International Law Programme
Meeting Summary

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The ICC at a Crossroads: The Challenges of Kenya, Darfur, Libya and Islamic State

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Introduction

This is a summary of an event held by the International Law Programme at Chatham House, in association with Doughty Street Chambers.[1] The meeting examined the current challenges facing the International Criminal Court (ICC) as a result of non-cooperation by states, and the obstacles that this creates with regard to investigations and prosecutions. The meeting also explored the possibility and challenges of prosecuting members and supporters of Islamic State (IS). This summary brings together the main strands of discussion:

1. Non-cooperation by states with the ICC, including Sudan, Libya and Kenya;
2. The impact of diplomacy, and the policies and strategies of the African Union (AU);
3. Questions regarding the possible prosecution of members and supporters of IS.

The meeting was not held under the Chatham House rule.

Non-cooperation by States with the ICC

The ICC has been set up as an independent international judicial institution, without the usual law-enforcement apparatus that accompanies courts at the national level to ensure automatic compliance with its decisions and the rule of law. By design, when states negotiated the Rome Statute, which established the ICC, responsibility for law enforcement and enforcement of judicial orders were left to states, which were not willing to grant such intrusive powers to the Court itself. States parties thus have the obligation under the Rome Statute to enforce the Court's decisions and to cooperate with it. But this also means that the ICC relies heavily on state cooperation for its effectiveness. Indeed, the ability to secure compliance resides almost entirely with states.

The only available remedy under the Rome Statute to enforce states' compliance with their legal obligations is for the judges to refer an instance of non-compliance back to the Assembly of States Parties (ASP) – the 123 states parties to the Rome Statute – or to the UN Security Council (UNSC) where it referred a situation. These bodies may encourage or coerce the state to cooperate. So far, this has proven largely ineffective with regard to cooperation in situations referred to the ICC by the UNSC and remains untested in other situations. It was noted that in the case of the International Criminal Tribunal for the former Yugoslavia (ICTY), successful compliance was secured through issue-linkage strategies employed by the EU through its Stabilisation and Association Process and by NATO's Partnership for Peace programme, as well as by means of World Bank and other bilateral donor efforts that linked cooperation with the ICTY to other areas of economic, political and military activity, which changed the strategic national interest calculations for the states concerned. The approach was largely successful because of a common, unified position adopted by the international community with regard to the values represented by the Tribunal. By contrast, in the case of many of the situations before the ICC, the interests of the international community and the state concerned are typically far more disparate.

[1] This summary was prepared by Victoria Barlow.

Often, whether the ICC can conduct effective investigations will hinge on the levels and forms of cooperation in the states concerned. Although there are an increasing number of methods through which to access evidence more remotely where non-cooperation is at issue, it was noted that remote investigations can never make up for full access to the territory and evidence concerned. There are certain aspects that cannot be worked around, including access to official records held solely by the national authorities, material held by commercial enterprises that can only be accessed through domestic production orders, forensic evidence, witness protection or interference, and arrests.

Non-cooperation in situations referred to the ICC by the UN Security Council

The situations in both Darfur and Libya were referred to the Court by the UNSC. Although investigations have been conducted into alleged crimes committed in Darfur, there are outstanding arrest warrants against President al-Bashir and other indictees that have not been complied with. In Libya the government has failed to hand over Saif Gaddafi to the ICC, in line with its obligations.

Despite representations made to the UNSC by the Court, the international community has thus far failed to take action on either of these situations. At present, the UNSC has not even acknowledged letters from the ICC President raising the issue of non-cooperation by Sudan and, more recently, Libya.[2] On 9 March 2015 Pre-Trial Chamber II of the ICC issued a decision referring Sudan to the UNSC for non-cooperation with the Court;[3] whether this serves to initiate some form of international response remains to be seen. Doubt was expressed about this, notwithstanding the progress noted in relation to the UNSC's mainstreaming of the ICC in a number of resolutions relating to children in armed conflict, the role of women, the protection of journalists and other conflict-prevention resolutions. However, it was acknowledged that the ASP made some progress in 2014 through agreeing to avoid non-essential contact with individuals subject to an ICC arrest warrant.

