

## **Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact**

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### **Abstract:**

Following contested elections in late 2007, Kenya experienced brief but significant violence. International pressure and diplomacy led to a coalition government, and a commission of inquiry recommended the creation of an internationalized criminal tribunal or International Criminal Court (ICC) involvement, should a tribunal not be created. The government of Kenya both promised to create a hybrid tribunal and to cooperate with the ICC, yet has arguably done neither, engaging in delaying tactics for about a year before the prosecutor requested approval to open an investigation. The specific situation presented by Kenya requires careful analysis of two key principles of admissibility in the Rome Statute, gravity and complementarity. This article, based on fieldwork and interviews in Kenya and in The Hague and on judicial decisions and prosecutorial policy documents, examines the treatment of these to date, emphasizing the use and abuse of the concept of positive complementarity.

### **Keywords:**

International Criminal Court (ICC); gravity; complementarity; crimes against humanity; Kenya

## Introduction

The brutal violence that followed Kenya’s presidential elections of 27 December 2007 shocked the world’s conscience. Over a period of two months, well over 1,000 people were killed and hundreds of thousands more were displaced. Credible allegations were made that senior politicians and businessmen organized many of the attacks, just as they had during large-scale political violence in the 1990s. Domestic courts had never held to account those responsible for atrocities in the past and there was little prospect that they would do so following the most recent violence. This time, however, a new international actor could claim jurisdiction, the International Criminal Court (ICC). This was the type of crime that the ICC was supposed to prevent or at least prosecute.<sup>1</sup> Over two years after the violence ended, on 31 March 2010, Pre-Trial Chamber II of the ICC authorised the prosecutor to open investigations into Kenya’s most recent bout of political violence.<sup>2</sup> This was an unprecedented act in two ways. It was the first time the ICC prosecutor had sought the initiation of an investigation himself (*proprio motu*), rather than after a referral by a state or by the United Nations Security Council. It is also the only judicial mechanism to date that seeks to achieve accountability for mass atrocities in Kenya. On 7<sup>th</sup> April 2011, six suspects voluntarily appeared before the court pursuant to a summons to appear, including the deputy prime minister, two cabinet ministers, and the former head of the police force.<sup>3</sup> On 23 January 2012, the Pre-Trial Chamber confirmed charges against four of the six individuals who had been issued summonses.<sup>4</sup> While substantive trials have yet to begin, there is much that can be learned from the early engagement of the ICC with the situation in Kenya.

The ICC involvement in Kenya presents the opportunity to examine what the evolution of the ICC’s understandings of complementarity and gravity, as well as the concept of “positive complementarity” and the impact of the “shadow of the ICC” and potential trials on the ground in Kenya. In so doing, it does not engage extensively with, but hopes to contribute to, broader discussions about the putative tensions between peace and justice, and potential impact of the ICC on peacemaking and peacebuilding, except insofar as it considers the degree to which ICC involvement is expected by some to deter future violence in Kenya directly and challenge a culture of impunity through positive complementarity. The primary focus of the Article is however on the specific legal criteria of gravity and complementarity and expected effects on impunity.<sup>5</sup>

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<sup>1</sup> Judges of the ICC will consider whether acts committed during this period constitute crimes against humanity. Though some sensationalistic observers initially suggested that genocide was underway, that would be an inaccurate description of the situation.

<sup>2</sup> International Criminal Court, Pre-Trial Chamber II, *Decision pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (ICC-01/09) 31 March 2010.

<sup>3</sup> The confirmation of charges hearings in *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang* ICC-01/09-01/11 took place 1-8 September 2011; the confirmation of charges hearings in *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Muhammed Hussein Ali* ICC-01/09-02/11 took place 21 September- 5 October 2011.

<sup>4</sup> *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (ICC-01/09-01/11 23-01-2012 1/173 FB PT) 23 January 2012 and International Criminal Court transcript (ICC-01/09-02/11-T-17-ENG ET WT 23-01-2012 1/9 SZ PT) 23 January 2012. Judge Kaul issued a dissenting opinion in both cases on the grounds that the crimes committed during post-election violence were not crimes against humanity but were common crimes in Kenya.

<sup>5</sup> In the literature on transitional justice, and on the ICC and ongoing conflicts, it is often posited that legal accountability will promote peace and stability by helping to restore rule of law and satisfy victims, by providing symbolic instantiation of the rule of law in societies where it may have been shattered, by deterring future

This article examines the unfolding legal and political developments both in Kenya and at the ICC. First, the situation in the country provides the opportunity to observe how the ICC’s involvement can affect domestic debates and action on accountability and impunity. The ICC prosecutor, Luis Moreno-Ocampo, has explicitly articulated the concept of positive complementarity—the expectation that scrutiny by and advice from the court can enable or compel states to pursue accountability themselves and where necessary to undertake legislative and judicial reform to enable that accountability. In the case of Kenya, the prosecutor went further, proposing a novel “three-pronged strategy” that includes two domestic mechanisms alongside ICC investigations: a special tribunal and a truth commission. Below, this article discusses several failed attempts to create a special tribunal, as well as other accountability mechanisms discussed, suggesting that such efforts sought mainly to evade ICC investigations without genuinely engaging in reform or prosecution. This does not, however, mean that the ICC had no impact. Indeed, it bolstered civil society actors seeking to promote accountability and reform and provided leverage without which discussions of domestic accountability mechanisms might not have proceeded as far as they did.

Second, circumstances in Kenya provide the opportunity to track the evolution of the standards of complementarity and gravity utilized by the Office of the Prosecutor (OTP). The Rome Statute of the International Criminal Court (hereafter “Rome Statute”) stipulates that admissibility is conditional on the absence of genuine investigations or proceedings in the country, and on the alleged crimes being of sufficient gravity to merit investigation.<sup>6</sup> However, the statute does not further define either: this has evolved through the OTP’s policy decisions and the judges’ rulings. In considering the situation in Kenya, the prosecutor and judges alike had to decide whether the situation was of sufficient gravity, and whether the government was unable or unwilling to prosecute. Given that the Kenyan government sought to delay and prevent investigations but did not reject the court’s jurisdiction outright, the case provides a clear opportunity to consider the interpretation of complementarity where sham or limited proceedings, or alternative mechanisms, are proffered to evade the court. Further, given the relatively small scale of the violence in Kenya (when compared to other cases, such as Sudan and the Democratic Republic of Congo), the prosecutor and judges’ treatment of the concept of gravity will prove of particular interest.

This article is informed by a review of the relevant official ICC documents and scholarly literature. It also draws heavily from interviews in both Kenya and the Netherlands. The authors engaged in fieldwork in Nairobi in January 2010, after the prosecutor’s request to open an official investigation, but prior the decision granting that request. They interviewed government

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perpetrators, and more. Conversely, scholars have argued that seeking accountability will prolong conflicts by preventing belligerents from negotiating peace, by scapegoating communities and groups and promoting further cleavages, and destabilizing fragile states. See, e.g., Phil Clark and Nicholas Waddell (eds.), *Courting Conflict? Justice, peace, and the ICC in Africa* (London: Royal Africa Society, 2008) available at <http://www2.lse.ac.uk/internationalDevelopment/research/crisisStates/download/others/ICC%20in%20Africa.pdf> (visited 15 January 2012); Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002); Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995); Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (London: Frank Cass, 2004); Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006); and Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: US Institute of Peace Press, 2010), for a range of philosophical, legal, comparative, and quantitative approaches.

<sup>6</sup> International Criminal Court, Rome Statute, Article 17 (17 July 1998).

and NGO officials, members of the judiciary, local academics, staff of international organizations, and representatives of Western governments and bilateral aid agencies. Similarly, they conducted interviews in The Hague in July 2010, with officials at the ICC headquarters, academics, NGO officials, journalists, and representatives of the Dutch and Kenyan governments, all of whom were either involved in or close observers of the ICC's work.

The next section examines the situation in Kenya that prompted the ICC's involvement there, followed by a section on the decisions by the ICC prosecutor and judges regarding gravity and complementarity. Finally, the article analyzes the effects to date of the ICC involvement and its potential future impact, including its effects upon domestic discussions about and options for accountability and broader rule of law reform. The ICC's engagement with Kenya reveals the interplay of law and politics, and the ways in which a judicial institution is expected to influence a state's politics, even as a state's politics not only attract ICC attention, but invite new strategies. The article argues that (1) the Kenya situation has given the ICC the opportunity to further refine its conceptions of complementarity and gravity, not without controversy; (2) the mere possibility of ICC involvement has strongly influenced the political situation in Kenya, keeping accountability at the top of the public agenda and catalyzing pressure for reform, as well as influencing the behaviour of politicians; and (3) holding a few senior officials, or even just one senior official, responsible for serious crimes for the first time in Kenyan history would be a remarkable achievement, though it is unlikely to either deter future large-scale violence and compel the broader changes that most Kenyans hope for.

