SPECIAL COURT FOR SIERRA LEONE
OUTREACH AND PUBLIC AFFAIRS OFFICE

The newly built Thomas Peyton building at the Sierra Leone Grammar School is being formally opened today.

PRESS CLIPPINGS

Enclosed are clippings of local and international press on the Special Court and related issues obtained by the Outreach and Public Affairs Office
as at:
Monday, 25 March 2013

Press clips are produced Monday through Friday.
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Martin Royston-Wright
Ext 7217

For di People
Monday, 25 March 2013

Appeals Chamber Upholds Contempt Convictions Against Former AFRC Leaders

A THREE-judge panel of the Appeals Chamber has rejected the appeals by three former AFRC leaders convicted in September 2012 of contempt for interference with Prosecution witnesses. The appeal was heard by Justice Emmanuel Ayoola (presiding), Justice Renate Winter, and Justice Jon M. Kamanda.

Ibrahim Bazzy Kamara and Santigie Borbor Kanu (aka: "Five-Five") each appealed against their convictions and sentences of one year and fifty weeks for "knowingly and willfully interfering with the administration of justice" in violation of Rule 77(A) (ii) and (iv) of the Rules of Procedure and Evidence, by interfering with prosecution witnesses who had testified against them in their trial for war crimes and crimes against humanity. Kamara was convicted on two counts of otherwise interfering with a prosecution witness, and for knowingly disclosing the identity of a protected witness. Kanu was convicted on two counts of offering a bribe to a witness and otherwise interfering with a witness.

Samuel Kargbo (aka: "Sammy Ragga"), who pleaded guilty to two counts at his initial appearance in July 2011, appealed what he alleged was the trial judge's failure to order protective measures for him. A fourth defendant, Hassan Papa Bangura (aka: "Bombblast"), did not file a proper N

In the summary of the decision read out in court by Presiding Judge Justice Emmanuel Ayoola, the Chamber found that many of Kamara and Kanu's grounds of appeal failed to comply with the Special Court's Practice Direction for Certain Appeals, noting "that both their form and contents did not satisfy the standard of review for appeals from judgements.

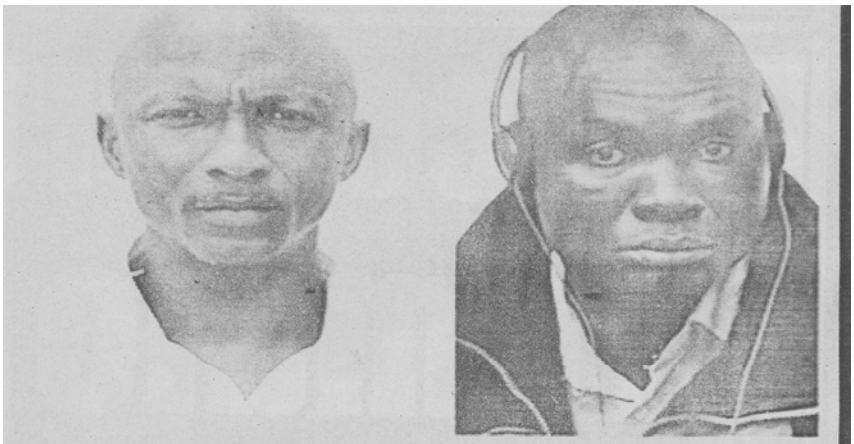
The Judges dismissed Kamara's appeal as "incompetent" on the grounds that his Notice of Appeal failed to stipulate "the grounds on which the appeal was made" (Article I.1 of the Practice Direction), or "clearly delineate which filing or part of the filing constitutes grounds and which part of the filing constitutes submissions based on those grounds" (Article I.2).

"The Appeals Chamber is unable to overlook the fundamental flaw in the Notice of Appeal brought about by the manifest non-compliance with Rule 106(A) and the 2004 Practice Direction," Justice Ayoola said.

The Judges also dismissed Kanu's 27 grounds of appeal against conviction and three grounds of appeal against sentence, finding that "several, if not all, of his grounds of appeal suffer from similar deficiencies to those outlined in Kanu's grounds of appeal.

