

CASE STUDY 4: KENYA – OUTREACH: TAKING INTERNATIONAL CRIMINAL JUSTICE TO THE PEOPLE³⁶

Background

In the short and turbulent history of the Rome Statute and the ICC, Kenya has proved to be a test-case for a number of the challenges and successes the international criminal law project has encountered.

As already mentioned, Kenya was at the centre of a storm of controversy when it hosted Sudanese President Bashir in August 2010, and then again when, under immense pressure from CSOs, the government cancelled a second planned visit by Bashir. These events were a good illustration of the practical implications for states with legislation domesticating their Rome Statute obligations, and of the role CSOs can play in ensuring adherence to those obligations.

After the Presidential Election held on 27 December 2007, the Kenyan Electoral Commission declared incumbent President Mwai Kibaki the victor. His political opponent, Raila Odinga, rejected the results, accusing the ruling party of electoral fraud. Widespread violence followed, mainly along ethnic lines, as Kibaki is Kikuyu and Odinga Luo. About 1 200 people were killed, and 500 000 people were displaced. Former UN secretary-general Kofi Annan was called in to mediate and a peace deal was reached in which the parties agreed to establish a Commission of Inquiry. The commission, chaired by Judge Philip Waki, released a report and recommended that a domestic tribunal be established to try those responsible in Kenya. The Waki Report was also given to Annan, who was instructed to forward it to the ICC if the Kenyan tribunal was not established.

The ICC opened investigations once it was satisfied that no genuine attempt at local accountability was being undertaken. This ICC investigation into the violence that followed the Kenyan elections in 2007 illustrates the manner in which the ICC Office of the Prosecutor will initiate an investigation into a situation in a state party. The investigations began only after the prosecutor determined that the Kenyan government was unwilling to prosecute the perpetrators domestically.

Today Kenya has to balance domestic and international prosecutions of perpetrators: there is pressure on the director of public prosecutions to institute domestic prosecutions for the post-election violence, in addition there are on-going ICC cases concerned with the same events. As in all situations before the ICC only those deemed to be most responsible have been indicted by the ICC. This means that the burden for prosecuting the “foot soldiers” and the lower ranking officials involved in the post-election violence will have to fall on the domestic mechanisms.

The situation in Kenya has also been the setting for two of the more novel aspects of an ICC prosecution: **outreach and victim participation.**

“Outreach is a process of establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC. Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials.”³⁷

For the first time in international criminal justice the ICC process affords **victims** a number of rights. Ordinarily in criminal cases victims are seen merely as witnesses for the prosecution, but in the ICC they are to be treated as a specific party to the case. Victims are afforded the opportunity to participate in the hearings and are provided with their own legal representative. The ICC is also empowered to grant reparations to the victims following a successful prosecution – this is in line with the goal of restorative justice and is an attempt to assist in rebuilding the victims’ lives. The difficulty faced by the ICC is that many of those affected by the crimes are in rural, inaccessible areas and often have no knowledge of the process or the purpose of the ICC. CSOs have a vital role to play in outreach as the resources of the ICC simply do not extend to providing all countries with outreach officials, and so simply cannot reach all victims and potential participants in the trials.

Organisation: Kituo Cha Sheria

Countries: Kenya

Issues Addressed: Outreach and awareness of the ICC and international criminal justice processes

Kituo Cha Sheria's Outreach

Kituo Cha Sheria is a CSO based in Nairobi that designed a project aimed at facilitating effective community participation in the domestic Truth Justice and Reconciliation Process in Kenya, as well as victims' participation in the ICC process in the wake of the post-election violence. The programme has two broad aims: to educate Kenyans about the processes and how the ICC and international criminal law can create justice for the post-election violence; and to collect victim testimony and assist victims in appearing before the ICC.³⁸

Members of the organisation travel to rural communities that were affected by the 2007/2008 post-election violence in all eight provinces and host forums in public places such as churches and social halls. Here they provide the communities with information about the ICC, its jurisdiction and rules and procedures. They have also developed materials with information and frequently asked questions about the ICC. Providing these communities with information is vital in a country where the ICC process has become politicised and where there has been a general lack of knowledge of and of trust in the international process. There is a need to ensure that knowledge of the ICC is spread accurately and comprehensively.

LESSONS LEARNT

SUCCESSSES

- The organisation has been granted permission by the ICC's Trial Chamber V to file amicus observations, which will help to ensure that the victims' participation is both meaningful and beneficial.
- Kituo has also directly assisted victims in submitting victim participation and reparation application forms to the ICC. The programme has reached 6 000 victims and has submitted over 2 000 applications, some of which have resulted in victims being admitted as participants in the cases. Kituo's involvement has been invaluable as the application process is cumbersome for the victims. The forms require detailed information from the victims and many of the required documents were lost or misplaced when the victims fled during the violence. Additionally, some of the information is sensitive and revisiting it for these applications traumatised the victims.
- The vast number of victims and communities and that Kituo has been able to reach has allowed the spread of knowledge and understanding of ICC processes. This has allowed many victims who would not otherwise have had the requisite knowledge or resources to participate, to do so.

CHALLENGES

- It is clear that the ICC does not have the capacity to conduct thorough and widespread outreach activities and so the burden of this will often fall on CSOs.
- It is often citizens in rural areas who are most in need of outreach activities as they have the least access to more general information. This places financial and logistical burdens on organisations undertaking outreach activity.
- Outreach needs to extend to a wide range of communities with different levels of knowledge and awareness of international criminal law. This can require that a variety of different materials are prepared which can be time consuming and logistically difficult.

BENEFITS OF EFFECTIVE OUTREACH

- Without outreach programmes many victims of international crimes would remain unaware of their rights and the extent to which possibilities of achieving justice exist.
- The ICC has emphasised the need for victim participation in the trials but without outreach many victims remain unaware of this possibility and of how to approach the Court.
- The high volume of negative coverage of the ICC can be counteracted by outreach programmes that can dispel myths about the ICC and provide comprehensive information about the Court and international criminal justice more generally.