Chapter 13
A Strained Relationship: Reflections on the African Union's Stand Towards the International Criminal Court from the Kenyan Experience

Sosteness Francis Materu

Contents

13.1 Introduction

This chapter is a commentary on the current 'hostile' attitude adopted by the African Union towards the International Criminal Court. The chapter focuses mainly on two aspects: First, it comments on the African Union's 'common positions' on the Court regarding the prosecution of African serving Heads of State, Kenya being the main point of reference here. Second, also using the Kenyan experience, it analyzes how

S.F. Materu (✉)
University of Dar Es Salaam, Dar Es Salaam, Tanzania
e-mail: osakisos@yahoo.com

G. Werle et al. (eds.), *Africa and the International Criminal Court*,
International Criminal Justice Series 1, DOI 10.1007/978-94-6265-029-9_13

the International Criminal Court is perceived in Africa by mainly two groups: the political elite and the ordinary citizens, including victims of the atrocities investigated by the Court. Kenya is refered to for two main reasons. Kenya is a State Party to the ICC Statute, which means it has direct treaty obligations with regard to the Court. Then, both the President and Deputy President of Kenya are currently undergoing trial before the International Criminal Court, a fact which has stirred the most recent attitude of the African Union towards the Court.

The chapter finally reveals that although the AU Assembly brings together Heads of State of almost all African countries, the current views of the Assembly about the International Criminal Court do not necessarily represent the views of the African people in general. Consequently, any assertion that 'Africa is against the International Criminal Court' is shown to be flawed. It will also be contended that the Court remains a relevant institution for Africans, especially the victims of serious human rights violations, despite any flaws or limitations which may be associated with the Court's current legal framework.

13.2 Contextualizing the Problem

There are now three popular facts about Africa and the International Criminal Court. First, African states strongly supported the establishment of the Court. Second, so far, five African states have out of their own invited the Court to prosecute crimes committed on their respective territories. Third, African states make up the largest regional grouping represented at the Court. But as various scholars and commentators rightly indicate,[1] the relationship between the African Union and the International Criminal Court is now strained. Such a relationship started turning 'sour' when the Court indicted *Omar Al Bashir*, the incumbent Sudanese President. The issuance of an arrest warrant against *Muammar Gaddafi*, the former Libyan leader, would have worsened the relationship had he not met with his untimely death before appearing before the Court. But currently it is obvious that the situation has become worse following the Court's indictment of *Uhuru Kenyatta* and *William Ruto*, Kenya's President and Deputy President, respectively, who had already been indicted by the Court before they were elected to office.

Whereas in the case of Sudan and Libya the Court's jurisdiction was triggered by the United Nations Security Council,[2] the Court's jurisdiction in respect of Kenya was invoked *proprio motu* by the ICC Prosecutor.[3] Prior to the indictments

[1] See, e.g., Jalloh 2012, p. 203 et seq; Villa-Vicencio 2011, pp. 38–41; Mills 2012, p. 404 et seq; Hansen 2013; Cote 2012, pp. 411–412; Murithi 2012, pp. 4–9; and Murithi 2013.

[2] Article 13(b) of the ICC Statute, read together with UN Charter, Chapter VII, Article 39.

[3] Articles 13(c) and 15 of the ICC Statute. See also Bergsmo and Pejic 2008, pp. 581–593.

resulting from these three particular referrals, the International Criminal Court had already started exercising jurisdiction over cases arising from other referrals made by three other African states, namely the Democratic Republic of the Congo,[4] the Central African Republic,[5] and Uganda.[6] Besides, the International Criminal Court is currently also exercising jurisdiction over cases arising from two other African countries, namely Mali (self-referral)[7] and Côte d'Ivoire (resulting from a voluntary acceptance of Court's jurisdiction by a non-State Party).[8] Both States referred their respective situations to the International Criminal Court in the face of the strained AU-ICC relationship.

By and large, it is the indictment of African politicians who are still in power which has influenced the African Union to adopt various Decisions and 'common positions' expressing 'hostility' with the Court.[9] In addition, various pronouncements by some of the AU leaders have branded the International Criminal Court as a racist, neo-colonial and biased institution that is only targeting Africa and its leaders in particular.

What is also worth mentioning is the fact that the African Union has not, so far, adopted any common position (be it in favor or against the Court) in respect of cases arising from the self-referrals or indictments of 'ordinary' Africans. Two things are noteworthy here: First, the African Union has raised concerns about ICC indictments only when they touch the African political leaders in power or their allies, but not when such indictments are against their political opponents (or rebels), such as *Thomas Lubanga, Germain Katanga, Mathieu Ngudjolo Chui, Joseph Kony and Jean Pierre Bemba*. Second, the indictments complained about have all resulted from either Security Council referrals (Libya and Sudan) or *proprio motu* investigations of the ICC Prosecutor (Kenya).

