GlobalResearch
Center for Research on Globalization

Discriminatory International Justice and the Quest for a New World Judicial Order: ICC Drops Charges Against Pres. Uhuru Kenyatta

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Global Research, December 09, 2014
Baraka Books

Region: sub-Saharan Africa
Theme: Law and Justice

The International Criminal Court dropped charges against Kenyan President Uhuru Kenyatta on December 3, 2014. This is good news, even though the I(mperialiste) CC claims it was done because of Kenya's refusal to cooperate. This case has been examined closely in Justice Belied recently published by Baraka Books. When President Kenyatta appeared before the ICC in The Hague in October 2014, Baraka Books ran the following excerpts from Chief Charles Taku's article in Justice Belied, The Unbalanced Scales of International Criminal Justice. In light of this news, we are proud to repost them.

"Demeaning," "condescending," "neo-colonial posturing." That is how Chief Charles Taku of Cameroun describes the actions of the of the International Criminal Court (ICC), and other international courts in Justice Belied: The Unbalanced Scales of International Criminal Justice, edited by Sébastien Chartrand and John Philpot. (order directly from GR)

Following are excerpts from two articles by Chief Charles Taku who makes the case that the actions of the ICC—and other international courts—are essentially "neo-colonial posturing."

Excerpt from Chapter 1 of Justice Belied.

"African Court and International Criminal Courts:
Discriminatory International Justice and the Quest for a New World Judicial Order"

The ICC: The Price of Selective and Discriminatory Justice

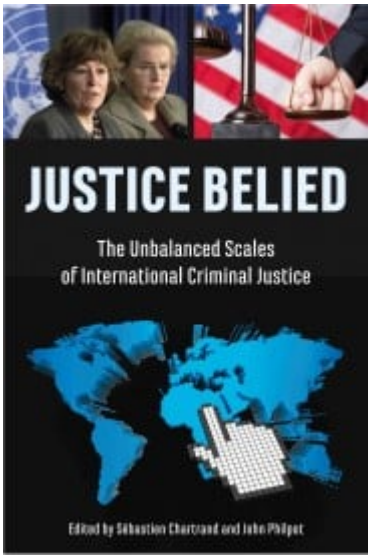
The International Criminal Court has come under serious criticism by African states for its unjustified focus on Africa during its ten years of existence. This focus has been reasonably explained by the fact that some of the superpowers that have opposed the ICC and indeed refused to ratify the Rome Statute have deflated the attention of the court towards Africa.Justice Belied

The provision in the statute of the ICC that the UN Security Council may make referrals or deferrals before the court[1] gives these world powers extraordinary powers to control the formulation, conduct, and execution of prosecutorial policy, in a manner that detracts attention from conflicts around the world that are sponsored by these powers either through proxies or as direct participants. To these superpowers and their proxies, the ICC has become a convenient conduit to effect regime change in errant regimes in Africa as well as to protect their strategic geopolitical interests.

The urgency with which the prosecutor of the ICC purported to have conducted investigations and filed indictments against Muammar Gaddafi and some of his close aides in Libya at the heart of the war, when NATO bombs were indiscriminately falling on Libya for eight months, surprised many in Africa. It was more amazing that when the ICC indictee Muammar Gaddafi was apprehended alive and murdered in cold blood, the media antics that characterised the tenure of Mr. Moreno Ocampo as the prosecutor of the ICC went dead. The next time we heard about him was when he was informing the world, invoking the principle of complementarity,[2] that the judicial system of Libya was well-equipped to try Islam Gaddafi, the captured son of Muammar Gaddafi held by rebels over whom the central governing authority in Libya has no control.

Paradoxically, the same prosecutor explained his intervention in the Kenya post-election violence on the grounds that no mechanism existed within Kenya for a credible trial of the indicted to be conducted. This decision to intervene in Kenya was made barely two months after the commencement of the post-election violence in 2007. Within the same period, the same Western powers that supported the position of the prosecutor towards the situation in Kenya were appealing to Kenya to prosecute within its judicial system pirates and perpetrators of international crimes against foreign vessels in the Indian Ocean.

The obsession to "baby-sit" Africa reached humiliating proportions when Mr. Ocampo, whose mandate was to oversee the fight against impunity at the global level, publicly displayed his implication in the politics of Kenya by singling out Kenya alone as the focus of his farewell address. It is demeaning and condescending neo-colonial posturing like this that finally compelled the African Union to stand up for the sovereignty, dignity, and interest of the African Continent and all black people the world over who felt insulted by this policy of humiliating selective focus on Africa by the ICC and international criminal justice in general.



Excerpt from Chapter 7 of Justice Belied.

