

“A General Update on Kenya’s Search for Accountability for the Post Election Violence”

A Paper Presented by Mr. George Kegoro-Executive Director of the Kenya Section of the International Commission of Jurists at a Regional Forum on International and Transitional Justice organized by Avocats Sans Frontières-Uganda Mission and the Uganda Coalition of the International Criminal Court on 30th July, 2012 at Imperial Botanical Beach Hotel, Entebbe

Introduction

This paper provides an update on the search for justice in Kenya following the serious violence that followed the 2007 elections. The paper describes the response to the violence, the failed attempts to implement measures that would have brought accountability against the violence, the intervention by the International Criminal Court, the progress of the Kenyan cases before the ICC and attempts in Kenya to bring about domestic accountability in relation to persons other than those facing ICC charges.

Responses to the Post Election Violence

Kenya experienced significant violence when the results of the presidential elections for 2007 were disputed by the opposition which termed them fraudulent.

The political crisis resulting from the violence compelled intervention by the African Union which instituted a mediation process in Kenya. The mediation led to the formation of a coalition government in which Mwai Kibaki, of the Party of National Unity, who had been declared re-elected in the elections, agreed to share power with his main challenger, Raila Odinga, of the Orange Democratic Party, (ODM), who became the country’s prime minister.

The mediation agreed to the formation of two public commissions of inquiry as part of the response to the violence. The first, the Independent Review Commission, was appointed to investigate the disputed presidential election results, which triggered the violence, with a view not only to establishing the true outcome of the results but also recommending reforms to the electoral process that would avoid the outbreak of similar disputes in future. Headed by a retired South Africa judge, Johann Kriegler, the commission’s report recommended sweeping reforms to Kenya’s electoral process, including the abolition of the country’s electoral commission, which had been discredited for the incompetent manner in which it handled the elections.

The report of the Commission of Inquiry into the Post Election Violence, (also known as the Waki Commission), was established to study the causes of the violence, and ascribe responsibility.

In its report, the Waki Commission established that the number of those killed by the violence at 1133 at those displaced by it as 350,000. The report established that although much of the violence was as a result of spontaneous anger caused by the announcement of presidential election results that many had not expected, there was alongside this, some planned violence. To deal with a culture of violence which, the report noted, was on the rise in Kenyan politics, it proposed the establishment of a Special Tribunal to bring accountability against persons bearing the greatest responsibility for the violence. In default, the Commission recommended that those suspects, whose names it had placed in a sealed envelope handed over to the African Union for safe custody, be brought to justice before the International Criminal Court at The Hague.

The Waki Commission also dwelt at great length with the role of state security agencies, establishing that the police had acted in a high-handed manner during the violence, and was responsible for the killing of a significant number of those who died during the violence. The commission recommended far-reaching reforms on the police force, including the establishment of an independent complaints authority for the police and also a police service commission to take police responsibility for policing matters. The commission recommended that in order for these reforms to be carried out, an independent police reform group, made up of both international and national experts, be set up to work independently with the police with a view to implementing the reforms in question.

There followed a robust and highly divisive public debate on whether or not the report of the Waki Commission should be implemented. A group of politicians led by the Prime Minister, urged for the implementation of the report in its entirety, not only as a stand against political violence and the culture of impunity that had taken root in the country, but also so as to forestall the International Criminal Court from taking action against those whose names were contained in the sealed envelope. Another group of politicians, including President Kibaki and politicians from the country's Rift valley Province, which had been the epicentre of political violence, were against the implementation of the report, arguing that the prosecution of some people would open up ethnic divisions afresh. Those opposed to the implementation of the report argued that what the country needed after the serious violence was a chance for the various warring communities to come together and forgive one another and that the implementation of the report would undermine the possibility of this happening. On its part, Kenya's civil society has expressed support for the implementation of the report, with the Catholic Church being particularly vocal in demands for action based on the recommendations to be taken.¹

Failed Attempts to Implement Waki Report

The Waki, which the government accepted, required that the government should sign an agreement within 60 days for the establishment of a special tribunal to try

¹ See, Standard Team, "Catholics urge Kibaki to implement the Waki Report", in The East African Standard, (Nairobi), 23rd November, 2008, p. 6.

post election suspects. While President Mwai Kibaki and Prime Minister Raila Odinga, as the two principals, signed the agreement in time, nothing else has followed to fulfill its requirements. The signing was regarded as a political commitment to supporting justice in relation to the post election violence in Kenya. The agreement also required that public officials charged with crimes arising from the violence would be required to resign their offices.

