

My Day at the International Criminal Court

Leigh Brownhill

Background on the Kenya cases at the ICC

I have written previously about the two Kenyan crimes against humanity cases being heard before the International Criminal Court in The Hague - in December 2010, when six suspects were first named in the case, and in January 2012, when the judges confirmed charges against four of the accused. By October 2014, there were only three suspects, charges being dropped again the other three. Two of the remaining defendants have, since the cases against them began in 2010, been elected President and Deputy President of Kenya. William Samoei Ruto (now Deputy President, but accused in his personal capacity) is charged with several counts of crimes against humanity in one case, while Uhuru Mugai Kenyatta (now President, but accused in his personal capacity) is similarly charged in the second case.

Following two recent events I wished to make the two prior articles into a trilogy by presenting this record of and reflection on the ICC's Kenya cases. On September 8, 2014, I spent a full day at the International Criminal Court in The Hague watching the case being tried against William Samoei Ruto and his co-accused, radio announcer Joshua Sang. On October 8, 2014, Uhuru Kenyatta appeared in person at the ICC for the first time since being elected President in 2013. Two days earlier, to avoid all perception that he was taking the sovereignty of Kenya to sit before the court, Mr. Kenyatta stepped down from the Presidency, and formally swore-in William Ruto as Acting President for two days, in order that Mr. Kenyatta could travel to The Hague court as a private citizen and not as a president.

Why were these men in court? The immediate background to the events that led up to the mass crimes committed in Kenya between 28 December 2007 and end of February 2008 began with the December 27, 2007 general election, which led to a hostile dispute between supporters of the incumbent presidential candidate, Mwai Kibaki and contender Raila Odinga. In the 2007 election, Uhuru Kenyatta and William Ruto were running to regain their parliamentary seats. While they were united in KANU in the 2002 election and in the 2005 national referendum on the constitution, Kenyatta and Ruto faced off from opposing party's ranks in 2007. Kenyatta, son of Kenya's first president Jomo Kenyatta, was aligned with the incumbent President Mwai Kibaki; and Ruto, son of peasant commoners, and named for an historic anti-colonial Kalenjin leader, was aligned with then-contender, Raila Amolo Odinga. Odinga has an equally compelling family history, being heir to his late father Jaramogi Oginga Odinga's high statesmanship (Oginga Odinga was Vice President under Jomo Kenyatta from 1964 to 1966) and popular appeal (an originator of the post-Independence opposition parties in Kenya).

As polls closed on election day in December 2007, Raila Odinga had a clear lead; but Kibaki's numbers surged, as results from several of his strongholds came in at the last moment and were added to his tally. To add controversy to the surprise turn-around in poll numbers, Kibaki was hurriedly sworn-in as President, against cries of 'foul' from the opposition. Protest marches set out from slums and in towns in opposition strongholds. Marches turned to chaos, after police shot dead hundreds of protesters across the country. Within days, the country's whole population was confronted with a downward spiral of fear and trauma, while a small minority added insult to injury by taking up arms, from stones to machetes to petrol and matches, and descended into various murderous rampages. Before a truce could be achieved through the intervention of a Kofi Annan-led mediation team, over 1,300 Kenyans had lost their lives; hundreds, probably thousands of women were raped; many men were forcibly circumcised or castrated. More than half a million people fled their homes, some forcibly evicted and since then never able to return even seven years later.

The violence took some ethnic turn, through attacks by Luos and Kalenjin against Kikuyus, or counter-targeting of Luos by Kikuyus. Ethnic divisions were closely, but by no means completely synonymous with party lines, with Kikuyus mainly voting for Kibaki's Party of National Unity (PNU), and Luos and Kelenjins voting mainly for Odinga's Orange Democratic Movement (ODM). In early 2008, then, Kofi Annan struck a mediated settlement which saw Mwai Kibaki remain President, while the post of Prime Minister was created to accommodate Raila Odinga.

During the 2007 election, Kenyatta and Ruto were on opposite sides of the political divide. The ICC Prosecutor's cases conceive of Ruto (a Kalenjin) as ultimately responsible for the uprising of Kalenjins against PNU supporters (mainly Kikuyus); and Uhuru Kenyatta (a Kikuyu) is accused of being behind the organization of retaliatory attacks by Kikuyus on ODM supporters (mainly Luos and Kalenjins). Yet after being named as suspects in 2010, these two supposed deadly enemies in what has become known as the "post-election violence," joined forces and combined their resources, popularity and political savvy to run for the Presidency in the 2013 election. The duo ran against Raila Odinga, who once again sought Kenya's highest elective seat, and who once again lost, in a dramatic but peaceful 2013 election, replete with technical hiccups, delayed vote tallying, a petition to the court challenging Uhuru and Ruto's win, and finally, a declaration by the Supreme Court of the validity of the election results. Where street protests were called in 2007, the courts were used in 2013. A generally left-leaning Chief Justice, Willy Mutunga, added huge legitimacy to the election results, because he appeared to approach the cases with a disinterested judicial objectivity.

