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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**THE LEGALITY OF THE INTERNATIONAL CRIMINAL COURT INVESTIGATIONS  
IN KENYA**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Mbugua Robert Chege**

**December 2011**

The American University in Cairo  
School of Global Affairs and Public Policy

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The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

THE LEGALITY OF THE INTERNATIONAL CRIMINAL COURT INVESTIGATIONS IN  
KENYA

Mbugua Robert Chege

Supervised by Professor Thomas Skouteris

ABSTRACT

The opening of ICC investigations in Kenya in March 2010 incorporated a *proprio motu* decision and an authorization by the Pre-Trial Chamber of the court. Post-election violence in the months between December 2007 and January 2008 were the basis of the supposed crimes committed by individuals in Kenya. Because Kenya did not forward a referral, and the Security Council did not issue a resolution to request the opening of investigations, the Prosecutor of the ICC was required to establish to the Pre-Trial Chamber that there was reasonable basis to move forward with investigations. According to the Pre-Trial Chamber's ruling, the Prosecutor had reasonable basis to suspect violations of the laws of the Rome Statute.

What has made the ICC's role in Kenya unique and controversial is the use of *proprio motu* powers for opening Kenya to ICC investigations, and the implications of interpretations of legal principles outlined in the statute of the ICC.

As established in the Rome Statute, one of the primary roles of the ICC Pre-Trial Chamber is to ensure that the Prosecutor does not initiate investigations beyond his legal capacity. When presented with the information from the Office of the Prosecutor, the Pre-Trial Chamber authorized the investigations on the basis of a description of "reasonable basis." In the absence of a clear and concise description of the term in the Rome Statute, the Pre-Trial Chamber derived meaning from interpretations of a number of articles that relate to standards of evidence.

Additionally, the Pre-Trial Chamber explained why it believes that gravity and admissibility existed in the situation in Kenya, warranting the exercise of its jurisdiction for serious crimes.

Pertinent articles in the Rome Statute will be examined to determine whether the decision was in fact in accordance with the principles of the ICC. An analysis of three requirements for

investigations in the Rome Statute including reasonability, admissibility, and gravity, is carried out to determine whether a legally sound interpretation was followed. The legality of the decision to open investigations is the primary focus, taking into account arguments from non-Rome Statute States citing a fear of frivolous litigation. A discussion of the Pre-Trial Chamber's authorization and the dissenting opinion of one of the judges in the chamber will also be discussed to underscore the difficulty in interpreting the prosecutorial discretion and limitations within the ICC.

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## I. INTRODUCTION

Ending impunity has been the mantra of the International Criminal Court since its coming into force in 2002.<sup>1</sup> The wording in chapter four and five of the preamble of the Rome Statute sets the tone for this mandate and provides a site of reference for indicating that this is the objective of the Rome Statute.

After the ratification of the Rome Statute by 60 countries and its coming into force,<sup>2</sup> 114 countries have since become member-states. However, there remains the notable absence of key states including the U.S.A and China.<sup>3</sup> One is left to wonder why these two states and others have refrained from ratifying the Rome Statute even when the goal of the ICC is seemingly noble one; ending impunity for those who are “most responsible for the most serious crimes of international concern.”<sup>4</sup>

Hypotheses that attempt to answer this question can be answered by political theorizing, or perhaps by a closer look at legal principles and regulations that take into account legal documentation for the work of the ICC, can shed some light.<sup>5</sup> In order to obtain an explanatory theory based on legal analysis, one must search within the Rome Statute itself which is the “Magna Carta” of the ICC that provides authority for how to conduct operations. Laid out in the Rome Statute, and from whence a state may make a referral to the ICC, the Security Council may pass a resolution, or the ICC Prosecutor can initiate an investigation, is the authority for these three subjects in the Rome Statute to trigger the mechanism of the ICC.<sup>6</sup> The third subject above, the ICC Prosecutor, may request the initiation of an investigation through his discretionary powers that are referred to as *proprio motu* in the Rome Statute. This form of prosecutorial discretion in the ICC has so far only been employed once; in the situation of Kenya for crimes committed during the post-election violence. Research in this paper will look at the

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<sup>1</sup> Dov Jacobs, *A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase*, 6 Law & Prac. Int'l Cts. & Tribunals 318 (2007)

<sup>2</sup> Official website of the ICC, *About the Court*, available at <http://www.icc-cpi.int/Menu/ICC/About+the+Court/> (last accessed 21 May 2011)

<sup>3</sup> International Criminal Court, official website of the ICC, The States Parties to the Rome Statute, available at <http://www.icc-cpi.int/Menu/ASP/states+parties/>

<sup>4</sup> Rome Statute of the International Criminal Court, preamble par 4 and par 5, U.N. Doc No A/CONF.183/9 (July 17, 1998), reprinted in 37 Int'l Legal Materials 999 (1998) [hereinafter Rome Statute].

<sup>5</sup> Lu Jianping and Wang Zhixiang, *Chinas Attitude Towards the ICC* 3 J. Int'l Crim. Just. 610 (2005) – this article provides one view which discusses the U.S. military operations around the world as being a major political factor against joining the ICC, in contrast to China, which in these authors' view has more dissensions with the Rome Statute on interference based on legal principles.

<sup>6</sup> Rome Statute, at Art 13

*proprio motu* powers and the regulations guiding its use, as pertaining to the Prosecutor of the ICC in general and specifically analyze the operations in Kenya. It is an attempt to determine the legal applicability of *proprio motu* decisions in any given situation, and whether a connection exists between the reluctance of states to join the ICC and a well founded fear of the *proprio motu* privilege of the ICC Prosecutor.

Seemingly at stake in the provision of provision of *proprio motu* powers for the ICC Prosecutor is a judicial independence free from external influences that threatens the neutrality of the first permanent international criminal court.<sup>7</sup> The political angle that affects the willingness of these states to ratify the statute is that the ICC Prosecutor will not be independent from influence, and will have the power to choose at will, and when to open cases against their citizens. But, beyond the negotiations and talks that resulted in the adoption of the Rome Statute and the establishment of the International Criminal Court (ICC) in 1998,<sup>8</sup> a debate has also arisen among member states and non-member states alike about the legitimacy of certain means of initiating investigations. Arguments forwarded by the U.S.A and China against becoming parties to the ICC include several point towards several political grievances. However, these two states have also refrained from ratifying the Rome Statute for reasons that include a hesitation against ceding too much control to the Prosecutor.<sup>9</sup> Amongst other things, a fear of frivolous litigation has held back the U.S. and China, which are among two important states that remain non-members to the statute. Their arguments are both legally and politically slanted, however, a clear answer can be derived based on the legal fact that the ICC Prosecutor has been endowed with *proprio motu* powers to initiate investigations. It is crucial to analyze the degree of legality and the threshold that the Prosecutor must demonstrate before he can exercise discretion in opening investigations. A legal answer to this dilemma resides in the checks and balances that limit the ICC Prosecutor and control the process of opening investigations, which limit his powers within a specific context. This foresight of the drafters of the Rome Statute has come

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<sup>7</sup> Rod Rastan, The Power of the Prosecutor in Initiating Investigations, Int. Cent. for Crim. L. Ref. and Crim. Just. Pol., 4 (2007) – Rastan discusses Frivolous Litigation under the backdrop of Prosecutorial predictability in his discretion, and how that plays a role in clarity of law.

<sup>8</sup> Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (July 17, 1998), reprinted in 37 Int'l Legal Materials 999 (1998) [hereinafter Rome Statute].

<sup>9</sup> Lu Jianping and Wang Zhixiang, *supra* note 5, 611. China may not yet have the type of influence that the U.S. has in signing bi-lateral agreements to fight the jurisdiction of the ICC, but the worry remains the same that the ICC Prosecutor may at any time use his *proprio motu* powers to prosecute their nationals more for political reasons than legal ones.

close to absolving some of the hesitations of states from joining the ICC by including two rules that regulate the scope and power of the court. But questions remain.

First, because ICC is governed by the Rome Statute, the sole purpose of the court is to engage in processes that are geared towards “ending impunity for perpetrators of the most serious crimes of international concern.”<sup>10</sup> It is clear that the ICC has been legally mandated to prosecute a very specific set of crimes, and operates in a limited scope of criminal law, which would seemingly allay the apprehensions of member states. Despite the fact that all the State Parties to the Rome Statute formally accept the ICC’s jurisdiction to investigate and prosecute certain crimes on their territory, it is on condition that only four crimes delineated in the statute will be the subject of ICC operations.<sup>11</sup> The Rome Statute gives the ICC jurisdiction to prosecute only genocide, war crimes, crimes against humanity, and aggression.<sup>12</sup> The question to consider is what threshold of crimes constitutes the reasonable cause of belief to warrant the opening of investigations.

Second, any investigations that are opened on a *proprio motu* basis need authorization from the Pre-Trial Chamber of the ICC, and should reflect a regard for three factors that would ensure clarity of law. Only under *proprio motu* guidelines, is the Prosecutor of the ICC is required by law to forward a “request for authorization.”<sup>13</sup> When a case is referred to the ICC by a state or the Security Council or a State-Party, the Prosecutor is not required under the Rome Statute to submit a request for authorization to officially open investigations. The purpose of Pre-Trial authorization is a balancing prosecutorial discretion with the checks and balances would in theory provide the ICC Prosecutor sufficient prevent frivolous litigation against member states, while still offering prosecutorial discretion. An analysis by the Pre-Trial Chamber of reasonable basis, admissibility, and gravity according to Article 53 of the Rome statute is undertaken, in the assumption that ICC Prosecutor had already regarded all three of these guidelines. The second question to take into account here is whether, as per the Rome Statute, the ICC Prosecutor and the Pre-Trial Chamber are in fact bound to a strict interpretation of the three regulations above, or if they are merely “guidelines” for loose interpretation.

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<sup>10</sup> *Id.* at, Preamble paragraph 4

<sup>11</sup> Rome Statute, *supra* note 1, at Article 1.

<sup>12</sup> William Schabas, *Punishment of Non-State Actors*, 26 Fordham Int’l L.J. 907, 910 (2002)

<sup>13</sup> Rome Statute, Article 15, paragraph 3

Other legal limitations on the scope of the ICC that exist include its territorial and temporal jurisdiction. For the former case, Article 12 states that the ICC may exercise jurisdiction when the crime occurred on the territory or vessel of one of the State-Parties, or if a national of one of the State-Parties committed the crime.<sup>14</sup> While jurisdiction grievances remain important objections against joining the ICC, only the two questions regarding *proprio motu* laid out above will be discussed in this article, since the main focus is on the situation regarding Kenya. The issues mentioned above remain the key questions for Kenya.

The prosecutorial discretion in the power of *proprio motu* afforded to the ICC Prosecutor enabled him to open investigations in Kenya after receiving information on politically motivated crimes. Between December 2007 and February 2008, Kenya was divided as a result of political upheaval that led to deadly violence. As peace negotiations brought about an end to the violence, both Kenyans and the international community sought methods for bringing to justice those suspected of inciting violence and violating crimes of international concern. Since Kenya had signed and ratified the Rome Statute in 2005,<sup>15</sup> state consent as a sovereign state was therefore assumed to have ceded authority to the ICC to exercise jurisdiction over the territory of Kenya. The Prosecutor remains legally authorized to investigate and prosecute on any State-Party to the Rome Statute.<sup>16</sup> Prosecutor Luis Moreno Ocampo<sup>17</sup> used his *proprio motu* powers to initiate investigations in Kenya.<sup>18</sup> His decision was based on an interpretation of the law, and the information from independent reports regarding probable Rome Statute crimes committed on the territory of Kenya. According to the Pre-Trial Chamber rulings on the request, the sources of information were mainly provided by the United Nations High Commissioner for Human Rights, the Waki Commission, and the Kenya National Commission on Human Rights.

The bulk of the research in following chapters is based on the interpretation of law in Article 53 of the Rome Statute. When the ICC Prosecutor initiated investigations in Kenya did he take into consideration each of the three determining factors that are outlined as preliminary for jurisdiction to be acquired by the ICC? Answering this question necessitates dissecting the

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<sup>14</sup> *Id.* at, Article 12

<sup>15</sup> International Criminal Court [Hereinafter ICC], Press Release: *Kenya Ratifies Rome Statute* (2005), available at <http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202005/kenya%20ratifies%20rome%20statute>

<sup>16</sup> This provision is highlighted under Article 4 of the Rome Statute

<sup>17</sup> Luis Moreno was first elected to the ICC in 2003, and has been the prosecutor since that time.

