Africa Summary

Justice in Kenya: Impacts of the African Union’s ICC Decision

George Kegoro
Executive Director, International Commission of Jurists, Kenya

L. Muthoni Wanyeki
Kenyan political scientist

Chair: Alex Vines OBE
Research Director, Area Studies and International Law; Head, Africa Programme, Chatham House

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INTRODUCTION

This document is a summary of an event held at Chatham House on 29 October 2013.

Africa’s relationship with the International Criminal Court (ICC) was the topic of discussion at an extraordinary summit held by the African Union (AU) in Addis Ababa on 12 October 2013. Following the meeting, the AU issued a declaration calling for the suspension of ICC cases against President Uhuru Kenyatta and Deputy President William Ruto of Kenya, who are accused of involvement in orchestrating violence that followed Kenya’s 2007 elections.

The AU expressed concern that the ICC has become politicized in its indictments against African leaders, and that the Kenyan cases are a threat to the country’s sovereignty and the region’s stability.

The speakers discussed the implications of the AU’s declaration for the victims of Kenya’s post-election violence, and whether the summit signals Africa’s retreat from the ICC.

The meeting consisted of presentations followed by a discussion, both of which were held on the record. The following summary is intended to serve as an aide-mémoire for those who took part and to provide a general summary of discussions for those who did not.

For more information – including recordings, transcripts, summaries, and further resources on this and other related topics – please visit www.chathamhouse.org/research/africa.

GEORGE KEGORO

Mr Kegoro gave detailed background information about the situation in Kenya to date. He began by stating that there had been some civil disturbances bordering on civil war after the 2007 elections in Kenya. After these disturbances, a commission of enquiry was set up to investigate the cause of the civil unrest and to ensure that the perpetrators were dealt with accordingly.

Mr Kegoro discussed the reasons for the commission of enquiry’s establishment. He noted that there had been no accountability for the violence that had occurred after Kenya’s two previous elections, and said that it was therefore essential for an enquiry to hold to account those responsible for the latest instance of violence. Mr Kegoro stated that proper mechanisms were not put in place to ensure that this enquiry process was conducted
properly, and so there was no capacity within Kenya for those responsible for the violence to be held to account. This led to the involvement of the ICC.

When the ICC began its investigation, it had to look into two factors. These were the complaints of the aggrieved, and the actions of the security forces during the violent uprising. The indictment of Kenya’s current president, Uhuru Kenyatta, and his deputy, William Ruto, was described as the main reason for the passing of the Kenyan parliament’s resolution to withdraw from the ICC. Mr Kegoro suggested that members of Kenya’s political class saw the March 2013 elections as a referendum on the ICC question. For them, the election of Kenyatta and Ruto – despite the charges against them – showed resounding domestic support for the two leaders, and a desire on the part of Kenyans for the ICC to refrain from ‘meddling’ in the country’s politics.

Mr Kegoro argued that although the terrorist attack on the Westgate Mall in Nairobi was deplorable, it had nonetheless emboldened the Kenyan government to persuade the AU to hold an extraordinary summit in order to discuss the implications of the ICC’s indictments against Uhuru and Ruto. Kenya’s government has argued that it would be unhelpful for both the president and the deputy president to be outside of the country in the aftermath of a terrorist atrocity. The government has also continuously argued that Kenya has the necessary capability to investigate the post-election violence of 2007–08, and therefore that the ICC’s involvement is unnecessary.

Mr Kegoro described Kenya’s government as having a continually changing position on the ICC. He stated that at various points it has suggested that the cases should be deferred, while on other occasions it has argued that they should be dropped altogether. Mr Kegoro argued that, in his view, Kenya’s political elite wants to avoid the cases going to trial at the ICC at any cost. Significant state resources are being spent on the ICC issue.

Mr Kegoro concluded by examining what the consequences of a deferral of the Kenya cases might be. He argued that a deferral would result in difficulties for witnesses and the human rights defenders acting for them, as a delay in the cases would allow more time for pressure to be brought on them. A long deferral could therefore result in witnesses dropping out. Mr Kegoro argued that Kenya’s government saw its election as synonymous with its impunity. He emphasized that the popularity of the president and the deputy president should not mean that they should not be held responsible for their actions.
L. MUTHONI WANYEKI

Ms Wanyeki stated that, despite popular media reports, surveys demonstrate that the majority of Kenyans still support the ICC. The human rights community in Kenya does not support the deferral of the cases against Uhuru Kenyatta or William Ruto.