Non-cooperation by Kenya and the failure of the *Kenyatta* case

Non-cooperation by Kenya was partly responsible for the failure of the *Kenyatta*[4] case. Although one of the main reasons for the collapse of the case was the loss of confidence in the credibility of three key linkage witnesses, the lack of cooperation on behalf of the Kenyan government also presented obstacles to obtaining critical evidence. Such evidence included financial, banking and telephone records, which might have had direct bearing on the alleged financing and organization of violence by Kenyatta. The Prosecutor therefore demanded compliance with the request for access to these records. It was noted that it would otherwise not have been fair, proper or in the public interest to withdraw the case in the face of outstanding non-cooperation by the government of Kenya on these matters.

[2] UN Security Council, Letter dated 29 December 2014 from the Secretary-General addressed to the President of the Security Council (30 December 2014), UN Doc S/2014/953.
[3] *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, No. ICC-02/05-01/09 - 227, 9 March 2015.
[4] *The Prosecutor v. Uhuru Muigai Kenyatta,* No. ICC-01/09-02/11-982.

The government of Kenya did not comply with the requests, and instead challenged their legality. The Trial Chamber found in favour of the prosecution in terms of the lawfulness of the requests, and ultimately held that the government of Kenya had failed to cooperate. The Trial Chamber did not, however, refer the matter to the ASP. It further rejected the Prosecutor's request to adjourn the proceedings, and held that the Prosecutor must decide how to proceed. The Prosecutor withdrew the case without prejudice on 5 December 2014, and sought leave to appeal the decision not to refer the matter to the ASP. (Leave to appeal has since been granted.)[5]

It was noted that other factors also affected the withdrawal of the case, including an atmosphere of severe witness intimidation throughout Kenya that had an impact on the willingness of witnesses to come forward. The Prosecutor continued to undertake investigations of contempt of court in this regard. This will be particularly pertinent to the ongoing *Ruto* and *Sang*[6] case.

The role of African and Kenyan diplomacy

Several attempts have been made by the Kenyan government to terminate or postpone the cases. In October 2013 Kenya attempted to get support for deferring the cases under Article 16 of the Rome Statute, which allows the UNSC to defer cases for 12 months on the basis of a threat to international peace and security. The UNSC rejected the request.

The Kenyan government subsequently proposed to the ASP to introduce a system whereby the accused could file a notice with the Court through which he/she would not be required to be present at court full-time, waiving the right to appear, and would instead be represented by a lawyer.

The ASP accepted a modified version of Kenya's proposal, and adopted new Rules 134 *bis, ter and quater*. The ASP emphasized that the final decision as to whether the individual appeared before the Court was not at the behest of the individual, but for the judges to decide. It was noted that, from the perspective of states that agreed to adopt the rule, this was a minimal compromise to prevent a threatened mass walk-out of the 34 African states and ensure the integrity of the Rome Statute. Conversely, it was argued that a better option would have been to stand firm behind the ICC and refrain from what looked like interference by governments with the Court, as a walk-out was actually unlikely.

Although not directly involved in the legislative process, the Office of the Prosecutor (OTP) was not in favour of the amendments, as Article 63(1) of the Rome Statute explicitly states that 'the accused shall be present during the trial.' The Prosecutor had previously argued that any discretion to permit the accused's absence from the trial should be highly extraordinary. In a split decision, the Appeals Chamber held that there is some discretion, but that 'absence of the accused can only take place in exceptional circumstances and must not become the rule.' In particular, it set out six conditions restricting the ability of the Trial Chamber to permit such a process.[7] While the ASP codified these conditions into rule 134 *ter*, it also went one step further, adopting a

[5] *The Prosecutor v. Uhuru Muigai Kenyatta,* No. ICC-01/09-02/11-1004.
[6] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* ICC-01/09-01/11.
[7] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', No. ICC-01/09-01/11-1066, 25 October 2013.

modified version of another rule proposed by Kenya that if the accused has extraordinary functions, he/she does not expressly have to satisfy these six requirements and can be excused more broadly.[8]

Other developments in the cases

Until recently, it was commonly assumed that the Court could only invite voluntary appearance of witnesses before it. However, the Prosecutor has argued, and it has been upheld by the Appeals Chamber, that the ICC does have the power to compel witnesses to appear before it. The Court cannot require a state to forcibly transfer a citizen to The Hague, but persons can be required to appear before the Court *in situ* within the territory of the state, or to appear before a video link.[9] This solution has been applied for nine witnesses in the *Ruto and Sang* case.