The Judges dismissed Kargbo's appeal as "incompetent" on the grounds that it was not an appeal either against conviction or against sentence, and thus did not fall with the appellate jurisdiction of Appeals Chamber.

"For the foregoing reasons, the Appeals Chamber…dismisses all the grounds advanced by Defence of Samuel Kargbo, Brima Bazzy Kamara and Santigie Borbor Kanu, affirms the sentences imposed on Samuel Kargbo, Brima Bazzy Kamara and Santigie Borbor Kanu by the Single Judge, and orders that the Judgement be enforced immediately pursuant to Rule 102 of the Rules," Justice Ayoola said



Santigie Borbor Kanu

Samuel Kargbo At sentencing judgement

The Big News
Monday, 25 March 2013

War crimes tribunal targets George W. Bush

This month is the 10th anniversary of the initiation of the Iraqi war, which ended in December 2011.

With the war slowly fading behind us and new threats being posed, former President George W. Bush and former Prime Minister Tony Blair, along with other high-ranking politicians, are wanted for war crimes involved with the Iraqi invasion and the Iraqi war.

The Kuala Lumpur War Crimes Tribunal Foundation (KLFCW), a non-governmental organization, was established in Malaysia in 2007 to prosecute individuals involved in war crimes such as human rights abuse, unjust armed conflict and genocide. The purpose of these international war crime tribunals is to provide an open forum to hold hearings and carry out the legal system for international crimes. The KLFCW aims to charge and prosecute the political leaders from a decade ago for their actions, the first charge being for torture, the second being for war crimes.

The chatter about wanting individuals such as Blair, Bush, former Vice President Dick Cheney and former Secretary of Defense Donald Rumsfeld to be formally charged with war crimes is not new, but the most recent charges that have been made within the International Criminal Court for “acts of aggression,” which would be what Bush is charged with, do not take effect until 2017.

Along with the “acts of aggression” charge against him, people involved in having Bush held accountable for his actions also wish to see him charged for war crimes and crimes against humanity, along with violations against the U.S. and United Nations international laws.

When it comes to war crimes, the political leaders are the individuals that will be prosecuted for their decisions. According to philosopher Helen Frowe, the combatants are just pawns meant to carry out the political leader’s orders; combatants are not responsible for what the politicians do. Both sets of combatants believe they are fighting for the just side, believing their cause is the right cause to be fighting for.

Since the Holocaust and other such human rights disasters in the years since, there is a need for human rights to be paid attention to and something done about the countries that violate human rights. But while being more aware of human rights and knowing that every human in the world is entitled to what the Declaration of Human Rights states, human rights threaten a country’s autonomy and sovereignty.

To make sure crimes against human rights are not being committed, the UN safeguards these rights even though countries feel threatened by such a power above them, rather than below them. In this context, the UN and human rights trump government, which states do not agree with. Along with feeling threatened by the UN, the International Criminal Court was created for the concerns of human rights as a place to prosecute war criminals, even though since its creation, the ICC has yet to do much with their name.

Will Bush, Blair and all of the other head politicians from a decade ago wind up in court with war crime charges against them? It seems doubtful with how these courts work, but the issue of war crimes needs to be tackled and solved as a global issue. If it is not these individuals that eventually go to court for their actions, plan on seeing President Barack Obama to be wanted for the war crimes he has committed in the next decade or so.

In today’s global world, with the war, the armed conflicts and the uprisings, a want for war crime charges will start appearing for those who have had a hand in global affairs. It takes time for these cases to work their way forward and into the spotlight— trials for a woman involved in the genocide in Rwanda is just now facing the ICC in court sometime within the past month, and the genocide happened nearly two decades ago.

Aljazeera
Monday, 25 March 2013

The enforcement gap: How the International Criminal Court failed in Darfur

On March 4, 2009, the International Criminal Court (ICC) issued an arrest warrant against Omar al-Bashir, the President of Sudan, for crimes against humanity and war crimes allegedly committed in Darfur. Four years later, Bashir remains at large amid concerns that the ICC's lack of enforcement mechanisms coupled with a largely uncooperative international community have hamstrung the case.