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[4] International Criminal Court, Press Release 2004.

[5] International Criminal Court, Press Release 2005.

[6] International Criminal Court, Press Release 2004.

[7] See Referral letter by the government of Mali http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf. (All internet sources in this chapter were accessed on 24 March 2014).

[8] See Article 12(3) of the ICC Statute; and the Letter reconfirming the acceptance of the ICC jurisdiction http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf.

[9] See, e.g., the following specific decisions and declarations of the AU Assembly on the International Criminal Court as adopted in its various Sessions Ext/Assembly/AU/Dec.1(Oct.2013), Extraordinary Ordinary Session, 12 October 2013; Assembly/AU/Dec.397(XVIII)—Doc.EX.CL/710(XX), 18th Ordinary Session, 29–30 January 2012; Assembly/AU/Dec.366(XVII)—Doc. EX.CL/670(XIX), 17th Ordinary Session 30 June–1 July 2011; Assembly/AU/Dec.334(XVI)—Doc. EX.CL/639(XVIII) 16th Ordinary Session 30–31 January 2011; and Assembly/AU/Dec.245(XIII) Rev.1—Doc. Assembly/AU/13 (XIII) 3, 13th Ordinary Session, 1–3 July 2009. The Decisions can be found in the Annex to this book.

13.3 Regional Positions Versus Obligations of States Towards the International Criminal Court

13.3.1 Regional Common Positions on the International Criminal Court

Common regional positions on various matters are not uncommon, neither are they confined to the African Union as a regional bloc. In fact, the AU's common positions are contemplated under its Constitutive Act, one of whose main objective is that the African Union shall "promote and defend African common positions on issues of interest to the continent and its peoples".[10] One of the earliest such positions as regards the International Criminal Court was adopted in 1998 by the Council of Ministers of the then Organization of African Unity, urging its Member States not only to support but also to participate in the ongoing processes towards creating and making the Court operational.[11] Like the African Union, the European Union has similarly adopted various common positions with regard to the International Criminal Court. One of them that was adopted on 16 June 2003[12] repealed and replaced an earlier position originally adopted in 2001 and amended in June 2002.[13]

All the common positions adopted so far by the European Union have leaned towards strengthening the Court. The European Union has stressed its objective "to support the effective functioning of the Court and to advance universal support for it by promoting the widest possible participation in the Rome Statute".[14] To achieve this objective, the EU's common positions have not only insisted on ratification and implementation of the ICC Statute, but also on the need to extend the moral and financial support to the International Criminal Court.[15] Consistent with its above-mentioned objectives, the European Union adopted yet another common position in 2002, specifically rejecting USA's bilateral agreements with other States.[16] These agreements were (and still are) intended to shield US citizens from arrest and surrender to the International Criminal Court for prosecution.[17] The fact that all EU Members are signatories to the ICC Statute is a symbolic gesture which may lend more legitimacy to EU's 'common' positions. This is not the case with the African Union.

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[10] See Constitutive Act of the African Union of 11 July 2000, Article 3(d).

[11] See Decision CM/Dec.399 (LXVII), 67th Ordinary Session of OAU's Council of Ministers Addis Ababa, 25–28 February 1998.

[12] See EU Council Common Position 2003/444/CFSP of 16 June 2003.

[13] See EU Council Common Position 2002/474/CFS amending Common Position 2001/443/CFSP.

[14] EU Council Common Position 2003/444/CFSP, Article 1(2).

[15] EU Council Common Position 2003/444/CFSP, Articles 2 and 3.

[16] See Coalition of the International Criminal Court 2002.

[17] See Coalition of the International Criminal Court 2002. For more information see Bantekas 2012, pp. 439–440.; Hafner 2005, p. 323 et seq.; Benzing 2004, pp. 181–236.

Contrary to the central objective of EU's positions, which is to have a strong and functioning International Criminal Court, the Decisions adopted by the African Union, especially after the Court started its work, are implicitly aimed at weakening rather than strengthening the Court. More concerning is the fact that such Decisions include those which have expressly asked African Union Member States, *regardless of whether they are parties or non-parties to the ICC Statute,* not to cooperate with the Court.[18] A question that arises is this: Does the African Union care about the treaty obligations that some of its Member States have voluntarily incurred under the ICC Statute? Only 33 out of 54 (61 %) of African countries have ratified the Statute.[19] This means that, as the African Union adopts Decisions purportedly entailing African 'common positions' on the International Criminal Court, 39 % of the AU Members who associate themselves with such Decisions are not States Parties to the Court. Through its Decisions, the African Union turns a blind eye to the fact that the obligations of these two groups of African states with regard to the International Criminal Court differ, and that different consequences may flow from the relationship between them and the Court.

