THE ICC KENYA CASE: IMPLICATIONS AND IMPACT FOR *PROPRIO MOTU* AND COMPLEMENTARITY

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INTRODUCTION

The situation in Kenya culminating in the confirmation of charges against four individuals for crimes against humanity in the International Criminal Court (ICC) has significantly enhanced understanding of fundamental concepts contained within the Rome Statute, the Court's controlling statute.[1] For example, the jurisprudence in this case has further elucidated the principle of *proprio motu* as set forth in the Rome Statute as well as the particular contexts in which it may be appropriate for the

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1. *See infra* notes 239 through 246 and accompanying text. In May 2013, the charges against one defendant, Mr. Muthaura, were dropped by the ICC Prosecutor; accordingly, three of the four defendants whose charges were confirmed by the ICC awaited trial: Mr. Ruto, Mr. Sang, and Mr. Kenyatta, the current President of the Republic of Kenya. *See infra* notes 239–40 & 246. Defendants Ruto and Sang's trial was scheduled to begin on September 10, 2013. INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx (last visited Mar. 27, 2013) [hereinafter ICC Website]. Defendant Kenyatta's trial has been postponed, and is now set to begin on October 7, 2014. *Id*. However, the trial opening against Kenyatta was vacated, and on December 5, 2014, the ICC Prosecutor filed a notice of withdraw of charges against Kenyatta. On March 13, 2015, the case against Kenyatta was officially terminated by the ICC. *Id*. Kenyatta is the current President of Kenya. Ruto is Deputy President. *Id.* Sang is the director of a major radio station in the Kenyan capital, Nairobi. *Id.* Kenyatta's trial was postponed by the ICC Prosecutor due to problems with witnesses. *See* ICC Prosecutor: Evidence Insufficient to Try Kenyan President Uhuru Kenyatta, *available at* http://www.cnn.com/2013/12/20/world/africa/kenya-president-icc/ (last visited Apr. 13, 2014). Note that there is no immunity from prosecution before the ICC under the Rome Statute for governmental officials. *See* Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 27 [hereinafter Rome Statute], *available at* http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf. Lastly, there is currently one additional suspect in the ICC Kenya case, Mr. Walter Osapiri Barasa. *See* ICC website, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx (last visited Mar. 28, 2015). An arrest warrant has now been issued by the ICC for Mr. Barasa for "offenses against the administration of justice," in particular for allegedly influencing in a corrupt manner various ICC witnesses. *Id.*

Prosecutor to exercise her authority to investigate a case under this principle.[2] The situation in Kenya also sheds further light on the fundamental concept of "complementarity" within the ICC system since it is the first time a state party has challenged the admissibility of a case before the ICC under this principle.[3] In particular, the case provides further clarification of the evolving criteria to be used to determine if the ICC must defer to a national jurisdiction under the complementarity principle.

This article will analyze in depth the Prosecutor's request to investigate the situation in Kenya, the Pre-Trial Chamber's (PTC's) authorization of this investigation, Kenya's application to the PTC to find the case inadmissible before the ICC under the complementarity principle, the determinations by the PTC and Appeals Chamber on the admissibility issue, and the PTC's decision to issue summonses and subsequently

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2. "*Proprio motu*" refers to the power of the ICC Prosecutor to investigate international crimes within the Court's jurisdiction on his own initiative, as set forth in Article 15 of the Rome Statute. *See* Rome Statute art. 15. In particular, *proprio motu* allows the Prosecutor to submit a request to the Pre-Trial Chamber (PTC) of the ICC to investigate alleged crimes against humanity or other qualifying international crimes under the Rome Statute. *Id.* Prior to submitting such a request, the Prosecutor must have a "reasonable basis" to believe that international crimes were in fact committed ("If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."). *Id.* art 15 (3). *See also id.* art. 13. *And see id.* art. 5 (listing and describing the crimes over which the ICC currently has jurisdiction, including war crimes, crimes against humanity and genocide). *See also id.* art. 53 (1)(a) ("The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether [*inter alia*]: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed[.]"). Other considerations the Prosecutor must make in deciding whether to initiate an investigation include those related to complementarity and the interests of justice. *See id.* art. 53 (1)(b) & (c). The Situation in Kenya is the first time the Prosecutor has exercised Article 15 powers. *See* ICC Prosecutor's Application for Authorization to Open an Investigation in the Situation of Kenya, *infra* note 88, at 1.

3. *See* Thomas O. Hansen, *A Critical Review of the ICC's Recent Practice Concerning Inadmissibility Challenges and Complementarity*, 13 MELB. J. INT'L L. 217, 222 (2012). Complementarity refers to the concept that if a national court with jurisdiction is able and willing to prosecute or investigate a person who has allegedly committed war crimes and/or other qualifying crimes under the Rome Statute, then the case involving those crimes is inadmissible before the ICC. *Id.* In relevant part, the complementarity principle in Article 17 reads as follows:

> [T]he Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. . .

Rome Statute art. 17(1)(a) & (b). Unwillingness and inability for purposes of this complementarity provision are also defined in article 17. *See id.* art. 17(2) & (3).

confirm charges for particular Kenyan defendants. Not only does this analysis provide a more nuanced understanding of the *proprio motu* power and complementarity principle that are central to the ICC's functioning and continued existence but it also helps to illuminate the evolution of the Kenya case from its pre-trial stages to its current point at the beginning of the trials, which have begun against two of the four individuals whose charges related to the post-election violence in Kenya were confirmed by the ICC.[4] These individuals include prominent Kenyan officials, including the current Kenyan Deputy President.[5]

This article consists of seven parts. Part I of the article provides background information pertaining to the situation in Kenya, summarizing the events and factors that led up to the post-election violence. Part II will address the efforts made by the Kenyan government to address the violence and punish the perpetrators of the post-election violence, including the formation of the Commission of Inquiry into Post-Election Violence (CIPEV), or Waki Commission.[6] Part III highlights important aspects of ICC law as it relates to the progress of the Kenya case thus far. Part IV is devoted to the PTC's authorization of the Prosecutor's request to commence an investigation *proprio motu* into the situation in Kenya. Part V discusses Kenya's application to the PTC to find the case inadmissible under the complementarity principle, and the PTC's and Appeal Chamber's "precedent-setting" response. Part VI will examine the summonses issued and charges confirmed against particular Kenyan defendants, two of whom continue to face charges before the Court. Part VII will explore the impact and implications to date of the Kenya case for future ICC investigations and prosecutions. In particular, it will analyze

4. ICC Website, *supra* note 1.

5. *Id.*

6. See International Center for Transitional Justice, *The Kenyan Commission of Inquiry into Post-Election Violence*, *available at* http://ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf (last visited July 22, 2013), at 1. "The Commission of Inquiry into Post-Election Violence (CIPEV) was the outcome of the Kenya National Dialogue and Reconciliation Accord of February 28, 2008, negotiated by Kofi Annan and the Panel of Eminent African Personalities, and its sister agreement of March 4, 2008, known as Agenda Item 4, which called for the establishment of a number of bodies of inquiry to address justice and accountability and longer-term issues of governance and the rule of law." *Id. See also* THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT, at 1, *available at* http://kofiannanfoundation.org/sites/default/files/Microsoft%20Word%20-%20South%20Consulting%20-%20Monitoring%20and%20Evaluation%20 Report.pdf (explaining that the parties to KNDR agreed to establish CIPEV). CIPEV is commonly referred to as the "Waki Commission." Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, 4 AFR. J. OF LEG. STUD. 78 (2009). *See also* International Center for Transitional Justice: *The Kenyan Commission of Inquiry into Post-Election Violence*, *available at* http://ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf (last visited Mar. 24, 2014).

the Pre-Trial Chamber's "supervisory" role over the ICC Prosecutor's *proprio motu* power and the criteria offered by the ICC judges with which to assess the complementarity issue.

Ultimately, the Article argues that the Kenya case supports the notion that the PTC is taking its supervisory role "seriously" by placing reasonable limits on the Prosecutor's potentially broad and robust *proprio motu* power. In addition, in light of the somewhat overly rigid test for states created by the ICC in the Kenya case through which to evaluate the complementarity principle (i.e., the "same person, substantially the same conduct" test), the Article puts forth an alternative test that aims to be more responsive to the shared role of national jurisdictions and the ICC under the Rome Statute in combating and ending impunity for grave crimes. This test is supported, in part, by both the Rome Statute and recent jurisprudence by the Court in the Libya case. In light of the shared role, the Article proposes that the definition of "investigation" for purposes of the complementarity principle be expanded to include less "traditional" methods used by states to address periods of mass crime, such as truth commissions and other local approaches. In this way, state sovereignty would be further protected from undue encroachment by the Court. Finally, the Article, while ultimately agreeing with the ICC finding of admissibility under the complementarity principle in the Kenya case, suggests that Kenya still has a more limited opportunity to end ICC intervention in the case if it begins to sufficiently investigate or prosecute grave crimes related to the post-election violence. This opportunity, however, is quickly diminishing as the ICC trials have begun against two of the four defendants for whom charges were confirmed, including Kenya's Deputy President. Moreover, Kenya's own truth commission recently revealed in its final report that the Kenyan government still needs to investigate further perpetrators of the election-related violence.

I. BACKGROUND

Kenya ratified the Rome Statute in March of 2005 and became a state party to the ICC.[7] By becoming a state party, Kenya accepted the jurisdiction of the Court in certain cases over international crimes committed on its territory or by one of its nationals, thereby opening the

7. *See* ICC Website, "State Parties to the Rome Statute," http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/kenya.aspx (last visited July 5, 2013); *see also* United Nations website, *Rome Statute of the International Criminal Court*, http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf (July 17, 1998).

door for the ICC prosecutor's investigation into potential international criminal acts within Kenya. In particular, the Court would be able to exercise its jurisdiction in certain cases over war crimes, crimes against humanity, and genocide committed by Kenyan nationals or on Kenyan territory on or after March 15, 2005, the date that Kenya ratified the Rome Statute.[8]

The conflict that occurred in Kenya in the 2007 post-election period was a product of deep-rooted ethnic rivalries.[9] Rivalries between the Masaai and Kikuyu ethnicities[10] stem from disputes over land allocations by government leaders in the Rift Valley since the post-independence period in Kenya.[11] In Kenya, political leaders have been successful in aligning their platforms along ethnic lines and polarizing the country. Kenya's political scene focuses on ethnicity as opposed to the performance of politicians. Clashes in the Rift Valley are not new phenomena in Kenya; indeed, violence has erupted in Kenya around election time in recent years and investigations have identified political leaders as the main culprits of this violence.[12] Along with this political involvement in election-time violence, there has been a culture of impunity toward the perpetrators of violence.[13] There has been no previous legal action taken against those that are alleged to have incited violence prior to 2007. This history of violence and impunity laid the groundwork for the violent outbreaks that followed the December 2007 elections.[14]

Even though the political violence in Kenya has very deep roots, the actual trigger for the violence that began after the December 2007

8. *See* Rome Statute, *supra* note 1, arts. 5, 11, 12 (1) & (2).

9. Human Rights Watch, *Ballots to Bullets*, 12 (2008) [hereinafter Ballots to Bullets] *available at* http://www.hrw.org/reports/2008/kenya0308/.

10. "Kenya is made up of over 40 different ethnic groups: The three largest groups are the Kikuyu, the Luhya . . . and the Luo." Ballots to Bullets, *supra* note 9, at 13. The Masaai and Kalenjin ethnicities inhabited the area known now as the Rift Valley before British occupation. The Rift Valley area is now currently inhabited by the Kikuyus, which are the majority in Kenya.

11. "After independence the new government under Jomo Kenyatta did not recognize customary land use in law or practice but instead sold the land it acquired from British settlers under the principle of 'willing seller, willing buyer.' But much of the land ended up in the hands of members of Kenyatta's Kikuyu ethnic group rather than with the communities from which it had been taken [during the colonial period]." *See* Ballots to Bullets, *supra* note 9, at 12–13.

12. Ballots to Bullets, *supra* note 9, at 18. *See also* The Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya [hereinafter The Akiwumi Report], *available at* http://www.hrw.org/en/news/2002/10/31/kenya-report-politicians-fueled-ethnic-violence (last visited July 22, 2013).

13. *See* Ballots to Bullets, *supra* note 9, at 19.

14. In 1992 and 1997, there were eruptions of violence during election time. During both campaigns the violence was directly linked to the incumbent President Moi's party (KANU) and proved to be purely politically motivated and instigated. UNITED NATIONS FINDING MISSION TO KENYA, 2/2008, 6, *available at* http://responsibilitytoprotect.org/OHCHR%20Kenya%20Report.pdf.

elections was the manipulation of the election outcome. Before the election took place, the campaign atmosphere was dominated by socio-ethnic polarization between the communities of the two main contenders: Mwai Kibaki and Raila Odinga.[15] This polarization, in turn, led to an extremely hostile environment in the candidates' respective strongholds. Leaflets were circulated and text messages were sent from undisclosed locations containing hate speech from both of the contenders' camps.[16]

Some violence began to break out prior to the actual election;[17] however, the strongest and most widespread violence began hours after the results were announced.[18] The beginning stages of the tabulation process indicated that opposition leader Raila Odinga carried a lead of about a million votes.[19] Even though there were reported irregularities throughout the election process, it was towards the end of tallying the votes where the most damaging acts of fraud were committed.[20] In particular, when the Electoral Commission of Kenya (ECK) presided over the tallying processes, it was seen by many as a "desperate last-minute attempt to rig the contest in favor of incumbent Mwai Kibaki."[21] The lead by Mr. Odinga quickly ceased to exist under reported irregular proceedings, which in turn resulted in a victory for Mr. Kibaki by a very slim margin of votes.[22]

The electoral processes were soon engulfed in confusion. The Kenyan public became quite upset and there was also pressure from other outlets

15. *See id.* at 7–8. Mwai Kibaki, elected in 2002, was the incumbent in the 2007 elections, representing the Party of National Unity (PNU), which is mainly comprised of Kikuyu people. *Id.* at 6–7. Raila Odinga was a candidate in the 2007 elections and current Prime Minister under a power-sharing agreement negotiated by former UN Secretary-General Kofi Annan. *Id.* at 5, 7. Odinga is of Luo ethnicity and represents the Orange Democratic Movement (ODM), which is mainly supported by the Luo, Luyha, Kalenjin and Maasai populations, among others. *Id.* at 7.

16. *See generally European Union Election Observation Mission (EUEOM)*, Kenya Final Report: Elections December 27, 2007 (2008) [hereinafter Kenya Final Report], 21, *available at* http://eeas.europa.eu/eueom/missions/2013/kenya/pdf/eu-eom-kenya-2013-final-report_en.pdf (last visited July 22, 2013).

17. Kenya National Commission on Human Rights (KNCHR), ON THE BRINK OF A PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST-2007 ELECTION VIOLENCE FINAL REPORT [hereinafter On the Brink of a Precipice], at 20 (2008), *available at* http://fidakenya.org/wp-content/uploads/2013/08/khrc-report...on-the-blink.pdf.

18. Human Rights Watch, *Ballots to Bullets*, 12 (2008) [hereinafter Ballots to Bullets], *available at* http://www.hrw.org/reports/2008/kenya0308/, at 8–9, 23.

19. Ballots to Bullets, *supra* note 9, at 22.

20. *Id.* at 21. *See also* Kenya Elections Domestic Observation Forum (KEDOF), Preliminary Press Statement and Verdict of 2007 Kenya's General Elections [hereinafter Preliminary Press Statement] (2007), *available at* http://kenyastockholm.files. wordpress.com/2008/01/kedof-statement-31-12-07.pdf (last visited July 22, 2013).

21. Ballots to Bullets, *supra* note 9, at 21–22.

22. *Id.* at 22. The results of the election were also in direct conflict with the parliamentary vote in which the ODM won 99 seats to the PNU's 43 seats. *Id.*

to reverse the election outcome.[23] From this outcry over the electoral process, officials from the electoral commission "denounced the apparent fraud;" furthermore, the head of the ECK announced that he was personally unsure of which candidate actually won the election.[24] In the face of this clearly disputed result, and before the public had time to voice their "concerns" over the skewed election results, Mr. Kibaki quickly had himself sworn into another term in office.[25] At that point, election observers issued reports "condemning the tallying process" officially casting doubt on the election outcome.[26]

In addition to the uncertainties surrounding the results of the election and the hurried swearing in of Mr. Kibaki, the press was ordered to suspend live broadcasts of the elections.[27] This action led to rising levels of anxiety among Kenyans because they were unable to examine the election process.[28] As a result of the delay in making election results known, incidents of violence began to emerge in Kenya. Once the results were finally announced publicly, the violence spread.[29] There have been explicit reports by different agencies that the violence that ensued was, in fact, not spontaneous; indeed, overwhelming evidence exists suggesting the actual planning of violence.[30] There have also been reports of evidence of violence perpetrated by police that include use of excessive and lethal force.[31] Furthermore, there have been recommendations in reports from various organizations for the pursuit of war criminals domestically;[32] however, the recommendations also include that appropriate action be taken by the international community, namely the ICC, should the perpetrators not be actively pursued in domestic courts.[33]

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23. *See id.*
24. *Id.*
25. *Id.*
26. *Id.* at 23. *See also* Kenya Final Report, *supra* note 16, at 31–37; *see generally* Preliminary Press Statement, *supra* note 20.
27. *See* Kenya Final Report, *supra* note 16, at 2, 22–23.
28. *See* Ballots to Bullets, *supra* note 9, at 23.
29. *See id*.
30. *See id*. at 4. For example, there were numerous statements from victims of the violence who said that they were being threatened with violent evictions before the actual outbreak of violence started. There were also leaflets circulated that warned of violent evictions of the Kikuyu people. *See generally* On the Brink of a Precipice, *supra* note 17.
31. Ballots to Bullets, *supra* note 9, at 24. *See generally* On the Brink of a Precipice, *supra* note 17.
32. Ballots to Bullets, *supra* note 9, at 8, 65.
33. *See* On the Brink of a Precipice, *supra* note 17, at 4, 10. *See also* Ballots to Bullets, *supra* note 9, at 6.

II. THE KENYAN RESPONSE: THE WAKI COMMISSION AND EFFORTS TO PROSECUTE

In the weeks following the outbreak of violence, the Kibaki administration did not make any real and tangible efforts to end the violence until there were interventions from the international community in the form of negotiations to end the violence. In particular, a power-sharing agreement was reached with the intervention of Kofi Annan two months after the violence began.[34] The formal signing of the National Accord and Reconciliation Act of 2008 finally brought relief to the Kenyan community.[35] The agreement included forming a coalition government and a complete overhaul of Kenya's governmental practices.[36] This agreement has been identified as the first potential step in cultivating a culture of respect for human rights in Kenya. With that said, a clear obstacle to this culture is the opposing culture of impunity in Kenya.[37]

The power-sharing agreement negotiated by Kofi Annan called for the creation of a Truth, Justice, and Reconciliation Commission[38] and a

34. Ballots to Bullets, *supra* note 9, at 8, 67.

35. The National Accord and Reconciliation Act, No. 4, (2008), *available at* http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationAct_No4of2008.pdf; *See also* Ballots to Bullets, *supra* note 9, at 63.

36. *See generally* Ballots to Bullets, *supra* note 9, at 63–64, 67.

37. *Id.* at 8, 63.

38. Kenyan National Dialogue and Reconciliation, Truth, Justice and Reconciliation Commission (2008), *available at* http://www.hdcentre.org/fileadmin/user_upload/Our_work/Peacemaking/Kenya/Supporting_documents/8-Truth-Justice-and-Reconciliation-Commission-Kenya-National-Dialogue-and-Reconciliation-4-March-2008.pdf. This document outlines the principles that were agreed upon during negotiations in the creation of the Truth, Justice and Reconciliation Commission. The Kenyan Truth, Justice and Reconciliation Commission's mandate was to:

> [P]romote peace, justice, national unity, healing, and reconciliation among the people of Kenya by . . . (a) establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February 2008, including the . . . (i) antecedents, circumstances, factors and context of such violations; (ii) perspectives of the victims; and (iii) motives and perspectives of the persons responsible for commission of the violations, by conducting investigations and holding hearings.

