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AMERICAN BRANCH OF THE  
INTERNATIONAL LAW ASSOCIATION  
INTERNATIONAL CRIMINAL COURT COMMITTEE\*

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THE KENYAN CASES AT THE INTERNATIONAL CRIMINAL COURT  
AND THE AFRICAN UNION 'S POSITIONS AS TO THEM

QUESTIONS & ANSWERS

On December 3, 2014, after Pre-Trial Chamber II (“PTC II”) of the International Criminal Court (“ICC”) declined to further adjourn trial, the ICC’s Prosecutor withdrew the charges against current Kenyan President Uhuru Kenyatta. The withdrawal was without prejudice so that if additional evidence becomes available a new case may be pursued.

While some of the questions and answers below—discussing the Kenyatta case, the response of the Government of Kenya and the African Union (“AU”), and the challenges of trying a head of state—are for the time-being no longer at issue as to the Kenyatta case, the concerns raised remain relevant. Although some of Kenya’s and the AU’s issues with the ICC (discussed below) may be alleviated by this recent development, the issues are not necessarily moot, as the trial against Kenya’s Deputy President William Ruto continues, the Kenyatta case may resume in the future, and Sudanese President Bashir also faces charges against him at the ICC.

**WHAT ARE/WERE THE KENYAN CASES ABOUT?**

In March 2010, Pre-Trial Chamber II authorized the then-current ICC Prosecutor to open an investigation into crimes against humanity allegedly committed in Kenya in relation to violence that followed Kenya’s 2007 presidential election, which killed over 1,200 and displaced 600,000.<sup>1</sup> This was the first time<sup>2</sup> that the Prosecutor used his “*proprio motu*” powers to initiate an investigation without first having received a referral from a State Party to the ICC’s Rome Statute,<sup>3</sup> or the U. N. Security Council.

**WHO ARE/WERE THE ACCUSED?**

**Kenyan President Uhuru Kenyatta** was alleged to have planned, financed, and coordinated violence perpetrated against supporters of the opposition Orange Democratic Movement (“ODM”) during the 2007-08 post-election violence.<sup>4</sup> He was alleged to be criminally responsible as an

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<sup>1</sup> International Criminal Court, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya,” ICC-01/09-19, Mar. 31, 2010.

<sup>2</sup> American NGO Coalition for the International Criminal Court, *The Challenges of the Kenyan Cases at the International Criminal Court*, June 17, 2014, <http://www.amicc.org/docs/The%20Kenya%20Cases%20at%20the%20International%20Criminal%20Court.pdf>, p. 2 (“AMICC Report”).

<sup>3</sup> Rome Statute refers to the Rome Statute of the International Criminal Court, *available at* <http://untreaty.un.org/cod/icc/statute/rome.htm>.

<sup>4</sup> International Criminal Court, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigui Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigui Kenyatta and Mohammed Hussein Ali,” Mar. 8, 2011, pp. 6-7.

indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the crimes against humanity of murder, deportation or forcible transfer, rape, persecution, and other inhumane acts.<sup>5</sup> It was alleged that Kenyatta had control over the criminal Mungiki organization and directed it to commit the above crimes in the towns of Kibera, Kisumu, Naivasha, and Nakuru from December 30, 2007 to January 16, 2008.<sup>6</sup>

In addition, **Deputy President William Samoei Ruto** and broadcaster **Joshua Arap Sang** are on trial and alleged to have planned and organized crimes against humanity against perceived supporters of the Party of National Unity (“PNU”)—predominantly from the Kikuyu, Kamba and Kisii ethnic groups—during the 2007-08 post-election violence. Both Ruto and Sang are accused of having contributed to the crimes against humanity of murder, deportation or forcible transfer, and persecution.<sup>7</sup> The Prosecutor contends that Ruto along with others, and supported by Sang, worked for up to a year before the election to create a network to carry out a plan, and that this network was activated when the election results in favor of Kibaki were announced.<sup>8</sup> The goals of the plan, the Prosecutor alleges, were to punish and expel from the Rift Valley people perceived to support the PNU, and to gain power in the province.<sup>9</sup>

**Ruto** was elected Kenya’s Deputy President in March 2013 and was formerly a Member of Parliament for Eldoret North (Rift Valley).<sup>10</sup> In 2010, Ruto was suspended from public office as a result of corruption allegations. However, he was acquitted of all charges in April 2011 and in 2013 ran for his current position. He was sworn in as Deputy President on April 9, 2013.<sup>11</sup> **Sang** is a former radio personality and the head of operations at Kass FM radio station in Nairobi. In 2012, he resigned from his position in order to run in the 2013 general elections for the Kenyan Senate seat in Trans Nzoia (Rift Valley). However, he dropped his bid in order to focus on his upcoming trial at the ICC.