Issues of enforcement have plagued the ICC since it first opened its doors in July 2002. Until now, attempts at rectifying the problem have either been woefully inadequate or politically troubling. Unless it develops a set of robust mechanisms to address this enforcement gap, the ICC stands little hope of achieving its mission to end impunity for the worst international crimes.

Although support for Bashir may currently be waning among some of the Arab states, public consensus in favour of his handover has yet to materialise within the Middle East and North Africa region [AP]

In the Bashir case, problems began at the very start, with the Security Council's decision to refer the Darfur situation to the ICC. In September 2004, the UN Security Council ordered a commission to investigate and report on the situation in Sudan's Darfur region. After receiving the commission's report, the Security Council passed Resolution 1593 on March 31, 2005, giving the ICC jurisdiction to investigate and prosecute alleged crimes committed in the region. Concluding that the statutory criteria for referral were satisfied, the Office of the Prosecutor opened a formal investigation into the case on June 6, 2005.

On April 27, 2007, the ICC issued two indictments for crimes against humanity and war crimes against then-Minister Ahmed Muhammad Harun and former Janjaweed militia leader Ali Muhammad Al Abd-Al-Rahman. In addition to the March 2009 indictment, on July 12, 2010, the ICC issued another indictment against Bashir for genocide.

On March 1, 2012, the ICC issued an arrest warrant for crimes against humanity and war crimes against Sudan's Minister of National Defense, Abdel Raheem Muhammad Hussein. The prosecutor also brought petitions to indict three high-profile members of the Darfur opposition, Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.

Lack of cooperation

In the years since the indictments issued, there has been limited progress in the case, with all defendants, except the three opposition members, still at large. Despite its ostensible obligation to comply with the referral, Sudan's rejection of Resolution 1593 and general unwillingness to cooperate with the ICC case are unsurprising.

Darfur remains challenge for UN peacekeepers

On the one hand, domestic politics inside Sudan have made a hand over highly unlikely - in the years since the referral was made, Bashir, Harun and Hussein have consistently maintained important positions within the Sudanese government. On the other hand, international politics has made it virtually inevitable that Sudan would both see and present itself to the world as a victim of Western hypocrisy and hegemony.

The ICC referral came at a time when the global "war on terror" was at its apex, with very evident and devastating consequences on civilian populations. Against this backdrop, Sudan had ample reasons to cry foul. While Western governments, like the United States, had the political weight to sidestep criminal accountability, Sudan saw itself as selectively and unfairly targeted for international opprobrium by virtue of its weakness and lack of influence.

Sudan's lack of cooperation represented one among many compliance challenges facing the ICC's work in Darfur. Other states and inter-governmental organisations (including the UN) have also been unwilling to enforce the ICC's actions.

Enforcement is critical to the ICC's work; without it, the ICC's decisions are worth little more than the paper on which they are written. Lacking an associated police force or other enforcement arm, the ICC primarily depends on two elements to ensure its decisions are implemented.

First, under the Rome Statute, all State Parties are obligated to take necessary measures to enforce the ICC's indictments and otherwise support its work. Through these mechanisms, the ICC is able, in principle, to leverage the resources of member states to ensure its decisions are respected. Where a State Party fails to follow through on its obligations to the ICC, the ICC may make a finding to that effect and refer the matter to the Assembly of States Parties, its governing body.

Second, support for the ICC depends in large part on its image as a trusted and reputable international institution. For the ICC, creating and maintaining this image largely depends on the legal soundness and objectivity of its work. Whether to encourage adoption of the Rome Statute or ensure State Parties adhere to its provisions, building normative support around the globe increases the reputational risks facing countries that eschew compliance with the ICC's directives.

In the Darfur case, the ICC's inability to realise either of these objectives has resulted in toothless prosecutions. Much of this failure stems from continuing problems created by perceptions about Resolution 1593's "political" nature.

