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Criminal Courts and Tribunals

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CRIMINAL COURTS AND TRIBUNALS

INTERNATIONAL CRIMINAL COURT

KENYA'S DECISION TO WITHDRAW FROM ROME STATUTE

On September 5, 2013, the Kenyan Parliament supported a proposal from the government to withdraw from the jurisdiction of the International Criminal Court (ICC). The motion "to suspend any links, cooperation and assistance" to the Court comes while Kenyan Deputy President William Ruto is currently on trial in The Hague and Kenyan President Uhuru Kanyatta began trial in November 2013; both are accused of organizing violence that constitutes crimes against humanity following the disputed 2007 election. Although a withdrawal from the jurisdiction of the ICC will not have major procedural implications for the ongoing trials of Kenyatta and Ruto, the withdrawal will have an immense impact on the future relations between the ICC and Kenya, specifically, and Africa, in general.

The ICC investigation in Kenya concerns the period after the disputed elections held on December 27, 2007, during which over 1,200 civilians were killed and another 600,000 displaced. The Kenyan government created a Commission of Inquiry on Post Election Violence but the government refused to create tribunals to hold accountable those responsible for the violence. In 2009, the Commission turned its findings over to the ICC. President Kenyatta and Deputy President Ruto were among the names of officials accused of inciting violence. Kenyatta and Ruto were elected to the government after their ICC indictment, however, placing them among the highest acting state officials currently being tried by the ICC.

The ICC's investigation into the 2007 violence was the first *proprio motu* investigation under Article 15 of the Rome Statute, which provides for an independently initiated investigation without prior referral from a member state or the United Nations Security Council. *Proprio motu* under Article 15 elicited significant opposition during the drafting of the Rome Statute and opponents of Article

15 expressed concerns that the Prosecutor would use the *Proprio motu* to target high-profile leaders in politically motivated moves or be beholden to powerful states or groups attempting to utilize the Court in "political machinations," leading to the unwanted politicization of the ICC.

Kenya ratified the Rome Statute on March 15, 2005. Withdrawal from the Rome Statute is allowed pursuant to Article 127. Withdrawal would not have any legal effect on the current trials of Kenyatta and Ruto, however, as the withdrawal would not be finalized for at least a year. Article 27 provides that a state's "withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate." The cooperation requirements of states are enumerated in Articles 86 and 88 of the Rome Statute, and additionally in the ICC's Rules of Procedure and Evidence. Member states are obligated to assist in the arrest and surrender of individuals and, importantly, the collection of evidence. Kenya or any other withdrawing nation therefore would be required to act as a full state party for any investigation opened prior to withdrawal. Nonetheless, Kenya's decision represents a shift in African public opinion, and many fear that it will limit the Court's ability to proceed with ongoing investigations and cases.

In response to the trials of Kenyatta and Ruto, many Kenyan politicians have complained that the Court only targets Africans. Indeed, all eighteen cases that the ICC has investigated thus far are against African leaders, causing a general distaste for the Court across the continent. The African Union supports Kenya's decision to withdraw, and discussions of organizing a mass departure of African nations from the Rome Statute are being held. A proposal for a mass withdrawal of all 34 African members could be presented at the AU summit in January, or perhaps even before the end of the year, following the expected criticism of the Court during the ongoing UN General Assembly meetings in New York. If a proposal for mass

withdrawal is presented to the AU or if other African countries follow Kenya's lead, the jurisdiction of the Court would be further limited in a continent with few alternative means of justice in cases of human rights abuses.

In the current case, Kenyatta and Ruto have formally pledged cooperation with the ICC, but many see the recent Parliamentary vote as another example of Kenya's disinclination to truly cooperate with the Court. The unwillingness to turn over official documents to the Court or facilitate the evidence collection is part of the Kenyan government's "unprecedented interference," thereby undermining the overtures of cooperation. The ICC "depends on the public support of its member countries and other interested parties to create a climate conducive to its work." With growing discontent in many African countries, and the possibility of a mass withdrawal from state parties, the work of the Court could be obstructed and hindered, not only in the Kenyan cases, but in any future ICC investigations in Africa.