The trial of Ruto and Sang commenced on September 10, 2013. While Henry Kosgey (a prominent ODM politician) and Muhammed Ali (a former police commissioner) were originally issued summonses to appear in relation to their alleged roles in the 2007-8 post-election violence, PTC II’s judges declined to confirm the charges against them, with Judge Hans-Peter Kaul dissenting.<sup>12</sup> The case against Francis Muthaura (a former head of civil service) was dropped in March 2013.<sup>13</sup>

### **WERE KENYATTA AND RUTO STATE OFFICIALS WHEN CHARGED?**

Both Kenyatta and Ruto only gained their current positions as President and Deputy President, respectively, after charges were confirmed.<sup>14</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> International Criminal Court, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11, “Decision on Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Mar. 8, 2011, pp. 6-7.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Open Society Foundation, *Briefing Paper: Kenya – Trial of William Samoei Ruto and Joshua Arap Sang at the International Criminal Court*, September 2013 (“OSF Kenya Briefing Paper”); Human Rights Watch, *Kenya: Pre-trial Hearing in Second ICC Case*, September 21, 2011; Human Rights Watch, *Kenya and the International Criminal Court: Questions and Answers*, January 25, 2011, p. 2, [http://www.hrw.org/sites/default/files/related\\_material/QA%20-%20Kenya%20and%20the%20ICC%2001.25.11.pdf](http://www.hrw.org/sites/default/files/related_material/QA%20-%20Kenya%20and%20the%20ICC%2001.25.11.pdf) (“HRW Kenya Q&A”).

<sup>11</sup> *Id.*

<sup>12</sup> Rob Jillo, *Ocampo Will Not Appeal Kosgey, Ali Acquittals*, Capital News, Jan. 24, 2012, <http://www.capitalfm.co.ke/news/2012/01/ocampo-will-not-appeal-kosgey-ali-acquittals/>.

<sup>13</sup> *ICC Prosecutors Drop Case Against Kenyan Politician Francis Muthaura*, The Guardian, Mar. 11, 2013, <http://www.theguardian.com/law/2013/mar/11/icc-prosecutors-kenyan-francis-muthaura>.

<sup>14</sup> AMICC Report, *supra* note 2, at p. 2.

### **DID KENYA FIRST HAVE THE OPPORTUNITY TO TRY THESE CASES ITSELF?**

Yes. In 2008, the Kenyan Coalition Government of National Unity set up the Commission of Inquiry on Post-Election Violence (the “Waki Commission”).<sup>15</sup> The Waki Commission recommended establishing a special tribunal modeled on the Special Court for Sierra Leone to investigate and prosecute those responsible for the violence. The Commission also set a strict timeline for this development, which, if breached, would result in Kofi Annan delivering the names of suspects to the International Criminal Court. Kenya’s Parliament voted against the adoption of the bill that would have established the planned tribunal, prompting Kenyan civil society to lobby the former Secretary-General to hand over the envelope containing the names.<sup>16</sup> In July 2009, the Kenyan delegation to The Hague informed Luis Moreno Ocampo, the ICC Prosecutor at that time, that Kenya would either hold national trials or it would refer the situation to the ICC for investigation.<sup>17</sup>

The Kenyan Parliament abandoned their plans for the tribunal, and, in November 2009, the ICC stepped in and sought authorization from the Pre-Trial Chamber to open an investigation. The PTC noted that the Kenyan government has been “reluctant” to address the post-election violence and that there were no relevant national proceedings (as required under Article 19 of the Rome Statute). Subsequently, in December 2010, the ICC Prosecutor announced that he was seeking six separate summonses to appear against individuals alleged to have been involved.<sup>18</sup>

Since then, the Kenyan Government has repeatedly tried to seek support from regional leaders and political bodies – including the United Nations Security Council and the AU to end the ICC’s Kenya cases.<sup>19</sup>