## 1. The ICC's Involvement with Kenya

This section examines how the ICC's involvement in Kenya was first proposed, in the wake of the 2007-08 post-election violence that attracted international attention. It also outlines the political calculus that led Kenyan political elites to support either domestic justice mechanisms (under the shadow of the ICC) or wait for The Hague to act, sometimes alternating between the two. Their manoeuvres prevented the establishment of the proposed domestic tribunal and postponed—but failed to forestall—ICC involvement.

### 1.1. *The Waki Commission*

The official results of the 27 December 2007 presidential election proclaimed incumbent Mwai Kibaki the victor, a late and sudden reversal of the significant lead that his principal challenger, Raila Odinga, had enjoyed in pre-electoral opinion polls and maintained during most of the ballot-counting process, suddenly lost under opaque circumstances.<sup>7</sup> The highly disputed result provoked violent confrontations between the supporters of Kibaki's Party of National Unity and those of Odinga's Orange Democratic Movement. The unrest and violence that shook the country for a period of two months killed over 1,100 people and displaced some 350,000 others.<sup>8</sup> It prompted the international community to intervention at the diplomatic level, most notably

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<sup>7</sup> David Throup, 'The Count', 2 *Journal of Eastern Africa Studies* (2008) 290-304.

<sup>8</sup> *Waki Commission, Report of the Commission of Inquiry into Post-Election Violence* (Nairobi, Kenya, 2008) pp. 345-51. On the violence and its causes, see, among others, Hervé Maupeu, 'Retour sur les violences', *Les Élections générales de 2007 au Kenya* (Paris and Nairobi: Karthala and IFRA 2008) pp. 17-49, and Susanne D. Mueller, 'The Political Economy of Kenya's Crisis', 2 *Journal of East African Studies* (2008) 185-210.

through an African Union–appointed mediation team led by the former United Nations Secretary-General, Kofi Annan.<sup>9</sup> A negotiated solution put in place a power-sharing deal that rapidly ended the violent conflict two months after it had begun. As part of the National Dialogue and Reconciliation process, the coalition government appointed a Commission of Inquiry into Post-Election Violence, known as the Waki Commission (after its Kenyan chair, Justice Philip Waki). Were it not for the report of the Waki Commission, it seems far less likely that the Prosecutor would have sought to open investigations into Kenya’s post-election violence, given the number of situations of interest, although he clearly had the legal authority to do so.<sup>10</sup>

A key recommendation of the so-called Waki Report was the establishment of a special tribunal to try those responsible for the worst abuses. Qualified personnel from other Commonwealth countries would hold key positions in the tribunal, including two of the judges and the prosecutor, because the Kenyan judiciary was so thoroughly discredited that a purely national solution would sorely lack credibility and legitimacy. The Waki Commission ingeniously included a provision in its report, released in October 2008, which ensured that it would not merely gather dust, like previous Kenyan special commission reports: a self-enforcing mechanism. The commission gave Kofi Annan a sealed envelope with the names of the top alleged perpetrators of post-election violence (most of whom are believed to be very high-level politicians), along with numerous boxes of evidence. If the government did not follow the commission’s recommendation to set up a hybrid “Special Tribunal for Kenya” by 30 January 2009, Annan was requested to forward the envelope and evidence to the ICC.<sup>11</sup> This hybrid, never created, was envisaged as a mixed national-international tribunal, with domestic and international judges and staff and authorized to try serious international crimes, to be sited in Kenya, similar to the Special Court for Sierra Leone. As with other hybrid or internationalized criminal tribunals, the mixed composition was expected to mitigate the bias and other weaknesses of the national judiciary and reap the benefits of international legal expertise and predicted impartiality, while providing justice at a local and more visible level.<sup>12</sup>

After a period of inaction, the government tried to rush legislation through parliament, which defeated the bill on 6 February 2009, one week after the Waki deadline. Despite having expressed unanimous support for implementing the Waki recommendations, MPs voted it down for a variety of reasons. Some opposed it because they considered it fatally flawed by loopholes, for instance, allowing for presidential pardons. Others opposed it for the opposite reason, believing that it might be effective and thus result in them or their allies being prosecuted. The ICC alternative seemed less threatening to them, as they expected any investigations and

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<sup>9</sup> See Monica Kathina Juma, ‘African mediation of the Kenyan post-2007 election crisis’, 27 *Journal of Contemporary African Studies* (July 2009) 407-430, and Gilbert M. Khadiagala, ‘Regionalism and conflict resolution: Lessons from the Kenyan crisis’, 27 *Journal of Contemporary African Studies* (2009) 431-444.

<sup>10</sup> The Office of the Prosecutor has indicated interest in no less than nine situations as subjects of preliminary examination, two of which are now also the subject of investigation, in a 2011 report. International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination activities* 15 December 2011 at <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>.

<sup>11</sup> Waki Commission, *supra* note 7, at p. 18.

<sup>12</sup> The hybrid tribunal would have been empowered to try crimes against humanity, rather than war crimes, as the Special Court for Sierra Leone was. Compare Beth K. Dougherty, ‘Right-sizing international criminal justice: The hybrid experiment at the Special Court for Sierra Leone’, 80 *International Affairs* (2004) 311-328 and Chandra Lekha Sriram, ‘Wrong-sizing international justice? The hybrid tribunal in Sierra Leone’, 29 *Fordham International Law Journal* (2006), 472-506.

prosecutions would pursue only a handful of “big fish” in a process that could drag on for many years—possibly more than a decade, like the International Criminal Tribunals for Rwanda and the former Yugoslavia—whereas a special tribunal could act more expeditiously and potentially prosecute hundreds.<sup>13</sup>

Annan granted two more extensions, but the government did not reintroduce legislation. The Office of the Prosecutor engaged in discussions with the government, trying to convince them to initiate domestic proceedings with a carrot-and-stick approach.<sup>14</sup> Exasperated by the government’s stalling tactics, Annan handed over the Waki envelope and evidence to the OTP in July 2009. Later that month, after cabinet failed to agree on new legislation, the government announced it would dispense with plans for a hybrid tribunal. Instead, President Mwai Kibaki announced at a press conference, with the entire cabinet literally behind him, that the government would first reform the judiciary and the police, after which it would try suspects in regular courts.<sup>15</sup> Many presumably hoped that this scenario would be sufficient to prevent ICC intervention. However, the announcement was greeted with widespread scepticism, not least because the government had been promising reform since it first took office in 2003. Some cabinet ministers repudiated the plan the next day and it was quietly dropped. In September 2009, the prosecutor indicated that he would seek to pursue investigations.<sup>16</sup> In November, backbench MP Gitobu Imanyara introduced revised legislation for the establishment of a hybrid tribunal as a private member’s bill. Though many top government officials have publicly expressed their support, MPs have boycotted its debate, which cannot be held for lack of quorum, a tactic that almost certainly has behind-the-scenes support from President Kibaki and Prime Minister Raila Odinga.

## 1.2. *The Domestic Political Calculus*

Several politicians’ public preferences for either the ICC or the hybrid tribunal shifted over time, sometimes back and forth. Their support for one was meant to undermine the other scenario and they switched when the other seemed more likely to move ahead. For example, as mentioned above, some supported leaving the matter to ICC because they believe it to be less likely to prosecute them or their associates than a hybrid court—or in some cases perhaps likely to remove a political rival (be it from a competing party or internally). When ICC prosecutions became more probable, they expressed support for the tribunal as a way of forestalling ICC action. No matter how many times the government publicly promised to cooperate fully with the ICC, many of its senior officials still had an interest in delaying intervention for as long as

<sup>13</sup> International Crisis Group, *Kenya: Impact of the ICC Proceedings*, Africa Briefing N° 84 (International Crisis Group, Nairobi/Brussels, 2012) available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/B084%20Kenya%20---%20Impact%20of%20the%20ICC%20Proceedings.pdf> (visited 15 January 2012), pp. 6-7; Stephen Brown with Chandra Lekha Sriram, “When the Hyena is the Judge, the Goat will never have Justice”: The Politics of Criminal Accountability for Post-Election Violence in Kenya”, 111 *African Affairs* (2012, in press).

