

INTERVIEW

A Practitioner's Perspective on the Kenya I and Kenya II Cases Before the ICC

Interviews with the Lead Defense Counsel in the Ruto Case (Kenya I), Karim A.A. Khan, and Lead Prosecutor in the Kenyatta Case (Kenya II), Adesola Adeboyejo

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On 10 September 2013 the International Criminal Court (ICC) began hearing a case against William Ruto, Deputy President of the Republic of Kenya, and Joshua Sang. The related case against the President of Kenya, Uhuru Muigai Kenyatta, was scheduled to begin in November 2013 but has since been postponed until October 2014. Both cases are noteworthy since they are the first against sitting politicians. Unsurprisingly, they have not been without controversy.

These trials are challenging for the Court, not least because the Kenyan government recently passed a resolution withdrawing from the ICC and repealing its domestic legislation criminalizing international crimes, arguing that Kenya needed to restore its sovereignty and resist neo-colonialism. Although this withdrawal does not affect the current cases before the Court, it certainly makes cooperation with Kenya for the purpose of further investigations more difficult.

Karim A.A. Khan, QC, formerly the defense counsel of Muthaura and currently the lead defense counsel of Ruto, raised these issues in an interview taking place one week before his opening statements in the Kenya I case. These same issues and concerns were also raised with Adesola Adeboyejo a lead prosecutor in the Kenya II case in December 2013.

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Introduction

On 10 September 2013 the International Criminal Court (ICC) began hearing a case against William Ruto, Deputy President of the Republic of Kenya, and Joshua Sang. The related case against the President of Kenya, Uhuru Muigai Kenyatta, was scheduled to begin in November 2013 but has since been postponed until October 2014. Both cases are noteworthy since they are the first against sitting politicians. Unsurprisingly, they have not been without controversy.

The two cases stem from post-election violence that erupted in Kenya from December 2007 to February 2008. The violence began after allegations of election fraud after the main opposition party, the Orange Democratic Movement (ODM), and its presidential candidate Raila Odinga, were defeated in the final hours of voting by the incumbent President Mwai Kibaki of the Party of National Unity (PNU). Armed gangs attacked individuals from other ethnic and tribal groups. Approximately 1200 people were killed, 3500 injured and 350,000 forcibly displaced (some figures go as high as 600,000 displaced). Additionally, a high number of rape and sexual-based violence occurred. Given the scale of the violence, an African Union mediation team, led by Kofi Annan, stepped in to negotiate a peace.

The mediation resulted in the two political parties agreeing to share political power and to implement important legislative and economic reforms. As part of the agreement, the Kenyan government appointed a judicial commission to investigate the crimes that took place, referred to as the Commission of Inquiry into Post Election Violence or the Waki Commission after the Appeals Judge who chaired the body. The Waki Commission compiled a report along with a list of alleged perpetrators of violence, and the chairman gave this report to Annan who in turn handed it to the then Prosecutor of the ICC, Louis Moreno Ocampo.

After the Kenyan parliament voted against a bill to establish a special court to investigate the crimes that took place, Moreno Ocampo took action. In accordance with Article 15 of the ICC Statute, he independently requested the court to open a formal investigation into the situation in Kenya. The Kenya situation marks the first time that the prosecutor exercised these powers under the Statute. Not long after, Pre-Trial Chamber II, in a two-to-one decision granted the prosecutor's request, finding that there was a reasonable basis to believe that crimes against humanity had been committed on Kenyan territory.¹

Early in his investigation, the prosecutor focused on six individuals divided in two cases. In the first case, referred to as Kenya I, the Prosecutor sought charges against William Ruto, Henry Kosgey and Joshua Sang. At the time of the attacks, Ruto was a senior member of the ODM. More recently, he has been declared Deputy President of Kenya after the March 2013 General Elections and is currently the leader of the United Republican Party. Kosgey was the Chairman of the Orange Democratic Movement (ODM) during the 2007 elections. Sang worked for Kass FM until October 2012 where he was once the radio station's head of operations and a popular program host.

In the second case, known as Kenya II, the prosecutor sought charges against Uhuru Muigai Kenyatta, Francis Muthaura and Mohammed Ali. At the time of the attacks, Kenyatta was a senior member of the PNU. Kenyatta is now President of the Republic of Kenya after the March 2013 General Elections and is currently the leader of the National Alliance Party. Muthaura served as the Head of the Public Service and Secretary to the Cabinet in the lead up to the 2007 elections whereas Ali was the Commissioner of Police.

