FEATURE

Political dynamics in Kenya’s post-electoral violence: Justice without peace or political compromise?

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ABSTRACT

The political upheavals that erupted in Kenya after the release of the 2007–8 election results resulted in the death of approximately 1 200 people, as well as the loss of livestock and other valuable property. While the Kenyan government tried to seek solutions to the crisis, the International Criminal Court (ICC) issued warrants for the arrest of top government officials. For its part, the African Union (AU) accused the ICC of racism by targeting only African leaders, and maintained that such practices undermine the rule of equality before the law set forth in Article 27 of the Rome Statute. The AU is therefore advising African countries, including Kenya, to consider withdrawing from the ICC. Will the ICC’s intervention into the situation in Kenya bring justice and peace to the country, or will it add to the existing injuries affecting not just the country but the region as well? Through a critical analysis of contemporary scholarly discourse, this article unravels the dilemma of the ICC’s intervention and the likely consequences of this action for the people of Kenya and Africa.

KEYWORDS

Post-electoral violence; International Criminal Court; peace; justice; mediation; conflict resolution

Introduction

Kenya is seen as an important nation in the Great Lakes region of Africa, specifically for its rapid business and infrastructure development. Since attaining independence in 1963, the country has worked towards fostering good governance, peace and unity among its citizens. However, this has been hampered by hardship, poverty, low standards of living and other inhibiting factors that have caused frustration among those looking to the government for a better life. As a consequence, the country suffered its worst humanitarian crisis since independence following the 2007 presidential elections that pitted incumbent president Mwai Kibaki against opposition leader Raila Odinga. Upon the release of the election results, the opposition rejected the outcome on the grounds that the result was a product of fraudulent
manipulations masterminded by the ruling party, as they had access to the entire electoral process. Following this allegation, the opposition mounted a protest that devolved into widespread violence and resulted in the deaths of many people.4

Causes and effects of the conflict in Kenya

The causes of the post-electoral violence in Kenya can be assessed in three dimensions.5 Whereas many assumed that the violence was a spontaneous reaction to the election results, the United Nations (UN) Office of the High Commission for Human Rights (OHCHR) deployed a fact-finding mission to uncover the perpetrators of the crimes committed during the post-election violence. In observing the overall situation, the OHCHR mission spokespersons maintained that the violence stemmed from cumulated frustrations generated by the poor living conditions and historical disenfranchisement of the voiceless majority, and was triggered by the anger of opposition supporters at what they conceived as the theft of the presidential election.6 According to the mission’s report, the method of violence used by the perpetrators varied from one area to the other, greatly depending on area-specific dynamics.7

The first pattern of violence, which many observers perceived to be spontaneous, was the burning and looting of shops, houses and commercial outlets in the slums of Nairobi and Kisumu by youth groups.8 The second pattern of violence observed around the Rift Valley was the targeting of communities of small farmers and landholders perceived to be government supporters, with the primary intention of driving them out and keeping them away from the region.9 Substantial evidence compiled by the OHCHR mission suggests that the violence was partially organised by local politicians and/or traditional leaders who sought to settle long-held grievances over land issues, as well as other real and perceived discriminations.10 In a third pattern, violent reprisals against communities of mainly migrant workers perceived to be opposition supporters were reportedly carried out by government supporters, including militia, in the areas of Nakuru, Naivasha and Central Province and in the slums of Nairobi (Kibera and Mathare).11 An estimated 1 200 people (men, women and children) are said to have died as a result of the conflict. A considerable number of internally displaced persons now live in camps, with an equal number seeking refuge with relatives or friends.12

Besides the humanitarian consequences, other areas central to the country’s economy have also been affected. Agricultural activities were hampered as the conflict forced farmers to stay away from their fields, posing a long-term risk to the country’s food security, which was already threatened by drought and soaring fertiliser prices.13 Health and education services were also compromised due to the large-scale displacement of professionals.14

In terms of regional consequences, the violence in Kenya had serious economic ramifications throughout East Africa, particularly for the landlocked countries of the Great Lakes region (Uganda, Rwanda, Burundi, and the eastern parts of the Democratic Republic of the Congo).15 These countries depend upon Kenyan infrastructure links (particularly the port at Mombasa) for import and export routes. Furthermore, significant shortages of gasoline were reported in Uganda as well as Zanzibar following the elections.16 The East African Community, despite having election observers in Kenya, failed to provide solutions to the crisis.