While support for the ICC's work may have been strong in its early days, as the prospects increased for a negotiated settlement to the conflict, some Western states appeared to prioritise political and diplomatic processes over judicial prosecutions. As a result, theses governments have been unwilling to push for enforcement of outstanding ICC arrest warrants.

The Security Council has similarly made little effort to pressure UN member states to enforce the ICC's indictments. In fact, in June 2012, the UN provided a helicopter ride to Ahmed Haroun, who had since become governor of the Sudanese state of South Kordofan, to facilitate his attendance at a meeting to resolve a local conflict within his governorate.

Obviously, this lack of support for the ICC's work is more a result of political expediency than concern with Resolution 1593's politicisation. Nevertheless, because of widespread perceptions about the referral's political-nature, the normative soundness of the ICC's work has been weak. This, in turn, has allowed Western actors to suit their own interests and turn a blind eye to the ICC's outstanding arrest warrants.

Enforcement regime

A similar dynamic has been at play among a number of Arab governments as well as the African Union (AU), all of which have opposed the Darfur case. This hostility has largely focused on the ICC's indictment of Bashir, and likely reflects a generalised fear that similar action may be taken against leaders in other regional countries. Again, normative controversies surrounding the Darfur case and suspicions about the political objectives behind the Security Council referral have given this hostility a stronger footing.

In March 2009, the Arab League issued a statement expressing its "solidarity with Sudan and reject[ion] of the ICC decision [against Bashir]". Since his indictment, Bashir has made a number of official visits to Arab countries, receiving guarantees against arrest during his stays. Although support for Bashir may currently be waning among some of these states, public consensus in favour of his handover has yet to materialise within the Middle East and North Africa region.

In July 2009, at its 13th Summit of Heads of States, the AU passed a resolution prohibiting its member countries from cooperating with the ICC arrest warrant against Bashir. In July 2010, the AU reiterated this decision. In early June 2012, the organisation again called upon the Court to drop its case against the Sudanese leader.

In contrast to the Arab League, a significant number of AU member countries are also State Parties to the Rome Statute and, as such, are subject to the decisions of both organisations. As some scholars have suggested, there is no clear way of legally reconciling these competing obligations. With many of these countries either unwilling or uninterested in cooperating with the ICC, it is left with little recourse.

To address these and other persistent problems of enforcement, the ICC has a number of options, of varying feasibility. It could, for instance, establish a police force to execute upon its arrest warrants, among other responsibilities. Such a force is, however, unlikely to materialise, given the high financial cost and logistical complexities associated with such an endeavour.

Alternatively, the ICC could take steps to increase the normative force of its work by addressing claims about political bias. Among various possible solutions, the ICC could create a mechanism for early-stage judicial review of Security Council referrals to consider issues of jurisdictional propriety. This process would subject referrals to legal scrutiny, impose some oversight over the Security Council's actions and reassert the ICC's independence as a judicial institution.

While a mechanism like this may have important long-term effects, transforming normative perceptions about the ICC's work will take time. It may also do little to alter the behaviour of states determined to act in their own self-interest. Strengthening the ICC's enforcement regime is both a long-term and short-term problem requiring normative and punitive solutions.

This brings us back to the ICC's reliance on the coercive power of its member states and the Assembly of States Parties. Historically, efforts made by these groups to bring recalcitrant countries into line have been largely limited to diplomatic gestures. They have also generally been unsuccessful.

There may, however, be a way of reorienting these efforts to more effectively resolve issues of non-compliance and potentially prevent their occurrence in the first instance.

Legally enforcing the Rome Statute against State Parties is the place to start. As a treaty, the Statute can be enforced against signatory states, which have obligated themselves to adhere to its provisions regardless of inconvenience or immediate self-interest.

The International Court of Justice (ICJ) serves as a possible forum for such enforcement proceedings. The ICJ is the principal judicial organ of the United Nations with jurisdiction to hear all cases, which "[state] parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force".