### **HAVE THERE HISTORICALLY BEEN TRIALS OF HEADS OF STATE AT THE INTERNATIONAL LEVEL?**

Yes. After World War II, the charters of the International Military Tribunal (the “Nuremberg Tribunal”) and the International Tribunal for the Far East (the “Tokyo Tribunal”) each provided for jurisdiction over individuals, irrespective of “official position, including as a head of state.”<sup>20</sup> Adolf Hitler and Benito Mussolini died before the Nuremberg Tribunal was established; however, Karl Dönitz, the German head of state for several weeks after the death of Hitler, was tried and convicted for war crimes.<sup>21</sup> Although Japan’s Emperor Hirohito survived the end of World War II, he was granted immunity by the Allied Nations and not prosecuted by the Tokyo Tribunal.<sup>22</sup> However, Hideki Tōjō, the Japanese Prime Minister from 1941 to 1944 who ordered the Pearl Harbor attack, was tried and convicted by the tribunal.<sup>23</sup>

<sup>15</sup> Human Rights Watch, *Establishing a Special Tribunal for Kenya and the Role of the ICC*, March 25, 2009.

<sup>16</sup> *Id.*

<sup>17</sup> HRW Kenya Q&A, *supra* note 10, at p. 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, art. 6, Aug. 8, 1945, 85 U.N.T.S. 251, <http://avalon.law.yale.edu/imt/imtconst.asp>, art 7 (“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”); INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST CHARTER, art. 6, Jan. 19, 1946, T.I.A.S. No. 158, <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east> (“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”)

<sup>21</sup> JOHN TOLAND, *THE LAST 100 DAYS: THE TUMULTUOUS AND CONTROVERSIAL STORY OF THE FINAL DAYS OF WORLD WAR II IN EUROPE* (2003); *see also* Mary Margaret Penrose, *The Emperor’s Clothes: Evaluating Head of State Immunity Under International Law*, 7 SANTA CLARA J. INT’L L., No. 2, 85, 104 (2010).

<sup>22</sup> Penrose, *supra* note 21, at 104-107; *see also* HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* pp. 592-93 (2000).

<sup>23</sup> *Hideki Tojo Biography*, SPARTACUS EDUCATIONAL, <http://www.spartacus.schoolnet.co.uk/2WWtojo.htm>.

The International Criminal Tribunal for the Former Yugoslavia (the “ICTY”) was created in 1993 to prosecute war crimes, crimes against humanity, and genocide committed in the region from 1991 going forward.<sup>24</sup> Article 7.2 of the statute for the ICTY explicitly states: “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”<sup>25</sup> In May 1999, the ICTY released its first indictment of Slobodan Milošević, the former President of Serbia and the Federal Republic of Yugoslavia.<sup>26</sup> He was arrested in April 2001 and turned over to the ICTY.<sup>27</sup> Milošević was the “first former head of state delivered by a government to face an international war crimes court [since Karl Dönitz].”<sup>28</sup> However, as the trial neared its end, Milošević died in his prison cell.<sup>29</sup> Radovan Karadžić, the former President of Republika Srpska, was indicted by the ICTY in 1995.<sup>30</sup> He was charged with genocide, war crimes, and crimes against humanity for his role in, *inter alia*, the shelling of Sarajevo and the Srebrenica massacre.<sup>31</sup> Karadžić’s trial is pending before the ICTY.

Shortly after the ICTY was created, the U.N. Security Council created the International Criminal Tribunal for Rwanda (“ICTR”) to prosecute genocide, crimes against humanity, and war crimes that were committed when over 800,000 people were slaughtered in Rwanda in a mere three months.<sup>32</sup> Like Article 7(2) of the ICTY Statute, Article 6(2) of the statute for the ICTR (the “ICTR Statute”) provides that “head of state” status will not relieve an individual of criminal responsibility nor provide mitigation.<sup>33</sup> Jean Kambanda, Prime Minister of Rwanda after former President Habyarimana and the previous Prime Minister were assassinated in April 1994,<sup>34</sup> was indicted, in October 1997, for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity.<sup>35</sup> After his guilty plea, Kambanda became the first person ever to be sentenced for genocide.<sup>36</sup>

<sup>24</sup> *Id.*; see also UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, arts. 2-5, September 2009, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

<sup>25</sup> *Id.*, at art. 7.2.

