

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

This PDF is auto-generated for reference only. As such, it may contain some conversion errors and/or missing information. For all formal use please refer to the official version on the website, as linked below.

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

<https://www.e-ir.info/2014/01/09/accountability-vs-stability-assessing-the-iccs-intervention-in-kenya/>

MAURICE DUNAISKI, JAN 9 2014

Introduction

The International Criminal Court's (ICC) indictment of the ringleaders behind the post-election violence (PEV) that wrecked Kenya in late 2007 and early 2008 has prompted an all too familiar debate about the potential trade-offs between accountability and stability in post-conflict situations. On the one hand, there are those who argue that criminal accountability for the PEV will exacerbate tensions between Kenya's ethnic communities and prevent the country from embarking on a path of reconciliation (e.g. Kanyiga, 2012; Paisley, 2012). On the other hand, there are those who argue that the ICC's prosecution of the ringleaders of the PEV is not only morally justified, but also an effective deterrence against future violence in Kenya (e.g. Alai & Mue, 2010; Hansen, 2011). The above debate on the ICC's involvement in Kenya reflects the principal 'dilemma' of transitional justice efforts, which arises from the need to balance the two potentially competing imperatives of justice and peace (Hansen, 2011).

This paper will examine the Kenyan accountability efforts for the 2007/08 PEV in light of the general debate on transitional justice. Its primary goal is to establish whether the ICC's intervention in Kenya has increased or decreased the ethnic tensions that erupted during the elections in 2007. It will argue that – contrary to the expectations raised by the above-mentioned peace vs justice dilemma – the ICC's involvement has had a positive and stabilizing impact on the relations between Kenya's various ethnic communities. The experience of Kenya therefore suggests that accountability efforts are compatible with reconciliation and stabilization efforts in the wake of massive human rights abuses. The paper will be divided into three sections. Firstly, it will locate its analysis within the broader scholarly debate on transitional justice. In the second section, it will then provide the factual background of the 2007/08 PEV and the subsequent accountability efforts. Lastly, it will turn to the main argument and show that the ICC's accountability efforts in the wake of the PEV have had a stabilizing impact on the inter-ethnic tensions in Kenya.

1. Literature Review

The past two decades have seen the proliferation of transitional justice mechanisms, such as criminal tribunals and truth commissions, which promise accountability for perpetrators and redress for victims in the wake of authoritarianism and civil war (Gready, 2011). Transitional justice (TJ) efforts may include, but are not limited to, criminal tribunals, truth commissions, lustration[1], institutional reforms, public memorials, reparations, and amnesties (Andrieu, 2010). The origins of TJ can be traced back to the Nuremberg Trials in post-war Germany, where, for the first time, responsibility for large-scale human rights violations was attributed to individual perpetrators rather than sovereign states (Teitel, 2000). The realpolitik of the Cold War era temporarily stifled the 'cosmopolitan' ambition behind the project of TJ (Andrieu, 2010). Yet, after the end of the Cold War, it experienced a massive expansion, as TJ efforts increasingly became an integral part of liberal 'peace-building' and 'nation-building' projects throughout the world (Nagy, 2008). The establishment of the International Criminal Court in 2002 as a permanent mechanism to prosecute individuals for genocide, war crimes and crimes against humanity can be seen as an expression of the recent 'normalization' of transitional justice in the arena of international politics (Teitel, 2003).

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

It is often suggested that the key 'dilemma' of TJ results from the need to balance two distinct imperatives that characterize the transitional moment. On the one hand, one needs to return to the rule of law and hold perpetrators of gross human rights violations accountable. On the other hand, one needs to embark on a process of reconciliation between former enemies, which might be undermined by the blind pursuit of justice (Boraine, 2006). According to the 'logic of appropriateness' of certain idealist and constructivist scholars, the imperative of justice should be favoured (see Orentlicher, 1991; Finnemore & Sikkink, 1998; Roth, 2001; Sikkink & Walling, 2007), whereas the more sceptical pragmatic-legalist approach gives preference to the imperative of peace and follows the 'logic of consequences' (see Snyder & Vinjamuri, 2003/04; Mendeloff, 2004; Graubart, 2010)[2]. This paper will examine the ICC's involvement in Kenya's transitional justice effort[3] in light of this debate between the proponents of the 'logic of appropriateness' and the advocates of the 'logic of consequences'. It will suggest that the Kenyan experience shows that justice-seeking and peace-seeking are not necessarily irreconcilable in post-conflict situations. Whether Kenya is actually in a state of 'transition' is of course debatable, given the fact that the power-sharing agreement to end the 2007/08 PEV effectively prevented a profound regime change (Hansen, 2013). Nevertheless, this paper will suggest that the language of 'transitional justice' can be used to analyse the on-going accountability efforts in Kenya and to highlight what is at stake in these processes. This approach seems all the more appropriate considering that most national and international stakeholders have framed Kenya's post-2008 accountability efforts in the language of 'transitional justice' (Musila, 2009; Hansen, 2013).