The OTP has indicated that it will make an application, after these witnesses have been heard, to have their original statements tendered into evidence as permitted by amended Rule 68, which was also adopted by the ASP. [10] The government of Kenya has indicated that it will challenge this, because when the amendment to Rule 68 was adopted it was agreed that it would not have retroactive effect to the detriment of the accused, a common requirement for all rules according to article 51 of the Rome Statute. The outcome of this litigation may prove to be pivotal.

The Impact of the Policies and Strategies of the African Union on Non-cooperation by African States

The discussion emphasized the lack of unity among members of the AU with respect to the ICC. At the ASP in 2013 and 2014, it was noted that there was no common position among African states. For example, some African states have denied entry to their territories for President al-Bashir, while others have allowed him entry. Some AU member states also continue to refer cases to the Court. Despite this fragmentation, the AU is attempting to implement a united position against the ICC, and has adopted a resolution cautioning states not to refer cases to the ICC without first seeking the advice of the AU Commission.[11] At the same time, some individual AU states have voiced their disquiet as to the impact of the political position taken at the AU, noting that their cooperation with the ICC is a matter of their sovereign prerogative. It was further emphasized that although some of the AU's concerns about the ICC may be understandable, it is equally important to note that the relationship between the AU and the ICC is poor only in respect of two or three specific cases – i.e. those involving incumbent heads of state.

A number of criticisms of the ICC were raised by one participant, including its alleged politicization, racist selectivity and funding by ex-colonial powers. It was, however, suggested that many of these criticisms were not based in fact, given the referral of several situations to the Court by African governments in their own capacity or as voting

[8] ASP Resolution ICC-ASP/12/Res.7, 27 November 2013.
[9] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', No. ICC-01/09-01/11-1598, 9 October 2014.
[10] ASP Resolution ICC-ASP/12/Res.7, 27 November 2013.
[11] Assembly of the African Union, Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct.2013).

members of the UNSC; or have become outdated, given the fact that numerous other states and situations outside the African continent are under preliminary examination and likely to proceed to investigation, and other donor countries now provide a larger proportion of funding to the Court. Nor was this a view shared by victims of these crimes.

One strategy of the AU that has received attention recently is the African Court of Justice and Human Rights (ACJHR). It is intended that the ACJHR's jurisdiction will be extended to criminal jurisdiction. The recent protocol to this court has however caused controversy, as it stipulates that leaders retain immunity before the ACJHR while they remain in office.[12] It was noted that this protocol therefore represents a step backwards in the progression of international criminal justice. But it appears that the protocol will be slow to come into force. Additionally, it was noted that external funders of the ACJHR, such as the EU, may be unlikely to support the protocol, as the EU has been a strong advocate of Article 27 of the Rome Statute (relating to the waiver of immunity).

None the less, in terms of overall coherence with the aim of ending impunity, it was emphasized that the ICC will always seek to encourage genuine criminal justice initiatives, whether taken at the national or regional level. The only question was how the ACJHR would fit within the overall framework. It was suggested that the ICC, for example, would likely retain a role alongside the ACJHR in its ability to try incumbent heads of state without an immunity bar, since such cases would be 'inactive' before the ACJHR and thus clearly admissible before the ICC. It was further noted, in response to a question on the immunity of non-party state nationals, that in situations referred to the Court by the UNSC, Chapter VII obligations are placed on the territorial state to cooperate fully with the Court, and that such obligations are binding on UN member states so concerned in accordance with Articles 25 and 103 of the UN Charter. The judges have held that in these circumstances, the entire legal regime of the Rome Statute applies, including the non-applicability of head of state immunity (Article 27). The AU has proposed that the ICC be complementary to national *and regional* criminal jurisdictions. It was suggested that this would in principle be workable if the African Charter creating the ACJHR also recognized, just as states parties do, that while the ICC will defer to genuine national (or regional) proceedings, this is contingent on the ACJHR's acceptance of the binding nature of ICC complementarity judgments on forum allocation.

Islamic State

It was queried whether IS and its supporters could be prosecuted before the ICC. The ICC does not have territorial jurisdiction over Iraq or Syria, as they are non-states parties to the Rome Statute. However, it was noted that there are people of as many as 90 different nationalities fighting for IS, and the ICC has jurisdiction over state party nationals. It was further noted that although considered as terrorism (which has not yet itself been included in the Rome Statute), specific acts carried out by IS might also constitute war crimes and crimes against humanity, and would thus fall within the scope of the ICC's subject-matter jurisdiction.