In order for a state to bring a case, it must have acceded to the ICJ Statute or be a member of the UN. Unless it has already accepted the ICJ's jurisdiction as compulsory ipso facto under Article 36, the offending or defendant state must also accept the ICJ's jurisdiction over the particular matter. Among the types of cases that may be heard are those involving questions of fact which, "if established, would constitute a breach of an international obligation".

Any judgments rendered by the ICJ are binding only upon the parties to the action. Nonetheless, failure to abide by its decisions comes at a high price. Under the UN Charter, "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

Criminal accountability

In its role as an advisory body, the ICJ may also consider matters brought before it by international organisations. It may issue "advisory opinion[s] on any legal questions at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request". Although advisory opinions generally have no binding effect, they "carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and have peace-keeping virtues".

Under this framework, ICC member states could bring cases before the ICJ against recalcitrant member countries. Arguably, State Parties are under an obligation to bring such enforcement actions pursuant to their responsibilities under the Statute to provide any "assistance [to the ICC] which is not prohibited by the law of the requested States, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".

"Maintaining ICC's reputable image largely depends on the legal soundness and objectivity of its work."

The Assembly of States Parties (or even the ICC's Office of the Prosecutor) could also bring requests for advisory opinions to the ICJ. For instance, in the case of Omar al-Bashir, an advisory request could be brought to resolve the competing obligations on African states subject to directives from both the AU and ICC.

Admittedly, the ICJ cannot be a panacea for the ICC's enforcement problems. It is an institution of limited resources, with a less than spectacular track record for rendering decisions in a timely manner. There are also a number of other not insignificant issues raised by potential ICJ proceedings.

Whether brought by individual states or the Assembly of States Parties, litigating before the ICC would obviously entail financial expenditures. These costs could theoretically be defrayed by creating a fund at the ICC to support enforcement proceedings, although the Assembly of States Parties may be unwilling to set aside the money.

Of course, State Parties may be as unlikely to bring enforcement actions to the ICJ as some ICC member states are to comply with the ICC's decisions. Where required, defendant states may also refuse to agree to the ICJ's jurisdiction, although the Rome Statute could be amended to mandate such jurisdiction over enforcement actions.

In the case of advisory opinions, it remains unclear whether subdivisions of the ICC would be able to appear before the ICJ in all cases. To bring a request for an advisory opinion, an international organisation must be an organ or specialised agency of the UN, or otherwise authorised by the Security Council or General Assembly. The ICC is wholly independent of the UN and, since Security Council authorisation may be hard to secure, would likely be required to obtain General Assembly approval before a request could be brought to the ICJ.

These questions, however challenging, are worth exploring. The ICJ is an institution whose decisions are accorded a great deal of respect by the international community, a fact demonstrated by the relatively high-rates of compliance with its decisions. In addition to subjecting non-compliant states to punitive measure, ICJ actions may also strengthen conformity with the ICC's directives, and promote the ICC's substantive norms on criminal accountability.

Leveraging the ICJ's work to help remedy the woeful compliance issues faced by the ICC is, as such, an important strategy to be considered. Ending impunity for the worst international crimes demands at least this much.

Maryam Jamshidi is an international lawyer and editor-in-chief of Muftah.org, a digital magazine on the Middle East and North Africa. She holds a JD degree from the University of Pennsylvania Law School and a Master's degree in Political Theory from the London School of Economics. Maryam recently authored a chapter on "The International Criminal Court & the Arab Spring: Overcoming Bias, Increasing Engagement," which will be published in the fall of 2013 in the edited volume Human Rights, Human Security, and National Security.

The New Times
Saturday, 23 March 2013

Rwanda: Compromise Key in Transfer of Genocide Suspects - Attorney General

By James Karuhanga

In negotiations to bring Genocide trials to Rwanda, government faced difficulties and thus had to, where necessary, give up on smaller matters so as to get out of a stalemate, Justice Minister and Attorney General Tharcisse Karugarama told lawmakers on Wednesday.

He was tabling the draft organic law repealing the 2007 law on transfer of cases to Rwanda from the International Criminal Tribunal for Rwanda (ICTR), other states or international criminal tribunals, and another modifying the 2007 organic law on abolition of the death penalty.