The role of the International Criminal Court (ICC)

In December 2010, the International Criminal Court (ICC) launched an investigation into the situation in Kenya, and the chief prosecutor at the time, Luis Moreno Ocampo, sought a summons
for six suspects, including Uhuru Kenyatta and William Ruto, who had already announced their intentions to run for the 2013 presidential elections. The Pre-Trial Chamber II of the ICC confirmed charges of crimes against humanity against four of the six suspects, including Kenyatta and Ruto, on 23 January 2012. This confirmation activated public pressure against the suspects, to the extent that Francis Muthaura and Kenyatta tabled resignation letters to quit their ministerial positions as the head of civil service/secretary to the cabinet and minister of finance, respectively. These actions were intended to ease the already volatile political atmosphere and avoid a further escalation of violence. However, Kenyatta retained the position of deputy prime minister and both he and Ruto reaffirmed their decisions to run in the 2013 presidential elections.

Following the outcome of the elections in 2013, Kenyatta became the President of the Republic of Kenya, while Ruto was elected Vice President. Even though both suspects emerged victorious after the elections, the ICC went on to indict them. These calls by the ICC strengthened the weakened opposition and, subsequently, the government started facing political obstacles. At a time when the country was looking for a peaceful solution through good governance and leadership to counter its internal challenges, the ICC acted in a manner that undermined the government’s authority. The ICC’s actions thus hampered Kenya’s journey towards peace, and could be interpreted as being driven by self-interest rather than the desire to resolve the conflict.

Kenyatta and his deputy were the first sitting heads of government to stand trial before the ICC since its inception in 2002. Their appearance broke new ground in the history of the ICC and, as a result, the African Union (AU) alleged that the ICC was unfair to African leaders. The AU maintains that the appearance of Kenyatta and Ruto before the ICC undermined the principle of equality set forth in Article 27 of the Rome Statute. On this note, the AU has accused the ICC of racism, asking African countries to reconsider their membership of the court. Following this call from the AU, Kenya determined to formally withdraw from the ICC. In a motion led by Kenyatta and Ruto’s governing jubilee coalition in September 2013, the jubilee parliamentary leader Aden Duale declared:

I am setting the stage to redeem the image of the Republic of Kenya. The trials of Kenyatta, Ruto and Sang will continue – the legal process of disengaging from the ICC takes about a year, and does not technically affect cases that were brought before then.

Kenya’s cooperation with the ICC has come to a stalemate and negatively affected the prosecutors’ ability to try the case effectively. The withdrawal was framed as a necessary consequence of the ICC’s illegitimacy and its alleged victimisation of Ruto and Kenyatta, which laid the legislative framework for Kenya to set aside a guilty verdict had one eventually emerged. However, the ICC lacked the necessary evidence and witnesses to testify against the accused and, consequently, the charges brought against Kenyatta have been dropped. Even though the ideals of the ICC seem to be noble, the pragmatic demands of running a court with an international reach are challenging. Hindered by political considerations, as well as logistical and financial hurdles, the ICC may become a toothless bulldog, like many international organisations.

Restorative justice versus nation building and reconciliation

There is an important debate when the ICC is faced with the competing interests of peace and justice. Most often, the debate is evident in the competing imperatives of retributive and
restorative justice. While retribution typically focuses on prosecuting all those complicit in committing the said international crimes, restorative justice focuses on the victims’ needs, the root causes of the conflict, and the possibility of reintegrating the perpetrators into society and rehabilitating them. In furthering scholarly understanding of these two principles with regard to the ICC, the following questions must be given due consideration. Can both principles be achieved with equal standards by the ICC in the face of a conflict? Should the ICC give prominence to one at the expense of the other? If so, what is the legal basis for such an application by the ICC? In attempting to provide answers to these questions, there is a need to visit the Rome Statute that established the ICC.