[12] See Article 46A *bis* of Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

Is it, however, appropriate for the ICC to institute proceedings even if it has jurisdiction on the basis of nationality? It was noted that a number of states are already prosecuting their nationals who have returned from fighting for IS; the principle of complementarity would require that such cases would be inadmissible before the ICC if the proceedings are genuine. Where states are not willing or able to prosecute, or are inactive, the cases would in principle be admissible before the Court. But would ICC prosecutions fit in within the normal scope of its prosecutorial strategy, which is to focus on those most responsible for alleged offences? The answer to this question remained unclear at this stage. It was noted that the military and political leadership of IS appears to remain Syrian and Iraqi. However, analysis suggests that a limited number of middle- and possibly higher-ranking military commanders responsible for serious crimes may be nationals of states parties. More analysis was therefore required as to the exact role of such state party nationals: whether they appear responsible for serious crimes, and whether their state of nationality is already investigating or prosecuting them. Concern was also expressed with regard to the imbalance and selectivity that could arise if only a select handful of perpetrators could be prosecuted by the ICC, and not necessarily those most responsible. It was also recalled that IS is one of several armed groups and forces allegedly responsible for serious crimes in Iraq and Syria. The OTP continues to follow the available information, and will also see how it can support the efforts of relevant states with jurisdiction.[13]

Other options for investigation and prosecution include the possibility of one of the territorial states (or neighbouring states with spillover violence) making a declaration under Article 12(3) of the Rome Statute, accepting the jurisdiction of the ICC on an ad hoc basis. This could, for example, be granted over the territory that is the subject of hostilities and open up all alleged crimes committed on that territory to the scrutiny of the Court, whether committed by IS or state actors. Another possibility is a UNSC referral to the Court, as well as ratification of the Rome Statute by the governments concerned.

Whether the ICC could conduct effective investigations if it had jurisdiction over IS or more generally in Syria and Iraq was also raised. Although the situation on the ground is highly unstable and insecure, according to some international justice experts and investigators, the evidence that has been gathered so far by local actors and other fact-finding and documentation bodies is of a high quality. This is the case at least with regard to alleged crimes committed in Syria by state actors. There is video and other evidence derived direct from the territory; interviews along the border; and documents provided by defectors from the Syrian army, for example, linking crimes on the ground with President Assad's circle.

Conclusions

It was acknowledged that the responsibility for improving cooperation falls largely on states parties. ICC states parties have procedures in place for dealing with non-cooperation, but when these procedures were introduced, they did not go far enough in specifying the exact role of the ASP or the UNSC, or the measures that could be adopted.

[13] Criteria for undertaking preliminary examinations are laid out in: Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (ICC-OTP, November 2013).

At the ASP in 2014, states parties agreed to review these procedures in the future and reflect on lessons learned. It is hoped that this mandate will be taken seriously by states parties, as the ASP has so far failed to test its enforcement powers.

With regard to the Court and the framework of the Rome Statute, it was noted that the ICC works alongside states to investigate and prosecute, either for cases brought before the Court or to support genuine national efforts. Some states have specialized war crimes units that are well positioned to undertake genuine investigations and prosecutions. In some states, such as Colombia or Guinea, a major reason given by many observers as to why the authorities have adopted transitional justice mechanisms to bring forward criminal prosecutions is concern that the ICC could otherwise step in. The OTP has also become more willing to employ Article 87 of the Rome Statute to pursue findings of non-cooperation (whereby the Court may make a formal finding of non-cooperation and refer the matter to the ASP or the UNSC), or to test out the limits of the cooperation regime – such as by pursuing the summonsing by states parties of recalcitrant witnesses. The Prosecutor has also increasingly proceeded under Article 70 regarding contempt of court with respect to witness intimidation and corruption.

The Court's own enforcement powers are limited. If states were not disunited among themselves, effective follow-up could be more vigorously pursued. This could include the imposition of sanctions on individuals and states by the UNSC. It was suggested that the lack of enforcement measures in the Rome Statute may require a review.

The Court must continue to act independently and impartially in order to retain its status as a truly *international* criminal court. Creative thinking, robust litigation and unified diplomatic efforts are essential for dealing with non-cooperation, and thus for the survival of the international criminal justice system.