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By Jacob Aliet

Does Judge Kaul's Dissent Offer a Ray of Hope to the ICC Suspects?

Judge Hans-Peter Kaul of the ICC has recently gained wide media coverage because he issued a minority dissenting opinion against issuing summons to Kenya's top six ICC suspects as identified by the ICC prosecutor Louis Moreno Occampo. The judge explained the reasons for issuing his dissenting opinion in a recently published nineteen page document which is available at the ICC website. Does his dissent provide a foothold for the defence lawyers of the Occampo six? Many are inclined to believe that this dissent offers a weakness that can be used to undermine the entire case. But does it?

Generally, dissents are a simple declaration of disagreement with the majority. They may instruct, prod, scold, or otherwise urge the majority to consider the dissenter's point of view. But they carry no precedential weight and are not relied on as authority in subsequent cases. However, lawyers and judges sometimes consult them to understand the dissenter's analysis of the majority opinion. But in the vast majority of cases, courts do not readily admit errors or overrule past decisions. The principle of *stare decisis* ("let the decision stand") has a powerful influence on courts.

Why did this Judge dissent on the decision of fellow judges and on what issues and on what grounds? First of all, he agreed with the other judges and the ICC prosecutor on many issues. For example, he agreed that abhorrent crimes were committed, that Joshua Sang spread propaganda instigating violence against the non-Kalenjin populations and calling for their eviction from the rift valley. He is convinced that William Ruto and Henry Kosgey distributed or otherwise provided money to attendees of meetings and distributed money for training purposes.

He also agrees that Uhuru Kenyatta was the principal contact between the Mungiki gang and the duo of Francis Muthaura and Mohammed Ali. Mr. Ocampo refers to Muthaura, Ali and Uhuru as "the principal perpetrators." The principal perpetrators, the judge is convinced, had agreed to attack civilians perceived to support ODM in order to maintain PNU in power. He is also satisfied that the Kenyan Police Forces in Kisumu and Kibera committed crimes by using excessive force and that the police did not intervene to stop crimes committed by Mungiki members in certain localities.

So what does Judge Hans-Peter Kaul disagree with the other two judges about?

He differs with them on a small matter that nonetheless influences various facets of the case as presented by the prosecutor Louis Moreno Ocampo. Just one word; the meaning of the word *organization* as contemplated in Article 7 (a) of The Rome Statute of ICC, which is about crimes against humanity.

The judges all agree that "attack directed against any civilian population" in that article means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a state or *organizational* policy to commit such attack.

The dissenting judge objects that “the network” used by Messrs Ruto, Sang and Kosgey entails an organization, whether tribal, political or military. He denies that the crimes that were admittedly committed by Police occurred pursuant to the policy of a State or an 'organisation' within the meaning of the Statute. He also faults the majority judges for not regarding any of the other actors (besides Mungiki) mentioned in the prosecutor's application, such as the Kenyan Police, to be part of the 'organisation'. Whereas he agrees that the Mungiki and pro-PNU youth led attacks in Nakuru and Naivasha and the Kenyan Police Forces led the attacks in Kisumu and Kibera, they together with other PNU politicians and wealthy PNU supporters (financiers of the attacks) do not constitute one organization.

The Judge clearly sets out his understanding of the essential characteristics of an 'organisation' in terms of membership, duration, structure, the capacity to impose the policy on its members and the capacity and means to attack any civilian population. Hence, he concludes firmly, an 'organisation' could not have existed in which the primary actors were the Mungiki gang and the Kenyan Police Forces, who are fundamentally antagonistic.

He admits that even though the Mungiki and police cooperated through a series of meetings organized by “the principal perpetrators”, he argues that because that opportunistic partnership of convenience was temporary and *ad hoc*, it does not qualify as an organization.

Because the crimes committed were not embedded in an "organizational policy", the judge maintains, the Court has no subject-matter jurisdiction (*ratione materiae*) in the Kenyan case.

All this sounds good, like it is a well-grounded dissent until one considers the preponderant evidence and interpretive framework that the majority judges rely on to concur with the prosecutor that the court has a jurisdiction in the Kenyan situation.

Whereas the prosecutor relies on *his own* understanding for the meaning of the word organization, the majority judges rely on the case against Katanga and Ngudjolo Chui who were Congolese warlords, the case against Jean-Pierre Bemba of the DRC, the case against Clement Kayishema and Ruzindana of Rwanda and a raft of court documents to conclude that the absence of governmental or organizational action cannot be used to argue against the existence of an organizational policy and that the policy need not be explicitly defined or formalized.

The final nail on the coffin of the dissent comes from the Appeal Judgement of Yugoslavia’s Dragoljub Kunarac, which abandoned the requirement for a formal policy. In that case, the court held that neither the attack nor the acts of the accused need to be supported by any form of "policy" or "plan." And the majority judges add this plank to the pillars supporting their ruling that the Kenyan case is within the ICC’s jurisdiction.

It is clear therefore that the grounds for the dissenting judge are considerably weak and it is not wise to think that the dissent offers any avenue for attacking the prosecutor’s case

because the majority judges are on solid ground on the matter of *ratione materiae*. The defence attorneys would be well advised to seek other aspects of the prosecutor's case to poke holes in.

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