The Rome Statute establishes the ICC with the core mandate of bringing an end to the culture of impunity, in line with the responsibility to maintain international peace and security as stipulated under Chapter VII of the UN Charter. However, the statute imposes limits upon the ICC’s jurisdiction in circumstances where its proceedings may jeopardise the very essence of international peace and security. The statute identifies four categories of limitations that can render the ICC’s proceedings inapplicable in the face of a conflict. First, Article 16 requires the UN Security Council (UNSC) to defer ICC proceedings for 12 months if there is sufficient proof that such proceedings will endanger international peace and security. Second, the statute provides for inadmissibility under Article 17 to the extent that the exercise of complementarity gives priority to alternative justice mechanisms in favour of peace, otherwise the ICC’s quest for justice will be rendered inadmissible. The third option available under Article 20 is the ne bis in idem principle. In this scenario, alternative justice mechanisms are considered as already existing remedial measures, in which case such mechanisms block the ICC’s subsequent proceedings, to avoid the clash of applicable remedies. Therefore, the ICC’s proceedings can become futile due to an alternative measure provided by the state in whose territory the crime has been committed. Fourth, the prosecutorial discretion provided for in Article 53 allows the prosecutor to decline further prosecutions if she or he believes that there is no factual basis upon which to proceed and that said prosecution does not fall within the confines of the ICC’s jurisdiction, otherwise further proceedings will be rendered inadmissible in accordance with Article 17.

The above provisions contained in the Rome Statute provide the legal foundation upon which the ICC can be limited in the performance of its legal obligations in favour of alternative measures. Such provisions have, however, not been applied forthwith, as their application is considered to limit the aims and objectives of international criminal justice. Critics argue that the application of such provisions tends to frustrate the very essence of the ICC, namely to target and prosecute the perpetrators of international crimes and thereby bring an end to impunity. Article 22 of the Rome Statute provides for the general principle of criminal law, nullum crimen sine lege, which provides that criminal responsibility shall lie only on she or he who intentionally commits the ingredient act of an offence with the intention of causing the result that completes it. In the context of this article, it can be concluded that the perpetrators of international crimes deserve appropriate punishments from the ICC as a means to counter such acts. Such punishments reflect the theory of retributive justice as the best alternative to advance the interests of the victims. It is obvious that such retributive punishments can only be brought about by a competent court whose jurisdiction covers the criminal offences in question.

Article 75 of the Rome Statute encourages the ICC in the course of its proceedings to establish a foundation for reparation, restoration and rehabilitation. Rationally, alternative conflict resolution mechanisms cannot by implication suppress the functioning of the ICC, as its
proceedings are aimed at achieving similar goals. Allowing alternative measures to suppress the proceedings of the ICC is like granting impunity to top government officials against the very citizens they have sworn to protect. Therefore, is it proper or not to prioritise alternative conflict resolution measures over international criminal justice? The arguments for and against this position represent what constitutes the peace versus justice debate, as reflected in the following sections of this article.

The ICC’s intervention in Kenya and the peace versus justice debate

Arguments in favour of peace

The ICC’s role in Kenya deviates from the noble demands of peace and good governance in favour of justice and, accordingly, the AU has maintained the argument that its decision was irrational given the political pressure under which the country was placed. The ICC was supposed to trade justice for peace in Kenya by deferring the hearings to the future, as prescribed by Article 16 of the Rome Statute. The volume of support for this argument has increased recently for one simple reason: most of the states concerned hold the view that judicial interventions by the ICC complicate conflict resolution efforts. Therefore, deferrals under Article 16 represent a possibility to freeze the ICC’s investigations or prosecutions in exchange for peace and good governance, which would be likely to put an end to the bloodshed.

