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THE PROSECUTION OF SITTING HEADS OF STATES BY THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

International criminal tribunals have had the opportunity to prosecute former heads of states and governments. However, a foray into the prosecution of sitting heads of states and governments is a recent phenomenon and one that is proving the Achilles heel of the International Criminal Tribunal [ICC]. It has also managed to stir controversy because as with other cases before the ICC, the target heads of states happen to be from Africa, a continent that has had a difficult relationship with the tribunal. The ICC entered the uncharted waters of prosecuting a sitting head of state with the indictment of the Sudanese President. In a fortuitous twist and somewhat partly due to a galvanizing effect of their indictment, two former Kenyan officials indicted for their role in the post-election violence [PEV] in 2007-2008 were elected as presidents and vice presidents of Kenya in a democratic election in 2013. Before their election, the presidential candidates vowed to clear their

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names and their election was not going to be an obstacle to their attendance at their court hearing at The Hague. During the course of this saga, chain of events that took place following their election had thrown into doubt their continued cooperation. The events include the retraction of witness testimony, perhaps under pressure; Government of Kenya’s official request to and that of the African Union to have the trials postponed or reverted to Kenya’s national system. In fact, as will be shown later in this paper, the Prosecutor relented from proceeding with the case against President Kenyatta due to the withdrawal of a number of key witnesses crucial to the prosecution’s case.

These and other instances of maneuvers by Kenya are informed by the principle of complementarity, which accords the national state the priority to prosecute its own suspects. Complementarity which was hailed as the key achievement of the ICC Rome Statute is proving to be its weakness, since any functioning government can invoke this principle to delay the trial of its sitting head of state. With the issue of personal immunity of heads of states rendered largely irrelevant, states are continuously pressuring the ICC to suspend or defer cases against sitting heads of states as occurred in cases against the presidents of Sudan and Kenya. Anyone can guess that such states do not mean to put their own sitting heads of states on trial, even if the cases are referred back to them. This could result in deadlock. This paper examines the practical problems encountered by the ICC in asserting its complementarity jurisdiction against sitting heads of states. The Kenyan situation before the ICC will be used as a prime example.

II. BRIEF HISTORY OF PROSECUTION OF HEADS OF STATES

Charles I of England is perhaps the first head of state to have been tried and sentenced to death in 1642, for crimes committed while a king.\(^1\) Since then, there have been several instances of former heads of states and governments being indicted and found guilty of various crimes.\(^2\) Fast forward to the era after the World War II, we have a long list. The Tokyo Tribunal saw the indictment of the Japanese Prime Minister,

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while the Emperor was spared this fate for political expediency reasons. There have also been several national trials.

The establishment of international and internationalized tribunals since the 1990s in response to conflicts in the former Yugoslavia, Rwanda and Sierra Leone has also given examples of the indictment of heads of states and governments. Of these, the conviction and sentencing for genocide and crimes against humanity, based on a guilty plea by the former Rwandan Prime Minister, Jean Kambanda, is the world’s first in that category. The conviction and sentencing of Charles Taylor of Liberia for crimes committed in Sierra Leone is another such landmark case. Yet, in the realm of the prosecution of heads of states, one of the most distinguishing features of the pre-1990 era has been prosecution of former heads of states and governments instead of sitting power holders.

The indictment of sitting heads of state by international tribunals is a relatively recent phenomenon. Even more rare is their trial, while still controlling the levers of power in their home countries. Former Yugoslav President Slobodan Milosevic was the first sitting head of state to be indicted of international crimes such as war crimes, crimes against humanity and genocide on May 24, 1999, for the conflict in Bosnia during 1993. There was a widespread doubt as to whether such individuals could ever be tried successfully. At that time, Louise Arbor, the Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), told CNN, “Do I believe that people indicted by this tribunal will be tried? If I didn’t believe that, I wouldn’t be here.” Her optimism was not unfounded overall, but the arrest and transfer Milosevic to The Hague had to wait until after his resignation in 2001. The trial began on February 12, 2002. He died on March 11, 2006, before the conclusion of the trial. His Republika Srpska counterpart, Radovan Karadzic’s, trial commenced several years later on October 26, 2009. The ICTY Prosecutor initially indicted Karadzic in July of 1995, however, he had been on the run since then.