See The Truth, Justice and Reconciliation Act, 2008, art. 5 (a), *available at* http://www.tjrckenya.org/images/documents/TJRC-Act.pdf. The Commission also was charged with investigating human rights abuses and determining which individuals were responsible for these abuses. *See id*. art. 5(c). The Commission was to recommend prosecution of those responsible. *See id.* art. 5 (d). It was to also provide recommendations to redress wrongs suffered by the victims of these abuses. *See id.* art. 5(e). It was also to provide an opportunity for victims and others to explain the abuses, and for perpetrators to seek and promote reconciliation by confessing their misdeeds. *See id*. at 5(g)-(i). Amnesty was possible for certain perpetrators who came before the truth commission and revealed all of the facts

Commission of Inquiry on Post-Election Violence (CIPEV).[39] CIPEV, which is more commonly known as the Waki Commission, was specifically charged with investigating the violence that took place following the 2007 elections and making recommendations concerning the prevention of similar, future violence (including recommendations related to bringing to justice those responsible for the violence, ending impunity, and fostering reconciliation).[40] The Waki Commission produced a report handed to Messrs. Kibaki, Odinga and Annan in October 2008 that included key findings with respect to the violence and recommendations regarding the pursuit of justice.[41] These recommendations included the creation of a Special Tribunal for Kenya.[42] This Tribunal represented an opportunity for Kenya to pursue the perpetrators of the violence domestically, including through the investigation and prosecution of crimes such as crimes against humanity.[43] The Special Tribunal was to be enacted through statute and tied to the Constitution of Kenya to prevent any objections based on the validity of the Tribunal.[44] Although the Waki Commission's report sought to provide a domestic avenue to pursue justice, it also included fair warning that should a Tribunal not be formed domestically within the mandated time frame, further action would be taken, including transmitting to the ICC Prosecutor a list of individuals suspected of bearing the greatest responsibility for crimes related to the post-election violence.[45]

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underlying the abuses for which they were responsible. *See id*. at 5 (f). For further discussion of the amnesty issue, *see infra* note 274. On May 3, 2013, the Commission issued its final report. For a description of the report, *see infra* notes 274–76 and accompanying text. *See also infra* notes 264, 266–67.

39. *See also* Kenyan National Dialogue and Reconciliation: Commission of Inquiry on Post-Election Violence, *available at* http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Kenya_14_KNDR_Commission_of_Inquiry.pdf. This is the document which mandates the creation of the Commission of Inquiry on Post-Election Violence (CIPEV). *Id.* The chairman of the commission was Justice Philip Waki, a judge from Kenya's Court of Appeal. *See* International Center for Transitional Justice: The Kenyan Commission of Inquiry into Post-Election Violence, *supra* note 6, at 1. CIPEV is commonly referred to as the Waki Commission. *Id.*

40. *See* International Center for Transitional Justice: The Kenyan Commission of Inquiry into Post-Election Violence, *supra* note 6, at 1.

41. CIPEV Final Report [hereinafter Waki Report], *available at* http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf. This is the report produced by the Waki Commission.

42. *See* Waki Report at 472–75.

43. Waki Report at 472. One of the principal crimes that the Special Tribunal was to adjudicate was crimes against humanity. *Id.*

44. *Id.* at 473.

45. *Id.* "If either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, or the Special Tribunal fails to commence functioning as contemplated above, or having commenced operating its purposes are subverted, a list

The Waki Commission also made quite clear in its report that it possessed a list of the names of the principal, alleged perpetrators of the violence;[46] however, it did not mention the individuals that were most responsible for inciting the violence.[47] In part, this was done in an effort to avoid compromising the integrity of the sensitive information pending the creation of the Special Tribunal.[48] Even so, the Waki Commission was serious about bringing the individuals to justice. The report outlined that the names of the alleged perpetrators would be placed in a sealed envelope along with the supporting evidence until the Special Tribunal was created in compliance with the Waki Report's recommendations.[49] The report also explicitly stated that if there was a failure in constituting the Tribunal, the list of the alleged perpetrators' names would be forwarded to the Prosecutor of the ICC in The Hague to conduct further investigations and possible prosecutions.[50]

Furthermore, the Waki Commission expressed concerns over Kenya's legal system in prosecuting those responsible for the most serious crimes. The report describes an extremely weak criminal justice system. In particular, the report highlights a flawed investigative process that in recent history has laid the foundation for a culture of impunity.[51] The poor investigative processes of the Kenyan criminal justice system have impacted the outcomes of proper prosecution and adjudication, and that, in turn, has led to virtually no successful prosecutions of perpetrators of

containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court. The Special Prosecutor shall be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons." *Id.*

46. *See* International Center for Transitional Justice: The Kenyan Commission of Inquiry into Post-Election Violence, *supra* note 6, at 2. *See also* Waki Report at 15–18.

47. Waki Report at 17–18 ("The Commission has carefully weighed the choices available to it and has decided against publishing the names of alleged perpetrators in its report. Instead, these names will be placed in a sealed envelope, together with its supporting evidence. Both will be kept in the custody of the Panel of African Eminent Personalities pending the establishment of a special tribunal to be set up in accordance with our recommendations. In default of setting up the Tribunal, consideration will be given by the Panel to forwarding the names of alleged perpetrators to the special prosecutor of the International Criminal Court (ICC) in the Hague to conduct further investigations in accordance with the ICC statutes. This is a major recommendation made by the Commission."). *Id.* at 18.

48. *Id.* at 17. Names were also not released because most of the individuals suspected of committing election-related crimes could not be given an opportunity before the Commission to properly respond to the accusations. *Id.* at 16.

49. *Id.* at 18. *See also supra* note 43.

50. *Id.*

51. *Id.* at 449–54.

violence.[52] With the lack of credible investigations, individuals and organized groups have continued to commit crimes with the assumption that they will not be held accountable.

The Waki Commission's report also indicated that while it conducted its hearings, "the Attorney General [of Kenya] appointed a joint team of his [own] officers and police officers to review all cases related to [the] post-election violence . . . No results of such exercise were furnished to the Commission, despite requests and promises . . . ."[53] The report also describes the overall lack of political will in prosecuting such serious crimes.[54] This lack of will to prosecute appears to stem, in part, from the authorities fearing reprisals by the political leadership and populace.[55] Moreover, the manner in which the authorities handled the Akiwumi Report in the recent past further diminishes confidence in the current Kenyan criminal justice system because authorities essentially ignored the Report and its recommendations related to the issue of ethnic violence.[56]

There have also been ongoing issues related to perceived lack of independence and impartiality of the judiciary in Kenya.[57] In particular, the judiciary has gained the reputation of failing to adequately provide democratic governance in Kenya.[58] This also has had a direct impact on the post-election violence of 2007, in that the ODM refused to accept the jurisdiction of the courts to settle the disputed election results.[59] The clear distrust of the judiciary by prominent Kenyans further highlights the weakness associated with domestic prosecutions.[60]

Amid the concerns on the state of the criminal justice system there have also been concerns regarding existing legal frameworks in Kenya. The Kenyan Penal Code does not include specific language regarding crimes against humanity.[61] As a result, grave human rights violations are

52. *Id.* at 454.

53. *Id.*

54. *See generally id.* at 456–60. This section of the "Waki Report" is titled "Lack of political will and fear of the political establishment." *Id.* at 456.

55. *See id*. at 457.

56. *Id* at 456. *See generally* Akiwumi Report, *supra* note 12. *See also Kenya Report: Politicians Fueled Ethnic Violence*, HUMANRIGHTSWATCH.COM, http://www.hrw.org/en/news/2002/10/31/kenya-report-politicians-fueled-ethnic-violence (last visited March 20, 2015).

57. Waki Report. at 460.

58. *Id.* at 460–61. This section of the report also discusses on-going reforms of the judiciary to restore faith in the system. *See id.* at 461.

59. *Id.*

60. *Id.*

61. *See* Kenyan Penal Code, Sections 202–207, *available at* http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf (last visited July 26, 2013). These sections of the Kenyan Penal Code specifically address murder and manslaughter but do not contain any

not recognized as being more serious than murder, assault, or the like. Also the penal code does not effectively separate the direct perpetrators from the planners, high-level instigators, and financiers of violence. Thus, these two groups—perpetrators and planners—are subject to the same judicial proceedings and punishments.[62] This lack of clear delineation between planners and perpetrators also makes it difficult to prosecute the planners domestically if they have not actually committed the atrocities. Unfortunately, absence of prosecution in this regard only further contributes to the culture of impunity among the upper echelons of the perpetrators of violence.

Human rights groups in Kenya as well as the Waki Commission had voiced serious concerns regarding the domestic prosecution of the perpetrators based on the recent history of impunity for ethnically and politically motivated clashes.[63] The human rights organizations and the Commission were adamant about reversing the culture of impunity and had indicated that the international community, namely the ICC, be involved if no action was taken domestically.[64] Furthermore, the recommendations stemming from the Kenya National Commission on Human Rights (KNCHR) and the Waki Commission have set forth mandates which state that a failure to institute a Special Tribunal in Kenya domestically would lead to action involving the ICC. Indeed, both commissions had in fact called upon the ICC to remain at arm's length during the evolution of the domestic processes.[65]

The effort of the Kenyans to prosecute the perpetrators of the post-election violence of 2007 domestically had been minimal at best. The Waki Commission's recommendations to create a Special Tribunal were rejected by the Kenyan Parliament. In particular, in February of 2009, the Parliament of Kenya struck down the proposal to amend the National Constitution to create the government sponsored Special Tribunal.[66] The

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sections appropriate for prosecuting those who bear the most responsibility for the post-election violence (e.g., the Code lacks the possible charge of crimes against humanity). *Id.*

62. *See id.* at 202–07.

63. *See generally* On the Brink of a Precipice, *supra* note 17. *See also* Waki Report, *supra* note 41, at 445–460.

64. *See generally* On the Brink of a Precipice, *supra* note 17. *See also* Waki Report, *supra* note 41, at 470.

65. *See* On the Brink of a Precipice, *supra* note 17, at section entitled "Recommendations." *See also* Waki Report, *supra* note 41, at 17–18, 473. *See also supra* notes 45 & 50.

66. Auriele Coppin and Lucia DiCicco, Communications to the ICC Regarding the Situation in Kenya [hereinafter Communications to the ICC] (2009), at 3, *available at* http://amicc.org/docs/Kenya.pdf (last visited Aug. 3, 2013); *See also* Annan, H.E. Kofi, Statement from the Chair of the Panel of Eminent African Personalities, KENYA NATIONAL DIALOGUE AND RECONCILIATION (2009), *available at* http://www.dialoguekenya.org/pressmedia/13-Feb-2009%20-%20Press%20

following day Kofi Annan was set to release the names of the officials that had been suspected to have incited the violence and that had been provided to him by the Waki Commission to the Prosecutor of the ICC. However, Mr. Annan announced that he would afford more time to Kenya in their efforts to create the Special Tribunal.[67] He also expressed that he would forward the list of names and supporting documents to the ICC, if no arrangement to create the Special Tribunal had been made in a reasonable amount of time.[68] On July 3, 2009, a delegation from Kenya met with ICC Prosecutor Luis Moreno-Ocampo in The Hague to discuss the situation. The outcome of the meetings resulted in Mr. Annan handing over the list of names and supporting evidence to the Prosecutor's office of the ICC.[69]

Upon receiving the evidence compiled by the Waki Commission the ICC Prosecutor supported a three-pronged approach to address the post-election violence, in which the ICC would prosecute those most responsible for the crimes, a national Special Tribunal would be instituted for other perpetrators, and a Justice, Truth, and Reconciliation Commission (JTRC) would be created to investigate the full history of the past and shed light on how to prevent future atrocities.[70] The Office of the Prosecutor (OTP) continued discussions with Kenyan officials regarding the situation and further reiterated that the evidence he received was compelling and further suggested that the evidence would meet the threshold for admissibility by the ICC.[71] The Kenyan government continued to delay making any tangible steps to prosecute and was fast approaching a deadlock in choosing the appropriate avenues for seeking justice.[72]

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statement%20by%20H.E.%20Kofi%20Annan%20on%20the%20defeat%20of%20the%20Constitution%20of%20Kenya%20Amendment%20Bill%20in%20Parliament..pdf (last visited Aug. 3, 2013).

67. *Id.* at 3. *See also* H.E. Kofi Annan, Statement from the Chair of the Panel of Eminent African Personalities, Kenya National Dialogue and Reconciliation, (2009) [hereinafter Statement from Kofi Annan], *available at* http://www.dialoguekenya.org/pressmedia/24-Feb-2009%20-%20Press%20statement%20from%20H.E.%20Kofi%20Annan%20on%20letters%20to%20the%20two%20principals..pdf (last visited Aug. 3, 2013).

68. *See* Communications to the ICC, *supra* note 66, at 3. *See also* Statement from Kofi Annan, *supra* note 67, at 1.

69. *See* Communications to the ICC, *supra* note 66, at 3. *See also* Statement from Kofi Annan, *supra* note 67.

70. Press Release, International Criminal Court, ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya (30 Sept. 2009), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282009%29/Pages/pr456.aspx (last visited Aug. 3, 2013). Regarding the development and evolution of the Kenyan Truth Commission, see *supra* note 38.

71. "Kenya: Leaving the Door Open." *Africa Confidential* 50.20 (10/2009): 8. Print.

72. *Id.*

Based on the continued delay of the Kenyan government to effectively produce a mechanism for domestically holding accountable the perpetrators of violence, the OTP indicated that the national system would not be considered to be sufficient to prosecute those responsible.[73] The evidence provided to the ICC Prosecutor by the Waki Commission, as well as other forms of communications to the OTP by human rights organizations and Kenyan officials, have solidified the Prosecutor's view that crimes against humanity were in fact committed in Kenya's period of post-election violence in 2007. The specific crimes that have sufficient supporting evidence, according to the Prosecutor, are the murders, rapes, deportations, forcible transfer of populations, political persecutions and various other inhumane acts that were perpetrated on a widespread and systematic scale by the political machines of Kenya.[74]

III. RELEVANT ICC LAW

The ICC Prosecutor must take several issues into account when deciding whether to pursue an investigation *proprio motu*. For example, the Prosecutor must consider whether there is reasonable cause to believe a crime within the jurisdiction of the Court is occurring or has occurred. In addition, she must evaluate the issue of complementarity as it relates to the shared role between the Court and individual state parties in prosecuting high-level international crime offenders.[75] In this regard, the preamble of the Rome Statute states ". . . the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[76] In addition, Article 1 of the Rome Statute provides, in relevant part, that

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73. *Id.*

74. *See* Press Release, International Criminal Court Prosecutor, Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity (Dec. 15, 2010), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/Pages/pr615.aspx (last visited Aug. 3, 2013); *see also* Press Release, 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 (Mar. 31, 2010), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/Pages/icc%20judges%20grant%20the%20prosecutor%E2%80%99s%20request%20to%20launch%20an%20investigation%20on%20crimes%20a.aspx (last visited Aug. 3, 2013).

75. *See* Rome Statute, *supra* note 1, art. 53 (1)(a)& (b) & Rule 48 of the Rules of Procedure and Evidence. *See also supra* note 1.

76. Rome Statute, *supra* note 1, at pmbl. ¶ 10. ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions. . . .").

> An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.[77]

Under the complementarity principle, which is related to the question of the admissibility of a particular case, the ICC Prosecutor must determine whether the relevant investigating or prosecuting nation state is able and willing to investigate or prosecute the case, or has, in good faith, decided not to prosecute. If any of these considerations apply, then the case is inadmissible before the ICC.[78] Furthermore, and also related to the admissibility of a case, the ICC Prosecutor must consider whether the case is of sufficient seriousness, or "gravity," to merit consideration by the Court. Finally, in deciding whether to initiate an investigation, the Prosecutor must determine whether the investigation would serve "the interests of justice."[79]

In addition, in accordance with the Rome Statute, the International Criminal Court is currently empowered to investigate and prosecute

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77. Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE JOURNAL OF INTL LAW 121 (2005). *See* Rome Statute, *supra* note 1, art. 1.

78. Rome Statute, *supra* note 1, at pmbl. & art. 17 (1)(a)-(b) & 17(2)-(3) (addressing complementarity considerations for a case to be deemed admissible before the ICC). For the relevant ICC provisions related to complementarity, *see supra* note 3.

79. Article 17 addresses gravity—"[T]he Court shall determine that a case is inadmissible where "[t]he case is not of sufficient gravity to justify further action by the Court." *See id*. art. 17(1)(d). *See also* art. 53 (1)(b). For the interest of justice provision, *see* art. 53 (1)(c) ("Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."). *See also* art. 53(2)(c)("A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime[]"). The Article 17 admissibility decision also includes one additional consideration—whether the defendant has been legitimately tried by another court for the same international criminal conduct within the jurisdiction of the ICC (and for which the ICC intends to prosecute the defendant). *See* art. 17(1)(c) ("The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3"). *See also* art. 20, ¶ 3 ("No person who has been tried by another court for conduct also proscribed under [the articles containing the crimes within the Court's jurisdiction] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice"). *Id.* art. 20(3).

instances of genocide,[80] crimes against humanity,[81] and war crimes.[82] For the Court to be able to exercise its jurisdiction over a crime, certain "pre-conditions" must be met: the alleged perpetrator either must be a national of a state party to the Rome Statute or the alleged crimes must occur on the territory of a state party.[83] Finally, for the Court to exercise its jurisdiction, the case, or "situation," must come before the Court in one of three ways: (i) the state party can refer a situation to the Court; (ii) the Security Council can refer a situation under Chapter VII; or (iii) the Prosecutor herself can initiate an investigation into a situation *proprio motu*.[84]

In all cases, the Office of the Prosecutor (OTP) first investigates the entire situation—encompassing all alleged crimes and perpetrators potentially implicated by the evidence she receives—and subsequently builds cases against individual defendants for particular criminal conduct. If the Prosecutor officially decides to initiate an investigation *proprio motu*, she must first obtain authorization from the Pre-Trial Chamber.[85]

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80. *See id.* art. 6 ("For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. . ."). *See also* P.M. Wald, *Genocide and Crimes against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 623 (2007). "The five genocidal acts are: killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures designed to prevent births, and finally transferring children from a protected group to another group." *Id.*

81. *See* Rome Statute, *supra* note 1, art. 7 ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."). *See also* Wald, *Genocide and Crimes Against Humanity*, *supra* note 80, at 623. Article 6(c) of the IMT (International Military Tribunal) Charter limited crimes against humanity, defined to include extermination, enslavement, deportation and subjection to inhumane. *Id.*

82. *See* Rome Statute, *supra* note 1, art. 8.

83. *Id.* art. 12(2) (a) & (b).

84. *Id.* art. 13. The Charter of the United Nations, Chapter VII, encompasses articles 39–51 which grant various discretionary powers to the Security Council, one of which has been interpreted to be power to refer cases to the ICC. UN Charter, Chapter VII, *available at* http://www.un.org/en/documents/charter/chapter7.shtml (last visited July 26, 2013).

85. *See* Rome Statute, *supra* note 1, art. 15 (3). *See also supra* note 2.