On 17th October, 2008 the Waki report was handed over to former UN Secretary General Kofi Annan. He was also handed a sealed envelope with the names of persons singled out by the Commission as bearing the greatest responsibility for the violence. The Commission had recommended that consideration be given to handing over the names in the envelope to the ICC if there was failure by Government to set up a Special Tribunal.

The first legislation published by government in an attempt to establish a special Tribunal through a Constitutional Amendment on 28th January, 2009, sought to entrench the Special Tribunal in the Constitution was unequivocally rejected by Members of Parliament, who instead asked for suspects to be prosecuted by the International Criminal Court.

The second attempt at generating a Special Tribunal Bill in July, 2009 was rejected by the cabinet citing a need for immunity clauses for the head of state as well as presidential power to pardon suspects within any such legislation.

Subsequently, on 11th November 2009, a Member of Parliament, Gitobu Imanyara, tabled a Bill to establish a Special Tribunal for Kenya through Constitution of Kenya (Amendment) Bill (No 3). However, Members of Parliament defeated the bill through a walk out to deny the realization of quorum that would have enabled a discussion of the Bill.

Within this, the 60-day deadline was extended, and exceeded, severally.

Finally in January 2010, the Prosecutor of the ICC applied for leave to commence investigations into the Kenyan situation the first time that he had exercised the power conferred to him under article 15 of the Rome Statute.

On 15 December 2010, the prosecutor of the court announced that he would be presenting two separate cases for confirmation of charges: the first case was against ODM's chair Henry Kosgey, William Ruto, who at the time the charges were brought was a ODM Government Minister, and Joshua Sang, a radio announcer. The second case presented was against members belonging to the PNU camp, including deputy prime minister, Uhuru Kenyatta, the former head of the Kenyan police, Hussein Ali, and the head of the civil service, Francis Muthaura.

As the ICC prosecutor announced the names of the six Kenyans he regarded as bearing the greatest responsibility for the post election violence in December 2010 and as some of these turned out to be key advisors of the president, it was expected that they would be required to leave office. However, in pre-empting this,

President Kibaki announced that those among the six that were public officials would be allowed to remain in office until the confirmation of charges.

On the 15th March 2011, the Pre-trial Chamber of the ICC issued summonses to appear for Ruto, Kosgey, and Sang ²and also for Muthaura, Kenyatta and Ali³ for their alleged responsibility in the commission of crimes against humanity.

Following confirmation hearings in September and October 2011, the Pretrial chamber on 23rd January 2012 announced the conformation of charges against all the suspects except Kosgey and Ali.

Responses to the ICC cases

On 17 December 2009 President Kibaki and Prime Minister Odinga signed an agreement for the establishment of accountability mechanisms for the post election violence. Rarely referred to, this document contains important political undertakings including an agreement not to shield from accountability any person against whom recourse may be needed for the post election violence.

In his response to the public announcement of the names of the six Kenyans on 15 December 2010, President Kibaki issued a statement that public officers named by the prosecutor would continue in office until the confirmation of charges.

Logically, the president would have been expected to ask any member of his government whose case is confirmed to leave office as he had promised. However upon confirmation of charges the president directed the Attorney General to appoint a task force that would advise the government how to react to the ICC charges.

In January 2011, a few days after the ICC announcement, Ruto and Kenyatta convened a high profile political rally in Eldoret, the epicentre of the post election violence, ostensibly to discuss peace between the Kalenjin and Kikuyu, their respective ethnic groups whose members were regarded as key players in the post election violence. The attendance by Kibaki at the rally came as a great surprise to the public, as he was openly consorting with persons facing ICC cases. The rally, the first sign that Kenyatta and Ruto had decided to unite their previously opposing platforms against the common threat of prosecution by the ICC, appeared to receive the support of the president who declared his support for their programme.

The confirmation of charges came with complications for the president: the court's detailed justification for the confirmation of charges expressly implicated the president in the acts that gave foundation to the ICC charges against Kenyatta and Muthaura. In confirming the charges against these two, the court virtually treated the president as a suspect.

² ICC-01/09-01/11

³ ICC-01/09-02/11

Domestic Accountability for the Post Election Violence

A local justice mechanism, the favoured option by a section of the Government would, in principle, have been welcome because, under the Rome statute, the ICC is a court of last resort, and only steps in when domestic mechanisms fail. However, there have been several difficulties in the way of such a mechanism.

First, the violence in question took place more than four years ago. However, there has been no consistent national programme aimed at bringing accountability for these crimes during all this time. The government twice sought more time from Kofi Annan, the interlocutor of the international community in Kenya, with promises that if that time was provided, Kenya would put in place a process to deal domestically with the post-election violence. Despite a generous allowance of time, the country failed to do so, and has employed a stop-start approach towards accountability for the post election violence. One of the grounds on which a request for a local justice mechanism can be rejected by the ICC is if "there has been unjustified delay in the proceedings which in the circumstances is inconsistent with intent to bring the person concerned to justice". The delays that occurred together with those that would result if Kenya was given the exclusive chance to deal with the post election violence cases, was unlikely to convince the ICC that justice would be done if this option was exercised.