The other high profile indictment of a sitting head of state was against Charles Taylor of Liberia, for his role in the Sierra Leone conflict. A sealed indictment was issued by SCL on March 7, 2003, which was unsealed in June of 2003. He resigned on August 11, 2003.

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4. Id.
On March 29, 2006, he was arrested in Nigeria while trying to leave the country. He was then transferred back to Liberia. His trial opened at The Hague on June 4, 2007. He was sentenced to 50 years and he is now serving his sentence having failed to have his conviction and sentencing quashed by the Appeals Chamber of the Tribunal.

Perhaps, the case of the Sudanese President Al Bashir and the ongoing trial of the Kenyan President and his deputy by the ICC ranks as the boldest attempt yet by an international tribunal to hold sitting heads of states accountable for alleged international crimes committed by sitting heads of state. The arrest warrant for the Sudanese President was issued in March of 2009.

While the Sudanese situation was referred to the ICC by the United Nations Security Council [UNSC], the Kenyan counterpart resulted from the first ever exercise of the ICC Prosecutor’s *proprio motu* powers. The case against the current Kenyan president arose from his alleged role in the PEV in 2007. At the time of his indictment, he was the deputy Prime Minister of Kenya. However, he won the presidency in the 2013 elections.

A foray into the prosecution of sitting heads of states and governments is a recent phenomenon and one that is proving the Achilles heel of the ICTY. It has also caught more attention because, as with other cases before the ICC, the targeted heads of state happen to be from Africa, a continent that has had a difficult relationship with the Court. The ICC entered the uncharted waters of prosecuting a sitting head of state with the indictment of the Sudanese President. As pointed out, in a fortuitous twist of circumstances and somewhat partly due to a galvanizing effect of their indictment, two former Kenyan officials indicted for their role in the PEV in 2007-2008 were elected as presidents and vice presidents of Kenya in a democratic election in 2013.

III. BASIS OF JURISDICTION

Territoriality and nationality have long been the basis of national criminal jurisdiction. There is the principle of universal jurisdiction for limited crimes such as piracy and slave trading. Pre-ICC international and internationalized tribunals had primacy as the basis of their jurisdiction. Primacy ensured that tribunals are given priority in trying the suspects. These Tribunals were projects of either the victorious allied powers or backed by permanent members of the United Nations Security
Council. Given this political reality, it was not difficult to ensure that these tribunals enjoyed primacy of jurisdiction thereby removing the potential challenge of concurrent jurisdiction given that national courts ordinarily enjoy original jurisdiction.

According to the ICTY Statute, the tribunal was given concurrent jurisdiction with national courts to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991. However, the International Tribunal shall have primacy over national courts. Primacy is understood as primacy at any stage of the proceedings. According to ICTY, in Tadic case:

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as “ordinary crimes,” or proceedings being “designed to shield the accused,” or cases not being diligently prosecuted. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

These ever-present dangers of letting the offending state claim jurisdiction are present even when complementarity is adopted as a basis of jurisdiction. However, the reality of the negotiation of the ICC Rome Statute meant that, primacy was not an acceptable choice for many states. On the other hand, UNSC had no problem ensuring primacy of jurisdiction for ICTY and ICTR.

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8. S.C. Res. 827, supra note 5, art. 10, at ¶ 2(a).
9. Id. at ¶ 2(b).
IV. COMPLIMENTARILY AND KENYA AS AN EXAMPLE

Article 17(1) of the ICC Rome Statute states:

17(1). Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State, which has jurisdiction over it, and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; ... 11

Complementarity is regarded “as an instrument to overcome sovereignty fears against the exercise of jurisdiction by the Court and as a tool to remedy shortcomings or failures of domestic jurisdiction through application of the criteria listed in article 17.” 12 It is a notion designed as a compromise to sovereignty concerns and the possible shortcomings of national prosecutions that may not address impunity concerns. As Madeline Morris states:

