International Criminal Court
Foreword

The Kenyan Section of the International Commission of Jurist is pleased to publish this first book on the central challenges in the construction of national ability to investigate, prosecute and adjudicate core international crimes. The publication brings together several contributions by several leading experts on what has frequently been referred to as ‘Complementarity’, that is, the combined efforts of State and non-State actors to contribute to the strengthening of national criminal justice systems in the area of war crimes, crimes against humanity, genocide and aggression. Involving authors with experience both from academia and from practice, the book aspires to bring the emerging discourse on ‘positive complementarity’, to a new and more concrete level.

Complementarity is a fundamental principle upon which the International Criminal Court (ICC) is premised. As such, it has been subjected to much academic scrutiny, both in terms of its constituting elements and the potential ramifications of its use. Complementarity regulates the correlation between the ICC and national legal orders. Article 17 of the Rome Statute permits the ICC to intervene and exercise jurisdiction where states are incapable or unwilling genuinely to investigate or prosecute, without replacing judicial systems that function properly.

One of the main objectives of the Rome Treaty establishing the permanent International Criminal Court is to advance the unification of international criminal law. Whilst it may be contended that this body of law is acquiring a great degree of specificity and uniformity in content through the ICC Statute, both its development and importantly its scope are fundamentally reliant on its interpretation and application at national level; it is here that the enforcement of complementarity measures are fragmented.
ICJ Kenya is therefore pleased to make available this research as an important and timely contribution to the overall discussions now regarding Complementarity. We hope that this journal will be of benefit to all.
Acknowledgements

This is a report by The Kenyan Section of the International Commission of Jurists (ICJ Kenya), with the support of the European Union, undertook research on assessing the International Criminal Court’s Support for Domestic Prosecutions. These research findings explore complementarity in action in various situations referred to the ICC.

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We trust that you will find this journal a useful resource.

George Kegoro
Executive Director
Contrasting Complementarity: Assessing the International Criminal Court’s Support for Domestic Prosecutions

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Contrasting Complementarity: Assessing the International Criminal Court’s Support for Domestic Prosecutions

Introduction

One of the most lauded principles of the International Criminal Court (ICC), and international criminal justice in general, is the notion of nurturing and enabling domestic legal systems to adequately prosecute and try individuals suspected of committing international crimes. The ICC was always envisioned as a ‘court of last resort’, existing to ‘plug the impunity gap’. This gap exists where States, and their domestic legal systems, are unable or unwilling to prosecute perpetrators of international crimes. A central theme of the ICC’s work is to ‘foster positive complementarity’.

In other words, the ICC works to support the domestic prosecution of perpetrators of international crimes. This would require the ICC, and specifically the Office of the Prosecutor (OTP), to only getting involved when the State or state mechanisms are insufficient or there is a lack of political will to bring suspects of international crimes to justice.

Eleven years on, the ICC has looked into several situations involving possible international crimes in different jurisdictions. Some of these situations have progressed to full investigations, trial, and convictions, while others have not made it that far. This chapter seeks to provide a framework about the development of complementarity, both in what has been written about it and also how it seems to have been implemented in
practice. In particular, this chapter will focus on several different country situations, and contrast different modes of ‘complementarity’ associated with ICC involvement or non-involvement in country situations, as the case may be. By looking at these different situations, we can develop our understanding about what the principle of complementarity seeks to achieve, and where it is succeeding or failing to be implemented.

The countries that will be highlighted are those which are in the preliminary examination stage, undergoing analysis by the Office of the Prosecutor on grounds of complementarity. This includes Colombia, Guinea, and Georgia. On the other hand, countries like the Democratic Republic of Congo and Libya each have different standings with respect to ICC complementarity. Each of these countries have unique international justice issues, and each one is being addressed differently. This chapter will highlight each country’s situation, and focus on how the concept of ‘positive complementarity’ has impacted the situation, or not.

In Colombia, the conflict between the Colombian Government and the Revolutionary Armed Forces of Colombia - People’s Army (Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo, or FARC) and other armed militia groups has resulted in gross human rights violations, some of which could fall in the category of international crimes. However, despite prolonged ICC preliminary examinations, the ICC has not yet launched a full investigation in Colombia.

In Guinea, the ICC has also refrained from moving forward into full investigations. The situation under examination concerns the 2009 massacre of protesters in Conakry, which also included allegations of persecution, sexual violence, and inhumane treatment. The Office of the Prosecutor has visited Guinea several times, but has thus far refrained from moving ICC intervention forward, due to ongoing complementarity considerations.

The ICC has also continued to monitor Georgia, following the 2008 armed conflict in South Ossetia. Fueled by ethnic tensions in the area,

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1 Nigeria is also a situation that was recently placed in this group. See note 35, below.
the violence involved military from Georgia, Russia, South Ossetia, and Abkhazia. During the conflict, there were many allegations of violations of international humanitarian and human rights law, as well as allegations of war crimes by all sides involved. The ICC confirmed that it was conducting preliminary examinations into the situation in Georgia, but as yet the threshold for moving into an investigation into the situation has not yet been reached.

On the other hand, the Democratic Republic of Congo (DRC), was one of the first countries to be investigated by the ICC, from March 2003, and the first country to have a suspect arrested, tried, and convicted, in the case of Thomas Lubanga, whose verdict was issued on 14 March 2012. Despite this apparent success, the DRC remains a country in conflict, and it is unclear how the ICC’s intervention has contributed towards decreasing the conflict, or even deterring the commission of international crimes.

The 2011, internal uprising and revolution in Libya precipitated violence and human rights violations, and was duly referred to the ICC by the United Nations Security Council (UNSC). It was quickly moved through preliminary examinations, and become a situation country at the ICC in a short space of time. However, even after the armed conflict had subsided, the Libyan government challenged the admissibility of the ICC cases, on complementarity grounds, arguing that they are willing and able to prosecute the suspects.

Each of these countries provide contrasting views on the influence of ICC proceedings on domestic prosecutions of international crimes. Ultimately, what this chapter will strive to show is that the principle of complementarity is the torch-bearer for the grander goal of ensuring that there is international accountability and justice for the most serious crimes.

**Definition of Complementarity**

The term complementarity is not specifically defined in the Rome Statute of the ICC (the international treaty that establishes the ICC, and sets out its structure and rules). In the Preamble of the Statute, it emphasizes that the ICC “shall be complementary to national criminal jurisdictions”. This is
also affirmed in Article 1 of the Rome Statute. The concepts behind the principle of complementarity are further articulated in Article 17 of the Rome Statute, regarding issues of admissibility, where it states:

Article 17

1. Having Regard to Paragraph 10 of the Preamble and Article 1, the 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;
   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;

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
   b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.2

Article 17 of the ICC limits the Court's interventions to only those cases where a State is ‘unable or unwilling’ to prosecute, speaks to the fact that the ICC is supposed to support domestic proceedings, not circumvent them. This, then, is the key aspect of complementarity - the ICC is not supposed to overshadow or replace national judicial systems. In fact, an ICC intervention should be viewed as a ‘last resort’, only stepping in exceptional circumstances, where a state is ‘unable or unwilling’ to prosecute individuals suspected of committing international crimes.

In addition to this notion of complementarity that emerges from the Rome Statute, the OTP has further elaborated on this issue through a policy guideline, the Office of the Prosecutor’s Policy Paper on Complementarity3, and has coined the term ‘positive complementarity’ in its Prosecutorial Strategy of 20094. In defining how the ICC is a ‘complementary’ court, the OTP policy paper states that one measure of success, regarding the effectiveness of the ICC, is “the absence of trials, as a consequence of the effective functioning of national systems”5. What the principle of complementarity implies for the work of the OTP, the Policy Paper notes, is that “a major part of the external relations and outreach strategy of the OTP will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes”6. This seems to suggest that complementarity, as it applies to the OTP, is more than just a test of admissibility.

Indeed, in the 2009 Prosecutorial Strategy, the ICC defined the principle of complementarity as having two dimensions - one related to the

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2 Rome Statute of the International Criminal Court (Rome Statute)
3 OTP Policy Paper on Complementarity
4 OTP 2009 Prosecutorial Strategy Paper
5 OTP Policy Paper, Supra at note 3
6 OTP Strategy Paper, Supra at note 4
admissibility test in the Rome Statute, and the second as the concept of ‘Positive Complementarity’\textsuperscript{7}. What the OTP is defining as positive complementarity here further elaborates on what appears in the Rome Statute. The OTP is holding itself to a higher principle, the idea that the work of the ICC is not only to allow a State for the first chance to attempt to prosecute a suspect, but that the ICC’s role is to actively bolster the ability of the State to do so - positive complementarity is a “proactive policy of cooperation aimed at promoting national proceedings”\textsuperscript{8}. The OTP notes that encouraging domestic proceedings does not involve direct financial, technical, or capacity building assistance, but rather that it relies on “various networks of cooperation”\textsuperscript{9}. This includes involving national judiciaries, officials, experts, lawyers, other UN bodies, non-governmental organizations in information sharing and activities designed to promote accountability and the end of impunity\textsuperscript{10}.

Articulating a definition of complementarity is elusive. Analysts and commentators have portrayed the issue in sometimes conflicting light, and it is unclear if the principle of complementarity is actually a binding international norm or customary international law. Hitomi Takemura, in his paper “Critical Analysis of Positive Complementarity”, notes several challenging areas that the principle of complementarity poses\textsuperscript{11}. First, Takemura notes that the policies on complementarity, when combined with the current practices surrounding state self-referral\textsuperscript{12} casts the work of the ICC in a ‘non-impartial’ light. Self-referral also presents a problem, especially where the self-referrals are not ‘genuine’\textsuperscript{13}. Takemura also notes that a major issue arising from complementarity surrounds the use of

\textsuperscript{7} Ibid.
\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid.
\textsuperscript{10} Ibid, see especially paragraph 17.
\textsuperscript{11} Hitomi Takemura, Presentation of “A Critical Analysis of Positive Complementarity” at the xvth International Congress of Social Defence, as a competitor for the Cesare Beccaria Award for Young Researchers, Toledo, Spain, 22 September 2007.
\textsuperscript{12} Discussed in the next section - Takemura notes that self-referral, in some cases, has been the result of negotiations and solicitations by the ICC, Ibid.
\textsuperscript{13} Ibid - Takemura uses the example of Uganda, but the same holds true for the Democratic Republic of Congo, discussed below.
amnesties as peace-building tools\textsuperscript{14}. Indeed, this discussion fits into the broader scope of issues surrounding the role of the ICC, and the OTP, and the “justice” it promotes, balanced against peace efforts in conflict situations. Takemura’s concerns are highlighted very well with the ongoing situation in the DRC, discussed below.