At the core of the different above-mentioned approaches to TJ, empirical claims regarding the causal effects of trials and truth commissions can usually be identified. For example, while some observers claim that trials are a disincentive to peace, others assert that they have a stabilizing effect. Unfortunately, the empirical research on the actual impacts of TJ efforts is still very much in its infancy (Pham & Vinck, 2007). A recent survey of the literature finds:

"that empirical evidence of positive or negative effects [of TJ efforts] is still insufficient to support strong claims [and that] more systematic and comparative analysis of the transitional justice record is needed in order to move from 'faith-based' to 'fact-based' discussions" (Thoms et al., 2010, p.1).

One of the reasons for this relative dearth of systematic impact assessments of TJ can be found in the lack of consensus about what constitutes a 'successful' TJ intervention (Gready, 2011). Should 'success' be measured in terms of perpetrators punished, truth uncovered, or communities reconciled? Another reason for the lack of evidence-based evaluations of TJ efforts is that concepts such as justice, peace, reconciliation or truth are very difficult to quantify precisely and hard to operationalize for statistical analysis (Thoms et al., 2010). Akhavan, for example, points out that the ICC's impact on peace-building and reconciliation in a given country is particularly difficult to measure because 'success' in this case is measured by what does not happen – i.e. by the absence of conflict (Akhavan, 2009, p.636). A further impediment to precise impact assessments of TJ interventions is the difficulty of isolating the effects of criminal tribunals or truth commissions from the various other national and international factors that may determine a country's post-conflict trajectory (Thoms et al., 2010). In light of these obstacles to clear "cause and effect" conclusions about the impacts of TJ interventions, it therefore seems appropriate to approach the problem by means of detailed qualitative studies of individual transitional countries[4], or by means of the "soft empiricism" of small-N cross-country comparisons (Akhavan, 2009, p.629). Importantly, it must be acknowledged that any conclusions drawn from such qualitative studies cannot be readily generalized and applied to different contexts. What has worked in one country, might not work in another. This analysis of the ICC's impact on ethnic tensions in Kenya should be read with the above-mentioned methodological limitations in mind.

2. Factual Background

Violent clashes along ethnic lines have been a common feature of Kenyan politics at least since the advent of multi-party elections in 1991 (ICG, 2012). Even though they never reached the same level of brutality and organizational sophistication as in 2007/08, violent clashes regularly accompanied Kenya's general elections throughout the 1990s. The outbursts of inter-ethnic tensions in the 1990s are best described as state-induced violence, organized and financed by members of the ruling Kenya African National Union (KANU), which aimed at intimidating opposition supporters and sought to displace them from land where they were not considered 'indigenous' (Klopp, 2001)[5].

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

Given the close connection between the instigators of the violence and the ruling KANU party, it is unsurprising that the various commissions of inquiry into PEV in the 1990s rarely led to criminal prosecutions. Often, these commissions were little more than ploys of the ruling party to deflect public pressure for accountability. (ICG, 2012, p.2). The 2002 elections were far more peaceful than earlier elections, largely because the two competing presidential candidates, Uhuru Kenyatta and Mwai Kibaki, were both from the Kikuyu community. Brown & Sriram (2012) suggest that this unusual constellation led to a non-alignment of Kenya's main ethnic groups with specific political parties and thus significantly decreased the potential for electoral violence. However, a brief historical overview suggests that the relatively peaceful 2002 elections should be understood as an exceptional event in Kenya's long history of "electoral despotism" (Klopp, 2001, p.476).

The election campaign in the run-up to the December 2007 general elections was largely peaceful but nevertheless infused with narratives of competition between Kenya's ethnic groups (ICG, 2012). In contrast to the preceding election, the 2007 elections pitted Kenya's largest ethnic groups against each other. President Kibaki's Party of National Unity (PNU) had its support base largely amongst the Kikuyu, Kisii, Embu and Meru communities, whereas the opposition Orange Democratic Movement (ODM), headed by Raila Odinga, drew most of its support from members of the Luo, Luhya and Kalenjin (ICG, 2008). On 30 December 2007, the Electoral Commission declared Kibaki the winner of the presidential elections, despite evidence of vote rigging and procedural shortcomings (ICG, 2008). The ODM refused to recognize the results and pronounced Odinga the winner of the presidential race. In the context of this electoral crisis, the tensions between PNU and ODM supporters exploded and public order broke down in large parts of Kenya. Over a period of roughly two months, at least 1300 people were slaughtered and many more were seriously injured. In addition, roughly 350.000 people were displaced from their homes and forced to flee from areas where they constituted an ethnic minority (ICG, 2008).