The ICC's Office of the Prosecutor began presenting its case against William Ruto in September 2013. In the past year, some 27 witnesses have testified, some appearing in court in person, others by video link from a secure location. The Prosecution appears to be nearing the end of its

presentation of evidence against Ruto and Sang. Meanwhile the second case, against Uhuru Kenyatta, has failed to take off, with the Prosecutor's Office requesting more time to investigate and gather evidence against him, and a status conference on October 8th yet to lead to the judges determination of the course of action the court will follow. Legal scholars outline five possible scenarios: the judges can terminate the case; or pass a verdict of 'not guilty'; or adjourn the case indefinitely (the OTP's preference); or temporarily withdraw charges; or, finally, declare Kenya to be 'non-compliant' and refer the country to the Assembly of State Parties for further consideration. The judges' ruling is expected any day.

As an Africanist, or, if there is such a thing, a 'Kenyanist,' I have taken an interest in the Kenyan ICC cases out of my long-standing focus on struggles over land in that part of the world. My outward-looking research focus on East Africa has also led me to understand my own deep-rooted family history of expropriation, in the Americas and in Europe. It has made me look anew on the land where I was born, more-or-less in the same Massachusetts neighbourhood that has been home to over ten generations of my mother's mother's people – both English and Wampanoag. Equally, my study of agriculture in Kenya has turned me also to the study of the political economy of organic farming in Canada, whence I transplanted myself during graduate school, half a lifetime ago. And it was in the context of my eco-feminist writing and analyses of the political and cultural economies of subsistence farming in Canada and in Kenya, that I was invited to present at a conference on the theme of "Degrowth" in Leipzig, Germany. It was thus that I found myself in Europe in early September 2014, in a position to visit Holland for a few days, and, on September 8th, to attend a day-long session of witness testimony in the first of the two Kenyan cases at International Criminal Court in The Hague.

My day in court

The public gallery opened at 9:15 a.m. and the trial session started at 9:30. Other members of the public in the gallery included a very young English law student-type who left after the morning break; a middle-aged Asian woman who came and went twice, then didn't return; a German retired couple and a number of Kenyans, including Mrs. Rachel Ruto and the Kenyan Ambassador to the Netherlands, Ms. Rose Muchiri.

As the blinds were raised between the visitors' gallery and the court room, and the sound in our headsets turned on, it was a surprise to see how close we were, and how relatively small is the courtroom itself. Compact, one could say, in Dutch architectural style. The proximity and size of the whole scene added a sense of 'nearness.' It was not some vaulted ceilinged marble echo-chamber; this courtroom is modest, wood coloured. The people inside all were dressed in grey, black and white. The monochrome was relieved only by the bit of blue on the ICC's flags and on the bibs of the three judges and red stripes on the ties of the defendants.

The courtroom itself is set in a sort of inverted U. If the judges sit at 12 o'clock, the prosecution is at 3 and the defense at 9. Thus, we look in from the public gallery at 6 o'clock. The glass between court and gallery is sound-proof, but transparent, two-way glass, and as such our demeanour in the gallery is directly observable from the bench. Nothing we do can distract or disrupt the proceedings in any way. I suppose there are some messages from the set up of this open court: that the public has an interest and a part in the administration of justice; that in fact the judges face the public more squarely, more directly, than they face either defense or prosecution. The interests of the public are being deliberated in the courtroom; and the public's interest in peace may come to outweigh counsels' arguments on justice. But I am getting ahead of myself here.

After the blinds opened in the public gallery, we rose to our feet when asked to do so, as the judges entered, and sat after they'd sat down. All eyes were on the judges. Then, just as the court session began with some solemn pronouncements, the door to the public gallery opened, and a group of some 30 men in Mexican military dress uniform entered and filed around the room looking for seats. The soldiers filled nearly half the place. They put on their headsets and whispered and gestured to each other occasionally.