A government that is responsible for the crimes is unlikely to be efficacious in their prosecution. For that reason, the law in this field is unlikely to be enforced effectively through the usual mechanisms of domestic law enforcement. This circumstance creates a fundamental problem for international criminal jurisdiction: how to design a jurisdictional structure that circumvents obstruction by perpetrator regimes while maintaining legitimate foundations for the exercise of judicial power. 13

In view of these concerns, complementarity won the approval of the negotiators at the Rome Statute negotiations. Hence, the need for complementarity that accommodates these concerns. In the next

paragraphs and sections, we shall look at Kenya as an example of how complementarity played out in the investigation and indictment of Kenyans suspected of involvement in the PEV.

The violence that followed Kenya’s presidential elections of December 27, 2007 had left a stain in the country’s political history. The political fallout led to the establishment of unity government and investigation of the violence by an inquiry commission. The Kenyan PEV Commission, also known as, the Waki Commission, after its Chairman Phillip Waki, a Judge of the Kenyan Court of Appeal that investigated the violence, issued its report on October 15, 2008. The Commission did not publicly name the suspects, but handed over a sealed list to Mr. Kofi Anan, who was involved in the mediation efforts. He passed the list to the then ICC Prosecutor, Louis Moreno Ocampo. Kenya had signed ICC on 11 August 1999, and ratified it on 15 March 2005.

Kenya was given nearly one year to initiate criminal investigation. When the prosecution was not forthcoming, the ICC Prosecutor sought authorization from the Pre-Trial Chamber on November 26, 2009, to conduct an investigation *proprio motu*-pursuant to Article 15(3) and (4) and article 53(1) of the Statute. The Pre-Trial Chamber authorized the investigation. On June 6, 2011, Kenya filed an appeal pursuant to Article 19(2)(b) of the Rome Statute. The situation in Kenya is the first instance in which the Prosecutor of the ICC exercised his *proprio motu* powers.

Following the commencement of the ICC process, the charges were confirmed and the six accused were summoned to appear before the Court at The Hague. Concurrently, on March 31, 2011, the

15. *Id.* at 18.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
Government of the Republic of Kenya filed the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute,” wherein it requested the Chamber to find that the case against the suspects to be inadmissible. On May 30, 2011, the Pre-Trial Chamber rendered its decision on Kenyan Government’s application rejecting all admissibility challenges. On June 6, 2011, Kenya appealed the Pre-Trial Chamber’s decision.

A. Kenya’s Main Admissibility Challenges

Kenya did not assert existence of national proceedings, hence the Pre-Trial Chamber did not have to decide on the issue. In regards to admissibility, the Appeals Chamber, under Article 17(1)(a), for a case to be inadmissible before the tribunal when a warrant of arrest of summons to appear is issued, the national investigations must “cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.” Both Chambers agreed that the words “is being investigated” in this context signifies the taking of steps directed at ascertaining whether this individual is “responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.” The standard test has also been stated to be: “If a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.” Thus, “the question is not merely a question of ‘investigation’ in the abstract, but is whether the same case is

23. Id. at ¶ 40.
27. Id. at ¶ 40.
28. Id. (emphasis added).
being investigated by both the Court and a national jurisdiction. For the Appeals Chamber, it did not matter whether officials in a similar hierarchy were being investigated at the stage of the proceeding where summonses have been issued. Thus, in instances where there are likely to exist a large number of suspects, which is often the case, ICC can always bring action against specific individuals not being investigated by nation states. If both national and ICC authorities do not coordinate their activities, it is likely that both could be involved in the investigation and prosecution of individuals suspected of involvement in crimes arising from same situation.

Kenya challenged the Pre-Trial Chamber’s finding of “same person, same conduct” test on the ground that it is not always possible for the national jurisdiction to have the same incriminating evidence as the Prosecutor does given the magnitude of the violence and number of potential suspects. The Court found this argument unpersuasive for two reasons:

First, if a State does not investigate a given suspect because of lack of evidence, then there simply is no conflict of jurisdictions, and no reason why the case should be inadmissible before the Court. Second, what is relevant for the admissibility of a concrete case under articles 17 (1) (a) and 19 of the Statute is not whether the same evidence in the Prosecutor’s possession is available to a State, but whether the State is carrying out steps directed at ascertaining whether these suspects are responsible [...].