13.3.2 Obligations of African States Parties to the International Criminal Court

There are crucial points which must be clearly highlighted before going further. Pursuant to the complementarity principle under which the International Criminal Court operates,[20] and as far as the African continent is concerned, the Court has a direct relationship with only the 33 African States that have ratified the ICC Statute. With regard to such States, an obligation arises pursuant to the principle of *pacta sunt servanda* according to which states parties to an international treaty (e.g. the ICC Statute) are required to perform their obligations under the respective treaty in good faith i.e. in a manner that does not defeat but promote the objectives of the treaty.[21] As far as the remaining 21 African non States Parties to the ICC Statute are concerned, a relationship that arises with the Court is only to the extent contemplated under Articles 13(c) and 12(3) of the ICC Statute, that is to say: (i) when the International Criminal Court is exercising jurisdiction over situations referred to it by the United Nations Security Council; or (ii) when such a State lodges a declaration to accept the jurisdiction of the Court with respect to the specific crime in question. According to Article 13(c) above, the Security Council,

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[18] See, for example, AU Decision Assembly/AU/Dec.245(XIII) Rev.1, 3 July 2009, Article 10.

[19] See ICC Statute ratification status at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

[20] See ICC Statute, Article 1.

[21] See Vienna Convention on the Law of Treaties of 1969 (VCLT), Article 26.

acting under Chapter VII of the UN Charter, is empowered to refer a case or situation in any State to the International Criminal Court, whether or not that State is party to the ICC Statute, if the Security Council deems it fit for purposes of restoring or maintaining peace and security. In such a scenario, every State is bound to cooperate with the Court when requested, despite the general rule that a treaty cannot create obligations or rights for a third state unless such a state expressly consents in writing.[22] In this case, any State's defiance towards the Court's orders or requests (whether or not such State is party to the Statute) is arguably tantamount to defying orders of the Security Council under the UN Charter, and consequently, sanctions can be imposed by the Security Council on the defiant state.[23]

Apart from the relationship between states and the International Criminal Court as explained above, the ICC Statute does not contemplate a relationship between the Court and regional groupings as such. However, this is not to say that common positions articulated by such regional groupings regarding how their Member States should relate with or act towards the International Criminal Court may not have any impact whatsoever on how some of those states may actually behave towards the Court. Rather, it is to argue that such common positions should not aim at making states which are members to such regional groupings and at the same time are parties to the ICC Statute to disregard their obligations under the Statute, which obligations such states incurred voluntarily, exercising their sovereignty.

From the foregoing it follows that AU Decisions and Declarations purporting to 'instruct' or 'encourage' its members, including those 33 States which have voluntarily ratified the ICC Statute, to behave defiantly towards the Court are unjustifiable. As already stated, the African Union has the mandate under its Constitutive Act to adopt common positions, including on the International Criminal Court. But before acting on instructions entailed in such decisions, it is important for the African States Parties to the ICC Statute to individually weigh them against their obligations under the ICC Statute. It is important for these States to evaluate if the respective AU Decisions impose obligations which are in conflict with State Parties' obligations under the ICC Statute. Specifically, such States must consider whether by implementing AU Decisions they may end up breaching their obligations under the ICC Statute; or whether by not implementing such Decisions they will be breaching their obligations under the AU Constitutive Act. If conflicting obligations arise in this respect, then such States could seek a solution, *inter alia*, under international law. But we find no such conflict here for the following reasons:

Most of the issues raised by the African Union in its Decisions are political in nature, save for a few which are purely legal or are on the border of law and politics. The most important and relevant legal issue that has featured more

[22] See VCLT, Articles 34 and 35.

[23] See Akande 2009, pp. 342–338; Fletcher and Ohlin 2006, pp. 428–433.

prominently is the argument that the Court's indictment of African leaders violates a customary law principle that grants immunity from prosecution to the serving Heads of State and Government of Kenya and Sudan. But this argument is not as significant or convincing as the African Union would like it to be, and even the issue of immunity which it raises does not give rise to any conflict that could put African States Parties to the Statute in a dilemma with regard to the implementation of their obligations under the ICC Statute and those under the AU's Constitutive Act.