<sup>14</sup> International Criminal Court, Office of the Prosecutor, *Agreed Minutes of the meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan Government*, 3 July 2009, <<http://www.icc-cpi.int/NR/rdonlyres/AA9AC1FD-112F-4582-84D8-AA6C58445D98/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf>>, 02 December 2011; interview with an official in the Office of the Prosecutor, International Criminal Court, in The Hague, Netherlands (July 2010).

<sup>15</sup> Bernard Namunane and John Ngirachu, ‘Local Courts to Try Waki List Suspects’, *Daily Nation*, 30 July 2009.

<sup>16</sup> ICG, *Kenya*, *supra* note 12 at p. 8.

possible—witness the government’s refusal to refer the matter to the ICC, which would have spared the ICC prosecutor the need to convince the pre-trial chamber of the basis for investigations and thus sped up the process.

Other actors, including numerous Kenyan civil society organizations and the ICC prosecutor himself, saw the hybrid tribunal as an integral part of a three-prong approach to accountability and justice. Rather than *either* the ICC *or* the Special Tribunal, they wanted both: the ICC for those most responsible for the atrocities and the tribunal for a couple of hundred “smaller fish”, as well as the Truth, Justice and Reconciliation Commission (TJRC) for truth-telling, establishing an accurate historical account of abuses since independence and some restitution. Representatives of Western governments were initially highly in favour of the tribunal and wary of the ICC. Following the Americans’ lead, most have since pragmatically revised their positions to reflect the unlikelihood of a tribunal being created, advocating the ICC route instead. They have indicated very little support for the TJRC, which—given its broad mandate, limited timeframe, serious internal problems and lack of popular legitimacy—seems to have been the right judgement call.

Once Pre-Trial Chamber II authorized the ICC prosecutor to open an investigation, which it did in March 2010, it was too late for Kenyan politicians to revive the hybrid tribunal. To be more precise, they could still create a hybrid tribunal, but it would be too late do so if their goal was to prevent ICC involvement, which they could do only if they tried the same people accused of the same crimes in genuine proceedings. Any potential *ad hoc* trials by the Africa Union or the East African Community would have to meet the same criteria if they were to have any chance of convincing either the prosecutor or judges to end ongoing investigations or prosecutions, although as the Rome Statute anticipates state, rather than regional, investigations or trials, it seems unclear that the latter would impede ICC proceedings.

After the ICC prosecutor revealed, in December 2010, the names of the six accused for whom he requested the Court to issue summonses to appear, the Kenyan government began a concerted effort to prevent a trial from ever taking place. First, MPs passed a unanimous motion to withdraw from the Rome Statue. The motion was non-binding and any formal withdrawal would only take effect after a year and regardless would not remove the court’s jurisdiction over the case.<sup>17</sup> The government then tried to lead a massive departure of African countries from the ICC, which failed. It then tried, unsuccessfully, to convince the UN Security Council to request that the ICC suspend the case for one year, as it is empowered to do under Article 16 of the Rome Statute, based on a promise that it would set up a special local court (as distinct from the earlier proposed hybrid one). Simultaneously, it challenged the admissibility of the cases and the Court’s jurisdiction, in evident contradiction with its strategies seeking to eliminate or defer the court’s jurisdiction.

The ICC’s intervention is important not only for those seeking justice for post-election violence in Kenya. It has also presented the opportunity for further interpretation of two critical criteria for admissibility of cases at the ICC, complementarity and gravity, the treatment of which are considered next.

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<sup>17</sup> Under article 127 of the Rome Statute, withdrawal can only take effect one year after the receipt of notification of withdrawal by the UN Secretary-General, and withdrawal does not discharge a state’s obligations undertaken while a state party to the statute, including its duty of cooperation, in regard to criminal investigations and prosecutions begun prior to the withdrawal taking effect.

## 2. Kenya before the ICC: Complementarity and Gravity

On 26 November 2009, the prosecutor requested authorization from Pre-Trial Chamber II to open an investigation in relation to acts allegedly committed within the jurisdiction of the court in 2007-08 that could constitute crimes against humanity. As mentioned above, this was the first effort to open a case *proprio motu* in light of the failure of the Kenyan government to open investigations or prosecutions or to create the tribunal recommended by the Waki Commission.<sup>18</sup> In this request, the prosecutor relied not only upon evidence provided by the Waki Commission, but also upon publicly available reports from a range of Kenyan and international NGOs.<sup>19</sup> The pursuit of the case in Kenya provides fresh insights with regard to the interpretation of two key, but under-defined, provisions of the Rome Statute by both the prosecutor and the judges: complementarity and gravity.<sup>20</sup>

Considerations of complementarity and gravity should be examined together because each is a pillar of admissibility: under Article 53(1)(b) of the Rome Statute, in initiating a case the prosecutor must take into consideration whether the potential case is or would be admissible under Article 17, the provisions of which include complementarity and gravity. These considerations are also potentially intertwined because in situations where national proceedings are taking place, the ICC may need to examine closely whether the same conduct by the same person is being prosecuted by a national jurisdiction before decide if it will take action. Further, there is the possibility that a national jurisdiction could choose to prosecute ‘more grave’ crimes than the ICC; indeed this has been the objection to the prosecution of Thomas Lubanga in some circles.<sup>21</sup> The defence of Germain Katanga specifically raised this issue, suggesting that complementarity and gravity be linked, such that admissibility would turn not just on one or the other, but on the relative gravity of charges at the national and international levels.<sup>22</sup> While this was not an argument the judges found convincing, it did draw attention to the potential interaction of the two principles. This article examines next complementarity and gravity as they are evolving before the ICC and as specifically interpreted for Kenya.

### 2.1. *The Principle of Complementarity*

The principle of complementarity in the Rome Statute is critical to any decision regarding the admissibility of a potential case. It can be seen as part of a delicate balance between the extension of international criminal jurisdiction and the preservation of state sovereignty,

<sup>18</sup> Korir Sing’Oei Abraham, ‘The ICC as arbiter in Kenya’s post-electoral violence’, 19 *Minnesota Journal of International Law* (2010) p.6.

<sup>19</sup> International Criminal Court, Situation in the Republic of Kenya. *Request for the opening of an investigation pursuant to Article 15* (ICC-01/09-3 26-11-2009 1/42 EO PT), 26 November 2009.

<sup>20</sup> Abraham, *supra* note 17, pp. 8-14.

<sup>21</sup> See, for instance, William A. Schabas, ‘Prosecutorial Discretion and Gravity’, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, Leiden, 2009) pp. 240-41. The same conduct test was also considered in Situation in the Democratic Republic of the Congo. *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, (ICC-01/04-01/07 OA 8) 25 September 2009. Carsten Stahn, ‘Perspectives on Katanga: An Introduction’, 23 *Leiden Journal of International Law* (2010) 311-318.

<sup>22</sup> *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chu*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute (ICC-01/04-01/07-949 11-03-2009 1/34 RH T ) 11 March 2009; Susana Sácouto and Katherine Cleary, ‘The Katanga Complementarity Decisions: Sound Law but Flawed Policy’, 23 *Leiden Journal of International Law* (2010) 363-74; and interview with David Hooper, Defence Counsel for Germain Katanga, International Criminal Court, in The Hague, Netherlands (9 July 2010).



providing as it does for the primacy of national jurisdiction.<sup>23</sup> At the stage at which the opening of an investigation is requested, the prosecutor may not yet have identified specific suspects and charges. Nonetheless, the judges must consider the admissibility of potential cases under Article 53(1)(b), and in particular consider both complementarity and gravity of potential cases. To do so, they utilize the standards enumerated in Article 17(1) of the Rome Statute, although those standards are related to the admissibility of individual cases rather than potential cases in context. As shall be shown, the pre-trial chamber considered potential cases in considering the request to open an investigation for Kenya, utilizing Article 17(1) standards for complementarity.<sup>24</sup>

The court will not have jurisdiction, according to Article 17(1)(a), if “The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.<sup>25</sup> In principle, then, only a genuine investigation or prosecution by a jurisdictional state can operate as a bar to admissibility of a case, meaning that the court may be compelled in some instances to assess the nature of national proceedings for accountability.<sup>26</sup> The language of the Rome Statute suggests that the question of complementarity hinges on the presence of actual investigations or prosecutions, not prospective ones. It also appears to depend upon official, state-level action, not local or traditional justice measures, although the latter have been proposed by among others the government of Uganda for crimes in the north of the country, despite its referral of the situation to the ICC.<sup>27</sup> The Rome Statute’s requirement of an investigation or prosecution, rather than only prosecution, has led some analysts to speculate that investigations without trials, including through bodies, such as commissions of inquiry (for instance, Kenya’s Waki Commission), could suffice for Article 17(1)(a).<sup>28</sup>

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<sup>23</sup> Jakob Pichon, ‘The Principle of Complementarity in the Cases of the Sudanese Nationals *Ahmad Harun* and *Ali Kushayb* before the International Criminal Court’, 8 *International Criminal Law Review* (2008) 185-228; Eric Leonard, ‘Discovering the new face of sovereignty: The Complementarity and the International Criminal Court’, 27 *New Political Science* (2005) 87-104.