The Appeals Chamber also refused to give Kenya leeway in the exercise of discretion in the application of the principle of complementarity to allow domestic proceedings to progress. According to the Court, this is because, “the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible.” The standard is clearly strict. The Court will not give consideration to other extra factors in deciding whether the country needs some more time or latitude in going forward with the investigation and prosecution.

29. Id. at ¶ 36.
30. Id. at ¶ 41.
31. Id. at ¶ 42.
32. Id.
33. Id. at ¶ 43.
Regarding any ongoing attempt at initiating investigation, the Kenyan authorities are required to show that “concrete, progressive investigative steps be taken and demonstrated at the time admissibility challenge is raised.”\textsuperscript{34} The Court also held that it is not sufficient to argue judicial reform action and promises for future investigative activities without concrete evidence of current initiative.\textsuperscript{35}

Kenya further alleged in its appeal, that three procedural errors were committed: “refusal to permit the filing of further investigation reports within the timetable proposed by Kenya; the refusal to hold an oral hearing, inter alia, to receive evidence from the Commissioner of Police on the alleged ongoing investigations; and the refusal to decide on Kenya’s request for assistance before determining the Admissibility Challenge.”\textsuperscript{36} On these matters, the Appeals Chamber deferred to the decision of the Pre-Trial Chamber stating that it will not, “interfere with the Pre-Trial Chamber’s exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.”\textsuperscript{37} Accordingly, the Appeals Chamber found that an abuse of discretion by the Pre-Trial Chamber had not been shown.\textsuperscript{38}

These sets of complementarity related objections demonstrate the challenges that could be mounted by a country asserting jurisdiction to circumvent ICC prosecution. While the ICC demanded the showing of concrete steps being taken in investigating specific individuals, Kenya on its part, argued that it had planned to initiate the investigation following the grounds up strategy where low level officials are investigated and prosecuted first in order to build a case against top level officials. Such a strategy, as we can see below, is not without a precedent.

For example, ICTY successfully followed this grounds-up investigation strategy, which was pyramidal in character.\textsuperscript{39} At the early phase of its operations, it was clear to the ICTY that cooperation from states was not forthcoming, as well as it was unable to “build up a credible evidence to indict the leaders who masterminded the criminal

\textsuperscript{34} Id. at ¶ 81.
\textsuperscript{35} Id. at ¶ 49.
\textsuperscript{36} Id. at ¶ 84.
\textsuperscript{38} Id. at ¶ 64.
campaigns.\textsuperscript{40} As a result it had to devise a “pyramid” investigation strategy, “where low ranking military and other officials are held to account for their actions.”\textsuperscript{41} According to ICTY, this enabled investigators “to build up cases against their superiors and ultimately the main architects of the crimes.”\textsuperscript{42} This strategy faced tremendous resistance from the Court itself, but it eventually proved a successful strategy.

\textit{B. Subsequent Attempts to Delay the Trial}

\textit{1. Political Efforts}

When these admissibility challenges failed, Kenya took other steps to avert the attendance of the trial in person by its serving head of state and his deputy. In addition to the jurisdictional issue of complementarity, Kenya also justified its actions on the ground of its implementation of demonstrable political and legal reforms following the PEV. Kenya viewed ICC’s investigation as meddling in its internal affairs.

One of the first concerted effort to reject ICC’s alleged meddling came on December 22, 2010, when Kenyan Parliament passed a non-binding motion urging the government to withdraw from the Rome Statute and repeal the International Crimes Act as a result of the ICC Prosecutor naming of six suspects, five of them high-ranking government officials.\textsuperscript{43} Two of these officials were later to be elected Presidents and Vice Presidents during the 2013 election. Obviously the Kenyan parliament did not make good on its threat.