<sup>18</sup> Official Website of the ICC, *Supra* note 4, Prosecutor, available at <http://www.icc-cpi.int/menus/icc/structure+of+the+court/office+of+the+prosecutor/biographies/the+prosecutor.htm>

purpose and meaning of the Article 53 and the terms that used in each of the paragraphs that delineate the factors that the ICC Prosecutor must consider before initiating investigations. First, reasonable basis will be discussed, to gauge whether the standards of evidence proposed to the Pre-Trial Chamber as a potentially precedence-setting decision did in fact meet the “reasonable basis” standard of the Rome Statute. If it is assumed that the court had a “reasonable basis” for investigating certain individuals, thus it can also be inferred that the court made the judicial decision *quid pro quo* to effectively assume that the crimes committed were of the nature constituting international crimes. Second, an overview of admissibility will be provided as a primary factor for acquiring jurisdiction, and a requirement for consideration by the ICC Prosecutor in order to exemplify whether these factors were considered before initiating investigations. Third and final, the question of application of gravity in the Rome Statute will also be addressed. A clear standard of gravity is the difference between arbitrary decision-making and a precise legal dissemination of ICC jurisdiction over the territory of sovereigns. When the decision to initiate investigations in Kenya was made, was gravity taken into consideration? And if so, what standards were used, and how do these compare to previous decisions of the ICC?

An evaluation of “threshold” in the crimes committed in Kenya will be carried out in order to analyze whether a legal process was appropriately followed by the ICC Prosecutor and if a threshold was met. Crimes against humanity will be the main focus of this evaluation, as this was the category of crimes brought against individuals suspected of crimes in Kenya. The discussions will establish whether the opening of investigations in Kenya was well-founded according to the legal principles outlined in the Rome Statute. Research will address whether the ICC Prosecutor applied all of the requirements and preconditions of the Rome Statute. Additionally, legal definitions of threshold in the Rome Statute will be discussed to gauge whether the Pre-Trial Chamber’s authorization of the investigations meets the standards of legality set forth in the Rome Statute.

## **II. REQUIREMENTS FOR ICC JURISDICTION THROUGH *PROPRIO MOTU***

The *proprio motu* power endowed to the prosecutor of the ICC is not unlike the power that local prosecutors in the United States judicial system have to request the opening of

investigations in certain criminal investigations. After finding reasonable basis, prosecutors in the domestic criminal court systems may open investigations against criminal suspects. Similarly the ICC prosecutor must show reasonable basis for specific crimes committed in order to request investigations, in addition to fulfilling other requirements. For the ICC to acquire jurisdiction of a case, a demonstration of three determinant factors listed under Article 53 of the Rome Statute are required: *reasonable basis* (article 53, paragraph 1.a), *admissibility* (article 53, paragraph 1.b) and *gravity* (article 53, paragraph 1.c).

Because the crimes committed in Kenya occurred in 2008, and Kenya signed the Rome Statute in 2005, any crimes occurring after that date would fall within the temporal jurisdiction of the ICC. Additionally, the Court must also apply other jurisdiction requirements including substantial, and territorial or personal jurisdiction. Under the substantial jurisdiction, the ICC has authority to adjudicate only crimes which are listed under its statute. The Rome Statute does not try domestic crimes that do not amount to international crimes.

If an accused committed crimes of the domestic nature without the material element that raised the violation to the international arena, then he or she is not bound by the laws of the Rome Statute. A conflicting reality thus naturally presents itself in the operations of the ICC when in its attempts to substantiate a claim that crimes committed amount to serious crimes of international crimes. The Prosecutor must first establish whether crimes did in fact occur, by using reasonable basis.

## **A. Prosecutor Requirements for Opening Investigations by *Proprio Motu***

### **1. Article 15: *Reasonable Basis***

Ensuring independence of the ICC Prosecutor

Article 15 of the Rome Statute provides a systematic description of the process that the ICC Prosecutor must take in opening investigations. After establishing that a crime seems to fit the description of a Rome Statute crime or on that is among the “most serious,” as in Article 15 (2), the Prosecutor must then determine whether there is “reasonable basis” to proceed with the

investigations. The information being analyzed by the Prosecutor is done so on preliminary basis. As such, the court has not officially applied jurisdiction over the crimes and thus is not bound to legal rules pertaining to the basis of why the court is investigate certain crimes. Article 15(3) of the Rome Statute introduces the requirement of reasonableness, stating that the Prosecutor must include this in his request for authorization.<sup>19</sup> This comes after a careful analysis of the preliminary information he has received and the supporting documents which he will use to support and qualify his decision for the ICC to open official investigations.

## **2. Article 17: *Admissibility***

Article 17(1) indicates that the ICC must consider the issue of admissibility before extending its jurisdiction over international cases.<sup>20</sup> Four Article 17 provisions indicate the points at which the Prosecutor may deem that a case is admissible in the ICC. Article 17 (1) (a) states that when a country is “unwilling or unable to genuinely” investigate or prosecute then the case is admissible in the ICC. Article 17 (1) (b) discusses the instance of admissibility when a State has undergone domestic investigations and the ICC can prove those investigations resulted in impunity due to the “unwillingness or inability” on the part of the State to prosecute. Article 17 (1) (c) defines a crime as admissible to the ICC as long as there have has been no prior domestic or international trial for the suspected individual. And Article 17 (1) (d) delineates gravity as the fourth factor determining admissibility, where the ICC will only consider crimes which are of sufficient gravity. All four of these stipulations must be met comprehensively in order for a crime to become admissible for ICC investigations.

## **3. Article 53: *Admissibility, Reasonable Basis, and Gravity***

Article 53 reaffirms Article 15, developing a comprehensive list of qualifications that the ICC prosecutor must consider before a crime can come under the jurisdiction of the ICC. Article 53 (1) (a) states that the information available to the prosecutor must provide a reasonable basis

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<sup>19</sup> Rome Statute, Article 15, par. 4

<sup>20</sup> Rome Statute, Article 17

for assuming that a Rome Statute was committed. Article 53 (1) (b) requires that a crime first be admissible under Article 17 before an investigation can be opened. This article stresses the ICC is a complementary court and not one of first instance. Article 53 (1) (c) takes into account gravity and stresses the importance of considering the interests of victims when opening an investigation. If any of the above conditions are not met, the ICC investigations do not continue and the Prosecutor is obligated to inform the Pre-Trial Chamber of his conclusions. Under Article 53 (4), the Prosecutor may reconsider his determination at a later date, based on new information.

## **B. Pre-Trial Chamber Requirements for Authorizing an Investigation**

The ICC comprises of four organs, one of which is the judicial organ which is divided into three chambers. Article 34 (2) divides this organ into three chambers: the Pre-Trial Chamber, Trial Chamber, and the Appeals chamber. It is the mandated function of the Pre-Trial Chamber to work with the Prosecutor in determining which cases fall under the jurisdiction of the court and are admissible.

### **1. Article 15: *Reasonable Basis***

Similar to the requirement of the ICC Prosecutor to find reasonable basis for proceeding with investigations, the Pre-Trial Chamber is required to make a similar finding. Article 15 (4) of the Rome Statute stipulates that the Pre-Trial Chamber examine the request of the Prosecutor and supporting documents in order to “conduct an examination of the request and the supporting material” to find whether there is reasonable basis to proceed with investigations and to decide whether the crime “appears to fall within the jurisdiction of the court.”<sup>21</sup>

The process therefore entails a comparison of the specific details of the case with the material elements of the Rome Statute crimes.

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<sup>21</sup> Rome Statute, Article 15, par. 4

In his application the ICC Prosecutor lists the crime which he believes was committed and subsequently gives his reasoning. An endorsement by the judges is the final approval that the Prosecutor needs to proceed. A negative response by the Chamber at this point does not bind the Prosecutor from re-submitting the request for authorization based on new information.<sup>22</sup>

## **2. Article 19: Admissibility and Jurisdiction**

Under Article 19 (1), the court is given the right to make a decision on jurisdiction by “satisfying itself” that it has jurisdiction. It also authorizes the court to “determine the admissibility” of a crime “by its own motion.” Article 19 (2) indicates that the prosecutor may request a ruling of the court on admissibility or jurisdiction. Since Article 17 on admissibility refers to the entire ICC, this section (Article 17) must also therefore refer to the Pre-Trial Chamber when it is approving the opening of investigations.

## **3. Article 57: Majority Vote**

Article 57 (2) considers the manner in which an authorization decision will be made by the Pre-Trial Chamber. For any official decisions having to do with Article 15 *inter alia* of the Rome Statute, the Pre-Trial Chamber must decide on a majority basis of its judges.<sup>23</sup> In Article 15 (4), the Pre-Trial Chamber has the mandate to analyze the request of the Prosecutor on the reasonableness of a request to investigate Rome Statute crimes. Article 57 does not require the Pre-Trial Chamber to make a judgment on admissibility at this time.

Besides these two Articles, the Rome Statute does not mention further requirements besides a general review of the Prosecutor’s request for authorization. The chamber must decide whether the ICC Prosecutor was correct in his analysis of reasonableness that a crime was committed, and deem that this crime falls under the jurisdiction of the court. When the Pre-Trial

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<sup>22</sup> Rome Statute, Article 15, par. 5

<sup>23</sup> Id. at Art 57, par. 2 (a)

Chamber has ruled in favor of a crime being admissible, any party that has interest<sup>24</sup> in the case can appeal the decision at any date before the confirmation of charges is made.<sup>25</sup>

### C. Crimes under the jurisdiction of the ICC

There are four crimes under which ICC jurisdiction may be exercised in order to prosecute, and considered to be among the “most serious crimes.” Article 5 of the Rome Statute outlines the crimes that are under the jurisdiction of the ICC as genocide, crimes against humanity, war crimes, and aggression.<sup>26</sup> Any other breaches of law that do not amount to any of the four crimes above are not under the jurisdiction *ratione materiae* of the ICC and cannot be adjudicated in its chambers.<sup>27</sup>

The Rome statute provides a running list of several violations that fall under one of the four listed crimes. In and of itself, even a horrific breach of law such as murder or rape would not fall under the ICC jurisdiction, unless the existence of certain necessary elements unique to one of the four crimes was proven. This is what makes the violations the “most serious crimes” of international concern under the Rome Statute. No further legal description is provided of the term “most serious crime.”

In order to exercise his *proprio motu* power, the ICC Prosecutor must demonstrate reasonable belief of a violation of one of these crimes and request approval from the ICC Pre-Trial Chamber in order to proceed with investigations. The preamble of the Rome Statute stresses twice that only the “most serious” crimes of international concern are punishable under this statute. Scholars such as Cherif Bassiouni propose that one of two qualifying factors is required to transform a domestic crime into an international crime. Either the violation is international because it ‘affects the interests of more than one state,’ or it has risen to the level of an international crime because ‘it constitutes an offense against the world community’ in general

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<sup>24</sup> By those with interest in the case, this term refers to Article 19, par. 2 that indicates that the accused, the state that would otherwise have jurisdiction or a third state that accepts jurisdiction under Article 12 can make an appeal against a ruling on admissibility.

<sup>25</sup> Rome Statute Article 19, par 6. If the appeal to the admissibility of the case is made after the confirmation of the charges, the appeal will go to the Trial Chamber.

<sup>26</sup> Rome Statute Article 15, par 4. The crime of aggression is still not under the mandate of the court to prosecute as determined by Article 5(2) due to a current lack of consensus, and therefore shall not be discussed in this paper.

<sup>27</sup> *Id.* at art.5

terms.<sup>28</sup> The ICC Prosecutor himself has reiterated that indeed the goal of the Rome Statute is to “end impunity” *only* for the “most serious crimes.”<sup>29</sup> Article 1 of the Rome Statute indicates the “most serious” crimes of international concern are those under the jurisdiction of the ICC.<sup>30</sup> Therefore the denoting factor of a “most serious crime” is on that shows up in the Rome Statute. Article 15(2) of the Statute requires that a crime must be deemed “most serious”, before approval for investigations can be given. Even before the prosecutor has the opportunity to formally request the Pre-Trial Chamber to open an investigation, he must establish what constitutes a “most serious” crime warranting an informal inquisition. While this is a subjective decision, some basic parameters exist to understand what constitutes a “most serious crime.”