Along similar lines, Kevin Heller notes that the principle of complementarity, strictly applied, has major repercussions with respect to ensuring fair trial and due process rights at the national level\textsuperscript{15}. According to Heller, one of the pitfalls of the complementarity regime is that, through the promotion of national proceedings, there may be serious constraints associated with providing defendants procedural protections necessary for international fair trade standards\textsuperscript{16}. Heller notes that other scholars fall into the trap of the ‘Due Process Thesis’, where they claim that a state’s failure to provide a defendant with appropriate due process measures will simply result in the case being admissible under Article 17 - failure to provide due process measures makes a state ‘unable or unwilling’ to genuinely prosecute\textsuperscript{17}.

However, Heller notes that a strict interpretation of Article 17 of the Rome Statute only applies to situations were State legal proceedings are “designed to make a defendant more difficult to convict”\textsuperscript{18}. Heller argues that, even where there is procedural unfairness, according to international legal standards, the ICC must find a case inadmissible where the legal proceedings are designed to make it easier to convict the accused\textsuperscript{19}. This is particularly important in the case of Libya, which has challenged the ICC with respect to the admissibility of the two suspects that the ICC is seeking to try. Libya asserts that they are willing and able to prosecute the accused using domestic legal proceedings, as will be discussed further below.

\textsuperscript{14} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
In any event, this chapter takes a broad, open-ended interpretation of the principle of complementarity. In particular, it looks at the concept of complementarity in the context of the ICC as a whole, and how the principle of complementarity works towards the end goals of the ICC and international criminal justice generally. As Katharine Marshall notes, positive complementarity, also sometimes referred to as ‘proactive complementarity’, can have a meaningful effect, since “the most direct contribution [the ICC] can make towards prevention [of international crimes] is through engagement with States Parties to strengthen domestic judicial institutions”20. Given that foundation, it will be important to contrast the relative strengths and failures of Complementarity in practice.

Complementarity in Practice

While the principle of complementarity comes out of the documentation and the literature, as above, the practical application of the principle also requires analysis. The chief steward of promoting the principle of complementarity is the OTP, and, in particular, the Chief Prosecutor. Currently, this office is occupied by Fatou Bensouda, with her predecessor, Luis Moreno Ocampo, responsible for the bulk of the ICC cases initiated during his tenure. In order to understand how complementarity fits into the work of the OTP, it will be helpful to understand the basic structure of OTP examinations, investigations, and decisions.

First, from Article 13 of the Rome Statute21, the OTP is able to investigate cases that are brought forward in one of three ways:

1. Referral by a State Party
2. Referral by the UNSC (via the authority of a Chapter 7 resolution)
3. Through the Proprio Motu powers of the OTP. That is, under the initiative of the Prosecutor herself, on the basis of complaints that the OTP receives

21 Rome Statute, Supra at note 2.
In addition, referrals and ICC involvement have limited jurisdiction. The limits include temporal limits and ‘territorial’ limits. The ICC has a limited temporal scope, in that it can only address situations and possible crimes that occur after the date the ICC was created in July 2002.\textsuperscript{22} The ICC also has a ‘territorial’ jurisdiction, in that it can only investigate situations that occurred on the territory of a State Party, or by the national of a State Party in a foreign jurisdiction. As is explained below, though, this territorial jurisdiction can be expanded in cases where the situation is referred by the UNSC.

Situation referrals are a key aspect of the work of the ICC, for a variety of reasons. The \textit{proprio motu} power of the OTP grants the Prosecutor an enormous amount of power, giving the ability to look into possible crimes and situations in any country that is a State Party to the Rome Statute. This power is only limited by the rule that, for any situation that the Prosecutor wishes to investigate more formally (with a view to issuing warrants and starting cases) she must first obtain approval before ICC judges in chambers. The other two forms of approval do not require chambers approval. The situations that have been initiated using the OTP \textit{proprio motu} power are in Kenya and Côte d’Ivoire.\textsuperscript{23}

Second, referrals by the UNSC carry a much broader scope than the other referral mechanisms. UNSC referrals can be directed at any country, including countries that are not State Parties to the Rome Statute. This was the method used to refer the situations in the Sudan and Libya to the ICC - neither country is a State Party to the Rome Statute, and none of the

\textsuperscript{22} Note that this temporal limitation may be different for each State Party - the ICC only has jurisdiction over a State Party at the time the State Party ratifies the Rome Statute. However, most State Parties, upon ratification, submit to the full temporal scope of the ICC, up to 2002. Although, as with Columbia, below, there are some countries that have also signed some exemptions in temporal jurisdiction.

\textsuperscript{23} Although both situations have interesting similarities to ‘self-referrals’. In Kenya, there was a campaign by Parliamentarians of “Don’t be Vague, Go to the Hague” (see “Don’t be Vague, Let’s Go to the Hague”, in Africa Confidential Vol 51 No25, 17 December 2010), which can be seen as governmental support for ICC intervention. In Côte d’Ivoire, the State (which was not a member of the Rome Statute at the time that the government approached the ICC), submitted a notice accepting the jurisdiction of the ICC, again as a measure that supported the work of the ICC, akin to a self-referral.
alleged crimes were committed by nationals of a State Party. Indeed, it can be argued that the referral of Sudan and Libya by the UNSC, and the subsequent investigations launched by the ICC, are a chief reason for the ongoing debates about the impartiality of ICC interventions.

Third, the state referral mechanism has evolved from what the drafters and negotiators of the Rome Statute had initially envisioned. As Claus Kress mentions, initial assumptions were that state referrals of other states “would be as rare an exception as are state complaints under international human rights instruments”24. Instead, what has emerged is a practice of ‘self-referrals’, where a State Party refers its own situation to the ICC, and effectively ‘waives’ complementarity. This has occurred in the DRC, as will be discussed below, Uganda, Central African Republic (CAR), and most recently in Mali. It has been demonstrated, though, that in order for a State to refer itself to the ICC, it must be a State Party, or must ‘acquiesce’ to the jurisdiction of the Court, as happened with the Côte d’Ivoire. Furthermore, accepting the jurisdiction of the ICC requires the accepting party to actually be a state, as was shown in the situation where Palestine attempted to submit to the jurisdiction of the ICC, but was deferred, due to the fact that Palestine is not a recognized State.25

The structure of the OTP itself runs according to its different functions. Broadly, the OTP is divided into three different departments that deal with matters as they progress from Preliminary Examination, to full Investigations, to legal proceedings and Trial. Each of the departments have specific roles to play in moving the process from the initial complaint stage through to the launching of a trial. The OTP investigation unit is primarily responsible for the investigation phase, and the prosecution


25 See the OTP Statement on Palestine 2012. In November 2012, Palestine was voted into the UN General Assembly as a non-member observer state (see the BBC News report ‘Palestinians win upgraded UN Status by Large Margin’, 30 November 2012). This may have implications for Palestine’s application lodged with the ICC, although this process has, as yet, not moved forward. The OTP has stated that it is still leaving open the possibility of investigations, however, the Assembly of State Parties to the ICC will have to rule on whether they accept Palestine as a state, over and above what was done by the UN General Assembly.
unit is primarily responsible for the legal proceedings. The department associated with preliminary examinations is typically the Jurisdiction, Complementarity, and Cooperation Division (JCCD).

Important to the scope of this chapter, the JCCD is tasked as the main resource for considering factors as to whether situations ought to proceed to full investigation. Understanding the JCCD decision-making process is important for understanding why some cases proceed, and others remain stagnant at the preliminary examination stage. The JCCD determines whether there is a reasonable basis for a situation under preliminary examination is to proceed with an investigation into a situation under Article 53, specifically subsection (1)(a) through (c). In particular, the JCCD considers the following three factors:

1. Jurisdiction (including temporal, material, and territorial/personal jurisdiction)
2. Admissibility (including issues of Complementarity and gravity)
3. The Interests of Justice (a test outlined in the September 2007 policy paper of the OTP)

The JCCD assesses these factors in four distinct phases. Phase one is the initial review of information that the OTP receives with regards to potential international crimes. Under Article 15 of the Rome Statute, the OTP is able to receive information, or ‘communications’, from outside sources, regarding information into potential situations involving the commission of international crimes. According to the ICC website, as of 2012, the OTP has received 9,717 communications, approximately half of which are “manifestly outside the jurisdiction” of the ICC.

Phase two of the JCCD assessment looks at jurisdiction. This includes all the different forms of jurisdiction: temporal, material, and territorial jurisdiction. Temporal jurisdiction, as discussed above, is a major reason why the ICC is not investigating any of the crimes in, for example, Guatemala.

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27 Ibid.
28 Ibid.
(where the crimes occurred in the 1980s, prior to the July 2002 time limit that the ICC functions under). Material or ‘subject-matter’ jurisdiction concerns whether the situation involves international crimes as defined under Article 5 of the Rome Statute (Genocide, Crimes Against Humanity, War Crimes, and - starting in 2017 - the Crime of Aggression). Territorial jurisdiction limits the scope of OTP investigations to the geographical territory of State Parties to the Rome Statute, and also includes ‘personal’ jurisdiction - where a citizen of a State Party commits international crimes, even if he or she is on the geographical territory of a non-State Party to the Rome Statute. For example, preliminary examinations in Afghanistan, Honduras, and Korea are currently in phase two of the JCCD process. Each situation is being reviewed for subject-matter jurisdiction - in other words, the OTP is looking to find enough evidence as to whether international crimes were committed in those countries. In contrast, with regards to information received from Venezuela, the OTP decided not to proceed with a full investigation, because many of the crimes alleged occurred prior to 2002 and, more importantly, because the crimes that did occur after 2002 could not be characterised as Crimes Against Humanity or in any of the other categories of international crimes.29

Phase three of the JCCD process, and most important to this chapter, is the assessment of complementarity and gravity. Assessing complementarity requires an analysis to be taken under Article 17 of the Rome Statute, looking at the willingness and the ability of the State to genuinely launch proceedings with regards to the alleged crimes (including whether there have been any prior proceedings with respect to the alleged crimes). Currently, there are three countries with matters that the JCCD is reviewing in terms of complementarity issues: Columbia, Guinea, and Georgia, see further discussions on these situations below.

Gravity, on the other hand, looks at the background of whether the alleged crimes are the ‘most serious’ crimes, and whether those ‘most responsible’ are being held to account. For example, the OTP received

29 See the 9 February 2006 Press Release from the OTP, regarding the decision not to proceed to investigations in Venezuela.
over 240 communications regarding the actions of coalition forces in Iraq.\textsuperscript{30} Besides issues concerning the fact that Iraq is not a State Party to the ICC, the OTP, in its decision not to proceed with investigations in Iraq, also listed gravity as one of the reasons they were declining to intervene. The OTP used information that they received regarding the detention, mistreatment, torture, and other possible war crimes committed by Coalition forces against Iraqis. Based on their analysis, they could only find a maximum of 20 victims where inhumane acts may have occurred. They then noted that the available information did not suggest that these acts formed a larger plan, policy or were part of a larger-scale commission of these crimes. Moreover, the OTP noted that a “key consideration [for gravity] is the number of victims of particularly serious crimes”.\textsuperscript{31} In this case, the 20 victims were of a different order of magnitude, from, for example, the conflicts in the DRC, Uganda, or the Sudan, each of which involved the wilful killing of thousands of individuals, and many more victims of other crimes.