INTERNATIONALIZED CRIMINAL TRIBUNALS

ECCC CLOSING REMARKS IN CASE 002/01

Closing arguments in Case 002/01 in the Extraordinary Chambers in the Courts of Cambodia (ECCC) concluded on October 31, 2013. Case 002 defendants Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith are charged with crimes against humanity, grave breaches of the Geneva Convention of 1949, and genocide under the regime of Pol Pot. The Prosecution alleges that each of the defendants committed crimes against humanity through acts or omissions (via a joint criminal enterprise) by having planned, instigated, ordered, or aided and abetted, or being responsible by virtue of "superior responsibility" crimes between April 17, 1975 and January 6, 1979. The Court terminated proceedings against Ieng Sary on March 14, 2013 following his death and found Ieng Thirith unfit for trial due to

severe dementia, thereafter releasing her from provisional detention on September 16, 2012.

On September 22, 2011, the Trial Chamber issued a severance order that split Case 002 into three mini cases “in the interests of justice,” pursuant to the ECCC’s Internal Rule 89*ter*. The Supreme Court Chamber, however, reversed the severance order on the prosecution’s appeal, finding that the severance of the trial unfairly limited the scope of Case 002/01 as well as the amount of admissible relevant evidence. As Case 002/01 had already significantly progressed by the time of the reversal, the SCC ordered the TCC to reassess the severance decision and to thereby consider an expansion of Case 002/01 to include all of the issues and accusations addressed in the Closing Order, including the additional allegations of religious persecutions, forced marriage, forced labor at security centers and worksites, and genocide.

Despite this order, on April 26, 2013, the Trial Chamber confirmed the severance of the trial, noting the lack of agreement between the parties regarding the possible expansion of the case. The Supreme Court Chamber’s order and a tentative schedule for the completion of Case 002 wherein Cases 002/02 and 002/03 would proceed in order with the opening of the subsequent case beginning immediately after sentencing of the prior case. The Trial Chamber’s

tentative schedule plans for a verdict for Case 002/01 delivered in the first quarter of 2014 with subsequent appeals foreseeable until late 2015, at which time the Trial Chamber would commence Case 002/02. Assuming continued funding for the ECCC, and the continued health of the remaining defendants, the Trial Chamber envisioned final appeals in Case 002/02 lasting until 2016-2017 and a final conclusion of Case 002/03 in approximately 2020-2021.

As set out in Article 5 of the Law of the Establishment of the Extraordinary Chambers (the Statute), Case 002/01 involves crimes related to the forced transfer of the population of Phnom Penh beginning on April 17, 1975, the forced transfer of Cambodians between 1975 and 1977, and crimes against humanity, including crimes committed at the Tuol Po Chrey execution site. After the conclusion of Case 002/01, Case 002/02 will focus on policies and activities surrounding the genocide and execution sites of the Cham and Vietnamese minorities pursuant to Article 4 of the Law. Case 002/03 will address *inter alia* cooperatives and worksites, the treatment of Buddhists, and forced marriage.

In the closing remarks of Case 002/01, the prosecution reviewed the relevant evidence linking the defendants to the forced transfers and portrayed the defendants as extremists who had not reformed

or repented since the atrocities of the 1970’s. The defense, on the other hand, attacked the foundation of the case based on a dearth of substantiated facts and questioned the legitimacy of the Court itself. Following the end of the concluding remarks, the prosecution requested the maximum sentence of life in prison while the defense demanded acquittal.

After the conclusion of the closing remarks, the Trial Chamber will focus on Article 39 of the Statute, which stipulates that those found guilty of any of the aforementioned crimes shall be sentenced to a prison term from five years to life imprisonment. Due to the complexity of the case and the amount of evidence presented, the Trial Chamber did not give a date for the announcement of a verdict, but many believe that the verdict will come in the first quarter of 2014. The subsequent mini cases, though connected with Case 002/01, will all have independent verdicts and sentences delivered. Regardless of the verdict in Case 002/01, the Trial Chamber will prepare for Case 002/02. Trial Chamber President Nil Nonn announced, however, that the Trial held a trial management meeting from December 11 to 13, 2013 to prepare for and reassess the remaining portions of Case 002.

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