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Political Bickering over the International Criminal Court

The Case of Kenya

Margit Hellwig-Bötte

The International Criminal Court's indictment against Sudanese President Omar al-Bashir in 2009 provoked massive criticism from the African Union. The indictment of Kenyan President Uhuru Kenyatta swelled those voices to a choir, demanding suspension of his trial and immunity from the ICC for serving heads of state.

The African Union's criticism has two roots: Firstly, the wish for its efforts to establish peace and security in the continent to be taken seriously by the UN Security Council and the European Union. Secondly, the desire among the ruling political elites of many African states to dissuade the European Union and other Western states from focussing their political dialogues with African countries on human rights and rule of law, which the former increasingly regard as paternalistic. Although the Assembly of States Parties to the ICC, which met in The Hague from 20 to 28 November 2013, made concessions to Kenya by amending the rules of procedure, the underlying conflict between Africa and Europe over Article 27 of the Rome Statute and the African states' wish to exempt serving heads of state from the jurisdiction of the ICC was not defused. The two sides should use the lead-up to the next EU-Africa summit in April 2014 to bring their perceptions of international criminal justice closer together again.

When the Rome Statute came into force on 1 July 2002 seventeen African countries had already joined. Senegal was the first country of all to ratify, on 2 February 1999; Ghana, Mali, Botswana, Sierra Leone and South Africa were also founding members. Kenya signed the Statute in 2005 and adopted it into national law in January 2009 with the International Crimes Act. In the meantime the number of African signatories has swelled to thirty-four, representing the largest regional group among the 122 ratifying states. At the founding conference in Rome in 1998 the African countries joined Europe in arguing – against resistance – for the chief prosecutor to be granted strong powers and for the Court to remain independent of the UN Security Council. The ICC was given automatic responsibility for crimes against humanity, war crimes and genocide. There was no north-south controversy over the canon of values on which

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the Rome Statute was to build, or the establishment of binding international criminal justice. In 2000, in its founding charter, the African Union also pledged to respect democratic principles and condemned impunity.

The Turning-point of Sharm el-Sheikh

This pact between Europe and Africa was not to last. At its July 2008 summit in Sharm el-Sheikh the African Union slammed arrest warrants instigated by "non-African states" against African heads of state as politically one-sided abuses of the universality principle (which permits prosecution of crimes that have no connection to the prosecuting country where these are illegal under international criminal law, such as genocide, crimes against humanity and war crimes). The African Union urged its member-states not to enforce the arrest warrants and demanded a mutually agreed interpretation of the universality principle by the African Union and the European Union. Despite the establishment of a joint working group, the latter never materialised. As a consequence of these communication failures, the European and African interpretations, including those of international criminal justice, drifted apart.

The Kenyan President at the time, Mwai Kibaki, for example demonstratively invited his Sudanese counterpart Bashir to attend the ceremonial inauguration of the Kenyan constitution in Nairobi in August 2010, an affront to Western diplomats. Kenya refused to hand Bashir over to the ICC in The Hague as obliged under the Rome Statute, and instead obeyed the AU resolution of Sharm el-Sheikh.

When the ICC's pre-trial chamber confirmed the charges against Uhuru Kenyatta, William Ruto and two other defendants in January 2012, Kibaki's government sought support from the African Union for having the Kenyan trial referred to a Kenyan court or suspended on the basis of security concerns under Article 16 of the Rome Statute. These efforts left a heavy mark on the election campaign, which welded together Kenyatta and Ruto and was characterised by anti-Western and pan-African rhetoric. Vilifying the ICC and attacking the West, above all the United Kingdom as the former colonial power, helped Kenyatta to stoke the ethnic and national sentiments of his supporters and win the election in the first round on 13 March 2013.

A "Clash of Civilisations?"

Almost two thirds of all African countries have now ratified the Rome Statute. It must be noted that the legal understanding of ruling political elites in Africa is permeated more strongly than in Europe by the idea that the head of state is untouchable (even as their civil societies struggle to uphold the principle of justice). The member-states of the African Union and the European Union also diverge over the relative importance of peace and justice as guiding principles for stabilising society during or after conflict. Whereas criminals in Europe are brought to justice by a centralised justice system before a society makes a new start after violent conflict or civil war, African nations place greater importance on restorative justice, redress, compensation and reconciliation, even if this leaves crimes judicially unpunished.