Finally, phase four of the JCCD assessment process involves looking into the interests of justice. The Interests of Justice test comes from Article 53 of the Rome Statute, which states that the OTP shall consider whether “there are...substantial reasons to believe that an investigation would not serve the interests of justice”.\textsuperscript{32} Additionally, the basis for not proceeding due considerations of the interests of justice must take 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”.\textsuperscript{33} The OTP has also released a Policy Paper on the Interests of Justice, further attempting to define what this concept means, although there are, as yet, no situations where the Interests of Justice have been used to stop a situation proceeding to investigations\textsuperscript{34}.

\textsuperscript{30} OTP Decision on Iraq.
\textsuperscript{31} Ibid.
\textsuperscript{32} Article 53 of the Rome Statute.
\textsuperscript{33} Article 53 of the Rome Statute, subsections (1)(c) and (2)(c).
\textsuperscript{34} OTP Policy Paper, 2007. It is interesting to note that the OTP clearly states that ‘peace negotiations’ and similar things do not affect the interests of justice. This is especially true regarding the OTP stance towards the situation in Uganda and Darfur.
These four phases constitute the process that the JCCD goes through to transition a case from preliminary examination to full investigations of a situation or the decision not to proceed. It should also be noted that under Article 53(4) of the Rome Statute, the OTP retains the ability to reconsider its decision whether to initiate an investigation based on new facts and information. Ultimately, the decision to move from Preliminary Examination to full Investigations of a situation lies at the discretion of the OTP (although, under the *proprio motu* mode of investigation, investigations must be authorized by the ICC Chambers). However, given the diverse nature of the situations that the OTP investigates, it is not surprising that, as yet, there are no decisive guidelines to what exactly the thresholds are for each of the different phases of assessment. In particular, the issue of complementarity continues to be a topic that does not yet have established parameters. In what follows, this chapter looks at different outcomes related to complementarity issues, in order to establish potential patterns of decision-making.

**Complementarity in Action**

Based on the above discussion, it is clear that the principle of complementarity is supposed to work to support domestic mechanisms for prosecuting individuals suspected of international crimes. It is also, in some ways, envisioned as a cooperative principle, with mutual support being drawn from the resources and impartiality of the ICC, and the domestic State resources, which are critical for ensuring, for example, the arrest and detention of an accused. However, how the principle of complementarity has manifested in countries that the ICC has been involved in has varied. This chapter will focus on three countries that are under preliminary examination, where the OTP is assessing issues of complementarity: Colombia, Guinea, and Georgia. Each have their own particular situational contexts, although the information available about the OTP engagement in each country is variable.

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35 On 5 August 2013, the Preliminary Examination Status of the possible situation in Nigeria was upgraded by the OTP. In the Article 5 Report on the Situation in Nigeria, the OTP has found sufficient evidence that Crimes against Humanity were perpetrated in the conflict involving the Boko Haram, and the situation is now under examination for admissibility. As such, there are now 4 countries that are under a complementarity analysis.
Colombia

Colombia’s history of conflict spans over fifty years, involving disputes between government forces and armed militia groups and, at times, between different rebel groups. Primarily, the conflict has involved government forces, including the army and police, governmental paramilitary forces called the Autodefensas Unidas de Colombia (AUC), and rebel groups such as the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejercito de Liberacion Nacional (ELN). Some of the alleged crimes include murder, sexual violence, the use of child soldiers, forcible transfer of populations, torture, disappearances, among other atrocities. One of the most infamous aspects of the conflict was the use of ‘false positives’, acts by government forces of killing civilians and dressing them in rebel regalia in order to bolster success rates and receive monetary awards, which occurred predominantly between 2004-2008.36

Colombia has been a State Party to the Rome Statute since August 2002. However, in addition to ratifying the Rome Statute in 2002, Colombia also made a declaration under Article 124 of the Rome Statute. This section of the Rome Statute holds that States are able to make a declaration not to submit to the jurisdiction of the ICC with respect to crimes under Article 8, relating to war crimes, for a period of up to seven years.37 Accordingly, this period expired for Colombia in November 2009. The ICC continued to have jurisdiction over the crimes against humanity and genocide from 2002 onwards.

The OTP has been examining the situation in Colombia since June 2004 and, in March 2005, informed the Government of Colombia that they had information relating to possible crimes that could fall under the jurisdiction of the court38. As of September 2012, the OTP had received 114 communications under Article 15 of the Rome Statute regard situations in Colombia.

36 OTP Interim Report on Colombia 2012.
37 Rome Statute, Article 124.
38 OTP Interim Report on Colombia 2012.
With the OTP engaged in Preliminary Examinations for over 8 years, Colombia represents the clearest example of the principle of complementarity at work. The OTP, in its 2012 interim report, clearly highlights that there are good information sources to show the likelihood that crimes against humanity and war crimes (post-2009) had been committed in Colombia. However, despite this information, the case has not moved forward to full investigation of the situation, as the OTP continues to monitor the ongoing domestic investigations and prosecutions.\(^{39}\) In particular, the OTP notes that there are many ongoing investigations and prosecutions relating to the situations that could fall under the jurisdiction of the ICC. The main consideration, at this point, is whether the proceedings meet the standard of genuineness, and whether the domestic proceedings are accounting for those most responsible for the most serious crimes. There are two important factors that the OTP highlights as showing that, at least for the time being, the Colombian proceedings are genuine: the effectiveness and scope of ongoing Colombian proceedings, especially with regards to the enactment of Law 975 of 2005, the Justice and Peace Law (JPL), and the indication that the ongoing Colombian proceedings involve those most responsible for the most serious crimes.

The Justice and Peace Law, enacted by the Colombian Government in 2005, was a measure to move the peace process forward, especially through encouraging the demobilization of rebel troops. The JPL is used as a transitional justice framework, meant to promote truth, justice, and reparations, and offers perpetrators the benefits of reduced sentences for coming forward and being convicted. So far, the JPL system has seen 4,714 individuals nominated to participate, with 680 charges being laid against former paramilitary members, and a total of 14 convictions\(^{40}\). In addition, because of the facts revealed through the JPL system, a further 10,780 cases have been undertaken through the ordinary criminal justice system, related to evidence gained from JPL hearings, with 23 individuals being convicted thus far. In particular, the JPL proceedings have highlighted the agreements between paramilitary groups and public officials, including

\(^{39}\) Ibid.

\(^{40}\) Ibid.
politicians and congressmen (a phenomenon known as *parapolíticos*)⁴¹. There have been investigations and prosecutions of these public officials engaged in agreements with paramilitary groups, including some who have been investigated for crimes against humanity. The OTP also noted that there have been extensive legal proceedings concerning the conduct of the Colombian army, with over 200 recorded convictions of members of the army, including commissioned officers.⁴² The OTP also noted that there are over 1,600 cases currently under investigation involving the actions of members of the Colombian army.

With all the ongoing investigations in Colombia, the OTP took note of whether the domestic investigations and prosecutions were capturing those most responsible for the most serious crimes. The OTP found that the large majority of senior leaders for the rebel and paramilitary groups had been investigated and prosecuted, also noting that a large number of them had been extradited to the United States of America for proceedings involving drug trafficking.⁴³ In some cases, these leaders had been convicted *in absentia*, although the OTP did not express any issues with this, subject to the execution of the sentences of those convicted.⁴⁴ However, with respect to the proceedings against governmental actors and the army, the OTP concluded that “while numerous members of the armed forces have been investigated, for crimes that fall under the jurisdiction of the ICC, and disciplinary measures, criminal convictions, and prison sentences issued, the proceedings have not focused on the responsibility of those at senior levels for the occurrences of those crimes”⁴⁵. It is the appearance of this possible double-standard that has led the OTP to continue its preliminary examination and monitor the situation in Colombia. This is particularly relevant because the Rome Statute specifically stipulates the importance of prosecuting individuals who are primarily responsible for the most serious crimes of international concern. The OTP has called on the Colombian government to work towards effective prioritization of cases, especially with regards to the investigation and prosecution of...  

Given the OTP stance on Colombia, one can propose it as a positive example of how complementarity works in practice. There is information sharing between the Colombian authorities and the ICC, which has led to the successful investigation and prosecution of many of those most responsible for some of the most serious crimes that occurred. Indeed, some commentators argue that the ICC involvement, without full investigation and trials, has been one of the factors that have led to the commencement of historic peace talks between the Government of Colombia and the leaders of FARC in October 2012. However, there are still several concerns about the lack of progress through domestic mechanisms at effectively prosecuting those most responsible. In a presentation regarding a study done on complementarity issues in Colombia by Kai Ambos and Florian Huber, the two authors argue that the lack of progress in successful and effective investigation and prosecution of the highest ranking officials of the paramilitary, government forces, public officials, and businessmen should justify OTP intervention. In particular, they note that the extradition of senior rebel leaders to the USA precludes their participation in the JPL process, and effectively removes them as an information source towards greater understanding of the conflict, as well as providing potential evidence for further investigations and prosecutions. They also express concern of the fact that the majority

46 In his June 2009 Statement on Colombia, Philip Alston, then the UN Special Rapporteur on Extrajudicial Executions, described the phenomenon of ‘false positives’ as extrajudicial executions of civilians by Colombian security forces. Civilians were often lured by security officers ‘recruiters’, then they were executed, and dressed in guerilla uniforms, in order for the security forces to gain financial compensation.


49 Ibid.
of legal proceedings have focused on mid to low-level perpetrators, and that there has been limited progress in the investigation and prosecution of those most responsible for the most serious crimes especially, it can be added, in the cases of false positives. Consequently, they note that because of the lack of progress, “it is becoming increasingly difficult to justify a (selective) non-intervention of the ICC”\textsuperscript{51}. It can also be noted that the use of in absentia trials as a method of prosecution are also controversial, especially given the fact that the accused individuals were not present at trial, and therefore unable to make a full answer and defense to the charges\textsuperscript{52}.

