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Masters of manipulation: how the Kenyan government is paving the way for non-cooperation with the ICC

Thomas Obel Hansen, 30th May 2012

A policy of non-cooperation with the International Criminal Court (ICC) will leave the victims of 2007/8 post-election violence without a legal remedy, and may prompt new violence in upcoming elections. It will also present a devastating blow to international justice if left unopposed.

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At first glance it may look as if the Kenyan government has employed a bunch of incompetent lawyers. Any first year student of international law would know that the government's most recent suggestion for "bringing the ICC cases home" by using the African Court of Justice and Human Rights ("the African Court") to try the so-called Ocampo Four [11] has absolutely no chance of succeeding. The Court, in its new form as a merger between a human rights court and a forum for solving inter-state disputes, is barely operational, it is seriously underfunded and lacks the necessary capacity and structures to conduct criminal trials. Even if the Kenyans successfully convince the other state parties that the mandate of the regional court should be revised to include criminal cases, it would take many years to make it capable of conducting something that could come close to fair and credible trials.

Furthermore, the Rome Statute [12] does not offer a basis for transferring ongoing ICC cases to a potentially competing regional criminal court, and the Kenyan government has, so to speak, already used its last bullet trying to find legal leeway to end ICC intervention. Article 19(2) allows a state to challenge admissibility on the grounds that it is conducting its own investigations or prosecutions, but according to article 19(4), the "admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State". The government already challenged admissibility last year, but this challenge was turned down by Pre-Trial Chamber II, and since by the Appeals Chamber, on the grounds that there remained "a situation of inactivity" in Kenya. While article 19(4) states that "[i]n exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial", it is extremely unlikely that the Court would consider using this provision given the government's rather ambiguous record in the area of accountability – including the failure to prosecute anyone for planning and organizing the post-election violence in a period of more than four years, as well as a series of other factors.

So, if the government's most recent attempt to challenge the ICC's jurisdiction is doomed to fail, why then is the Kenyan leadership investing so much energy in it, including placing it on the agenda of a recent African Union legal expert meeting in Addis Ababa, held 7-11 May?

Could it be that the real intention behind the government's action is to pave the way for non-cooperation with the ICC? In citing a commitment to using the African Court to pursue criminal accountability for the four suspects of Kenya's 2007/8 post-election violence, the Government is attempting to create yet another argument that can be put forward when justifying why, ultimately, it is not going to arrest and transfer the suspects to The Hague. Though the African Court proposal is highly unconvincing to any

observer of international law, distinguishing between good and bad legal arguments is not always easy for the man on the street in Kenya. The Kenyan government has proven to be a master of manipulation.

Segments of the leadership, including President Kibaki and many of his closest allies, have long been convinced that criminal justice will jeopardize the status quo, and hence the privileges of a so far untouchable political-economic elite. Some of the suspects [13] – Kenyatta, Muthaura and Ruto – serve or have served as high profile members of the current administration and belong to the inner circle of these elites. Consequently, despite formal commitment to accountability, the leadership has never had any intention of seeing criminal trials unfold in Kenya and has consistently attempted to create new barriers for holding members of the country's ruling class accountable in The Hague.

Initially, the leadership argued that a domestic accountability process, either in the form of the ordinary courts or a Special Tribunal, as proposed by the so-called Waki Commission – which was set up by the selfsame leadership – was the appropriate way of dealing with the post-election violence. Then, political leaders said that this was not the case, because only the ICC could guarantee independence and impartiality. When the leadership was surprised that The Hague Court actually moved ahead and named prominent politicians and senior civil servants as suspects, it started arguing [14] that the ICC process poses "a real and present danger to the exercise of government and the management of peace and security in the country." While the African Union, unsurprisingly, supported Kenya's claim, several permanent members of the UN Security Council did not, and the deferral request was thus never acted on. Instead, the government attempted to get rid of the ICC by filing an admissibility challenge, making reference to ongoing (or at least planned) domestic proceedings. As already noted, this move similarly failed, and the leadership was forced to look for other alternatives to end ICC intervention. There are none left, other than non-cooperation with the ICC, which would be a clear breach of Kenya's treaty obligations.

However, the Kenyan government does not wish to be labeled a pariah state, like al Bashir's Sudan. So, rather than simply stating that the government will refuse to hand over the suspects should they refuse to appear voluntarily, the leadership is creating a more sophisticated strategy aimed at legitimizing non-cooperation with the ICC.

First, Kibaki's government decided to get rid of the critical voices in the Government itself. In late March this year, Justice Minister Kilonzo was transferred to the Ministry of Education, in what Kibaki labeled an ordinary cabinet reshuffle. Mr Kilonzo is arguably the only cabinet minister who has openly and consistently supported the ICC process and in other ways showed sincere commitment to accountability principles, for example by calling for the removal of the ICC suspects from their government posts. He was replaced by Eugene Wamalwa, a Saboti MP who is a member of the so-called G-7 coalition, which was formed by Kenyatta and Ruto as an alternative to current Prime Minister Odinga's presidential bid and to work against the ICC. Combined with a number of other ministerial removals and appointments, commentators agree that the reshuffle clearly favoured Kenyatta, who still serves as Deputy Prime Minister in the government despite being suspected of having committed crimes against humanity. In other words, Kibaki has not only laid the ground for a transfer of power to Kenyatta (his Mount Kenya region ally), but also created a bulwark against cooperation and internal critique of the other tactics deployed to confuse the debate about international justice.