Legal scholars have argued that although the perpetrators of human rights violations deserve severe punishment through retributive justice, it does not follow automatically and is certainly not justified by morality that such punishments become the prerequisite for restoring peace in the face of turbulence. The morality of retributive justice may well be overwritten by extraneous factors, including but not limited to matters peculiar to the individual and/or state concerned, the morality of social and criminal justice policy, or the fundamental nature of the state’s relationship with its citizens. Because retributive punishments are often perceived as a form of vengeance, imposing such punishments will not engender the culture of human rights and good conscience envisaged by the wider international community.

In the interests of peace and in response to the above contestations, the law places limits upon the operations of the ICC by providing for the deferral of investigations or prosecutions under Article 16 of the Rome Statute under circumstances where the law conflicts with politics; however, this provision has not been given due consideration. The possibility of invoking Article 16 in order to defer an ICC investigation or prosecution has been taken up on a number of occasions. Numerous individuals, organisations and states, including the AU, the Arab League and the People’s Republic of China, have periodically requested the deferral of any prosecution against Sudan’s President Omar al-Bashir. The United States (US) and other Western states were willing to defer the arrest warrant of al-Bashir in exchange for allowing the peaceful separation of South Sudan from the Republic of Sudan. However, such actions proved less successful and the arrest warrant against al-Bashir is still outstanding.

At the AU summit of 23–26 January 2015, the AU restated its decision of non-cooperation with the ICC. The decision clearly indicates that member states’ concerns with the court remained unchanged from 2009 – largely because of the al-Bashir warrant and the failure of the UNSC to accede to the AU’s request for a deferral under Article 16 of the Rome Statute. The AU also encouraged African states to protect their geographical integrity by signing the Malabo Protocol, which empowers the African Court of Human and Peoples’ Rights to exercise criminal jurisdiction over international crimes committed in Africa. In this
way, the AU insisted, Africa would gain independence from the ICC. In a previous summit held in 2010, the former president of Malawi, Joyce Banda, raised concerns about threats to state sovereignty in the context of the al-Bashir case:

To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for for so many years … There is a general concern in Africa that the issuance of a warrant of arrest for … al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union Charter. Maybe there are other ways of addressing this problem.

At the same gathering of African heads of state, the then chairperson of the AU Commission, Jean Ping, was more pointed in his criticisms of the ICC and its prosecutor:

We have to find a way for these entities [the protagonists in Sudan] to work together and not go back to war … This is what we are doing but Ocampo doesn’t care. He just wants to catch Bashir. Let him go and catch him … We are not against the ICC … But we need to examine their manner of operation. There are double standards. There seems to be some bullying against Africa.

The above-mentioned cases present real opportunities where the ICC could have traded justice for peace in the interests of the people. Instead it adopted a stereotypical approach that continues to complicate both national and international efforts aimed at conflict resolution. With regard to the situation in Kenya, the UN had warned that a repetition of the problems could occur after the next elections if the country failed to strengthen its administrative and judicial institutions. It therefore should have been the role of the ICC to support regional efforts geared towards restoring peace in Kenya. However, the ICC created a whole new set of problems by forcing Kenyan leaders to appear before the court. Such actions compromised the legitimacy of the government and subsequently made room for political instability and further escalation of violence. After the 2010 review conference of the ICC, statements made by the AU leadership and the decisions of its member states clearly indicate that despite the hosting of the review conference and high-level commitment of African states parties – as evidenced in their official representation, declarations and pledges – there are still concerns about the ICC among African states.

Africans have expressed disappointment with the ICC in noting that, rather than pursuing justice around the world – including cases in Colombia, Sri Lanka and Iraq – it has focused only on Africa, undermining rather than assisting African efforts to solve its problems. In a BBC broadcast in September 2008, Ping was quoted as complaining that it was ‘unfair’ that all those indicted by the ICC so far were African leaders. While confirming that the AU was not against international criminal justice, he lamented that it seemed that Africa had become the laboratory for testing the new international law system. Mamdani joined Ping, arguing:

Its name notwithstanding, the ICC is rapidly turning into a western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the US doesn’t oppose like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.