Brown & Sriram (2012) suggest that the 2007/08 post-election violence in Kenya can be roughly divided into four different categories depending the group of perpetrators. The first category consists of the spontaneous rioting by Luo ODM supporters, shortly after the Electoral Commission had pronounced Kibaki the winner of the presidential race. The second category encompasses the premeditated attacks in the Rift Valley on Kikuyus through the use of private militias, largely recruited from the Kalenjin community. The third category refers to ensuing revenge attacks, mainly in Nairobi, Central Province and the Rift Valley, by members of the Kikuyu (especially the cult-like Mungiki militias) against communities perceived to be in favour of the ODM. Lastly, the fourth category captures the shooting of unarmed demonstrators by state security forces (Brown & Sriram, 2012, p.248). The latter three categories of PEV can be said to constitute crimes against humanity under international criminal law because they were perpetrated in order "to further state or organizational policies" (Alai & Mue, 2010, p.4; cf. ICC, 1998, Art. 7.2(a)).

Following intense international pressure and mediation efforts led by Kofi Annan, the leaders of PNU and ODM eventually managed to resolve the constitutional stalemate. They did so by establishing a transitional government of national unity and by creating the new position of Prime Minister for Raila Odinga (ICG, 2012). As in previous instances of PEV in Kenya, the two parties decided to set up a commission of inquiry to investigate the human rights abuses. However, in order to avoid a similar fate as the 'toothless' commissions of the 1990s, the Waki Commission – as it became known – recommended the establishment of a local special criminal tribunal to bring the main perpetrators of the PEV to justice. Crucially, its final report presented this recommendation in the form of an ultimatum and threatened that:

"If either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, [...] a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Chief Prosecutor of the ICC" (cited in ICG, 2012, p.6).

The Waki Commission's recommendation to establish a local special tribunal was not implemented for mainly two reasons. Firstly, a local tribunal was opposed by reform-minded parliamentarians who feared that it would be subject to political manipulations and therefore unable to bring the ring-leaders of the PEV to justice. Secondly, a local tribunal was also opposed by a group of parliamentarians whose primary goal was to avoid accountability because they were themselves implicated in the PEV. This second group around William Ruto (ODM) and Uhuru Kenyatta

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

(PNU) mistakenly assumed that the ICC proceedings – as opposed to domestic proceedings – would take a long time to commence, giving them enough time to increase their bargaining power by participating in the 2013 presidential elections (ICG, 2012). The combined opposition of these two interest groups meant that in early 2009 Kenya's parliament failed to pass the legislation required to establish a local special tribunal for the perpetrators of the PEV (Hansen, 2011).

As a consequence, a sealed envelope containing a list of the main suspects was forwarded to the ICC in July 2009. Shortly afterwards, the ICC's chief prosecutor initiated a *proprio motu* investigation into the Kenyan situation in accordance with Article 15(3) of the Rome Statute (ICC, 1998). This was the first time that the ICC's chief prosecutor invoked his right to initiate an investigation without a prior referral from the UN Security Council or a State Party to the Rome Statute (Kenya Monitor, 2013). In January 2012 the ICC's Pre-Trial Chamber confirmed criminal charges against four ringleaders of the 2007/08 PEV: The two high-ranking Kikuyu PNU politicians Uhuru Kenyatta and Francis Muthaura, and the two ODM supporters William Ruto and Joshua Sang, who are both members of the Kalenjin community[6]. The ICC did not prosecute any members of Raila Odinga's Luo community since they were mostly responsible for spontaneous violence, which failed to meet the "organizational" threshold required by the Rome Statute's definition of crimes against humanity (ICC, 1998, Art. 7.2(a)).

The Kenyan government's response to the ICC's indictments has been largely characterized by two strategies aimed at undermining the ICC's accountability efforts. On the one hand, the government launched a (so far) unsuccessful diplomatic campaign to obtain a UN Security Council deferral of the Kenyan cases before the ICC. The argument put forward by the Kenyan government and its supporters in the African Union is that the ICC prosecutions will jeopardize peace in the country and prevent its leaders from adequately dealing with the threat of terrorism emanating from neighbouring Somalia (BBC, 2013b). This argument closely resembles the claims put forward by proponents of the pragmatic-legalist approach to transitional justice mentioned above. On the other hand, the Kenyan government launched an equally unsuccessful legal campaign challenging the admissibility of the cases before the ICC. The Kenyan government argued that the on-going ICC investigations violate the Rome Statute's foundational principle of complementarity[7] because a domestic accountability process has been initiated (Jalloh, 2012). This argument was rejected by the ICC judges on the ground that Kenya has failed to provide evidence showing that:

"the national investigations [...] cover the same individuals and substantially the same conduct as alleged in the proceedings before the Court." (Jalloh, 2012, p.273).