<sup>26</sup> *Prosecutor v. Slobodan Milošević, et al.*, Case No. IT-99-37, Indictment ‘Kosovo,’ (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1999). This indictment, termed the “Kosovo” indictment, was amended twice. A second indictment, termed the “Croatia” indictment, was issued against Milošević in September 2001 and also amended twice. *Prosecutor v. Slobodan Milošević, et al.*, Case No. IT-99-37, Indictment ‘Croatia,’ (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2001). A third indictment, termed the “Bosnia and Herzegovina” indictment, was issued against Milošević in 2001 and was later amended once. *Prosecutor v. Slobodan Milošević, et al.*, Case No. IT-99-37, Indictment ‘Bosnia and Herzegovina,’ (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2001).

<sup>27</sup> *Milosevic Arrested*, BBC NEWS, April 1, 2001, <http://news.bbc.co.uk/2/hi/europe/1254263.stm>.

<sup>28</sup> Marlise Simons and Carlotta Gall, *The Handover of Milosevic: The Overview; Milosevic is Given to U.N. for Trial in War-Crime Case*, NEW YORK TIMES, June 29, 2001, <http://www.nytimes.com/2001/06/29/world/handover-milosevic-overview-milosevic-given-un-for-trial-war-crime-case.html?ref=slobodanmilosevic>.

<sup>29</sup> Marlise Simons and Alison Smale, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes Dies*, NEW YORK TIMES, March 12, 2006, [http://www.nytimes.com/2006/03/12/international/europe/12milosevic.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/03/12/international/europe/12milosevic.html?pagewanted=all&_r=0).

<sup>30</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-I, Indictment ‘Bosnia and Herzegovina,’ (Int’l Crim. Trib. for the Former Yugoslavia July 24, 1995); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-I, Indictment ‘Srebrenica,’ (Int’l Crim. Trib. for the Former Yugoslavia Nov. 14, 1995).

<sup>31</sup> *Karadzic Genocide Charge Reinstated*, BBC NEWS, July 11, 2013, <http://www.bbc.co.uk/news/world-europe-23275181>.

<sup>32</sup> S.C. RES. 955, ¶ 1, U.N. DOC. S/RES/955 (Nov. 8, 1994); Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AMER. J. INT’L L., No. 3, 501, 501-04 (July 1996).

<sup>33</sup> UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, art. 6(2), as amended January 31, 2010, <http://www.unict.org/Portals/0/English/Legal/Statute/2010.pdf>.

<sup>34</sup> James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in ’94 Massacres*, NEW YORK TIMES, September 5, 1998, <http://www.nytimes.com/1998/09/05/world/ex-rwandan-premier-gets-life-in-prison-on-charges-of-genocide-in-94-massacres.html?pagewanted=all&src=pm>.

<sup>35</sup> *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-DP, Indictment, (Int’l Crim. Trib. for Rwanda Oct. 28, 1997).

<sup>36</sup> McKinley, *supra* note 34.

The Special Court for Sierra Leone (“SCSL”) is a hybrid international-national tribunal created by agreement between the United Nations and Government of Sierra Leone.<sup>37</sup> The statute for the SCSL (the “SCSL Statute”) contains the same language as the ICTY and ICTR Statutes regarding no immunity for heads of state.<sup>38</sup> In March 2003, the SCSL issued a sealed indictment against Charles Taylor, then the sitting President of Liberia, for war crimes and crimes against humanity, including recruitment of child soldiers and murder.<sup>39</sup> Following a difficult process leading to Taylor’s apprehension and his subsequent trial in The Hague, Taylor was convicted in 2012 of war crimes and crimes against humanity.<sup>40</sup>

While talks between the United Nations and the government of Cambodia to establish a Cambodia tribunal began in 1997,<sup>41</sup> an agreement was not reached until 2003.<sup>42</sup> Article 29 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea provides: “The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.”<sup>43</sup> In Case 2 before the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), one of the defendants is Khieu Samphan, the former head of state of Democratic Kampuchea. Samphan was charged with genocide, crimes against humanity, and war crimes.<sup>44</sup> While he was convicted of crimes against humanity as part of the first phase of the trial, the second phase is still ongoing.<sup>45</sup>

Thus, there is solid precedent for the trial of high level officials, including heads of state, at the international level, going back nearly a half century to the precedent set at the Nuremberg Tribunal.