**Guinea**

The situation in Guinea revolves around the massacre, rape, and inhumane treatment of protesters representing the opposition party to the Guinean government. According to a report by Human Rights Watch\textsuperscript{53}, unarmed protesters were gathered in a stadium in a pro-democracy demonstration, and were attacked by members of the presidential guard. From the attack, over 150 people were killed, 1,400 people were wounded, and there were at least 60 reported cases of sexual violence. In some instances, there was also forcible detention, which included ongoing acts of torture, sexual violence, and inhumane treatment. The report notes that, immediately after the attack, members of the presidential guard closed off the stadium to health care workers, and allegedly buried many victims in mass graves\textsuperscript{54}. The report also notes that there was directed violence after the Conakry massacre, mainly directed at communities known for supporting the opposition party.

\textsuperscript{50} Ibid.

\textsuperscript{51} Ibid. They also note this is the case, “notwithstanding the Prosecutor’s apparent personal preferences” not to intervene (as highlighted by a 2010 interview that Luis Moreno Ocampo gave in the Colombian newspaper El Tiempo).

\textsuperscript{52} Although, at least some international standards would support the use of in absentia trials, as shown in the Special Tribunal for Lebanon.


\textsuperscript{54} Ibid.
The OTP involvement in Guinea was made public in October 2009, shortly after the events that happened in Conakry in September 2009. Guinea has been a State Party to the Rome Statute since July 2003, giving the ICC jurisdiction over international crimes within its territory. From its 2012 report on preliminary examinations, the OTP notes that 19 communications were received with respect to the events in Guinea. According to the information received, the OTP concluded that there was a reasonable basis to believe that crimes falling under the jurisdiction of the ICC had been committed, possibly including wilful killing, forcible disappearance, rape and sexual violence, arbitrary detention and torture, and persecution.

In assessing admissibility, and issues of complementarity, the OTP noted that following the OTP’s announcement of the preliminary examination, the Guinean authorities had taken actions to show their preference to deal with the investigations domestically. The Guinean Foreign Minister visited the OTP in order to express the willingness and ability of the Guinean government to undertake criminal investigations, and the Guinean Chief Prosecutor formally opened the investigations in February 2010, by appointing panel of investigative judges to handle the case.

The Guinean investigation has resulted in the indictment of six individuals, including two individuals listed as perpetrators by a United Nations International Commission of Inquiry into the events of September 2009 in Conakry. The two individuals implicated are Lt. Col. Moussa Tiegeboro Camara, who was a Minister in charge of the fight against organized crime and drug trafficking, and was indicted in February 2012, and Col. Abdoulaye Cherif Diaby, the former Health Minister, who was indicted in September 2012. The OTP expressed concern that the process was being carried out slowly, although not slowly enough to warrant a finding of unjustified delay, and that the investigative judges were facing challenges with respect to financial and logistical resources for their work. However, the OTP found no reason to doubt the integrity of the process, and continues

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56 Ibid.
57 Ibid.
to monitor the situation, which remains under preliminary examination\textsuperscript{58}. The OTP has also conducted several visits to Guinea to “take stock of the investigation being conducted by the Guinean investigating judges”\textsuperscript{59}, in an effort to promote the complementary nature of the ICC and domestic proceedings. In its most recent visit to Guinea, the OTP noted that progress had been made by Guinean authorities towards the investigation and prosecution of those most responsible for the Conakry massacre, through the indictment of a ‘high-ranking official’\textsuperscript{60}. In each visit, the OTP clearly states that either the Guinean authorities will investigate and prosecute, or the ICC will step in - “there is no third option”\textsuperscript{61}.

According to the International Federation for Human Rights (FIDH), the situation with respect to the September 2009 massacre has been mostly positive. In their 2012 report “The Fight Against Impunity in Guinea: Progress Observed, Actions Awaited”, FIDH notes that the charging of the two high-ranking officials has “ignited hopes for justice amongst victims in particular, and the wider population in general”\textsuperscript{62}. In addition, there has been a further indictment of Colonel Claude Pivi, head of the President’s Security Service.\textsuperscript{63} These developments, along with the visits by the OTP, have also contributed to the overall success of the judicial investigations. Perhaps as a by-product of the success of the investigations into the September 2009 incident, the Guinean authorities have also begun investigations and prosecutions relating to human rights violations in 2007 and 2010, both of which have resulted in the indictments of high-ranking officials.\textsuperscript{64} It would seem, then, that the Guinean justice mechanisms have, for the time being, been bolstered by the successes with the September 2009 case, and have made strides towards ending impunity more generally within the country.

\textsuperscript{58} Ibid.
\textsuperscript{59} November 2010 ICC Press Statement by Fatou Bensouda (then Deputy Prosecutor).
\textsuperscript{60} April 2012 Press Statement by Fatou Bensouda (then Deputy Prosecutor).
\textsuperscript{61} Ibid.
\textsuperscript{64} Ibid.
Georgia

The involvement of the OTP in Georgia surrounds the events in August 2008. Owing its roots to the dismantling of the Soviet Union, the conflict between Georgia and South Ossetia degenerated into armed violence between the two governments, and became and international conflict, due to the involvement of the Russian Government and armed forces. During the conflict, many international crimes were allegedly committed, by all sides. A cease-fire agreement was signed on 12 August 2008, although it is alleged that further human rights violations and potential international crimes were committed afterwards as well. The conflict reportedly resulted in the forcible displacement of 30,000 ethnic Georgians from South Ossetia, which falls under the category of a crime against humanity, unlawful attacks against civilians and peacekeepers, destruction of property, pillage, and Torture, which fall under the category of war crimes.

The OTP began its preliminary examination into Georgia on 14 August 2008, shortly after the cease-fire agreement was signed. The OTP received 3,854 communications in relation to the situation in Georgia, by far the largest number of communications for a given situation. Georgia had ratified the Rome Statute in September 2003, giving the ICC jurisdiction over crimes committed on its territory relating to the 2008 conflict. Based on its analysis of jurisdiction, the OTP has concluded that the subject-matter of the alleged crimes that occurred in the 2008 conflict fall under the jurisdiction of the ICC.

With the preliminary examination now at the admissibility stage, the OTP has noted that both Georgian and Russian authorities are conducting separate investigations into the possible crimes committed during the 2008 conflict. However, given the adversarial nature of the two governments with respect to this incident, it seems that there is no

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66 Ibid.
67 Ibid, although the OTP notes that there is not enough information to form a reasonable basis to believe crimes were committed against Russian Peace keepers.
68 Ibid.
cooperation that is leading closer to genuine legal proceedings. The OTP notes that, on 18 October 2011, the Russian Embassy in The Hague informed the Office that the Russian authorities were genuinely unable to conduct further proceedings owing to the lack of cooperation of the Georgian government and the immunity enjoyed by senior foreign officials who might be subject to prosecutions. On 18 June 2012, however, the Russian authorities specified that the “refusal of Georgia to provide legal assistance and immunity of senior officials of foreign States, do not – in accordance with the rules of criminal procedure of the Russian Federation – constitute grounds for termination of the said criminal case. Thus, the national proceedings with respect to this criminal case are carried on.”

With respect to the Georgian investigations, the OTP stated in its December 2011 updated report that the Georgian government confirmed to the OTP that it was “mindful of its international obligation to investigate and prosecute grave crimes that concern the international community as a whole and resorts to its best efforts to comply with those commitments.” The Government further announced its intention to submit additional information and material to the OTP within a few months, specifically focusing on the “ethnic cleansing case.” As of now, this submission has yet to be received.

Both of these responses seem to show that the governments involved are willing to lead their own investigations into the alleged crimes. Yet, as the OTP notes, despite the fact that they both seem to be conducting relevant proceedings, neither country has yielded any results after four years. Furthermore, Russia has alleged that Georgia has been blocking its ability to investigate, although clearly backtracking from the statement that Russia is ‘genuinely unable to conduct further proceedings...’ Likewise, the Georgian authorities have stated that an obstacle to their investigations is due mainly to an inability to access the crime scenes, as well as lack of cooperation from Russia and South Ossetia. The OTP seems cognizant that these responses seem to suggest that the domestic investigations may be

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69 Ibid.
70 Ibid.
71 Ibid.
for the purposes of shielding, are not impartial or independent, or are due to a substantial inability of the states to obtain the accused or necessary evidence to carry out the proper proceedings. Additionally, the OTP notes that the non-actions of both states could amount to an unjustified delay, which would also give authority to the OTP to launch investigations into the situation. This is a clear case where complementarity is not particularly taking hold, and is perhaps hindered by the fact that there are not just multiple actors, but multiple States involved in this conflict. The OTP has noted that it needs further information to show whether the supposed investigations have actually halted, and whether the identified obstacles can be overcome through mutual legal assistance.

**Complementarity in Contrast**

The three preliminary examination situations that are currently under ‘complementarity analysis’ by the OTP give several insights into the practical use of complementarity and the role of the ICC to end impunity. Particularly in Guinea and Colombia, there is a tangible sense that the OTP has played a role in promoting or supporting the domestic investigation and prosecution of crimes that fall under the ICC’s jurisdiction. Colombia seems to be embarking on a hopeful peace processes, and Guinea’s investigations, despite slow progress, seem to have been a catalyst for further investigations to end impunity. However, the challenges in the Georgian situation, as well as the concerns expressed about the lack of prosecutions of high-ranking officials in Colombia, also show the delicate balance that the principle of complementarity works under.

It is also noteworthy to point out that in each case where complementarity is still being analyzed, the OTP has given each situation a very long time, from 3 to 8 years since the initial review of communications, to prove or disprove its willingness and ability to genuinely investigate the alleged crimes. In contrast, in the two examples discussed below, the preliminary examinations lasted no longer than two months, from the time of referral.

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72 Ibid.
73 Ibid.
74 Ibid.
to the time of launching a full investigation. In the DRC, this was partially the result of a ‘burden sharing’ agreement between the OTP and the Government of the DRC. In Libya, however, the situation is less clear.

What this section aims to do, then, is to look at the contrasting situations in the DRC and Libya, from the perspective of complementarity, and especially the OTP’s policy of promoting domestic prosecutions through positive complementarity. Both countries provide insights into the differences of OTP intervention, as well as the effects of ICC involvement with respect to the broader goal of ending impunity and promoting domestic competence to prosecute international crimes.

The Democratic Republic of Congo

The DRC was the first country that the ICC investigated, and continues to be a situation that occupies a large portion of the ICC’s resources. According to the OTP, the DRC had been under close analysis dating back to June 2003. The situation was ‘self-referred’ by the DRC in March 2004, and the OTP opened a full investigation into the situation in June 2004. The DRC has been a State Party since it ratified the Rome Statute in April 2002.

