runs an ICC protection programme (ICCPP) and participation in this programme may be triggered by a referral by the Prosecution, request by counsel, or, in the case of victims, by their lawyers. Specific details about the ICCPP process are confidential but as a general matter, the VWU requires 'a high likelihood that the witness will be harmed or killed unless action is taken'. Though this system has crucial safeguards including a 24/7 emergency response system that enables the Court to transfer witnesses to safe locations, educating them on the importance of confidentiality and developing cover stories and emergency backup plans,⁵⁹ these measures ultimately depend on the witnesses themselves. The VWU can do little if the witnesses themselves reveal their whereabouts or make contact with interlocutors of the accused. Even so, the ICC Prosecutors have a judgment call to make: namely, making an early determination of the solidity and trustworthiness of their witnesses.⁶⁰

A failure to grasp the Kenyan political context? The OTP has been criticised for over-confidence, ignorance or naivety in the investigation of the Kenyan cases. The brunt of the criticism is borne by the former ICC Prosecutor Louis Moreno Ocampo who, it is said, failed to appreciate the political realities of Kenya. Central to that charge is the claim that in the haste to prosecute the 'big-fish' Mr. Ocampo failed to grasp the incestuous links, and the mendacity, of Kenya's political elite. Uhuru Kenyatta was President Kibaki's deputy prime minister and minister for finance and it was alleged that he organised and financed attacks against ODM supporters in order to help Kibaki retain power. This meant that long before Uhuru became president it should have been obvious that the Kenyan government was always going to be ambivalent in its dealings with the ICC and that it would do everything it could to shield those of its supporters indicted by the ICC. On this reading, expecting unadulterated co-operation from the Kibaki administration was naïve, a naivety evinced by the Prosecutor's decision to file a 'Request for Cooperation under Part 9 of the Statute', two years after the Kenyan government had actually failed to co-operate with the Prosecutor's requests for assistance. By then, Mr Kenyatta was President of Kenya, and his government was unlikely --much more than Kibaki's – to hand over any incriminating evidence that the state may have had in its possession.

⁵⁷ Rome Statute, art. 43(6).

⁵⁸ *Ibid.*, art. 68(4).

⁵⁹ <https://www.icc-cpi.int/about/witnesses>

⁶⁰ Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, 29 and 30 January 2009 and Summary Report on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, 24 November 2012, available at; <https://www.icc-cpi.int/about/witnesses>

Still, the OTP has been criticised for being ineffective in its response to the Government of Kenya's failure to co-operate. For example, on 3 August 2015, the lawyer for the victims complained in his filing, 'Victims' request for review of Prosecution's decision to cease active investigation'⁶¹ that,

'...the remedy for systematic obstruction of access to evidence", (such as that which Kenya had engaged in in this case), "is not simply to walk away in despair. To do so profoundly undermines the Court's deterrent effect in respect of grave crimes, and encourages other powerful accused before the Court to carry out similar acts of obstruction'.⁶²

The challenges of victim participation in the ICC Kenya cases Article 68(3) of the Rome Statute allows victims of international crime to participate in proceedings so long as 'their personal interests are affected' and they can participate 'in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.⁶³ Once allowed in, they are free to present their views. Unfortunately, the collapse of the cases left grave injustices without redress. Many victims of post-election violence had come to see the ICC as their only hope for holding perpetrators to account by first, revealing the truth of what happened in 2007 and 2008, and second, giving them justice. Neither of these two goals was fully met, even though – unlike in previous cycles of electoral violence in 1992 and 1997 – some partial truths did emerge. Nonetheless important issues remain to be addressed.

Patchy assistance to victims and almost non-existent progress Initiatives to assist the victims of PEV have been ineffectual and fragmented, reflecting, at the state level, a fundamental lack of political will to initiate restitutive measures and compensation. Many of the forcibly displaced and dispersed, especially the so-called integrated IDPs⁶⁴, are yet to be settled; victims of rape and police violence continue to suffer in obscurity and when resettlement programmes have been attempted, there have been allegations of bias and discrimination. For example, the victims involved in the Kenyatta case say that compensation measures have excluded those from Nakuru and Naivasha, a result, they claim, of ethnic discrimination.

The role of the ICC Trust Fund for Victims (TFV) at the international level The fund has a dual role: it is used to, first, make reparations upon conviction and, second, provide general assistance – for example, by drawing from voluntary contributions from donors to provide for victims and their families, in situations where the Court is active. It is not limited to victims participating in the trial and it may disburse funds once the Board of the TFV notifies the Court that it is necessary to assist victims. Unfortunately and in spite of numerous efforts by civil society organisations, lawyers for the victims and others, when requesting the TFV to conduct an assessment with a view to commencing assistance programmes in Kenya, the TFV has not done so. Even recognising that the TFV cannot address all needs, this

⁶¹ 'Victims' request for review of Prosecution's decision to cease active investigation', 2 August 2016, ICC-01/09-154.

⁶² 'Victims' request for review of Prosecution's decision to cease active investigation', 2 August 2016, ICC-01/09-154.

⁶³ Article 68(3), Rome Statute of the International Criminal Court.

⁶⁴ i.e. IDPs who did not go to camps but were instead absorbed by friends and relatives in urban areas such as Kisumu.

marks an egregious failing on the part of the Trust Fund, in that there are hundreds, perhaps thousands of victims in urgent need of medical assistance, the basics of life, and psycho-social support. In addition to pleas by Kenyan civil society, Human Rights Watch has also written to the board members of the TFV, urging ‘the Trust Fund for Victims (Trust Fund) to use its assistance mandate to contribute to fulfilling critical needs in Kenya’.⁶⁵ However, no assistance has been forthcoming.