Karugarama said: "When you are negotiating, there are things you forego so as to obtain other bigger things. Those who play the game of chess know the pieces called pawns. When you let your opponent take two meaningless pawns and you take the queen, you are at an advantage," he said.

"We made compromises so they can give us these people [Genocide suspects] from foreign jurisdictions since no country would give them to us when there was a death penalty," Karugarama added.

The Chamber of Deputies unanimously supported the basis for repealing the Bills, but MPs Gabriel Semasaka and Jean Damascene Murara queried what they said appeared to be acts by government "to please foreigners" as well as double standards in dealing with Genocide suspects.

Article 2 of the Bill on abolition of the death penalty says a convicted person in a case transferred to Rwanda from the ICTR or from other jurisdictions shall not be liable to life imprisonment with special provisions, while one convicted from Rwandan courts could get life imprisonment.

Murara said: "If people who committed the same crime get dissimilar punishments, is that justice? It seems as if we are modifying many things to please foreigners, yet Rwanda is a sovereign country."

The minister acknowledged the 'legal contradictions,' but said it is how the law has been; only that it is just being modified to conform to the Constitution.

New Bills' underlying principle

The Bill dealing with the transfer of cases to Rwanda is being repealed to conform to a constitutional obligation that requires it to be made an ordinary law.

Articles 93 and 202 of the Constitution stipulate that Organic Laws are only those envisaged by the Constitution and those not provided for shall be converted into Ordinary Laws within a period not exceeding three years from June 17, 2010.

Concerning the draft organic law modifying the 2007 law on abolition of the death penalty, Karugarama said a constitutional obligation is again being respected.

"When we abolished the death penalty, we introduced a replacement which is either life imprisonment with special provisions, or life imprisonment, simple. That is why we were modifying it so that we conform to the provisions of the Constitution," Karugarama said.

The change assures ICTR and other international jurisdictions that suspects transferred to Rwanda shall not be sentenced to "life imprisonment with special provision."

Institute for War and Peace Reporting
Friday, 22 March 2013

ICC Under Fire over Investigations

Dropping of charges against Kenyan suspect raises serious questions about role of witnesses.

By Simon Jennings

An eventful week for the International Criminal Court, ICC, saw prosecutors drop charges against a former senior Kenyan official just before a Congolese rebel leader walked into the United States embassy in Kigali and asked to be sent to The Hague.

In light of both developments, international justice experts say ICC prosecutors need to review the way they investigate cases, and in particular ensure they have enough evidence to give them a strong chance of securing convictions.

On March 11 ICC prosecutors in The Hague announced that they were dropping charges against former Kenyan civil service chief Francis Muthaura. Muthaura had been charged alongside president-elect Uhuru Kenyatta for orchestrating and financing the violence that engulfed Kenya following its 2007 general election.

On March 9, Kenyatta was declared the winner of Kenya's presidential election with 50.1 per cent of the vote, although the result is being challenged by his main rival, Raila Odinga, who polled 43. 3 per cent.

Prosecutors took the decision to drop the Muthaura case after it came to light that a key witness implicating him in an alleged plan to commit atrocities had lied in statements made to the court. The prosecutor said that other witnesses were now dead, and accused the Kenyan government of not cooperating fully with its investigation, an allegation denied by officials in Nairobi.

The lawyer of William Ruto, another of the Kenyan suspects, says that a witness due to testify in this case has withdrawn his testimony.

The decision on Muthaura comes soon after ICC judges acquitted a militia leader for crimes committed in the Democratic Republic of Congo, DRC. In their judgement in the case against Mathieu Ngudjolo in December, judges ruled that the prosecution's case was not strong enough because its witnesses were unreliable and gave testimony that was "too contradictory and too hazy".

OTP is appealing the judges' findings in relation to the reliability of its witnesses in the Ngudjolo case. However it says it is always trying to improve its investigations.

"To that end, we study and consider carefully all of the decisions of the judges," OTP said, noting that "it is not always possible to investigate and find corroboration for witness accounts."