In mid-January of 2011, the coalition government agreed to establish a special division of high court to try PEV cases, while at the same time arguing that “the criminal justice process could jeopardize peace and security” consequently launching diplomatic offensive to have the case at the ICC deferred.\textsuperscript{44} On March 17, 2011, Police Spokesperson Eric Kiraithe stated that “PEV files had been prepared, implicating up to 6,000 individuals, and that the cases would be prosecuted once a special

\textsuperscript{40} ICTY, History, available at http://www.icty.org/sid/95.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{44} Id. at 2.
tribunal or a special division was created.\textsuperscript{45} Some believed that this statement was tied to Kenya’s challenge filed on March 31, 2011, which argued, “that investigations into the PEV were ongoing, or alternatively, that ongoing judicial reforms would soon allow a national accountability process to commence.”\textsuperscript{46} As shown earlier, this admissibility challenge was not successful and the charges against four suspects, including the current President and his deputy, were confirmed on January 23, 2012.

The plan to establish a special division may be tenable, but there is the stumbling block of what law to charge the suspects with. Given that the 2009 international crimes act could not be applied retroactively for events before January 1, 2009, which includes the 2007 PEV, there is the question of whether to amend the Act or to charge them with ordinary crimes (murder, rape etc.).\textsuperscript{47} As ICTJ study notes, “neither international law nor the Rome Statute regime requires that crimes in question be prosecuted as international crimes.”\textsuperscript{48} There is also a possibility of charging them for crimes under international customary law.

In terms of judicial reform in Kenya, the ICTJ Report has the following to say:

Kenya’s judiciary has undergone significant changes. With the passage of the Judicial Service Act, the Vetting of Judges and Magistrates Act, the Supreme Court Act, and other laws, the institutional framework for a reformed judiciary is now in place. Additionally, the new chief justice, Willy Mutunga, is generally seen as being committed to the principles that underpin a strong and independent judiciary. Furthermore, a vetting process has been implemented that is likely to help remedy problems in the judiciary, such as widespread corruption and incompetence.\textsuperscript{49}

While these reforms had taken place, they came a little too late after the wheels of international criminal justice started turning. This, of course, did not stop Kenya from continuing to challenge the prosecution by deploying legal and political techniques. We will look at some of these below.

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 4.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
2. Change of Venue

As one of the tools in its arsenal, Kenya had also lodged change of
venue application in an effort to avoid the accused, including the
President and his deputy, from traveling to The Hague. Under ICC rules,
the possibility of holding in-situ hearings is provided for in Articles 3(3)
and 62 of its Statute and Rule 100 of ICC’s Rules of Procedure and
Evidence. Rule 100 provides that the tribunal may in the interest of
justice decide to sit in a State other than the Host state. The defense
argued that, a change of venue is desirable in the conduct of the trial in
either in Kenya or Tanzania, “would cause minimum disruption to the
private and public lives of the defendants.”

After considering the arguments both in favor of and against holding hearings in the case in
Nairobi or Arusha, the judges did not reach the required two-thirds
majority necessary for a decision to change the seat of the Court.

The Judges reached this conclusion after taking into consideration
numerous factors, such as security, the cost of holding proceedings
outside The Hague, the potential impact on victims and witnesses and on
proceedings in The Hague, the length of the proceedings to be held away
from the seat of the Court, as well as the potential impact on the
perception of the Court and the impact on the Court’s ability to conduct
and support other proceedings that are taking place simultaneously at the
seat of the Court. This judgment is one lost opportunity in using ICC’s
procedural flexibility to allow trials to take place in countries where the
alleged violations took place. Given that Kenya is neighbors with
Tanzania where the state of the art facilities of the ICTR are located, it
would have been a great opportunity to conduct part of the trials in that
facility to ensure that the owners of the process can closely follow.

