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Misconceptions II – Domestic Prosecutions and the International Criminal Court

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This article is part of a debate organized by Oxford Transitional Justice Research (http://www.csls.ox.ac.uk/otjr.php) (OTJR) in collaboration with Moi University (http://www.mu.ac.ke/) (Eldoret) and Pambazuka News (http://pambazuka.org/en/). A selection of essays based on this debate will be published in an edited volume by Fahamu Books. For PDF documents of the debate please go to www.csls.ox.ac.uk/otjr.php (http://www.csls.ox.ac.uk/otjr.php).

This is the second of three essays on misconceptions in debates over transitional justice in Kenya. The first (../2009/08/misconceptions-i-%E2%80%93-the-icc-and-the-truth-justice-and-reconciliation-commission-tjrc/) essay considered complementarity and the Truth, Justice and Reconciliation Commission (TJRC), and argued

that, *if* Kenya's situation was otherwise admissible to the International Criminal Court (ICC), the TJRC in its current form is unlikely to satisfy the Court's complementarity test. This essay considers the discussion on domestic prosecutions in Kenya. It points to some challenges in the proposed relationship between the Imanyara Bill (http://endimpunityinkenya.org/pdf/Special%20Tribunal%20Bill%20by%20Hon.%20Gitobu%20Imanyara.pdf) for the Special Tribunal for Kenya (STK) and the ICC, and argues that the Bill envisions a relationship with the ICC which is both outside the Rome Statute and the current, narrow practice of complementarity. Kenyan victims and anti-impunity advocates depending on the ICC to give the STK teeth are likely to be disappointed unless the Court embraces a broader, more politically-conscious engagement with Kenya. The next essay in the series will make the case for such an engagement.

The Waki Report recommended the STK as the institutional response required to prevent the ICC's involvement in Kenya. That initial coercive tactic failed to catalyse domestic prosecutions when the Kenyan Parliament rejected a constitutional amendment Bill brought by former Justice Minister Martha Karua in February 2009. Subsequently, in what appeared to be "promises as usual"□, the government agreed (http://www.icc-cpi.int/NR/rdonlyres/AA9AC1FD-112F-4582-84D8-AA6C58445D98/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf) by the end of September to give the ICC Office of the Prosecutor (OTP) a summary of progress towards investigations and proceedings conducted "through a special tribunal or other judicial mechanism adopted by the Kenyan Parliament"□. In the event of a failure to institute domestic proceedings, the Kenyan government would refer the situation to the Court in accordance with Article 14 of the Rome Statute.

If the initial failure of the Waki envelope to trigger a domestic judicial response resulted in part from the fact that domestic actors perceived the ICC to be a remote threat, that perception was expected to change when the Waki list of suspects was given to the ICC. The ICC's opening of the Waki envelope became the second (bigger) "stick"□ in the hands of prosecutions advocates. This stick served to frame all political struggles in the language of "impunity"□ v "justice"□, as NGO statements cautioned that Kenya's failure to institute "genuine"□ proceedings that meet "international standards"□, terms whose meanings were assumed to be objectively understood, meant that the ICC would now "step in"□ and "take over"□. Nonetheless, the coercive force of

the Court receiving the list (and the accompanying headline photographs of the Prosecutor scrutinizing the names of suspects on the list) turned out to be overestimated, and the Cabinet resolved to reject the STK, cooperate with the ICC, strengthen the domestic judiciary, and revisit the mandate of the TJRC.

But the direct involvement of the OTP was not without effect. It provided the background against which the use of the apolitical discourse of "genuine" proceedings in accordance with "international best practices" by the Minister of Justice in his push (http://www.nation.co.ke/News/-/1056/631718/-/ulih60/-/index.html) for his vision of the STK within Cabinet meetings resonated. This, combined with the unrelenting international focus on the desirability of domestic trials, contributed to shifting domestic anti-impunity advocates from a perspective which primarily endorsed ICC-only action, to one which included the possibility of robust domestic prosecutions. This is how Imanyara explained his personal change in preference from "The Hague option" to the STK: an independent domestic process obviated the need for an ICC-only position. Accordingly, the Imanyara Bill (of 24 August 2009) proposed a two-tiered structure where the ICC and the STK would operate concurrently in a division of labour: the ICC would prosecute authors of crimes, and a domestic process would take charge of lower perpetrators. When asked about the Bill in an interview (http://www.nation.co.ke/News/politics/-/1064/640268/-/xvmj0mz/-/index.html) with *The Nation*, Imanyara summarised the relationship as follows: "In our revised Bill, we have introduced a clause to leverage on the International Crimes Act, which domesticates the ICC, to have the ICC try the masterminds while the tribunal goes for the small fish." In this innovative partnership, Imanyara concluded, "Serious crimes will just have to go to The Hague." This does not intend to give an historically efficient reading of the process– at the governmental level, a cynic might represent what happened as simply a case where sections of a fractured elite who were politically unhappy about domestic prosecutions for a number of reasons unrelated to "international standards" suddenly found in the ICC and subsequently the STK a justificatory framework for their uncompromising political positions and a possibility of refashioning themselves as reformists. Instead, it sketches one version of how the ICC was eagerly woven into the narrative of what accountability in Kenya must look like, and how it found its way into Imanyara's STK and into civil society discourse (see the Law Society of Kenya here (http://www.nation.co.ke/News/politics/-/1064/647022/-/xvhpg2z/-/index.html) and Nobel Laureate Wangari Maathai here (http://www.nation.co.ke/oped/Opinion/-/440808/653760/-/item/1/-/3csv2y/-/index.html)).