An internal report to the Attorney General prepared by a team reviewing cases of post-election violence indicated that in February 2009 the state had opened investigations into 156 cases, but they all related to relatively minor offenses, such as theft, house-breaking, malicious damage to property, publishing false rumors, criminal possession of offensive weapons, robbery with violence, assaulting police officers, and breach of the peace.⁴ The State has not issued any public report of what happened to these investigations.

Further, Kenya's capacity to demonstrate ability to conduct genuine domestic prosecutions against the post-election violence suspects is circumscribed by the transition that is currently underway as a result of the enactment of the new Constitution. The new Constitution required the retirement of the serving Chief Justice, a wholesale vetting of the existing Judiciary, and the establishment from scratch of a new court, the Supreme Court. Although a new Chief Justice was appointed who enjoys great public confidence, plans for the establishment of the vetting mechanisms were delayed and this has only recently started its work. Without a settled judiciary, it is difficult to argue that the domestic prosecution of such important crimes is possible.

⁴ *Report to the Attorney-General by the Team on the Review of Post-election related violence in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi provinces*, February 2009. Also cited in the *ICC Prosecutor's Request for Authorization of an Investigation Pursuant to Article 15*, Nov. 26, 2009 at www.icc-cpi.int

Another element needed for domestic mechanisms to be established is an independent prosecution function. Again, the new Constitution mandated the retirement of the Attorney General whose office it split into two, creating an independent Director of Public Prosecutions (DPP). This new office holder was appointed under some controversy. If a credible and independent DPP had been appointed, this would have gone a long way towards supporting the preference for local accountability mechanisms. Since, as appears, the appointment of the DPP was controlled by the political establishment, leading to a choice that did not meet the confidence of the larger public; this has affected the debate on local accountability mechanisms. Those that prefer local accountability mechanisms would have done this option some justice if they engaged in a genuine and inclusive process on how the country could derive its first constitutional DPP.

The last element to be considered in the debate on whether genuine local prosecutions are possible is the investigative function. The two cases so far presented in court as a result of the post election violence have both confirmed the frailties of the investigative function in Kenya. The Kiambaa church murder trial resulted in an acquittal of all the accused persons with the trial judge, Justice David Maraga,⁵ reserving some unkind words for the police who had investigated the case. Even the Kisumu killing by a policeman in cold blood, which was captured on national television, ended in an acquittal. In this particular case, the firearm alleged to have been issued to the suspect and that which was presented to court in evidence did not match. The trial judge, Justice Fred Ochieng, was left with no option but to acquit. Clearly there had been some deliberate misconduct during the investigation, which compounded original crime.

Police participated in horrendous criminality during the post election violence and were involved in unjustifiable killings and sexual violence. Thereafter, their leadership refused to acknowledge that these crimes had taken place. Police created a chance at self-redemption when they announced the formation of a task force to investigate sexual crimes but this effort lacked credibility and never took off. Since police cannot investigate their own crimes, a corpus of independent investigators will need to be identified if Kenya wishes to demonstrate a commitment to deal with the post election violence. A national discussion on who these independent investigators might be, would need to take place.

Something should be said about the overall political situation in the country and how this is tied to the possibility that Kenya can carry domestic prosecution. In response to the announcement of the names of the 6 Kenyans to face ICC charges, Parliament approved a motion to pull the country out of the Rome statute in stormy session. The political passions that were evident in the aftermath of the post election violence returned during the debate, and a measure of tension was evidenced in the country. A number of members of parliament joined ordinary

⁵ See *Republic vs. Stephen Kiprotich Leting & 3 others*, eKLR, Cr. Case 34 of 2008, Judgment High Court of Kenya, at Nakuru, April 30, 2009.

Kenyans in a demonstration through the streets of Nairobi, thought to have been choreographed by the same MPS, in support of one of those named by the prosecutor. Similar demonstrations took place in other parts of the country.

It is not possible to argue that a local process can withstand this level of political pressure. If the government is serious about a domestic justice mechanism it will need to do more to deal with the political pressure that is rising in the country following the ICC announcements.

Although they had initially supported investigations by the ICC, a large section of the Kenyan parliament, which is part of the country's political leadership, either no longer regards the ICC as credible or are only prepared to support its work in Kenya if it does not touch those in their political corner. The idea of blind justice has not been accepted by the political leadership in Kenya. If a domestic justice process results in an attempt to prosecute any of those that have been named by the ICC prosecutor, it is more than likely that the same amount of passionate resistance to its processes will manifest itself.