The main reason for this argument lies at the heart of Article 27 of the ICC Statute. This provision explicitly states that as far as the crimes in the ICC Statute are concerned, the official capacity of a suspect is not a bar to prosecution; and that any immunity that a national or international law may provide to such a person on the basis of his or her official capacity is not a bar to prosecution by the International Criminal Court. This makes the AU's arguments on immunity of Kenya's Head and Deputy Head of State unsustainable for two reasons. First, Kenya's voluntary ratification of the ICC Statute was an unequivocal waiver of immunity to serving Heads of State as far as the core crimes under the Statute are concerned. This deprives the African Union of any justification whatsoever for protesting against the enforcement of this clear exception to the general rule which Kenya, as a sovereign state, has not only endorsed, but also enshrined in its own Constitution. The Kenyan Constitution provides explicitly that although "the President or a person performing the functions of that office" enjoys a general protection against legal proceedings "during their tenure in office", such immunity "shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity".[24]

Second the AU had earlier acknowledged the existence and validity of the waiver of immunity under Article 27 of the ICC Statute. The African Union noted that such a waiver could be valid provided it is applied only to states which have ratified the ICC Statute. The only thing that the African Union strongly contested and flawed is an extension of such waiver to a third state like Sudan, which is not party to the ICC Statute.[25] But even as regards third states, it must be mentioned that the AU's argument above is correct only to the extent that the International Criminal Court is *not* acting on referrals made by the Security Council. The reason is that a mere referral of a situation or case involving a serving Head of State of a third state (e.g. Sudan) to the Court is tantamount to extending the applicability of Article 27(2) (and the entire ICC Statute) to that state by the Security Council.[26] And since the UN Charter, under which the Security Council acts in such a scenario, is the supreme treaty, then the ICC Statute as a whole becomes

[24] Constitution of Kenya of 2010, Articles 143(1) and (4).

[25] AU Press Release No. 002/2012, 9 January 2012, p. 2.

[26] See Chap. 3 in this volume by *Trendafilova* (under Section 3.3.3., Head of State Immunity and Security Council Referrals).

applicable to that third state as if such state were party to the Statute.[27] As regards ICC States Parties, the AU's argument in its press release of 9 January 2012 cited above stated the correct position. Interestingly, the AU's correct position of the law as regards the applicability of the waiver of official capacity changed later when *Kenyatta* and *Ruto* were elected as Kenya's President and Deputy President, respectively. The African Union now argues that such immunity *cannot be waived,* even where the state in question is party to the ICC Statute.

Despite the AU's Decision of 12 October 2013, categorically instructing Kenya's President and Deputy President not to continue attending their trials before the Court, the Deputy President, whose trial had commenced, continued to appear before the Court, while Kenya continued to invoke other legal means within the legal framework of the ICC Statute to address its demands and concerns. Similarly, despite the AU's calls for non-cooperation with the International Criminal Court, several African countries which are parties to the Statute, specifically Botswana and Malawi under the new President *Joyce Banda*, expressly refused to act in a manner that would result in a breach of their obligations under the ICC Statute.[28] In addition, on 31 January 2014, barely two months after the AU's most recent hostile Decision against the International Criminal Court, the parliamentarians from four Francophone African States Parties to the ICC Statute, namely Mali, Guinea, Senegal and Côte d'Ivoire, met with the President of the Assembly of States Parties to the ICC Statute and made statements supporting "the ongoing judicial work of the International Criminal Court throughout Africa".[29] All this shows that these individual States Parties to the ICC Statute have realized that AU's instructions on how they should behave towards the Court are flawed in principle.

At another level, the African Union presents an alternative argument: It argues that the International Criminal Court should defer the cases against Kenya's President and Deputy President until such a time that they are no longer serving in their current capacities.[30] This proposal must be dismissed. Apart from not being contemplated under Article 27 explained above, such a view has both implicit and explicit implications on justice for the victims. Despite the fact that hitherto six years have already lapsed since the alleged crimes were committed in Kenya, the AU's argument would further mean that the Court has to defer the Kenyan cases until 2017 or 2023. This is because the first term of the *Kenyatta-Ruto* presidency ends in 2017, and assuming they are re-elected (as they are eligible), their second and final term will end in 2023. By the time the cases resume, it is clear that the evidence will have greatly been affected—witnesses will have probably died or their memories will have faded. In short, therefore, embedded in the AU's argument is an implicit motive to shield the suspects. From the point of view of the victims, it suffices to say that justice delayed is justice denied.

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[27] See Blommestijn and Ryngaert 2010, pp. 432–436.

[28] Murithi 2012, p. 6.

[29] See ICC, Press Release 2014.

[30] AU, Decision Ext/Assembly/AU/Dec.1(Oct.2013), Article 10(ii).