<sup>24</sup> Notably, article 15(4) of the Rome Statute stipulates that decisions regarding the opening of an investigation are without prejudice to any subsequent judgments regarding jurisdiction and admissibility of a case.

<sup>25</sup> *Rome Statute of the International Criminal Court* (17 July 1998), <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/281/44/IMG/N9828144.pdf?OpenElement>>, 26 August 2010.

<sup>26</sup> However, the use of the term “genuinely” is problematic, as has been observed by Leila Nadya Sadat, because it might in principle permit a state to simply open an investigation only for the purpose of preventing the ICC from exercising jurisdiction. Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers, Ardsley, NY, 2002) pp. 123-4. This was the issue presented when Sudan set up tribunals for crimes in Darfur which appeared to do just that. Julie B. Martin, ‘The International Criminal Court: Defining Complementarity and Divining Implications for the United States’, 4 *Loyola University of Chicago International Law Review* (2006) 114-115. Pre-Trial Chamber I has ruled that the charges against Sudanese President Omar al-Bashir and others are admissible despite the creation of these courts. *Prosecutor v Omar Hassan Ahmad Al Bashir* (“*Omar Al Bashir*”) Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-3 04-03-2009 5/146 CB PT) 4 March 2009.

<sup>27</sup> Alexander K.A. Greenawalt, ‘Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court’, 50 *Virginia Journal of International Law* (2009) 107-62.

<sup>28</sup> *Ibid*, p. 126-131.

### 2.1.1. *The Office of the Prosecutor’s Approach: Positive Complementarity*

However, the Office of the Prosecutor has taken the view that beyond complementarity as a pure question of admissibility, as elaborated in the Rome Statute, complementarity might be viewed as a tool to promote national proceedings, or what it terms “positive complementarity”. This is something of a variation on what William Burke-White has advocated as “proactive complementarity”.<sup>29</sup> Positive complementarity is not envisaged in the statute, but rather is an interpretation of the Office of the Prosecutor, elaborated in prosecutorial documents in 2006 and 2010.<sup>30</sup> The prosecutorial strategy of 2010 explains that the ICC’s promotion of genuine national proceedings can occur through various measures, including contacting country officials, experts, and lawyers to encourage participation in investigation and prosecution, and providing information to national judiciaries. The expectation is that the ICC can advocate national action that renders ICC action unnecessary. Some have argued, for example, that the scrutiny by the ICC of Colombia’s Justice and Peace Law helped to propel national reconsideration and accountability efforts, although to be clear, the revision of the legislation was achieved through a decision of the Colombian Constitutional Court.<sup>31</sup> Beyond the advancement of national accountability mechanisms, the concept of positive complementarity envisages a preventive effect for the court. The prosecutor has suggested that crimes falling within the court’s jurisdiction may deter further abuses, and the strategy proposes helping NGOs to maximize any preventive impact.<sup>32</sup> However, the strategy is clear that the court will not engage in capacity-building, nor is it expected to engage in direct support to national legislatures and judiciaries.

There is a risk, however, that states seeking to evade ICC scrutiny may use the concept of positive complementarity to delay through the creation of sham tribunals, in what Christopher Keith Hall has referred to as “perverse complementarity”.<sup>33</sup> Thus, in Uganda, the government has created a Special Division within the High Court to try leaders of the Lord’s Resistance Army, shielding them in theory from ICC prosecutions, and also, not coincidentally, excluding members of the national army from that court’s jurisdiction.<sup>34</sup> The delays and machinations in Kenya included proposals for a special tribunal, the suggestion that the TJRC could have judicial functions and the promise of judicial reform in order that domestic trials might proceed. In such situations, it can be difficult to determine the genuineness of national proceedings. For instance, if the Kenyan parliament had adopted the first hybrid tribunal bill, what types of limiting clauses designed to protect many perpetrators, including the possibility of presidential pardon, would have caused the ICC judges to have viewed the tribunal as not genuine? Such a judgement might

<sup>29</sup> William W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 *Harvard International Law Journal* (2008) 53-108.

<sup>30</sup> International Criminal Court, Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)* 12 September 2006, para. 95 at [http://www.iccnw.org/documents/3YearReport%20\\_06Sep14.pdf](http://www.iccnw.org/documents/3YearReport%20_06Sep14.pdf); International Criminal Court, Office of the Prosecutor, *Prosecutorial Strategy 2009-2012*, 01 February 2010, paras. 16 and 17, <<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>>, 26 August 2010. The concept was supported in substance, although not by name, by the *States Parties at the review conference of the statute in June 2010* (Resolution RC/Res.1 Complementarity) 14 June 2010.

<sup>31</sup> See generally Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach* (Springer, Berlin, 2010).

<sup>32</sup> International Criminal Court, *supra* note 29, at para. 65.

<sup>33</sup> Christopher Keith Hall, ‘Positive complementarity in action’, in Carsten Stahn and Mohamed El Zeidy (eds.) *The ICC and Complementarity: From Theory to Practice* (Cambridge University Press, Cambridge, 2010).

<sup>34</sup> Members of the security forces can face proceedings before military tribunals rather than civilian courts.

be only possible, if at all, after the completion of enough trials to identify a clear pattern of actual accountability for the crimes. However, the limited steps towards accountability undertaken or promised by the Kenyan government discussed below appear to be attempts to hijack the concept of positive complementarity and the Kenya-specific three-pronged strategy in order to prevent accountability. The interpretation of complementarity for cases arising from post-election violence in Kenya might thus prove particularly interesting.

## 2.2. *The Interpretation of Complementarity for Kenya*

The situation in Kenya provides the opportunity to investigate the emerging standards of complementarity that the Office of the Prosecutor and the judges utilize. It is of particular interest because Kenya is the first country in which investigation was sought through the exercise of the Prosecutor's *proprio motu* powers, unlike earlier situations of state self-referral. Under Article 15 of the Rome Statute, the Prosecutor can initiate investigations *proprio motu* into crimes under the jurisdiction of the Court, rather than wait for state or UN Security Council referral. Where states have themselves sought the court's intervention and either declared themselves unwilling or unable to pursue specific cases, the determination that they were indeed unwilling was made potentially much easier.<sup>35</sup> However, where a state declares itself capable of pursuing domestic prosecutions, but takes relatively few steps to pursue cases, and pursues none against alleged high-level perpetrators while engaging in delaying tactics, complementarity must be closely assessed. The Rome Statute does not specifically indicate a timeframe in which action must be taken, but rather refers, in Article 17 (2) (b), to an unjustified delay in proceedings which is inconsistent with the intent of bringing the person concerned to justice. Nor does it provide any detailed guidance for assessing unwillingness or inability to pursue cases or for judging where sham proceedings are being created or stalling tactics are being utilized, but rather refers, in Article 17(2)(a,c) to proceedings undertaken with the purpose of shielding a person from prosecution, or where proceedings are being conducted in a manner inconsistent with the intent of bringing a person to justice. In Kenya, the delays and ultimate failure to establish a hybrid tribunal occurred under the watchful eye of the Office of the Prosecutor, with warnings issued and deadlines set by it.

As noted above, the Kenyan government repeatedly delayed action, which in turn postponed the ICC prosecutor's request for a formal investigation. This would suggest that complementarity is not simply assessed at the moment that an investigation is contemplated, but rather that the prosecutor will allow time for states to put prosecutions into place, instead of taking an immediate decision about inability or unwillingness of a state to prosecute. It also suggests, however, that the leeway given to domestic systems is not infinite: the political manoeuvring lasted nearly a year before Moreno-Ocampo officially requested an investigation. The rather implausible promise of domestic reforms and trials at an unspecified future date was not sufficient to prevent the eventual request for investigation.