## 1. Genocide

Genocide in the Rome Statute mirrors the description laid out in the Genocide Convention, stating that it is committed when there is intent to destroy a national, ethnical, racial or religious group, whether in part or in whole.<sup>31</sup> This crime is listed under Article 6 of the Rome Statute and includes killing, causing serious bodily harm, inflicting physical conditions that would lead to the effect above, biologically causing birthing complications for the same reason, and forcibly transferring the group. Without the intent of destruction, any of the above crimes do not constitute genocide.

## 2. War Crimes

War crimes are prohibited by Article 8 of the Rome Statute. This article recognizes the Geneva Conventions of 1949 in Common Article 3, and Additional Protocol II which are prohibitive in of these violations in the public domain. As a multi-lateral treaty among several states, not only do these obligations of humanitarian law bring about state responsibility to member states for state action, but also applies individual responsibility for grave breaches. By law of the Geneva Conventions all states parties are accountable for War Crimes. Kenya as

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<sup>28</sup> Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT’L L. 27, 29 (1983)

<sup>29</sup> Louis Moreno Ocampo, *The International Criminal Court: Seeking Global Justice*, Case W. Res. J. Int’l L., 40 CASE W. RES. J. INT’L L.215, 215 (2007)

<sup>30</sup> Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, (*entered into force* July 1, 2002). [hereinafter Rome Statute], at art. 1

<sup>31</sup> Rome Statute, Article 6 and the Genocide Convention, Article 2.

party to the 1949 Geneva Conventions, is thus under all the limitations including attacking civilians and civilian objects.<sup>32</sup> Common article 3 of the Geneva Conventions also prohibits violence to the life and dignity of civilian persons and the provision of medical assistance for the wounded and sick.<sup>33</sup>

Article 146 paragraph two of the Fourth Geneva Convention binds all contracting parties to ‘enact legislation’ that would be necessary to penalize crimes arising from the grave violations of humanitarian law that would amount to war crimes.<sup>34</sup> The same article recognizes the right of a state to extradite a suspect of grave crimes to a signatory state that is trying cases on ‘prima facie’ basis. The Nuremburg Charter similarly criminalized the actions of those involved in planning and perpetrating violations of the Geneva Conventions as war crimes, applying criminal responsibility.<sup>35</sup> Following the Nuremburg tribunals, the ad hoc tribunals including the International Criminal Tribunal of Yugoslavia and the International Criminal Tribunal of Rwanda were established and operated under a mandate to try War Crimes among others.

The ICC has followed suit in criminalizing War Crimes. Article 8(1) indicates that the ICC will have jurisdiction when a war crime is committed when it is ‘part of a plan or policy or as part of a large-scale commission of such crimes.’<sup>36</sup> In order for any crime to be deemed as a war crime, a prerequisite armed conflict whether non-international or international must have existed at the time of the commission of the violation.<sup>37</sup>

### **3. Crimes Against Humanity**

Crimes against humanity are a crime that is “part of a widespread and systematic attack directed against any civilian population with knowledge of the attack.” The attacks include murder, enslavement, torture, and other forms of domestic violations included in Article 7 of the Rome Statute. The basis that elevates domestic crimes is included in Article 7 (1) means that they are part of the widespread and systematic plan.

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<sup>32</sup> Nmaju, *supra* note 4, at 81

<sup>33</sup> Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), UNTS 287, 6 UST 3516, TIAS No. 3365, 75, (*entered into force* Aug. 12, 1949), at art. 3

<sup>34</sup> *Id.* at art 146

<sup>35</sup> Nuremburg Charter, art. 6, (1945) available at <http://www.icrc.org/IHL.NSF/WebPrint/350-FULL?OpenDocument>

<sup>36</sup> Rome Statute, Article 8, par. 1

<sup>37</sup> Geneva Convention IV, *supra* note 30, at art. 2 and art. 3

Article 7 (2) (a) considers these crimes as those that are part of “multiple” conducts referred to in Article 7 (1), and is pursuant to, or furthering a state or organization policy. The acts cannot be deemed Crimes against Humanity in isolation, and without a plan or policy associated to them. As such it is mandatory that the Prosecutor of the ICC establish reasonable basis for suspecting a crimes were part of a plan when opening investigations of Crimes against Humanity.

#### **4. Aggression**

Aggression is still under debate at the Assembly of Heads of state in the ICC and as such is not yet judicable in the ICC. As talks continue on how this crime will be addressed in the ICC, states argue against giving up jurisdiction in cases where the state can easily be implicated. While a state cannot commit a crime, the symbolic nature of aggression in regards to war is a politically charged debate that brings tension to the table.

### **III. ANALYSIS OF THE CRIMES IN KENYA**

Kenya is comprised of over forty tribes, living together in relative harmony, despite an underlying distrust that exists between members of the opposite tribe. Peace has prevailed since independence in 1964 and was only threatened due to historical disparities ranging from land-disputes or ethno-centric divisions.<sup>38</sup> Nairobi Population studies indicate that the vast majority of citizens living in the capital are predominantly inhabitants of low-income residential neighborhoods of the city including Kibera, Kawangare, Mathare, Kangemi, and Korogosho. These slums are situated on the outskirts of the metropolis of Nairobi and comprise of some the

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<sup>38</sup> Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, 3 AFR. J. LEG. STUD. 78, (2009): Nmaju cites the colonial impact on ethnic tension in Kenya. As a result of the power vacuum left at independence, Kikuyu’s took advantage of the situation and amassed large portions of land inherited from the British. Resentment developed among other tribes such as the Kalenjin, who felt that the Kikuyu had illegally appropriated their territory. The divisions necessarily haved into sentiment exploitation historically employed by political leaders for personal gain.

most densely populated communities in Kenya.<sup>39</sup> These same dense neighborhoods can also be found in other smaller cities in Kenya including those in the Rift Valley and Coastal Provinces.

Other states in Africa have gone through mass violent struggles and they have undergone transitional processes, local regimes have faced problems of fractured allegiances and competition for resources. In states such as the Democratic Republic of Congo and the Central African Republic, this led to a civil war where millions of people lost their lives or were displaced from their homes. The death toll in the civil war of the region was the cap on a myriad of crimes that were committed which included rapes, torture, murder, and the use of child soldiers in combat in a conflict that saw the International Criminal Court investigate and indict several individuals deemed as the most responsible in the conflict. Atrocious crimes that were committed were reported and the DRC submitted a self-referral that was accepted by the ICC. Other ICC operations in Africa that stemmed from self-referrals included Uganda and the Central African Republic, where cases were investigated and deemed to have risen to the level of international crimes. Sudan was a divergent case, which saw the Security Council of the United Nations exercise Chapter VII powers and refer the case to the ICC, which subsequently commenced investigations and issued arrest warrants and summonses for particular individuals. Each of the African cases referred to the ICC concerned situations where several people lost their lives, amidst other atrocious acts. Each of these conflicts included military factions and organized armed groups that operated under a particular chain of command and struck civilian targets through a pre-determined policy.

Other conflicts on the continent that did not involve the ICC include the 1994 Rwanda Genocide, South Africa's apartheid era, Sierra Leone and Ivory Coast's civil wars that ended in 2002, the Algerian civil war, the Burundi's civil war, the Eritrea-Ethiopia war of 1998-2000, the Liberian civil war that ended in 2003, and the war in Somalia that has ravaged the country since 1991.

While some of these conflicts have seen adjudicative functions that have taken the form of special hybrid tribunals such as the Special Court for Sierra Leone, the International Criminal Tribunal of Rwanda, and the efforts of the International Court of Justice, many of these conflicts

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<sup>39</sup> THE COMMISSION OF INQUIRY ON POST ELECTION VIOLENCE, THE REPORT OF THE COMMISSION OF INQUIRY ON POST ELECTION VIOLENCE [hereinafter *Waki Report*] 193 (15 Oct 2008) available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>

have also dealt with the conflicts in domestic courts. Other cases such as the DRC v. Uganda and Rwanda were dealt with by the African Commission on Human and People's Rights. Some cases like Somalia continue to internal inefficiencies and lack of an effective interior government. South Africa resorted to internal implementation of reconciliation efforts.

Therefore it seems that Kenya's post-election violence in the context of the history of Africa and the violent upheavals seems pale in comparison to situations named above. Regardless of where Kenya falls in the scale of atrocities in terms of numbers or seriousness, there seems to be an indicator that conflict resolution can occur in a variety of fashions on the African continent as represent by the history indicated above.

The 2007/2008 election year changed the relative peace and order. Electoral anomalies were recorded by civil society members including the media outlets, NGO's, and the election committees such as the Electoral Commission of Kenya. Reports and statements made indicated that the results had been compromised, and a rift between two sides would swiftly widen.<sup>40</sup> Mass protests overcame the country as announcements of the presidential results were met with disbelief and anger, leading to a political/tribal dimension affecting millions of people in weeks of unprecedented violence.

As one of the few African nations enjoying relative peace since independence, the violence that erupted was a shock to the continent and the international community as a whole.

#### **A. Violence Reports Published on the 2007 Post Election Period**

In the months leading up to the elections, a general sense of peace prevailed, and the few incidences of small-scale violence that occurred were considered isolated.<sup>41</sup> Under the banner of the political entity, The Party for National Unity [hereinafter PNU], Mwai Kibaki formed a coalition party comprised of close confidants and supporters including Uhuru Kenyatta, and other major political figures in Kenya mainly from the Kikuyu tribe, as well as the Embu and

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<sup>40</sup> KENYANS FOR PEACE WITH TRUTH AND JUSTICE (KPTJ), KENYAN ELECTIONS OBSERVERS' LOG: DECEMBER 29-30, 2007 1 (30 Jan 2008), available at <ftp://ftp.wizy.com/pub/wizy/kenya/KPTJelectionobs.pdf>

<sup>41</sup> Human Rights Watch [Hereinafter HRW], *Kenya: Review of Elections Needed to End Violence* (03 January 2008), available at <http://www.hrw.org/en/news/2008/01/03/kenya-review-elections-needed-end-violence>

Meru tribes. Through the PNU party, Kibaki ran for his second term in office, hoping to thwart any competition that his main competitor Raila Odinga might muster. On the other hand, operations of Raila's campaign were conducted by the Orange Democratic Movement party [hereinafter ODM] which comprised of political leaders amongst the Luo tribe and other supportive leaders including William Ruto from the Kalenjin tribe.<sup>42</sup>

The day that Mwai Kibaki was sworn in as president marked the beginning of unabated mass protests led by among others, Raila Odinga and his supporters demanding a re-do of the elections. Immediately following the election results spontaneous violence broke out in the heavily diversified neighborhoods of Nairobi and other parts of Kenya.<sup>43</sup> On each side of the internal domestic political divisions stood the two presidential candidates including the incumbent President Mwai Kibaki and his opponent Raila Odinga.<sup>44</sup> The political turmoil increased as a result of irreconcilable differences between two major political parties within Kenya. Both sides took to inciting the crowds towards demonstrations and protests arose against the legitimacy of the newly announced president. Reports in the media indicated Raila Odinga, the opposition candidate, planned protests in the city to refute the results of the controversial elections. In statements made to the public, Odinga called for a "million-strong rally" and "peaceful mass action."<sup>45</sup> Legal provisions under the constitution of Kenya allow for freedom of expression and assembly, assuming that these do not infringe on legal rights and freedoms of other individuals. International obligations limiting state action against civilians and serving to protect human rights are also embodied in the International Covenant for Civil and Political Rights (ICCPR), of which Kenya is a signatory. As such, Kenya is under the obligation to respect freedom of expression and freedom of assembly rights. The freedoms and guarantees established in Articles 19 (2) and Article 20 of the ICCPR for the individual to seek and impart information and to assemble freely are however also counter-balanced. Article 19 (3) of the ICCPR allows for derogation from the protection of this right when it 'infringes' on other rights,

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<sup>42</sup> Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008, United Nations Commissioner for Human Rights, 7, (March 2008), available at <http://responsibilitytoprotect.org/OHCHR%20Kenya%20Report.pdf>

<sup>43</sup> *Id.*

<sup>44</sup> Human Rights Watch [Hereinafter HRW], *Kenya: Review of Elections Needed to End Violence* (03 January 2008), available at <http://www.hrw.org/en/news/2008/01/03/kenya-review-elections-needed-end-violence>

<sup>45</sup> British Broadcasting Corporation [Hereinafter BBC], *Scores dead in Kenya poll clashes* (31 Dec. 2007), available at <http://news.bbc.co.uk/2/hi/africa/7165602.stm>

or when ‘national security’ is deemed to be at risk.<sup>46</sup> Freedom of assembly is similarly restricted and negated in the instance that there is a direct conflict with national security that is in conformity with the law.<sup>47</sup> The Kenyan domestic legal system mirrors the international standards, and recognizes freedom of expression and assembly under the first part of article 79 and article 80 of the 2001 Kenyan Constitution, before it was amended in 2008.<sup>48</sup> The limitations pertinent to the 2007 post election violence legally delineated in article 79 (2) and article 80 (2) of the same document officially prohibit any form of assembly or expression directly linked with incitement of violence, or threats to national security.