The Office of the Prosecutor, now under the leadership of Chief Prosecutor Fatou Bensouda, alleges that the men from Kenya I conspired to attack supporters of the PNU and that in response prominent PNU members, namely those named in Kenya II, organized an attack against ODM supporters.

At the confirmation of charges hearing in Kenya I, the Pre-Trial Chamber confirmed charges against Ruto and Sang but declined to confirm charges against Kosgey. In Kenya II, the judges confirmed charges against Muthaura and Kenyatta but declined to confirm charges against Ali. However, in March 2014, Bensouda, announced that she was dropping all charges against Muthaura saying she had insufficient evidence and faced challenges with witness intimidation in the case. Kenyatta's trial is now scheduled to start in early October after several delays and the withdrawal of multiple key witnesses. Indeed, securing witness testimony at trial has been a major challenge in both Kenya cases.

These trials are challenging for the Court, not least because the Kenyan government recently passed a resolution withdrawing from the ICC and repealing its domestic legislation criminalizing international crimes, arguing that Kenya needed to restore its sovereignty and resist neo-colonialism. Although this withdrawal does not affect the current cases before the Court, it certainly makes cooperation with Kenya for the purpose of further investigations more difficult.

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Karim A.A. Khan

Thank you for taking the time to meet with me so soon before the start of your trial. Can you tell us what makes this case different from your average case at the ICC?

It is very different from other cases before the Court because it started pursuant to the prosecutor's Article 15 powers to make a *proprio motu* application to investigate a situation. There is no indication that Kenya was unwilling or unable, in our view, nor was there a UN Security Council referral as there was in the case of Sudan or Libya. So really, the responsibility for this case is one in which the former prosecutor took upon himself and that is an obvious difference from the other cases.

Another difference of course is that Kenya is very different from the other theatres that other courts have worked in. By maturity, by infrastructure, by mature civil service, by all the various standards, it is no DRC (Democratic Republic of Congo), it is no Darfur. It is not only a mature system, it is a working system. It has a working judiciary and, at first blush, it is not a country that one thought the ICC would operate in. It has a disciplined army and it is not a broken or failed state that was characteristic of the Balkans prior to the commencement of the ICTY or Sierra Leone before the Special Court for Sierra Leone. And definitely, if one puts it next to the situation in Darfur or the DRC, by every indication, it is a completely different

¹ ICC, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, Case No. ICC-01/09, para. 73.

country. It may be on the same continent but it has a working government, it is a mature government. And it is a government that organizes itself relatively well and certainly much better than its neighbors Somalia or Sudan.

Another reason that it is unique is that it deals with complex political factors. While other situations may have taken place in the context of political elections, the situation in East Timor, for example, before the Special Panels for Serious Crimes took place in the context of a referendum for independence, in this case, a lot of the influences which we say have contaminated the judicial process through the actions of the prosecutor, can be accounted, in part, to the elections that had not taken place at the time when the ICC had started investigating. In other words, the 2012 elections. And I think what the Court needs to be very careful of, and what the prosecution has failed to be fully alive to, is the propensity for interest groups, political parties, and others, masquerading sometimes under the umbrella of civil society groups, to seek to misuse a judicial process in a bid to clear the pitch—to clear the decks politically. I think one of the things that will become apparent in this trial is that certain influences have sought to use judicial processes both in Kenya and at the ICC to get rid of opponents politically that they couldn't do via the democratic process. And that is something the Court needs to be very alive to. It is our view that the prosecutor has failed to be fully sensitive and cognizant to that basic reality, but that is a matter that the trial chamber will decide in due course.

You first represented Muthaura for whom charges were eventually dropped by the prosecution. Can you tell us how that really worked? What was it about that case that ultimately made it go in the defendant's favor? And what was the reaction of the accused and his family?

The case was dropped because the case should never have started. We said at the time of confirmation that it was a travesty that the case was commenced against Ambassador Muthaura. It is a case which would not have been brought had the most basic investigative steps been taken by the prosecution. They failed to investigate in the way that any competent domestic prosecution would. The sad thing is that the standard of investigation that one received in the Muthaura case, and it is a signature of the Kenya situation as a whole, is actually far below the standard any individual would expect of their domestic prosecuting authorities or their domestic law enforcement authorities. It is the hallmark of these ICC, OTP investigations. And we said at confirmation that not only would the case fall, we said that when the case is not confirmed there should be a big enquiry. There needs to be an investigation into how it was that the various procedural safeguards built into the Rome Statute have all failed. The case was confirmed but subsequent events made it clear that the prosecution had been duped by a witness that they themselves call a liar. The time came, in a public filing in which the prosecutor accepted that the witness lied to them. When it became manifest that that witness had lied and had been contradicted there was no option but to withdraw the case. And at the time of actually filing, it is also important to note that the defense had put forward many applications including sanctioning, sanctioning prosecution staff members for misrepresentation and for certain investigative malpractice. Now those fell away when the case was withdrawn.