#### **WOULD A DIFFERENT ANSWER ATTACH AT THE DOMESTIC LEVEL?**

Potentially. In 2002, the International Court of Justice held in the *Yerodia/Arrest Warrant* case that serving heads of state and heads of government have a broad personal immunity from the jurisdiction of *foreign domestic courts*, including from prosecution for international crimes.<sup>46</sup> However, “a growing number of states reject immunity based on official capacity when it comes to serious crimes.”<sup>47</sup>

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<sup>37</sup> AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE, January 16, 2002, <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>; S.C. RES. 1315, S/RES/1315 (Aug. 14, 2000); “Statute of the Special Court for Sierra Leone,” (“SCSL STATUTE”) January 16, 2002, <http://www.sc-sl.org/LinkClick.aspx?fileticket=uCInd1MJ eEw%3d&tabid=176>.

<sup>38</sup> SCSL STATUTE, art. 6(2).

<sup>39</sup> *Cases: Prosecutor v. Charles Taylor*, SC-SL.ORG, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx>; see also CNN Library, *Charles Taylor Fast Facts*, CNN.COM, October 3, 2013, <http://www.cnn.com/2013/04/26/world/africa/charles-taylor-fast-facts/>.

<sup>40</sup> *Id.*

<sup>41</sup> Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARVARD INT’L L.J., Issue 2, 551, 551 (Summer 2003).

<sup>42</sup> AGREEMENT CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, 2329 U.N.T.S. 117 (June 6, 2003).

<sup>43</sup> LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, NS/RKM/1004/006 (as amended on October 27, 2004), [http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_ame nded\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_ame nded_27_Oct_2004_Eng.pdf).

<sup>44</sup> *Prosecutor v. Khieu Samphan, et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order (Indictment), (Extraordinary Chambers in the Courts of Cambodia Sept. 15, 2010).

<sup>45</sup> *Case 002*, ECCC.GOV, <http://www.eccc.gov.kh/en/case/topic/2>.

<sup>46</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, p. 3; 128 ILR 1.

<sup>47</sup> Human Rights Watch, “Human Rights Watch Memorandum for the Thirteenth Session of the International Criminal Court Assembly of States Parties,” Nov. 2014, at p. 17.

## **DOES THE ROME STATUTE PROVIDE THAT HEADS OF STATE MAY BE TRIED BY THE ICC?**

Yes. Article 27 of the Rome Statute provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>48</sup>

Because Kenya is a State Party to the Rome Statute, Kenya has voluntarily joined a statute that clearly provides that there is no head of state immunity or immunity for any other government official (such as a Deputy President) before the ICC for crimes committed in its territory and by its nationals.

## **DID THE AFRICAN UNION OPPOSE THE KENYATTA AND RUTO TRIALS?**

Notwithstanding Kenya's decision to join the ICC (complete with article 27), the Kenya cases have evoked much criticism and resistance from the Government of Kenya and the AU. In May 2013, the AU issued a resolution calling for the ICC to halt its proceedings against Ruto, Sang, and Kenyatta and for the cases to be handled by a "national mechanism" in Kenya.<sup>49</sup> The AU Chairman and Ethiopian Prime Minister, Hailemariam Desalegn, accused the ICC of unfairly targeting Africans.<sup>50</sup> Later that year, at the 12<sup>th</sup> session of the Assembly of State Parties ("ASP"), the AU contended that standing trial as a sitting head of state would interfere with official duties.<sup>51</sup> They argued the absence of the Kenyan President and Deputy resulting from their presence at the ICC would constrain them from attending the domestic security situation in Kenya after the attack of a Nairobi shopping center on September 21, 2013.<sup>52</sup> In October 2013, the AU also requested the UN Security Council to defer the two Kenyan cases pursuant to Article 16 of the Rome Statute, a request which was denied by the Council.<sup>53</sup> Several African states also threatened to withdraw from the Court, including Kenya itself.<sup>54</sup>

## **DID SUCH OPPOSITION REPRESENT THE VIEWS OF AFRICAN CIVIL SOCIETY?**

According to Human Rights Watch, "Kenya's proposed withdrawal from the Rome Statute has been greeted with wide disapproval by Kenyan civil society. Groups are organizing demonstrations against withdrawal and seeking to collect a million signatures on a petition calling on the Kenyan government to remain in the ICC."<sup>55</sup> African civil society groups are also actively advocating the Court's work in post-conflict situations.<sup>56</sup>

## **DOES THE ASP AGREE THAT THERE SHOULD BE HEAD OF STATE IMMUNITY?**

In November 2013, the Assembly of State Parties (ASP) convened a special segment to discuss the *Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*.<sup>57</sup> However, the ASP did not debate whether a sitting head of state should stand

<sup>48</sup> UN General Assembly, *Rome Statute of the International Criminal Court*, Article 27 (last amended 2010), 17 July 1998.