13.3.3 The AU's Shift of Attention from Victims to Perpetrators

The last thing to highlight in this section is that since the Court's interventions started in Africa, no serious Decision has ever been adopted by the African Union with regard, for example, to mitigating the suffering of the internally displaced persons or generally, the victims or even with regard to measures to ensure or assist the situation countries to address criminal accountability at the domestic level. Thus, whereas the focus of the International Criminal Court is to punish the perpetrators and at least bring some justice to the victims, the position currently held by the African Union in relation to the ICC activities in Africa diverts the attention (protection) from where it should be to where it should not be—from the victims to the perpetrators of heinous crimes in Africa, specifically when such perpetrators happen to be part of the African ruling elite.

13.4 How Is the International Criminal Court Perceived in Africa? The Kenyan Experience[31]

13.4.1 Introduction

Following Kenya's 2007/2008 post-election violence, serious atrocities were committed, including 1,200 murders, 3,000 rapes, 350,000 incidents of forceful removals, 3,561 incidents of grievous bodily injuries, 117,216 incidents of destruction of properties and 41,000 cases of destruction of houses.[32] Following Kenya's failure to institute domestic proceedings against the alleged perpetrators, the ICC Prosecutor's *proprio motu* intervention was invoked pursuant to an earlier agreement.[33] Subsequently, the International Criminal Court indicted six Kenyans for crimes against humanity committed during the violence.[34] Among those indicted were *Uhuru Kenyatta* and *William Ruto* who were later elected Kenya's President and Deputy President, respectively.

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[31] On the Kenya Situation before the International Criminal Court see Materu SF, The Post-Election Violence in Kenya: Domestic and International legal Responses (forthcoming book).

[32] See Republic of Kenya, Report of the Commission of Inquiry into Post-Election Violence (CIPEV), 2008, pp. 345–352. See also Kenya National Commission on Human Rights (KNCHR) 2008.

[33] See CIPEV Report, p. 473.

[34] See Decision on the Prosecutor's application for summonses to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011; and Decision on the Prosecutor's application for summons to appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.

The question of how the Court is perceived in Kenya did not arise prior to the ICC intervention; it only arose subsequently. Various groups have, at different times, expressed different opinions in relation to the on-going ICC process. Such opinions differ according to the group. For example, politicians as opposed to ordinary citizens, including civil society; (alleged) perpetrators or their allies as opposed to the victims of the crimes; believers in justice as opposed to perpetuators of impunity, etc.

13.4.2 The Political Elite

Before the International Criminal Court intervened in Kenya there had been a domestic agreement that a special tribunal would be formed to prosecute the perpetrators of the alleged crimes against humanity.[35] The political elite, specifically the Members of Parliament, became immediately divided when efforts were being undertaken to implement this recommendation. A small group of Members of Parliament genuinely favored a domestic special tribunal, but many others were against it and preferred the 'The Hague option', i.e. the ICC route to criminal accountability. Those who favored the ICC route were also divided into two groups, although each group had a different motive. The first and small group believed that Kenya's judicial institutions were too weak to render impartial justice as they could easily be manipulated by those with "vested interests". Thus, for this group, the International Criminal Court was perceived as an impartial and neutral institution when compared to the domestic courts, including even a special tribunal, which could be manipulated easily.[36] The second and bigger group of Members of Parliament who favored the ICC route did so solely for political reasons. They perceived the Court as a 'remote threat' as they seem to have hoped that it would involve a protracted procedure that would delay criminal accountability.[37] Until then the ICC Prosecutor had not named any suspects yet.

Thus, those who expected to use the International Criminal Court to settle scores against political opponents also played a political card. Interestingly, *Uhuru Kenyatta*, who was then Deputy Prime Minister doubling as Finance Minister, and *William Ruto*, Member of Parliament and former Education Minister, were among those who urged the Court to intervene immediately, not knowing that they themselves would be arraigned before it.[38] *Ruto,* for example, argued that instead of wasting time on a special tribunal, the names of suspects should be handed over to the International Criminal Court "so that proper investigations can start".[39]

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[35] See CIPEV Report, p. 472.

[36] International Crisis Group 2012, p. 6.

[37] Cf. Asaala 2012, p. 131; International Crisis Group 2012, pp. 6–7.

[38] See The Star, 12 March 2011; International Crisis Group 2012, p. 6.

[39] The Daily Nation, 21 February 2009.