As for his and his family's reaction, when we came off the plane in Kenya it was very moving. Ambassador Muthaura was met by his children. One daughter hugged him and broke down sobbing. That is the face that the public does not see and also the prosecutors do not see. There are consequences to their investigations and one needs to be very careful in a criminal process to realize that you are discharging a very powerful mandate and not to just cast allegations in a bid to fill the pot up with cases that don't have merit [just] to keep investigators or prosecutors or even defense counsel busy. There is a moral and legal responsibility to make sure that you do not use the courts to name and shame but rather to get those individuals against whom there really is proper evidence and that has not been the hallmark of the Kenya situation. The hallmark has been shoddy, slapdash, inadequate and incompetent prosecutorial investigations.

We need to be very careful. While we shouldn't stall investigations because we are scared of the consequences, we must make sure that investigations are based upon evidence and not just evidence cobbled together with witnesses pursuing their own agendas.

How do you see the Ruto case being similar to the previous case?

I actually thought that I would never see a case as badly investigated in my life as Kenya II. I really thought it can't get worse than this. And when we were asked, after the Muthaura case was withdrawn, to represent the Deputy President, I was absolutely flabbergasted and deeply upset that it was investigated to an even worse standard than the Kenya II case. I am upset not just for Ruto.

I believe in the rule of law. I believe there needs to be accountability and I believe in the mandate of the ICC. As you may know, I have prosecuted at the ICTY and ICTR, and I have represented victims in Cambodia, I

am not some kind of political animal wailing against colonial justice or imperial justice. That is not my game. It is not my forte. I believe in the law and that nobody should be above the law whether you are president or head of state. But also, nobody should be beneath the law. I believe that with a very firm conviction. I also feel that it is a very noble job to be the prosecutor of this court. It is a lifetime opportunity to have the honor and the privilege and the very real responsibility to be trusted by the Assembly of State Parties, the international community, to discharge such a mandate. One realizes that the ICC has a mandate to fulfill which cannot be left to the sole preserve and inheritance of Luis Moreno Ocampo. In fact, it is the inheritance of humanity and it deserves better than what it is getting at the moment.

What are the different variables in the Ruto case?

I don't want to say too much but what I can say is that there are very big issues. I mean the prosecution have adopted this very ragtag phrase called a 'network' in which a whole variety of people are thrown into a bag and tossed about and then the prosecution says 'presto' this is the network capable of making an organizational policy within the meaning of the Rome Statute. I mean that is complete nonsense. I think it is not what the drafters of the Rome Statute intended.

We accept that victims suffered. We accept the suffering of Kenyans. But when it comes to those individuals pointing their finger against William Ruto they are not all what they seem to be. And one of the things that will be done in this case is to unmask who is responsible for those lying witnesses. Why they have been willing to go along with that plan and the benefits they have received. Certainly your readership will know that if you are from a slum in Kenya there may be understandable reasons for people to be affectively bribed or induced to give false narratives if it means getting a green card or a Schengen visa and getting relocated from that squalor to a life that they view from East Africa as being far better. Those issues will be explored in trial on a witness by witness basis.

What are some of the biggest challenges you face?

Disinformation. The prosecution's incessant assertion of intimidation to mask what we say are fundamental investigative failings. It cannot be right and people should not be beguiled into thinking that the reason that this case is a failing, it failed against Ali, it failed against Kosgey, it was withdrawn against Muthaura, is because of witness intimidation. It is because the prosecution got it wrong. They haven't investigated. To lose one case may be careless. To lose two, incompetent. But in this case, how many cases will be lost before people actually realize that there is something fundamentally wrong with how the prosecution is investigating?

And this disinformation, this smokescreen of witness difficulty, is really nonsense because certainly the witness difficulties encountered by the prosecution in Kenya are a million times less than the witness difficulties encountered by the defense in Sudan because in those cases we can't enter the territory at all. We can't investigate there at all and the court says a fair trial can take place. Here the prosecutors, both Fatau Bensouda and Ocampo, met the president, the prime minister. They were given red carpet treatment. Investigators may come and do their work speaking with witnesses. So to come and say they are prejudiced in these circumstances is nothing short of a smokescreen. They got it wrong. They got it wrong because they interfaced and latched onto a flawed domestic processes in Kenya and particularly out of the Waki Commission. The prosecution has swallowed that virus which is now infecting its current case.