Thus the preference for local justice mechanisms comes with the unstated condition that if it seeks to bring justice against the persons in their political corner, it will also be resisted.

As part of the political leadership, the role of President Kibaki needs to be mentioned. What has been presented by him as a neutral response by the government is actually a positive affirmation of those that were named by the prosecutor. The resistance that is building against the selection by Ocampo will be emboldened by the view that it has the support of the president.

Some Comments

While public support for accountability against the violence has always been high, a number of factors including the lack of political will and weakness on the part of public institutions responsible for law enforcement have combined to make this impossible.

At the same time, Kenya had signed and ratified the Rome Statute even before the post election violence, an indication of the country's support for the fight against impunity, and a statement that the country was, in principle, prepared for the rigors that its possible engagement with the ICC would invite.

The ICC intervention provided the current government an opportunity to demonstrate Kenya's outrage against political violence and to send a warning that the future use of violence to achieve political ends would not be tolerated.

ICC politics is now embedded in Kenya's succession struggles. Other than affecting transitional politics, the ICC cases have strained the day to day relations in the coalition government. The power sharing agreement was the single most contested item in the national dialogue and reconciliation process during early 2008. The

importance of this agreement was reflected by the fact that it immediately brought an end to the hostilities that constituted the post election violence.

By entertaining the declaration by Kenyatta and Ruto of their presidential ambitions, Kenya is courting an inherently risky enterprise. If their candidature ultimately fails, because of the legal challenges that they face, it is not unlikely that the support they have built will translate into political instability for the country. In that event, it may be difficult for the president to manage his own succession in a peaceful manner. Further, the president will be unable to defend himself against accusations that his partiality towards Ruto and Kenyatta was at the cost of national stability.

At the same time, if Ruto or Kenyatta successfully runs for president, it is likely that the winner will use his position to control the response of the Kenyan state to the ICC intervention. Even though, this would significantly affect the country's international standing.

On their part, Kenyatta and Ruto seem to have decided to ride their luck as far as the ICC cases are concerned. While Ruto has applied to the court for a deferment of the commencement of the trials until after Kenya's next elections, Kenyatta and Muthaura have applied for a change of the trial venue to Kenya or neighbouring Tanzania, arguing that the Hague is too far and would too costly for them. It is likely that the two are linking their cases with Kenya's next elections as a deliberate effort to increase their own leverage over Kenya's domestic politics. As part of this, if they can, they will run for president and see what comes of that. If not, they may be hoping to cash in the support they have amassed for themselves, in exchange for a political deal that will, in their view, lead to some kind of protection against the ICC trials. Whatever the case, the political endeavours by Kenyatta and Ruto, with the apparent support of Kibaki, is designed to shield the two from trial and to undermine Kenya's capacity to cooperate with the ICC, an essential element for shielding them from trial.

Conclusion

Kenya suffers from a legacy of political violence. As warned by the Waki Commission, unless deliberate measures are taken to address the legacy of violence in Kenya, the country runs the risk of becoming a failed state. The ultimate effect of the cynical manner in which the Kenya government has chosen to treat the ICC intervention is that it may contribute to the fulfilment of this prediction.

Repeatedly, Kenya has failed to establish a local justice mechanism, as recommended by the Waki Commission, to try offences committed during the post election violence. The report of a task force appointed by the Attorney General to advise on Kenya's response to the cases before the ICC noted that whereas the country made claims to a commitment to local justice mechanisms and whereas the police had announced investigations against the four persons facing ICC charges, only one of these had ever been formally questioned by the police. Even as the

political leadership in Kenya resists the ICC process, they do not have even the slightest arrangement which can be used as pretext for doing so.

With regards to the Court itself, the involvement of the ICC in Kenya has reinforced the difficulties in the relationship between the Court and the AU, which commenced with the court's involvement in Sudan situation. The political leadership in Kenya and Sudan has found a common cause in resisting the Court and has played a leading role in its demonization in the African continent. Although the Kenyan cases have navigated difficult stages in reaching their current phase, the greatest risk still lies ahead and has to do with whether or not the accused will turn up in Court for their trial. If, against the odds that they have generated, the ICC manages to put the Kenyan accused on trial, this will go a long way towards confirming its pre-eminence to try all persons regardless of official position. If, on the other hand, the accused manage to get Kenya to shield them from trial, this, coupled with the unresolved situation around Sudanese President al-Bashir, will deal the ICC and the international justice project a blow from which it will be difficult to recover.