The prosecution's questioning focused on the witness's original statement, and most of this questioning was done in private session. These private sessions are called sometimes at the request of the OTP, sometimes the presiding judge, Chile Eboe-Osunji, sometimes the witness himself. Such sessions lasted from ten to 30 minutes or longer, at which time, we, the public could see but not hear the proceedings. On each occasion when the court went into a private session, one of the court clerks would make a phone call, stand and declare the session closed. Headsets in the public gallery were then disabled. She would make a second phone call, and stand to declare the session open again, whenever judges determined the public session could resume. From the gallery, the visitors got accustomed to putting their headsets back on when they could see the clerk making the second call.

During the public sessions, we could hear Anton Steynberg for the Office of the Prosecutor (OTP) review with the witness the events detailed in his original statement, taken in June or July of 2013. The witness at each stage denied that any of his statement was actually true. He did this with declarations of "I don't recall." "It is a cooked up story." "That was my imagination." And "I only wanted to show that Ruto had incited the Kalenjin against the Kikuyu." Other times, Steynberg's questions would be followed by the witness's agonizing silences and prolonged pauses. Steynberg respectfully allowed the witness to take his time, but on several occasions had to ask, "Witness, have you heard the question?" or "Witness, it has been 30 seconds. Did you understand the question?" To which the witness would reply, "Pardon? Was there a question? Can you repeat it?"

In between all this, the prosecutor reviewed the witness's original allegation that at a harambee in Kapsabet, Ruto had uttered the threatening words that all PNU supporters should "go to hospital," and that if votes were stolen in the election, "Kenya would not remain the same." The witness said he had taken this to mean what had actually happened: the looting, killing and eviction of Kikuyus from the Rift Valley after the Kikuyu incumbent, Mwai Kibaki, was declared and sworn-in as President in the contentious 2007 election.

As this serious topic was being examined, a few of the senior Mexican officers sitting in the front row of the public gallery removed their headsets and rose to leave. All of the rest of the soldiers followed in succession, boots thundering across the floor of the tidily-sized room.

Steynberg pressed the witness to explain why, if he were trying to "fix" Mr. Ruto, he chose words that were, at best, ambiguous? Why did he not chose words, if lies anyway, that more clearly implicated Ruto?

"I wanted to make it sound as if there was code language being used," he said. Following on the theme of coded language, Steyburg asked why the witness had emphasized in his original statement, that Mr. Ruto had used and repeated a particular word (in Kiswahili?) in his public statements, and asked what the word meant. The witness said the word meant "items" or "tools," and that, in fact, it was not coded language and had no connection to anything violent or inciting. When pressed, the witness said he could not explain further, and an exasperated Steynberg saw no reason to continue with this line of questioning.

As matters proceeded in the courtroom, a group of six Asian women and men entered the public gallery, sat through 15 minutes of the session, and then left. It started to feel like a museum exhibit, or an attraction on some kind of ghoulish tourist circuit or "reality" show. It seemed disrespectful, dishonouring the magnitude of the case and the memory of the dead, with the coming and going of seeming spectators.

As for the tone of the courtroom itself, it was subdued. The Presiding Judge, Chile Eboe-Osunji, sat with his hand over his mouth much of the time. It gives the impression that he is studiously and pensively engaged. One can have no doubt that he is a serious man. Whenever he speaks it is with gravitas, a rich baritone voice and a deeply furrowed brow. The other two judges, Olga Herrera Carbuccia and Robert Fremr, were silent all day, frowning relentlessly and occasionally passing notes to Judge Chile.

After lunch, the session began again at 2:30. Steynberg completed his questioning of the witness, then renewed the application for judges to declare P0604 as a hostile witness, whereupon the witness was excused from proceedings until the application was decided. Judge Chile told the witness that he should stand ready to return to questioning. Thus proceedings turned to the prosecutor's argument on the witness's total turn-around and denial of his earlier statement and of the damage he had done to the OTP, by accusing it of knowingly collecting

false testimony. If declared hostile, the OTP is able to cross examine the witness to get to the bottom of why and how he decided to recant.

Victim's counsel concurred. Karim Khan, William Ruto's defense counsel, argued against the application, saying the OTP had already proceeded to interrogate the witness. Joshua Sang's defense Counsel, Caroline Buisman, argued that it should be rejected based on the fact that the very mode of collection of the original statement was not verifiable. Steynberg retorted to this that witnesses had been declared hostile for hundreds of years before the advent of electronic recording devices, and yet testimony had been taken to be verifiable even in the absence of such technologies.

Arguments presented, the judges then turned off their microphones, pulled their chairs closer together and huddled for four minutes. In customarily precise legalese, the Presiding Judge granted the prosecution's application. They then invited the further opinion of victims' counsel and the two defense teams on whether the cross-examination of the witness could begin. None had any objection, with Karim Khan particularly vocal in support of a deeper questioning of the witness.