Apparently, *Ruto, Kenyatta* and their allies hoped to use the Court to indirectly settle scores against *Raila Odinga,* their political rival. They seem to have hoped that *Odinga*, who was a presidential candidate in the 2007 election, would be among those to be indicted by the Court. However, later, *Ruto* and *Kenyatta* were named as suspects, and *Odinga* not. Thenceforth the duo and their political allies changed the tone of their original stand with a view to keeping the International Criminal Court away.[40]

When *Kenyatta* and *Ruto* indicated their intention to contest for presidency in the 2013 elections, a group of financially powerful political elite started criss-crossing the country trying to persuade ordinary citizens to believe that their 'sons' were being indicted by a "white man's court", and that such an indictment was a "neo-colonialist ploy […] taking them back to before independence".[41] The same group described the International Criminal Court as an "imperialist imposition" dangerous to Kenya's sovereignty and as "a Western colonial institution that is bent on re-colonizing Africa".[42] And on 12 October 2013, six months after being elected, as Kenya's President, *Kenyatta* claimed before African Heads of State and Government that "Western powers are the key drivers of the ICC", since the EU funds 70 % of the Court's budget; and that "the threat of prosecution" by this Court is being used as a tool to make "pliant states execute policies favorable to these [Western] countries".[43]

13.4.3 Civil Society and Ordinary Citizens

The views of ordinary Kenyans about the ICC process in Kenya differ significantly from those of the political elite. Soon after the violence, the emerging debate had two themes: (i) the role and competence of the national judicial system to prosecute the perpetrators of the violence; and (ii) and the role of the International Criminal Court in the breaking of the 'culture of impunity' which had been entrenched in Kenya with respect to crimes involving the political class. Both the Kenyan Catholic Church and prominent scholars believed that the ICC route was the only hope to true justice, because it was by far more competent and impartial when compared to the local judicial organs..[44]

Independent surveys indicated that the majority of Kenya's general public, including the victims of the violence, perceived the International Criminal Court as

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[40] International Crisis Group 2012, p. 7; The Daily Nation, 26 March 2011.

[41] See Drakard 2011.

[42] See Jalloh 2010.

[43] See Daily Standard, 13 October 2013.

[44] The Daily Nation, 19 July 2009. See also Musila 2009, p. 456. For a detailed discussion on the independence of judges and lawyers as well as on allegations and investigations into corruption of judges in Kenya, see Mbote and Akech 2011, pp. 99–115.

the most trustworthy, independent and reliable forum to try the perpetrators.[45] Periodic survey reports were published by South Consulting, an independent research firm which continuously monitored the situation on behalf of the AU Panel of Prominent Personalities which mediated in the conflict. The April 2011 survey confirmed that there was a "clear disconnect" between ordinary Kenyans and the politicians as regards how the International Criminal Court was perceived in Kenya.[46] It concluded that while the political elite had "a common interest in opposing accountability and other measures to end impunity […] there [was] a strong public mood against impunity",[47] with most ordinary citizens perceiving the Court as "the only concrete action to hold powerful people [i.e. politicians] accountable for [the] post-election violence".[48] Similarly, the January 2012 survey found, *inter alia*, that victims of the post-election violence had a strong perception that "the Kenyan government [would] unlikely conduct genuine investigations and prosecute the suspects" at the domestic level.[49] In view of this, a victim in one of the internally displaced persons' camps believed that

> the ICC is the only option left to fight impunity in Kenya because the [domestic] institutions and the politicians have failed. Ocampo […] must not fail. If he does, that will be the end of Kenya because there will be nothing left to fear anymore.[50]

13.4.4 Quantifying the Perception

The surveys show that by April 2011 the support for the International Criminal Court in Kenya by the general public was 78 % nationally,[51] although it fluctuated

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[45] Alai and Mue 2011, p. 1232. For example, the survey conducted by Infotrack Research & Consulting in November 2009 showed that the public support was 62 % for the ICC trials and 2 % for trials under the proposed Special Tribunal. See Alai and Mue 2010. In September 2010, a poll by Synovate indicated that despite the judicial and legal reforms planned domestically, the public support for accountability measures was as follows: trial at the International Criminal Court (54 %), local trials (22 %), granting of amnesty (22 %). See Reuters 27 September 2010. From another poll published by Synovate in April 2011, the results were: ICC trials (61 %) and a special tribunal (24 %). See The Africa Review, 5 April 2010.

[46] Kenya National Dialogue and Reconciliation Monitoring Project 2011, p. 25, para 60.

[47] Kenya National Dialogue and Reconciliation Monitoring Project 2011, p. VI, para 9.

[48] Kenya National Dialogue and Reconciliation Monitoring Project 2011, p. 8, para 26.

[49] Kenya National Dialogue and Reconciliation Monitoring Project, January 2012, p. 52, para 133, and p. 57, para 142.

[50] As quoted *verbatim* in Kenya National Dialogue and Reconciliation Monitoring Project 2011, p. 25, para 59. See also International Center for Transitional Justice 2011, pp. 51–54.