The ICC and its outreach to and on behalf of victims The ICC’s outreach and communication efforts could have been done differently and there are lessons to be learnt for the future. One, the Public Information and Documentation Section (PIDS) did not do enough to counter the propaganda constantly broadcast by the accused and their supporters. By failing to counter the numerous inaccuracies that the accused put out, the ICC allowed them to control the narrative. Many victims believed that the Prosecutor had bowed to pressure to terminate the case against Mr Kenyatta and were not aware of the deficiencies in the evidence or the lack of co-operation from the Kenyan government. Given the prevalence of corruption in Kenya, some even believed that Prosecutor Bensouda had ‘been bought’.

In addition the Victims Participation and Reparations Section (VPRS) did not do a good job of involving the victims, or of informing those that they excluded why they had been left out. In the end, only a handful fulfilled the criteria required for them to participate in the trials. The majority of victims did not participate and were not informed why this was so. A perception may have seeped through that they had been ignored and that the ICC was ‘favouring’ certain communities. These negative perceptions could have been easily corrected but only through sound outreach programmes by PIDS and the VPRS. Similar quietism characterised the Court’s response to political attacks that the ICC was biased towards Africa, which gave credence to the misinformation and propaganda that the court was racist or that the witnesses in the cases had lied.

⁶⁵ A copy of the letter is available at: <https://www.hrw.org/news/2016/04/25/letter-board-directors-icc-trust-fund-victims>

III: Key Recommendations

The Court

1. The ICC, particularly the Assembly of States Parties, should do more to ensure that it does not allow political statements to interfere with the judicial independence of the Court.
2. The ICC should ensure that it takes steps to respond to messages of a political nature and correct inaccurate statements in a timely manner. In addition, it should ensure that such key messages reach the right audiences, including victims and affected communities.
3. The Court should continue to build its relationship with African States that openly support the mandate of the ICC; in addition, the ICC should do more to improve its relationship and image with the AU.
4. The Trust Fund for Victims should commence operations in Kenya, as victims have received little to no assistance from the Kenyan government. This is especially the case for victims who were displaced from Nakuru and Naivasha.

The Prosecutor

1. The Prosecutor should carefully consider when to request 'summons to appear' as opposed to 'warrants of arrest' and take into account the individual circumstances of each accused person.
2. Swift action should be taken by the Prosecutor and the Court in instances of non co-operation by States Parties. Any instances of non co-operation should be resolved speedily in such a manner that the outcome of proceedings on non co-operation can be applied to strengthen an ongoing case and not be delayed to the point that the outcome is only of academic significance.
3. The Prosecutor should continue to carry out a review of its investigative strategies and methods in order to ensure that it is trial-ready.
4. The Prosecution should ensure that its staff are able to spend as much time as possible on better understanding the context and nuances of a given situation country.

The African Union

1. The AU should live up to its Constitutive Act, which rejects impunity and respects the sanctity of human life. The AU should also adhere to the commitments in the African Charter on Human and People's rights and the African Charter on Democracy, Elections and Governance both of which emphasise – explicitly or implicitly – commitment to democracy and the rule of law as well as the indivisibility of human rights.
2. The AU should engage with the ICC in a more constructive manner so that genuine concerns of its members may be addressed in a mutually agreed manner that does not undermine the fight against impunity.
3. The AU should consider the interests of the victims of mass atrocities in Africa and not work to undermine the rights of victims on the continent.

The Government of Kenya

1. The Kenyan government should take immediate steps to co-operate with the ICC and provide the Court with the records it has requested.
2. The Kenyan government should provide immediate redress, including reparations to victims of the post-election violence and take immediate measures to prosecute all perpetrators of the 2008 post-election violence.
3. The Kenyan government should immediately execute the three outstanding warrants of arrest against Mr Walter Osapiri Barasa⁶⁶, Mr Paul Gicheru and Mr Philip Kipkoech Bett.
4. The Kenya government must take action against the lower level perpetrators of post-election violence. Most of these live among the victims and the blatant reminder of their impunity and the injustice to the victims is, in the long run, destabilising since it communicates the idea that the only way to get redress is through self-defence.

The Assembly of States Parties

1. The ASP should strengthen sanctions for non co-operation with the ICC, including condemnation by the Security Council of non co-operating states.
2. Powerful nations that have not ratified the Rome Statute – such as China, the USA and Russia – can immeasurably strengthen the system of international criminal justice if they join it. It is in the long-term interest of all, that those who violate international criminal law are apprehended and convicted.

⁶⁶ 'Warrant of arrest for Walter Osapiri Barasa', 26 September 2013, ICC-01/09-01/13-1-Red2.

Civil Society

1. Kenyan civil society should improve its communication strategies to reach ordinary Kenyans with its anti-impunity messages. Civil society did a sterling job in pushing for accountability and countering false narratives on the international stage, notably at the ASP. However, it was less successful in communicating effectively with ordinary Kenyans and countering anti-ICC propaganda at the grassroots.
2. Civil society should continue to advocate for justice for victims of post-election violence and the implementation of an integrated approach to transitional justice that incorporates prosecutions, truth-seeking, reparations, memorialisation, and institutional reforms.

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