### 2.2.1. *The Prosecutor's Treatment of Positive Complementarity in Kenya*

Perhaps equally interestingly, the Office of the Prosecutor elaborated a new approach building on the concept of positive complementarity. As mentioned above, it promoted what it termed a

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<sup>35</sup> Jann K. Kleffner, 'Auto-referrals and the complementary nature of the ICC', in Stahn and Sluiter (eds.) *supra* note 20, pp. 41-53; Schabas, *supra* note 20, pp. 238-9; Gilbert Bitti and Mohamed M. El Zeidy, 'The Katanga Trial Chamber Decision: Selected Issues', 23 *Leiden Journal of International Law* (2010) 319-22.

“three-pronged strategy” for Kenya, of prosecutions of top-level perpetrators by the ICC, of middle-level perpetrators by a hybrid tribunal (never created), and finally a truth commission to address violations more generally.<sup>36</sup> This is consistent with the prosecutorial strategy, which explicitly recognizes a role for truth commissions, reparations, institutional reform, and traditional justice as part of “comprehensive strategies to combat impunity”.<sup>37</sup> However, this approach in Kenya suggests an interpretation of complementarity in which even some genuine domestic trials might not prove to be an obstacle to ICC prosecution.

### 2.2.2. *The Judges’ Treatment of Complementarity in Kenya*

The decision of Pre-Trial Chamber II in March 2010 to authorize investigations does not deal with the principle of complementarity in much detail.<sup>38</sup> Rather, the chamber’s decision concludes that there is no need to assess whether Kenya is unwilling or unable to prosecute, interpreting Article 53(1)(b) and 17(1)(a) to provide for inadmissibility only where a case is being investigated or prosecuted. However, as noted above, the judges were not in a position to consider the presence or absence of investigations or prosecutions in respect of specific named accused, as they would be able to do later when presented with a request for an arrest warrant or summons to appear for a specific person.<sup>39</sup>

Instead, the judges needed to consider whether there were investigations or prosecutions in Kenya in respect of particular events and alleged perpetrators likely to be the subject of ICC prosecutions in the future, rather than specific cases, thus construing the concept of a case rather broadly, as potential cases in context, at the preliminary stage.<sup>40</sup> Thus, in February 2010, the pre-trial chamber requested clarification and additional information from the prosecutor regarding potential cases to be investigated and possibly prosecuted by the ICC. His office provided as confidential annexes a list of what were considered the most serious incidents and persons who appeared to bear the greatest responsibility.<sup>41</sup> The prosecutor also provided further information relating to apparent state and/or organizational policies promoting violations, as required by the Rome Statute for consideration of alleged crimes against humanity.<sup>42</sup> While there have been a few investigations and prosecutions, the judges did not find inadmissibility on grounds of

<sup>36</sup> Press release, International Criminal Court, Office of the Prosecutor, *ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya*, (ICC-OTP-20090930-PR456), 30 September 2009. The Office of the Prosecutor has stated a clear strategy to focus only upon those bearing the greatest degree of responsibility for crimes within its jurisdiction, although in principle it has jurisdiction over any perpetrator. International Criminal Court, Office of the Prosecutor, *Policy paper on the interests of justice* (ICC-OTP-2007 7) September 2007.

<sup>37</sup> International Criminal Court, *Policy paper*, *supra* note 35, pp. 7-8.

<sup>38</sup> International Criminal Court, Pre-Trial Chamber II, *Decision pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* ( ICC-01/09) 31 March 2010.

<sup>39</sup> At this stage, the judges would be in a position to assess the investigations or prosecutions under article 17(2), as discussed above.

<sup>40</sup> International Criminal Court, Pre-Trial Chamber II, *Decision pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* ( ICC-01/09) 31 March 2010, paras. 40-54. On the distinction between situations and cases generally, see Héctor Olásolo, ‘The triggering procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor’, 5 *International Criminal Law Review* (2005) 129-30.

<sup>41</sup> International Criminal Court, Office of the Prosecutor, Pre-Trial Chamber II, *Situation in the Republic of Kenya: Prosecution’s Response to Decision Requesting Clarification and Additional Information* (ICC-01/09-16 03-03-2010 1/19 CB PT) 3 March 2010, paras. 7-9 and 31-37, <<http://www.icc-cpi.int/iccdocs/doc/doc831129.pdf>>, 27 August 2010; interview with officials in the Office of the Prosecutor, International Criminal Court, The Hague, Netherlands (July 2010).

<sup>42</sup> *Ibid.*, paras. 10-30.

complementarity, apparently because these prosecutions did not relate to the incidents and persons of interest outlined in the annexes. The naming, in December 2010, by the prosecutor of six persons to appear before the court further confirms this; none of the six had been the subject of formal criminal investigations, much less prosecutions, in Kenya.<sup>43</sup>

It is worth noting that the chamber did not consider the two mechanisms, one in existence, one proposed, which might engage in investigations and/or prosecutions: the Truth, Justice and Reconciliation Commission (TJRC) and the proposed special tribunal, although the prosecutor’s submission emphasized that the latter had not been created.<sup>44</sup> This is perhaps a missed opportunity for those interested in the evolving interpretation of complementarity. A close analysis of the mandate and functions of the TJRC might have provided an assessment as to whether its investigative functions would be a bar to admissibility generally, or for prosecution of a more limited set of individuals. Moreover, a direct consideration of the delays in creating a special tribunal would have provided insights into whether the judges take into account national deliberations on the creation of a prosecutorial body, or merely the presence or absence of investigations and trials.<sup>45</sup>

Subsequent proceedings on admissibility, responding to challenges by the government of Kenya, have further clarified the limitations on complementarity claims related to existing investigations or prosecutions: in August 2011 the Appeals Chamber of the ICC confirmed that such proceedings must be with regard to the same person and the same charge (termed the ‘same person/same conduct’ test), and that no evidence had been adduced. The government of Kenya both challenged the same person/same conduct test and simultaneously made broad claims that crimes were being investigated by the government. As noted in the Appeals Chamber decision, however, the documentation provided by the government offered assertions but no evidence of ongoing investigations of any of the six accused. At issue was the presence or absence of investigations; the operation of the TJRC was not discussed in the decision.<sup>46</sup>

### 2.3. *The Principle of Gravity*

The standard for gravity, part of the admissibility assessment under Article 53(1) and articulated in Article 17(1)(d) is not elaborated in much detail in the Rome Statute, so the situation in Kenya helps to cast some light upon it. As with complementarity, the other key threshold for admissibility of a case, the assessment at the stage of the request for opening of an investigation does not turn on specific cases presented. Rather, the court has to consider, not specific cases, but the types of cases likely to be presented in the context of the situation. If crimes are not of sufficient gravity, cases would not be admissible, but the Rome Statute does not specify the

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<sup>43</sup> As discussed below, while there have been a few prosecutions, there has been one conviction and in general the government has failed to furnish sufficient evidence to support prosecutions. International Criminal Court, *supra* note 39, paras. 52-53; International Criminal Court, *OTP Weekly Briefing* (Issue #82), 5-11 April 2011; International Criminal Court, Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, (I.C.C.-01/09-01/11); International Criminal Court, Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali* (I.C.C.-01/09-02/11).

<sup>44</sup> International Criminal Court, *supra* note 39, para. 36.

<sup>45</sup> See Lionel Nichols, *ICC Pre-Trial Chamber Gives Ocampo the Green Light in Kenya*, EJIL: Talk!, 15 April 2010, <[www.ejiltalk.org](http://www.ejiltalk.org)>.

<sup>46</sup> International Criminal Court, *Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”* (No. ICC-01/09-02/11-274), 30 August 2011.

meaning of sufficient. Until recently, there has been relatively little scholarly discussion and even less judicial elaboration on the meaning of gravity. Specifying what gravity means is essential, as it can determine the admissibility of a case, but it is also elusive in the context of the Rome Statute. As all of the crimes in the jurisdiction of the court are grave by definition, the allegation of the commission of grave crimes cannot suffice.