It is worth noting that the two arguments put forward by the Kenyan government are somewhat contradictory. After all, if accountability efforts really were a threat to stability, then surely this logic would apply to international as well as domestic trials. These argumentative flaws show that the Kenyan government is primarily driven by a desire to shield the main instigators of the 2007/08 PEV from criminal accountability (Hansen, 2011). But given the fact that the ICC's primary suspects are high-ranking officials in the Kenyan government, these political manoeuvres should come as no surprise. The antagonistic relationship between the ICC and the Kenyan government is likely to continue in the near future, especially since the two main suspects, Uhuru Kenyatta and William Ruto, won the 2013 general elections on a joint ticket (BBC, 2013a).

3. Assessing the ICC's Impact

This section will assess the ICC's impact on inter-ethnic relations in Kenya. It will show that, contrary to the expectations raised by the 'peace vs justice' debate mentioned earlier, the ICC's accountability efforts have actually contributed to stability in Kenya, rather than exacerbating inter-ethnic tensions. It will argue that the ICC's intervention had positive impacts on Kenya's inter-ethnic relations in four different ways; the first two with short-term and the last two with long-term consequences for stability. Firstly, the ICC prosecutions led to a 'union of convenience' between Kikuyu and Kalenjin politicians, thereby decreasing the potential for ethnic conflict in the Rift Valley during the 2013 elections. Secondly, the ICC prosecutions effectively deterred political leaders from using 'hate speech' against other ethnic groups in order to mobilize their own constituencies. Thirdly, the ICC's involvement promoted judicial reforms, which will strengthen the rule of law in Kenya in the long run. Lastly, the ICC prosecutions

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

led to a healthy scepticism amongst ordinary Kenyans concerning the relationship between ethnic groups and their political 'kingpins', thereby undermining the potential for mass mobilization based on ethnicity.

3.1. *Bringing Together Kenyatta and Ruto*

To begin, it should be noted that ethnic or tribal loyalty has historically been the main determinant of voting patterns in Kenyan elections (Cheya, 2002). Hansen, for example, states that that members of the large Kikuyu and Kalenjin ethnic groups have tended to vote almost exclusively for candidates from their own or closely affiliated communities (Hansen, 2011, p.22). In a similar vein, Murkammen suggests that:

"in Kenya certain leaders embody the ideals of their respective communities and that is why they are kingpins where they come from. [An] attack on these individuals is construed to be an attack on the larger community" (cited in Hansen, 2011, p.25).

Accordingly, any tensions between Kenya's political leaders can spread directly to their constituencies, who see the fate of their 'kingpins' as being closely connected to their own (Klopp, 2001). In light of this close connection between Kenya's ethnic groups and their political leaders, this paper argues that the ICC's involvement had a stabilizing effect on ethnic tensions in Kenya because it led to a forced union between the two main adversaries behind the 2007/08 PEV – i.e. the Kikuyu kingpin Uhuru Kenyatta, and William Ruto of the Kalenjin community.

Following the ICC's naming of its main suspects in late 2010, Uhuru Kenyatta and William Ruto formed a political alliance, which had the purpose of obtaining power in the next general elections (Hansen, 2011). It seems likely that this union is primarily a "marriage of convenience" between the ICC's two main suspects, which aims at increasing their political leverage vis-à-vis the ICC (Hansen, 2011, p.20). Nevertheless, the union between Kenyatta and Ruto is somewhat surprising, given that these two politicians are believed to have masterminded violent attacks on each other's supporters in the wake of the 2007 general elections (ibid.). The coalition between the two kingpins of the Kikuyu and Kalenjin communities is also remarkable considering the fact that opposing Kikuyu and Kalenjin militias were responsible for the worst atrocities committed in early 2008 (ICG, 2008).

