

KENYA

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ICC summons "Ocampo Six" – End of impunity?

Last week, written summonses issued by the International Criminal Court (ICC) have been delivered to the suspects of 2007/08 post-election violence (PEV) in Kenya. In December 2010, ICC Prosecutor Luis Moreno Ocampo had made a request for summoning those personalities he believed to be most responsible for the committed crimes against humanity, widely known as the "Ocampo Six". The way in which Kenya handles the ICC case is not only decisive for future relationship with her Western allies, but also a very important test of her will to scatter impunity.

BACKGROUND

The announcement of PNU candidate Mwai Kibaki as the winner of presidential elections in 2007 triggered a period of violent clashes between PNU supporters on the one hand and ODM supporters on the other hand. There was a widespread perception among the Kenyan population that the results had been manipulated in favour of president Mwai Kibaki. Since the introduction of a multi-party system in Kenya in 1991, voting in most communities is considered to be along ethnic lines. Ethnic tensions based on historical injustice were one of the major reasons leading to the violent conflict between different tribes following the presidential elections. Whereas incumbent president Kibaki is a member of the Kikuyu tribe, his opponent Raila Odinga belongs to the Luo tribe. When ODM supporters, headed by Odinga, took their disapproval to the streets, the situation dramatically escalated and brought the country on the brink of civil war. Aggression by ODM-

supporting Luos was mainly directed against Kikuyus who, belonging to the same ethnic group as president Kibaki, were perceived of supporting PNU. On the opposite side, attacks were launched against ODM supporters, mostly belonging to Luo, Luhya and Kalenjin ethnic groups. The violent unrest left over a thousand Kenyans dead and internally displaced around 600,000 people in early 2008.

In response to the outbreaks of hostility, Kenya was confronted with the issue of prosecuting the agitators of the post poll events. Kenyan parliament, however, rejected a bill calling for the establishment of a local tribunal in order to try the main suspects on a national level. Notably though, Finance Minister Uhuru Kenyatta and Eldoret North MP William Ruto, then Agriculture Minister, who are now facing trial at The Hague, were among those who voted in favour of the bill. Taking account of an apparent lack of political will at the highest level and absence of credible effort to prosecute perpetrators nationally, a list containing the names of post-election violence suspects was handed over to the ICC to take care of the process. This was a first step to overcome a long culture of impunity practised by delinquents who escaped sentence because they were part of the government. However, having a local tribunal deal with punishment of post-election violence would have helped to strengthen Kenya's judicial system. At the same time it would have been a clear sign of Kenya's willingness to fight injustice and impunity on all political levels.

The Republic of Kenya became a State Party to the ICC in 2005 when it ratified the Rome

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Statute, making it possible for the Court to investigate in crimes against humanity in cases where the national government does not take action. As a consequence of the Kenyan government's lack of prosecution and in view of the fact that the ICC is a court of last resort, the International Criminal Court decided to authorise Luis Moreno Ocampo's investigation in the cases of post-election violence. It was only when the summonses were announced in December that the political elite seemed to realise the full scope of ICC's mandate. Subsequently, the government launched a series of attempts to stop investigations and to establish a local tribunal within the framework of the new constitution yet again. This happened on the basis that "The only reason the post-election violence cases are being investigated by the ICC is because there is no appropriate local judicial mechanism"¹.

CASES AND SUSPECTS

The ICC has established two cases against suspects of post-election violence in Kenya. The first accuses Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali of being criminally responsible as "indirect co-perpetrators [...] for the crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts"². More precisely, they are being accused of murder of civilian supporters of ODM political party in Kisumu, Kibera, Nakuru and Naivasha. According to the indictment, the crimes against non-Kikuyu population were carried out by members of Mungiki. Having held several senior positions in government before, Muthaura is currently head of the Public Service and Secretary to the Cabinet of Kenya. In this position he was among those people who received regular intelligence briefs on the possible violence that would break out. Uhuru for many years has been notably famous for the fact that he is the son of

¹ Is the establishment of a local tribunal enough to stop the ICC? In: <http://www.mzalendo.com/2010/12/15/is-the-establishment-of-a-local-tribunal-enough-to-stop-the-icc/>.

² International Criminal Court, <http://www.icc-cpi.int/>.

Kenya's founding President Jomo Kenyatta. In recent years he has, however, started to engage in politics himself and is presently holding the positions of Deputy Prime Minister and Minister for Finance of the Republic of Kenya. The third co-defendant of this case, Ali, was head of the Kenya Police at the time of the presidential elections in 2007. The police force is accused of killing at least 400 people during post-election violence. Currently, Ali is Chief Executive of the Postal Corporation of Kenya. The three suspects received summonses to appear before the Court in The Hague on 8 March 2011.