Fault Lines in the African Union

In its growing criticism of supposed Western paternalism, the African Union appears outwardly united but is in fact internally divided on the question of how to deal with the ICC. South Africa, especially, finds itself in a dilemma, because it has supported the ICC since the outset and made rule of law central to its foreign policy in the tradition of Nelson Mandela. As Chair of the AU Commission it must now defend African unity and demonstrate solidarity with Kenya's demand for the trial to be suspended. But behind the scenes it is

working hard to prevent a collective withdrawal from the Rome Statute.

Showdown in the Security Council

Immediately after the terrorist attack on the Westgate Mall in Nairobi on 21 September 2013, the Kenyan government demanded that the trial of Kenyatta and Ruto be suspended, citing Article 16 of the Rome Statute. While Rwanda, Togo and Morocco persuaded the UN Security Council to discuss the matter on 15 November 2013, it was already clear that their motion for a deferral of up to twelve months would fail as the majority did not see world peace or regional stability threatened by the attack. To that extent the African countries deliberately set out to document the Security Council's divisions over dealing with a central African concern in order to improve Kenya's negotiating position at the Assembly of States Parties in The Hague.

Compromise in the Assembly of States Parties

In The Hague Kenya failed to achieve its objective of amending the Rome Statute to create an arrangement that spared Kenyatta – and all other heads of state – from participating in trials. But it did at least achieve a compromise. The Rules of Procedure and Evidence were modified to permit the Court to grant exceptions from the duty to be present in person on a case-by-case basis while leaving fundamentally intact the accused's obligation to attend trial. In future, for example, participation by video conferencing can be permitted at the accused's request. The ICC retains its authority in all respects. The Kenyan government sells this arrangement as victory over the ICC, but the Rome Statute is not affected.

A Way Forward?

The fundamental problem of the African Union and European Union holding different legal interpretations remains unresolved, as does the question of whether Kenyatta will attend the opening of his trial. While the case was last scheduled for 5 February 2014, on 19 December 2013 the ICC Prosecutor requested an adjournment. No new date has yet been announced. Both accused have so far outwardly cooperated with the ICC. With William Ruto a serving vice-president is for the first time ever voluntarily in the dock at The Hague.

Nonetheless, the criticisms expressed at Sharm el-Sheikh still persist. Relations between Kenya and the European Union are likely to remain tense, with Kenya continuing to accuse the European Union of neo-colonial behaviour. Nairobi is particularly aggravated by the European Union's policy of limiting contacts, which largely avoids any encounter with the accused president and vice-president but at the same time continues existing cooperation as long as the Kenyan government cooperates with the ICC.

Although the decision of the Assembly of States Parties has relaxed the situation in the short term, supporters and critics of the ICC should nonetheless use the window before the opening of Kenyatta's trial and the next EU-Africa summit in April 2014 to continue to discuss African criticisms of the UN system and the ICC's procedures in formal and informal working groups in New York and The Hague. The Rome Statute and its universality should be defended. The West should offer an honest dialogue along the line indicated by the Assembly of States Parties – rejecting impunity for African heads of state but discussing different attitudes to justice, for example in the relationship between peace and prosecution in post-conflict reconstruction. But the dialogue must be conducted by both sides in the proper venues: only the ICC can decide procedural questions, while political discussions and decisions concerning the Rome Statute belong in the Assembly of States Parties.

Europe should leave no doubt that it takes human rights and their universality

seriously. But African governments also have a duty to reveal how they intend to ensure that the rights of victims and minorities receive protection equal to those of the ruling elites, above all those of their heads of state. The principles of international criminal justice and the independence of the ICC must not be compromised: all parties to the Rome Statute owe that to the victims of violence and armed conflict, not least in Kenya.

The argument that all persons currently accused before the ICC come from African countries should not simply be dismissed out of hand. Of course the so-called ICC situation countries should be viewed in an overall perspective with former Yugoslavia, Lebanon and Cambodia, for which separate tribunals were established. But the Security Council's inability to speak with one voice on human rights becomes glaringly obvious when it fails to refer crimes against humanity in countries like Syria to the ICC. The resulting loss of credibility of the UN system is registered especially acutely in African countries, which accuse the Security Council of assigning greater weight to human rights questions in their countries than elsewhere in the world.

Germany is not only one of the initiators of the ICC; its own history also lends it a strong commitment to a court that is based on the principles of the Nuremberg Tribunals. It enjoys a good reputation in Africa as an honest broker that is not pursuing the interests of a former colonial power. Both grant credibility to the German engagement for human rights and rule of law. Germany should use its influence to foster dialogue with African states and their civil societies on international criminal justice and rule of law and resolve the EU/AU bloc confrontation. Pursuing an autonomous role on this issue can also sharpen its Africa profile within the European Union.

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