With that matter settled, the witness was brought back to the courtroom, through his video link, and the prosecutor's cross-examination began. Almost immediately into cross-examination, the court went into private session, where it remained until 4pm, when the judges ended the session for the day, rose from the bench and departed from the courtroom.

The day had been draining. The ghosts of the post-election violence had seemed to be present, in the corners of public gallery and in reflections in the soundproof glass separating us from the courtroom. The sorrows of those violated and bereaved hung like a mist around the cold, imposing building that houses the court. I couldn't help thinking that these ghosts were what I'd always heard about as 'the spirit of the law.' The deception that the witness had engaged in added to the atmosphere of despondency. Even the exasperation of the prosecutor, the frequent and strident objections of the defense, the complicated dilemmas of the judges, and the apparent lack of respect for the proceedings shown by some of the visitors to the public gallery, emphasized the seemingly narrow confines of the matters under this court's jurisdiction, and therefore the selective justice the Kenya cases may be able to dispense.

I felt my small backpack getting heavier as I exited the building to the street and walked the few meters to the bus stop. Looking back towards the court building, I saw the accused enter their vehicles and drive away just as my bus arrived. I sat in the front seat and settled in for the long ride. A few insistent tears fell from my eyes as the bus pulled away from the curb. Nothing could have prepared me for the impact of the court experience. I was heartbroken on several levels: for the victims, for the contradictions at the heart of the international justice system, for the question of the spirit of the law, for the trauma of every Kenyan who lived through those violent days –

not only the 600+ victims who'd qualified to join the case but all Kenyans, victims, perpetrators, by-standers and everyone in between.

But the day had also closed for me a circle: four years earlier, on 9 September 2010, before William Ruto was Deputy President and before he had been named as an accused in the ICC case, I had interviewed him on food security policy due to his place as a former Minister of Agriculture. Here, on 8 September 2014, I met the man again, under vastly different circumstances, but with a surprisingly similar question on my mind. How can all Kenyans get justice, starting with food justice, and including reparations for generations of dispossession and the attendant myriad ills, neigh, crimes, visited upon them?

The next day

On the day after my day in court, I visited the Peace Palace in downtown Den Haag. The Palace houses the Permanent Court of Arbitration, which deals mainly with border and money disputes, but whose judges will give advice on other matters when asked. This court was established to handle cases in which parties wish to reconcile through mediation. The Palace also houses the International Court of Justice, the main legal branch of the United Nations. The Hague is home to several other international courts and tribunals, including the International Criminal Court. This concentration of legal bodies makes Holland the 'law capital' of the world, where the proclaimed aim is 'peace through justice.' The size and grandeur of the setting can inspire awe and hope, but there is also a sense of the grave contradictions at the heart of the international justice system: World War One broke out one year after the Peace Palace was built for the purpose of providing a neutral space in which to settle conflicts peacefully. To whom do international laws apply? Will multi-national corporations ever be charged at the ICC for their crimes against humanity? When will crimes against the environment be recognized also as crimes against humanity; plunder for individuals' profit at the expense of humans and other beings globally?

With the two Kenya cases, it seems to me that the ICC walks a delicate divide between its duty to justice and its responsibility to peace. For whatever the judges decide down the road, the ICC's mandate excludes the possibility of, for instance, ordering reparations paid to every single Kenyan. Yet that may be exacted what is needed to build the conditions for both justice and lasting peace – now reparations not paid by a single accused person to a limited set of eligible victims, but a national dialogue and action plan on citizens' sharing of the 'commonwealth' of their country along with a people-led re-prioritization of government spending. This would be to seek justice by sowing peace, rather than trying to reap peace by sowing justice. The peace envisioned here borrows from the vision of a refugee woman at a Naivasha IDP camp in 2008, who saw peace as 'being able to feed, clothe and educate your children; to have a good house

and good health.’ This peace, with justice, might be realized through a program of social reparations and redistribution, to correct a very sharp inequality index; alongside a suite of legal mechanisms, such as community justice circles, village courts, other court cases against direct perpetrators, and a wider truth and reconciliation process. This would take more effort, and from a wide range of social actors within Kenya. But such a homegrown process could constitute a truer and more generalized form of justice, and draw on East Africa’s brilliant and creative legal minds. And it would make Kenya an example to the world of how recent as well as historical mass dispossessions, injuries and crimes can be rectified and repaired, and conditions created for the flourishing of a self-determined, food self-sufficient, peaceful and sovereign people.