Nor was the Ngudjolo case the first in which prosecutors have struggled to secure the kind of witness testimony that would support their case. After the trial of another Congolese militia chief, Thomas Lubanga Dyilo – the only individual the ICC has convicted to date – judges criticised the prosecutor's office for employing intermediaries to gather witness testimony that was later deemed unreliable.

“A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on,” the Lubanga trial judgement of March 2012 read.

Lubanga remains in custody in The Hague pending an appeal hearing.

The ICC announced it was launching an investigation in Kenya in March 2009, after the country’s parliament failed to make arrangements to prosecute the perpetrators of violence that erupted in the aftermath of the December 2007 presidential election. A dispute over the outcome led to clashes along party-political and ethnic lines, resulting in the more than 1,100 deaths and 600,000 people displaced.

Of the six suspects originally summoned by the court in March 2011, judges confirmed charges against only four, divided into two cases – Kenyatta and Muthaura in one, and William Ruto (now Kenyatta’s electoral running-mate) and journalist Joshua Arap Sang. The withdrawal of charges against Muthaura came just four months before the trial date, scheduled for July.

Given that Muthaura was Kenyatta’s co-defendant, lawyers for the latter have asked judges to send his case back to the pre-trial chamber to verify whether the evidence still available to the prosecution actually merits a trial.

CONGOLESE COMMANDER HEADS FOR ICC

As Kenyatta celebrated victory in the election and prosecutors withdrew charges against Muthaura, another suspect – this time from DRC – offered himself up to the ICC.

On March 18, Bosco Ntaganda surrendered to the United States embassy in Kigali and asked to be taken to The Hague.

By March 22, Ntaganda was in the custody of ICC officials on a plane heading from Kigali to The Netherlands.

"This is a good day for victims in the [Democratic Republic of Congo] and for international justice. Today those who are alleged to have long suffered at the hands of Bosco Ntaganda can look forward to the future and the prospect of justice taking its course," Prosecutor Fatou Bensouda said in a statement.

The ICC issued a warrant for Ntaganda’s arrest in 2006, and has accused him of conscripting and using child soldiers in fighting in the Ituri district of eastern DRC, as well as orchestrating the murder, rape and sexual enslavement of civilians in 2002-03. The charges date to a different period of conflict in DRC than the present situation, in which Ntaganda was until recently a senior figure in the M23 rebel movement.

It not yet known exactly how Ntaganda crossed the border into Rwanda and reached the US embassy in Kigali. But following a defeat to a rival faction of the M23, which split in two last month, it is thought that he had become isolated and effectively faced a choice between death or surrender to the ICC.

Ntaganda’s case is expected to include much of the same evidence that was criticised by judges in the Lubanga and Ngudjolo cases, which date to the same period, and similar barriers exist to collecting new evidence.

In the Lubanga case, an ICC prosecution spokesperson told IWPR that, “The prosecutor’s access to witnesses or documentary evidence in that hostile environment was necessarily limited and difficult.”

The ICC’s critics say its struggle to obtain evidence in insecure and unfamiliar territory has been a common theme of its investigations in Africa.

Phil Clark, an expert in international justice at the University of London's School of Oriental and African Studies, SOAS, says there is inadequate funding by the countries that back the court - known collectively as the Assembly of States Parties – which he says has limited the quality of investigations. (See for example Mali Case Throws Spotlight on ICC Budget Constraints.)

“The big question is whether the Assembly of States Parties is willing to fund the ICC to the level that it would need to, to carry out effective investigations in the field,” Clark said. “I think [the court has] tried to do justice on the cheap and what we’re seeing is that, as a result, the court is overstretched.”

Of the 14 cases that have come before the ICC, five have lacked enough evidence to go forward to trial, and of the two that were completed, Lubanga was convicted but Ngudjolo acquitted.

Legal experts say prosecutors need to review their strategy for pursuing investigations if they are to ensure convictions in future cases, such as that of Ntaganda.