It seems plausible to suggest that the relatively peaceful general elections in 2013 were at least partly^[8] due to the fact that the Kikuyu and Kalenjin communities could unite behind the Kenyatta-Ruto joint ticket (ICG, 2013, p.7). Thus, the ICC's accountability efforts not only united Kenyatta and Ruto in their quest for immunity, but also contributed to forging an alliance between the hitherto antagonistic Kikuyu and Kalenjin communities (ibid.). In this respect, it is likely that the ICC made a positive contribution towards stability in Kenya – especially in the Rift Valley where ethnic tensions between Kikuyus and Kalenjins exploded in early 2008. It is, however, important to keep in mind that the stabilizing consequences of the ICC-induced union between Kikuyus and Kalenjins are likely to be of a short-term nature. This is because the opportunistic alliance between Kenyatta and Ruto will not necessarily tackle the socio-economic grievances that fuel ethnic competition in Kenya (Hansen, 2013).

3.2. *Deterring 'Hate Speech'*

A second way in which the ICC prosecutions have had a short-term stabilizing impact on inter-ethnic tensions in Kenya, is through their effective deterrence of 'hate speech'. It has been suggested that the potential for Kenya's political elite to mobilize their constituencies through ethnically divisive 'hate speech' present *the* biggest challenge for inter-communal peace in the country (Hansen, 2011, p.25). It is, of course, difficult to establish precisely to what extent 'hate speech' can precipitate and promote mass atrocities. However, it seems plausible to suggest that 'hate speech' can have destructive consequences. The Rwandan experience, where "incitement to hatred by RTLM radio [...] was crucial to the success of the 1994 genocide", serves to illustrate this point (Akhavan, 2009, p.637). This paper argues that the on-going ICC investigations in Kenya significantly reduced the use of 'hate speech' during the 2013 election campaign and therefore had a positive impact on inter-ethnic tensions in the country.

Even though there were several lower-level politicians who (again) resorted to the rhetoric of ethnic competition during the campaign for the 2013 elections, the main candidates (i.e. Kenyatta, Ruto and Odinga) largely abstained

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

from such divisive propaganda (Hansen, 2011; ICG, 2012). This reluctance to resort to 'hate speech' can be seen as a direct consequence of the ICC's involvement in Kenya. During the hearings of Ruto et al. in early April 2011, the presiding judge of the Pre-Trial Chamber II warned the main suspects that the use of "dangerous speeches" would lead the ICC to issue arrest warrants (Musau, 2011, p.n/a). It has been suggested that these warnings had a positive impact on the nature of statements subsequently made by the suspects during the campaign for the 2013 elections (ICG, 2012, p.10). Hansen, for example, observes that "there was a notable change in the language used during the suspects' 'home-coming' rally shortly after the ICC issued it's warning, with William Ruto stating that:

"[w]e are prepared to carry this cross, but our consolation is that never again shall a Kenyan lose his life or property because of political competition." (Hansen, 2011, p.26).

Thus, it seems plausible to maintain that the ICC has effectively deterred the use of 'hate speech' during the run-up to the 2013 elections, thereby significantly decreasing the risk of ethnically-motivated violence in Kenya – at least in the short term.

3.3. Promoting Judicial Reform

This section will go beyond the two above-mentioned short-term stabilizing consequences of the ICC's involvement in Kenya. It will suggest that its accountability efforts have also had consequences that will decrease the likelihood of PEV in the long term. It will also argue that the ICC's intervention has prompted judicial reforms in Kenya and thereby contributed towards the crucial task of ending the 'culture of impunity', which has allowed elites to orchestrate ethnic violence for their own political goals.

It is widely acknowledged that Kenya's unaccountable and inefficient criminal justice system is responsible for perpetuating a 'culture of impunity' amongst the country's elite (Bjork & Goebertus, 2011). This 'culture of impunity' has, in turn, encouraged unscrupulous politicians to use ethnic violence as a political weapon against adversaries, knowing that their crimes would go unpunished (Hansen, 2011, p.26). There is some evidence to suggest that the public opinion's preoccupation with the ICC trials has taken pressure off the Kenyan government to undertake badly needed reforms of the domestic criminal justice system (see Bjork & Goebertus, 2011). However, this paper argues that the Kenyan government's admissibility challenge against the jurisdiction of the ICC, mentioned earlier, has prompted important judicial reforms aimed at 'bringing the cases home'.

Hansen (2011) shows how the wish to avoid accountability at The Hague has prompted Kenyan politicians to support domestic judicial sector reforms. He quotes one influential MP, Ephraim Maina, as saying that parliament:

"must now concentrate on enacting laws that will lead to creation of a tenable judicial mechanism and ensure it is in place when the [suspects] return to The Hague. With this, the country will be able to argue for a deferral and transfer of the case home" (Hansen, 2011, p.27).