IV. PROSECUTOR'S REQUEST TO INVESTIGATE PROPRIO MOTU IN KENYA AND THE RESPONSE BY THE PTC

On November 26, 2009 the Prosecutor formally requested that the Judges of the ICC's Pre-Trial Chamber (PTC) authorize investigations into the post-election violence that followed the 2007 elections.[86] Under Article 13 of the Rome Statute the ICC may exercise jurisdiction in one of the following three ways: (1) if the situation is referred to the Prosecutor by a State Party; (2) if it is referred by the Security Council of the United Nations; or (3) if the Prosecutor seeks to initiate an investigation.[87] Article 15 of the Rome Statute explicitly outlines the ability of the Prosecutor to initiate investigations absent a referral from either a state party or the Security Council.[88]

An extremely important feature of the use of this principle is the submission of a formal request by the Prosecutor to the PTC for authorization of such an investigation.[89] The PTC is, in turn, charged with the task of determining whether or not the request by the Prosecutor is in

86. *See* Request for Authorisation of an Investigation pursuant to Article 15, submitted to the Pre-Trial Chamber II from the Office of the Prosecutor (Nov. 26, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf (last visited Aug. 3, 2013).

87. *See* Rome Statute, *supra* note 1, art. 13.

88. Article 15 of the Rome Statue states as follows:

> Prosecutor (1.) The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. (2.) The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. (3.) If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence. (4.) If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. (5.) The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. (6.) If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

See Rome Statute, *supra* note 1, art. 15.

89. *See* Rome Statute, *supra* note 1, art. 15(3).

accordance with the Rome Statute's requirements for jurisdiction.[90] The situation in Kenya is the first time that the Prosecutor has exercised his right to *proprio motu*.[91]

Upon the PTC's receipt of the request by the Prosecutor, the PTC judges held a hearing to determine whether there was a reasonable basis to grant the request.[92] The PTC subsequently reviewed the information that was provided by the Prosecutor, which included various reports. On February 18, 2010 the PTC issued a response to the Prosecutor's request. The chamber requested that the Prosecutor provide further information and clarification about the issues at hand.[93] The information requested by the PTC included information on the incidents and groups of persons that will most likely be the focus of the investigations in Kenya along with any domestic investigations.[94] The Prosecutor was also asked to provide information that would identify a link between "[the] events, the persons involved, the acts of violence allegedly committed . . . and, on the other hand, a policy of a State or one or more organizations."[95] On March 3, 2010 the Prosecutor provided clarification regarding "criminal incidents that appear to have resulted from a State and/or organizational policy," outlined investigations that would take place in regards to specific methods of senior level politicians and businessmen to incite violence, and additionally included a non-binding list of suspects that would be investigated to the PTC.[96] The Prosecutor also noted that a "limited number" of judicial proceedings were pursued for minor offenses domestically but that no Special Tribunal had been created in Kenya to prosecute those "most responsible" for the crimes and indicated that the Kenyan government was "ready to provide [its] full cooperation to the ICC, including in the execution of arrest warrants."[97] The PTC reviewed

90. *See* Rome Statute, *supra* note 1, art. 15 (4).

91. Tania Deigni, ICC Prosecutor's Application for Authorization to Open an Investigation in the Situation of Kenya, at 1 (2010), *available at* http://amicc.org/docs/Kenya_Application.pdf (last visited Aug. 3, 2013).

92. *See* Rome Statute, *supra* note 1, art. 15 (4).

93. "Decision Requesting Clarification and Additional Information" Submitted to the OTC from PTC II (Feb. 18, 2010), *available at* http://www.icc-cpi.int/iccdocs/doc/doc825223.pdf (last visited Aug. 3, 2013).

94. *Id.* ¶ 14.

95. *Id.* ¶ 13.

96. "Prosecution's Response to Decision Requesting Clarification and Additional Information" Submitted to the PTC II by the OTP, 3 March 2010, 4, *available at* http://www.icc-cpi.int/iccdocs/doc/doc831129.pdf (last visited Aug. 2, 2013).

97. *Id.* ¶¶ 35–36.

the additional information and clarifications, deemed them to be sufficient, and approved the request of the Prosecutor on March 31, 2010.[98]

The PTC, from the outset of the authorization decision approving the Prosecutor's request to investigate the situation in Kenya, understood its importance. In particular, the Chamber commented that it would "examine the Prosecutor's Request taking into consideration the sensitive nature and specific purpose of this procedure [i.e., Article 15 requests for authority to investigate proprio motu]."[99]

Some of the key features of this decision lie in the analysis of the evidence by the judges of the PTC as it relates to the threshold admissibility requirements. The judges used the criteria of "admissibility" and "reasonable basis to proceed" to ensure the existing requirements of the OTP are met, and to further note that the PTC is held to the same legal standard.[100] The PTC specifically refers to Article 53(1)(a-c) of the Rome Statute in the rationale for approving the investigation. In particular, the Judges stated "if upon review of the three elements [burden of proof, complementarity/gravity and interests of justice considerations] embodied in article 53(1)(a-c) of the Statute and on the basis of the information provided, the Chamber reaches an affirmative finding as to their fulfillment, the "reasonable basis to proceed" standard will consequentially be met."[101]

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98. "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" Submitted to the OTP from PTC II (Mar. 31, 2010) (PTC Authorization of Investigation), *available at* http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf (last visited Aug. 3, 2013).

99. *Id.* ¶ 18.

100. *Id.* ¶¶ 21–22.

101. *Id.* ¶ 26. Article 53 reads:

> Initiation of an investigation
>
> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is
>
> being committed;
>
> (b) The case is or would be admissible under article 17 [i.e., complementarity and gravity provisions] ; and
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

See Rome Statute, *supra* note 1, art. 53.

A. Article 53(1)(a) The Information Available to the Prosecutor Provides a Reasonable Basis to Believe that a Crime has Been or is Being Committed

The standard of "reasonable basis to believe a crime . . . has been committed" is the evidentiary burden of proof that the ICC Prosecutor must meet prior to commencing an investigation proprio motu.[102] The PTC, in its authorization decision, accepted the "reasonable basis" test, which is described in conjunction with *proprio motu* in the Rome Statute.[103] Additionally the PTC addressed the issue of the evidence presented by the Prosecutor, which must point to a "reasonable conclusion [that a crime within the Court's jurisdiction has been committed]."[104] According to the PTC, the "reasonable basis to believe" test is the "lowest evidentiary standard provided for in the Statute."[105] This has been affirmed because at the early stage of proceedings the Prosecutor may not have "comprehensive" or "conclusive" information.[106] Moreover, the PTC notes that the "reasonable basis to believe" standard is akin to "reasonable suspicion," as that phrase is defined by the European Court of Human Rights—"the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[107] The Chamber concludes the analysis of the reasonable basis to

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102. *Id*. art. 53 (1)(a).

103. *Id*. art. 15(4).

104. *See* "PTC Authorization of Investigation," *supra* note 98, ¶ 33. The Court notes that there may be more than one conclusion reached based on the evidence. The Court elaborates in this way:

> Rather, it is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available. . . . The Chamber considers that in the context of the present request, all the information provided by the Prosecutor certainly need not point towards only one conclusion.

The Prosecutor is therefore not required to point to any one or specific conclusion at this stage of the proceeding. *See id*. ¶¶ 33–34.

105. *See* PTC Authorization of Investigation, *supra* note 98, ¶ 27.

106. *Id.* The Court notes that there may be more than one conclusion reached based on the evidence. The Court articulates this by stating that:

> Rather, it is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available. . . . [T]he Chamber considers that in the context of the present request, all the information provided by the Prosecutor certainly need not point towards only one conclusion.

"PTC Authorization of Investigation," *supra* note 98, ¶¶ 33–34.

107. *Id.* ¶ 31.

believe standard and the PTC's role in evaluating that standard, in the following way:

> [T]he Chamber must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed.' A finding on whether there is a sensible justification should be made bearing in mind the specific purpose underlying this procedure.[108]

The second question raised in part (a) of Article 53 specifically looks to whether or not the Prosecutor meets the reasonable basis of a crime committed "within the jurisdiction of the Court."[109] The Chamber sets forth three guidelines for determining if the jurisdictional standard is met:

> Thus, the Chamber considers that for a crime to fall within the jurisdiction of the Court, as stated in Article 53, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute (jurisdiction ratione materiae); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction ratione temporis); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction ratione loci or ratione personae). The latter entails either that the crime occurs on the territory of a State Party to the Statute or a State which has lodged a declaration . . ., or be committed by a national of any such State.[110]

B. Article 53(1)(b) The Case is or Would be Admissible Under Article 17

Within the context of the admissibility evaluation under article 17, which includes the complementarity and gravity determinations, the Chamber, in its authorization decision, first addresses the ambiguity that was associated with the terms "case" and "situation." In this regard, the Chamber ultimately concludes that "since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation."[111] Even

108. *Id.* ¶ 35.
109. *See* Rome Statute, *supra* note 1, art. 53 (1)(a).
110. PTC Authorization of Investigation, *supra* note 98, ¶ 39.
111. *Id.* ¶ 48.

though the Court expresses that the admissibility evaluation focuses upon a potential case or cases within a situation, the Court also points out that this evaluation "cannot be conducted in the abstract."[112] The Court specifically notes that there must be a solid basis of information before the investigation can be approved. In particular, the Prosecutor must show evidence concerning the perpetrators and criminal incidents, "likely to shape his future [case or cases]."[113] The Chamber then articulates the guidelines for assessing a "potential case:"

> Accordingly, admissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation.[114]

Next, the Court squarely addresses the admissibility issue of complementarity within the context of its "potential cases" concept. In particular, the Chamber states that "[t]he admissibility assessment requires an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court's investigations. If the answer is in the negative, the "case would be admissible", provided that the gravity threshold is also met."[115] In reference to the situation in Kenya, the Court recognizes that there is no need to assess an unwillingness or inability to investigate or prosecute the potential cases that may shape the Prosecutor's case, within Kenya's domestic court system:

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112. *Id.* ¶ 49.
113. *Id.*
114. *Id.* ¶ 50.
115. *Id.* ¶ 52.

> Thus, in the present scenario, it is not necessary to proceed to the second step [of the complementarity determination, regarding inability or unwillingness to investigate or prosecute] which requires an examination of the remaining parts of the [article 17 complementarity] provision, since the available information indicates that there is a situation of inactivity with respect to the elements that are likely to shape the potential case(s).[116]

Following its complementarity determination, the Chamber addressed the admissibility issue of gravity.[117] The Court points out that the gravity requirement cannot be associated with a concrete case at this stage of the investigation and therefore should, like the complementarity determination, be based on the "potential cases" that may arise: "[G]ravity should be examined against the backdrop of the likely set of cases or 'potential case(s)' that would arise from investigating the situation."[118] In addition the Court sets forth parameters for defining a potential case within this context. The Court explains that:

> As for the first element [i.e., the groups of persons that are investigated to form a potential case] the Chamber considers that it involves a generic assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. . .As for the second element [the crimes committed during the incidents that are investigated to form a potential case], the Chamber is of the view that this mainly concerns the gravity of the crimes committed within the incidents, which are likely to be the focus of an investigation. In this regard, there is interplay between the crimes and the context in which they were committed (the incidents). Thus, the gravity of the crimes will be assessed in the context of their modus operandi.[119]

The Chamber also discusses a qualitative assessment, or "test," to determine gravity:

> In making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a qualitative

116. *Id.* ¶ 54.

117. The issue of gravity is a required component of the admissibility evaluation; in this regard, the Court notes that ". . . the gravity assessment is a mandatory component for the determination of the question of admissibility (under the Article 53 (1)(b) assessment)." *See id.* ¶ 57.

118. *Id.* ¶ 58.

119. *Id.* ¶¶ 60–61.

> approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave. . . . These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families.[120]

C. Article 53(1)(c) Taking into Account the Gravity of the Crime and the Interests of Victims, there are Nonetheless Substantial Reasons to Believe that an Investigation Would Not Serve the Interests of Justice

The Chamber then briefly addressed Article 53(1)(c), the interests of justice requirement. The PTC noted that it "does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. . . . It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber."[121]

After the Chamber reviews the relevant law in approving the investigation, it looks to whether the criteria have been met by the OTP. The PTC recalls the jurisdictional parameters of *ratione materiae, ratione temporis* and alternatively *rationae personae* or *ratione loci* under article 53.[122] The Chamber proceeds to analyze each of the requirements. In the analysis of *ratione materiae*, the Chamber acknowledges that "[u]pon

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120. *Id.* ¶ 62.

121. *Id.* ¶ 63. Lastly, the Chamber determines that the jurisdictional inquiry embedded within the Article 15 proprio motu authorization decision is met through the Article 53(1)(a) assessment. In this regard, "the Chamber finds that its determination of jurisdiction concerning the crimes as required under article 53(l)(a) of the Statute already covers the analysis of jurisdiction over any potential case pursuant to article 15(4) of the Statute". *Id.* ¶ 65. Furthermore the Chamber finds that the Article 53 jurisdictional assessment is sufficient:

> It follows from the above analysis that the Chamber is satisfied that a review of article 53(l)(a)-(c) of the Statute is sufficient for the purpose of this procedure [related to examining whether the Court has jurisdiction over the crimes] and there is no need to duplicate its assessment of jurisdiction under article 15(4) of the Statute.

Id. ¶ 68.

122. *Id.* ¶ 71.

examination of the available information, bearing in mind the nature of the present proceedings, the low threshold, as well as the object and purpose of this decision, the Chamber finds that the information available provides a reasonable basis to believe that crimes against humanity have been committed on Kenyan territory."[123] The Chamber then addresses the contextual elements of crimes against humanity and breaks them into distinguishable parts. The parameters are (i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread and systematic nature of the attack, and (iv) nexus between the individual and the attack.[124]

The Chamber then analyzes each portion beginning with the first element of "an attack against any civilian population". The Chamber articulates the meaning of "attack" as being "a campaign or operation carried out against the civilian population."[125] Additionally the Court states that an "attack consists of a course of conduct involving the multiple commission of acts referred to in article 7(1)."[126] The Chamber then addresses the requirement of "directed against a civilian population:" "The Prosecutor will need to demonstrate, to the standard of proof applicable, that the attack was directed against the civilian population as a whole and

123. *Id.* ¶ 73. *See also* Rome Statute, *supra* note 1, at 53(1)(a).

124. PTC Authorization of Investigation, *supra* note 98, ¶ 79. Also, it is noted by the Chamber that a fifth requirement of "knowledge of the attack" cannot be assessed at this early phase of the proceedings because it speaks to the mental element under Article 30(3) and cannot be evaluated as of yet. *Id*.

125. *Id.* ¶ 80 (citing Elements of Crimes, Introduction to Article 7 of the Statute, ¶ 3).

126. *Id.* ¶ 80 (citing Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 75). Article 7(1)-(2)(a) of the Rome Statute reads as follows:

> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
>
> 2. For the purpose of paragraph 1: (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack[.]"

See Rome Statute, *supra* note 1, art.7.

not merely against randomly selected individuals."[127] Further stipulated is that:

> The Chamber need not be satisfied that the entire civilian population of the geographical area in question was being targeted. However, the civilian population must be the primary object of the attack in question and cannot merely be an incidental victim. The term 'civilian population' refers to persons who are civilians, as opposed to members of armed forces and other legitimate combatants.[128]

The second element in determining whether crimes against humanity have been committed is "state or organizational policy" assessment. The Chamber notes that the terms "policy" or "state or organizational" are not defined in the Rome Statute and looks to *stare decisis*. In the previous case brought before the PTC against Katanga and Ngudjolo Chui, the Chamber set forth the following assessment relative to this provision.

> [E]ven if [the attack is] carried out over a large geographical area or directed against a large number of victims, [it] must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.[129]

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127. *Id.* ¶ 81 (citing Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 77).

128. *Id.* ¶ 82 (citing Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01//05-01/08-424, paragraph 76) (also citing various ICTR, ICTY and Geneva Convention provisions).

129. *Id.* ¶ 84 (citing Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 396). *See also id.* ¶ 85 (quoting Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 81) ("[t]he requirement of 'a State or organizational policy' implies that the attack follows a regular pattern. Such a policy may be made by groups of person who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.").

The Chamber also relies on the International Law Commission (ILC) and the jurisprudence of the previous special, ad hoc tribunals in Yugoslavia and Rwanda to interpret the legal contexts of the Rome Statute, especially within the assessment of crimes against humanity.[130] The Chamber particularly looks to the ICTY in the case against Tihomir Blaskic when evaluating whether a "plan" exists in the context of "state or organizational policy". In this case, the ICTY determined that the plan to commit attacks "need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events . . ."[131] An important aspect of the "state and organizational policy" assessment is that an organization not linked to a state could fall under the scope of this requirement. In particular, the PTC found that organizations "not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population."[132]

Next, the Court examines the third requirement of crimes against humanity—the "widespread or systematic nature of the attack." The

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130. *See* "PTC Authorization of Investigation," *supra* note 98, ¶ 86. Particularly the Chamber mentions Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind, which was adopted by the ILC in 1996 and the Chamber specifically mentions the ICTY and ICTR in solidifying the definition of "crimes against humanity."

131. *Id.* ¶ 87 (citing ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, 3 March 2000, ¶ 204). The Blaskic decision mentioned the following "series of events:"

> (a) the general historical circumstances and the overall political background against which the criminal acts are set; (b) the establishment and implementation of autonomous political structures at any level of authority in a given territory; (c) the general content of a political programme, as it appears in the writings and speeches of its authors; (d) media propaganda; (e) the establishment and implementation of autonomous military structures; (f) the mobilisation of armed forces; (g) temporally and geographically repeated and co-ordinated military offensives; (h) links between the military hierarchy and the political structure and its political programme; (i) alterations to the "ethnic" composition of populations; (j) discriminatory measures, whether administrative or other (banking restrictions, laissez-passer, . . .); (k) the scale of the acts of violence perpetrated—in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.

Id.

132. *Id.* ¶ 92. Additionally, in paragraph 93 of its authorization decision, the PTC sets forth criteria for determining whether a particular group constitutes an organization under the Rome Statute:

> (a) whether the group is under a responsible command, or has an established hierarchy; (b) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (c) whether the group exercises control over part of the territory of a State; (d) whether the group has criminal activities against the civilian population as a primary purpose; (e) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (f) whether the group is part of a larger group, which fulfills some or all of the abovementioned criteria."

Id. ¶ 93.

Chamber begins by addressing the fact that an alleged attack can be *either* widespread *or* systematic under this requirement for crimes against humanity.[133] The Chamber articulates "only the attacks, and not the alleged individual acts, are required to be widespread or systematic."[134] Then the PTC examines the respective terms "widespread" and "systematic." The widespread element is described by the Chamber as "the element (that) refers to both the large-scale nature of the attack and the number of resultant victims."[135] Regarding this element, the Chamber further notes that "[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts. Accordingly, a widespread attack may be the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[136]

When evaluating the term "systematic", the PTC relies upon ICTR and ICTY precedent to posit the following criteria:

> (i) being thoroughly organised, (ii) following a regular pattern, (iii) on the basis of a common policy, . . . (iv) involving substantial public or private resources, [v] a political objective or plan, [vi] large-scale or continuous commission of crimes which are linked, [vii] use of significant public or private resources, and

133. PTC Authorization of Investigation, *supra* note 98, ¶ 94. The Chamber notes that "This alternative is clear from the text of Article 7(1) of the Statute, which clearly states "widespread or systematic". *Id.* at n.91.

134. *Id.* For this proposition, the Chamber looks to ICTY precedent. *See, e.g.*, ICTY, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paragraph 94; ICTY, Prosecutor v. Deronjic, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ¶ 109; ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, ¶ 101; ICTY, Prosecutor v. Kunarac et al. Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, ¶ 96. *Id.* at n.93.

135. *Id.* ¶ 95. The Chamber looks to ICTY and PTC precedent in defining "widespread." *See, e.g.*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 83; Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-01-Corr, ¶ 62. *See also* ICTY, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004,¶ 94; ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004 , ¶ 101; ICTY, Prosecutor v. Kunarac et al. Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, ¶ 94. *Id.* at n.95.