[51] Kenya National Dialogue and Reconciliation Monitoring Project 2011, p. 9, para 27. See also p. 12, para 34, showing that in March 2011, the confidence was at 72 %.

between 60 and 82 % at the provincial level.[52] Throughout the year 2012, surveys, including the one conducted in January 2012 (towards ICC Decisions on confirmation of charges against the Kenyan suspects), found that the public support for the Court was still above 50 %.[53] The most recent survey conducted by *Ipsos Synovate* in November 2013, immediately after AU's Extraordinary Summit which purported to instruct President *Kenyatta* and Deputy President *Ruto* not to attend their ICC trials,[54] still found that, generally, 67 % of the ordinary citizens wanted President *Kenyatta* to continue attending his trial at the International Criminal Court regardless of his official status.[55]

However, there is another trend established by the surveys which is worth noting. This trend indicates that after the names of the six suspects were revealed, and also after the charges against four of the six suspects were confirmed,[56] the support for the International Criminal Court amongst their ethnic communities started declining.[57] This is evident in the February 2013 survey which indicated that although generally, the support for the Court in Kenya was at 66 % national wide, it only remained strongest in five provinces, namely Nyanza, Nairobi, Western, North Eastern and Coastal provinces (from where not a single ICC suspect came). It remained lowest in the Central province and in Rift Valley, from where the suspects hailed.[58] It was this new dimension—gradual ethnicization of the ICC process at the domestic level—that prompted the controversial KAMATUSA ethnic association (bringing together the Kalenjin, Maasai, Turkana and Samburu ethnic groups) to even claim that it was "the entire Kalenjin community [which] was on trial at the International Criminal Court by virtue of *Ruto* being a suspect".[59] Apparently, the perception here was, or still is, not necessarily that the accusations against *Ruto,* who is currently a *de facto* Kalenjin leader, are false or baseless. Rather, the perception was, and still is, that the Court is practicing "selective justice" by only 'targeting' *Ruto* and not "other known suspects" (ostensibly from other ethnic communities) who could have also been charged.[60]

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[52] In December 2010, confidence in the International Criminal Court per province was: North Eastern (82 %), Western and Nyanza (75 %), Eastern (74 %), Rift Valley (60 %). See Kenya National Dialogue and Reconciliation Monitoring Project 2011, pp. 9–12, paras 28–33.

[53] Kenya National Dialogue and Reconciliation Monitoring Project January 2012, p. 51, para 132; see also Second Review Report, May 2012, paras 52–60 (indicating, at para 56, that by May 2012, up to 58 % of Kenyans were happy about the work of the International Criminal Court in Kenya).

[54] See Ext/Assembly/AU/Dec.1 (Oct.2013), para 10(ix).

[55] The Daily Nation, 14 November 2013.

[56] See *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the confirmation of charges, 23 January 2012; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the confirmation of charges, 23 January 2012.

[57] Kenya National Dialogue and Reconciliation Monitoring Project, January 2012, p. 57, para 142.

[58] Kenya National Dialogue and Reconciliation Monitoring Project 2003, para 75.

[59] The Star, 3 April 2012.

[60] See Kenya National Dialogue and Reconciliation Monitoring Project, January 2012, p. 53, para 134; Human Rights Watch 2013, p. 5.

13.5 Evaluation

One can discern from the discussion above that the AU's views about the International Criminal Court are not necessarily the 'common' views of all African states, neither do they embody 'the African perception' about the Court; they do not necessarily represent the views of all individual African states or citizens. In addition, the Kenyan experience demonstrates that various groups—political, ethnical, religious, etc.—within a country may have varying opinions about the Court, one of the main determinant factors being how the Court has actually impacted or is likely to impact on the group in question. Naturally, those who are or are likely to be *negatively* affected by the International Criminal Court must be against the Court. It can be contended that a *section* of the African ruling political class falls squarely under this category.

It is common knowledge that the African continent has a long history of, among other things, serious deficiencies as regards good governance and the rule of law. It has also been engulfed in massive corruption and undemocratic practices which are orchestrated, for the most part, by the ruling political elite. As a consequence, this group has always had the ability and tendency of manipulating local judicial institutions so as to avoid criminal accountability in respect of crimes they commit. They would even try to do the same with the International Criminal Court. One finds no better evidence of this assertion than the AU's letter dated 10 September 2013 to the ICC Presidency purporting to explain AU's 'expectations' regarding how the International Criminal Court should make judicial rulings on issues relating to the cases against Kenya's President and Deputy President.[61] Notably, it is this group of the ruling political elite which supports the Court—or at least remains indifferent—whenever it is clear to them that the Court could be used to settle scores against political opponents in Africa. This, as shown above, is evident in the manner in which the majority of the Kenyan political elite behaved initially when the ICC process started. It is also evident in the self-referrals that have emanated from the Continent so far.