3. Permission to be Absent from Trials

Another procedural reprieve resorted to by the accused is the request
to be excused from attending all of the scheduled hearings at The Hague
pursuant to Art 63 (1) of the ICC’s Statute. Given the position of
responsibility the president and his deputy occupy, it is understandable

50. ICC, Pre-Trial Chamber, The Prosecutor v. William Samoei and Joshua Arap
Sang, Joint Defense Application for a Change of Place where the Court Shall Sit for
Trial, ICC-01/09-01/11, ¶ 26 (Jan. 24, 2013) available at http://www.icc-
cpi.int/iccdocs/doc/doc1544498.pdf.
51. Id. at ¶¶30-36.
that a request of this kind is made. Even before such request has been made, President Kenyatta had ruled out any circumstances under which both he and his deputy could concurrently attend their trials at The Hague. 52

While it seemed that the request would be given an utmost consideration by the Court and given the Trial Chamber’s prior ruling that excused the deputy president, the Appeals Chamber, however, reversed the Trial Chamber’s decision of June 18, 2013, which gave conditional excusal from continuous presence at the trial. 53

The Trial Chamber had excused the Deputy President from attending all the trials except “the opening and closing statements, the presentation in person of the views and concerns of victims, the delivery of judgment, and, if applicable, the sentencing hearings, the sentencing, the victim impact hearings, the reparation hearings, and any other attendance directed by the Chamber.” 54 The decision was made with the provisos that “Mr. Ruto’s absence from the trial at other times ‘must always be seen to be directed towards performance of Mr. Ruto’s duties of state’ and that Mr. Ruto sign a waiver of his right to presence during trial.” 55

On Appeal by the Prosecution, the Appeals Chamber held that the trial chamber interpreted its discretion too broadly and that any absence should be considered on a case-by-case basis and be limited to which is strictly necessary. 56 At the appeal, Tanzania, Rwanda, Burundi, Eritrea and Uganda filed joint observations pursuant to rule 103 of the Rule of Procedure and Evidence. The key findings of the Appeals Chamber resulting from the limitation of the Trial Chamber’s discretion to excuse an accused person from presence during trial were that: 57


55. Id.

56. Id. at ¶ 63.

57. Id. at ¶ 26.
i. the absence of the accused can only take place in exceptional circumstances and must not become the rule;

ii. the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial;

iii. any absence must be limited to that which is strictly necessary;

iv. the accused must have explicitly waived his or her right to be present at trial;

v. the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and

vi. the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

This restrictive approach taken by the Appeals Chamber is later to be superseded by the amendment to the ICC Rules by the Assembly of the State Parties to the ICC Rome Statute (ASP) during its November 2013 Annual Meeting. This will be covered later.


Deferral requests of cases against the Kenyan President and his deputy pursuant to Article16 of the Rome Statute have been made to get a reprieve for the accused at least temporarily. However, the proposed United Nations Security Council Resolution failed to get the necessary votes due to eight abstentions. The draft resolution was sponsored by African members of the UNSC, Rwanda, Togo, and Morocco with the backing of some permanent members of the UN Security Council. It has also had the backing of the African Union that convened an extraordinary summit to make a collective demand to get the cases deferred until the accused leave office.

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In addition to supporting Kenya’s request for deferral of the trial, the AU extraordinary Summit also called for:\textsuperscript{50}

\begin{itemize}
  \item[i.] no future trial of a sitting head of states to take place; to fast track the process of expanding the mandate of the African Court on Human and Peoples’ Rights (AfCHPR) to try international crimes;
  \item[ii.] that African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;
  \item[iii.] that African ICC member states put the issue and its impact on reconciliation on the agenda of ICC’s annual meeting;
  \item[iv.] that any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of the African Union;
  \item[v.] that President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC; and
  \item[vi.] to convene, an Extraordinary Session, towards the end of November 2013, to review the progress made in the implementation of this Decision of the AU Assembly.
\end{itemize}

None of these demands were heeded by the UNSC. This was not the first time Kenya sought to have the cases deferred or terminated. The deferral and termination requests were turned down by the UNSC in 2011. The latest deferral request was made after AU Extraordinary Summit’s decision on Africa’s relationship with the ICC in October of 2013.