136. *Id.* ¶ 96. The PTC looks to precedent set forth by the ICTY as well as the PTC. *See, e.g.*, ICTY, Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Judgement, 17 January 2005, ¶ 545. *See also* Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05- 01/08-424, ¶ 83, ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, 3 March 2000, ¶ 206; ICTY, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; ICTY, Prosecutor v. Blaskic, Case No. IT-95 14-A, Appeal Judgment, 29 July 2004 , ¶ 101. *Id.* at n.96.

> [viii] the implication of high-level political and/or military authorities.[137]

Lastly, as part of the crimes against humanity assessment, the PTC addresses the fourth element of "nexus between the individual acts and the attack." The Chamber notes that "[i]n determining whether an act . . . forms part of an attack, the Chamber must consider the nature, aims and consequences of such act. Isolated acts which clearly differ, in their nature, aims and consequences, from other acts forming part of an attack, would fall outside the scope."[138]

D. Application of Relevant Law to the Situation in Kenya

The Chamber, in its authorization decision, next turned its attention to applying the law to the situation in Kenya. The PTC assessed the Kenyan situation with respect to the four elements set forth above concerning crimes against humanity and the three elements, also set forth above, listed in article 53 (i.e., the elements addressing the standard of "reasonable basis to proceed" with an investigation).

E. Crimes against Humanity in Accordance with Articles 7 and 53(1)(a)

Concerning the evaluation of the element of "an attack directed against any civilian population," the Chamber divides the nature of the attacks into three separate categories because the violence occurred during a substantial number of incidents.[139] The first category consists of attacks started by the ODM and targeted against PNU supporters.[140] The second comprises retaliatory attacks by groups targeted by the initial attacks and directed towards groups believed responsible for the initial attacks.[141] Within the third category, the evidence suggests that a substantial amount "of violent acts were committed by police."[142] For example, between June

137. PTC Authorization of Investigation, *supra* note 98, ¶ 96 & nn.99 & 100 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998, ¶ 580. ICTY, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, 3 March 2000, ¶ 203).

138. *Id.*¶ 98 (citing Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 86; ICTR, Prosecutor v. Kalelijeli, Case No. ICTR-98-44A-T, Judgement, 1 December 2003, ¶ 866; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement, 15 May 2003, ¶ 326; ICTY, Simic, Tadic and Zaric, Case No. IT-95-9-T, Judgement, 17 October 2003, ¶ 41). *Id.* at nn.103 & 104.

139. PTC Authorization of Investigation, *supra* note 98, ¶ 103.

140. *Id.* ¶ 104.

141. *Id.* ¶ 105.

142. *Id.* ¶ 106.

and October 2007, the police executed at least five hundred members of the Mugiki gang.[143] In addition, between December 2007 and February 2008, police allegedly employed excessive force, collaborated with attackers, and intentionally failed to take certain actions.[144] Upon review of the nature of the attacks the Chamber concludes that:

> The available information indicates that the civilian population was the primary target of the attacks. Indeed, with regard to the initial and retaliatory attacks, it is reported that the attackers targeted business premises and residential areas of various villages, burnt down entire houses, as well as places where people sought refuge. Targets of police violence allegedly included unarmed women, elderly persons, children and teachers.[145]

Additionally, the Chamber notes that "the attacks were directed against members of specifically identified communities. These communities were targeted on behalf of their ethnicity which was, in turn, associated with the support of one of the two major political parties, PNU and ODM."[146] Moreover, attackers specifically identified ethnic groups to target; for example, the attackers in Nairobi and Naivasha went "door-to-door . . . in order to single out . . . the Luo community and other non-Kikuyus."[147]

Next, the Chamber examines the second element of crimes against humanity, which is the requirement of "state and organizational policy." The PTC first concludes "the violence was not a mere accumulation of spontaneous or isolated acts. Rather, a number of the attacks were planned, directed or organized by various groups including local leaders, businessmen and politicians associated with the two leading political parties (PNU and ODM), as well as by members of the police force."[148] The evidence suggests that planning and policy formation took place in the initial attacks against the Kikuyu community, which included meetings between business and political leaders and young people. As part of these meetings the youth were "given instructions, supplied with weapons, and

143. *Id.* (citing HRW Report, ICC-01/09-3-Anx3, at 48)
144. *Id.*
145. *See id*. ¶ 109.
146. *Id.* ¶ 110. Reports show that initially the violence was directed to mostly Kikuyu, Kisii and Luyha communities who were perceived to be in support of the PNU. In the retaliatory phase the attacks were targeting members of Kalenjin, Luo and Luhya communities which were seen to be affiliated with the ODM. *Id.* ¶¶ 111–112.
147. *Id.* ¶ 113.
148. *Id.* ¶ 117.

[given] money."[149] Additionally, politicians used the media to articulate their plans of violence against certain ethnic groups, such as the Kikuyu community.[150] The evidence supports a clear sense of organized plans and policies that are "coordinated and organized."[151]

The Chamber then looks to the third element of the crimes against humanity assessment, which addresses the "widespread nature of the attacks." The Chamber determines that "the available information substantiates the Prosecutor's submission that a large number of civilians were victimized in the course of the attacks."[152] The Chamber states, "for the period between 27 December 2007 and 28 February 2008, it is reported that 1,133 to 1,220 people were killed, about 3,561 people injured and up to approximately 350,000 persons displaced."[153] Moreover, the PTC discusses that approximately 400 of the deaths that occurred resulted from police shootings.[154] The PTC concludes that the attacks were widespread.

Lastly, the Chamber evaluates the fourth element of the "nexus between the individual acts and the attacks," which it finds satisfied. The PTC assesses the situation in Kenya as follows: "[T]he Chamber observes that the nature, aims and consequences of many of the individual acts recall either the characteristics of the initial attacks, the retaliatory attacks or the attacks emanating from the police."[155] For example, in the initial attacks, significant groups of youths attacked Kikuyu communities and

149. *Id.* ¶ 119. Training and the taking of oaths apparently took place at private residences or camps prior to instances of violence. *Id.*

150. *Id.* ¶ 120.

151. *Id.* ¶ 121. The specific evidence mentioned by the Chamber is as follows:

> In some instances, attacks were carried out by large groups of raiders which arrived from different directions outside of the scene of the attack, carried out simultaneous attacks or fought in different shifts. Some groups of attackers showed visible signs of internal cohesion consisting of some form of uniform or face painting. ... The supporting material also highlights phenomena such as the large supply of petrol and the use of sophisticated weaponry. Such phenomena are consistent with allegations that businessmen or politicians financed the violence or directly supplied vehicles, petrol or weapons which were to be used in the attacks.

Id. ¶¶ 121–122. The Chamber also mentions that with regard to the retaliatory attacks involving violence against non-Kikuyu groups, similar planning and organization took place, such as "meetings organized by politicians, local businessmen and local leaders where attacks against communities associated with the ODM were reportedly discussed." *Id.* ¶ 124. Additionally, politicians reportedly used hate speech and religious leaders sent out ethnic propaganda against non-Kikuyu communities. The media also participated in distributing this propaganda. *Id.* ¶ 125.

152. *Id.* ¶ 130.

153. *Id.* ¶ 131.

154. *Id.* ¶ 134. This number is for the period between December 27, 2007 and February 28, 2008. *Id.*

155. *Id.* ¶ 135.

burnt down their houses, ostensibly in order to expel them from their communities. These actions resulted in "massive displacement."[156] In the retaliatory attacks youths attacked members of the Kalenjin and Luo communities with weapons, resulting in further displacement and expulsion of the non-Kikuyu communities.[157]

Within the assessment of crimes against humanity the Chamber examines the "underlying acts constituting crimes against humanity" which implicates the *rationae materiae* requirement. The PTC acknowledges that at the early phase of the proceedings it is impossible to assess the *mens rea*; therefore, the Chamber examines only the *actus rea* of the specific crimes committed.[158] The first of the analyzed crimes is "murder constituting a crime against humanity under article 7(1)(a) of the Statute."[159] The Chamber finds that "the Prosecutor's submission that murder occurred is substantiated by the available information."[160] Next, the PTC addresses "rape and other forms of sexual violence constituting a crime against humanity under article 7(1)(g) of the Statute."[161] The Chamber determines that "The Prosecutor alleges that 'numerous incidents of sexual violence including rape of men and women took place. The Chamber observes that the available information substantiates the foregoing allegation."[162]

The PTC subsequently addresses the issue of "forcible transfer of population constituting a crime against humanity under article 7(1)(d) of the Statute."[163] The Chamber recognizes that "[t]he supporting material reveals further that the displacements did not take place on a voluntary

156. *Id.* ¶ 136.

157. *Id.* ¶ 137. Luo men were also "forcibly circumcised." *Id.*

158. *Id.* ¶ 140.

159. *Id.* at 57.

160. *Id*. ¶ 143. *See also* ¶¶ 144–150. Examples of the murders are as follows: within December 2007 and February 2008 it has been reported that 98 people were killed in Western province. In Nyanza, 134 deaths occurred; in Nairobi province, 125 deaths; in Central province, "up to approximately 15 people were killed[;]" and in Coast province, "at least 27 deaths." *See id*. ¶¶ 146–150.

161. *Id.* at 60.

162. *Id.* ¶¶ 152–153. Specific evidence supporting this determination is as follows:

> [I]n the period between 27 December 2007 and 29 February 2008, the Nairobi Women's Hospital's Gender Violence Recovery Centre treated 443 survivors of sexual and gender based violence, 80 percent of which were rape or defilement cases. . . [T]he Chamber notes the high number of reported gang rapes, including rapes by a group of over 20 men, and the brutality, characterized in particular by the cutting of the victims. . .

Id. ¶ 154. Additionally, the Chamber acknowledges that instances of sexual violence were at times based on ethnicity and targeted certain such groups, and that many acts of sexual violence were committed by police. *Id.* ¶ 155.

163. *Id.* at 62.

basis, and were forced. People were displaced either as a result of violence or as a consequence of threats of violence."[164] Lastly, the PTC evaluates "other inhumane acts causing serious injury constituting a crime against humanity under article 7(1)(k) of the Statute."[165] The Chamber recalls "that to establish that other inhumane acts have been committed, it must be satisfied that 'a perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.'"[166] Furthermore, the Chamber "finds that the available information substantiates the Prosecutor's submission with regard to the occurrence of other inhumane acts."[167]

After addressing the "underlying acts constituting crimes against humanity" the Chamber evaluates the jurisdictional requirements, including *ratione temporis* and *ratione loci*. In this respect the Chamber "concurs with the Prosecutor that the crimes allegedly committed after 1 June 2005 [the date Kenya ratified the Rome Statute] . . . fall within the jurisdiction *ratione temporis* of the Court."[168] The Chamber then evaluates *ratione loci* and finds that "the alleged crimes against humanity occurred on the territory of the Republic of Kenya, for which reason the Court's jurisdiction *ratione loci* . . . is satisfied."[169]

F. Article 53(1)(b) and Article 17 "Admissibility" Determinations (Complementarity and Gravity)

Significantly, the PTC, in its authorization decision, finds that "the case would be admissible under article 17 of the Statute."[170] The Chamber

164. *Id.* ¶ 162. Evidence to support this finding includes:

> IDPs [Internally Displaced Persons] were forcefully evicted through direct physical violence against them, the burning of their houses and the destruction of their property. Most IDPs left their homes in panic, under emergency conditions, often under direct attack from gangs of armed youth. Sexual violence was another means to forcibly evict women and their families from particular communities.

Id. ¶ 164. In addition, the Chamber noted "the available information does not include any contentions to the effect that the targeted communities were not lawfully present in the area from which they were transferred or that such transfer could have been justified by grounds permitted under international law." *Id.* ¶ 165.

165. *Id.* at 65.

166. *Id.* ¶ 166 (citing Elements of Crimes, Article 7(1)(k)(1)).

167. *Id.* ¶ 168. Supporting evidence here includes the following: "at least 3,561 persons suffered injuries as a result of the violence associated with the 2007 presidential elections." *Id.* ¶ 169. The PTC also relied upon acts of violence including "various instances of cutting and hacking, including amputations." *Id.* ¶ 170.

168. *Id.* ¶ 174.

169. *Id.* ¶ 178.

170. *Id.* ¶ 181.

emphasizes that at the current point in the proceedings the admissibility evaluation refers to the admissibility of one or more *potential* cases within the context of a "situation".

> The parameters of a potential case have been defined by the Chamber as comprising two main elements: (i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[171]

In addition to the review of potential cases, under the complementarity provision the PTC must determine if "Republic of Kenya or any third State is conducting or has conducted national proceedings in relation to these elements which are likely to constitute the Court's future case(s)."[172] Initially, in Kenya, there were indications that Kenyan officials wanted to proceed with forming a special tribunal to address the post-election violence; however, a bill to enact such a tribunal had not been passed by the Kenyan Parliament.[173] In addition, there have been no domestic prosecutions for crimes against humanity or of those individuals who bear the most responsibility.[174] Instead, there have been proceedings for lesser offences conducted on a small scale.[175] The potential cases to arise from the OTP's investigation would be admissible under the complementarity provision:[176]

> In this regard, the Chamber's review of the available information does not contravene the Prosecutor's conclusion that there is a lack of national proceedings in the Republic of Kenya or in any third State with respect to the main elements which may shape the Court's potential case(s). Yet, there are references to a number of domestic investigations and prosecutions concerning the post-election period, but only in relation to minor offences. In particular,

171. *Id.* ¶ 182.
172. *Id.*
173. *Id.* ¶ 183.
174. *Id.* Indeed, there was an absence of any attempts at domestic prosecutions for these crimes. *Id.*
175. *Id.* The "lesser offenses" for which there apparently have been criminal proceedings in Kenya include "malicious damage, theft, house breaking, possession of an offensive weapon, and robbery with violence." *Id.* Clearly, these criminal acts do not rise to the level of crimes against humanity.
176. *Id.* ¶¶ 181, 183.

> the February 2009 report submitted to the Kenyan Attorney General concerning cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi provinces reveals that national investigations and prosecutions were directed against *persons that fall outside the category of those who bear the greatest responsibility*. . . . Moreover, attempts to establish a special tribunal to prosecute those who are responsible for the post-election violence were frustrated, which serves as a further indication of inactivity on the part of the Kenyan authorities to address the potential responsibility of those who are likely to be the focus of the Court's investigation.[177]

The Chamber then concludes "in the absence of national investigations in relation to: (i) the senior business and political leaders associated with the ODM and PNU . . . ; and (ii) the crimes against humanity allegedly committed in the context of the most serious criminal incidents . . . , the case would be admissible under [the complementarity principle]."[178]

Following its analysis of the complementarity requirement, the PTC examines the gravity component of admissibility. In particular, the PTC examines:

> (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation. In relation to the latter, the Chamber stated earlier that it is guided by factors such as the scale, nature, manner of commission, impact of crimes committed on victims and the existence of aggravating circumstances.[179]

After assessing the situation in Kenya with respect to the gravity requirement, the Chamber finds that: "the Prosecutor's submission concerning the scale of the post-election violence appears substantiated. This finding is justified on the basis of the alleged number of deaths, documented rapes, displaced persons, and acts of injury, as well as the geographical location of these crimes, which appears widespread."[180] The Chamber also mentions the brutality of the attacks within the context of its evaluation of gravity:

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177. *Id.* ¶ 185 (italics supplied).
178. *Id.* ¶ 187.
179. *Id.* ¶ 188.
180. *Id.* ¶ 191.

> The Chamber is of the view that the Prosecutor's submission concerning the element of brutality is pertinent to the means used to execute the violence. The supporting material corroborates the Prosecutor's contention insofar as it reveals many instances of cutting and hacking, including amputations, and reports of forced circumcision and genital amputation inflicted upon members of the Luo community. The supporting material further indicates that rapes were often characterized by a degree of brutality, including high numbers of reported gang rapes, including by a group of over 20 men, and the cutting of the victims or the insertion of crude weapon and other objects in the vagina.[181]

After reviewing these general gravity considerations, the Chamber turns to gravity in relation to "potential cases." The PTC addresses the first element of the gravity analysis by noting that with regard to "the groups of persons likely to be the focus of the Prosecutor's future investigations, the supporting material refers to their high-ranking positions, and their alleged role in the violence, namely inciting, planning, financing, colluding with criminal gangs, and otherwise contributing to the organization of the violence. This renders the first constituent element of gravity satisfied."[182] Next, the Chamber examines the second element, and finds that it is also satisfied: "[C]oncerning the crimes allegedly committed within the incidents that are likely to be the object of the Prosecutor's investigations [i.e., the second element], the Chamber considers that some of the specific crimes committed in the context of the potential incidents suggested by the Prosecutor satisfy the element of scale."[183] Thus, according to the PTC, the overall test of gravity has been met.[184]

G. Scope of Investigation

Upon its approval of the OTP's request to initiate an investigation *proprio motu* pursuant to Article 15 of the Statute, the PTC carefully outlined the parameters for the investigation. For example, regarding temporal limitations on the investigation,

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181. *Id.* ¶ 193.
182. *Id.* ¶ 198.
183. *Id.* ¶¶ 199–200. Regarding scale, the Court noted that the crimes include "burned houses, deaths, and displaced people, which resulted from the violence. Some of the crimes which occurred in the context of the proposed incidents were marked by elements of brutality, for example burning victims alive, attacking places sheltering IDPs, beheadings, and using pangas and machetes to hack people to death." *Id.* ¶ 199.
184. *Id.* ¶ 200.

> [T]he Chamber consider[ed] it appropriate to define the temporal scope of the authorized investigation of the events that took place as between . . . the date of the Statute's entry into force for the Republic of Kenya . . . and . . . the date of the filing of the Prosecutor's Request . . ., since this was the last opportunity for the Prosecutor to assess the information available to him prior to its submission to the Chamber's examination.[185]

In addition, the PTC emphasized its active, supervisory role over the "material" scope of the investigation:

> [F]or the material parameters of the authorization with respect to the investigation in Kenya, the Chamber recalls that the purpose of the proceedings under article 15 of the Statute is to provide it with a supervisory role over the Prosecutor's *proprio motu* initiative to proceed with an investigation. The Chamber is of the view that, allowing the Prosecutor, by way of the present authorization, to investigate acts constituting crimes within the jurisdiction of the Court other than crimes against humanity (*i.e.*, the alleged crimes referred to in the Prosecutor's Request and in the supporting material and, as such, the only material subject-matter of the present decision), would not be consistent with the specific purpose of the provision of article 15 of the Statute to subject the Prosecutor's *proprio motu* initiative to commence an investigation to the review of the Chamber. By the same token, to leave open the material scope of the authorization would deprive of its meaning the examination of the Prosecutor's Request and supporting material conducted by the Chamber for the purposes of its decision to authorize or not the commencement of an investigation initiated *proprio motu* by the Prosecutor.
>
> *For this reason, the Chamber is of the view that the authorization granted to the Prosecutor pursuant to article 15 of the Statute shall encompass the investigation into the situation in Kenya in relation to the alleged commission of crimes against humanity.*[186]

Additionally, a point that should also be noted is the dissenting opinion of one of the PTC judges in deciding to grant the Prosecutor's request. The dissent of the judge was based on the fact that the crimes committed in

185. *Id.* ¶ 207.

186. *Id.* ¶¶ 208–209 (italics supplied). Finally, the PTC restricted geographically the investigation by the OTP to the "territory of the Republic of Kenya." *Id.* ¶ 211.