Gravity could refer purely to the number or scope of violations committed. Indeed, in a 2005 speech, the prosecutor asked the question, “Is gravity just the number of killings, or is it other factors, with wider-scale implications?”<sup>47</sup> For obvious reasons it would be difficult, and rather distasteful, to set a numerical threshold below which crimes, however heinous, would not be considered grave for the purposes of the Rome Statute, and indeed the evolving understanding of gravity has come to encompass elements beyond numbers.<sup>48</sup> Nonetheless, the International Criminal Court does not have unlimited time and resources, and cannot hear all cases potentially within its jurisdiction. The concept of the gravity threshold was first introduced as early as 1992 in discussions of a possible mandate for a future international criminal court to allow for the discretion to decline to pursue a case otherwise clearly within the court’s jurisdiction, specifically to avoid overburdening such a court.<sup>49</sup> Thus it may fall to the discretion of the prosecutor, first, and to the judges of the court, second, to exclude certain cases for lack of gravity. However objectionable, some cases will and perhaps should be prioritized.<sup>50</sup>

What cases, however, should be viewed as of greater gravity? In considering allegations of abuses of civilians and detainees in Iraq, the prosecutor declined to pursue a case because the potential crimes within the court’s jurisdiction (those alleged to have been committed by personnel of a state party, the United Kingdom) were relatively small in number. A letter in February 2006 explaining the decision made a pointed contrast with other situations being considered by the court, such as those in Northern Uganda, the Democratic Republic of Congo (DRC), and Darfur.<sup>51</sup> This would appear to suggest that a numerical threshold alone was determinative. The first judicial determination of the criteria for gravity was set forth in a decision by Pre-Trial Chamber I in February 2006, in relation to the situation in the DRC. There, the judges laid out two criteria: the alleged conduct must have been either systematic or large-scale, and consideration must be given to the “social alarm” caused in the international community. However, the appeals chamber subsequently overturned this decision but did not offer an alternative test.<sup>52</sup> The Office of the Prosecutor has subsequently sought to develop more

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<sup>47</sup> Luis Moreno-Ocampo, ‘Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives’, 21 *American University International Law Review* (2005-2006) p. 497.

<sup>48</sup> Margaret M. deGuzman, ‘Gravity and the legitimacy of the International Criminal Court’, 32 *Fordham International Law Journal* (May 2009) 1401-02. In the communication regarding the decision not to open a case in relation to crimes alleged to have been committed in Iraq, the Prosecutor noted that: “in a general sense, any crime within the jurisdiction of the Court is ‘grave’”. International Criminal Court, Office of the Prosecutor, *OTP response to communications received concerning Iraq* 8, 9 Feb. 2006, <[http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)>, 27 August 2010.

<sup>49</sup> Susana Sácouto and Katherine Cleary, ‘The gravity threshold of the International Criminal Court’, 23 *American University International Law Review* 809 (2007-2008) 817-23.

<sup>50</sup> DeGuzman, *supra* note 47, pp. 1402-05.

<sup>51</sup> International Criminal Court, *supra* note 47, pp. 8-9.

<sup>52</sup> *Prosecutor v Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 (ICC-01/04-01/06-8-US-Corr 09-03-2006 1/65 SL) 24 February 2006, para. 46; *Prosecutor v Ntaganda*, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I ((ICC-01/04-169-US-Exp) 13 July 2006; Sácouto and Cleary, *supra* note 21, pp. 810-11, 832-37.

detailed criteria for assessing gravity. The OTP regulations set out four criteria: the scale of the crimes (although setting a numerical threshold would be problematic, intensity would be considered), the nature of the crimes, the manner of their commission, and their impact on victims and families.<sup>53</sup>

#### 2.4. *The Interpretation of Gravity for Kenya*

The scale of the crimes in Kenya—over 1,100 people killed, although hundreds of thousands displaced—might not have been of sufficient gravity, on a narrow reading of the term.<sup>54</sup> However, following the Office of the Prosecutor’s definition of gravity, the crimes in Kenya could suffice. Nonetheless, when the judges of Pre-Trial Chamber II, tasked with considering the prosecutor’s request for the opening of an investigation, asked for more information about the alleged crimes and extended its deadline for ruling on the request, speculation emerged again that there were concerns about gravity.<sup>55</sup> The prosecutor sought to emphasize, in his response, the manner of the commission of the crimes, specifically the organization of them. He argued that the senior political leaders of the Party of National Unity (PNU, President Kibaki’s party) and the Orange Democratic Movement (ODM, Prime Minister Odinga’s party) “organized, enticed, and/or financed attacks against the civilian population” in furtherance of an organizational policy. The prosecutor also provided the judges with a list of what he considered the most serious criminal incidents, as well as a list of 20 names of those who appear to hold the greatest responsibility for those crimes.<sup>56</sup>

The pre-trial chamber, in approving the opening of an investigation, had to consider the gravity of the alleged crimes. First, it determined that it did not at such a preliminary stage have to assess the gravity of any individual concrete case, but rather the likely set of cases given the context.<sup>57</sup> Second, applying the criteria set forth by the Office of the Prosecutor, it considered the potential crimes of sufficient gravity, adding “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which make it grave.”<sup>58</sup> The judges evaluated the quantitative nature of the crimes, but also their qualitative nature.<sup>59</sup> They weighed the scale of the alleged crimes (including geographical and temporal intensity), their nature, the manner in which they were committed,

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<sup>53</sup> International Criminal Court, *Regulations of the Office of the Prosecutor, Regulation 29(2)*, (ICC-BD/05-01-09) adopted 23 April 2009, <<http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf>>, 27 August 2010; see also International Criminal Court, Office of the Prosecutor, *Policy paper on the interests of justice*, (ICC-OTP-2007) September 2007, pp. 4-5. In the decision of 31 March 2010 authorizing the investigation, the pre-trial chamber judges interpreted these factors following in significant part the interpretation offered by the OTP submission for the authorization (Pre-Trial Chamber II, *Decision*, paras. 56-59 and 62).

<sup>54</sup> Mba Chidi Nmamu, ‘Violence in Kenya: Any Role for the ICC in the Quest for Accountability?’ 3 *African Journal of Legal Studies* (2009) 78-95, maintains that the gravity threshold has not been met, although he does not clearly elaborate the grounds for the claim.

<sup>55</sup> International Criminal Court, Press release, *ICC judges request clarification and additional information with regard to the situation in Kenya* (ICC-CPI-20100219-PR497) 18 February 2010.

<sup>56</sup> International Criminal Court, Press release, *ICC Prosecutor to Judges: Kenya crimes resulted from a policy by identifiable leaders* (ICC-OTP-20100303) 03 March 3 2010.

<sup>57</sup> Pre-Trial Chamber II, Decision pursuant to Article 15 of the Rome Statute, *supra* note 2, paras. 48 and 55-62.

<sup>58</sup> *Ibid.*, *supra* note 2, para. 62.

<sup>59</sup> *Ibid.*

and the impact of the crimes and the harm to victims.<sup>60</sup> Their consideration of the manner in which the crimes were committed was particularly important, as it challenged the narrative that any violence was merely a spontaneous reaction to the announced election results or subsequent retaliatory violence, but rather recognized the organized nature of much of the violence, including acts committed by the police force. One of the three judges dissented from the ruling, but on different grounds, arguing that crimes against humanity must be the result of a specific policy by a state or state-like organization and that this was not demonstrated.<sup>61</sup> His dissenting opinion explicitly acknowledged that crimes appeared to have occurred, but found that they would not fall within the court’s subject-matter jurisdiction, and made no findings with regard to gravity.

While at the time of writing, six persons have been issued summonses to appear and have voluntarily done so, the confirmation of charges is not yet complete and trial proceedings may yet be some time off. However, it is not too early to consider the results to date of the ICC’s involvement and speculate on its potential future impact. That is the task to which this article now turns.

### 3. Results in Kenya

#### 3.1. *Impact to Date*

Although the government never implemented the Waki Commission’s recommendation to establish a hybrid tribunal, the Waki Report’s self-enforcing mechanism linked to the ICC has had far-reaching effects, even before the pre-trial chamber authorized an official investigation. First, without the ICC, the Waki Commission would have had no leverage. The government could have ignored its recommendations, just as it ignored those of numerous previous commissions. It seems unlikely that the question of accountability would have remained as prominent two years after the release of the report had it not been for the shadow of the ICC.

Second, had the Waki Commission not sent the names of high-level alleged perpetrators and supporting evidence to the OTP via Kofi Annan, it is unclear that the prosecutor would have sought permission to investigate the situation in Kenya. The manner in which the situation was brought to the attention of the ICC, the attention it had garnered, and the international stature of the messenger likely helped convince the prosecutor seek the opening of an investigation *proprio motu* for the first time.