According to the above provisions, Raila Odinga’s actions in calling for the demonstrations seemed well within domestic legal and international bounds. Amidst the call for rallies and gatherings by the opposition group PNU, President Kibaki subsequently responded by ordering security forces to control the crowds and prevent mass gatherings which were deemed to be a threat to national security.<sup>49</sup> From reports received by independent civil society members and the media, ethnic tensions were high in all parts of the country, and attempts by the police to deter civilians from attacking each other were met with more violence. National security was put at risk during certain points following the declaration of the election results.

Based on the information above, one can draw the conclusion that the responsibility for the crimes committed did not fall solely on a select few, but on several individuals who were involved in the atrocities. Low-level operatives committed mass atrocities and high-profile political leaders influenced the outcome of the violence.

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<sup>46</sup> International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at art 19.

<sup>47</sup> *Id.*, at art. 21

<sup>48</sup> *The Constitution of Kenya*, National Council for Law Reporting with the Authority of the Attorney General, art 79 and 80 (2001) accessible at

[http://www.cabinetoffice.go.ke/index.php?option=com\\_docman&task=cat\\_view&gid=44&Itemid=67&limitstart=5](http://www.cabinetoffice.go.ke/index.php?option=com_docman&task=cat_view&gid=44&Itemid=67&limitstart=5)

<sup>49</sup> OHCHR reports on Kenya, *supra* note 7, at 12. Accounts by the government of Kenya on police brutality responded by indicating that the police were caught by surprise by the sudden rise of violence, and responded with the necessary measures. The human rights reports of the OHCHR questioned the lack of preparedness and violence employed by the police. While the response and actions of the police on the ground may have constituted domestic crimes, the actions of the president and the decision of the government to order the police to restore order was a separate, legal decision in the face of mass unrest.

A report from the United Nations Commissioner for Human Rights (UNCHR) indicated that ensuing violence resulted in three distinct stages, each defined by the response of the actors who were directly engaged in the acts of brutality.<sup>50</sup>

The first stage of violence involved civilians, responding to the election results in spontaneous acts of violence. In just a few days several homes were burned, hundreds of people killed, and many more displaced in the initial outburst of violence. The initial ‘first response’ described above had both a political and ethnic characteristic as the youth comprised of mostly supporters of the opposition leader Raila Odinga erupted in mass protests. Civilians living in close proximity to each other in low-income neighborhoods turned on each other, violently attacking and looting the property of members of considered being of the opposite tribes.<sup>51</sup> Demonstrators turned to illegal activities that included looting and burning down various businesses and governmental buildings.<sup>52</sup> Attacks by Raila supporters were greeted by counter-attacks from opposing factions in Nairobi and other cities in the country, in what some have called perpetrations of grave crimes.

The second wave of violence was marked by the involvement of militia groups acting in retaliation to the widespread violence in “organized attacks against targeted communities.” The ongoing frustration in the second wave of violence was in contrast to the unprompted early violence, as attacks at this stage consisted of local factions of illegal civilian groups coming together to act in aggression. Many previously organized gangs such as the ‘Mungiki,’ ‘Siafu,’ and ‘Taliban’ responded in violent attacks initially intended to be a form of self-defense.<sup>53</sup> Their involvement was controversial due to the supposed illegality of the groups, whose members have been accused of gang activity, drug smuggling and theft. Groups of a several hundred to a few thousand went on the offensive venting frustrations against the political results that were the outcome of the election. Homes were looted, burned down, taken over, and sometimes destroyed. It was reported that the violence was mainly targeted towards the residents living in

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<sup>50</sup> International Criminal Court, ICC JUDGES GRANT THE PROSECUTOR’S REQUEST TO LAUNCH AN INVESTIGATION ON CRIMES AGAINST HUMANITY WITH REGARD TO THE SITUATION IN KENYA, including the *Dissenting Opinion of Judge Hans Peter-Kaul’s to open ICC investigations in Kenya*, 83, 1 (31 March 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>

<sup>51</sup> Human Rights Watch [Hereinafter HRW], *Kenya: Review of Elections Needed to End Violence* (03 January 2008), available at <http://www.hrw.org/en/news/2008/01/03/kenya-review-elections-needed-end-violence>

<sup>52</sup> OHCHR reports *supra* note 7, at 8.

<sup>53</sup> Waki Report *supra* note 3, at 193.

close proximity to each other including the Kikuyu, the Kalenjin and Luo. Several hundred families from the Kikuyu were forcefully evicted from their homes, and the death toll began to rise.<sup>54</sup>

The final stage of violence took on another dimension in organization and criminality. Police responded to the destruction of private and public property by forming a blockade around strategic areas of town. A heavy police presence around the radius of the capital's administrative center provided a barricade against protesters moving towards governmental buildings in Nairobi, resulting in a volatile situation in mainly poor residential areas of the capital.<sup>55</sup> After several days of arrests and violence, accounts of police brutality and use of live ammunition were given in the media. Sources cited the crack-down against all protestors was what many considered as 'disproportionate use of force' through 'organized retaliatory attacks.'<sup>56</sup> After approximately thirty days of civil unrest, it was estimated that one thousand one hundred people had lost their lives, and another five hundred thousand were displaced.<sup>57</sup>

The three-stage occurrence of violence reports were the results of the fact finding mission of the UNCHR, Waki Commission, and the Kenya National Commission on Human Rights.

## **B. The Peace Process in Kenya**

Peace negotiations were the primary process of establishing a ceasefire to end the violence that claimed hundreds of lives, and displaced about half a million. At the beginning of the negotiation, neither civil nor criminal charges were a part of the peace and reconciliation building process. . Questions were brought before the African Union Diplomatic Panel discussing whether the security that was negotiated would serve as a lasting phenomenon or a short-lived break before further violence erupted. In response, two criteria were outlined to

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<sup>54</sup> *Id.*

<sup>55</sup> THE COMMISSION OF INQUIRY ON POST ELECTION VIOLENCE, THE REPORT OF THE COMMISSION OF INQUIRY ON POST ELECTION VIOLENCE, CIPEV [hereinafter *Waki Report*] 196 (15 Oct 2008) available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>

<sup>56</sup> KPTJ *supra* note 8, at 1.

<sup>57</sup> Waki Report, *supra* note 3, at 383.

address reconciliation efforts for the crimes committed. The first included the formation of the Truth, Justice, and Reconciliation Committee (TJRC) to oversee the process of fact-finding missions and enhancing reconciliation. Domestically, the constitution seemed to be a point of contention, providing overarching political power to the president of the country, while the Central Department of Police Investigations was criticized as lacking the independence necessary to bring perpetrators in high levels to justice.

As a result to the valid concerns, constitutional reform was heavily supported in the negotiations for the move forward after the elections.

In addition to the Truth, Justice, and Reconciliation Committee, the United Nations also responded to the situation in Kenya.<sup>58</sup> The U.N. discussed possible ways of responding to the attacks on civilians in Kenya and the massive human rights violations. In assessing the tumultuous events of the month of January 2008, the U.N. was unwilling or unable to come to a conclusion and resolution to criminalize the acts that happened in Kenya as ones that were of the nature of being elevated into the international plane. Instead, the United Nations Secretary General, Ban Ki-Moon travelled to Kenya on February in support the African Union delegation represented by the Kenya National Dialogue and Reconciliation project (KNDR). No mandate was established to intervene in Kenya, and after proceedings determined that there was a legal path to follow to establish responsibility of the crimes that were committed. The U.N. took its involvement further by sending the UN High Commissioner for Human Rights to investigate and report on the atrocities that occurred during the post-election period. The UN Commissioner for Human Rights found that indeed massive human rights violations had been committed in Kenya, which included excessive use of force by state agents, the denial of the freedom of expression and assembly, sexual and gender-based violence, forced displacement, and a denial of basic rights of health and education.<sup>59</sup> The report also suggested that there had been a ‘lasting legacy of impunity’ and a ‘lack of trust in state institutions’ which was built over the years stemming from despotism and political shortcomings of the state.<sup>60</sup> Despite acknowledging that violations had indeed occurred and perpetrators should be brought to justice, the U.N. High Commissioner

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<sup>58</sup> Kenya National Commission on Human Rights, Final Report, 2007 Post election account of human rights violations, 28, par. 79, (15 Aug 2008) available at <http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>

<sup>59</sup> OHCHR report on Kenya PEV, *supra* note 7, at 10 – 15.

<sup>60</sup> *Id.* at 16

for Human Rights recommended that the U.N. and the A.U. play only a supportive and not a direct role for the Commission of Inquiry into Post-Election Violence (Waki Commission). In addition, the UNCHR also suggested other plausible options in response to the human rights violations. Instead of requesting a Security Council referral for international criminal charges, the UNCHR instead opted to encourage the establishment of both a Truth, Justice and Reconciliation Committee and a constitutional review process in order to established independent domestic institutions within the police force, the judiciary and other mechanisms that would enable effective responsibility.<sup>61</sup>

As a third and final international response to the violence in Kenya, the United States of America utilized political pressure through both diplomatic dialogue and an imposition of sanctions geared towards achieving a particular outcome. One of ways the U.S. responded was by sending a diplomatic delegate with Jendavi Fraser the U.S. Assistant Secretary of State, to Nairobi to reinforce the diplomatic pressure from other international delegates and to assist in mediations. Additionally the U.S. announced a travel ban on ten Kenyan leaders, in the hopes that this would send a message that the international community was not complacent.<sup>62</sup>

Weeks of mediation through the African Union delegation in the Kenya National Dialogue Reconciliation project resulted in a break-through when and on 8 February 2008, an agreement was signed between President Mwai Kibaki and Raila Odinga. Terms of the agreement included the formation of a coalition government and the commitment to take necessary steps towards ensuring that the violence ended. The ultimate objective for the United Nations and the African Union was to eliminate any risk of another outburst of violence.

The African Union responded by sending in a diplomatic delegation to oversee peace-talks and to attempt to resolve the political turmoil that quickly overcame the country. Other international agencies and state-representatives made strong statements condemning the violence and called for a peaceful resolution. In order to broker a peace agreement between the two opposing factions, the African Union appointed a peace and conflict resolution team to enter Kenya, led by Kofi Annan, the former Secretary General of the United Nations. Kofi Annan chaired the Panel of Eminent African Personalities at the time in the African Union, spent several

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<sup>61</sup> OHCHR report on Kenya PEV, *supra* note 7, at 17.