There is a degree of complexity to the conflict in the Eastern Provinces of the DRC which has been ongoing since 1999, and despite a brief respite in 2009, seems to have been reignited recently. The conflicts have been described as ‘international in character’, and UN reports have indicated that the conflict in Eastern DRC has involved actors from the DRC, Rwanda, and Uganda, including other ICC suspects such as Joseph Kony and other members of the Lord’s Resistance Army. The OTP investigations initially focused on the events surrounding armed ethnic

conflicts between the Hema and Lendu communities in the Ituri district. From their investigations there, the OTP has launched cases against four individuals: Thomas Lubanga, Bosco Ntaganda, Mathieu Ngudjolo, and Germain Katanga. The alleged crimes committed focused heavily on the recruitment and use of child soldiers, as well as other war crimes and crimes against humanity arising out of the events in Ituri. It is noteworthy that, effectively, Lubanga and Ntaganda allegedly acted on one side of the conflict (Hema), and Ngudjolo and Katanga retaliated on behalf of the other community (Lendu).

In addition to the cases launched surrounding the issues in Ituri, the OTP also launched two cases, against Callixte Mbarushimana and Sylvestre Mudacamura, for their roles in attacks on civilians in the Kivu Provinces of Eastern DRC. Mbarushimana was the alleged supreme commander of the Forces Démocratiques Pour la Libération du Rwanda (FDLR), an offshoot of the forces that escaped from Rwanda, following the civil war that broke out during the 1994 genocide. Mbarushimana was the alleged executive secretary of the FDLR. It was claimed that in 2009, the FDLR launched attacks against civilians in the Kivus, in order to raise their ‘status’, and legitimize their goals on the international stage. In the process, war crimes and crimes against humanity were committed. Mbarushimana was apprehended by French authorities and handed over to the ICC; however, the OTP was unable to satisfy the ICC Chambers that there was a reasonable basis to proceed to trial, and his charges were not confirmed. The other suspect, Mudacamura, is still at large.

From the outset, the OTP involvement in the DRC has been complicated and challenging. Initially, the process unfolded smoothly, as the DRC authorities apprehended and surrendered Lubanga, Katanga, and Ngudjolo to the ICC. However, due to procedural issues, cases against them, especially in the Lubanga case, nearly stopped before proceeding on any substantial points. Lubanga was eventually convicted of the recruitment,

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78 See the OTP webpage on the Situation in the DRC, online: http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200104/Pages/situation%20index.aspx.
conscription, and use of child soldiers, and has been sentenced to 14 years imprisonment. It is important to note that the conviction and sentence are currently under appeal. Ngudjolo was acquitted and released from custody. As of the time of writing, the verdict on the Katanga trial is still outstanding.

More importantly, the case against Ntaganda has not been able to proceed, as he has not been apprehended. Since the release of his arrest warrant, Ntaganda has moved from his former position as second-in-command to Lubanga, to a separate rebel group. In 2009, he and several of his men were integrated into the Congolese army, as part of a peace process between the rebel groups and the DRC government. At the time, Ntaganda declared his freedom to be essential to the peace in the Kivus, and the DRC authorities did not pursue apprehending him to face his charges at the ICC. Since then, Ntaganda led a mutiny in 2012, and joined forces with other rebel groups to form what is now known as the M23. This has led to a significant increase in violence in Eastern Congo, and further human rights violations, including possible international crimes.

The situation in the DRC, and the involvement of the ICC in attempting to bring various actors in the ongoing conflicts there, provide an interesting counter-example to the complementarity situations describe previously. In particular, there are two specific issues that the DRC situation highlights - the effects of ‘self-referral’ on preliminary examinations, and especially considerations of complementarity, and the effects of ICC cases, once launched, on the domestic situation.

As is noted in the OTP press statement on the decision to open an investigation in the DRC, the ‘self-referral’ of the DRC was not an isolated event. Indeed, it was accomplished through open solicitation by the OTP. In order to assist the OTP in launching a full investigation, the DRC referred its situation to the ICC. The OTP refers to these types of situations as ‘burden sharing’ agreements, where the OTP is given the task of investigating those most responsible for the most serious crimes, and the

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80 Ibid.
81 Ibid.
82 See the OTP 2009 Prosecutorial Strategy.
State is given support to investigate and prosecute the low and mid-level perpetrators. It should be noted that this ‘self-referral’ also meant that the OTP did not need to seek prior approval from the ICC chambers to launch a full investigation. In addition, it has been noted that self-referrals are also treated as ‘waivers of complementarity’ in the preliminary examination process, as the State is effectively declaring itself unwilling or unable to genuinely prosecute a situation. This would ‘fast track’ a situation through preliminary examination (provided the situation met other jurisdiction, admissibility, and interest of justice requirements). On its face, the idea of ‘burden sharing’, in the context of self-referral seems exactly in line with the concepts behind the idea of ‘Positive’ or ‘Proactive’ complementarity - that idea that the ICC would move forward with its purpose of plugging the impunity gap, while at the same time empowering domestic competency to prosecute international crimes. This was essentially how the situation played out, with the Congolese authorities apprehending and submitting Lubanga, Ngudjolo, and Katanga to the ICC. However, with the DRC’s refusal, or inability, to apprehend and turn over Ntaganda, it is no longer clear that the ‘burden’ is being equally shared.

More recently, in a curious turn of events, Ntaganda somehow turned himself into authorities at the USA embassy in Kigali, Rwanda. This is significant for three reasons. First, he turned himself in willingly, specifically for the purpose of being transferred to the ICC. Second, he turned himself in via an embassy of a country that does not support the ICC (the USA), in a country that has openly criticised the work of the ICC (Rwanda). Finally, and despite the previous reasons, he was promptly delivered to the ICC by the USA. While this is a positive development for the OTP’s work in the DRC, the motivations of not only Ntaganda, but also the USA and Rwanda warrant further scrutiny.

Following from this issue of ‘self-referral’ and ‘waiving complementarity’, though, it unclear as to whether ICC interventions have had a positive effect on the situation and conflicts in the DRC. As noted by Human

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83 See Kress, at note 24.
Rights Watch, the engagement of the ICC in the DRC has led to greater awareness that, for example, the recruitment and use of child soldiers is a criminal offense\textsuperscript{85}. Despite this, however, there are widespread reports of the recent resurgence in recruitment of child soldiers, due to the rise of M23\textsuperscript{86}. In particular, the initial refusal of DRC authorities to apprehend Ntaganda, it can be argued, has directly led to further hostilities in the region. Furthermore, Human Rights Watch has expressed concern that the OTP investigations have not been as successful at focusing on ‘those most responsible’, especially alleged perpetrators in the DRC government, and individuals intervening in the crisis from Uganda and Rwanda. Indeed, in his press statement regarding the cooperation between the OTP and the DRC government, the former ICC Prosecutor Luis Moreno Ocampo also suggested that corporations involved in resource extraction in Eastern Congo who were implicated in contributing to the conflict, could also face criminal charges at the ICC; however, none of these have come to fruition. That being said, the situation in the DRC is incredibly complex, likely involves multiple cases of international criminal offences, and continues to be a conflict situation. In a response to an interview Ocampo mentioned\textsuperscript{87}, once the ICC launches a full investigation into a situation, it does not go away, and in some respects, “there is no rush”. In some respects, the urgency for more charges and warrants, as seems to be expressed by organizations like Human Rights Watch, tends to belie the role that the ICC plays in conflict. For example, under a broad reading of the 2009 Prosecutorial Strategy, the OTP considers itself, in some ways, outside of conflict zones. In any event, we will have to wait and see what the long term effects of the ICC involvement are in the DRC, and how it contributes to, or hinders, transitions towards peace in the Eastern DRC.

**Libya**

The situation in Libya is one of the most recent issues where the ICC has launched a full investigation. On February 2011, the UNSC adopted Resolution 1970, which referred the situation in Libya (which is not a State

\textsuperscript{85} HRW, Unfinished Business, above at note 70.

\textsuperscript{86} Ibid.

\textsuperscript{87} In the documentary ‘The Prosecutor’, by Barry Stevens, accessible at http://www.nfb.ca/film/prosecutor/trailer/prosecutor trailer.
The situation in Libya surrounds the political upheaval that occurred in February 2011, which resulted in the de facto leader of Libya, Muammar Gaddafi, and his administration, being overthrown by armed militia. Inspired by the so-called ‘Arab spring’ events occurring in Tunisia and Egypt, large scale pro-democracy protests occurred in early 2011, with increasingly violent repercussions. Eventually, armed militia began to organize themselves in Benghazi, leading the Gaddafi forces to begin systematic attacks on towns and cities perceived as being ‘pro-militia’. UN representatives accused the pro-Gaddafi forces of using cluster bombs against civilians during their crackdown on the rebel forces. Eventually, the international community became involved, and began launching airstrikes against the pro-Gaddafi forces, as a measure to ‘prevent further civilian casualties’. Eventually, the rebel forces succeeded in capturing Tripoli, and eventually the conflict ended with the rebels seizing control of the country, and Muammar Gaddafi’s death. The internal conflict lasted from early February 2011 to mid-October 2011.

The situation was referred to the ICC at the very outset of the conflict in Libya, and the decision to proceed to full investigation also occurred in the midst of ongoing attacks by both armed and pro-Gaddafi forces in Libya. In the OTP’s December 2011 Report on Preliminary Examinations, it was noted that the situation in Libya had met the criteria for opening an investigation, due to “security forces [shooting] at civilians demonstrating against the regime” and because “scores of former political prisoners, opponents, and journalists had allegedly been arrested by Internal Security” in addition, the Report noted that it had not found any genuine national investigation or prosecution of the persons or conduct related to the OTP’s investigations. The OTP applied for, and was granted, arrest

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88 This information is sourced from the BBC timeline on the Libya Conflict, online at: http://www.bbc.co.uk/news/world-africa-13860458.
warrants for three individuals: Muammar Gaddafi, his son Saif Al-Islam Gaddafi, the de facto Prime Minister of Libya, and Abdullah Al-Senussi, Head of Libyan Military Intelligence.

Since the OTP launched its investigations into Libya, there have been several setbacks and challenges. First, as the conflict subsided in October, Muammar Gaddafi was killed by the armed forces, effectively ending the OTP’s case against him90. Then, when Saif Al-Islam had been apprehended in Libya, it became clear that Libyan authorities were not willing to transfer him to the ICC. Instead, when the ICC sent a team of four lawyers to speak to Al-Islam, they were arrested by Libyan authorities91. Similarly, Al-Senussi was apprehended through joint France-Mauritanian initiative, but instead of delivering him over to the ICC to face the court, Al-Senussi was extradited to Libya, where he is currently in remand92.