“I hope they are going through a lot of soul-searching, and they had better solve the problem [of securing convictions] soon,” William Schabas, a professor of law at Middlesex University, told IWPR shortly after the charges against Muthaura were dropped. “I think more and more people realise that there is something very unsatisfactory about the performance of the court.”

The Office of the Prosecutor, OTP, argues that success is not just about convictions; it should also be measured by the deterrent effect of undertaking proceedings against those accused of atrocities.

“Justice is not just about securing convictions. There are various facets to justice,” a spokesperson for the OTP said in an email to IWPR. There is also “the court’s preventative role and its capacity to defuse potentially tense situations that could lead to violence”.

The OTP and former ICC prosecutor Luis Moreno Ocampo have both said the court’s intervention in Kenya following the 2007-08 bloodshed played a deterrent role in ensuring peace this time round.

SECURING EVIDENCE TO BUILD STRONG CASES

In the wake of previous judgements, there are questions about the court’s use of eyewitness testimony, something that can be notoriously unreliable compared with other forms of evidence.

According to Schabas, the first trials at the ICC have been “very witness dependent” compared with those at other international courts such as the International Criminal Tribunal for the Former Yugoslavia, ICTY.

“Although they [at the ICTY] hear quite a lot of witness testimony, I don’t think they have had cases standing or falling on the testimony of one or two witnesses,” Schabas said.

Memories fade over time and trauma can inhibit recollections of events, so testimony given by different witnesses about the same incident can vary greatly. Witnesses may also be pressured by outsiders to give certain testimony.

Experts say court rules that limit contact between lawyers and witnesses make this challenge even more difficult.

Jens David Ohlin, a law professor at Cornell Law School, says this prevents prosecutors from building a thorough case from the beginning of their investigation.

"If you have unrestricted access to the witness by the prosecutor's office, they will be able to do a very good job of weeding out at the very beginning [or at] the interim stages the witnesses who are going to be reliable and those witnesses who are going to be problematic," he said. "And so you get the case straightened out at a much earlier stage, and you don't have cases falling apart mid-stage or late-stage."

David Kaye, a law professor at the University of California, told IWPR that one of the problems facing the ICC is the type of cases it selects.

He says prosecutors need to look more carefully at the likelihood of securing a conviction at trial before pursuing certain individuals.

"[Assessment of the evidence] has to be integrated into the case selection criteria of OTP," he said. "It is one thing to say we know that this person is a viable target for prosecution, but it is another to say they can secure a conviction. [OTP] has to weigh on what [evidence] it can go forward, and against who it can go forward."

The OTP denies that case selection is a problem and says it only moves ahead with cases if it feels there is a reasonable prospect of a conviction. It says the fact that it dropped charges against Muthaura is evidence of this approach.

"This action last week [in the Muthaura case] makes absolutely clear that the OTP does put great emphasis on assessing the likelihood of being able to secure a conviction at trial," the OTP spokesperson said.

SHIFT TO AREAS WHERE HARD EVIDENCE IS EASIER TO GET?

Besides witness testimony, prosecutors at the ICTY use a wealth of documents including minutes of meetings between senior government officials and military and intelligence records to prove that events happened and the suspects are culpable.

Investigations at the ICC, however, often take place during an ongoing conflict, or implicate current leaders, making the process much more challenging. The ICC has not been able to rely on documentary evidence to the same extent as the Yugoslav tribunal.

"The kinds of documentation that the ICTY had available to it would not be available for most of the cases on the ICC's docket right now, and that is a problem," Kaye said.

But if reliable witnesses and documentary evidence are hard to come by, there may be another way forward.

Schabas suggests that ICC prosecutors could move away from the type of cases they are currently investigating. He points out that it has been the court's choice to prosecute cases stemming from rebel conflicts in the DRC and electoral violence in Kenya. He argues that the ICC could equally select other crimes in other parts of the world, on the basis that stronger evidence is available.

"Somewhere at the root of this is the problem of the selection of the cases and the situations," Schabas said.

"The prosecutor will say that these cases require eye-witness testimony so maybe [OTP] should just get other cases that don't."

Simon Jennings is IWPR's Africa Editor.