"The ICC and Kenya: Going Beyond the Rhetoric"

Chief Charles Taku

Stepping on Sensitive Political, Ethnic, and Cultural Nerves

The prosecutor, Moreno Ocampo, chose the public media as a platform to lay out his cases

from the moment he made known his intention to intervene in the Situation in the Republic of Kenya. In so doing, he made the media a legitimate arena for the litigation of the cases. This venue of choice attracted a plethora of participants, some intended, others not. The media has since influenced public opinion on the cases in ways unimagined.

A significant media influence arose from the decision by the prosecutor to recruit some media practitioners as intermediaries in conducting investigations. The evidence collected through this process was presented before the Pre-Trial Chamber for confirmation of charges against the accused and in the unfolding trials. Mr. Barasa, a journalist practicing in the Rift Valley against whom the prosecutor has secured a warrant of arrest and transfer to the court for witness tampering, was recruited by the prosecutor to help in gathering evidence against accused in Case No. 1. It is unclear how this suspect tampered with witnesses whom he had a prosecutor's mandate to recruit. It is hoped that the proceedings against him, when and if they occur, will open a window to the world about the manner and tactics the prosecutor used to collect the evidence she is relying on to pursue these prosecutions. It may reveal a consistent pattern of questionable prosecutorial tactics that a Trial Chamber of the ICC criticised and warned against in the Lubanga trial.[3]

In his public media statements and in public court documents, the prosecutor laid out his case in political, cultural, and ethnic terms,[4] which carried significant risks. An obvious risk was the possibility that alternative explanations might account for the existence of these factors during the election violence. The alternative explanations could undermine the prosecutor's theories of the cases.

The prosecutor disregarded the political trends and shifting political alliances that are known influential factors in Kenyan politics. Like past elections, these factors were present during the election in which the alleged crimes occurred. The presence of these unpredictable political trends significantly undermined the theoretical relevance of assumed ethnic allegiance and cultural homogeneity that were claimed as facilitators of the alleged crimes. Contrary to this theory, the political forces that existed during the elections transcended alleged ethnic and cultural compartments in which the purported crimes were locked.

All ethnicities in Kenya were active in all the political parties, fielded candidates in the elections, and reacted differently to victory and defeat in their respective constituencies. The fact that some of the parties commanded a majority within distinct ethnic and cultural groups in locations where the crimes were alleged to have been committed did not undermine this reality. This significant factor was not seriously considered, and where considered was not given the attention it deserved.

The prosecutor of the International Criminal Tribunal for Rwanda was confronted with a similar situation in the case of The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye, and Innocent Sagahutu.[5] In that case, the prosecutor struggled to explain every conceivable crime that occurred in Rwanda in 1994 in ethnic terms.

When the ICTR was established, UN investigative reports held the Rwandan Patriotic Front accountable for the crimes that led to the extermination of hundreds of thousands of Hutu, in particular in areas that were entirely under the RPF occupation throughout the war.

Unlike the ICC prosecutor, the ICTR prosecutor acknowledged that serious crimes were

perpetrated against the Hutu and promised to investigate. Recognising the occurrence and magnitude of these crimes and undertaking to investigate at first gave the investigations a presumption of legitimacy. Regrettably, the tyranny of victors' justice left the ICTR prosecutor struggling to place the responsibility for the crimes that were perpetrated against Hutu victims (whom the prosecutor categorised as "moderates") on other Hutu whom she claimed to identify and categorised as "extremists."

At the trial, the prosecutor did not convincingly explain or establish the circumstantial categorisation of Hutu into "moderate" and "extremist." The prosecutor failed to account adequately for the massacre of hundreds of thousands of Rwandan citizens of Hutu and Twa ethnicity and to justify his inability to investigate and prosecute alleged perpetrators of the crimes. Like the ICTR, the inability of the ICC prosecutor to conduct proper investigations into all the crimes alleged significantly undermined her claims of seeking justice for victims and her supposed record of fighting impunity.

It may reasonably be discerned from Mr. Ocampo's numerous press statements that he intervened in the Kenya political arena when the perpetration of crimes was ongoing with a preconceived list of suspects and a case theory that perceived the crimes in ethnic terms. Once he sought and received permission of the Pre-Trial Chamber to open investigations, he found no need to conduct proper investigations to obtain credible evidence against all perpetrators of all crimes irrespective of ethnicity, or other discriminatory grounds. As a result, the cases he brought for trial lacked legitimacy in the eyes of a sizeable component of Kenyan citizens and victims. This may explain the lack of support the cases may be experiencing among the victims, witnesses, and the public at large. The alleged ethnic, cultural, and political foundations of the cases, both factual and theoretical, were therefore mired in serious controversy from inception. (…)

On or about September 10, 2013, the prosecutor (Fatou Bensouda) delivered her opening statement in Case No. 1. The statement was illustrated by, among other evidentiary material, videos of the Kalenjin elders in session performing traditional rites. The prosecutor, when laying out her case, failed to give serious consideration to the potential backlash that criminalising aspects of the Kalenjin and Kikuyu culture and traditions might cause. Alleging that Kalenjin initiation rites and protected cultural practices were used to perpetrate, or facilitate the perpetration of, crimes stated in the indictment was a serious misjudgment. The prosecutor came out, in the view of many Africans across the continent, as culturally insensitive. The misjudgment in this regard could potentially persuade some victims, witnesses, and their families to decide against participating in the trial process.