Kenya did not meet the threshold of crimes against humanity.[187] The source of the dissent lies within the legal definition of "attack directed against any civilian population" and whether those crimes were committed "pursuant to or in furtherance of a State or organizational policy to commit such [an] attack."[188] The judge concluded that the crimes outlined in the Prosecutor's request did not fall within the jurisdictional mandate of the ICC (i.e., they did not constitute "crimes against humanity").[189] The reasoning behind the judge's dissent was that "crimes against humanity" may only be committed by permanent or semi-permanent state-like organizations or states themselves.[190] He argued that the groupings of local leaders that perpetrated the violence were not sufficiently organized (for example, in terms of "structure, membership, duration and means to attack the civilian population.")[191]

V. KENYA'S ADMISSIBILITY CHALLENGE UNDER THE COMPLEMENTARITY PRINCIPLE AND THE ICC RESPONSE

The Kenyan government did not support the ICC's intervention in the post-election violence inquiry because it perceived it as an incursion into its sovereignty. In particular, in a key filing before the ICC, the Kenyan government sought to establish the case against the suspects as inadmissible under the complementarity principle.[192] For example, in its

187. PTC Authorization of Investigation, *supra* note 98, at app. ¶ 4 (Kaul, J. dissenting).

188. *Id.*

189. *Id.*

190. *Id.* ¶ ¶ 40, 51, 60.

191. *Id.* ¶ 150.

> In sum, I have not found any information in the supporting material, including the victims' representation, suggesting that a State policy existed pursuant to which the civilian population was attacked. In total, the overall picture is characterized by chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies.

Id. ¶¶ 152–153.

192. *See generally* Prosecutor v. Ruto, Case No. ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf [hereinafter Kenya Application]. *See also id.* ¶¶ 5–6, 80. Article 19 deals with challenges by states to the admissibility of a case before the ICC, including admissibility challenges implicating the complementarity principle. *See* Rome Statute, *supra* note 2, art. 19 (2)(b). Kenya requested that the Pre-Trial Chamber determine that the cases involving its six nationals were inadmissible less than a month after the summonses were issued. The PTC issued summonses to the "Ocampo Six" (i.e., the six individuals associated with the then current Kenyan coalition government—Francis Kirimi Muthaura, William Samoei Ruto, Mohammed Hussein Ali, Henry Kiprono Kosgey, Joshua Arap Sang, and Uhuru Muigai Kenyatta). *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang (Mar. 8, 2011), *available at*

filing, the Kenyan government cited judicial and constitutional reforms such as the drafting of a new constitution, which included strengthened trial rights and revamped national courts now able to try "crimes from the post-election violence, including the ICC cases . . ."[193] Kenya also cited its efforts to investigate and prosecute a number of lower-level perpetrators in the post-election violence.[194] Moreover, Kenya emphasized that with the passage of the legislative International Crimes Act of 2008, Kenyan courts "have jurisdiction to prosecute all of the crimes included in the [Rome] Statute."[195] According to Kenya, it would appoint judges to the appropriate appellate court capable of dealing with post-election cases by a certain date, and it would continue to carry out investigations for those cases (and corresponding crimes).[196]

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http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf. *See also* Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (Mar. 8, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf.

193. *See* Kenya Application, *supra* note 192, ¶¶ 2, 48 (explaining new Kenyan Bill of Rights). Kenya stated in its Article 19 filing that its judicial reforms would be completed by September, 2011. *Id.* ¶ 40. Another important point stressed by Kenya is the fact that the new Constitution makes the judiciary independent and "establishes a Supreme Court for the first time in Kenya's history which is the supreme judicial organ for the interpretation and protection of the Constitution (Article 163)." *Id.* ¶ 50. The Constitution also establishes a new, independent position of Director of Public Prosecutions to "guarantee independence of investigations and prosecutions at all levels." *Id.* ¶ 67. Moreover, Kenya highlights in its Article 19 application a vetting process for judges that is "competitive, open and transparent." *Id.* ¶ 53. Finally, Kenya posits that under the new Constitution there can be no official immunities from prosecution. *See id.* ¶ 59.

194. *Id.* ¶¶ 34,71.

195. *Id.* ¶ 57.

196. The date was the end of July 2011. *Id.* ¶¶ 61, 66, 70. The Article 19 application also explains recent police reforms. *Id.* ¶¶ 75–77. In addition, efforts have been made regarding the issue of witness protection. *Id.* ¶ 78. Finally, in a subsequent document submitted by Kenya following its application, Kenya asserted that "'any argument that there *must* be an identity of *individuals* as well as of *subject matter* being investigated by a State and by the Prosecutor of the ICC is necessarily false as the State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence.'" See Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," ¶ 28, (Aug. 30, 2011) http://www.icc-cpi.int/iccdocs/doc/doc1223118.pdf (citing Kenya's Reply of May 16, 2011, ¶ 27). Kenya argued that "'there is simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility as by the Prosecutor seeking to establish it.'" *Id.* (citing Kenya's Reply of May 16, 2011, ¶ 27). As to Kenya's argument that a state may not have available to it the same evidence as the ICC Prosecutor, the Appeals Chamber concluded that this argument is not "persuasive" because "if a State does not investigate a given suspect because of lack of evidence, then there is simply no conflict of jurisdictions, and no reason why the case should be inadmissible before the Court . . . [W]hat is relevant for the admissibility of a concrete case under [the complementarity] principle of the Statute is not whether the same evidence in the Prosecutor's possession is available to a State, but whether the State is carrying out steps directed at ascertaining whether these suspects are

Kenya's request of the Pre-Trial Chamber to find the cases against the defendants inadmissible under the complementarity principle was denied, and the cases ruled admissible.[197] The PTC found that "there are no concrete steps showing ongoing investigations against the three suspects in the present case."[198] The PTC concluded that because of the "situation of [judicial] inactivity [against the particular suspects,] . . . the Chamber [could not] but determine that the case is admissible."[199] Kenya appealed the decision; however, the Appeals Chamber agreed with the PTC, ruling that a state merely providing evidence of "ongoing investigations" would not suffice to dismiss an ICC investigation. On the contrary, to

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responsible for substantially the same conduct as is the subject of the proceedings before the Court." *Id.* ¶ 43.

197. *See generally* Prosecutor v. Ruto, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf [hereinafter Article 19 Decision]. *See also* Prosecutor v. Muthaura, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf. These two decisions challenging admissibility based on the complementarity principle (i.e., the appeal of Ruto, Kosgey and Sang, on the one hand, and that of Muthaura, Kenyatta and Ali, on the other hand), although appearing in separate documents, reach the same essential findings and holdings. *See also* Thomas O. Hansen, *A Critical Review of the ICC's Recent Practice Concerning Inadmissibility Challenges and Complementarity*, 13 MELBOURNE J. INTL. L. 217, 221 (2012). Up until the time of these admissibility decisions in the Kenya case, the ICC had used a "two-fold" test to evaluate the complementarity issue. *See id.* at 221. The two-fold test entails:

> considering whether a case is inadmissible under article 17(1)(a) and (b) of the *Statute* . . . [T]he initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the *Statute* [the gravity determination].

Id.

198. *See* Article 19 Decision, *supra* note 197, ¶ 60. *See also id.* ¶ 69 ("In particular, the chamber lacks information about dates when investigations, if any, have commenced against the three [particular] suspects, and whether the suspects were actually questioned or not and if so, the contents of the police or public prosecutions' reports regarding the questioning. The Government of Kenya also fails to provide the Chamber with any information as to the conduct, crimes or the incidents for which the three [particular] suspects are being investigated or questioned for. There is equally no record that shows that the relevant witnesses are being or have been questioned.").

199. *See* Article 19 Decision, *supra* note 197, ¶ 70. *See also* Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf. These two decisions challenging admissibility based on the complementarity principle (i.e., the appeal of Ruto, Kosgey and Sang, on the one hand, and that of Muthaura, Kenyatta and Ali, on the other hand), although appearing in separate documents, reach the same essential findings and holdings.

successfully challenge admissibility, Kenya would have to "provide the Court with evidence [consisting of] . . . a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case."[200]

The Appeals Chamber of the ICC ultimately rejected the challenges brought by Kenya under the complementarity principle.[201] These challenges constitute the first time that a state party has sought to have a case deemed inadmissible before the ICC on complementarity grounds.[202] The appeal essentially argued that the Pre-Trial Chamber's decision

200. *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Aug. 30 2011), ¶ 2 [hereinafter Article 19 Appeal], *available at* http://www.icc-cpi.int/iccdocs/doc/doc1223118.pdf (last visited July 29, 2013).

201. *See generally id. See also* Prosecutor v. Muthaura, No. ICC-01/09-02/11-274, "Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011), *at* http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf (reaching the same basic findings and holdings as the Appeals Chamber in the Ruto, Kosgey and Sang case). In both appeals (*i.e.*, the Ruto, Kosgey and Sang appeal, and the Muthaura, Kenyatta, and Ali appeal), the judgment was a 4–1 decision by the ICC. The dissent was by Judge Anita Ušacka. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Sept. 20, 2011) (Ušacka, J., dissenting), http://www.icc-cpi.int/iccdocs/doc/doc1234872.pdf. Article 19(2)(b) allows a state to challenge the admissibility of a case before the ICC based, inter alia, on article 17, the complementarity principle. It reads, in pertinent part, that "[c]hallenges to the admissibility of a case on the grounds referred to in article 17 . . . may be made by: . . . [b] A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted." *See* Rome Statute, *supra* note 1, art. 19(2)(b).

202. *See* Charles Chernor Jalloh, International Decision, *Situation in the Republic of Kenya. No. ICC-01/09-02/11-274: Judgment on Kenya's Appeal of Decision Denying Admissibility*, 106 AM. J. INT'L L. 118 (2011) [hereinafter Situation in the Republic of Kenya]. Libya followed suit in 2012. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the Statute (May 1, 2012), http://www.icc-cpi.int/iccdocs/doc/ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute.pdf. Kenya's appeal on the decision made on their Article 19 challenged was cited or referred to numerous times in Libya's application. *See id.* ¶¶ 70, 82, 86, 88, 92. Jalloh noted that there are two competing views on the issue of complementarity as reflected in the Appeals Chamber's ruling in the Kenya case. First, there is the view espoused by the Kenyan government that "national jurisdictions should win by default [in the absence of] strong evidence rebutting the presumption in favor of their right to prosecute first." *See* Jalloh, Situation in the Republic of Kenya, *supra* at 121. The second view, espoused by the Court, is that "the primary goal of the Rome Statute is to end impunity, and that whatever division of labor accomplishes that end will, or rather should, win out." *See id.* Jalloh asserts that "[t]he government [Kenya] and the dissent [by Judge Anita UŠACKA in the admissibility decision in the Appeals Chamber] correctly observed that the ICC was intended to complement the work of national jurisdictions when states exercise their primary duty to investigate and prosecute international crimes--a matter that, not coincidentally, also goes to the heart of state sovereignty." *Id.*

should be reversed because it was based on "factual, procedural and legal errors."[203]

The Kenyan government, in its appeal, sought a decision that favored deference to state jurisdiction under the Article 17 complementarity provisions. For example, Kenya argued that "the case is being investigated" language in Article 17(1)(a) did not mean, as the PTC had earlier determined, that "for a case to be inadmissible before the Court, a national jurisdiction must be investigating the same person and for the same conduct as in the case already before the Court."[204] That rather demanding test requires, for a case to be deemed inadmissible before the Court, that a criminal investigation at the national level encompass both the same conduct and the same person that are involved in the case before the Court.[205] Instead, Kenya claimed, the test should be whether the national proceedings "cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC."[206] Kenya thus envisioned that the complementarity principle of Article 17 carries a "presumption in favour of national jurisdictions" and "leaway [sic] in the exercise of discretion in the application of the principle of complementarity."[207]

In Kenya's appeal of the PTC's admissibility decision implicating the Article 17 complementarity provision, the Appeals Chamber ruled squarely on the "same-person, same-conduct" test.[208] The majority

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203. Article 19 Appeal, *supra* note 200, ¶ 13.

204. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011), ¶ 26, *available at* http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf.

205. *Id.* ¶¶ 27, 39.

206. *Id.* ¶ 27.

207. *See id.* ¶ 29. The Appeals Chamber rejected Kenya's argument for "leaway" in the following way:

> This argument has no merit because . . . the purpose of the admissibility proceedings under Article 19 of the Statute [e.g., admissibility challenges based on complementarity] is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favor of domestic jurisdictions does not contradict this conclusion.

Id. ¶ 43. *See generally* Jalloh, *Situation in the Republic of Kenya*, *supra* note 202.

208. Pre-Trial Chamber I had originally formulated this test in the case involving the Situation in the Democratic Republic of the Congo. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr Thomas Lubanga Dyilo, ¶¶ 31, 34, 37 (Feb. 10, 2006), http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF. *See also* Jalloh, *Situation in the Republic of Kenya*, *supra* note 202, at n.8.

essentially adopted this test as the principal tool with which to evaluate the complementarity issue, concluding that "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."[209] For the Court, the language of Article 17 and the context of the particular case (i.e., at or after a warrant or summons has been issued by the Court, or after charges have been filed by the Prosecutor and confirmed by the PTC) provide the rationale for adoption of the more specific and demanding "same-person, substantially the same-conduct" test.[210] In particular, in the Kenya case, because a

209. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011), ¶ 39, http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf. In the Libya case, the PTC recently elaborated on the meaning of "substantially the same conduct":

> Therefore, in the circumstances of the case at hand and bearing in mind the purpose of the complementarity principle, the Chamber considers that it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the [ICC's] Article 58 [Warrant] Decision as constituting instances of Mr Gaddafi's alleged course of conduct. Instead, the Chamber will assess, on the basis of the evidence provided by Libya, whether the alleged domestic investigation [of Gaddafi] addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision.

See Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the admissibility of the Case of Against Saif Al-Islam Gaddafi, http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf, ¶ 83. *See id.* ¶ 77 ("The Chamber considers that the determination of what is 'substantially the same conduct as alleged in the proceedings before the Court' will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis.") *See also id.* ¶ 133 (The Court "does not expect the national investigation to the exact events that are mentioned in the Article 58 [Warrant] Decision.").

210. *Id.* ¶ 36 ("Consequently, under Article 17 (1)(a), first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction."). The significance of case context is discussed in paragraphs 38 and 39 of the Appeals decision:

> The meaning of the words 'case is being investigated' in article 17(1)(a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53(1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. . . . Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. . . . In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. [For example,] Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be reasonable grounds to believe that the person named therein has committed a crime within the jurisdiction of the Court. . . . Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute [the complementarity principle], *the national investigation must cover the same person and substantially the same conduct as alleged in the proceedings before the Court*.

summons for particular suspects for specific conduct had already been issued, the "context" of the case meant that this test would apply.

"[The Kenyan] case is only inadmissible before the court if the same suspects are being investigated by Kenya for substantially the same conduct. The words 'is being investigated', in this context, signify the taking of [specific] steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."[211]

The Appeals Chamber concluded that Kenya was not actively taking these "specific steps":

> [The relevant documents provided by Kenya] made reference, in a general manner, to alleged investigations against all the suspects in the case[; however,] they do not provide any details as to the steps Kenya may have taken to ascertain whether they were responsible

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Id. ¶¶ 38–39 (emphasis added). *See also* Article 19 Decision, *supra* note 197, ¶ 54. ("The criteria established by the Chamber in its . . . Authorisation Decision were not conclusive but simply indicative of the sort of elements that the Court should consider in making an admissibility determination within the *context of a situation*, namely when the examination is in relation to one or more 'potential' case(s). At that stage, the reference to the groups of persons is mainly to broaden the test, because at the preliminary stage of the investigation into the situation it is unlikely to have an identified suspect. The test is more specific when it comes to an admissibility determination at the 'case' stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. At this stage, the case(s) before the Court are already shaped. Thus, during the "case" stage, the admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings."). *Id.*

211. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," ¶ 40 (Aug. 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf. The Appeals Chamber went on to say that:

> [T]he mere preparedness to take such steps or the investigation of *other* suspects is not sufficient. This is because unless investigative steps are actually taken in relation to the suspects that are the subject of the proceedings before the Court, it cannot be said that the *same case* is (currently) under investigation by the Court and by a national jurisdiction, and there is therefore no conflict of jurisdictions.

Id. ¶ 40. Finally, the Court concluded that in the Kenya case:

> [T]he proceedings have progressed and that specific suspects have been identified. At this stage of the proceedings, where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for substantially the same conduct.

Id. ¶ 41. The Appeals Chamber later noted that "[t]he [PTC] . . . required proof that Kenya was taking specific steps to investigate the three suspects. The Appeals Chamber . . . [could not] identify any error in this approach." *Id.* ¶ 61.

> for the conduct that is alleged against them in the proceedings before the Court. . . . The only suspect specifically named in [the relevant documents] is Mr Ruto. . . However, even this information falls short of substantiating what has been done to investigate him for that conduct.[212]

VI. THE DEFENDANTS, THE SUMMONSES, AND THE CHARGES

The Kenyan defendants were charged with crimes against humanity. Crimes against humanity require that the acts prosecuted be "part of a widespread or systematic attack directed against . . . [a] civilian population," and that the perpetrator know about the overall attack.[213] The most recent list of acts constituting crimes against humanity in the Rome Statute includes:

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212. *Id.* ¶ 67. Jalloh argues that:

> The majority's interpretation [in the Kenya admissibility decision by the Appeals Chamber] rests on a broader, more interventionist, and perhaps unrealistic vision of the ICC. In this view, the crimes over which the Court has jurisdiction are international in nature and since the ICC was created to help end the culture of impunity for them, the application of complementarity should not become too restrictive. Otherwise, the international penal court will lose its limited leverage over national jurisdictions and become unable to fulfill this broader noble mission. This conception, too, is supported by the preamble to the Rome Statute . . .

See Jalloh, *Situation in the Republic of Kenya*, *supra* note 202, at 121. However, according to Jalloh,

> Kenya's view of admissibility broadens the complementarity test to give the appearance that the . . . cases at issue belong within the realm of the inadmissible. In doing so, however, it oversimplifies the matter and boils the entire inquiry down to whether or not the national jurisdiction asserts a claim over the case and gives some promise to proceed with investigations or prosecutions. The idea that an ICC state party enjoys the first right to prosecute rests on solid ground in the Rome Statute. But the suggestion that, in the context of an admissibility challenge, mere promises to proceed with the investigation of an amorphous group of unidentified suspects that may or may not include those currently before the Court swings the pendulum too far in the opposite direction. It also masks serious concerns about the genuineness of the East African nation's investigations. . .

Id. at 122. Jalloh also evaluates the test for complementarity adopted by the Appeals Chamber in the Kenya admissibility decision:

> By essentially retaining the strict same-person, same-conduct test, which on its face granted no margin of appreciation for states to make different investigative or charging decisions from those of the ICC prosecutor, the Appeals Chamber places stringent demands on states. From a pro-accountability point of view, this high threshold may perhaps be apt at this adolescent stage of the Court's life. Nevertheless, in the long term it could undermine reasonable national efforts to prosecute by going against the logic of the burden-sharing goals of complementarity. Worse, it may also hinder the growth of effective national jurisdictions willing and able to prosecute the crimes, especially in Africa, which is so far the only scene of the Hague tribunal's investigations and prosecutions and where Kenya has a relatively more functional criminal justice system than most of the other countries.

Id. at 122.

213. *See* Rome Statute, *supra* note 1, art. 7 (1).

> (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or severe deprivation of physical liberty in violation of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group . . . on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds universally recognized as impermissible under international law, in connection with any act referred to [in the same paragraph] or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) . . . apartheid; (k) [and] [o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[214]

The ICC Prosecutor divided the situation in Kenya into two cases. The original defendants in the first case were William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang. The original defendants in the second case were Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali.[215]

As reflected in the ICC Prosecutor's application for summonses, "[William Samoei Ruto] ('Ruto') and [Henry Kiprono Kosgey] ('Kosgey'), prominent leaders of the Orange Democratic Movement ('ODM') political party, began preparing a criminal plan to attack those identified as supporters of the Party of National Unity ('PNU')."[216] "[Joshua Arap Sang] ('Sang'), a prominent ODM supporter, was a crucial part of the plan, using his radio program to collect supporters and provide signals to members of the plan on when and where to attack."[217] In order to meet their goal, Ruto, Kosgey, and Sang "coordinated a series of actors and institutions to establish a network, using it to implement an organizational policy to commit crimes."[218] "Their two goals were: (1) to

214. *See* Rome Statute, *supra* note 1, art. 7 (1)(a)–(k).