The second case is directed against William Samoei Ruto, Henry Kiprono Kosgey as well as Joshua arap Sang who are being accused of crimes against humanity of murder, forcible transfer and persecution. They are supposed to have committed or contributed to the commission of crimes in several locations including Turbo town and Hills town. Violence by organised gangs of Kalenjin youth targeted civilian population, namely the Kikuyu, Kamba and Kisii ethnic groups as part of "widespread and systematic attack"³. Ruto was Kenyan Minister for Higher Education, Science and Technology until he was suspended for corruption charges in October 2010. Just like Ruto, Kosgey belongs to the Orange Democratic Movement (ODM) and has been Minister of Industrialisation of Kenya as well as Chairman of ODM. In January 2011 he stepped down due to corruption allegations against him. Unlike the other suspects, Joshua arap Sang is not a politician but head of operations at the radio station Kass FM. Whereas Kosgey and Ruto are accused being responsible as indirect co-perpetrators of the mentioned crimes (i.e. committing crimes through another person) according to article 25(3)(a), Sang is suspected of having otherwise contributed to the commission of the crimes in accordance with article 25(3)(d) of the Rome Statute. By use of his radio programme, Sang is said to have collected supporters and provided signals to insiders of the plan on when and where to attack.

³ Ibid.

KENYAKATHARINA NETT
IRIS FÖLLNER**March 2011****www.kas.de****THE PROCEEDING**

So far, ICC summons have formally reached Kenya and were delivered to the six suspects by the Kenyan police in order to make them sign the receipt of the documents. For April 7 and 8, Francis Muthaura, Uhuru Kenyatta, William Ruto, Hussein Ali, Henry Kosgey and Joshua Sang have been summoned to the Pre-Trial Chamber of the ICC at The Hague in The Netherlands. Usually, the International Criminal Court can only take action at the request of a signatory state to the Rome Statute who is not able or willing to investigate a crime itself. In special cases Prosecutor Luis Moreno Ocampo can also launch investigations on his own initiative, which was the case for the Republic of Kenya.

Once a country has ratified the Rome Statute, any ICC process is only stoppable by its in-built mechanisms, meaning that it cannot be cancelled but only be temporarily suspended. For such a deferral, approval of all five permanent members of the UN Security Council is required or of the ICC, respectively, in case the country demonstrates ability to establish a local tribunal. According to article 127 of the International Crimes Act, a state can withdraw from the Statute at the earliest one year after the receipt of their request to the UN Secretary General.

THE CURRENT PUBLIC DEBATE

The government of Kenya has undertaken several efforts to hamper the ICC in prosecuting the "Ocampo Six". One of them was the attempt to challenge the legality of ICC by saying that The Hague trials were preserved for failed states, which Kenya is not. In March 2011 the government tried to convince the United Nations Security Council of the need to defer the trial by one year. The request was based on the argument that suspects should be tried locally instead of being held accountable by a "colonial, imperialist court"⁴. Allegedly, politicians fear a

⁴ Energy Minister Kiraitu Murungi, in: <http://www.standardmedia.co.ke/InsidePage.php?id=2000031599&catid=4&a=1>

loss of the country's sovereignty by relinquishing the cases to the ICC. However, ODM, PNU as well as the government are divided on the question as to whether the process should be deferred or not. In response to the letter by the Kibaki administration asking for deferral of the ICC process, ODM Secretary General Anyang Nyong'o urged the Security Council to reject the request. ODM officials allied to Ruto, in turn, distanced themselves from Nyong'o.

Even though China is willing to support Kenya's cause, the majority of the Council members were not convinced that conditions are fulfilled for deferral under article 16 (Rome Statute) according to which there has to be a threat to international peace and security. Despite all efforts, permanent members France, UK and the USA as well as Portugal and Germany made it clear that they would not support Kenya's attempt of deferral. In contrast to the chaotic scramble for deferral, public opinion widely supports the trial of "Ocampo Six" at the International Criminal Court. Sixty percent of the Kenyan population would like the process to continue uninterrupted and 73 percent are optimistic about the prosecution of suspects at ICC. Harsh criticism against the policy of delaying the trials has been levelled by former Minister of Justice Martha Karua who said that it aimed at protecting the political class and promoted impunity. She referred to a Motion issued in Parliament in December seeking to repeal the International Crimes Act and withdraw Kenya from ICC. As outlined before, even in case of success this move would not suspend the current investigations.

Meanwhile, public pressure continues piling on suspects to step aside from their official positions, especially regarding Uhuru Kenyatta, Francis Muthaura and Ali Hussein. According to the new constitution, public servants with pending cases must first be cleared of all charges before they can resume their position. Criticism also aroused on the PNU wing instructing the police to collect evidence on post-election violence, considering that the police was also involved in the unrest and can hardly be seen as an impartial investigator.

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The Kenyan government had its chance to establish a local tribunal, but since it failed to effectively prosecute the masterminds of post-election violence, the ICC started to take action. Therefore, attempts to defer the trials at ICC based on the argument that justice for the victims "will only be delivered here on our own soil"⁵ are rather hypocritical and lack credibility. The trials finally open the chance for the country to have closure and let justice be done on post-poll unrest. Unless the government wants to continue its inconsistent strategy of impunity, it should start to speak unanimously and advance reforms of the judiciary. Only then can it genuinely make a claim against the International Criminal Court and substantiate the country's ability to try suspects itself in future. If the intervention by the ICC can contribute to strengthening the judiciary in Kenya by pressuring it to be more assertive, it will take the country a big step forward. Once suspects have been tried at the ICC, Kenya can still prove her willingness to bring post-election violence perpetrators to justice by enforcing possible ICC sentences.

⁵ Wambui Mugo, in:
<<http://www.standardmedia.co.ke/news/InsidePage.php?id=2000030943&cid=4>>, 10/03/2011.