Evidence concerning sensitive aspects of the culture and traditions of victims, witnesses, and the public at large was treated with caution at the Special Court for Sierra Leone and the ICTR. Exposing to the world evidence on the initiation rites of a people and other aspects of their culture considered sacred is seen in most of Africa to be a serious affront to the cultural identity of the people. Alexander Zahar and Goran Sluiter[6] offered the following unpleasant opinion on a finding in the introductory section of the Akayesu judgment at the ICTR:

In the introductory section of the Akayesu judgment, which offers a potted history of Rwanda, we are told that in the early twentieth century the distinction between Hutu and Tutsi was based on lineage rather than ethnicity. We are told not consistently that the demarcation line was blurred (one could move from one status to another).[7]

In footnote 11, the authors described this finding as “simplistic, tendacious, at times incoherent and full of inaccuracies.”[8]fanon

The safeguarding and protection of African cultures and traditions have been at the centre of African consciousness. Frantz Fanon decried the fact that “the indigenous population of Africa is discerned by the west as an indistinct mass.”[9] Senghor wrote that the role of the intellectual has at least two responsibilities in his society: “First, to perceive what is good for his country, while holding intact the traditions of the past. The intellectual is one who must, in order to have a true national consciousness, be aware of his tradition and the sources of his past, a past which is still relevant even as he creates in reaction to it.”[10]

Writing about advocates of African heritage, Wilfred Cartey and Marin Kilson stated:

[T]o validate one’s heritage, to explore one’s culture, to examine thoroughly those institutions which have persisted through centuries is perhaps the first step in a people’s search for independence, in their quest for freedom from foreign domination. Such a validation, such an exploration and examination is resolutely undertaken at the turn of the nineteenth and beginning of twentieth century by four Africans, Casely Hayford, Jomo Kenyatta, James Africanus B. Horton, and Edward Blyden.[11]

This spirit was and is alive in Kenya and most of Africa. It is the driving force of African renaissance and the ongoing struggle for freedom from the pervasive influences of neo-colonialism in the continent. The cultural sensitivities transgressed in these cases in laying out the prosecutor’s case cannot therefore be minimised or wished away.

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Chief Charles Taku was lead counsel at the International Criminal Tribunal for Rwanda from October 1999 to February 2014, the Special Court for Sierra Leone from July 2005 to May 2013 and the International Criminal Court (continuing investigation in the Situation in the Republic of Kenya) from March 2012 to October 2013. Chief Taku and Co-counsel Beth Lyons won an acquittal in the Military II case on appeal at the ICTR. He is the author of “Contextual Foundations of International Criminal Jurisprudence, Authorhouse, 2012.

Notes

[1] See Articles 13(b) and 16 of the ICC Statute.
[2] See Article 17 of the ICC statute.

[3] Judgment of Trial Chamber 1 in Prosecutor v. Thamas Lubanga Dyilo, dated March 14, 2012, Decision on Intermediaries, May 13, 2010.

[4] The Prosecutor, Mr. Ocampo, was also rebuked by the Pre-Trial Chamber in the Situation in Libya due to prejudicial press statements made by him, which infringed on the suspects’ rights to fair trial.

[5] ICTR-00-56-T, The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye, and Innocent Sagahutu. The Trial Chamber entered a conviction and sentenced the accused to various terms of imprisonment. On appeal, co-counsel Beth Lyons and I obtained a reversal of the conviction of Major Francois-Xavier Nzuwonemeye and an acquittal entered in his favour, more than twelve years after he was arrested in France and transferred to the jurisdiction of the ICTR.

[6] Zahar, Alexander and Sluiter, Goran, “Genocide Law: An Education in Sentimentalism: The Problem with the Group”, in International Criminal Law: A Critical Introduction, Oxford University Press, 2008, p. 158.

[7] Supra.

[8] Supra.

[9] Frantz Fanon, The Wretched of the Earth, New York, 1966, The Intellectual Elite in Revolutionary Culture, p. 126.

[10] Wilfred Cartey and Martin Kilson, The Africa Reader: Independent Africa, “The role of the intellectual in independent Africa,” Random House, New York, 1970, p. 124.

[11] Ibid., p 3.

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