215. Nzau Musau & Simon Jennings, *Two Kenyan Suspects Off The Hook*, INST. FOR WAR & PEACE REPORTING (Apr. 24, 2012), http://iwpr.net/report-news/acr-issue-318 ("The OTP investigated both sides in the conflict, and divided the six suspects accordingly into two cases – Ruto, Arap Sang and Kosgey representing the Orange Democratic Movement, ODM; and Muthaura, Kenyatta, and Hussein Ali from the Party of National Unity, PNU.").

216. *See* Situation in the Republic of Kenya, Case No. ICC-01/09, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 1, (Dec. 15, 2010), http://www.icc-cpi.int/iccdocs/doc/doc1367853.pdf .

217. *Id.* ¶ 1.

218. *Id.*

gain power in the Rift Valley Province, Kenya ("Rift Valley"), and ultimately in the Republic of Kenya, and (2) to punish and expel from the Rift Valley those perceived to support the PNU (collectively referred to as 'PNU supporters')."[219] Supporters groomed by Ruto, Kosgey and Sang carried out "their plan by attacking PNU supporters immediately after the announcement of the [Kenyan] presidential election results . . . ."[220] Their attacks focused on specific locations "including Turbo town, the greater Eldoret area (Huruma, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town."[221] Supporters "burn[ed] down PNU supporters' homes and businesses, killing civilians, and systematically driving them from their homes."[222] In addition, a church "was attacked and burned with more than one hundred people inside. At least 17 people died."[223] Each attack was carried out "in a uniform fashion."[224]

According to the ICC Prosecutor, as a result of the attacks orchestrated by Ruto, Kosgey, and Sang on PNU supporters, and in order to manage protests organized by the ODM, Kenyan officials Francis Kirimi Muthaura ("Muthaura"), Uhuru Muigai Kenyatta ("Kenyatta"), and Mohammed Hussein Ali ("Ali") "developed and executed a plan to attack perceived ODM supporters in order to keep the PNU in power."[225] Under the National Security Advisory Committee, which was led by Muthaura and participated in by Ali, the Kenyan police were "deployed into ODM strongholds where they used excessive force against civilian protesters in Kisumu (Kisumu District, Nyanza Province) and in Kibera (Kibera Division, Nairobi Province)."[226] During the approximate time span of one year, the Kenyan police "shot at and killed more than a hundred ODM supporters in Kisumu and Kibera."[227]

Muthaura subsequently contacted Ali, "his subordinate as head of the Kenya Police, and instructed Ali not to interfere with the movement of pro- PNU youth, including the Mungiki."[228] In addition, Kenyatta ordered the Mungiki leaders to another meeting "to finalize logistical and financial arrangements for the retaliatory attacks."[229] As part of these attacks, "the

219. *Id.*
220. *Id.* ¶ 3.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* ¶ 4.
225. *See id.* ¶ 5.
226. *Id.* ¶ 6.
227. *Id.*
228. *Id.* ¶ 7.
229. *Id.*

attackers identified ODM supporters by going from door to door and by setting up road blocks for intercepting vehicles, killing over 150 ODM supporters."[230] In total, the post-election violence in Kenya "resulted in more than 1,100 people dead, 3,500 injured, approximately 600,000 victims of forcible displacement, at least hundreds of victims of rape and sexual violence and more than 100,000 properties destroyed in six out of eight of Kenya's provinces. Many women and girls perceived as supporting the ODM were raped."[231]

The PTC granted the Prosecutor's request for summonses to appear for suspects Ruto, Kosgey and Sang. In particular, the PTC found "reasonable grounds to believe that Ruto and Kosgey are criminally responsible under article 25(3)(a) of the [Rome] Statute for [particular] crimes against humanity. . . ."[232] The PTC also found "reasonable grounds to believe that Sang is criminally responsible under article 25(3)(d) . . . for [particular] crimes against humanity."[233] For these three suspects, the particular crimes against humanity for which the PTC found "reasonable grounds" were murder, forcible transfer of population and persecution.[234] As a result of the PTC's determinations concerning Ruto, Sang, and Kosgey, it "[decided] to issue summonses to appear . . . for the three persons, being satisfied that this measure [would be] sufficient to ensure their appearance before the Court."[235]

The PTC also granted summonses to appear for suspects Muthaura, Kenyatta and Ali. In particular, the PTC found that "there are reasonable grounds to believe that Kenyatta and Muthaura are criminally responsible

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230. *Id.* ¶ 8.

231. *Id.* ¶ 9.

232. *See* Prosecutor v. Ruto,Case No. ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, ¶ 49 (Mar. 8, 2011) at http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf.

233. *Id.* ¶ 53. Article 25(3)(d) reads:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime[.]

Rome Statute, *supra* note 1, art. 25(3)(d).

234. Situation in the Republic of Kenya, *supra* note 202, ¶ 57. The PTC declined to find that Ruto, Sang and Kosgey had committed the crime against humanity of torture. *Id.* ¶ 33.

235. *Id.* ¶ 59.

as indirect co-perpetrators [for particular crimes against humanity] . . .'"[236] Concerning Ali, the PTC found that "there are reasonable grounds to believe that [he] is criminally responsible under article 25(3)(d) of the Statute for having contributed to the commission of [particular] crimes against humanity.[237] For these three suspects, the particular crimes against humanity for which the PTC found "reasonable grounds" were murder (in the towns of Nakuru and Naivasha), forcible transfer of population (in Nakuru and Naivasha), rape (in Nakuru), other inhumane acts (in Nakuru and Naivasha), and persecution (in Nakuru and Naivasha).[238] Because of its findings regarding these crimes, the PTC decided to issue summonses to appear for Muthaura, Kenyatta, and Ali, "being satisfied that this measure is sufficient to ensure their appearance before the Court."[239]

The charges brought against Ruto and Sang, which were upheld by the Appeals Chamber, are crimes against humanity under articles 5 and 7 of the Rome Statute. In particular, Ruto and Sang are charged with "murder, deportation or forcible transfer of population, and persecution."[240] The charges brought against Muthaura and Kenyatta, which were upheld by the Appeals Chamber, are crimes against humanity under article 5 and 7 of the Rome Statute. In particular, Muthaura and Kenyatta were charged with "murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts and persecution."[241]

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236. *See* Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, ¶ 45 (Mar. 8, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf.

237. *Id.* ¶ 51. For the text of article 25(3)(d), see *supra* text accompanying note 233.

238. *Id.* ¶ 56.

239. *Id.* ¶ 57.

240. *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," ¶ 23 (May 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1417531.pdf. The Appeals Chamber found that the issues raised on appeal by Ruto and Sang were not articulated appropriately; that is, the issues were not ones of subject matter jurisdiction (as contended by defendants) but rather had to do with the substantive merits of the case (i.e., the interpretation of "organizational policy" for crimes against humanity and whether such a policy existed). *Id.* ¶ 33. *See also* Rome Statute, *supra* note 1, art. 7.

241. *See* Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the appeal of Mr. Francis Kirimi Muthaura and Mr. Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," ¶ 30 (May 24, 2012) [hereinafter Appeal of Muthaura and Uhuru], http://www.icc-cpi.int/iccdocs/doc/doc1417533.pdf. *See also* Rome Statute, *supra* note 1, art. 7. The Appeals Chamber found that the issues raised on appeal by Muthaura and Kenyatta were not articulated appropriately; that is, the issues were not ones of subject matter jurisdiction (as contended by defendants) but rather had to do with the substantive merits of the case (i.e., the interpretation of "organizational policy" for crimes against humanity and whether such a policy existed). Appeal of Muthaura and Uhuru, *supra*, ¶ 38. Note that the crimes against humanity charges in the Kenya case

Though charges were confirmed against Ruto, Sang, Muthaura, and Kenyatta, neither the charges against Kosgey nor the charges against Ali were confirmed.[242] In particular, the Court deemed the testimony of the Prosecutor's main witness against Kosgey as insufficient evidence for proving criminal responsibility for crimes against humanity:

> Having examined the evidence available as a whole, the Chamber does not find sufficient evidence to establish substantial grounds to

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marks the first time the ICC has attempted to prosecute these crimes outside armed conflict. The prosecution of crimes against humanity outside formal, armed conflict broadens the reach of international law and courts into a state's traditional sovereign domain. *See* Carey Shenkman, *Catalyzing National Judicial Capacity: The ICC's First Crimes Against Humanity Out-side Armed Conflict*, 87 N.Y.U. L. REV. 1210 (2012) [hereinafter *Catalyzing National Judicial Capacity*]. *See also* Rome Statute, *supra* note 2, art. 7(1) (requiring no armed conflict under crimes against humanity). The ICC is the first international tribunal to formally remove "armed conflict" as a de jure or de facto requirement for crimes against humanity. This lack of a requirement that crimes of humanity be linked with armed conflict was influential in the ICC being able to initiate proceedings in Kenya. *See generally* Shenkman, *Catalyzing National Judicial Capacity.* Shenkman also argues that the ICC can act as a "capacity catalyst" and through its work bring about internal judicial reforms in national jurisdictions. *Id.* at 1234. Shenkman defines "capacity catalyst" as the "indirect promotion of state-level judicial reform" and argues that this definition should be used to analyze the capacity building role of the ICC. *Id.* She forms her arguments primarily by adding to proactive complementarity arguments previously made by William Burke. *Id. See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 58 (2008) ("The possibility of international prosecution can create incentives that make states more willing to investigate and prosecute international crimes themselves."). Finally, Shenkman argues that defensive reactions made by the Kenyan government in response to possible ICC intervention, no matter how little, are "soft law" actions that show the impact the ICC has in facilitating judicial reform in states where it decides to launch an investigation into international crimes. Shenkman, *Catalyzing National Judicial* Capacity, *supra*, at 1248. These responses also promoted internal dialogue where none previously existed. *Id.*

242. *Prosecutor v.* Ruto, Case No. ICC-01/09-01/11, Public Redacted Version *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, ¶¶ 2, 93, 138 (Jan 23, 2012) [hereinafter Confirmation of Charges #1], http://www.icc-cpi.int/iccdocs/doc/doc 1314535.pdf. The Chamber did confirm the charge of crimes against humanity against Mr. Ruto (i.e., for murder, deportation or forcible transfer of population and persecution). *See id.* ¶¶ 299, 349. *See also id.* ¶ 138. Mr. Sang's charges for crimes against humanity were also confirmed; in particular, Mr. Sang was charged with the crimes against humanity of murder, deportation or forcible transfer of population and persecution. *See id.* ¶¶ 357, 366, 367. *See also id.* ¶ 138. *See also* Prosecutor v. Muthaura, Case No. ICC-01/09-02, Public Redacted Version *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, ¶¶ 424–427, 430 & p. 154 (Jan. 23, 2012), [hereinafter Confirmation of Charges #2], http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf. Mr. Muthaura and Mr. Kenyatta had charges confirmed by the PTC. In particular, Mr. Muthaura and Mr. Kenyatta were charged as "indirect co-perpetrators" for the following crimes against humanity: murder, deportation or forcible transfer of population, rape, other inhumane acts, and persecution. *Id.* ¶¶ 428–429. However, Mr. Muthaura and Mr. Kenyatta were not charged with "other forms of sexual violence." *Id.* at 154. A confirmation of charges hearing is held by the Pre-Trial Chamber to determine whether there is "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged." If the Pre-Trial Chamber confirms the charges, the Chamber commits the person to trial before a Trial Chamber, which will conduct the subsequent phase of the proceedings (i.e., the trial). *See* Rome Statute, *supra* note 1, art. 61(5) & (7).

> believe that Mr. Kosgey is criminally responsible as an indirect co-perpetrator with Mr. Ruto and others . . . or under any other alternative mode of liability for . . . crimes against humanity . . . The Chamber reaches this finding upon evaluation of the evidence available before it, provided by both parties. In particular, the Prosecutor primarily relies on the detailed description of one anonymous witness (Witness 6) to prove the allegations regarding Mr. Kosgey's role within the organisation. As the Chamber stated [previously in the decision] . . . , anonymous witness statements have lower probative value and, in the absence of corroboration of the key facts alleged by the Prosecutor, the evidence presented might not be deemed sufficient to commit a person to trial.[243]

Concerning defendant Ali, the Prosecutor alleged that Ali was responsible for "the inaction of the Kenya police" and that this "made possible and strengthened the Mungiki attack in or around Nakuru and Naivasha."[244] The Court first determined that "in order to hold Mr. Ali criminally responsible under the Statute for crimes allegedly committed *through* the Kenya Police, it is essential that it first be determined that the Kenya Police indeed carried out the objective elements of the crimes charged, whether by a positive conduct or by way of inaction. This is rooted in fundamental principles of criminal law, according to which it is necessary to determine at first the occurrence of the alleged historical event(s) and, if sufficiently established, the existence of a link between such events and the suspect. Only if and when there is a positive determination of *imputatio facti* to a suspect, is it possible to proceed to the assessment as to whether the link between the historical event(s) and the suspect grounds his or her criminal responsibility (*imputatio iuris*)."[245] Regarding Ali, the Court held:

> The evidence placed before [the Chamber] does not provide substantial grounds to believe that the Kenya Police participated in the attack in or around Nakuru and Naivasha, *i.e.* that there existed an identifiable course of conduct of the Kenya Police amounting to a participation, by way of inaction, in the attack perpetrated by the Mungiki in or around Nakuru and Naivasha. Since the Chamber is not satisfied that the historical events alleged by the Prosecutor took place, it is not possible to entertain further the attribution of any

243. Confirmation of Charges #1, *supra* note 242, at 138, ¶ 293.
244. Confirmation of Charges #2, *supra* note 242.
245. *Id.* ¶ 424.

> conduct of the Kenyan Police to Mr. Ali, and, *a fortiori*, his individual criminal responsibility. Accordingly, the Chamber is of the view that there is not sufficient evidence to establish substantial grounds to believe that Mr. Ali committed the crimes charged.[246]

Subsequently, in March of 2013, the charges against Muthaura were also withdrawn, and the case against him officially ended:

> In the present case, the Prosecution has submitted that current evidence does not support the charges against Mr Muthaura and that it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt. Significantly, the Muthaura Defence does not contest the Prosecution's withdrawal. In these circumstances, the Chamber . . . considers that the withdrawal of charges against Mr Muthaura may be granted.[247]

VII. FUTURE IMPLICATIONS

The selection and application of the Prosecutor's *proprio motu* power to initiate an investigation into the situation in Kenya sets a new precedent at the ICC, and in the process provides the Prosecutor a more certain path through which to combat international crime and the impunity issue. Instead of having to "wait and see" if a state party or the UN Security Council will refer an international crime case to the ICC, the Kenya case highlights the ability and power of the ICC prosecutor to begin crime investigations herself. But at the same time the case reveals certain limitations on this power, which together should assuage any legitimate concerns of its abuse for political or other improper ends.

Indeed, the PTC, as evidenced in the Kenya case, will be closely examining the Prosecutor's *proprio motu* power, and setting relatively stringent requirements for its application and use. For example, the Prosecutor may be required to provide additional information to the PTC so that it can better assess procedural matters, such as the admissibility of the case under the complementarity principle, as well as substantive matters such as information to assist the Court with determining whether

246. Confirmation of Charges #2, *supra* note 242, at 154, ¶¶ 425–427, 430.

247. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the withdrawal of charges against Mr Muthaura, ¶ 11 (Mar. 18, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1568411.pdf. Note also that on December 5, 2014, the ICC Prosecutor filed a notice of withdraw of charges against defendant Kenyatta. On March 13, 2015, the case against Kenyatta was officially terminated by the ICC. *See supra* note 1.

certain elements of crimes are indeed satisfied.[248] In particular, to enable the PTC to determine whether a case is admissible before the court at this stage under the admissibility principles of complementarity and gravity, it appears that the Prosecutor must henceforth provide the following description:

> (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[249]

As a result of having to meet this particular admissibility "hurdle," the prosecutor may be limited in the future in the number of successful *proprio motu* requests that she can make. This is because evidence at the level of specificity required by the PTC to satisfy these admissibility criteria may not always be available to the Prosecutor. For example, evidence required to meet the PTC's gravity assessment at this stage—"means of [crime execution] . . . [and] the impact of the crimes and harm caused to victims and their families,"[250]—may be difficult to acquire due to evidence destruction, reluctance of witnesses and victims to testify, or for other reasons. More broadly, it may not always be possible to determine which particular international crimes within the Court's jurisdiction were committed during specific incidents, as the complementarity and gravity inquiries apparently now require at the early *proprio motu* stage, due to the numerous and detailed factual and legal elements that make up these crimes (e.g., crimes against humanity or war crimes).

Finally, regarding even successful *proprio motu* requests by the Prosecutor, the Kenya precedent suggests that any authorized investigations will be subject to fairly strict constraints imposed by the PTC. For example, the PTC in the Kenya case placed both temporal and substantive limits on the Prosecutor's ability to investigate the post-

248. *See infra* notes 249 & 250 and accompanying text.

249. PTC Authorization of Investigation, *supra* note 98, ¶ 50.

250. *Id.* ¶ 62. For the factors required of the PTC at the proprio motu stage to show that the relevant crimes are grave (i.e., the crimes that make up the incidents that are likely to be further investigated for future cases), see *id.* and *supra* note 117 and accompanying text. Apparently, in the Kenya case, this information, or evidence, to satisfy the gravity assessment was not as difficult to acquire. PTC Authorization of Investigation, *supra* note 98, ¶¶ 193, 198–200 (noting specific evidentiary facts about the nature of the post-election violence and the means by which the violence was carried out).

election violence (i.e., a limited timeframe based on crime occurrence and a "content limit" based on crime type).[251] Such an imposition of constraints helps to ensure that the Prosecutor does not pursue more "open-ended" investigations that could be viewed as unjustified encroachments on state sovereignty. At the same time, however, the constraints necessarily limit the ability of the Prosecutor to address other international or domestic crimes occurring during the situation in question, and hence potentially undermine the ICC goal of ending impunity.[252] In this regard, the Prosecutor is not without a partial solution, at least with regard to other international crimes that fall within the Court's jurisdiction—he could seemingly return to the PTC to request authorization to investigate these other crimes (i.e., with the goal of prosecuting them).[253]

Perhaps as equally noteworthy as the PTC's decision to approve the prosecutor's *proprio motu* request in Kenya is the further elucidation by the ICC judges in the Kenya case of the complementarity principle. Overall, in both the PTC and Appeals Chamber admissibility decisions addressing the complementarity principle, a relatively high and rigid standard for finding a case inadmissible under the principle before the ICC emerges.[254] This is problematic insofar as it may "tilt" the balance of shared roles in international crime investigation and prosecution between the ICC and national jurisdictions under the complementarity principle too far in the direction of the former (i.e., the ICC), and in the process overly encroach on a state's sovereign authority to investigate and prosecute international crimes within its own borders. In addition, the complementarity standard itself, at least as it was articulated and explained

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251. *Id.* ¶¶ 207–209.

252. For evidence that one of the goals of the ICC is to end impunity for international crimes, see Rome Statute, *supra* note 1, at preamble, ¶¶ 4–5 ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. . . . Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.").

253. *See* Rome Statute, *supra* note 1, arts. 15(1) & (5). "The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation." *Id.* art. 15(5). Support for this proposition rests in article 15(5), which suggests that the prosecutor can make multiple proprio motu requests regarding the same situation (albeit after having been denied authority to investigate regarding that situation previously). *Id. See also id*. art. 53(4). "The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information." *Id.*

254. *See* Article 19 Appeal, *supra* note 200, at ¶ 25 (Usaka, J., dissenting) ("In the Impugned Decision, however, the Chamber applied what appear to be a high burden of proof and a demanding definition of 'investigation.'").

by the Court, may exclude alternative, non-prosecutorial responses to crime by national jurisdictions, such as truth commissions and other approaches.