Leaving aside the discussion about the accuracy of the analogies upon which Imanyara's team draw in structuring the STK ("Remember, the Sierra Leone government worked with the United Nations to set up their tribunal. The Rwanda tribunal was set up by a resolution of the UN Security Council. We'll work with the ICC"□), this proposed relationship is captured in two sections of the Bill. Section 3(a)(2) of the Constitutional Amendment Bill provides that the ICC will maintain

concurrent jurisdiction to investigate, indict and prosecute persons bearing the greatest responsibility and the Tribunal may at any stage, make a referral to the International Criminal Court as set out in Article 14 of the Rome Statute… if it deems it expedient….

Further, Section 7(5) of the proposed STK statute outlines the jurisdiction of the Court, and states that the

Tribunal may invoke Article 14 of the Rome Statute if deemed necessary and for avoidance of doubt it is declared that the person or persons on the list submitted to the International Criminal Court by the Chair of the Panel of Eminent African Personalities shall be deemed to have been referred to the International Criminal Court.

While some commentators hail this proposed relationship as one that "cleverly marries the ICC and the tribunal routes to justice"□ and "leaves opponents of justice without any credible arguments against it"□ (see Human Rights Watch (http://www.unhcr.org/refworld/docid/4a9e767e1a.html)), both these sections articulate a relationship with the Court that goes beyond the confines of the Rome Statute. Article 14(1) of the Statute provides that "a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed…."□ The referral provided for by the Statute is from a "State Party"□, not an independent institution such as the STK (not even if the STK is mandated by the Kenyan Parliament). It is such an official state referral that the minutes of the ICC Prosecutor's meeting with the Kenyan Ministers envisioned, in which they stated that Kenya will demonstrate its progress towards ending impunity and "in the alternative…the *Government of Kenya* will refer the situation to the Prosecutor"□ (emphasis added). The head of the Jurisdiction, Complementarity and Cooperation Division of the ICC was also quoted in the *Sunday Nation (http://www.nation.co.ke/News/-/1056/648008/-/um9prf/-/index.html)* stating that the OTP expected to meet with the *government* at the end of September over the referral. It is because of

developments such as these that Adam Branch has labelled (http://blogs.ssrc.org/darfur/2009/04/25/darfur-and-northern-uganda-two-models-of-intervention/) the Court "anti-democratic" because, he argues, in Uganda, the Court served the unilaterally expressed interests of President Museveni against the wishes of the Ugandan people and their Parliament.

Further, contrary to what the Bill suggests, the submission of the Waki list cannot constitute a referral, but rather is a transmission of "communications" to the Prosecutor; the list constitutes one more piece of information to be consulted (alongside the reports from NGOs, etc) in the Prosecutor's determination regarding whether there exists a reasonable basis to open an investigation. These procedures are explained in great detail in the ICC paper, "˜Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications' (http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Annex+to+the++_+Paper+on+some+policy+i
A further challenge to the STK's proposed structure is that it pays little attention to the contingent nature of the ICC's involvement in a situation. Even in instances of sufficient gravity, the determination of whether as a state is "unable" or "unwilling" to conduct "genuine" investigations can only be made by the Court. In Kenya, "gravity" will also have to be determined (see here (http://jurist.law.pitt.edu/forumy/2009/08/kenyas-dangerous-dance-with-impunity.php) for an assessment of the likely challenges in proving gravity in Kenya). Given the nebulous nature of all the definitional terms and the conditions under which they are sufficiently satisfied to give the Prosecutor reasonable basis to proceed, there is an arguable risk that Kenyan civil society and other pro-prosecutions forces that rely on the ICC for the prosecution of those most responsible will be disappointed. In a 2007 policy address (http://www2.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf) in Nuremberg, the Prosecutor clarified the role of the Court:

My duty is to apply the law without political considerations. I will present evidence to the Judges and they will decide on the merits of such evidence. And yet, for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground, to indict or withdraw indictments according to short term political goals… These proposals are not consistent with the Rome Statute.