Third, the activities of the Waki Commission and the ICC, with assistance from Annan, created great interest in and demand for accountability across Kenya. They influenced national debates (in cabinet, in parliament, in the media and at the local level), put several important politicians on the defensive and forced the government to embrace publicly certain international norms that it preferred to ignore, even as it tried to subvert them. This would not have been sustained if the ICC had not existed. In fact, the possibility of ICC involvement catalyzed an unprecedented interest in international criminal accountability, which resulted in a large-scale *de facto* civic education campaign.<sup>62</sup>

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<sup>60</sup> *Ibid.*

<sup>61</sup> International Criminal Court, Pre-Trial Chamber II, *Decision pursuant to Article 15 of the Rome Statute*, dissenting opinion of Hans-Peter Kaul, *supra* note 2, paras. 4 and 22-27.

<sup>62</sup> Interview with Mugambi Kiai, Open Society Institute, in Nairobi, Kenya (15 January 2010).



Fourth, this process also brought to the public agenda extra momentum for broader reforms that would reinforce the rule of law and prevent future violence, even if some supported them in order to thwart ICC involvement.<sup>63</sup> Most of this momentum was channelled into the constitutional review process, culminating in the approval by plebiscite of a new constitution in August 2010. Though there is widespread optimism about what the new constitution can achieve, its adoption will not *ipso facto* re-establish the rule of law and prevent violence. The proposed decentralization of power could help in some ways help meet local needs, but it also could lead to ethnic chauvinism and renewed violence at the local level against “outsiders” who “do not belong” in a particular location.

Fifth, the attention brought to bear on impunity along with broader legal and constitutional reform processes have created very high expectations among Kenyans and the ICC prosecutor, who believes ICC trials alone will prevent violence from recurring at the next general elections, due in 2012.<sup>64</sup> Though opinions are divided over the probability of large-scale electoral violence in 2012, it seems unlikely—given the complex roots of the violence and the constant flux of the political situation—that only six prosecutions and not necessarily that many convictions will be sufficient to deter violence, as explained in the next section.

### 3.2. Future Impact: Deterrence or Renewed Violence?

An important concern is what effect indictments of top politicians will have. If one-sided, i.e., if the ICC only charges or convicts politicians and other figures from one side of the ethno-political divides that existed at the time of the 2007-08 violence, the accused might be able to whip up unrest and potentially serious new bouts of violence in their areas of origin. This is certainly one of the concerns raised by some scholars regarding the ICC—that it could promote conflict by destabilizing conflict-affected states.<sup>65</sup> For instance, if the ICC confirms charges against or condemns the most prominent Kalenjin political leader William Ruto of the ODM, but no Kikuyu or member of the PNU, he and his associates are likely to incite unrest in Rift Valley Province, potentially leading to more deaths and expulsions of Kenyans whose ethnicity is “not indigenous” to the area (including Luo and especially Kikuyu). The ICC prosecutor is widely believed to be well aware of this danger and therefore sought to “balance” the indictments and avoid singling out leaders from one party or one ethno-regional group. As recommended by some analysts, he went after top people on both sides of the political party divide, but also of the police commissioner at the time of the post-election violence, whom many believe bears much of the responsibility for police officers shooting peaceful demonstrators (as discussed below).<sup>66</sup>

While the six persons issued summonses to appear did so voluntarily for the first confirmation hearings, this is no guarantee that each will willingly return for future proceedings. If those named by the court do not present themselves voluntarily and are not arrested while travelling abroad, the Kenyan government will be called upon to detain and extradite them. This would be politically contentious. For instance, President Kibaki would hardly want to go into retirement having just turned over a prominent ally such as Deputy Prime Minister Uhuru

<sup>63</sup> Interview with Ndung’u Wainaina, Executive Director, International Center for Policy and Conflict in Nairobi, Kenya (14 January 2010).

<sup>64</sup> Christine Alai and Njonjo Mue, ‘Kenya: Impact of the Rome Statute and the International Criminal Court’, ICTJ Briefing 5 (June 2010), <[http://www.ictj.org/static/Publications/ICTJ\\_KE\\_RSRC-ImpactofICC\\_bp2010.pdf](http://www.ictj.org/static/Publications/ICTJ_KE_RSRC-ImpactofICC_bp2010.pdf)>, 29 August 2010.

<sup>65</sup> See, e.g., Clark and Waddell, *supra* note 4.

<sup>66</sup> For instance, interview with an NGO official, in Nairobi, Kenya (January 2010).

Kenyatta, son of the country’s first president. Kibaki, Odinga and their cabinet colleagues would probably prefer to remove themselves from the process, leaving it to the Attorney General and perhaps the Minister of Justice to manage the politically sensitive issue of arresting alleged perpetrators. Perhaps they would privately persuade the accused to turn themselves in to avoid a political showdown and political responsibility, passing the buck to The Hague.<sup>67</sup> The government is also likely to receive significant pressure from aid donors with respect to the ICC’s indictments—or risk having aid dramatically cut—as well as from domestic and international media.<sup>68</sup> Kenya would also be labelled a pariah state, alongside Sudan, for its refusal to cooperate with the ICC. Though oil-rich Sudan can afford and sometimes appears to relish isolation from the West, the Kenyan political class would seek to avoid such ostracism, which would preclude their ability to travel to the West. The choice of the use of summonses was, it appears, a deliberate strategy by the OTP to encourage suspects to present themselves at the court voluntarily.<sup>69</sup>

A key question is whether the shadow of the ICC is likely to deter future atrocities. As alluded to earlier, many observers believe (or, understandably, want to believe) that breaking the culture of impunity, that holding to account even just one perpetrator, would have a powerful symbolic effect and dissuade those who might commit future gross violations of human rights.<sup>70</sup> Less optimistic analysis suggests that perpetrators might merely adjust their strategies: where, because of a history of impunity, they operated relatively openly in the past and cared little about leaving evidence behind, in the future they would make greater efforts to cover their tracks to avoid prosecution. Moreover, since no more than a half-dozen people will face justice in The Hague, future perpetrators would try to ensure they could not be construed as “big fish”. If militias are not disarmed and disbanded, they are likely to commit more acts of violence in the future,<sup>71</sup> taking sufficient precautions to avoid leaving behind evidence that could be used against them. New “warlords” could also emerge to fill the vacuum created by the removal of those who are taken to The Hague.

In addition, since the ICC will not prosecute ordinary Kenyans and rank-and-file police officers who committed the majority of the acts, the deterrent effect on those lower down in the chain of command might be minuscule at best and possibly non-existent. The potential for international criminal justice to deter future atrocities remains hotly contested.<sup>72</sup> At that level, only local trials could have a positive effect, and even that is uncertain. As of December 2011, of the cases that have been tried under domestic law, Human Rights Watch was able to identify only six convictions for serious crimes, with another three cases pending. Most of those found guilty were affiliated with the ODM, while and one conviction was for the killing of a police

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<sup>67</sup> Interview with Apollo Mboya, CEO/Secretary, Law Society of Kenya, in Nairobi, Kenya (21 January 2010).

<sup>68</sup> Interview with an anonymous source (January 2010).

<sup>69</sup> The OTP has also requested summonses in the Sudan situation, including for Harun and Kushayb, against whom the judges decided to issue arrest warrants instead, and Abu Garda, Jerbo and Banda, for whom summons to appear were issued. Interview with officials in the Office of the Prosecutor, International Criminal Court, in The Hague, Netherlands, July 2010.

<sup>70</sup> For instance, interview with James Gondi, Legal Officer, International Commission of Jurists–Kenya Section, in Nairobi, Kenya (18 January 2010).

<sup>71</sup> Interview with Willy Mutunga, Representative, Ford Foundation, in Nairobi, Kenya (20 January 2010).

<sup>72</sup> Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, 95 *American Journal of International Law* (2001) 7-31; Kenneth Rodman, Darfur and the Limits of Legal Deterrence, 30 *Human Rights Quarterly* (2008) 529-60.

officer.<sup>73</sup> This record of convictions does not reflect the pattern of the post-election violence of 2007-08, in which ODM- and PNU-supporters committed similar levels of crimes, and the police themselves killed over 400 unarmed civilians—more than one-third of the total number of casualties.<sup>74</sup> In other cases, the government failed to provide compelling evidence of guilt, leading to acquittal, notably in the internationally publicized case of the burning of a church in Kiambaa after those seeking safety were locked inside.