<sup>49</sup> OSF Kenya Briefing Paper, *supra* note 10.

<sup>50</sup> *Id.*

<sup>51</sup> AMICC Report, *supra* note 2, at p. 3.

<sup>52</sup> *Id.*; see also Jurist, *African Union urges members to stand against ICC trials of presidents*, Feb. 1, 2014.

<sup>53</sup> AMICC Report, *supra* note 2, at p. 3.

<sup>54</sup> OSF Kenya Briefing Paper, *supra* note 10.

<sup>55</sup> HRW Kenya Q&A, *supra* note 10, at p. 8.

<sup>56</sup> AMICC Report, *supra* note 2, at p. 3.

<sup>57</sup> *Id.*, at 2. Coalition for the International Criminal Court, *Report on the 12<sup>th</sup> Session of the Assembly of States Parties*

trial, as article 27 of the Rome Statute makes clear the irrelevance of official capacity for establishing criminal responsibility.<sup>58</sup> Furthermore, there seems little momentum outside AU leadership for undermining this fundamental rule in the Rome Statute, one that (as discussed above) dates back to the Nuremberg Tribunal. To create such immunity for heads of state who are implicated in mass atrocity crimes would undermine the entire purpose of the Court and Statute.<sup>59</sup>

While Kenya has again asked for a special segment at the upcoming December 2014 ASP to discuss “the conduct of the Court and the Office of the Prosecutor,”<sup>60</sup> recent developments may minimize the perceived need for any such discussion.

### **DID THE ASP ATTEMPT TO ACCOMMODATE THE AU’S CONCERNS?**

Yes. The ASP tried to be responsive to the Kenyan government by considering its request that sitting heads of state should not have to attend their trials.<sup>61</sup> In November 2013, States Parties agreed to modify the ICC’s Rules of Evidence and Procedure regarding the requirement that the accused be present at trial. Specifically, the ASP added Rule 134*bis*, which allows the accused to request to attend the proceedings through video link instead of in person, and Rule 134*quater*, which allows an accused who has “extraordinary public duties at the highest level” to request to be exempt from attending parts of the trial, if certain strict criteria are met.<sup>62</sup> The Prosecutor has appealed these rule changes, and the Appeals Chamber must determine whether they conflict with the presence requirement in the Rome Statute.<sup>63</sup>

### **ARE THE AU’S CONCERNS ALLEVIATED?**

The AU has continued to push for additional changes to the Rome Statute including granting complete immunity to sitting heads of state.<sup>64</sup> Kenya has also proposed that sitting presidents *and their deputies* “be exempt from prosecution during their current term in office.”<sup>65</sup> To enact such changes to the Rome Statute however, ratification by 87.5% of the State Parties would be required.<sup>66</sup> The AU’s momentum in pressing for these changes may be somewhat blunted by withdrawal of the Kenyatta charges.

### **HAS THE AU’S CRITICAL STANCE RELATED ONLY TO THE KENYATTA CASE?**

No. The critical stance of the AU has been broader than merely the Kenya cases. Some AU dissatisfaction surfaced already with the ICC’s 2009 indictment of President Omar Hassan al-Bashir, the sitting Head of State of Sudan.<sup>67</sup> The AU subsequently adopted a hostile posture towards the ICC, calling for a policy of non-cooperation.<sup>68</sup> Rwanda’s President, Paul Kagame has also openly criticized the court, contending that it is not plausible to have a justice system where justice

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*to the Rome Statute*, Nov. 20-28, 2013, pp. 6-8; International Criminal Court Assembly of States Parties, *Special Segment as Requested by the AU: “Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation*, Informal summary by the Moderator, Nov. 20-28, 2013.

<sup>58</sup> *Id.*

<sup>59</sup> AMICC Report, *supra* note 2, at p. 5.

<sup>60</sup> HRW, Memorandum for the Thirteenth Session of the ICC ASP, at p. 11.

<sup>61</sup> *Id.*, at 3.