Since then, there have been strenuous objections by the Libyan authorities to the ICC case. They have refused to hand over both Al-Islam and Al-Senussi to the ICC and the new Libyan government has lodged an admissibility challenge with the ICC Pre-Trial chamber in May 2012. Chief amongst the challenges to the ICC proceedings is the Libyan claim that the State is both willing and able to prosecute Al-Islam and Al-Senussi.93

In a December 2012 decision issued by the ICC Pre-Trial Chamber I, the ICC highlighted the steps required by the Court in assessing admissibility and by extension complementarity. The Court looks at two aspects: first, identifying whether there are concurrent investigations or prosecutions at the national level, and second, interrogating whether the State is unable

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90 Supra, at note 82.
93 Note that the ICC chambers have instructed the Libyan authorities to hand over Al-Senussi. The Libyan authorities also attempted to halt this process, due to the ongoing admissibility challenge regarding Al-Islam, but the Court has decided against them, given that the two situations are separate.
or unwilling to genuinely carry out such an investigation or prosecution.\textsuperscript{94} The Chamber judges noted that ‘is being investigated’ required the State to show that there had been steps taken towards finding evidence of the individual’s involvement with the crimes. At a minimum, this includes things like “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”\textsuperscript{95}. Furthermore, the judges noted that it is the State who bears the burden of proof to show the case is inadmissible, when the State initiates the admissibility challenge, and therefore it is the State that must provide the Court with evidence “of a sufficient degree of specificity and probative value”\textsuperscript{96} to show its willingness and/or ability.

In response to this, in March 2013 Libya filed an additional brief with the ICC. In this brief, they noted that the case “is a litmus test for the credible and realistic complementarity system which fundamental object and purpose of the ICC Statute…[and] must be interpreted in light of the constraints that are likely to be faced by national judicial systems in post-conflict transitional contexts”\textsuperscript{97}. Their position stems largely from the fact that the ICC became involved in the midst of a civil war, and that now that things had settled, the new Libyan Government should be given time to set up its legal infrastructure to deal with similar cases. Indeed, one of the main positive aspects that the Libyan Government has cited to show its willingness and ability is the appointment of a new Minister of Justice\textsuperscript{98}.

In May 2013, the ICC Pre-Trial Chamber issued its decision\textsuperscript{99} rejecting Libya’s admissibility challenge. The judges held that Libya had not met its

\textsuperscript{94} \textit{The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi “Decision Requesting Further Submissions on Issues Related to the Admissibility of the Case against Saif Al-Islam Gaddafi” 7 December 2012 ICC-01/11-01/11, at para 6.}

\textsuperscript{95} \textit{Ibid} at para 7.

\textsuperscript{96} \textit{Ibid}. 

\textsuperscript{97} \textit{The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, “Libyan Government’s consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi” 4 March 2013 ICC-01/11-01/11.}

\textsuperscript{98} \textit{Ibid}. 

\textsuperscript{99} \textit{The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi “Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi” 31 May 2013 ICC-01/11-01/11.}
burden to prove its case that the situation was inadmissible. The judges several key aspects of assessing admissibility. First, they discussed the doctrine of ‘Same person, same conduct.’ This is an admissibility test that was highlighted in the Lubanga case - it holds that for a State to show that it is genuinely investigating and prosecuting a situation, it must prove, at a minimum, (1) that it is investigation the same person, and (2) that the investigations of that person are looking at conduct that touches on the same issues that the ICC has jurisdiction over (namely, international crimes). Assessing the conduct, the Chamber held, does not need to be identical to the kind of case, charges, and investigations that the OTP covers, but that the conduct covers at least the same subject-matter of the case. In this matter, the Chambers judges looked at whether there were domestic investigations, and whether those investigations were looking at the use of the Libyan State Apparatus and Security Forces by al-Islam to quell demonstrations, and to kill and persecute hundreds of civilians between 15-28 February 2011. The ICC Chambers found that while there were domestic investigations present, they were not satisfied that the domestic investigations covered the same subject-matter, as mentioned. However, they commented that they arrived at this decision due to the fact that Libya had not produced sufficient evidence (leaving open the possibility for Libya to submit further information as evidence of their investigations).

The second topic the judges discussed, after they examined the ‘genuineness’ of the Libyan proceedings, was the willingness or ability of Libyan authorities to prosecute al-Islam. In particular, the chamber judges discussed issues relevant to whether the Libyan justice system would be unable to investigate and prosecute al-Islam. After assessing the applicable legal structures, the chamber noted that, despite the existence of applicable laws, court systems, and other legal mechanisms, there was an ‘inability’ to properly prosecute al-Islam, due mostly to an inability of the authorities to obtain the accused (who was being held by a local militia in Zintan), an inability to obtain testimony (because of a lack of appropriate witness protection mechanisms), and an inability of

\[100\] Ibid, at para 133.
the accused to secure defence counsel.\textsuperscript{101} On that basis, it rejected Libya’s admissibility challenge, although it seems that there is still a possibility of Libya bringing another challenge, provided it can address the concerns raised by the Chambers judges.

The Libyan situation provides several interest points and principles with respect to admissibility. First, part of the controversy about complementarity in the Libya situation revolves around assessing the willingness and ability of a State in the midst of civil strife. Second, it raises the issue of timing and complementarity - is the OTP able to ‘repatriate’ a case after warrants have been issued?\textsuperscript{102} Finally, the Libyan response raises the more substantive legal question of whether a State is ‘willing and/or able’, simply through stating their willingness and ability, in the absence of ‘normal’ information regarding investigations and prosecutions. In other words, the case is beginning to uncover in more detail, what are the precursors and prerequisites (in terms of documentary evidence, information, and facts) that are required to actually show the ICC that a State is willing and able to investigate or prosecute international crimes. On a more political level, the Office of the Public Counsel for Defense (a body of the ICC that provides Defense Counsel for Accused, especially in cases where the Accused is unrepresented) has cited that a main reason that Libya should be found unable to prosecute is the fact that they are substantially unable to actually apprehend Al-Islam\textsuperscript{103}. Al-Islam is currently being held in Zintan, and it is believed that the local militia in the area continues to resist handing him over to the Libyan Government, in hopes that it may strengthen their bargaining power\textsuperscript{104}. The Libyan Government has claimed that it is working in agreement with Zintan authorities, to integrate the militias into the National Security Forces\textsuperscript{105}; however, this situation highlights some of the complexities of setting up a justice system in a post-conflict state.

\begin{itemize}
\item \textsuperscript{101} \textit{Ibid}, at paras 206-215.
\item \textsuperscript{102} This is something that was attempted, unsuccessfully, by the Government of Kenya for the two ICC cases in that country.
\item \textsuperscript{103} See Note 86, supra.
\item \textsuperscript{104} \textit{Ibid}.
\item \textsuperscript{105} Libyan Government submissions, supra at Note 91.
\end{itemize}
Lessons for the Complementarity Regime

What each of these country situations show is that the principle of complementarity has not, as yet, been meaningfully used in a coherent, consistent manner. This is in part due to the substantial differences between each of the situation countries - in terms of legal issues, domestic institutional structures, socio-political climate, and so on - but also is contributed to by the fact that the OTP has not engaged in its work in each of these countries in necessarily the same way. Looked at as a whole, the major question to be answered is what the role of complementarity is in the context of international justice generally. The ICC takes plugging the impunity gap as one of its most fundamental goals. However, given practical considerations (notably finances, resources, and time), it must necessarily narrow its focus and concentrate on ‘those most responsible’ for international crimes. This means that at times there will be an impunity gap for those mid and low-level perpetrators, especially in circumstances where domestic judicial systems are inadequate.

The contrasts between the situations stems from the apparent fact that the OTP is taking careful, considered approaches towards select ‘Complementarity Countries’ (specifically Colombia, Guinea, and Georgia), as opposed to the countries where it seems as if the OTP ‘rushed’ into full investigations (DRC and Libya - the ‘Rushed Countries’). These differences highlight the importance of the principle of complementarity and its position within the framework of global justice, international relations, and diplomacy. For example, a glaring difference between the ‘Complementarity Countries’ and the ‘Rushed Countries’ is the method of referral to the OTP. The Complementarity Countries are all initiated under the OTP’s own processes, whereas the situations in the DRC and Libya were referred through self-referral and UNSC referral, respectively. What this seems to have led to is a ‘fast-tracking’ of the preliminary examination stage, especially at the complementarity level where both countries, it seems, were assumed to have waived or simply be unable to investigate or prosecute international crimes. This is due, in part, to the fact that the OTP is not required to obtain approval from ICC chambers to move forward. But, as noted earlier, it also is a major reason why there is an ‘air
of partiality’ about the OTP’s actions. Why should the OTP be seemingly lenient with Colombia, which, after 8 years of preliminary examination continues to be given chances to pursue its own means of justice, despite not prosecuting those most responsible for the false positives, while Libya was not given any complementary support as it emerged from a massive conflict, and despite its expressed desires to investigate and prosecute those most responsible? This does not claim that the OTP has a double-standard. Instead, what is highlighted here is the difficulty in establishing any meaningful policy or guidelines with respect to complementarity, given the vastly different situations in Libya versus Colombia.

Another important contrast lies between Guinea and the DRC. Again, both situations stem from vastly different situations, the Guinea context relates to specific acts of violence, whereas the DRC situation refers to specific acts within an ongoing violent conflict. However, despite these contrasts, something is clear - the signs in Guinea, based in part by the complementary work of the OTP, has shifted the political and legal scene towards more accountability, without direct intervention. In the DRC, despite the direct intervention of the ICC, there seems to be less accountability, and worse, a resurgence in impunity, and the very crimes that the ICC hoped to deter - Human Rights Watch has reported that M23 has begun recruiting child soldiers again, despite the recent ICC decision convicting Thomas Lubanga of the War Crime of recruiting child soldiers. This issue is compounded by the previous fact that the DRC Government had previously refused to arrest and hand over Ntaganda to the ICC. With the growing conflict in the DRC, it is clear that the ICC, and the OTP specifically, will have to work very hard to change the culture of impunity in that State.

One of the chief issues that can be identified from the cases is that there is a lack of consistency when implementing the principle of complementarity. Given that each situation and conflict emerges in unique and challenging ways, there are still several different methods for implementing complementary actions in a consistent, well-defined manner. This lack of
consistency, it seems, may stem from a variety of different sources: over-eagerness to engage through the expedited avenues of state self-referral or UNSC referral, leniency for States that are considered to be more well-developed, over-reaction to specific global conflicts versus other ongoing conflicts, and over-politicization, both by States, and by International Organizations like the UNSC.

Regardless, the ICC, and in particular the OTP, occupies a position of power and responsibility in our global village. It is tasked with a large mandate - ending impunity - and has come up with novel ways of addressing its tasks. The Principle of Complementarity exists as one of the, potentially, key guidelines for making a noticeable impact on the judicial and legal systems in states across the globe. Consistency in application of the principle of complementarity will not only ensure that the ICC is perceived as an impartial institution, but also will allow the general public to track the effectiveness of the ICC to not only prosecute international crimes, but to build the infrastructures, competence, and ability of domestic justice systems to contribute to the overall fight to end impunity and, ultimately, to create a peaceful society.