### 3.3. *Broader Impact: How Realistic?*

As mentioned above, the prospect of ICC involvement in Kenya has raised tremendous expectations, and not only in the realm of preventing future outbreaks of violence. For instance, one NGO activist expressed his hope that the ICC would work directly with the Ministry of Justice and local NGOs on issues such as police oversight, professionalism and accountability.<sup>75</sup> Such activities, however, lie beyond the remit of the ICC, and the prosecutor, in advocating positive complementarity and his expectation that the ICC could enhance accountability and rule of law in countries under scrutiny, has also made it clear that the ICC will not engage in direct capacity-building.<sup>76</sup> To avoid disillusionment, civil society and the media will need to manage unrealistic expectations, while the court and the Office of the Prosecutor need to avoid promoting such expectations.<sup>77</sup> An outreach office in Kenya would be highly useful in this regard, but security concerns and budget limitations mean one has not yet been set up, and it is possible that one will never be.<sup>78</sup> Finally, while some in Kenya and elsewhere have suggested that the ICC should hold some trials in Kenya, or perhaps use the facilities of the International Criminal Tribunal for Rwanda in neighbouring Tanzania, the former step seems unlikely while security concerns prevent even the opening of an outreach office, and the latter will not make ICC proceedings significantly more accessible to people in Kenya.

ICC involvement will certainly reinforce, if not prove, the widely held perception that Kenya's judiciary is unable to challenge impunity.<sup>79</sup> Some believe that this will prompt judicial reform, which would constitute a lasting legacy.<sup>80</sup> Others, though, are more sceptical. The head of a human rights NGO, for example, stated that trials in the Netherlands would be too far removed from Kenya and the ICC would therefore have “no effect on the judiciary”, in spite of the

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<sup>73</sup> No convictions of PNU supporters or police officers have been obtained. Human Rights Watch, “Turning Pebbles”: Evading Accountability for Post-Election Violence in Kenya’ (Human Rights Watch, New York, 2011) pp. 39-44.

<sup>74</sup> Waki Commission, *supra* note 7, pp. 311, 346, 417-18.

<sup>75</sup> Interview with Mugambi Kiai, Program Officer, Open Society Institute, in Nairobi, Kenya (15 January 2010).

<sup>76</sup> International Criminal Court, *supra* note 29, para. 65, suggests that the court will work with NGOs to maximize preventive impact, but does not explain how, and elsewhere makes clear that the court will not engage in direct capacity-building activities.

<sup>77</sup> For instance, interview with Njonjo Mue, Head of Kenya Office, International Center for Transitional Justice, in Nairobi, Kenya, (12 January 2010).

<sup>78</sup> Interview with an anonymous source, in Nairobi, Kenya, (January 2010).

<sup>79</sup> International Bar Association and International Legal Assistance Consortium, *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya*, (International Bar Association, London, February 2010); Waruguru Kaguongo and Godfrey M. Musila (eds.) *Judiciary Watch Report. Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues, and Debates* (Konrad-Adenauer-Stiftung, Nairobi, 2009).

<sup>80</sup> For instance, interview with Willy Mutunga, Representative, Ford Foundation, in Nairobi, Kenya (20 January 2010). He also believes accountability could promote the emergence of alternative political leaders from social movements or the private sector.

potentially important symbolic effects of seeing senior politicians charged and prosecuted.<sup>81</sup> A donor agency employee concurred with this pessimism, arguing that the effect of the ICC on local institutions will be minimal. It will not affect police officers who killed, nor will it have an important effect in deterring local-level conflict or promoting reconciliation. In fact, it could further entrench the idea that foreign involvement is required, because local institutions are ineffective.<sup>82</sup>

The ICC has authorized the prosecutor to investigate possible crimes against humanity that occurred between 1 June 2005, the day the Rome Statute entered into force in Kenya, and 26 November 2009, when the prosecutor made his official request to investigate. The ICC could not legally have a mandate to investigate similar types of crimes that occurred before that period, notably state-induced political violence in the 1990s, nor can it investigate other types of crimes, for instance, large-scale economic crimes, because it lacks temporal and subject-matter jurisdiction over such acts.<sup>83</sup> Beyond the limited set of crimes which may be prosecuted before the ICC, it appears that longstanding impunity in Kenya will not be affected.

Finally, ICC involvement could create some perverse side-effects. If the ICC fails to convict anyone—or convicts perpetrators from only one side of the political divide at the time of the 2007 elections—some victims, frustrated by continued impunity, might become perpetrators.<sup>84</sup> The failure to convict perpetrators could well impel ordinary people, “hungry for blood”, to commit acts of “mob justice” at the local level.<sup>85</sup> Moreover, numerous Kenyan NGOs and activists have expressed serious concerns for the safety of witnesses and their families. The ICC will have limited ability to protect witnesses, especially during the investigation phase, and few are convinced that even the government’s revamped protection program will be effective. Several actual and potential witnesses have already been threatened and some have gone into hiding. Ironically—and tragically—ICC involvement could thus actually not be in the best interest of some of the victims.<sup>86</sup>

## Conclusion

The ICC is an institution still in its infancy, with great political expectations pinned on it, and an evolving record of jurisprudence. This article has examined two linked issues in its engagement

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<sup>81</sup> Interview with L. Muthoni Wanyeki, Executive Director, Kenya Human Rights Commission, in Nairobi, Kenya (22 January 2010).

<sup>82</sup> Interview with a western donor agency official, in Nairobi, Kenya (January 22, 2010).

<sup>83</sup> On the “ethnic clashes” of the 1990s, see Akiwumi Commission, *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya*. Nairobi: Government of Kenya (Government of Kenya, Nairobi, 1999); Stephen Brown, ‘Quiet Diplomacy and Recurring ‘Ethnic Clashes’’, in Chandra Lekha Sriram and Karin Wermester (eds.) *From Promise to Practice: Strengthening UN Capacities for the Prevention of Violent Conflict* (Lynne Rienner, Boulder, CO, 2003) pp. 69-100; Human Rights Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (Human Rights Watch, New York 1993); Peter Mwangi Kagwanja, *Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya* (Human Rights Commission, Nairobi, 1998); and Jacqueline M. Klopp, ‘‘Ethnic Clashes’ and Winning Elections: The Case of Kenya’s Electoral Despotism’, *Canadian Journal of African Studies* (2001) 473-517. On corruption, see among others Michela Wrong, *It’s Our Turn to Eat: The Story of a Kenyan Whistle Blower* (Fourth Estate, London, 2009).

<sup>84</sup> Interviews with Apollo Mboya, CEO/Secretary, Law Society of Kenya, in Nairobi, Kenya, 21 January 2010; and with a western donor agency official, in Nairobi, Kenya (22 January 2010).

<sup>85</sup> Interview with a European researcher, in Nairobi, Kenya (January 2010).

<sup>86</sup> Interview with an anonymous source, in Nairobi, Kenya (January 2010).

with Kenya: expectations that the court can have effects far beyond the courtroom, and decisions within the courtroom about which cases should come before it. At first blush, these might appear to be separate matters: one eminently political and the other largely legal. However, they are not. Expectations for the political impact of the court are closely tied to the legal concepts of gravity and complementarity, particularly with the development of the concept of positive complementarity, and the hope that the court might promote or compel accountability domestically so that its own jurisdiction is rendered unnecessary. This was made particularly explicit in Kenya, with the famous “Waki envelope” used as a tool to try to compel the creation of a special tribunal.

While positive complementarity ultimately appears to have failed in the face of perverse complementarity machinations, prosecutorial statements have elaborated the prosecutorial concept of positive complementarity. Further, future modifications of the “three-pronged” approach might yet arise, utilizing domestic trials, a hybrid tribunal, a commission of inquiry, or other mechanisms. At the same time, the decisions by the court to approve an investigation and rejecting Kenyan government arguments challenging admissibility provided further jurisprudence expanding on the meaning of complementarity. Similarly, while political actors sought to downplay either the scale of or motivation for the violence, the court’s consideration of the gravity threshold provided fresh insights into the interpretation of gravity per se, but also undermined political claims that the violence was not in many instances organized. The Kenyan situation is an important one for the court, as it has compelled elaboration of core principles for admissibility.

The “shadow of the ICC”, that is, the threat of its involvement affected the situation in the country in many positive ways, notably by the attention it brought to the fight against impunity. This provided much succour to human rights NGOs and forced politicians to modify their behaviour and embrace international norms, at least in public. The ICC will not prosecute more than half a dozen penetrators, offering relatively little retributive justice—and only for a small subset of the large number of abuses. Despite the limitations to its reach, the ICC is nonetheless the only institution that can achieve any degree of accountability for massive human rights violations in Kenya. It is unlikely to satisfy most Kenyans’ high expectations, notably preventing future instances of organized political violence, but it should be able to shatter the country’s record of complete impunity for high-level officials. That will be an important achievement, not least for its symbolic value.<sup>87</sup>

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