However, justice is in the interests of victims, and the victims of these crimes are Africans. To imply that the prosecution is a plot by the West is demeaning to Africans and undermines the commitment to justice we have seen across the continent. It is important therefore not to rely on the numerous criticisms raised against the ICC; rather, political leaders in Africa should be encouraged to eradicate the culture of impunity and build a strong judicial system that will bring to justice the perpetrators of international crimes committed in Africa. In doing this, the
entire continent would enforce the principle of justice and assume judicial power over international crimes committed within the region. So far, stability in Kenya has been sustained by the efforts of chief African mediators. Kofi Annan and a panel of eminent African personalities have emphasised the need for both parties to the Kenyan crisis to reconcile and share a common understanding in the interests of the continent. Their violent actions, they said, constitute a threat not only to Kenyans but also to the entire region of Africa and, as such, they have a duty of care to neighbours who look to them for peace.

**Arguments in favour of justice**

Legal practitioners have also noted that peace and justice are not mutually exclusive; rather, they are mutually reinforcing as they represent two sides of the same coin in the process of conflict resolution. They operate as independent and interdependent factors that influence one another in achieving the successful and sustainable resolution of violent conflicts. This means that the conflict resolution process is a mechanism that encompasses different stakeholders, including but not limited to human rights activists, humanitarian aid workers, peacekeeping operators, negotiators, mediators and even judicial officers. A collective effort is what brings about the successful resolution of a conflict; one therefore cannot exclude any of the aforementioned factions in their capacity as potential stakeholders in the conflict resolution process, or attempt to prioritise any one of the factions to the detriment of others, as their individual efforts are of equal importance in a collective manner to the envisioned process of conflict resolution.

Bassiouni defines international criminal law alongside international politics as a cat and mouse game through which international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), have come into existence. However, he lamented the fact that international politics has always been and continues to be a stumbling block to such tribunals. In light of this debate, he asks a number of questions:

- Did [the ICTY] achieve its objectives? Was it able to free itself from political influence? Did it succeed in grafting a transplanted justice into a society where it was foreign? … I think [the] answers are: (a) Some but not all; (b) Not entirely; and (c) No. The question that I would ask is somewhat different: ‘How close to justice can war crimes courts come in a world still dominated by the realpolitik of force and diplomacy?’ I personally suspect that international criminal courts will never be free of political pressure and that global events will always inhibit their ability to pursue justice in ways that they might prefer. That has been the experience of the ICTY and, to varying degrees, of the international tribunals that have followed in Rwanda, Sierra Leone, and East Timor. However, we can learn lessons from their histories that could help future courts to navigate the political rapids.

- On this note, Bassiouni’s argument ‘without justice’ explains: ‘There can be no lasting peace after bloody and violent conflicts … . Only retributive justice can bring some form of closure to these tragedies … Realpolitik is still stronger than the commitment of government to international criminal justice … ’

The post-electoral violence in Kenya saw a clash of political giants, whose violent actions resulted in the death of approximately 1 200 civilians. It is not fair, therefore, to talk about the perpetrators of the violence (political giants) and ignore the plight of the victims (the affected civilian population). With this in mind, the ICC becomes of paramount importance for achieving sustainable peace in Kenya. The primary role of the ICC is not to second guess the functions of peacekeeping operators in Kenya, but to make sure the perpetrators of crimes committed in the region do not go unpunished, which is part of what constitutes
complementarity as provided for by the Rome Statute.\textsuperscript{79} This is of crucial importance, as the ICC is perceived by the victims of the conflict as the last chance to restore – to a certain extent – what has been lost in the course of the violence.\textsuperscript{80}