<sup>62</sup> Amendments to the Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7, Adopted at the 12<sup>th</sup> Plenary Meeting on Nov. 27, 2013 by Consensus.

<sup>63</sup> See Rome Statute, art. 63.1 (“The accused shall be present during the trial.”).

<sup>64</sup> AMICC Report, *supra* note 2, at p. 3. Kenya’s proposed amendment to article 27 derives from an AU extraordinary summit decision, that: “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.” HRW, Memorandum for the Thirteenth Session of the ICC ASP, at pp. 17-18.

<sup>65</sup> *Id.*; see also EJIL Talk, *The AU’s Extraordinary Summit decisions on Africa-ICC Relationship*, Oct. 28, 2013.

<sup>66</sup> AMICC Report, *supra* note 2, at p. 3.

<sup>67</sup> Jemima Kariri, *Reflections on African Union’s Stance on the ICC*, African Network on International Criminal Justice, ICJ Kenya.

<sup>68</sup> Tim Murithi, *The AU and the ICC: An Embattled Relationship*, Institute for Justice and Reconciliation, Mar. 2013.

is dispensed “selectively or politically.”<sup>69</sup>

### **COULD THE KENYATTA CASE HAVE BEEN DEFERRED IF IT REALLY THREATENED KENYA’S PEACE AND SECURITY?**

Yes. The U.N. Security Council has the mandate to address political issues including issues of international peace and security.<sup>70</sup> The Rome Statute, in articles 13(b) and 16, specifies how the UN Security Council’s power interrelates with the Court.<sup>71</sup> Specifically, article 13(b) provides that the UN Security Council may refer situations to the ICC,<sup>72</sup> and, under article 16, it may defer situations, utilizing its Chapter VII powers, if the Security Council perceives the prosecution to constitute a threat to international peace and security.<sup>73</sup> Thus, if the UN Security Council legitimately believed that Kenyatta’s trial threatened the peace and security of Kenya, it could have deferred the case. It did not do so.

The possibility of deferral also remains as to the Deputy President’s case, were it to actually constitute a threat to international peace and security. (Such a threat, however, appears doubtful, since prior arguments—that having *both* the President and Deputy President on trial would not allow Kenya to address its domestic security situation—are now moot.) Absent a true threat to international peace and security, the Security Council must respect the Court’s independence and allow the judicial process to proceed.

### **HAS THERE BEEN INTIMIDATION AND WITHDRAWAL OF WITNESSES IN THE KENYA CASES?**

Leading up to the trial, numerous reports surfaced regarding the intimidation of Prosecution witnesses.<sup>74</sup> According to the ICC Prosecutor, the level of interference has been “unprecedented”; she has stated that “witness protection remains one of our highest priorities.”<sup>75</sup> The ICC court filings have noted that security concerns have prevented at least two witnesses from testifying at trial—which is what caused the ICC Prosecutor to adjourn Kenyatta’s trial date.<sup>76</sup> The Government of Kenya has also failed to provide access to required records.<sup>77</sup> In 2013, the ICC also requested Kenya to arrest Walter Osapiri Barasa and indicted him with three counts for corruptly influencing, or attempting to corruptly influence, three ICC witnesses testifying against Deputy President William Ruto.<sup>78</sup>

### **HAS KENYA FAILED TO COOPERATE IN THE KENYATTA INVESTIGATION?**

According to ICC Prosecutor Bensouda:

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<sup>69</sup> Ibrahim Tommy, *Reflections on African Union’s Stance on the ICC*, African Network on International Criminal Justice, ICJ Kenya, 3.

<sup>70</sup> UN Charter, Chapter VII.

<sup>71</sup> For background on the topic, see Jennifer Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, 24 Crim. L. Forum 417 (2013).

<sup>72</sup> See Rome Statute, art. 13(b).

<sup>73</sup> Article 16 provides: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Rome Statute, art. 16.

<sup>74</sup> OSF Kenya Briefing Paper, *supra* note 10.

<sup>75</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda in relation to Kenya, Statement on Apr. 5, 2013.

<sup>76</sup> OSF Kenya Briefing Paper, *supra* note 10; AMICC Report, *supra* note 2, at p. 3.

<sup>77</sup> Thomas Escritt, *Prosecutors ‘Failed’ to Prove Case Against Kenya’s President: Attorney*, Reuters.com, Oct. 8, 2014, <http://www.reuters.com/article/2014/10/08/us-kenya-court-idUSKCN0HX0LE20141008>.