<sup>62</sup> KNHCR report on the Kenya PEV, *supra* note 26, at 33

days in Nairobi, Kenya addressing the two opposing leaders in what would be the lead effort in establishing an immediate ‘cease fire’ and political solution to the escalating violence.<sup>63</sup>

The international African Union delegation worked under the newly formed and duly authorized committee called the Kenya National Dialogue and Reconciliation (KNDR) monitoring project. Serving in the capacity of a reconciliatory party, this team of experts brought together President Mwai Kibaki and his opponent, Raila Odinga in an attempt to broker a deal between the two individuals. Among the requirements brokered under the KNDR agreement, the two primary parties at the center of the conflict were asked to agree to take all measures necessary to end the violence between the two sides, address the humanitarian crisis and promote reconciliation, discuss ways on how to overcome political crisis, and plan for long term reform in the constitutions and state institutions.<sup>64</sup>

After the temporary peace-agreement was signed between the two parties, a legal, enduring, and convincing solution to perceived impunity for the culpable political leaders who swayed the public towards violent upheavals was on the docket for further discussion. Despite the dialogue about bringing accountability to the political negotiations, a decision on prosecuting perpetrators domestically in court was not among the agreements offered by the KNDR and signed by President Kibaki and Raila Odinga.

Skeptics of the agreement indicated that there was a lack of political will to try those who were most responsible for the violence in Kenya, and that criminal proceedings would not occur. It was argued by some scholars that impunity would lead to the manipulation of the Kenyan public at the general elections in 2012 and further violence down the road. Without individual accountability, well-founded voiced apprehensions suggested that turmoil would ensue again as political figures sacrificed peace in exchange for political gain.<sup>65</sup>

It was not long before a commission of inquiry into the Kenya Post-election violence was mandated to investigate the crimes committed. Work on establishing this investigative

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<sup>63</sup> KENYA NATIONAL DIALOGUE AND RECONCILIATION, the Panel of Eminent African Personalities chaired by H.E. Kofi Annan, (Feb 2008), available at <http://www.dialoguekenya.org/panel.aspx>

<sup>64</sup> Kenya national dialogue and reconciliation (KNDR) Monitoring Project, Review Report 2010, 8, (Oct 2010), available at [http://www.dialoguekenya.org/docs/october2010draftfinal\\_Nov10.pdf](http://www.dialoguekenya.org/docs/october2010draftfinal_Nov10.pdf)

<sup>65</sup> See Mba Chidi Nmaju, note 6, at 89 – 91, Nmaju discusses the role of the ICC in stemming impunity in Kenya, failure to which may result in an outcome of lack of domestic prosecution similar to the situations that occurred in Rwanda and Sierra Leone, where the domestic courts failed to prosecute high-level political figures for crimes.

commission began on 23 May 2007, and comprised of three Kenyan and two foreign legal experts. Funding for the Commission was split between the Government of Kenya, the United Nations, and the United Nations Development Program office.<sup>66</sup> After a swearing-in of the members of the Commission in June of 2008, procedures ensued to gather evidence and other material regarding the events of January 2008. This investigative commission adopted the name of the Waki Commission, and began preliminary work on what they would later call the *Waki Report*.

When completed, this comprehensive report was forwarded to the Kenyan government, the African Union delegation acting as peace mediators, and the International Criminal Court (ICC). In handing over the report on the post-election violence the *Waki Commission* transferred valuable information for peace and reconciliation building if applied effectively.

A power-sharing arrangement settled the immediate violence in Kenya, but questions regarding criminal persecution for those responsible remained unanswered. Attempts at forming a Kenyan national ad-hoc tribunal to try suspects failed to acquire the necessary parliamentary support domestically. A domestic peace and reconciliation commission also failed to materialize as efforts at engaging a local solution to the criminal prosecution reached a dead-end.

### **C. Illustration of the ICC Prosecutor's Role in Opening Investigations in Kenya**

As a body established through an international legally binding document, the procedures adopted by the court are determined by its statute. All treaties 'are considered binding upon all parties and must be performed in good faith.'<sup>67</sup> Article 15 of the Rome Statute of the International Court provides a list of authorized acts for the Prosecutor of the ICC, and the limitations that are to be followed. Under this article the Prosecutor of the ICC has to find reasonable basis for opening investigations, considering matters of jurisdiction and admissibility. In order for the crimes that were committed in Kenya to be considered under the jurisdiction of the ICC, certain elements that elevate an otherwise domestic crime must be present. Because the Prosecutor referred the case to the Pre-Trial Chamber II under the banner of Crimes against

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<sup>66</sup> *Id.* at 1

<sup>67</sup> Vienna Convention on the Law of Treaties, *supra* note 24, at art. 26

Humanity, the crimes committed in Kenya are analyzed according to the legal definition of CAH.

As a sovereign nation-state, Kenya presented a conundrum for the international community on how to respond to the crisis at hand. Two tangible responses had to urgently be achieved to prevent an outburst of future violence and to avoid an escalation that could mirror the proportions of Yugoslavia and Rwanda in the early 1990's. In achieving this feat, a response to the limitation of impunity was reportedly needed in the interest of justice.

The ICC subsequently took the lead in investigating particular individuals deemed to be most responsible for the crimes committed, elevating the crimes committed to 'international crimes.' Charges rising to the level of international crimes alleged to have been committed in Kenya depended on an efficient and effective investigative process, conducted by the Office of the Prosecutor (OTP) at the ICC. After receiving the *Waki Report*, Prosecutor Ocampo was left with the decision of whether to investigate crimes or not. ICC involvement would only take place after the Office of the Prosecutor exercised his *proprio motu* powers because neither the Security Council nor Kenya submitted a referral for investigations.

Government officials, mostly from the coalition government formed between PNU and ODM members received word from the Prosecutor's Office making it clear that impunity would not be tolerated, and a lack of response on the domestic front to prosecute those responsible would trigger ICC investigations in Kenya. Arising from the failure of the Kenyan parliament to establish a local tribunal to try the suspects of the international crimes, the Prosecutor of the ICC moved forward with his earlier admonition and forwarded an authorization for investigations in Kenya to Pre-Trial Chamber II.

Six counterparts of Raila Odinga and President Kibaki fell under scrutiny of the ICC investigations for purported crimes that allegedly committed during the post-election violence. William Ruto, the currently suspended Minister of Higher Education and Science and Technology in Kenya was accused of being a major figure inciting and planning youth gang violence against members of the Kikuyu tribe and voters aligned to PNU. Henry Koskey, a prominent Kenyan politician who later became the Minister of Industrialization was similarly accused of inciting violence against members of the Kikuyu tribe, inclusive of the forceful removal of civilians from their homes. Pre-Trial Chamber II of the international criminal court

confirmed by a simple majority that there were reasonable grounds to believe that these two individuals were responsible as co-perpetrators pursuant to article 25, (3)(a) of the Rome Statute, of committing international crimes. The third individual aligned with Raila Odinga's ODM party officially implicated with international crimes of inciting and planning wide-scale attacks on civilians, is Joseph Sang who was the head of a local radio station in Kenya at the time and remains so to this day.

In addition to the names above, three other individuals who were also identified as suspects by the Prosecutor of the ICC for being responsible and bearing the most responsibility in the post-election crimes include Deputy Prime Minister Uhuru Kenyatta, Francis Muthaura the Head of Public Service, and Mohammed Ali, the Head of Postal Services and former Chief of Police. All of the three individuals noted as being pro-Kibaki supporters and closely linked with serious crimes in the *Waki Report* were singled out by Moreno Ocampo. Kenyatta and Muthaura were also identified as suspects of international crimes for their role in inciting the crowds and mobilizing armed groups to attack civilian populations.

Rome Statute obligations deem that when the Prosecutor receives evidence, which in this case was the *Waki Report* and the names of the main suspects of crimes, he applies the rules of article 53 of the Rome Statute. This statute in addition to article 15 provides the criteria under which the Prosecutor may use his *proprio motu* powers to initiate an investigation. In order for Prosecutor of the ICC to initiate investigations, he must consider three major determinant factors listed under the Rome Statute articles mentioned above. The three factors that must be applied by the Prosecutor include: *reasonable basis* (article 53, paragraph 1.a), *admissibility* (article 53, paragraph 1.b) and *gravity* (article 53, paragraph 1.c).

For the purpose of applying the three terms listed above, the Rome Statute serves as a reference to determine the meaning of each of the terms above.

'Reasonable basis' can be cross-checked in the use of the term in a different context within the Rome Statute. Although there is no clear definition particularly assigned to the concept, it is applied in article 58 paragraph 1 (a), as a standard for issuing an arrest warrant or summons to appear. Pre-Trial Chamber II applied the meaning of the terms reasonable basis in the fashion of cross-checking the meaning of the term in order to make a decision on issuing

authorization for investigations.<sup>68</sup> Despite the application above being used by the chamber, for purpose of the Prosecutor’s decision to investigate crimes a definition of ‘reasonable basis’ is not provided within the Rome Statute.

Second, ‘admissibility’ requirements of crimes within the ICC are governed by stipulations of article 17 of the Rome Statute. Under this Rome Statute description, admissibility is affected by a state’s willingness or ability to investigate or prosecute, and the gravity of the crimes committed.

As the Prosecutor of the ICC analyzed the material presented to him in the *Waki Report*, he took into account the lack of prosecutorial advances against high-level perpetrators of the crimes committed in Kenya. When the government failed to establish a special tribunal to conduct trials, the Prosecutor determined that Kenya was unwilling or unable to prosecute. Additionally the Waki Report also mentioned the lack of independence for investigative bodies within Kenya to conduct operations against high-level political figures.<sup>69</sup> The request for authorization was handed over to the Pre-Trial Chamber II of the ICC for review and consent, without which the Prosecutor would not have legally been able to proceed.<sup>70</sup>

On March 31, 2010, the three judges of Pre-Trial Chamber II comprising of Judge Ekaterina Trendafilova, Judge Cuno Tarfusser and Judge Hans-Peter Kaul approved the commencement of official ICC investigations in Kenya.<sup>71</sup> The decision of the court required a majority, which occurred with only Judge Hans-Peter Kaul opposed to the investigation.<sup>72</sup> Authorization by the chamber was approved after taking into account matters of gravity, admissibility and admissibility.

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<sup>68</sup> Pre-Trial Chamber II decision to authorize an investigation in Kenya, *supra* note , at 14

<sup>69</sup> Waki Report *supra* note , at 453

<sup>70</sup> Among its functions the ICC Pre-Trial Chamber is tasked with formally approving a request for authorization when the Prosecutor of the ICC exercises his *proprio motu* power in requesting that an investigation be opened. Descriptions of the Pre-Trial Chamber functions can be found at: “ICC Structure of the Court, Pre-Trial Division, Functions of the Pre-Trial Chamber at the Beginning of an Investigation,” par. 2, (2001), available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Pre+Trial+Division/>

<sup>71</sup> BACKGROUND INFORMATION ON THE CHAMBER’S PROCESS OF RULING ON SUMMONS TO APPEAR OR WARRANTS OF ARREST, situation in Kenya, (16 Dec. 2010) available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/background%20information/background%20information%20on%20the%20chamber%E2%80%99s%20process%20of%20ruling%20on%20summons%20to%20appear%20or%20warrants%20of%20arrest>

<sup>72</sup> Pre-trial Chamber II Authorization of Investigations in Kenya, *supra* note 8, at 83

At the time of writing this article, official investigations by the ICC six summonses were issued to the individuals suspected of committing international crimes prohibited by the Rome Statute. On 31 March 2011, the government of Kenya filed an application officially challenging the admissibility of the ICC. In the second week of April, the six individuals attended the first appearance at the court to confirm their identities, and to schedule a Confirmation of Charges hearing. These were scheduled for 21 September 2011.<sup>73</sup>

#### **IV. LEGAL SHORTCOMINGS OF THE *PROPRIO MOTU* DECISION TO INVESTIGATE IN KENYA**

According to Rome Statute obligations in Article 15 (2), when the Prosecutor receives evidence from independent sources, he may analyze the seriousness of the crimes based on the information received. Deriving seriousness from these crimes entails analyzing and isolating the determining factors which sets these crimes apart from all other ordinary domestic crimes. One such factor that the Prosecutor must also focus on resolving why there is reason to believe that a violation of the Rome Statute has occurred. This proves that the court has jurisdiction over a crime. Without this jurisdiction, operations of the ICC would not be legally founded. Therefore, unless and only if the Prosecutor establishes that the crimes were committed on a *prima facie* basis is he able to conduct a request for authorization for investigations.