It is the responsibility of the ICC to make sure that the perpetrators of international crimes committed in Kenya pay adequate reparation to the victims who have been affected.\textsuperscript{81} It is an established principle in law affirmed by jurisprudence that the failure to apply a convention automatically generates the liability to make adequate reparation and accountability; there is therefore no need for this to be stated in the convention itself.\textsuperscript{82} In the landmark case of Velasquez v. Honduras, the Inter-American Court of Human Rights emphasised that the enforcement of reparations to victims of human rights violations of any kind should not be subject to modification, suspension or limitation at the domestic level.\textsuperscript{83} The court further clarified the general principle regarding reparations as follows: ‘It is a principle of international law, which jurisprudence has considered even a general concept of law that every violation of an international obligation which results in harm created a duty to make adequate reparation.’\textsuperscript{84}

Therefore, reparation is an indispensable necessity that must be applied as a remedy in the interests of the victims in Kenya; the vehicle for enforcing such a mechanism is none other than the ICC.\textsuperscript{85} The fact that war crime investigations can impede the process of peace cannot be denied. However, the investigations also cannot be ignored, as they constitute a significant stratum in the conflict resolution process. If this is the price that must be paid for the conflict to be completely resolved then there is no better option than to do so.\textsuperscript{86}

The only weakness identified in the Kenyan situation is the quality control before cases could be approved for indictments before the ICC. Unlike the ICC, most of the referrals made to the ad hoc tribunals had been subject to a critical psycho-legal analysis by the lawyers of the court so as to determine the quality of their facts.\textsuperscript{87} This quality control seems to be the main reason why cases of indictments before the ad hoc tribunals were always almost successful; had the Kenyan situation been subject to thorough quality control it is likely that the indictments would not have been approved for want of evidence or possibly even for political reasons.\textsuperscript{88}

\textit{Justification for the ICC’s consistent presence in Africa}

Reflecting on the history of the ICC, one can observe that the first state to ratify the Rome Statute was an African state, and all the states that have made declarations for ICC investigations under Article 12(3) are from Africa.\textsuperscript{89} It is also important to note that the first review conference of the ICC in 2010 was held in Kampala.\textsuperscript{90} Another important reason for the ICC’s presence in Africa may be the fact that national judicial systems on the continent are not well structured and therefore not capacitated to target and prosecute war criminals.\textsuperscript{91} Therefore, the ICC is always present in Africa as a last resort to address the plight of victims.\textsuperscript{92}

Whereas the ICC is always present in Africa in the interests of justice, Western countries seem to have established a strong judicial foundation with which to target and prosecute crimes committed in their territories, thereby relieving the ICC of any duty to do so.\textsuperscript{93} Examples that justify this assertion include the European Court of Human Rights and the Inter-American Court of Human Rights, which are both fully operational and active in committing states to the prevention of human rights violations that could amount to international crimes committed in their regions.\textsuperscript{94} The jurisdictions of these courts have, by implication, limited the arm of the ICC in these regions, as the ICC is mandated to intervene and exercise its jurisdiction in situations where national or regional justice systems prove less able or willing to accord justice to the
perpetrators of international crimes. Unfortunately this is not true with reference to Africa. The entire region, including individual states, has proven to be very weak in terms of judicial capacity, which is why the African Court of Human and Peoples’ Rights has not been able to reverse the culture of impunity witnessed on the African continent.

One can therefore argue that the question surrounding the ICC’s presence in Africa lies not with the court as an institution but with the entire region of Africa. So far, five out of eight cases brought before the ICC have been actioned at the request of African states by declarations under Article 12(3) of the Rome Statute. Two of the cases were actioned at the request of the UNSC. The Kenyan situation represents the one instance where the former chief prosecutor of the ICC used pro prio motu powers to investigate the alleged perpetration of international crimes in the country. These statistics lend weight to the opinion that Africa is the party expressing an interest in ICC intervention, rather than the ICC showing a bias towards intervening in Africa.

