

Kenya Goes Hard on ICC

On 26 March 2015 in the annual State of Nation Speech to the Parliament, President Uhuru Maigwa Kenyatta enjoined the Parliament to act on a Resolution made four years ago to cut ties with the International Criminal Court (ICC) following the 2007 post election violence that led to the summon of four Kenyans to the ICC by the then Prosecutor Luis Moreno Ocampo. This position signal that the government of Kenya is determined to be hard on the Court; despite the fact that a month after Mr. Kenyatta had requested the parliament to cut links with the ICC, the Attorney General of Kenya Githu Muigai had assured a symposium on international crimes in Nairobi that his government remained committed to fulfilling its international obligations.

In a report entitled “Report on Progress Made in Fulfilling the International Obligations of the Republic dated March 2015 and covers the period 2013 to 2014”¹; the report demonstrated how the government of Kenya will live up to its international obligations. Despite Mr. Kenyatta’s call by parliament to act on this report, parliament has been silent. The report reads as follows:

The National Executive is aware that the National Assembly of the 10th Parliament approved a resolution “To Suspend Any Links, Cooperation and Assistance” with the ICC. This position was subsequently affirmed by a Resolution of the National Assembly on 5th September, 2013 and by the Senate on 11th September, 2013 respectively. Parliament is urged to take such necessary measures to ensure the actualization of this resolution but to do so in a manner that respects our Constitutional Order.

It is worth noting that on 27 August 2010 Kenya’s new Constitution was promulgated. It incorporated all international treaties signed by Kenya as part of its law. Specifically in its Article 2(6) that reads thus: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution”.

On 24 December 2008, Kenya domesticated the Rome Statute under the International Crimes Act which came into force on January 1, 2009. Section 6 of this Act criminalizes in Kenya

¹ A copy of this report is with the International Justice Monitor. See Generally <http://www.ijmonitor.org/2015/05/kenyan-president-and-attorney-general-make-contradictory-statements-on-icc/> [Access 14 May 2015].

international crimes except the crime of aggression that the ICC has jurisdiction and punishment as per Article 5 of the ICC Statute. Also Part III to X of the Act implements provisions of Part IX of the Rome Statute which set out the scope of cooperation between the ICC and State Parties.

On 5 December 2013 Kenya's National Assembly passed a resolution to quit the ICC and on 10 December of same year the Senate approved the motion for Kenya to withdraw from the Rome Statute. This move was first taken by the National Assembly on 20 December 2010 authorizing the government to repeal the International Crimes Act; the aim is to withdraw from the ICC, it commands that:

Immediate action to have the International Crimes Act repealed and further that the Government takes appropriate action to withdraw from the Rome Statute pursuant to Articles 127, 19, and 17 of the Rome Statute as read together with the principle of complementarity emphasized at paragraph 10 of the preamble to the Rome Statute and further that any criminal investigations or prosecutions arising out of the post-election violence of 2007/2008 be undertaken under the framework of the new Constitution.

Furthermore, Kenya's Treaty Making and Ratification Act No. 45 of 2012 set out the Procedure of withdrawal from the treaty in Section 17 of the Act as follows:

17. (1) Where Kenya wishes withdraw from a treaty; the relevant Cabinet Secretary shall prepare a Cabinet Memorandum;
- (2) The provisions of Sections 4, 5 and 6 shall apply with necessary modification to withdrawal from treaty.

With regard to the above measures taken by Kenya, and according to Githu Muigai the Attorney General of Kenya in a submission to Trial Chamber V(a) in October 15, 2013, the issue he said is that there are several steps to follow after lawmakers passed the anti-ICC resolutions. These steps include tabling a bill, debating it, and passing it. He argues that if Parliament passed the bill, it will then be send to the President for his approval. Muigai contend that it is only at this stage that the government would be required to take further measures on Parliament's resolutions.

Despite her commitment to cooperate with the Court as the Attorney General has persuasively argued, there has been dissatisfaction on the part of the ICC for non – cooperation on the part of Kenya following a decision by Trial Chamber V(b) that found the government had not done as it should to assist the prosecution in its case against Kenyatta.

Kenyatta’s request to Parliament to follow through on its resolutions on the ICC is contradicted elsewhere in the same report he updated Parliament with on the progress Kenya is making in meeting its international obligations. The 279-page report is in two parts. The first is a description and analysis of what Kenya’s international obligations are and how the government has implemented or is implementing them. The second part is a breakdown in table form of the implementation of each agreement or treaty Kenya is a signatory to, challenges doing so, recommendations for future action, and the benefits to Kenya.

In the table concerning the Rome Statute, there is no recommendation to Parliament to implement its resolutions on the ICC. Instead the recommendations made are for “[p]rompt and effective national prosecutions of mass atrocity crimes to make sure the ICC remains a court of last resort as envisaged in the Rome Statute.” The only other recommendation is to “[c]ontinue to support complementarity.”

It is evident from the discussion that Kenya and other countries in the continent no longer hold the ICC to high esteem as they did when they enjoined their support for the creation of the Court. This attitude towards the Court has negative impact to international criminal justice as a whole. The trend one can speculate is that more regional courts will be created to assume the role of the ICC.