Despite the failure of its initial admissibility challenge, the Kenyan government continues to challenge the ICC cases by citing the Rome Statute's complementarity regime and domestic judicial reform efforts (ICTJ, 2013). Hansen suggests that the linkage between the admissibility challenge and domestic reforms has led to the appointment of a new Chief Justice, Willy Mutunga, who is generally believed to be firmly committed to the rule of law (Hansen, 2013). In addition, the effort to 'bring the cases home' has prompted the Kenyan parliament to pass a number crucial bills throughout 2011 to reform the judicial system (Hansen, 2011). Particularly noteworthy in this regard are the Judicial Service Act, the Vetting of Judges and Magistrates Act, and the Supreme Court Act, which, according to some observers, together establish the necessary institutional prerequisites to tackle the problems of unaccountability and ineffectiveness in the criminal justice sector (ICTJ, 2013). In the long run, these important ICC-induced reforms are likely to help Kenyans in the fight against the 'culture of impunity' that has in the past encouraged unscrupulous leaders to orchestrate ethnic violence against supporters of their adversaries.

3.4. Promoting Debate and Scepticism

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

The second way in which the ICC has had positive long-term consequences for stability in Kenya is related to the public debates that were sparked by the ICC prosecutions. This paper argues that the international trials have led to a healthy scepticism amongst ordinary Kenyans concerning the relationship between ethnic groups and their political leaders. This scepticism in turn undermines the potential for mass mobilization based on ethnicity. Bjork and Goebertus, for example, note that numerous Kenyan NGOs have used the ICC prosecutions as a “proof of the inadequacies of their current leaders” and as a tool for “mobilizing public opinion to oust the political establishment and change the basis on which politicians are elected”, i.e. to move away from ethnicity-based towards issue-based political loyalties (Bjork & Goebertus, 2011, p.221). The various ICC-induced civil society initiatives have united under the widely-known campaign slogan ‘Don’t be vague, go to The Hague’ in order to push for elite accountability and to educate the public about the ICC proceedings (Brown & Sriram, 2012, p.253; Bjork & Goebertus, 2011). It seems as though the above-mentioned advocacy efforts have to some extent helped to undermine the view amongst ordinary Kenyans that their fate is closely connected to that of their community’s ‘kingpins’. For example, a recent survey found that an overwhelming 78% of Kenyans support the ICC’s prosecutions of the ringleaders behind the 2007/08 PEV (KNDR, 2011, Figure 5, p.8). Crucially, it also found that Kenyans view criminal prosecutions as the single-most important way of preventing new ethnically-motivated violence (KNDR, 2011, Figure 13, p.25). Furthermore, it has been suggested that the ICC prosecutions have helped to undermine the long-held perception amongst ordinary Kenyans that their political leaders are above the law (Hansen, 2011). For example, during the April 2011 hearings at the ICC, the presiding judge ordered William Ruto to “sit down and be quiet” when he interrupted the court proceedings to challenge the charges brought against him (cited in Hansen, 2011, p.29). Importantly, this incident at the ICC received significant attention in national media and sent a clear signal to ordinary Kenyans that powerful individuals such as William Ruto would no longer be ‘untouchable’ (Hansen, 2011). In the long term, it is likely that the above-mentioned ICC-induced changes in Kenyans’ views about their political leadership will contribute to a decrease in inter-ethnic violence by de-linking the fate of individual criminal politicians from that of their ethnic communities.

Conclusion

In light of the above discussion, it can be concluded that the ICC’s accountability efforts in the wake of the 2007/08 post-election violence had a positive impact on inter-ethnic relations in Kenya – both in the short term and in the long term. This paper suggests that the ‘peace vs justice’ debate in the field of transitional justice is somewhat misplaced in the Kenyan context. In fact, the Kenyan experience gives reason to believe that accountability efforts in the wake of mass atrocities are not only desirable according to the ‘logic of appropriateness’, but can also make sense according to the ‘logic of consequences’. Nevertheless, it should be kept in mind that these suggestions do not allow firm conclusions to be drawn about the general impact of international criminal prosecutions on peace-building efforts in the wake of mass atrocities. Indeed, the much more ambiguous consequences of ICC interventions in, for example, Uganda or Sudan should warn against making broad generalization based solely on the Kenyan experience (see Akhavan, 2009; Rodman, 2008). Before such firm conclusions about the causal effects of international criminal tribunals can be drawn, a much more systematic and comparative impact assessment across a large number of cases would be necessary. As mentioned earlier, the empirical research on the overall impact of international criminal tribunals on peace-building is still in its infancy. Future research should therefore aim to fill this gap in the literature on transitional justice. However, this paper predicts that the results of any such research projects will be somewhat inconclusive and ambiguous, given the methodological pitfalls associated with the study of transitional justice mechanisms and the fact that the number of relevant cases is likely to remain relatively small in the near future.