On 26 November 2009, Pre-Trial Chamber II of the ICC received a request for authorization of investigations in Kenya from the Prosecutor Moreno-Ocampo. In March 2010, the Pre-Trial Chamber II consisting of three judges made the decision to authorize the Prosecutor's *proprio motu* request to investigate crimes in Kenya. The chamber took into account the preliminary information received by the Prosecutor of the ICC, gauging what was presented with the standards delineated in the Rome Statute for authorizing the investigations. Included in the task for the Pre-Trial Chamber was to provide a clear, concise, and legally sound report that demonstrated the grounds for making their decision. Two possible outcomes based on the conclusion of the chamber would have been possible. If the chamber found that there was no reasonable basis to open investigations, the Prosecutor would have been requested to re-draft

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<sup>73</sup> ICC Official Website, available at <http://www.icc-cpi.int/iccdocs/PIDS/cis/MuthauraKenyattaAliEng.pdf>

his request for authorization with new and compelling evidence supporting why an authorization should be reconsidered. Or, if the chamber did find that there was reasonable cause to believe that the alleged crimes were committed, and that the case appears to fall within the jurisdiction of the court, it could authorize the investigations ‘without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.’<sup>74</sup>

After a review of the information handed forward by the Prosecutor concerning Kenya, the chamber affirmed that there was reasonable cause to believe that there were crimes committed. As described under Article 25 of the Rome Statute, it was reported in the Pre-Trial Chamber’s Report authorizing the investigation that actions which occurred in Kenya included the following violations: infracting, aiding and abetting serious crimes. The reports stated that these amounted to international crimes.<sup>75</sup>

An analysis of the courts findings and the shortcomings of the in legality follow.

#### **A. Reasonable Basis**

The Rome Statute states that there must be sufficient information to establish reasonable basis to convince the Pre-Trial Chamber that serious crimes occurred. In Kenya, the Prosecutor attempted to demonstrate proof that investigations of *prima facie* crimes were legal.

Thus, in order for the Pre-Trial Chamber to authorize investigations into a situation concerning international crimes, there must be “reasonable basis” to proceed. The Rome Statute defines finding reasonable basis as the process through which the Prosecutor and the Pre-Trial Chamber confirm that the case appears to be in the jurisdiction of the court.<sup>76</sup> Whereas no legal definition is afforded for the terms ‘reasonable basis’ and ‘appears,’ the same article fifteen of the Rome Statute refers to jurisdiction and admissibility as the prejudicial bases that the Pre-Trial Chamber shall apply in making their decision.

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<sup>74</sup> Rome Statute, *supra* note 4, at art. 15, par. 4

<sup>75</sup> Pre-Trial Chamber II decision to authorize an investigation in Kenya, *supra* note 8, at

<sup>76</sup> As outlined in Article 15, par. 4 of the Rome Statute.

Pre-trial chamber II deemed that it there was a reasonable basis to believe that the Prosecutor of the ICC was warranted in opening investigations in Kenya.<sup>77</sup> Under article 15 (3) of the Rome Statute, the Prosecutor is bound to the limitations of what reasonable means, while using his *proprio motu* to determine what constitutes an international crime.

If the Pre-Trial Chamber of the ICC applies the same standard of ‘reasonable basis’ when assessing the request for authorization from the prosecutor, then it is assumed that the two different offices of the ICC will draw the same conclusion.<sup>78</sup> According to the authorization that Pre-Trial Chamber gave to the Prosecutor to proceed with investigations, a reasonable basis was found to exist in considering that there were international crimes.

Does reasonable mean taking into account that more than one thousand people were killed and several hundred thousand displaced? The the ruling on considering it ‘reasonable’ would have to look into the depiction of Crimes Against Humanity as wide-spread and systematic attacks on civilians including murder, rapes, torture, and forced displacement.

The Waki Commission report indicated that these crimes did indeed occur,<sup>79</sup> but to derive ‘reasonable’ basis taken by the chamber is a comprehensive analysis of three levels of consideration. These are adapted from the Rome Statute. The decision by the chamber cited the three different levels of assuming crimes as ‘reasonable basis,’ ‘substantial grounds,’ and ‘beyond reasonable doubt.’<sup>80</sup>

Authorizing an investigation by the Pre-Trial Chamber takes into account the least substantiated level of affirmation above because it is assumed that the results of the investigations will shed more light on the circumstances leading the belief that a crime was committed. The court clarified that the next step of making a decision to press charges would be based on the second most comprehensive level listed as ‘substantial grounds’ basis. Finally, in at the trial stage, for suspects to be considered guilty, it would take the final and most

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<sup>77</sup> Pre-trial Chamber II Authorization of Investigations in Kenya, *supra* note 8, at 13

<sup>78</sup> Rome Statute, *supra* note 2, at art. 15, par. 4

<sup>79</sup> Waki Report, at 52 In describing some of the results of its investigation found that rape, torture, and other violent acts were conducted on civilian populations.

<sup>80</sup> Pre-trial Chamber II Authorization of Investigations in Kenya, *supra* note 8, at 14, par. 28

comprehensive level of confirming that crimes were committed that would go ‘beyond reasonable doubt’ basis.<sup>81</sup>

For the establishment of reasonable basis, War Crimes were not among those that the Prosecutor chose to authorize. This is most likely because the violence in Kenya did not amount to a non-international armed conflict. The clashing groups in Kenya, though inclusive of criminal gangs, were not organized armed groups attacking each other.<sup>82</sup> The majority of the weapons used in the violence included crude domestic and gardening tools improvised to exact damage on the person. Additionally, there was not a clear chain of command in several of the attacks, no uniform, and no identifying mark to exemplify an organized armed group.<sup>83</sup>

Crimes against humanity must have the wrongful act in addition to the intent to enhance or further a policy of harm towards a civilian population. The intent in this case describes the point at which the domestic crime of murder, rape or other atrocious act passes the threshold and becomes an international crime.

Without the intent to enhance a policy, the crime remains a domestic crime and cannot be deemed a crime against humanity.<sup>84</sup> If the threshold requirement for commencing investigations is really so low as to assume that crimes were committed towards a specific civilian group and that the mental was possibly available thus warranting an investigation, then the it seems like the other statutory crimes listed in the Rome Statute would also fall within the jurisdiction of the court and be assumed to have reasonably been committed. Such a statement would seem unfounded, resulting in critique in the face of historical cases and decisions made in international criminal law. From the Nuremburg trials that dealt primarily with the Holocaust, to the International Criminal Tribunal of Rwanda that prosecuted crimes that were specifically directed towards destroying or permanently displacing the Tutsi tribe, to civil war in the Democratic Republic of Congo, the international criminal tribunals and courts have unanimously tried crimes conducted in the magnitude of massive violations.

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<sup>81</sup> *Id.* at par 29

<sup>82</sup> Dissenting Opinion of Judge Kaul, par 150

<sup>83</sup> Nils Melzer, *ICRC Interpretive Guidance Notes on Direct Participation in Hostilities*, 1, 28 (2010) available at [http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC\\_002\\_0990.pdf](http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf)

<sup>84</sup> See Rome Statute, *supra* note 3, at art.

## **B. Failure to Adhere to Rules of Complementarity (Article 53 1 (b))**

Article 52 (1) (b) directs the Prosecutor or the ICC to consider article 17 of the Rome Statute before initiating an investigation. When a case is not going to be admissible in the ICC, the Prosecutor is legally obligated to consider whether to proceed with investigations. Such a decision on admissibility is generally based on a state's willingness or inability of to prosecute.

Article 1 of the Rome Statute. Paragraph ten of the preamble which stress that the court is a "complementary" institution to "national criminal jurisdictions."<sup>85</sup> Whether a case was initiated by a Security Council resolution, a state referral, or *proprio motu* powers, the ICC is bound to take into account all admissibility factors when considering proceeding with investigations. As such, the ICC does not act as a court of first resort, but rather waits for domestic judicial first take action before exercising its jurisdiction. Complementarity is the fundamental principle governing admissibility, which takes into account the role of the Prosecutor in his *proprio motu* decision to apply jurisdiction over a case. Therefore in light of the fact that the ICC is complementary to national jurisdictions, it follows that the Prosecutor is obligated to follow suit with the Rome Statute limitations.

Article 18 of the Rome Statute provides the legal guidelines for the process of admissibility and subsequently gives a detailed depiction of how the ICC will practice the principle of complementarity. Before the initiation of any investigation, the Prosecutor of the ICC notifies the affected State of his decision to open investigations.<sup>86</sup> The State then has one month to respond to the notification and describe what processes have began to investigate the crimes that were committed, or whether these investigations have already been concluded. The Prosecutor may then "defer to the State's investigations of these persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation."<sup>87</sup>

Complementarity as a doctrine is contrary to the principle of primacy employed by some other international courts, which authorizes them to have the dominant lead in prosecutions.

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<sup>85</sup> Rome Statute, Article 17, par 1 and par. 10 of the Preamble.

<sup>86</sup> *Id.*, at Article 18 par 1

<sup>87</sup> Rome Statute, Article 18 par 2

“Complementarity works in two ways in this context: It limits the scope of prosecutorial discretion and it serves as a framework to facilitate certain managerial choices.”<sup>88</sup> In essence, both of this principle is established with the intention of limiting impunity where possible.

The Commission of Inquiry into the Post Election Violence (*Waki Commission*) headed by Justice Amos Wako of the Kenya Court of Appeal, and made up of two other local representatives, and two international experts reported that there had been a barrier to prosecution and justice in Kenya, relating directly to the post-election violence of 2007. A report was subsequently produced that provided findings from various investigative missions into the areas that experienced the heaviest violence (*Waki Report*). After consulting with witnesses and analyzing various forms of evidence, the commission concluded that in order to eradicate impunity, a special tribunal to try suspects of the crimes in the post-election violence should be established by a mandate of the Kenyan Parliament.<sup>89</sup> Grounds for the stance of the Waki Commission are discussed below.

First the commission indicated that a flawed investigative process susceptible to manipulations is a bar to the domestic prosecutions of high level perpetrators in Kenya. Several previously established commissions set up to investigate past incidences of violence related to elections conducted in the 1990’s have failed. Bodies such as the *Kiliku Committee*, the Standing Committee of Human Rights in Kenya, the Law Society of Kenya, and the *Akiwumi Commission* each turned in reports about sporadic violence arising from the 1992 and 1997 election years.<sup>90</sup> The *Waki Commission* spelt out the reluctance of the government of Kenya to proceed with investigations against high-level officials named as suspects of tribal-based and political crimes including murder and incitement to violence, despite the directives of the Attorney General. In a sworn testimony to the commission, the Attorney General stated that the police failed to investigate high level perpetrators due to ‘fear of reprisals in the context of ethnic violence, lack of resources..., and self-censorship for investigators susceptible to pressure and manipulation.’<sup>91</sup> In further statements, the Attorney General also cited a lack of follow-through by the Commissioner of Police in investigating political figures. The *Waki Commission*

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<sup>88</sup> See Luc Cote, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUSTICE 162 (2005); Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT’L CRIM. JUSTICE 71 (2004)

<sup>89</sup> *Waki Report*, *supra* note 1, at 472

<sup>90</sup> *Waki Report*, *supra* note 1, at 446-447

<sup>91</sup> *Id.* at 449

additionally reported that the limitation to prosecution of political figures is endemic to the political system in Kenya, because the Department of Criminal Investigations and the Commissioner of Police were directly under the authority of the Office of the President.<sup>92</sup> Political reform was suggested to enhance a more effective and independent system where the Department of Criminal Investigations is appointed under the Office of Attorney General as opposed to the Office of the President to enable effective investigations. It was acknowledged that this system remains lacking in Kenya.