How does the opinion of the Kenyan population affect the trial?

I don't think that it does. I mean all legal systems in the world need to have confidence in the legitimacy of a system. If, in England, the population didn't believe the courts, the fabric of justice would be torn and that is why in some jurisdictions it is a crime in fact to do anything that will affect the dignity of the judicial process. In the same way it is important for all states, all state actors, to have confidence in the ICC. But at the same time, it is key that the ICC looks at the evidence and is not affected by interest groups masquerading as the voice of the people. Otherwise it is very easy for interest groups, civil society groups that are funded by political interests, to get together, make a cacophony of noise, purport to be the voice of the people and somehow the ICC would act pursuant to that mobilization which may not reflect reality.

However, if one wants to go by what people think at all, then of course the fact that the president and deputy president have massive democratic mandates after the ICC brought a case against them should be some reflection of how they are viewed in Kenya. But the Court needs to be robust enough to look at the evidence and not be swayed by interests that are presented. At least they should not accept those without very careful scrutiny and looking behind what is presented as fact.

What are some of the biggest challenges facing the ICC?

You know, the biggest challenge facing the ICC is to get it right. The challenge is to divorce the prosecution from the institution. It is very important that people in Kenya and internationally do not confuse the utterances and the failings from the Office of the Prosecution with the institution of the ICC itself because ultimately our safeguard and the safeguard of justice is that there are independent and impartial judges. We need to project that because that is what actually insulates the process considerably. That is the safeguard for all of us. For the public, for the victims for the defense and, indeed, for the prosecution.

The judges must be viewed as being supreme amongst all of us. No more of those standoffs that Ocampo had with Judge Fulford, refusing to cooperate and refusing to bow his head to justice in the form of judges elected by the Assembly of State Parties but arrogating to himself some kind of judicial functions that he was not given. All of us must recognize that the judges are supreme. If all of us realize that and the judges do their job hopefully a fair process will be ensured. Without it we will get 'prosecution by assertion' or by the simple whim of whomever happens to be the incumbent of that office at one moment in time and that would of course effectively render the trial chambers as a rubber stamp. Luckily we don't have such rubber stamp trial chambers, at least not in this case. We have every confidence that they will do their job properly.

Would you consider yourself a glass-half-full or a glass-half-empty person when it comes to the future of the ICC as an institution?

Half and half! There are positives and negatives. The establishment of the ICC was a landmark event. I would love to be able to applaud the ICC and say that it is wonderful, its gained in maturity, and its everything that we wanted it to be but it is not. Unfortunately, my honest opinion is that the ICC, ten years on, is far less advanced than the ICTY was after 10 years. I think the way ICC prosecutions are conducted, the way investigators work at the ICC, is far worse, far less evolved than at the ICTY. ICTY investigators and prosecutors have a greater professionalism about them because of certain processes. I think there has been a gap in the internal processes of the ICC. During the Ocampo era, after Serge Brammertz left, there was no deputy prosecutor for investigations, and I think that was one of the reasons why there hasn't been enough oversight into the investigations. And I think, as the Statute requires, there should have been a deputy prosecutor for investigations and a deputy prosecutor for prosecutions. That hasn't taken place. At the very least, we now have a good deputy prosecutor for prosecutions, James Stewart, and I hope that the investigative shortcomings are addressed and that there is not a vacuum of leadership in which people are making decisions perhaps beyond their qualifications and experience.

What have been some of the most memorable experiences from these two Kenyan cases?

Certainly the withdrawal of the case against Muthaura was memorable. And the other memorable moment was when I found some witnesses who were willing to tell the truth even though that truth did not reflect very well on them. One of the things that I will say in my opening in Ruto trial is that mistakes are made in life but the people of Kenya and all of us should realize that these courts can be deceived. The only way we reduce that risk is by getting witnesses of truth, whether they are for the prosecution or defense. And when a witness has the courage to come and speak the truth, whatever has gone wrong in the past, they should not be condemned but they should be applauded because it is never easy to speak the truth.

And coupled to that, I will be saying that the Court needs to be very willing in this case more than any other case I have ever been involved in to charge people for perjury that come before the Court with deliberate agendas to pervert the course of justice. What I will say in my opening is that witnesses for either party should be free to come to The Hague and tell us anything, to incriminate to exculpate, as long as they tell the truth. But if a witness for the prosecution or defense thinks that they can come here and deceive these judges, being foreigners, and that they will just swallow it, they should be on notice that we, the defense, will seek their prosecution for perverting the course of justice. We want the truth. Nobody should have any patience for people who are willing to manipulate or who seek to manipulate the ICC because that is a gross discourtesy but also a great offense to the memory of those victims of the 20th century up to today that have required the existence of this court. No tolerance should be shown.