She noted that in arguing for the President Kenyatta’s case to be postponed and for Deputy President Ruto’s to be suspended until both have left office, the AU was demonstrating a lack of regard for Kenya’s constitution, which states that heads of state are not immune from international charges.

Ms Wanyeki highlighted the similarities in the positions of the AU and the wider international community in 2008, following the post-election violence. She argued that this drew on the widespread backing of the involvement of the AU Panel of Eminent Personalities

The move from the Commission of Inquiry to the ICC came about because the establishment of a Special Tribunal to investigate the violence failed three times, despite the endorsement of Kenya’s parliament. Ms Wanyeki argued that, to date, there has been no political action on the report published by the Commission on Human Rights, and few legal proceedings against civilian perpetrators of violence.

Instead, many civilian suspects were held for up to three months without charge following the post-election violence, although the rules stipulate that they should have been released after 48 hours if no charges could be brought. A Kenyan women’s movement withdrew its support for investigations because of problems they perceived with the treatment of victims of sexual violence.

Ms Wanyeki said that although there is an international crimes division in the High Court of Kenya, it does not have any judges assigned to it. Currently, only two cases related to the post-election violence are moving forward, both brought by Kenyan civil society.

Ms Wanyeki went on to explain that for many Kenyans the violence surrounding the 2007 elections was seen as a closed chapter. She said that reforms had been introduced following those elections, but in some cases these were seen to be in lieu of accountability; however there is a need for restorative justice as well as retributive justice.

She argued that Kenya’s political elite views the country as exceptional within the region, and distinct from the chaos in neighbouring Somalia and South Sudan, Therefore, for some the post-election violence is seen as a small-
scale event compared the numbers of deaths in other conflicts within the region.

Ms Wanyeki explained that the Kenya cases have drawn attention within the AU because questions of presidential authority and sovereignty play across the continent. There is still anger within Africa’s political elite about the treatment of senior political figures from Rwanda and Sudan by international courts.

QUESTIONS AND ANSWERS

Question
Do you think that the UN’s Security Council will agree that President Kenyatta’s case should be deferred?

L. Muthoni Wanyeki
Ms Wanyeki said that it is very difficult to predict what the Security Council will do, however it is important for it to examine thoroughly the merits of any request for deferral before making a decision.

George Kegoro
Mr Kegoro stated that at the moment it appears very likely that President Kenyatta will continue to cooperate with the ICC. He stated that it seems as if the people of Kenya want him to go and face the charges as they perceive it as being good for Kenya’s politics in the long run.

Comment
It is wrong to presume that this will be the first time that a sitting president has had to face charges at an international criminal court. Slobodan Milosevic and Charles Taylor both faced charges when they were sitting heads of states – however in Taylor’s case, he resigned from the presidency before going to trial.
**Question**

If over 50 per cent of Kenyans support the ICC, then why is there a perception that ICC support within Kenya has fallen dramatically?

**George Kegoro**

Mr Kegoro argued that because Kenya lacks a credible opposition, there is no political figure that can effectively counter the projection of low support for the ICC cases. He also noted that some of the owners of major media outlets are close to the political elite, and it is the reports from such media from within Kenya that are picked up by the Western media.

**Question**

Currently, the constitution allows for a sitting president to be tried at an international court. The constitution can only be changed by a referendum. If the question of presidential immunity was put to the Kenyan people, do you think the constitution will be changed?

**L. Muthoni Wanyeki**

Ms Wanyeki affirmed that the Kenyan constitution allows for the president to face trial, and argued that the AU’s current position therefore ran counter to Kenya’s constitution. However, according to Ms Wanyeki, amending the constitution would be seen as a regression by many Kenyans, as it was introduced so recently.

**George Kegoro**

Mr Kegoro concluded by positing that the legal sector within Kenya does not have any political space, and it remains as fractured as the rest of society.