Secondly, the *Waki Commission* indicated that secondary drawbacks towards successful investigations in Kenya after the 2007/2008 post-election violence included administrative difficulties faced during the investigations. The issues included restricted access to witnesses due to the large numbers of displaced persons, scattered away from the scenes of the violence, a reluctance of witnesses to offer information in fear of reprisal, and the trepidations of culpable individuals afraid of self-implicating, yet holding valuable information.<sup>93</sup>

Third, acknowledging that past experience is not a sole indicator of the inability the the provision of justice, the *Waki Report* not only emphasized inefficiencies in the investigative process, but also with the domestic judicial arm in prosecuting criminals and taking immediate action following the post-election violence. When presented with options for employing the local courts to try domestic crimes and prosecute high-level perpetrators, Kenya fell short of the expectations of the *Waki Commission*. It was reported that despite major reforms that have occurred in the judiciary, domestic courts in Kenya still remain incapable of being considered independent and autonomous.<sup>94</sup>

In light of the evidence and opinions provided above, an effective, legal, and conclusive domestic prosecution process was deemed to have been impossible. As a result, the *Waki Commission* recommended that the Kenyan government implement a Special Tribunal as earlier mentioned to try those responsible for the crimes committed in the post-election violence. In the event that the government of Kenya failed to form a special tribunal, the commission would forward names of those ‘bearing the greatest responsibility for the crimes’ to the Office of the

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<sup>92</sup> *Id.* at 453

<sup>93</sup> *Waki Report, supra* note 1, at 455.

<sup>94</sup> *Id.* at 461; The Judicial Service Bill was been proposed to the Kenyan parliament, ensuring further administrative and financial independence of the judiciary, but has not yet been enacted into law.

Prosecutor at the ICC.<sup>95</sup> The commission which was published in October 2008 gave the parliament of Kenya until 30<sup>th</sup> January 2009 to establish the local tribunal, but in February of 2009 a vote was passed against its establishment.<sup>96</sup> Despite the lack of resolve to form a special tribunal, six months later in June 2009, the government of Kenya succeeded in forming a Truth, Justice and Reconciliation Committee and pledged to reform its domestic courts.<sup>97</sup> While it may not be reasonable to expect that all perpetrators will be held accountable in the TJRC, those most responsible may be indicted at the ICC. The ICC involvement at this juncture would be justified if deemed to meet other legal standards.

Notwithstanding Kenya's seemingly lack of ability to prosecute, it must also be noted that for a case to be admissible in the ICC, the court regards

In order for Kenya to claim that the ICC has no jurisdiction over the crimes committed in Kenya, there would have to exist one of two options. One is that Kenya could demonstrate its willingness and ability to investigate and prosecute crimes. And two it may also show that the crimes were not of a grave enough nature to be within the jurisdiction of the ICC.

Kenya cannot opt out of its obligations by simply un-signing the Rome Statute or claiming it has a reservation. As a signatory to several international agreements Kenya is obligated by international law to respond and adhere to the rules. The Rome Statute is not in the category of treaties that permits states to make reservations. Article 120 of the Rome Statute comprises of clear wording which effectively exempts any and all options of forwarding a reservation to the effect the jurisdiction of the ICC.<sup>98</sup> Because no reservations are allowed, all the articles in the Rome Statute are considered binding

Beyond the ill-advised path of taking an obstinate alternative towards ceding jurisdiction to the ICC, another possibility for Kenya maintaining jurisdiction of the trials for crimes committed during the post-election period is refuting the admissibility of the cases to the court. Under the principle of complementarity listed in paragraph ten of the preamble of the Rome Statute, the prime suspects of international crimes are dealt with in tandem between the country and the ICC. Nowhere in the Rome Statute is the term complimentary defined, however the

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<sup>95</sup> *Waki Report*, *supra* note 1, at 473 (available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>)

<sup>96</sup> Njau, *supra* note 4, at 89-90

<sup>97</sup> *Id.* at 91

<sup>98</sup> Rome Statute, *supra* note 2, art. 120. "No reservation may be made to this statute."

“plain text of Article 1 compels the conclusion” that the ICC is “intended to supplement” national courts as opposed to superseding domestic enforcement of international norms.”<sup>99</sup> Either the suspects are tried at home, or when that fails for various reasons, the ICC takes precedence of conducting the trials.<sup>100</sup>

Tribunals including the International Criminal Tribunal of Yugoslavia and the International Criminal Tribunal of Rwanda opted to employ primacy, while the ICC opted for complementarity as listed in the Rome Statute. The Rome Statute also recognizes the core principle of *aut dedere aut judicare*; that a state is obligated to prosecute or give up an individual officially recognized as a suspect having committed an international crime to the ICC. As a state party to the ICC Kenya is under the obligation to prosecute or hand over those considered to have committed international crimes for trial. The ICC, as a complementary court, is obligated to assess whether Kenya implemented in good faith, legal steps when trying the perpetrators of grave crimes. If it can be proved that Kenya has implemented effective measures to investigate the alleged crimes committed or has already put on trial individuals who were suspected of having committed the crimes, then the ICC would be bound to recognize the legal limitations of pursuing criminal charges. For the purpose of analyzing the legality of the decision of the ICC to investigate in Kenya it is paramount to consider whether the steps to prosecute locally were taken.

Individual participation in international political assignments necessitates a considerable amount of travel across borders. It is inevitable that citizens of one state will cross international borders to conduct state affairs necessary for international relations. With the realization that top state officials in several foreign states will find themselves in the territory of another sovereign state, a policy of diplomatic immunity was adapted into customary international law to emphasize state sovereignty and safeguard inter-state relations.<sup>101</sup> In a historical perspective, state immunity was derived at a time when the emphasis on maintaining absolute respect for state sovereignty was as at the center of intentions in most inter-state relations.<sup>102</sup> As a result,

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<sup>99</sup>Luitenant Colonel Michael A. Newton, *Comparative Complimentarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 Military L. Rev. 20, 26 (2001)

<sup>100</sup> Rome Statute, *supra* note 2, art. 17, para. 1 (a)-(c)

<sup>101</sup> Andrea Bianchi, *Immunity Verses Human Rights: The Pinochet Case*, 10 E.J.I.L., 256, 237 (1999) also available at <http://www.ejil.org/pdfs/10/2/581.pdf>

<sup>102</sup> *Id.*

heads of state and other state officials acting in high-ranking capacity were provided with certain diplomatic privileges.

With the development of international human rights law and the principle of individual criminal responsibility for international crimes, this standard of immunity for state leaders has been the ‘object of steady erosion.’<sup>103</sup> The ICC has not acted in isolation in regards to undermining traditional principles of state immunity. Recent trends in convictions of heads of states and other high ranking officials for certain crimes have supported the trend towards dissipating protection clauses of immunity for state leaders perpetrating certain crimes. The Supreme Court of Israel convicted Adolf Eichmann on charges of ‘war crimes, genocide, and crimes against humanity’ for his role in the holocaust. Klaus Barbie and Paul Touvier were similarly convicted in French courts for their role in the Gestapo and directly committing or being complicit for crimes against humanity.<sup>104</sup> These individuals were held accountable for their actions despite them holding high ranking officials, and acting in official state-capacity for the Nazi regime during World War II at the times that the crimes were committed.

Additionally state immunity is rendered inapplicable when in direct conflict with peremptory norms. With the recent adoption of Article 53 of the VCLT in 1964, there has been a general recognition that peremptory norms do, by virtue of being accepted internationally apply a ‘no derogation’ clause. All treaties including those of state immunity are void and null when conflicting with norms of the peremptory nature, since they are non-derogable in all circumstances. Any individual found to be in violation of an international crime may be held accountable for the actions committed against these laws of a binding nature. With the exclusion of the state of Kenya from being one of the states that has ratified this treaty, direct limitations stemming from the treaty itself are not applicable to Kenya.<sup>105</sup> This however in no way affects the obligations of Kenya in the treaties that it has ratified and those arising from other sources of international law.

The ICC holds that it will not regard official capacity in particular the position of being head of state or belonging to high ranking governmental position as a justification for avoiding

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<sup>103</sup> Andrea Bianchi, *supra* note 34, at 256.

<sup>104</sup> Andrea Bianchi, *supra* note 34, at 252.

<sup>105</sup> VCLT signatories and ratified members, (24 March, 2011) available at [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en)

the application of criminal charges and prosecutorial procedures. Article 27 bars the defense of immunity by virtue of holding official state capacity being brought against the court.<sup>106</sup> The Rome Statute applies equally to all persons suspected of having conducted international crimes that are in the jurisdiction of the court. Finally the ICC also prohibits the giving of orders and planning any activities or attacks that are deemed to be in the pursuit of a policy of destruction towards a certain group or civilian population.<sup>107</sup> It is irrelevant whether an individual acting in official state capacity does not actually commit the crimes in question, if it is proven that the orders were carried forward by the individual to others to proceed with the crimes.

For the above function of admissibility to be applied in any given case, the State's actions are determinant of whether the ICC will acquire jurisdiction. That is to say that a case is only admissible only when a state is 'unable or unwilling to prosecute.'<sup>108</sup>

### **C. Discrepancies in Criteria Used in Kenya for Determining Gravity**

A useful measure of gravity was provided in the case concerning Uganda as the main criteria used by the ICC Prosecutor at that time. In deciding whether to bring criminal charges against the parties involved in the Northern Uganda conflict, the Prosecutor chose to prosecute only the members of the Lord's Resistance Army (LRA), and not the Uganda Peoples' Defense Forces (UPDF). The Prosecutor noted that the crimes committed by the LRA were "much more numerous and of a higher degree of gravity" than those committed by the UPDF.<sup>109</sup>

When evaluating the gravity of the crimes in Northern Uganda, the ICC Prosecutor considered "the scale of the crimes, the severity of the crimes, the systematic nature of the crimes, the manner in which they were committed, and the impact on victims."<sup>110</sup> In the February 2006 decision, Pre-Trial Chamber I ruled that in order for gravity to be established, the crime must be shown to have been "systematic or committed in large scale," and caused "social

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<sup>106</sup> Rome Statute, *supra* note 3, at art 27.

<sup>107</sup> *Id.* at art 33

<sup>108</sup> Rome Statute, Art 13

<sup>109</sup> *Id.* at 810

<sup>110</sup> Susan Sacuoto and Katherine Cleary, *Gravity Threshold of the ICC*, 23 AM. U. INT'L L. REV. 807, 809 (2006)

alarm” in the international community.<sup>111</sup> Additionally the ICC Prosecutor himself has stated that gravity in the Rome Statute refers to “numbers of people killed and victims, severity of crimes, scale of crimes, systematic nature of crimes, nature, manner, and impact of the crimes.”<sup>112</sup>

Two important Factors to consider in the Pre-Trial Chamber’s 2006 decision and the statement of the Prosecutor are whether the criteria used to measure gravity is discretionary, and whether it is stage-specific. First, prosecutorial discretion would eliminate any debate on specificity since a decision would be based on subjective standards that would be interchangeable based on the Prosecutor’s disposition at the moment of making a decision. In the 2006 Northern Uganda decision, the Pre-Trial Chamber declared that the gravity threshold required is not based on discretion of the Prosecutor, but rather the presence of the factors cited above which include systematic nature and scale of violence. Yet, the Prosecutor is authorized to maintain discretion to a certain degree. When deciding not to open investigations, the Prosecutor may establish the existence of additional criteria such as low likelihood of making an arrest, lack of access to evidence, and interest of justice as limitations to opening investigations. As a matter of practically this legal empowerment for the Prosecutor provides a mode of control for the number of cases the ICC can handle. Prosecutorial discretion in this case comes in the form of passive discretion, allowing the ICC prosecutor to turn down situations for investigating, but still limiting his discretion to criteria when opening investigations independently.

Second, gravity as a criterion for the Prosecutor is considered in two stages. Not only does the Prosecutor have take gravity into account when deciding to prosecute, but also when opening an investigation. Thus gravity was taken into account in the pre-investigative stage when the decision was made not to investigate crimes in Iraq. It was after a communication was forwarded to the OTP requesting the opening of investigations in Iraq, that the request was declined based on the conclusion that there was not sufficient gravity in the crimes committed. This was despite the existence of all other criteria to open investigations, including personal jurisdiction based on the implication of British nationals who were citizens of a State-Party of the Rome Statute.