Bibliography

AKHAVAN, P. (2009). Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism. *Human Rights Quarterly*. 31, 624-654.

ALAI, C. & MUE, N. (2010). *Kenya: Impact of the Rome Statute and the International Criminal Court*. International Center for Transitional Justice. Available at: <http://www.ictj.org/publication/kenya-impact-rome-statute-and-international-criminal-court> [accessed 16.11.13].

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

- ANDRIEU, K. (2010). Transitional Justice: A New Discipline in Human Rights. *Online Encyclopedia of Mass Violence*. Available at: <http://www.massviolence.org/Transitional-Justice-A-New-Discipline-in-Human-Rights> [accessed 16.11.13].
- BBC (2013a). 'Kenya supreme court upholds Uhuru Kenyatta election win.' *BBC News Africa*, 30 March 2013. Available at: <http://www.bbc.co.uk/news/world-africa-21979298> [accessed 25.11.13].
- BBC (2013b). 'UN rejects Africa bid to halt Kenya leaders' ICC trials.' *BBC News Africa*, 15 November 2013. Available at: <http://www.bbc.co.uk/news/world-africa-24961169> [accessed 25.11.13].
- BJORK, C. & GOEBERTUS, J. (2011). Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya. *Yale Human Rights and Development Law Journal*. 14, 205-230.
- BOED, R. (1999). An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice. *Columbia Journal of Transnational Law*. 372, 357-402.
- BORAINE, A. L. (2006). Transitional Justice: A Holistic Interpretation. *Journal of International Affairs*. 60, 17-30.
- BROWN, S., & SRIRAM, C. L. (2012). The big fish won't fry themselves: Criminal accountability for post-election violence in Kenya. *African Affairs*. 111, 244-260.
- CHEYA, L. (2002). *Electoral politics in Kenya*. Nairobi: Claripress.
- FINNEMORE, M. & SIKKINK, K. (1998). International Norm Dynamics and Political Change. *International Organization*, Vol. 52, No. 4. pp. 887-917.
- GERRING, J. (2004). What Is a Case Study and What Is It Good for? *American Political Science Review*. 98.
- GRAUBART, J. (2010). Rendering global criminal law an instrument of power: Pragmatic legalism and global tribunals. *Journal of Human Rights*, Vol. 9, No. 4. pp. 409-426.
- GREADY, P. (2011). *The era of transitional justice: the aftermath of the truth and reconciliation commission in South Africa and beyond*. Oxford: Routledge.
- HANSEN, T. (2011). Transitional Justice in Kenya?: an Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns. *California Western International Law Journal*. 42, 1-35.
- HANSEN, T. (2013). Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice. *The International Journal of Human Rights*. 17, 307-327.
- ICC (1998). *The Rome Statute of the International Criminal Court*. UN Doc. A/CONF.183/9. Available at: <http://legal.un.org/icc/statute/romefra.htm> [accessed 03.11.13].
- ICG (2008). Kenya in Crisis. Africa Report No 137, Nairobi/Brussels, 21 February 2008. *International Crisis Group*. Available at: <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/137-kenya-in-crisis.aspx> [accessed 23.11.13].
- ICG (2012). Kenya: Impact of the ICC proceedings. Africa Briefing No 84, Nairobi/Brussels, 9 January 2012. *International Crisis Group*. Available at: <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/b084-kenya-impact-of-the-icc-proceedings.aspx> [accessed 23.11.13].
- ICG (2013). Kenya after the elections. Africa Briefing No 94, Nairobi/Brussels, 15 May 2013. *International Crisis Group*. Available at: <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/b094-kenya-after-the->

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaiski

elections.aspx [accessed 23.11.13].

ICTJ (2013). Prosecuting international and other serious crimes in Kenya. *International Center for Transitional Justice, Briefing Paper 30 April 2013*. Available at: <http://ictj.org/publication/prosecuting-international-and-other-serious-crimes-kenya> [accessed 23.11.13].

JALLOH, C. (2012). Kenya vs the ICC prosecutor. *Harvard International Law Journal*. 53, 269-285.

KANYIGA, K. (2012). *Kenya: Pay Heed to the Divisive Potential of ICC Ruling*. Daily Nation, 28.01.12. Available at: <http://allafrica.com/stories/201201300470.html> [accessed 16.11.13].

KENYA MONITOR (2013). *The International Criminal Court Kenya Monitor*. Open Society Justice Initiative. Available at: <http://www.icckenya.org/> [accessed 25.11.13].

KIM, H., & SIKKINK, K. (2010). Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries¹. *International Studies Quarterly*. 54, 939-963.

KLOPP, J. (2001). Ethnic clashes and winning elections: the case of Kenya's electoral despotism. *Canadian Journal of African Studies*. 35, 473-517.