For example, based on the Kenyan precedent, the national jurisdiction challenging case admissibility under the complementarity principle must show, to avoid a finding of prosecutorial or investigative "inaction" (and hence admissibility before the ICC), that it is investigating or prosecuting the same suspects for substantially the same conduct (i.e., as the ICC).[255] Moreover, to qualify as an "investigation" for this "same person, substantially the same conduct" test, the state must show that it is pursuing specific "steps" to discover whether those same persons/suspects are responsible for that conduct.[256] The PTC and Appeals Chamber provide examples of such "steps": "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."[257]

Accordingly, under this new complementarity test, if the national jurisdiction, based on its own formal inquiries and fact-finding related to criminal incidents, focuses its investigations and/or prosecutions on other suspects, including high-level ones, that are not the focus of the ICC investigation and prosecutorial effort, then the case remains admissible before the ICC. In addition, though there may be some flexibility under the "conduct" prong of the test (i.e., the conduct investigated and/ or prosecuted by the state must only be "substantially" the same as the conduct investigated and/or prosecuted by the ICC for the case to be found inadmissible before the ICC), ultimately this prong may easily be interpreted in the direction of admissibility before the ICC.

For example, the ICC Prosecutor could argue in a complementarity challenge filed by a state that the conduct she is interested in prosecuting corresponds to a different criminal charge (for example, crimes against humanity) than the charges being pursued by the state (for example, the domestic crime of murder). Since the elements of these criminal charges are different, the Prosecutor could argue and the Court could find that different "conduct" is implicated.[258] Alternatively, the Prosecutor may

255. *See* Article 19 Decision, *supra* note 197, at 6–9, 22–23. *See also supra* note 211 and text accompanying note 210.

256. *See supra* notes 210 and 211 and accompanying text.

257. *Id.*

258. Note that this potential argument by the Prosecutor in response to a complementarity challenge by a state has perhaps been weakened by a recent decision of the Pre-Trial Chamber in the Libya case. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the admissibility of the case of against Saif Al-Islam Gaddafi," ¶¶ 85 (May 13, 2013) [hereinafter Decision on the Case Against Gaddafi], http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf ("The Chamber is of the view that the assessment of domestic proceedings should focus on the alleged conduct and not its legal

pursue altogether distinct crimes and, hence, "conduct" as compared to that pursued by the state (for example, the state may be pursuing murder investigations while the ICC Prosecutor is interested in "war crimes" involving the destruction of property).[259] Finally, the state and Prosecutor may be interested in conduct that, though it qualifies as essentially the same crime (for example, murder), is adjudged not to be "substantially the same" because it is part of a distinct criminal event, or incident (for example, incidents with different factual contexts, modus operandi, locations and/or timeframes). In each of these scenarios put forth above, different suspects in the same "high-level" hierarchy or (somewhat) different conduct, the ICC "wins" in a jurisdictional challenge between it and the nation-state over the complementarity principle.

These scenarios appear to illustrate that the shared role national jurisdictions have with the ICC under the Rome Statute, investigating and prosecuting international crimes and in the process ending impunity for these crimes, is perhaps not being taken as "seriously" as it should be by

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characterisation. The question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge."). *See also id.* ¶ 88.

> "It follows that a domestic investigation or prosecution for "ordinary crimes[,]' . . . to the extent that the case covers the same conduct, shall be considered sufficient. It is the Chamber's view that Libya's current lack of legislation criminalising crimes against humanity does not *per se* render the case admissible before the Court." (relying on the language from the Rome Statute's *ne bis id idem* statute and the Statute's drafting history).

Id.

259. For an example of such a war crime, *see* Rome Statute, *supra* note 1, art. 8(2)(a)(iv) ("For the purpose of this statute, 'war crimes' means: . . . Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"). *See also id.* art. 8(2)(b)(xvi)(crime of pillaging). In addition, the Prosecutor may be interested in other war crimes involving sexual crimes or the displacement of persons. *See id.* arts. 2(e)(viii) (displacement) & 8(2)(b)(xxii)(sex crimes). *See also* Jalloh, *Situation in the Republic of Kenya*, *supra* note 202, at 121–22.

> The majority's reasoning [in the Kenyan admissibility decision by the Appeals Chamber] endorses an extremely narrow reading of the nature, scope, and purpose of Article 17. Admittedly, in its first decision to deal frontally with this issue, the Appeals Chamber has amended the same-person, same-conduct test to the 'same-person, substantially same-conduct' test. The qualified test seems designed to maintain the national investigative spotlight on the same suspect as the one before the Court but appears to require only a rough equivalence in pursuing the impugned conduct. This approach makes sense, although it is difficult to imagine that a national prosecutor would choose to charge a suspect with harder-to-prove international crimes, such as crimes against humanity, if the same conduct could be more easily characterized as ordinary murder for the purpose of securing a conviction under domestic law. Be that as it may, the revised test still leaves ample room for outright [ICC-level] judicial rejections of any legitimate national attempt to prosecute the ICC crimes that occur within a state's territory on the basis that it does not address substantially the same conduct.

Id. at 122.

the ICC.[260] In other words, the "same person, substantially the same conduct" test, because it demands so much from a state before a case is found inadmissible before the ICC under the complementarity principle, may overly favor the Court in the allocation of this shared role. Perhaps a complementarity "test" that led to a finding of inadmissibility before the ICC if the state investigated or prosecuted international or domestic criminal conduct occurring during contextually similar incidents involving the same or greater levels of seriousness, or gravity, as the criminal conduct in the ICC proceedings, would better strike the balance between national jurisdictions and the ICC in their respective roles under the complementarity regime. Such a test finds some support in both the Rome Statute and the recent admissibility/ complementarity decision by the PTC in the Libya case.[261] Thus, applying this suggested test to the Kenya case,

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260. *See* Rome Statute, *supra* note 1, at pmbl. ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"). *See also id.* art. 1 ("[The ICC] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.").

261. This suggested complementarity test finds some support in the Rome Statute:

> Within one month of receipt of that notification [i.e., notification to a State with jurisdiction that the Prosecutor has begun an investigation *proprio motu* into crimes within the Court's jurisdiction], a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to *criminal acts* which *may* constitute crimes referred to in article *5 and which relate to the information provided in the notification to States.* At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

See Rome Statute, *supra* note 1, art. 18 (2)(italics supplied for emphasis). Thus, since "may" is permissive, the focus appears to be on criminal conduct, or "acts," and not necessarily on Article 5 crimes (e.g., genocide, crimes against humanity and war crimes). Also, the "relate" language would appear to indicate that the conduct under investigation by the state and ICC occur during at least "similar" incidents (whether because of modus operandi, overall context, location, timeframe, etc.). *See also id.* at Preamble:

> Affirming that the *most serious crimes of concern to the international community* as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation[;] Determined to put an end to impunity for the perpetrators of these crimes [i.e., most serious crimes] and thus to contribute to the prevention of such crimes; Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes[;] . . . Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions[.]

Id. (italics added for emphasis). "Seriousness" for purposes of the suggested test could be evaluated with reference to the harm suffered by the victim, means rea, "average" or "typical" sentence attached to the crime in domestic jurisdictions (or, if available, by international courts), etc. Finally, the Court could use its existing "gravity" jurisprudence to facilitate its determination of crime "seriousness."

Note that the recent decision in the Libya situation by the Pre-Trial Chamber concerning admissibility under the complementarity principle noted that the focus of the complementarity inquiry should be on the substantive criminal acts, or conduct (as opposed to whether an act is considered

since no international or domestic prosecutions or investigations have occurred there related to the post-election violence for the alleged crimes against humanity or other international or domestic criminal conduct of the same gravity (e.g., indiscriminate killings/murders), the case would remain admissible before the ICC. However, if Kenya were to investigate or prosecute a person for a crime against humanity or another international or domestic crime implicating underlying acts that are the same or greater in their level of seriousness as compared to the criminal conduct targeted in the ICC proceedings,[262] and this crime occurred as part of the post-

"domestic" or "international" in nature), and that national investigations related to either domestic or international criminal conduct "count" under the complementarity test as long as the underlying conduct being investigated by the state is "substantially the same" as the conduct targeted by the ICC proceedings. *See supra* note 258. *See also* Decision on the Case Against Saif Al-Islam Gaddafi, ¶ 108 (May 31, 2013), at http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf. "[T]he Chamber is of the view that there is no requirement under the Statute that the investigation at the national level be aimed at the prosecution of 'international' crimes as long as the investigation covers the same conduct". *Id.* The PTC in the Libya admissibility decision also emphasized that "similar incidents" was no longer a requirement of the complementarity "test" (i.e., same person / substantially the same conduct" test); however, the PTC in its Libya decision did stress "the ICC proceedings" language, or requirement, within the "same person, substantially the same conduct" test. *Id.* ¶ 76. "However, rather than referring to 'incidents,' the Appeals Chamber [in the Kenya admissibility decision] referred to [substantially the same] the conduct 'as alleged in the proceedings before the Court.'" *Id.* The proposed test for complementarity suggested in this Article re-incorporates the "similar incidents requirement" because though the conduct being targeted by the State and the ICC may essentially be the same under the "as alleged in the ICC proceedings" requirement, the incidents in which the conduct occurred could be completely unrelated in time, location and overall context. This does not make logical sense if one of the central goals of the ICC is to end impunity for particular crimes; thus, bringing back the "similar incidents" language ensures to a greater extent this important goal.

Ultimately, the PTC in the Libya admissibility decision addressing complementarity found that (1) the domestic legislation of Libya "may sufficiently capture" the criminal conduct targeted by the ICC proceedings; and (2) the criminal conduct, or case, being investigated by Libya related to defendant Saif Al-Islam Gaddafi is not substantially the same as the conduct, or case, being investigated by the ICC in its proceedings. *See id*. ¶¶ 113, 116–17, 135. This latter conclusion arises, according to the PTC, because Libya failed to provide sufficient detail regarding the scope of its national investigations. *Id.* ¶¶ 123, 135. However, the PTC did note that there were certain aspects of the conduct by Gaddafi under investigation by the ICC with regard to which Libya was taking particular investigative steps. *See id.* ¶¶ 132, 134. In addition, and unrelated to the first prong, or "limb," of the complementarity inquiry dealing with whether an ICC case is being investigated by the national jurisdiction (i.e., the same person, substantially the same conduct test), the PTC in the Libya admissibility decision also found that Libya was genuinely unable to carry out an investigation or prosecution of Mr. Gaddafi. *Id.* ¶¶ 216–17. Ultimately, the PTC found that the case against Gaddafi was admissible before the ICC. *See id.* ¶¶ 218,

262. For example, if the underlying conduct for the crime against humanity by the ICC involved particular violence against persons (e.g., murder), which it does in the Kenya case, then the state would need to also focus on this underlying conduct in its investigations or prosecutions. In Kenya, other international crimes under the Rome Statute such as genocide or war crimes did not occur, but had they occurred, and Kenya investigated and/or prosecuted the same crimes involving underlying acts as "serious," or grave, as the underlying acts of crimes against humanity charged by the ICC (i.e., murder), then under the test posited in this Article the case would be inadmissible before the ICC. The complementarity test put forward in this Article finds some support in the Rome Statute:

election violence in Kenya, the case would become inadmissible before the ICC under this suggested, "alternative" complementarity test. Such a test that is more concerned with the seriousness, or gravity, of criminal conduct, whether domestic or international in nature, would seem to better capture the shared role bestowed by the Rome Statute on states and the ICC in prosecuting, investigating and ultimately ending impunity for grave crimes. Though the test allows some flexibility by the state as to the person or persons selected for investigation or prosecution, and hence respects state sovereignty in this regard, ultimately the state, in order to prevent the ICC from exercising jurisdiction under the complementarity principle, must investigate or prosecute a person for criminal conduct occurring during a similar incident (i.e., "context") and involving the same or greater level of seriousness (i.e., as the ICC crime). These requirements would contribute to ending impunity for grave crimes while respecting the important role states have under the Rome complementarity system.

Another potential affront to state sovereignty in the complementarity assessment put forward by the Court in the Kenya case is the type of activities that qualify as "investigations" and hence merit "deferral" to the national jurisdiction by the ICC under the complementarity principle. For example, to qualify as an investigation, both the PTC and Appeals Chamber in their Article 19 admissibility decisions implicating complementarity suggested that only more "traditional" investigative responses to crime would suffice—interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses to determine whether particular suspects are responsible for crime.[263] And in a portion of their decisions, the PTC indicated and the Appeals Chamber

> Within one month of receipt of that notification [i.e., notification to a State with jurisdiction that the Prosecutor has begun an investigation proprio motu into crimes within the Court's jurisdiction], *a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States.* At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

See Rome Statute, *supra* note 1, art. 18(2) (italics supplied for emphasis).

263. *See supra* notes 198, 211, 257 & accompanying text. Also, the way in which the Appeals Chamber refers to the "parallel" state investigations in its Kenya decision suggests that only more "traditional" criminal justice efforts by states would qualify under the complementarity assessment (and prevent ICC jurisdiction over the crimes in question). For example, the Chamber refers to whether the "same case" is being investigated at the same time by the ICC and the state, and in various parts of its decision the Chamber refers to investigating "suspects." These references are to terminology generally reserved for formal, criminal justice processes. *See* Article 19 Decision, *supra* note 197, ¶¶ 53–54, 56–57, 65, 68–69. *See also id.* ¶ 69 (referring to police and prosecutor investigative reports concerning suspect questioning).

apparently endorsed these responses, or activities, specifically when conducted *by police or prosecutors*.[264]

But what this seemingly more narrow conception of "investigation" fails to adequately take into account is that some post-conflict societies choose other methods to address periods of grave crimes. For example, post-conflict nations that fear political instability if prosecutions or associated police investigations of "high-level" criminals occur, including a possible return to a period of abuse, perhaps by these very criminals and/or their associates who may attempt to gain and/or return to power to avoid prosecution**,** may opt instead to institute a truth commission or similar process (i.e., either exclusively or in addition to criminal investigations and prosecutions).[265] Truth commissions, though they do investigate crime, ordinarily do not involve formal investigations by police or prosecutors.[266] In addition, while truth commissions may investigate, in

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264. *See supra* note 198 (referring to the contents of the police or public prosecutions' reports concerning questioning of suspects.). *See also supra* note 210.

265. *See* Martha Minow, Between Vengeance and Forgiveness, 58 (1998). "When the societal goals include restoring dignity to victims, offering a basis for individual healing, and also promoting reconciliation across a divided nation, a truth commission again may be as powerful or more powerful than prosecutions." *Id.* at 88-89. Apparently, Kenya has actually made the claim that an accountability process involving the high-profile criminals who allegedly committed the international crimes in Kenya is undesirable because it presents a danger to peace and stability. This is because many of these alleged criminals are also high-profile politicians in Kenya. *See* Thomas Obel Hansen, *Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns*, 41 CAL. W. INT'L L.J. 1 (2011). Kenya's truth commission has also recently completed its investigation into crimes and human rights abuses occurring from December 12, 1963 to February 28, 2008, and submitted its final report. *See* Truth Justice and Reconciliation Commission of Kenya, Report of The Truth, Justice, and Reconciliation Commission ("TRJC") of Kenya, http://www.tjrckenya.org/index.php?option=com_content&view=article&id=573&Itemid=238. *See also TRJC to Submit Its Final Report*, TJRCKenya.org (Apr. 30, 2013), http://www.tjrckenya.org/index.php?option=com_content&view=article&id=571:tjrc-to-submit-its-final-report&catid=1:tjrc-news&Itemid=187 (last visited Aug. 24, 2013) (explaining date and methods of submission of final report). *See also* The Truth, Justice and Reconciliation Act (2008), Cap 2 § 5 (a) Kenya, *available at* http://www.tjrckenya.org/images/documents/TJRC-Act.pdf (last visited Aug. 24, 2013) (explaining temporal limitations on truth commission investigations). Post-apartheid South Africa is one example of a nation choosing a truth commission process to address a period of human rights abuses and conflict. If an individual appeared before the South African truth commission and admitted all of the facts underlying their "political" crime, amnesty from prosecution was provided. *Azanian Peoples Org. v. President of S. Afr.* 1996 (4) SA 637 (CC), ¶¶ 5, 32 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/1996/16.pdf.

266. *See* Priscilla Hayner, Fifteen Truth Commissions—1974 to 1994: A Comparative Study, 16 HUM RTS. Q. 597, 604 (1994).

> First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some

part, to determine overall or even individual responsibility for crimes, they neither conduct criminal prosecutions nor render formal convictions or sentencing reflecting a determination of guilt.[267] Nonetheless, these commission investigations by states may have direct, tangible consequences for individuals, such as community service assignments, reparation payments to victims, apologies to victims, lustration, etc., as well as less tangible ones.[268]

> sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report.

Id.

267. *Id.* at 600. *See also* Minow, *supra* note 265, at 58, 78. "[A] truth commission is charged to produce a public report that recounts the facts gathered, and render moral assessment. It casts its findings and conclusions not in terms of individual blame but instead in terms of what was wrong and never justifiable." *Id.* at 78. The Kenya truth commission was responsible for and did determine both overall and individual responsibility for crimes and human rights abuses. With regard to individual responsibility, the Kenya commission either determined that individuals should be banned from serving in public office in Kenya and/or be investigated and/or prosecuted by the appropriate Kenyan authorities for particular abuses and crimes. *See* The Truth, Justice and Reconciliation Act, *supra* note 265, § 5(a)–(d). *See also infra* note 276 (explaining lustration and recommendations to Kenyan prosecutor's office for investigation and prosecution).

268. Hayner, *supra* note 266, at 604, 609. Truth commissions may also recommend "military and police reform, the strengthening of democratic institutions, measures to promote national reconciliation, . . . or reform of the judicial system." *Id. See also* U.N. Transitional Administration in East Timor (UNTAET), Regulation No. 2001/10, U.N. Doc. UNTAET/REG/2001/10 (July 13, 2001) [hereinafter CAVR], *available at* http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg10e.pdf. CAVR stands for Commission for Reception, Truth, and Reconciliation, a truth commission organized by the United Nations in response to decades of violence in East Timor. *Id.* § 2.1. Note that as part of CAVR, there was an "admission of responsibility" requirement (i.e., individuals who committed minor crimes could come before CAVR and if they admitted responsibility for their crimes and met certain other requirements, they may receive an "act of reconciliation." *Id.* §§ 23.1, 27.7, & sched. 1. *See also* Minow, *supra* note 265, at 78.

> Trial records do not seek a full historical account beyond the actions of particular individuals. [In contrast, truth commissions,] . . . [through] [c]lose historical analysis of testimonies and documents . . . [revealing] the influences of [numerous circumstances behind the mass violence] . . . can do more than verdicts of guilt or innocence to produce a record for the nation and the world, and a recasting of the past to develop bases for preventing future atrocities.

Id. at 78–79. Minow argues that truth commissions provide a chance for victims to tell their story and "be heard without interruption or skepticism[.]" *Id.* at 58. "[T]ruth commission[s] can give context to the human rights violations, and remind a viewing public of the human costs that were suppressed or unknown." *Id.* at 76. In its final report, the Kenya truth commission made recommendations for lustration for particular perpetrators of human rights abuses in Kenya. *See infra* note 275. The Kenya truth commission also made recommendations related to the provision of reparations (compensation for injuries, memorials, apologies, community facilities, etc.) for the victims of human rights abuses. *See* Truth Justice and Reconciliation Commission of Kenya, Report of The Truth, Justice, and Reconciliation Commission ("TJRC") of Kenya, vol. 4, ch. 3 (May 13, 2013) [hereinafter Final Report of the Truth, Justice, and Reconciliation Commission Vol. 4], *available at* http://www. tjrckenya.org/index.php?option=com_content&view=article&id=573&Itemid=238. *See also id*. at 63, Annex "Recommendations and Implementation Matrix." All of the recommendations made by the truth commission, including ones related to reparations, lustration, further investigation and possible prosecution of crime by Kenyan authorities, are binding. *See* The Truth, Justice and Reconciliation

Thus, it appears likely that in light of the interpretation given by the PTC and Appeals Chamber in the Kenya case as to what qualifies as "investigations" by states under the complementarity principle, most state-initiated truth commission processes will be excluded.[269] Accordingly, cases may still be deemed admissible before the ICC notwithstanding a state's decision to address a period of crime and human rights abuses exclusively through a legitimate truth commission process (or similar, local practice). This is troublesome insofar as it prevents states from responding to grave crimes occurring within their borders in specific ways that they believe will best lead to reconciliation and overall stability within the framework of their particular, national "context." Such a narrow interpretation of "investigation" for purposes of the complementarity assessment leaves states less flexibility and ultimately less power over their preferred solutions to mass crime.