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<sup>111</sup> *Id.* at 811

<sup>112</sup> See, Luis MORENO-OCAMPO, STATEMENT AT THE INFORMAL MEETING OF LEGAL ADVISORS OF MINISTRIES OF FOREIGN AFFAIRS 6 (Oct. 24, 2005), available at [http://www.iccpi.int/library/organs/otp/speeches/LMO\\_20051024\\_English.pdf](http://www.iccpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf)

In paragraph 62 of the Pre-Trial Chamber’s ruling to authorize the investigations on Kenya, the Chamber stated that gravity can either be measured on a quantitative or qualitative basis.<sup>113</sup> Pre-Trial Chamber II did not consider gravity in the violence in Kenya through the human rights reports because the violence was not represented by the victims. The decision to judge on the gravity on crimes against humanity was deferred to a later time when victim representation would shed more light on the situation.<sup>114</sup>

Additionally in terms of war crimes, the UN Charter outlines an international conflict as one where one or more states conduct a ‘threat or use of force against the territorial integrity or political independence of any [other] state.’<sup>115</sup> Pre-Trial Chamber II deemed that the situation in Kenya did not amount to a non-international armed conflict because the clashing groups in Kenya were not organized or armed with the necessary weaponry. The majority of weapons used in the violence included gardening tools and other crude home-made weapons. The Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) states under Article 1 (1) that a non-international armed conflict is one that occurs between “armed forces and dissident armed groups” or “other organized armed groups” which are under “responsible command and exercise control of a part of territory.”<sup>116</sup> Article 1 (2) indicates that the laws in this Protocol are not applicable to “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence,” as these are not “armed conflicts.”<sup>117</sup> Additionally, there was not a clear chain of command in several of the attacks, no uniform, and no identifying mark to exemplify an organized armed group.<sup>118</sup>

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<sup>113</sup> Pre-Trial Chamber, authorization to open investigations in Kenya, par. 62

<sup>114</sup> *Id.*

<sup>115</sup> U.N. Charter, *supra* note 32, at art 2 par. 4

<sup>116</sup> Geneva Protocol II, entered into force 1978, Article 1.

<sup>117</sup> *Id.*

<sup>118</sup> Nils Melzer, *ICRC Interpretive Guidance Notes on Direct Participation in Hostilities*, 1, 28 (2010) available at [http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC\\_002\\_0990.pdf](http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf)

In the period before ICC investigations were officially authorized in Kenya, the Prosecutor in accordance with the Rome Statute analyzed the information and deemed that the crimes committed were of adequate seriousness. On 15 November 2009, he turned in the request seeking to authorize the official commencement of ICC investigations in Kenya.<sup>119</sup>

#### **D. Dissenting Opinion of Judge Hans-Peter Kaul, and his Apprehension**

Judge Hans-Peter Kaul argued against the Pre-Trial Chamber decision to investigate in Kenya citing he is unable to agree that investigations should be opened in Kenya by the *proprio motu* powers of the ICC prosecutor. The two basic reasons were because he did not believe that the “attacks on any civilian population” was well founded, and that a “State or organizational policy to commit such attacks” as written in Article 7 (2) (a) of the Rome Statute could be proven.<sup>120</sup> Judge Kaul further notes that albeit the threshold for reasonable basis outlined in Article 15 (4) may be low, it does not admit any information, but must take into account other factors outlined in Article 53 (a) to (c). He reminds the court that the Prosecutor has cited this requirement when he responded negatively to the requests to open investigations in Venezuela and Iraq.<sup>121</sup> In regard to an attack directed toward a civilian population as indicated in Article 7 (1) of the Rome Statute, Judge Kaul states that the attack is not just one attack, but one that is part of other widespread and/or systematic attacks.<sup>122</sup>

Second, to further expound on his argument, he presents the legal definition of a state or organizational policy as on that “actively promotes or encourages” an attack towards a civilian population. After a review of the information received concluded that the police acted as “mere observers, assisting civilians, and being overwhelmed with the situation to actively engage in the violence”<sup>123</sup> as opposed to having a policy. As such he found no reason to believe that a state or organization policy to attack was present.

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<sup>119</sup> Pre-trial Chamber II Authorization of Investigations in Kenya, *supra* note 8 at 4, par 5

<sup>120</sup> Pre-trial Chamber II Dissenting Opinion agianst Investigations in Kenya, par 4

<sup>121</sup> Dissenting Opinion of Judge Kaul, par. 16

<sup>122</sup> Id. at par. 36

<sup>123</sup> Dissenting Opinion of Judge Kaul, par 152

This final element of having a policy is also a core component of crimes against humanity that was not clearly defined in the reports that were handed to the Prosecutor of the ICC. It was claimed that there was reasonable basis to believe that these crimes had indeed happened, and it was therefore warranted for the court to become involved in Kenya.

Since crimes against humanity must have a state or organization policy element, the Prosecutor was under the obligation to provide evidence in the effect of expressing the intent to further a policy of crimes against a particular civilian population. This task was not sufficiently completed by the Prosecutor, leading to the conclusion that a crime against humanity was not substantially established to have been committed. Therefore if none of the three crimes above were considered to have been committed, it is with grave concern that the ICC took on investigations of international crimes that it may seemingly have no jurisdiction over.

## V. CONCLUSION

### A. Final Analysis

As described in its statute, the International Criminal Court is not a court of first resort and therefore is not legally bound to take on cases that are domestically prosecutable.<sup>124</sup> The court is also an international court that prosecutes grave breaches of international criminal law as defined in its statute. In spite of the reality that violations such as torture may have occurred on the territory of Kenya, which is a member of the Rome Statute, this does not necessarily have to mean that the ICC automatically attains jurisdiction over the perpetrators of the crimes. Exercising jurisdiction over crimes that are listed in the Rome Statute is a systematic process that requires a close examination of the rules regulating the opening investigations.

In order for the ICC to legally obtain jurisdiction of the individuals suspected of committing crimes, all requirements of legal jurisdiction must be met. Through State referrals and Security Council resolutions, the ICC is not required to provide reasonable basis for opening investigations. Through these two means of acquiring jurisdiction, the court is required to find

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<sup>124</sup> *Id.*

reasonable only in regard to expressing why it will not proceed with investigations. On the contrary it is during a *proprio motu* process, that the ICC must show reasonable basis for opening investigations. Taking such responsibility requires a provision of legal basis, and which belongs to the ICC Prosecutor. The situation in Kenya now brings to the forefront the significance of material jurisdiction and what this implies for the rules of legality for judicial operations of international courts.

In ruling that there was a reasonable basis to consider the crimes committed in Kenya as international crimes, the ICC implied one of three possible qualifying factors were available to transpose the domestic crimes into the international plane. In doing so, the court's decision leads to three conclusions for international criminal law, effectively contradicting legal definitions and rules for judicial operations.

First, the decision implies that in international criminal law there is a down-play of the importance of admissibility for investigative purposes. The Prosecutor of the ICC may investigate in any situation as long as it occurs on the territory of a state party or involves the citizens of a state party.

Second the court ruling indicates that the crimes committed likely constituted the required level of gravity which was attained by crimes in Kenya. No legal operation for crimes against humanity should downplay gravity as it is a fundamental policy for the ICC. The Prosecutor of the ICC is under the obligation to include gravity as a necessary component of international crimes; specifically in this case that is declared to reasonably believe the violations amount to crime against humanity. Justice Hans Peter-Kaul pointed out that for the consideration of gravity, it should be considered that at the point of authorization, it is taken to mean the court will have authority over the crimes at all stages of the proceedings and not just the investigations. If a situation is on the fringes and depicts some but not all elements of international crimes, it is the duty of the prosecutor to obtain all necessary evidence to show that a situation will in fact fall within the jurisdiction of the court at all stages of operation. Additionally if the court deemed that the elements were indeed applicable in the situation of Kenya, it would have to show justification that a central policy existed to commit crimes against humanity.

Since all international crimes prohibited by the Rome Statute are the most serious crimes of international concern, specific elements are required in order to raise an ordinary crime to

amount to a crime against humanity. Article 7 of the Rome Statute of the ICC provides that the legal definition of what constitutes a crime against humanity must include a ‘widespread or systematic attack,’ and ‘directed towards any civilian population’ and there must have been ‘knowledge of the attack.’

Justice Hans-Peter Kaul in his dissenting opinion against the decision to investigate in Kenya points out that an ‘attack directed towards any civilian population’ is defined in Rome State article 7 (2)(a) as a ‘constitutive, contextual element.’<sup>125</sup> In order for the attack in Kenya to be considered systematic, there must have been a state or organizational policy that had been employed which was found to be lacking in his analysis.

## **B. Recommendations**

Pre-Trial Chamber II has the opportunity to revise its decision to grant jurisdiction of the crimes committed by the six individuals from Kenya currently in confirmation hearings at the ICC. An investigation was opened on the basis that there was ‘reasonable cause’ to consider that crimes against humanity had been committed. However the assumption is made that the crimes were not in fact of the gravity elevating them into the international plane, if the court did not rule on this principle.

Besides recourse from an appeal that may deny admissibility to the ICC, the ICC faces also operational challenges when regarding its structure and due-course application of criminal trials in the future. An interpretation of law must set precedence and maintain consistency with the Rome Statute in order to promote clarity of law. Any dispute arising from a violation can effectively be handled in one of the other international institutions such as the ICJ, and a variety of forums may exist to tackle impunity can be employed. Some of these include economic and other sanctions, report-writing, stigmatization through the media, and political diplomacy. When the situation lacks a clear component necessary to elevate crimes to the international level such as gravity, the ICC is not inclined by law to acquire jurisdiction. Gravity is applicable to several domestic crimes such as rape, murder, and torture, but it does not necessarily mean that they should rise to the level of international crimes. Rulings by judges on cases about gravity will set

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<sup>125</sup> Pre-trial Chamber II dissenting opinion against investigations in Kenya, *supra* note 8, at 3, par. 4

precedence. Any judicial decision as applied in the situation of Kenya will be referred to and reapplied in future cases. Derivation of legal meaning from landmark decisions is especially prone to adaptation in emerging legal fields such as international criminal law and human rights law.

The implication for adopting a legally blurred definition of gravity, and consequently crimes against humanity, will result in the development of inconsistency and doubt. For a field where objective judgement and impartiality are the cornerstone of proceedings, it is vital for courts to be clear in legal definitions of terms and what the expectations are for the individuals who infringe on violations that pertain to those terms. It is not enough to resort to a variety of interpretations that need to be consistent in instances of the same pedigree.

Developing a clear distinction between serious domestic crimes and international crimes would serve the purpose of enhancing clarity in international criminal law as it attempts to respect sovereignty of states and other traditional principles of international law. Formulating a comprehensive definition of threshold for the purpose of international criminal law can come through previous case law and decisions by the international court, such as was cited by Justice Hans-Peter Kaul in mentioning the situations in Venezuela and Iraq not reaching the desired threshold of amounting to international crimes. The case of Kenya contradicts these two prior decisions and brings about a sense of arbitrary decision-making within the chambers of the court.

In order for the court to proceed in keeping in line with legal regulations and expectations, the court may redact the decision and request the prosecutor to conduct further investigations. Such a move was made in the pre-trial chamber in the John-Pierre Bemba case, when the chamber asked the Prosecutor to reconsider some charges of liability against Mr. Bemba and return with more conclusive evidence.

Several options also may also similarly exist for responding to international crimes in particular. With the initial reference to international crimes in the Nuremburg trials, individual criminal responsibility was adjudicated in the military tribunals set up after World War II. Regardless of the proposed 'states' immunity from criminal persecution, the prohibitions of humanitarian law can be adjudicated in the International Court of Justice when one state brings a case against another regarding the violations of individuals, requesting the domestic persecution of individuals for violations that would amount to war crimes. Additionally prohibitions in the

Genocide Convention can be adjudicated as a violation of a multi-lateral treaty in the ICJ which would determine whether an act of a state would constitute a breach of international law such as in *Bosnia and Herzegovina v. Serbia and Montenegro*. Crimes against humanity are similarly versatile in their judicial applicability and can be dealt with in ad hoc tribunals which are set up to try specific crimes in a fixed period of time such as the ICTR and the ICTY.

Finally, either of these violations of states or crimes of individuals may be settled domestically through national courts, truth, justice, and reconciliation committees or through military tribunals. Judicial and semi-judicial options often overlap and can be employed in effective measures when necessary.

Further research can be done in this topic to address the three principles of admissibility, reasonableness and gravity. More work is also needed in the subject of legitimacy related to the operations of the Pre-Trial Chamber and the prosecutor as well as the decisions that they make regarding jurisdiction. Finally, it is recommended that specific work be done to more concisely define the term gravity and how it relates to crimes against humanity.