KNDR. (2011). Draft Review Report April 2011. *The Kenya National Dialogue and Reconciliation Monitoring Project*. Available at: <http://www.dialoguekenya.org/Monitoring/%28April%202011%29%209TH%20Review%20Report.pdf> [accessed 28.11.13].

MENDELOFF, D. (2004). Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?¹. *International Studies Review*. 6, 355-380.

MUSAU, N. (2011). ICC warns Ocampo 6 over hate speech. *The Star*, 8 April 2011. Available at: <http://www.the-star.co.ke/news/article-67140/icc-warns-ocampo-6-over-hate-speech> [accessed 27.11.13].

MUSILA, G. M. (2009). Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions. *International Journal of Transitional Justice*. 3, 445-464.

NAGY, R. (2008). Transitional justice as global project: critical reflections. *Third World Quarterly*, Vol. 29, No. 2. pp 275-289.

ORENTLICHER, D. (1991). Settling accounts: the duty to prosecute human rights violations of a prior regime. *Yale Law Journal*. 1008, 2537-2615.

PAISLEY, I. (2012). *Peace must not be the Victim of International Justice*. New York Times, 16.03.12. Available at: <http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html> [accessed 16.11.13].

PHAM, P., & VINCK, P. (2007). Empirical Research and the Development and Assessment of Transitional Justice Mechanisms. *International Journal of Transitional Justice*. 1, 231-248.

RODMAN, K. A. (2008). Darfur and the limits of legal deterrence. *Human Rights Quarterly*. 30(3), 529-560.

ROTH, K. (2001). The Case for Universal Jurisdiction. *Foreign Affairs*, Vol. 80, No. 5. pp. 150-154.

SIKKINK, K. & WALLING, C. B. (2007). The Impact of Human Rights Trials in Latin America. *Journal of Peace Research*. 44, 427-445.

Accountability vs Stability? Assessing the ICC's Intervention In Kenya

Written by Maurice Dunaïski

SNYDER, J.& VINJAMURI, L. (2003/04). Trials and Errors: Principle and Pragmatism in Strategies of International Justice. *International Security*, Vol. 28, No. 3. pp. 5-44.

TEITEL, R. (2000). *Transitional justice*. New York: Oxford University Press.

TEITEL, R. (2003). Transitional Justice Genealogy. *Harvard Human Rights Journal*. 16, 69-94.

THOMS, O. N. T., RON, J., & PARIS, R. (2010). State-Level Effects of Transitional Justice: What Do We Know? *International Journal of Transitional Justice*. 4, 329-354.

[1] The term 'lustration' refers to the process of barring officials and collaborators of a former regime from positions of public influence after the transition from authoritarianism to democracy (Boed, 1999).

[2] There are also some scholars who defend accountability efforts based on the 'logic of consequences'. According to this view, international criminal tribunals can promote conflict resolution (Akhavan, 2009; Kim & Sikkink, 2010).

[3] The Kenyan TJ efforts have combined retributive and restorative justice models. On the one hand, criminal accountability efforts have taken the form of an external intervention by the ICC's chief prosecutor. On the other hand, restorative justice efforts have taken the form of a local Truth, Justice and Reconciliation Commission (Hansen, 2011). In this paper I will only deal with the impact of the ICC prosecutions on inter-ethnic tensions in Kenya, and leave aside the question of whether the local truth commission has had any impacts in this regard.

[4] For example, one can use the qualitative research method of 'process-tracing' (see Gerring, 2004).

[5] In the 1990s the clashes were largely between pro-KANU members of the Kalenjin and opposition members of the Kikuyu and Luo that were deemed foreign to the Rift Valley and a threat to President Moi's rule (Klopp, 2001).

[6] On 23 January 2012 the ICC rejected charges against police chief Mohammed Ali and ODM chairman Henry Kosgey. The charges against Francis Muthaura were later dropped due to the loss of key witnesses and the lack of cooperation from the Government of Kenya in gathering testimonies (Kenya Monitor, 2013).

[7] The complementarity principle gives State Parties to the Rome Statute a first right to carry out domestic prosecutions before the ICC jurisdiction is triggered (Jalloh, 2012, p.272).

[8] Other important factors contributing to the relative peacefulness of the 2013 elections were, for example, media self-censorship, restrictions on freedom of assembly, an increased deployment of security forces to hotspots and the pre-emptive flight of vulnerable groups from areas of past violence (see ICG, 2013).

—

Written by: Maurice Dunaïski

Written at: Paris School of International Affairs (Sciences Po)

Written for: Thierry Vircoulon

Date written: November 2013