The prosecutor has stated that a successful outcome of the ICC processes would be that there would be no trials. While the OTP has prescribed to a policy of positive complementarity, the examples a show that complementarity, in addition to being a legal issue of admissibility, is also an issue that continues to run throughout ICC engagement in a country. It is more than simply deciding who is going to prosecute whom. It is a deeper concept that, at the end, should leave the State, and the international community, more capable of handling international criminal prosecutions now and into the future.
Measured Hope:
Positive Complementarity and Accountability for Sexual Violence Crimes in Kenya

By Christine Alai
Measured Hope: Positive Complementarity and Accountability for Sexual Violence Crimes in Kenya

Abstract

Over five years since the 2007 post-election violence (PEV), more than 900 victims of sexual violence including rape, defilement, forced circumcision and other forms of genital mutilation are yet to find justice. The government of Kenya has not succeeded in initiating comprehensive or effective measures to investigate and prosecute PEV-related sexual violence crimes. The International Criminal Court’s (ICC) intervention initiated through its Prosecutor’s *proprio motu* powers and on the basis of the government of Kenya’s inaction has resulted in the indictment of the current President of Kenya, Uhuru Muigai Kenyatta, for orchestrating rape committed in the context of the violence. However, the charges of rape in this case, are limited in responsibility, geographic, temporal and substantive scope. The case leaves a wide accountability gap relative to the magnitude of rape and other forms of sexual violence crimes perpetrated during the violence. Although the government bears primary responsibility for all outstanding cases, several assessments conducted by credible institutions including the Commission of Inquiry into the Post-Election Violence (CIPEV), Human Rights Watch, Kenya National Human Rights Commission and the government itself reveal that technical, capacity, legislative and institutional gaps stand as critical obstacles to effective investigations and prosecutions for PEV-related sexual violence crimes.
This chapter explores the potential for effecting the principle of positive complementarity to address capacity needs and enhance effective domestic investigations and prosecutions for PEV-related sexual violence crimes. The chapter examines the government’s willingness to prosecute PEV crimes as a prerequisite for positive complementarity. In this regard, it determines that the proposed Special Division for International Crimes in the High Court of Kenya may present a promising opportunity if it is established with explicit, clear and targeted objectives to ensure effective investigations and prosecution of PEV crimes constituting crimes against humanity, including sexual violence crimes. This approach does not suggest that the Division’s jurisdiction should be exclusive to PEV crimes. Rather, it demands that the Division be provided with a specific mandate to hold perpetrators of crimes against humanity committed in the context of the PEV and to bring judicial closure to victims through technically sound and impartial investigations and prosecutions. The chapter explores various approaches to address identified legal, technical capacity and institutional gaps in relation to investigations, prosecutions, and victims and witnesses protection in the prosecution of PEV sexual violence crimes. It concludes that the ICC’s involvement in enhancing domestic accountability for PEV-sexual violence will be limited to the extent that cooperation safeguards its judicial independence, and the safety and well-being of victims and witnesses. The chapter highlights considerable opportunities for technical assistance, capacity building and other forms of cooperation to enhance prosecutions for PEV-sexual violence which remain to be maximised by states, the United Nations, development partners, non-governmental organisations and other actors. Moreover, the experiences of former and existing international tribunals and courts bear significant relevance in enhancing the capacity and competence of Kenya’s criminal justice system to effectively prosecute PEV-related sexual violence crimes as crimes against humanity.

BACKGROUND

Sexual violence in Kenya’s 2007 post-election conflict

In December 2007, a contested presidential election outcome triggered an
unprecedented episode of massive violence in Kenya. The Commission of Inquiry into the Post-Election Violence (hereafter CIPEV), which was created to investigate the extent, causes and consequences of the conflict, established that sexual violence was an evident yet silenced phenomenon of the conflict. The testimonies of 31 victims and reports from numerous organisations and hospitals submitted to CIPEV recounted over 900 cases of sexual violence including individual and gang rape, defilement, genital mutilation and other forms of sexual brutality perpetrated during the violence. Victims detailed how militia gangs and security officers gang raped them, pushed bottles and sticks into their private parts, and even forcefully mutilated their genital organs with machetes to gain easier penetration. Moreover, in many instances, victims were raped and abused in the presence of their children and spouses. Women and girls bore a disproportionate brunt of the sexual violence; but men and boys were also sodomized and forcefully circumcised.

Women and girls continued to experience sexual assault and exploitation in internally displaced persons (IDPs) camps where they took refuge. They were, for instance, forced to trade their bodies for sex with humanitarian workers and male camp officials in exchange for basic needs for themselves and their families including water, food and medicine.

CIPEV found that the post-election violence (hereafter PEV) was not merely a spontaneous reaction to the contested presidential election result. It

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108 ‘Commission of Inquiry into the Post-Election Violence Final Report (CIPEV)’ (2008) 237 – 268 & 348-350. Reports of incidents of sexual violence were presented to CIPEV by the Federation of Women Lawyers (FIDA), the Center for Rights, Education and Awareness (CREAW), CARE International and the Nairobi Women’s Hospital Gender Violence Recovery Center.

109 CIPEV (n 2 above) 239 & 249.

engulfed six of the eight provinces of the country and was characterized by considerably well planned and systematic attacks, including rape and forced circumcision, against individuals based on their ethnicity and perceived political affiliations. Based on its findings of organised and widespread attacks against citizens – and the conclusion by the Attorney General (hereafter A-G) and Kenya National Commission on Human Rights (hereafter KNCHR) that the violence *prima facie* revealed crimes against humanity – CIPEV advised the government to establish a special tribunal to investigate and prosecute individuals bearing the greatest responsibility for crimes against humanity committed during the PEV.

**Lack of political will to pursue accountability for PEV sexual violence**

The government has failed to implement CIPEV recommendations or to initiate any deliberate, genuine, comprehensive or effective measures to investigate and prosecute PEV-related sexual violence crimes. Over five years since the PEV there are merely inconsistent state reports and reviews indicating that only a handful of rape, defilement and other sexual assault cases have been processed through the criminal justice system.

Three attempts to create a special tribunal as recommended by CIPEV failed dismally. The first attempt was initiated through a Constitutional Amendment Bill to facilitate the creation of a special tribunal which was tabled in parliament by the former Minister for Justice, Martha Karua, in January 2009. The Bill failed to garner the required two-third parliamentary majority vote. Opposed members of parliament expressed doubt on the tribunal’s ability to conduct impartial proceedings. Subsequently, the International Criminal Court (hereafter ICC) was touted as a more transparent and viable option for accountability for PEV crimes.

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111 CIPEV (n 2 above) viii, 119, 346 - 348.
112 CIPEV (n 2 above) 303.
113 CIPEV (n 2 above) 472.
Amidst a looming ICC intervention, the succeeding Minister for Justice, the late Mutula Kilonzo, presented a second Constitutional Amendment Bill for the cabinet’s consideration in July 2009. However, the second Bill did not get past the cabinet which instead resolved to fast track reforms in the ordinary criminal justice system and enhance the mandate of the Kenya Truth Justice and Reconciliation Commission (hereafter TJRC) to deal with perpetrators of the PEV. The cabinet’s move was vehemently opposed by the Minister for Justice, civil society, chief mediator Kofi Annan, religious groups and foreign embassies. The opposing groups were emphatic that while the TJRC had the potential to catalyse healing and reconciliation it could not replace a judicial mechanism to investigate and prosecute perpetrators of PEV crimes. They also cited the judiciary and police's poor record of lack of efficiency and independence, and the slow pace of reforms in these institutions as an obstacle to using the ordinary criminal justice system to pursue accountability for PEV crimes.


118 ‘Engage TJRC but not on mayhem, mediator urges’ Standard Digital 9 October 2009 http://www.standardmedia.co.ke/?id=1144026019&cid=4&articleID=1144026019 (accessed on 3 January 2013); Kofi Annan was the chief mediator to the dialogue between the Orange Democratic Movement and Party of National Unity which resulted in the cessation of the PEV.


The TJRC was established in August 2009 pursuant to the TJRC Act of 2008. Its core objective was to establish an accurate historical record and provide recommendations for prosecution of perpetrators, reparations for victims and necessary reforms in relation to politically motivated human rights violations perpetrated between December 1963 and February 2008. The TJRC’s temporal mandate covered the PEV period but its constitutive Act was never amended to enhance its mandate to include investigation and prosecution of PEV crimes. The TJRC’s final report reports that PEV sexual violence cases formed majority of the 255 statements it received from victims of sexual violence committed in the broad context of political and ethnic clashes. However, given its lack of specific focus on PEV violations, the report does not provide disaggregated data on the specific number and nature of PEV sexual violence cases. Moreover, the report does not include specific recommendations for the investigation and prosecution of PEV-related sexual violence crimes. Nonetheless, victims of PEV sexual violence stand to benefit from the proposed reparations framework including provision of medical and rehabilitative assistance, and other recommendations suggested by the TJRC, if meaningfully implemented.

The last attempt, a private member’s Constitutional Amendment Bill initiated and tabled in parliament by Member of Parliament Gitobu Imanyara in November 2009, stalled due to lack of quorum to facilitate debate. This Bill was eventually withdrawn.

In February 2009, a team of State Counsels submitted a report to the A-G on the status of nationwide investigations and prosecutions of PEV-related crimes. The report did not include any information on the progress of accountability for cases of sexual violence despite the establishment of a Police Task Force (hereafter PTF) in October 2008 to investigate PEV

121 The Truth Justice and Reconciliation Act of 2008 sec 5(a).
124 ‘A report to the Hon. Attorney General by the team on the review of post-election violence related cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi provinces (February 2009), Annex 29 in ICC ‘Office of the Prosecutor request for authorization of an investigation pursuant to Article 15’ (26 November 2009), ICC-01/09.
sexual violence cases. The outcome of the PTF’s investigations has not been made public to date. However, the Director of Public Prosecutions (hereafter DPP) asserts that in 2009 the PTF forwarded a list of 66 complaints to his office, mostly alleging rape by security officers. The PTF suggested that the files should be closed for want of evidence, particularly due to complainants’ inability to identify perpetrators and lack of medical or other forms of corroborating evidence. In 2010, the DPP directed the police to conduct further investigations on the files, including evaluation of available materials that had potential evidentiary value such as torn clothes, underpants, and used cartridges found at crime scenes. The Police was yet to return the files to the DPP as of September 2011 and it is not clear whether the PTF’s investigations resulted in any subsequent prosecutions.\textsuperscript{125}

In March 2011 the government submitted a progress report on the status of investigations and prosecution of PEV-related crimes in support of its challenge to the admissibility of proceedings in two PEV-related cases before the ICC. The report alleged that as of March 2011 the government’s investigations had resulted in convictions in 45 cases, acquittals and withdrawals in 41 cases and pending arrest of known suspects in 25 cases of PEV-related ‘gender-based violence’ crimes. However, the report subsequently lists 47 cases resulting in convictions and 38 cases resulting in acquittals and withdrawals. Moreover, six out of the 47 cases alleged to have led to convictions are also listed as resulting in acquittals in the same report.\textsuperscript{126}