While what was most relevant at the time of this address was the peace process between the Lord's Resistance Army(LRA) rebels and the government of Uganda (where many advocates argued that the LRA would not sign the peace agreement unless the ICC arrest warrants were deferred, and the ICC Prosecutor reminded them that his mandate did not extend to such "˜political' considerations), the spirit of the assertion remains the same for Kenya: it is the sufficiency of the evidence, not the special political situation of Kenya nor the role scripted for the Court in the STK that will determine whether and how the Prosecutor will proceed. Whereas the legal issues raised above (see more criticism here (http://www.eastandard.net/InsidePage.php?id=1144022389&cid=588)) can be amended in a future version of the Bill, the STK's broader challenge of proposing a relationship outside the current (narrow) practice of complementarity remains. To date, the Court's practice of complementarity has involved attempts to catalyse domestic prosecutions through threatening judicial intervention using the *proprio motu* powers of the Prosecutor; setting standards for "genuine" domestic proceedings whose disregard can trigger a judicial intervention by the Court; and acting as the platform of last resort in cases where the national authorities are unable or unwilling to prosecute (Perrin 2006). Given this practice, what the Imanyara Bill calls "concurrent jurisdiction" requires a much wider interpretation of complementarity.

To be sure, the Bill derives its strength mainly from the proposed changes in domestic power structures that are not addressed in this paper: among other things, it seeks to remove the potential influence of the executive on the judiciary, makes the STK independent of the Kenyan High Court, and requires the resignation of officials who are under investigation. However, critical aspects of its performance – such as the prosecution of the "big fish" – appear to depend on a collaborative relationship with an unpredictable ICC. Given the current practice of complementarity, this proposed structure may be mistaken. This is not to advocate for a particular prosecutorial platform, nor to suggest that prosecutions secure particular social outcomes; such assertions would require an analysis that goes beyond the technical processes that are the focus of this paper. Rather, it is to point out that, if domestic prosecutions through the STK are thought to require external coercive force in order to be successful (in themselves, quite apart from the social impact they may or may not have), the current practices of the Court make it an unpredictable source of such coercive force.

The STK Bill – with the ICC written into it – constitutes another attempt at coercing the Kenyan government to institute domestic proceedings. This time, the OTP (and the ICC by extension) is directly implicated in the Kenyan narrative, and is likely to be affected by both the success and failure of Kenya's anti-impunity project. Consider one likely scenario: if Kenya *fails* to establish "genuine" domestic proceedings by the end of September, it has agreed to refer the situation to the ICC in accordance with Article 14 of the Rome Statute. If the government makes the referral (rather than trying to prove the complementary nature of any measures that may be underway by that point, including the TJRC), paradoxically, such a referral would signal a failure of the Court in catalyzing complementarity, and would allow the government to outsource to the Court the financial and political costs of domestic prosecutions (Burke-White, 2008). Further, if, following such a referral, the Prosecutor analyses the Kenyan evidence, finds no reasonable basis to proceed, and communicates such a finding back to the state, the Prosecutor can find himself in a moral hazard of potentially emboldening domestic perpetrators. Such a determination is also likely to reduce the probability of successful domestic prosecutions. Consequently, the Court could lose further legitimacy in the eyes of victims and civil society (even despite the fact that the Prosecutor can always revise his decision not to proceed in light of new information), who may question, as victims elsewhere have, whether the Court serves their interests (see Odinkalu's argument here (http://www.csls.ox.ac.uk/documents/Odinkal.pdf)). Under these circumstances, and against the background where important constituencies of the Court are increasingly engaged in public demonstrations withdrawals of consent to the institution, the ICC must engage in Kenya in a politically conscious manner. In this spirit, the Imanyara Bill may offer the beginnings of a model for operationalising a broader understanding of complementarity, or perhaps revisiting the ICC's neglected vision of "positive" complementarity. It is such a politically-aware engagement that will be the focus of my third essay.

Further Reading

Burke-White, W. W. (2008). Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice. *Harvard International Law Journal*.

Perrin, B. (2006). Making Sense of Complementarity: The Relationship between the International Criminal Court and National Jurisdictions. *Sri Lanka L. Int'l L., 18*, 301.

Stahn, C. (2005). Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court. *J Int Criminal Justice*, *3*(3), 695-720.

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