Although the above arguments seem rational in context, scholars have continued to question the ICC’s selectivity in terms of referrals and prosecutions. It has been argued that the question of whether heads of state can, in their official capacity, invoke immunity as a defence to exonerate themselves from international crimes committed in their respective regions has been nullified by the application of Article 27 of the Rome Statute. By implication, this provision cements the theory of universal jurisdiction, which constitutes an important component within the international criminal justice framework. Consequently, Article 27 confers upon the ICC the judicial capacity to target and prosecute the perpetrators of international crimes, irrespective of their personality or nationality.

The idea of a universal justice system would not have been achieved if the most influential personalities and powerful nations were still determined to stay away from the arm of international criminal justice. Kochler notes that the ICC’s alliance with the UN has compromised the former’s independence. Article 13(b) of the Rome Statute ‘hijacks’ the purported independence of the ICC by conferring upon the UNSC the power to exercise jurisdiction that otherwise would not have existed, considering the commitment from states parties on which the Rome Statute was founded. Therefore, the exercise of such authority conferred upon the UNSC does not only violate the general principles of international law, which maintain that only parties to a treaty are bound by the treaty’s provisions, but also drives the activities of the ICC in tandem with the changing international power politics currently dominated by the permanent members of the UNSC, which possess ‘veto powers’. Consequently, the ICC has been reduced to a phantom of what it would have represented in the real world of international criminal law. So far, the ICC is perceived as a symbolic institution weakened by its lack of jurisdiction over powerful nations in areas torn apart by crisis.

**Conclusion**

The actions of the ICC to achieve justice in Kenya’s post-electoral violence drew significant attention from the international community. Arguments continue that the ICC focuses too much on Africa, as the continent is known for accommodating perpetrators of international crimes who continue to enjoy impunity regardless of the crimes they have committed. Whereas many activists are in support of this school of thought, others have resorted to questioning the operations of the ICC on the basis that its jurisdiction seems limited to targeting African leaders. From its inception in 2002, the ICC has only tried African leaders, a question that raises doubts about its credibility. However, concerns surrounding the ICC’s credibility have been contradicted by
the fact that African states voluntarily signed the founding treaty that established it, and are therefore responsible for their own subjection to the jurisdiction of the court.\textsuperscript{107}

The ICC’s investigation of the Kenyan situation after the post-electoral violence in 2007–8 can therefore be endorsed by virtue of Kenya’s being a party to the Rome Statute.\textsuperscript{108} However, the intervention seems to have come into conflict with the very essence of international peace and security, as detailed in the peace versus justice debate presented in this article. At a time when the government was trying to strengthen national governance and internal security by developing a strategic plan to end the cycle of violent conflict in Kenya, it was the role of the ICC to support the efforts of the government – including the panel of African chief mediators – in achieving this objective.\textsuperscript{109} The ICC was expected to defer the indictment of Kenyan leaders in accordance with Article 16 of the Rome Statute. Unfortunately, it failed to adopt any of the above procedures and consequently – in combination with a lack of evidence and witness testimonies – the ICC proceedings have been brought to a stalemate.\textsuperscript{110} The outcome of the ICC’s proceedings in Kenya could be interpreted as suggesting that its actions were driven by self-interest rather than a desire to resolve the conflict. This one instance can be considered as having justified the assertion that the ICC is primarily targeting African leaders.

This article therefore recommends the following:

- The ICC should respect the principle of the sovereign equality of nations, as provided for under the Charter of the UN, and the principle of equality before the law set forth in Article 27 of the Rome Statute. The jurisdiction of the ICC should extend to cover the broader international landscape.
- The ICC should not rely on emotional sentiments motivated by the political manipulations of the permanent members of the UNSC. Rather, it should operate without selectivity, as stipulated under Article 4(1) of the Rome Statute.
- African states should pledge their support for regional justice by signing the Malabo Protocol, which empowers the African Court of Human and Peoples’ Rights to exercise criminal justice over the perpetrators of international crimes committed in Africa. In this way, the African court can take responsibility for international crimes committed in Africa.
- The Kenyan government should further strengthen national security and capacitate the Truth, Justice and Reconciliation Commission established by the African chief mediators.

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