<sup>78</sup> International Criminal Court, *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13. Ruto’s lawyer Karim Khan has denied interfering with witnesses, stating that the claim is “preposterous.” Mutambo Aggret, *Ruto’s ICC lawyer denies interfering with witnesses*, Daily Nation, Aug. 15, 2013.



On the 3<sup>rd</sup> of December 2014, the Judges of Trial Chamber V (B) . . . found that the Government of Kenya had failed to adequately cooperate with my investigations in the case against Mr. Uhuru Muigai Kenyatta. The Chamber stated, ‘[it] finds that, cumulatively, the approach of the Kenyan Government [...] falls short of the standard of good faith cooperation’ and ‘that this failure has reached the threshold of non-compliance’ required under the Rome Statute.<sup>79</sup>

In its ruling, the Chamber, therefore, found, ‘[...] that the Kenyan Government’s non-compliance has not only compromised the Prosecution’s ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber’s ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69 (3) of the Statute.’<sup>80</sup>

She noted that “[c]rucial documentary evidence regarding the 2007-2008 post-election violence, including concerning the conduct of the accused, can only be found in Kenya and is only accessible to the Prosecution through the assistance of the Government of Kenya.”<sup>81</sup> And, that ultimately, the investigation was hampered by:

- Failure to provide those documents, as well as
- “A steady and relentless stream of false media reports about the Kenya cases;”
- “An unprecedented campaign on social media to expose the identity of protected witnesses in the Kenya cases;” and
- “Concerted and wide-ranging efforts to harass, intimidate and threaten individuals who would wish to be witnesses.”<sup>82</sup>

### **IS THE AU ALSO TRYING TO CREATE A TRIBUNAL WITH IMMUNITY FOR ATROCITY CRIMES FOR HEADS OF STATE AND SENIOR STATE OFFICIALS?**

Yes. The AU has recently voted to establish the African Court of Justice and Human and Peoples Rights, which would prosecute a wide list of crimes.<sup>83</sup> The draft Statute provides for immunity for “any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure in office.”<sup>84</sup> Such immunity provisions, which civil society members vehemently oppose, would make the tribunal (if created) an “outlier amongst international courts.”<sup>85</sup>

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<sup>79</sup> “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya’s cooperation with the Prosecution’s investigations in the Kenyatta case,” Dec. 5, 2014, at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-04-12-2014.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-04-12-2014.aspx).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> For background, see Beth Van Schaack, “Immunity Before the African Court of Justice & Human & Peoples Rights – The Potential Outlier,” posted at Just Security, July 20, 2014.

<sup>84</sup> Draft Statute, African Court of Justice and Human and Peoples Rights, art. 46*Abis*.

<sup>85</sup> Van Schaack, *supra* note 83.

**IS IT EXTREMELY DIFFICULT FOR AN INTERNATIONAL TRIBUNAL TO PROSECUTE A HIGH LEVEL STATE OFFICIAL?**

As detailed above, over the last half century, various leaders and former leaders have been charged and, in some cases, prosecuted and convicted, by international tribunals for mass atrocity crimes, including Hitler's successor Karl Dönitz, former Liberian President Charles Taylor, former Rwandan Prime Minister Jean Kambanda, former Serbian president Slobodan Milosevic, and former Khmer Rouge head of state Khieu Samphan. Sudanese President Omar Hassan al-Bashir is subject to an ICC arrest warrant for war crimes, crimes against humanity and genocide, and most recently the ICC issued an arrest warrant (now terminated due to his fatality) for Libya's former President Muammar Gaddafi for crimes against humanity.

In practice, however, it remains extremely difficult for even international tribunals to try sitting heads of state or other high-ranking officials as it usually requires the cooperation of their home state for investigation and surrender of the indictees. It is thus a challenge for any international tribunal to try a current high level government official, and sometimes also difficult to proceed against former high level government officials if they continue to hold strong ties to the state. The current Prosecutor's determination to proceed with the Kenya cases despite abundant interference has shown the Court's commitment to ensuring that the rule of law prevails. That the Kenyatta case has been withdrawn reveals the vulnerability of the Court to interference with its work, and the need for all States Parties to adhere to their cooperation obligations to the Court.

-- American Branch, International Law Association,  
International Criminal Court Committee  
Jennifer Trahan, Chair