For example, Uganda goes down in history, being the first country to have made a voluntary referral of crimes committed on its territory to the International Criminal Court. When this referral was being made, the ruling elite viewed the Court as a part of the solution to the rebellion in Uganda as regards investigating the crimes of the Lord's Resistance Army, a rebel group operating in the northern part of the country.[62] But since the Court started indicting part of the African ruling political elite (in other countries)—apparently, a clear message that even the crimes allegedly committed by the government forces[63] could be investigated—the President of Uganda has come out as one of the main critics of the Court,

[61] See ICC Press Release 2013.

[62] See ICC Press Release 2004.

[63] See Human Rights Watch 2011, pp. 22–29.

describing it as a "shallow" and "biased" court that "mishandle[s] complex African issues".[64]

Thus, by indicting a section of the African ruling class, including now serving Heads of State, the International Criminal Court has become an imminent threat not only to the part of the ruling class actually indicted, but also to their peers who, judging from the way they govern their countries, some of them could be described as 'potential clients' of the Court. The fear of the Court arises from the fact that, by its very nature, it targets those who are "most responsible" for the serious crimes (planners, sponsors and instigators), who, more often than not, will involve politicians or their allies. It is, therefore, not surprising that members of this group, represented by the AU Assembly, have now developed a phobia for the Court, and are adopting a hostile attitude to frustrate its course.

But there is another group comprising the victims of crime who are ordinary Africans. From this group, and by using the Kenyan experience, a completely different conclusion can be reached. To them the International Criminal Court remains a credible Court—a ray of hope that promises not only to address impunity but also to deter people from committing crimes in the future. To this group, the Court is still relevant as a judicial institution and enjoys overwhelming support, as currently there is no 'African alternative' to it.[65] It is, therefore, the interests of this group—the quest for justice and an end to impunity for serious crimes in Africa—that should be given more weight. However, it is unfortunate that the views and needs of this particular group, which comprises the majority of Africans, are not taken seriously by the small but powerful group of the political elite represented by the AU leaders. This is perhaps the reason why there is no 'common position', resolution or an 'extra-ordinary' meeting held by the AU leaders with the view to designing concrete steps or measures for serious domestic prosecutions of the alleged crimes committed in Kenya or in any of the situation countries. In addition, there have never been any concrete and serious efforts by the African Union to help Kenya address the plight of the internally displaced persons who remain in camps six years after the post-election violence.

13.6 Conclusion and Recommendations

The achievement of the dream to establish and operationalize the International Criminal Court remains a breakthrough in the fight against impunity for serious crimes of concern to Africa and to the international community as a whole. But a successful fight against impunity cannot be realized by the International Criminal

[64] See 'Statement by H.E. Yoweri Kaguta Museveni President of the Republic of Uganda at the 68th United Nations General Assembly' http://www.statehouse.go.ug/media/speeches/2013/09/25/statement-he-yoweri-kaguta-museveni-president-republic-uganda-68th-united-.

[65] Cf. Allison 2012, pp. 25–28.

Court alone; it requires concerted efforts of other stake holders, including the African Union and African countries in particular. The recent antagonistic attitude taken by the African Union towards the Court is retrogressive in this regard and should not be allowed take us back to the Cold War era in which international criminal justice remained stagnant owing to political mistrust.[66]

Admittedly, the current legal framework under which the International Criminal Court operates is not without flaws or limitations. This is shown by the fact that not all the concerns raised by the African Union lack some validity.[67] But such flaws or anomalies should not be attributed to or blamed on the Court. Instead, any emerging concerns should be directed to the Assembly of ICC States Parties, the political body with the mandate to amend the Statute and address the concerns. At all times, the sanctity and independence of the Court as a judicial institution must be respected and maintained not only by the Court itself but also by all other stake holders. The fact of the matter remains that the International Criminal Court is a creature of a treaty which was politically adopted amidst many controversies and contestations, some of which are bound to re-emerge. But despite this fact, the Court itself is not a political body. It is a judicial institution which must always act as such by remaining focused on and confined to its mandate as defined in its Statute. As it has recently informed the African Union about this very fact,[68] and commendably so, the Court must not succumb to the political pressure surrounding it, but must always remain alive to the fact that such pressure will always exist.

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[66] See Werle 2009, p. 15.

[67] See, e.g., Chap. 12 by *Okoth* in this book on the abuse and politicization by the Security Council of the mandate under Article 16 of the ICC Statute.

[68] See ICC letter to the African Union dated 13 September 2013, Ref. 2013/PRESS/00295-4/VPT/MH attached to ICC Press Release, ICC-CPI-20130920-PR943.

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