5. ICC’s Assembly of States Parties [ASP]

At ICC’s twelfth annual Assembly of State Parties, African member states managed to get the agenda item of “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation.” Just a day after the Court’s Appeals Chamber ruled that President Uhuru Kenyatta must attend all the trials, the ASP reached a decision to amend the Rules and Procedures of the Court to allow defendants to appear via videoconference on a case-by-case basis with

the permission of the Court. The amendment to ICC’s Rules of Procedure and Evidence (RPE) now makes it possible for an accused to skip his/her trial. Rule 134bis now makes it possible for an accused to make a request to be present at his trial through the use of video technology. The Trial Chamber shall rule on such request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. This is a timely addition to the RPE of the Court introducing further flexibility.

Rule 134ter added at the RPE at ASP 13 deals with the issue of excusal from presence at trial. Accordingly, “an accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by a counsel only during part or parts of his trial or her trial.” For the request to be granted the Trial Chamber must be satisfied that: (a) exceptional circumstances justify such an absence; (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate; (c) the accused has explicitly waived his or her right to be present at the trial; and (d) the rights of the accused will be fully ensured in his or her absence. The amendment retains the power of the trial chamber to rule on the requests on case-by-case basis, “… with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.”

While the provisions added by the ASP can be used by sitting heads of States to either attend their trial via a video conferencing technology or to be excused from attending if represented by a counsel, the amendment introduced also provides additional provision for individuals with extraordinary public duties. The provision does not specify what qualifies for “extraordinary public duties.” Just like Rule 134ter the accused must make a request, be represented by a counsel, and must explicitly waive the right to be present at the trial. Likewise, the Trial

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63. Id. at Rule 134 bis (2).
64. Id. at Rule 134ter (1).
65. Id. at Rule 134ter (2).
66. Id. at Rule 134ter (3).
Chamber may excuse the accused in the interests of justice and if alternative measures are inadequate. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time. The amendment allows the court to retain control over the process even if it now opens the door wide open for accused with extraordinary public duties in general and head of states in particular.

V. Lessons

The ICC currently indicts two sitting Heads of States. While the Kenyan president and his deputy are cooperating, President Al Bashir of Sudan has refused to cooperate. Al Bashir was reelected after an arrest warrant was issued for his arrest. Likewise, while being indicted, Uhuru Kenyatta and his deputy won an election, which was widely viewed as free and fair. To make matters more dramatic, the president and his deputy both belonged to rival camps implicated in the PEV. Although the two accused were not presidents at the time of their indictment, it is clear that they were propelled into office, partly due to ICC’s perceived meddling in Kenya’s internal affairs.

It could be said that the threat of prosecution or perhaps the genuine desire to bring peace to their communities (Kikuyu and Kalenjin) may have prompted Uhuru Kenyatta and William Ruto, who were in opposing camps in 2007, to come together and run for the presidency on one ticket. The Kenyan electorate voted for the duo in what was considered free and fair election regardless of the ongoing trials of the two individuals. According to a Chatham House study, “[t]he Jubilee Alliance has helped to bring the Kalenjin and Kikuyu communities together politically and while inter-communal narratives of injustice, mistrust, and stereotypes remain at the local level, the alliance has decreased the likelihood of Kalenjin-Kikuyu violence in 2013.” On the overall threat posed by the ICC case, the same study noted:

A more negative impact of the ICC’s involvement is the way that it has raised the stakes of winning and losing the 2013 elections, and has

68. Id. at Rule 134quarter (2).
contributed to the division of Kenyan voters into two opposing camps characterized by a strong ethnic logic. For some Kenyans, the election has become a referendum on the ICC’s intervention, and many who will vote for Odinga and CORD will partly do so as a rejection of the joint candidacy of Kenyatta and Ruto. Many regard the leadership of the Jubilee Alliance as a political marriage forged to protect the two indicted men from the ICC.  

Both Kenyan and Sudanese leaders made a political issue out of the ICC cases against them and exploited to their advantage the often alleged bias by the ICC against their countries in particular and Africa in general. The ICC processes were presented as one of meddling in their internal affairs. Once elected, they considered the electoral verdict as one of rejection by the voters of the indictments against them.

As discussed already, given that ICC assumes jurisdiction on complementarity basis, the admissibility challenges made were largely informed by the country concerned to have the first go at the cases. One wonders whether these legal challenges and political maneuverings could have been avoided if ICC were accorded jurisdiction based on primacy, as was the case at the ICTY and ICTR. Of course, there is no guarantee that similar pressure could not have been exerted on the ICC by the states and the regional organizations to which the States belong if primacy was adopted, but complementarity had obviously provided them legal justification.