Interestingly, in the Kenya case, both the dissenting opinion of Judge Usacka in the Appeals Chamber's admissibility decision implicating complementarity as well as some commentators have suggested that Kenya should have been given more time to submit additional information to the ICC about its investigations of those committing international crimes in Kenya as part of the post-election violence period, or alternatively, more time in general to investigate or prosecute these crimes.[270] While it is true that the ICC summonses against particular

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Act, 2008, *supra* note 265, § 50(2) ("All recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation."). In this regard, the Kenyan truth commission set up an implementation mechanism, or committee, to oversee implementation of the commission's recommendations. *See id.* art. 48 (2); *See also* Final Report of The Truth, Justice, and Reconciliation Commission ("TRJC") of Kenya, Vol. 4, chap. 2, *available at* http://www.tjrckenya.org/index.php?option=com_content&view=article&id=573&Itemid=238 (last visited Aug. 24, 2013).

269. It is possible to read the PTC and Appeals Chambers Article 19 admissibility decisions in the Kenya case as permitting a narrow class of truth commissions to qualify as "investigations" for complementarity purposes. For example, occasionally a truth commission will seek to determine individual criminal responsibility and assign a "punishment" based on that determination. *See* CAVR, *supra* note 268, at 23.1 & 27.7. But even then, the punishment does not take the form of the traditional, punitive, and retribution-oriented form of criminal sentencing (i.e., prison or jail time) but rather is more reconciliation and rehabilitation-oriented (i.e., apologies, community service, etc.). Perhaps most importantly, even in this example (i.e., East Timor), the determination of responsibility and "act of reconciliation" were not made by police officers, prosecutors or other "traditional" criminal justice actors such as judges or juries. Rather, the truth commission officers made these decisions. There is some doubt following the Article 19 admissibility decisions in the Kenya case whether investigations by individuals other than "traditional" criminal justice actors would qualify (i.e., as "investigations" by the state under the complementarity principle). *See supra* notes 263 & 264 and accompanying text.

270. *See* Article 19 Appeal, *supra* note 200, ¶ 26 (Usaka, J., dissenting) (["The ICC Rules of Procedure and Evidence] gives the Chamber power to take all measures necessary, including

suspects for specific crimes did not issue until March 8, 2011, and the admissibility decision by the ICC occurred approximately three months later on May 30, 2011, Kenya knew of the ICC's intent to investigate and potentially prosecute particular international crimes (e.g., crimes against humanity) on November 26, 2009 at the latest, which is the date of the Prosecutor's application to the PTC to initiate his investigation *proprio motu*.[271]

In the approximately sixteen months between the *proprio motu* request and the date of Kenya's filing of the admissibility challenge (March 31, 2011), Kenya did not make sufficiently substantial efforts to investigate or prosecute serious international or domestic crimes committed during the post-election violence (either under the "same person, substantially same conduct" test posited by the Appeals Chamber in its admissibility decision or under the more flexible standard suggested in this Article). It clearly did not, as noted by the PTC and Appeals Chambers, "interview[] witnesses or suspects, collect[] documentary evidence, or carry[] out forensic analyses" of persons who were suspected of involvement in the serious crimes related to the post-election violence.[272] In addition, at the time of and during the 16-month period prior to the admissibility decision, Kenya had apparently failed to question *any* suspect, victim or witness about grave international or domestic criminal incidents related to the post-election

requesting more information or extending time to allow the State to present additional material. In the specific context of the case at hand, the Pre-Trial Chamber should have properly considered to make use of such powers."). *Id. See also* Jalloh, *supra* note 202, at 123–24 ("[O]ne solution could have been for the Court to suspend or defer the prosecutor's investigation to give Kenya an opportunity to conduct its own prosecution of the suspects while the ICC prosecutor would closely monitor the ongoing investigation to ensure that it remained devoted to the same 'case.' Article 18(2) of the Rome Statute provides the framework for such a deferral, even if the 'within one month' time limitation makes the provision not entirely applicable to this stage of the Kenya situation. Such a halfway solution would have numerous advantages over the Court's outright dismissal of the admissibility application and would have assuaged the government's and dissent's rightful concern about the future of the complementarity bargain struck at Rome.").

271. *See* Rome Statute, *supra* note 1, art. 18 (1) ("When . . . the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States."). For the relevant dates, *see* Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 86 (Nov. 26, 2009); Prosecutor v. Ruto, *supra* note 192 (Mar. 8, 2011) and Article 19 Decision, *supra* note 197 (May 30, 2011). The "tight" timeframe between the summonses and the admissibility decisions is also discussed by Judge Usacka in her dissenting opinion. *See* Article 19 Appeal, *supra* note 200, ¶ 28 (dissenting op. J. Usacka). The Prosecutor's request to initiate an investigation *proprio motu* was approved on March 31, 2010. *See supra* note 98 and accompanying text.

272. *See* Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber, *supra* note 211, ¶ 1.

violence.[273] The information it had gathered about Mr. Ruto was minimal at best, and the rest of its efforts had gone into prosecuting low-level, domestic crimes.[274]

Furthermore, though Kenya did commence and has recently completed a truth commission process in response to multiple periods of grave crimes committed within its territory, it specifically exempted from any immunity or amnesty from prosecution perpetrators of serious international crimes.[275] This approach along with specific recommendations made by the truth commission for Kenyan prosecutors to investigate and/or possibly prosecute alleged perpetrators of grave crimes, including perpetrators of the post-election violence, reflects a general desire on the part of Kenya, at least in theory, to prosecute (i.e., as opposed to choosing the truth commission process as an exclusive means to address grave crime).[276] Had Kenya chosen through some representative, democratic

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273. *See supra* text accompanying note 198, 212.

274. *See* Article 19 Appeal, *supra* note 200, ¶ 8 (Usacka, J., dissenting).

> With respect to Mr. Ruto, [the] information had indicated that a case file had been opened, referred to him as a "suspect," indicated his case file number and stated where the case was pending. It also provided information as to the scope of the investigations and the allegations against Mr. Ruto, including the location and time of the alleged criminal conduct. Further, it indicated that orders had been given, apparently by the authorities in charge, to start investigations against the other five persons under investigation by the Court, too.

Id. *See also supra* note 212. For the investigation and prosecution of minor, less serious offenses by the Kenyan authorities related to the post-election violence, *see supra* notes 97, 177.

275. *See* The Truth, Justice and Reconciliation Act, *supra* note 265, art. 34 (1)–(3).

> A person may make an application for consideration of amnesty to the Commission for any act or omission which constitutes a matter to be investigated under this Act; (2) The Commission may in accordance with this Part, and subject to subsection (3), recommend the grant of conditional amnesty to any person liable to any penalty under any law in Kenya.; (3) Notwithstanding subsection (2), no amnesty may be recommended by the Commission in respect of genocide, crimes against humanity, gross violation of human rights or an act, omission or offence constituting a gross violation of human right including extrajudicial execution, enforced disappearance, sexual assault, rape and torture.

Note that in order to obtain a recommendation for amnesty by the commission under the Act, the person seeking amnesty had to make a "full disclosure of all relevant facts[.]" *Id.* art. 38(2)(b) & art. 5 (f). Finally, note that no amnesties were actually granted by the Kenyan truth commission. *See* Final Report, Kenyan Truth, Justice, and Reconciliation Commission: Volume 4, *supra* note 265, at 4 ("The Commission was also mandated to recommend the grant of amnesty in respect of certain offences. However, as explained in the mandate chapter of this Report, the Commission did not process any amnesty applications and as such no recommendations pertaining to amnesty have been made."). The period of investigation of crimes by the Kenyan truth commission spanned from 1963 to 2008. *See infra* note 277.

276. *See* Final Report, Kenyan Truth, Justice, and Reconciliation Commission, Volume 4, *supra* note 265, at iv., 128 (Appendix 1). ("Justice is further achieved by the recommendations the Commission made with respect to further investigations and prosecutions, set out in Appendix 1 of Chapter 1 of this Volume"). Notably, lustration was also recommended for particular Kenyan officials. *Id.* at 6.

method a truth commission process as its unique means to address all grave, post-election crime, and this process was legitimately unfolding or had been completed at the time of the ICC admissibility decision, then these facts should have influenced the Court in its decision regarding complementarity, whether in the way of the Court deferring the case to national authorities, or providing Kenya with additional time to finish its domestic process. This was simply not the case in Kenya. Indeed, Kenya's basic intent, in theory, to withhold amnesty for perpetrators of grave crimes over multiple time periods and instead prosecute them has not borne itself out in practice; on the contrary, the recent findings and recommendations of the Kenyan truth commission support the notion that many of these perpetrators, including those allegedly responsible for the post-election violence, have neither been prosecuted nor sufficiently investigated.[277]

> However, the prevalence of impunity throughout the history of Kenya compelled the Commission to consider lustration for past abuses committed by individuals while acting in an official capacity. The Commission considered that tackling impunity is a necessary and urgent step in the full restoration of the rule of law in Kenya, in establishing lasting peace and stability, and in fostering reconciliation. For this reason, the Commission has recommended that specific individuals should not hold public office in Kenya's constitutional order on account of their past conduct and/or decisions which resulted in gross violations of human rights.

Id. For examples of individuals receiving the penalty of lustration by the Kenyan truth commission, *see id.* at 128 (Appendix 1 chart).

277. *See* Final Report, Kenyan Truth, Justice, and Reconciliation Commission, Volume 4, *supra* note 265, at 128 (Appendix 1). Examples of individuals the Commission found have not been investigated adequately or prosecuted for the post-election violence are mentioned at the following numbers (#'s) in the chart entitled "List of Adversely Mentioned Persons and Recommendations of the TJRC"—numbers 25, 26, 54, 90, 91, 93 & 95. *Id.* at 130, 135, 140. The commission recommends that the Kenyan prosecutor further investigate these individuals for alleged crimes, including killings and attacks leading to the loss of lives, related to the post-election violence. *See also id*. ¶ 13.

> With respect to recommendations concerning the investigation and possible prosecution of an individual, the following shall apply: The DPP [Kenyan Director of Public Prosecutions] or appropriate authority shall immediately commence an investigation into the individual named. Unless otherwise provided in the specific recommendations, such an investigation shall conclude no later than twelve months after the issuance of this Report. At the completion of such investigation the DPP or appropriate authority shall make an immediate determination concerning whether the evidence warrants a criminal prosecution. The DPP or appropriate authority shall immediately make that determination public, and shall include in that public statement detailed reasons justifying its decision.

In addition to individuals whom the Commission concludes merit further investigation and possible prosecution related to the Kenyan post-election violence, the Commission also found numerous incidents throughout modern Kenyan history where the government had not sufficiently investigated or prosecuted alleged perpetrators of crimes and human rights abuses. *See generally id*. at 128 (Appendix 1). *See also id*. at 10, ¶ 35.

> The Commission finds that the following factors encouraged the perpetuation of gross violations of human rights during the mandate period: [inter alia]: Consolidation of immense powers in the person of the President, coupled with the deliberate *erosion of the independence*

And significantly, this absence of discernible, qualifying investigative or prosecutorial activity on the part of Kenya related to the post-election violence was not due to some fundamental lack of opportunity for Kenya to show, or "prove," its efforts before the ICC, though the Court could perhaps have been more cooperative in sharing its own investigative information related to the case with Kenya.[278]

> *of both the Judiciary* and the Legislature. The failure of the state to investigate and punish gross violations of human rights. The Commission finds that in most cases, the state has covered-up or downplayed violations committed against its own citizens, especially those committed by state security agencies. During the entire mandate period (1963–2008), the state demonstrated no genuine commitment to investigate and punish atrocities and violations committed by its agents against innocent citizens.

Id. (italics supplied). *See id.* ¶ 64 ("The Commission is not aware of a single criminal conviction for any massacre committed by the security forces in Kenya during the mandate period.") *See also id.* ¶ 66.

> The Commission made formal requests to the [Kenyan] Ministry of Defence for information in respect of the role of the Army in the Shifta War and other massacres but no response was received. The Commission finds it regrettable that the Ministry of Defence chose to ignore or refuse the request, and thus to act in clear violation of the provisions of the TJR Act. In so doing the Ministry of Defence has undermined Kenya's truth and reconciliation process.

Id.

278. In particular, the PTC gave Kenya ample opportunity to prove it had taken the requisite steps to investigate or prosecute by allowing Kenya to file annexes with additional information, and to reply to submissions by other parties in this regard, including submissions by the prosecutor. *See* Article 19 Appeal, *supra* note 200, ¶ 98. And under the terms of the Rome Statute, it appears Kenya could (and should) have waited until it had made "serious" efforts to investigate and/ or prosecute international crimes related to the post-election violence before making its admissibility challenge on complementarity grounds. According to Article 19(5) of the Statute, Kenya should have waited to make its article 19 admissibility challenge at the "earliest opportunity[,]" which refers to "the earliest point in time after the conflict of jurisdictions has actually arisen." *See* Article 19 Appeal, *supra* note 200, ¶ 100. Furthermore, the Appeals Chamber noted that "[a] State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge *prematurely*." *Id.* (emphasis added). Finally, though the PTC had prohibited an oral hearing to allow the Kenyan Police Commissioner to present more facts, this information could have been provided in writing. *See id*. ¶¶ 110, 111. Regarding the decision by the Appeals Chamber not to compel the Prosecutor or the Court to share investigative information with Kenya, *see id.* ¶¶ 116, 122–23 (finding that the PTC's denial of Kenya's request for assistance to obtain evidence in possession of the Court and Prosecutor related to ICC investigations into post election violence in Kenya, including information related to the six suspects before the ICC, does not "amount to a procedural error vitiating the [PTC's] Decision."). *Id.* ¶¶ 116, 122. According to the Appeals Chamber, the PTC, under the Court's Rules of Procedure and Evidence, has "discretion" in deciding whether and what information to share. *See id*. ¶ 123. More recently, in the ICC case against President Kenyatta, the ICC Prosecutor had apparently refused to reveal the identity of certain witnesses out of a concern for their security. Defendant Kenyatta had demanded the release of these identities to both assist with his defense and in order for Kenya itself to begin investigating and prosecuting these individuals for crimes committed during the post-election violence. Kenyatta also opposed an attempt by the Prosecutor to grant the witnesses immunity for any testimony they provide. See Mwakilishi.com, dated 11/12/13, *available at* http://www.mwakilishi.com/content/articles/2013/11/12/president-uhuru-kenyatta-wants-15-mungiki-icc-witnesses-charged.html (last visited Apr. 13, 2014).

In short, Kenya, because of its clear lack of sustained activity related to the investigation and prosecution of grave international or domestic crimes occurring during the post-election violence, should not have been granted additional time by the ICC in its admissibility decision to submit additional proof or to further advance its investigative efforts. Notwithstanding this conclusion, Kenya can certainly begin seriously investigating and/ or prosecuting the grave crimes committed during the post-election incidents by ICC defendants whose trials have not yet begun, and if it does so, attempt to re-challenge admissibility under the "same person, substantially same conduct" test at any time prior to the commencement of the trial.[279] This possibility, though perhaps made somewhat challenging by the majority's strict "same person/conduct" test, does allow a state party like Kenya yet a further opportunity to exercise its sovereignty by taking appropriate steps to address grave crimes on its own without ICC involvement.

CONCLUSION

Through a series of pretrial decisions in the Kenya case, the PTC and Appeals Chamber of the ICC have already set several important

279. *See* Rome Statute, *supra* note 1, art. 19 (4) ("The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State . . . . The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c) [i.e., the *ne bis id idem* principle]."). *Id.*

Note that under the second prong, or limb, of the complementarity inquiry, any Kenyan investigations or prosecutions related to the post-election "grave" crimes would have to reflect an ability and willingness to genuinely investigate or prosecute. In addition, a decision not to prosecute one of these crimes could not stem from an inability or unwillingness to genuinely prosecute (i.e., a person for these crimes). *See* Rome Statute, *supra* note 1, art. 17 (1) (a) & (b). This second prong could conceivably pose a challenge for Kenya. See *supra* note 277."). *Id. See also id*. art. 19(10) ("If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17."). *Id.* Note that recently Kenya has shown its general unwillingness to assist the ICC through a vote by its Parliament to officially withdraw from the Rome Statute as a State Party. See "Kenya Parliament votes to withdraw from ICC" (dated Aug. 5, 2013), *available at* http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html (last visited Apr. 13, 2014) (noting that Kenya's legal obligations under the Rome Statute remain intact for those Kenyan defendants whose prosecutions have begun before the Court). Moreover, Kenya apparently seeks various amendments to the Rome Statute, including provisions that would essentially provide immunity for prosecution to sitting heads of state and other government officials. See "Justice in Conflict—Kenyatta's Next Move: What Kenya Wants from the ICC" (posted 11/13/13), *available at* http://justiceinconflict.org/2013/11/13/kenyattas-next-move-what-kenya-wants-from-the-icc/ (last visited Apr. 13, 2014).

precedents that will guide future adjudication by the Court. While revealing the potency of the ICC Prosecutor's *proprio motu* power, the Kenya case also establishes certain "hurdles" the Prosecutor must overcome prior to being able to exercise her power. In addition, the Kenya case highlights the seriousness with which the PTC views its supervisory role over *proprio motu* investigations by the Prosecutor.

On a separate note, the Kenya case further elucidates the principle of complementarity, a fundamental concept embedded in the ICC Rome Statute from its inception. Following the admissibility decisions by the PTC and Appeals Chamber in the case, it will be somewhat difficult for a state party to successfully show before the Court that it is "investigating or prosecuting a case" under the complementarity principle and is therefore entitled to deference with respect to that case by the ICC. This is for two principal reasons: (1) before the ICC defers a case to the state under the complementarity principle, the state must show that it is investigating or prosecuting the same person(s) for substantially the same conduct as the ICC; and (2) the types of investigative approaches that "qualify" under the Court's definition of "investigation" for purposes of the complementarity principle are relatively narrow in scope (i.e., the investigations apparently must entail "traditional" criminal justice methods used by police or prosecutors).

Thus, truth commissions or other "local" mechanisms to address mass crime chosen by a state as a result of some participatory, democratic process will likely not qualify under the Court's definition. This is troublesome insofar as it imposes the Court's view regarding appropriate responses to mass crime and in the process undermines legitimate efforts by a state to handle a period of abuse in ways that may account for its potentially distinct or unique national context. In short, the "same person, substantially the same conduct" test for complementarity, at least as articulated by the Court in the Kenya case, has the potential to encroach further on the exercise of a sovereign state's authority to investigate and/or prosecute international crimes occurring within its borders.

Finally, Kenya, either under the strict complementarity test developed by the Court or under a more lenient test of the kind put forward in this Article, did not sufficiently investigate or prosecute grave crimes related to the post-election violence at the time of the admissibility decision by the Court in the case; however, Kenya still has an opportunity with regard to defendants whose trials have not yet begun, to commence national investigative activities that would meet the "same-person, substantially the same conduct" test. The recent Kenyan truth commission report indicates that much work remains for Kenya to do in this regard.