Second, prominent politicians started arguing that the UK has plotted to have President Kibaki indicted by the ICC once he steps back from his post following the end of his second term. The claim, which was first made by MPs Charles Kilonzo and Aden Duale, concerns an alleged leaked dossier that describes the alleged secret plan to have the ICC indict the President and detain Kenyatta and Ruto, reportedly in an effort to promote Prime Minister Odinga's political career. The British government has dismissed the claims, with the Interim High Commissioner noting [15] that the "documents are not genuine. They are forgeries. The views expressed in them are light-years removed from the policy of the British Government. They do not in any way represent the views of the British Government." Though the document's origin has not been established with certainty, the most likely conclusion is that the incident is

yet another attempt to manipulate the process by disseminating a picture of the ICC as a tool of foreign powers to take control of Kenya's political processes.

Such allegations, which have been made by the government on a number of other occasions without offering any credible evidence seemingly aim at creating resistance in the electorate to international justice and thus a popular basis for any future decision not to cooperate with the Court.

Third, political elites have constantly manipulated the ICC process by providing misinformation about the Rome Statute and attempting to "ethnicize" the accountability process. Most recently, during a Rift Valley meeting in April where around 20 MPs endorsed Ruto's presidential bid, a statement issued on behalf of the group by the Kalenjin Council of Elders [16]Chairman John Seii claimed that "there is a clause [in the Rome Statute] that provides for deferral of ICC cases and we will marshal three million signatures to compel ICC to do so." Should a student in my international law class have claimed there is a provision in the Rome Statute which allows the Court to defer a case based on such a petition she could be sure to fail. Mr Seii may not be a student of international law, but he is certainly not an ignorant man. The call for a deferral was made alongside claims that more Kalenjins (the ethnic group which Ruto claims to represent) will likely be targeted by the ICC. Such statements are not only dangerous - adding fuel to the fire of tribalism by implying that the ICC process targets ethnic communities, as opposed to individuals - but again build public support for a future decision of non-cooperation with a Court that "ignores the views of Kenyans".

Finally, the government has consistently manipulated the debate about complementarity. While ideally complementarity is about creating positive interactions between national and international accountability efforts, the Kenyan leadership has instead perceived in the principle a useful tool for undermining *any* form of accountability. Most recently the complementarity scheme has been utilized as a device for obscuring the debate and creating a platform for non-cooperation. On the surface of it, the Kibaki administration's tactics may appear inconsistent and uncoordinated. Following the conformation of charges against the four suspects in late January this year, the government has simultaneously argued that the ICC cases will be prosecuted in national courts, in a modified version of the East African Court of justice and in the African Court. Confused? Well, that is exactly what the government wants us to be.

The political leadership wishes to capture the debate and camouflage a future decision of non-cooperation through the narrative of protecting Kenya against an aggressive International Criminal Court, disrespectful of national sovereignty and African sentiments, which will be portrayed as being in denial of all the efforts made by the Kenyan government to create a legitimate and credible alternative to the ICC.

Should I be proven right that the government ultimately intends not to cooperate with the ICC this will be a devastating move for a country that has periodically been affected by large-scale violence in the contexts of elections. Quite simply, the signal sent to ambitious politicians if these plans succeed would be: You can get away with anything, including crimes against humanity, if you are a powerful politician.

To forestall this dark forecast, civil society must communicate to ordinary Kenyans how the government is manipulating the process, in this way at least making non-cooperation more difficult because, after all, Kenya is a democracy, albeit ill-functioning, where leaders depend on popular support.

But international actors too have a clear responsibility to put pressure on Kenya's ruling elites. The best, or perhaps only, way to do this would be that the UN, major international players, including donor countries, make it clear that non-cooperation will have serious consequences, including diplomatic isolation of a country that perceives itself as a regional superpower, significant cuts in development assistance (or redirection from the government to civil society) as well as a freeze on foreign assets and travel bans for the ICC suspects and those politicians who support a policy of non-cooperation. A credible threat of hitting Kenya's elites hard on their wallet will likely change some minds – after all, the most significant reason many support Kenyatta's (or Ruto's) presidential bid is to preserve their wealth and

privileges, not that they share ideologies or real political programmes. Ultimately what drives Kenyan politics is a simple economic calculus of how to stay or become wealthy.

Should the US, the UK and other major donors fail to stand strong and united against a policy of non-cooperation this will leave the victims of the 2007/8 post-election violence without a legal remedy, and may in the worst case contribute to new violence in the upcoming elections. Further, maintaining "business as usual" with a country that clearly defies its obligations under the Rome Statute, will present a devastating blow to international justice. Who will take seriously an international court that is undermined by its own funders and cannot prosecute members of governments with ties with western governments? It is time to stand united against elite capture and manipulation of a process that the majority of Kenyans support, and let the rule of law prevail.