Regardless, complementarity is here to stay. The recent amendment to the ICC’s Rules of Procedure and Evidence that relaxed the attendance requirement is a step in the right direction. There are other remedial steps that can be taken to reduce the unnecessary friction between the ICC and States, especially when sitting heads of states are indicted.

At the outset, it is within the power of the Prosecutor to establish credible, yet flexible timeline within which it should initiate prosecutions. Kenya did not deny lack of national prosecutions, but asserted that its investigation is ongoing and it should be given more time to implement a ground up strategy of investigating suspects, a strategy that had been used by the ICTY. The Kenyan parliament failed twice to agree on establishing a local tribunal to investigate PEV and pushed for ICC intervention. The ICC Prosecutor launched an investigation against six Kenyans, within a year of the name of the suspects being handed over by PEV Commission. Given the circumstances of transition, one year is

70. Id. at 10.
hardly sufficient for Kenyan authorities to have completed investigation of the suspects. The notion of positive complementarity calls for the Prosecutor’s positive engagement with national jurisdiction to ensure that credible prosecutions take place within a reasonable time frame.

Even when prosecutions at the ICC are in progress, the ICC could have given positive consideration to change of venue applications that could have enhanced ICC’s own image in the eyes of the countries affected by the conflict. The reasons for refusing to grant change of venue by the court’s plenary powers, in spite of the support by the prosecution and the presidency, is not convincing. It is a lost opportunity for the court to be flexible and address genuine concerns regarding the impracticability of sitting heads of states to be absent from their countries to attend their trials at The Hague. While similar arguments could be raised in regards to all suspects, the request as well as the reactions of the Court must be interpreted in the context of the investigation and prosecution of a sitting head of state. As is apparent from Kenya’s arguments, more consideration is given to maintaining peace and security and achieving a stride in building local capacity in dealing with the PEV.

Likewise, the request of deferral of the prosecution pursuant to Art 16 of the Rome Statute has not been given due consideration by the United Nations Security Council (UNSC). In this connection, UNSC itself does not seem to have a guiding list of circumstances that may warrant its intervention to authorize deferral. Kenya sought to have the cases to be referred back because of fundamental changes that had occurred in the country. These changes include the historic adoption of a constitution and judicial reform and the election of indicted individuals as presidents and vice presidents. This provision has only been invoked once before in favor of the states not parties to the Rome Statute who contribute forces to UN Peace Keeping Missions.71

Although support for the ICC among Kenyans remained high, there is no question that the perceived hardline approach taken by the ICC had caused some decline in its popularity. Instances of witnesses’ withdrawal were also additional setbacks.72 In fact, the prosecution has been losing witnesses since the election of the Kenyan duo to the presidency. The final blow of sorts came on December 19, 2013, with the ICC Prosecutor Fatou Bensouda seeking adjournment of the trial of

President Uhuru Kenyatta on account of the case against him not satisfying "the high evidentiary standards required at the trial."#73 This happened due to one key witness refusing to testify and another confessing to "giving false evidence regarding a critical event in the Prosecution’s case."#74 The Prosecutor sought the adjournment to "complete efforts to obtain additional evidence," and considers such evidence enables the Prosecution to "meet the evidentiary threshold required at trial."#75

This saga demonstrates that, the indictment of a sitting head of state, while the accused controls the levers of power, is fraught with several complications. The state of Kenya challenged ICC both before the Chambers and politically putting tremendous pressure on the prosecution. Kenya also made use of the diplomatic force of the continental organization, the African Union to get the cases suspended or terminated altogether. As we have seen, on assumption of power by the duo, key witnesses mysteriously started to recant their earlier testimony or withdraw from acting as a witness altogether. Will the case eventually collapse? 'Time will tell. But if it collapses, the timing and tact adopted by the prosecution in pursuing this matter may be partly to blame.

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#74 Id.

#75 Id.