Adesola Adebeyejo

What makes this case different from your average case at the ICC?

This case is unique in the sense that the accused is the current sitting President of Kenya even though at the time the Prosecution filed the "Request for Authorisation of an investigation pursuant to Article 15" on

26 November 2009, he was certainly not in this position. Of course the case against Omar El Bashir is also against a sitting Head of State but that case was hampered by the fact that Sudan is not a party to the Rome Statute and it refused to submit to the jurisdiction of the Court after an arrest warrant was issued against the Head of State. This is not the case in Kenya which is a party to the Statute and which at the onset of the case actively supported the involvement of the ICC in the investigations into the post-election violence. This case is also unique as it constitutes the first time the Prosecutor has exercised his *proprio motu* powers pursuant to Article 15.

The Office applies the same standard in all its cases as it would in any of the 122 States Parties to the Rome Statute to ensure accountability of the perpetrators, justice for the victims and contribute to the prevention of future crimes. There are different ways the **Office the Prosecutor** (OTP) can initiate an investigation in any particular situation. Uganda, the Democratic Republic of Congo, Central African Republic and Mali referred the situations in their countries to the OTP. The situations in Darfur and Libya where the Court has no jurisdiction because they have not ratified the statute were referred by the UNSC to ensure justice for the victims of crimes allegedly committed on those territories. Ivory Coast even though not a State Party to the Rome Statute, accepted jurisdiction of the ICC and requested the Court's intervention. Kenya however, is the first case where the Prosecutor used *proprio motu* powers, authorized by the judges of the ICC, to open an investigation. The Prosecutor intervened following consultation with Kenyan leaders and agreement that impunity was not an option following the post-election violence. In all these cases, the Office is investigating and prosecuting alleged crimes under the jurisdiction of the court: genocide; crimes against humanity; and war crimes. Each of the eight situations is an adversarial process just like in national proceedings. The OTP takes its side based on the evidence and the defence will disagree. This is part of the process. At the end of the process, there will be trials and trials are already on going for some cases regarding Congo and Central African Republic and Kenya. Ultimately, independent judges will decide.

What are some of the biggest challenges you face with regard to this case?

The biggest challenge has come from ensuring that the witnesses are adequately protected against any form of interference or intimidation or harassment by any of the accused or their associates.

How does the opinion of the Kenyan population affect the trial?

The Court is sensitive to the views and concerns of the victims of the post-election violence and who have found a voice through their legal representative to present such views and concerns to the Court. Recently for example, the victims made it very clear through their Legal Representative, that they oppose the application by the accused to appear or be present for the trial via video link or to be excused from the proceedings. These views were taken into cognizance by the Trial Chamber in rendering its "decision on defence request for conditional excusal from continuous presence at Trial" on 18th October 2013.

How does the stance of the Kenyan government affect the trial, both legally and symbolically?

The Kenya 1 trial started on 10 September 2013 in spite of the challenges to the case with regards the defence application for the excusal of the Accused from continuous presence at trial. On the 22nd of October, the Appeals Chamber rendered its decision setting the criteria for when an accused can exceptionally be excused from being present at trial. This decision is expected to have a bearing on the Trial Chamber decision on the application for excusal in the Kenyatta case. The Court takes its legal and judicial role very seriously and will continue to take active steps in the protection of the trial process.

What are some of the biggest challenges facing the ICC in general?

This is a very broad question and I cannot speak for the Court in general but certainly within the context of the Kenyatta case, interference with witnesses has been a major challenge and remains a challenge the Court may continue to face owing to the sensitive nature of the types of cases it will be called upon to handle. The Office of the Prosecutor continues to work together with the Victims and Witnesses Unit in the Registry to address this. The OTP will continue to seek authorisation from the Judges for additional protective measures, as needed. The OTP will also explore the options of taking steps pursuant to Article 70 (Offences against the administration of Justice) to seek punishment for those who corruptly influence or tamper with witnesses. However, it is a continuing challenge that will last until after the trial. We will continue to strengthen additional protective measures as needed. We appreciate the sacrifices that witnesses make for the sake of truth and we will continue to do all we can to keep our witnesses safe.

Would you consider yourself a glass-half-full or a glass-half-empty person when it comes to the future of the ICC as an institution?

I consider myself blessed having benefitted from the diverse and exciting but challenging legal environment in the Court. One always has room to enjoy new experiences and to literally watch legal history and jurisprudence unfold. At the ICC, one is exposed to a continuous learning environment as the law is constantly being tested and interpreted.

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