While the foregoing inconsistencies may be overlooked as simple typographical errors additional discrepancies and contradictions point to the report’s unreliability. Most striking is the inclusion in the report of cases

\textsuperscript{125} HRW (n 9 above) 20 – 21.

that are neither sexual offences nor related to the PEV, including two cases of carnal knowledge.\textsuperscript{127} Human Rights Watch (hereafter HRW) consulted 17 case files listed in the report and found that contrary to the government’s assertion that the cases had resulted in convictions for gender-based violence crimes, three had actually resulted in acquittals or convictions for lesser or entirely different charges and nine were completely unrelated to the PEV; only one of the cases happened during the PEV, but it resulted in acquittal for the sexual assault charge and conviction for robbery with violence. HRW concluded that based on its review it was difficult to ascertain whether there had been any convictions for PEV-related sexual violence.\textsuperscript{128}

**The ICC Intervention**

The principle of complementarity in the Rome Statute underscores the primary responsibility of states to investigate and prosecute genocide, war crimes and crimes against humanity (hereafter collectively referred to as serious crimes).\textsuperscript{129} The ICC can however intervene to supplement states' efforts in the event of their inaction, inability or unwillingness to investigate and prosecute individuals bearing the greatest responsibility for serious crimes.\textsuperscript{130}

Kenya became a party to the Rome Statute on 1 July 2005. Consequently, following the PEV, the ICC had concurrent and complementary jurisdiction with Kenya in relation to the investigation and prosecution of individuals bearing the greatest responsibility for the gravest crimes against humanity committed during the PEV. However, the ICC’s jurisdiction could only be triggered as a last resort, if Kenya either failed to act or demonstrated unwillingness or lack of capacity in its investigations or prosecutions.

The former ICC Prosecutor, Luis Moreno Ocampo, began monitoring the PEV situation as early as February 2008.\textsuperscript{131} But it was not until November

\begin{itemize}
\item \textsuperscript{127} *Ibid*, cases 14 & 17.
\item \textsuperscript{128} HRW (n 9 above) 25 – 26.
\item \textsuperscript{129} *The Rome Statute* para 10 of the Preamble & art 1.
\item \textsuperscript{130} *The Rome Statute* art 17.
\item \textsuperscript{131} See ICC ‘Office of the Prosecutor statement in relation to events in Kenya’ (5 February
2009 when the Prosecutor determined that the threshold for the Court’s intervention had been met due to the government’s failure – despite several undertakings – to establish a Special Tribunal or any other mechanism to investigate and prosecute individuals bearing the greatest responsibility for PEV crimes. The Prosecutor sought the authorization of the ICC Pre-Trial Camber II (hereafter PTC II) to initiate investigations on his own motion in relation to crimes committed during the PEV.\textsuperscript{132} The Prosecutor asserted that reports from CIPEV, KNCHR and several United Nations agencies among other credible sources demonstrated a reasonable basis to believe that crimes against humanity, including crimes of rape and other forms of sexual violence, had been perpetrated as part of the PEV attacks.\textsuperscript{133} On 31 March 2010, PTC II, by majority, authorised the prosecutor to commence investigations in relation to the PEV.\textsuperscript{134}

Following investigations the Prosecutor commenced proceedings in two cases against six individuals. In the first case, the Prosecutor alleged that there were reasonable grounds to believe that two prominent Orange Democratic Movement (ODM) leaders, William Samoei Ruto and Henry Kiprono Kosgey, supported by radio journalist Joshua Arap Sang were most responsible for planning, coordinating and financing the violence in Uasin Gishu and Nandi districts in Northern Rift Valley.\textsuperscript{135} The Prosecutor established that the attacks involved murder, torture, deportation or forcible transfer, and persecution of civilians perceived to be supporters of the Party of National Unity (PNU) but failed to adduce evidence of sexual violence crimes.\textsuperscript{136} PTC II, by majority, subsequently confirmed

\begin{itemize}
\item\textsuperscript{132} ICC ‘Office of the Prosecutor request for authorization of an investigation pursuant to Article 15’ (26 November 2009), ICC-01/09.
\item\textsuperscript{133} Ibid, paras 3 - 10 & 18 - 20.
\item\textsuperscript{134} ICC PTC II ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya’ (31 March 2010) ICC-01/09.
\item\textsuperscript{135} Affected areas in the two districts included the greater Eldoret area (including Kiambaa, Huruma, Kimumu, Langas and Yamumbi), Turbo, Kapsabet and Nandi Hills towns.
\item\textsuperscript{136} ICC ‘Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’ (15 December 2010) ICC-01/09.
\end{itemize}
that the evidence presented by the Prosecutor demonstrated substantial grounds to believe that William Samoei Ruto and Joshua Arap Sang bore responsibility for murder, displacement and persecution constituting crimes against humanity committed during the PEV. The Chamber however held that the Prosecution had failed to provide sufficient evidence to establish the culpability of Henry Kiprono Kosgey.137

In the second case, the Prosecutor claimed that there were reasonable grounds to believe that two prominent PNU leaders and public officials, former Head of Public Service and Secretary to the Cabinet Francis Kirimi Muthaura and Deputy Prime Minister Uhuru Muigai Kenyatta, supported by former Police Commissioner Mohammed Hussein Ali, were most responsible for planning and executing attacks against supposed ODM supporters. The Prosecutor established that the attacks were carried out by the Mungiki – an organized criminal gang – with the involvement of Kenya Police officers who deliberately failed to take any action to stop the attacks. He further asserted that the attacks included rape in Kibera, Nakuru and Naivasha, and forcible circumcision as ‘other forms of sexual violence’ in Kibera, Kisumu, Nakuru and Naivasha.138

After examination of the prosecution’s evidence, PTC II, by majority, found reasonable grounds to believe that Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, supported by Mohammed Hussein Ali were criminally responsible for planning and facilitating attacks by Mungiki against perceived ODM supporters and using their authority to ensure that the police did not interfere with the attacks in Nakuru and Naivasha.139

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137 *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang* ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’ ICC PTC II (23 January 2012), ICC-01/09-01/11.

138 ICC ‘Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali’ (15 December 2010) ICC-01/09. Other alleged crimes included murder and persecution in Kisumu, Kibera, Nakuru and Naivasha, and deportation or forcible transfer of population in Nakuru and Naivasha.

In relation to sexual violence crimes, PTC II held that the prosecution’s evidence demonstrated that rape was perpetrated as part of the attacks in Nakuru but found no evidence substantiating allegations of rape in Naivasha.\(^{140}\) The Chamber also found that the attacks included forcible circumcision of Luo men in Nakuru and Naivasha but held that such cases could not be considered ‘acts of a sexual nature’ and were more properly qualified as ‘other inhuman acts’ due to their character resulting in serious bodily harm.\(^{141}\) Further, PTC II held that while the prosecution established reasonable grounds to believe that police raids in Kibera during the violence had led to rape, it failed to provide any evidence of an existing state policy upon which the Court could examine the conduct of the police as a state organ rather than part of the \textit{Mungiki} machinery. Consequently, the Chamber held that there was no reasonable basis to link the three suspects to the police attacks in Kibera and Kisumu, including rape and forced circumcision, as alleged by the Prosecutor.\(^{142}\)

Following submission of additional evidence by the prosecution during the proceedings to confirm charges against the three suspects, PTC II, by majority, found substantial evidence pointing to Francis Kirimi Muthaura and Uhuru Muigai Kenyatta’s criminal responsibility for rape and forced circumcision perpetrated by \textit{Mungiki} in both Nakuru and Naivasha between 24 and 27 January 2008, and 27 and 28 January 2008, respectively.\(^{143}\) The Chamber reiterated its position that the incidents of forced circumcision could not qualify as sexual violence as they were ‘motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.’\(^{144}\)

PTC II however held that the prosecution did not provide sufficient evidence to establish the criminal liability of the former police commissioner, Mohammed Hussein Ali, for the inaction of police officers in Naivasha and

\(^{140}\) \textit{Ibid}, paras 17 & 26.
\(^{141}\) ICC (n 35 above) paras 27 & 34.
\(^{142}\) ICC (n 35 above) paras 30 – 32.
\(^{143}\) \textit{Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali} ‘Decision on Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’ ICC (23 January 2012) ICC-01/09-02/11, paras 257-258.
\(^{144}\) \textit{Ibid}, paras 260-270.
Nakuru. It concluded that the evidence demonstrated that the conduct of police officers was ethnic-driven and a result of unpreparedness rather than a deliberate component of the *Mungiki* attacks. In addition, the Prosecution subsequently withdrew all charges against Francis Kirimi Muthaura on 11\textsuperscript{th} March, 2013. The Prosecutor notified the Trial Chamber that there was ‘no reasonable prospect of conviction’ of Muthaura due to several developments in the period after confirmation of charges. In particular, the Prosecution cited the retraction of a significant part of incriminating evidence by a critical witness, the death of several critical witnesses or their unwillingness to testify, and lack of government cooperation with the Prosecution to secure important evidence, as key factors that would render it unable to obtain proof of charges against Muthaura beyond reasonable doubt.

Thus, the ICC proceedings in the PEV situation currently consist of two cases: the ICC Prosecution against William Samoei Ruto and radio journalist Joshua Arap Sang in the first case, and Uhuru Muigai Kenyatta in the second case. Uhuru Muigai Kenyatta and William Samoei Ruto have since been elected as President and Deputy President of Kenya, respectively, during the recent general election that was held on 4\textsuperscript{th} March, 2013. The first case does not include any charges of sexual violence committed in Northern Rift Valley during the PEV. Charges for rape committed in Nakuru and Naivasha have only been maintained in the second case against President Kenyatta. The trials are scheduled to commence on 10\textsuperscript{th} September, 2013 in the first case, and 12 November, 2013 in the second case.

**Tracing the Impunity Gap in Relation to PEV Sexual Violence Crimes**

**Limitations of the ICC intervention**

The ICC case against President Kenyatta (hereafter referred to as ‘the case’)

\(^{145}\) ICC (n 39 above) paras 224-226 & 425.


\(^{147}\) See [http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx) for a summary of the cases.
undoubtedly presents a significant opportunity to counter impunity and holds promise for a number of victims of PEV-related rape, particularly when measured against the lack of any effective domestic accountability efforts. Nonetheless, it presents a modest prospect that is seriously limited with regard to its geographic, temporal, liability and substantive scope, leaving a wide impunity gap in relation to accountability for over 900 documented and many more – possibly thousands – unreported incidents of rape and other forms of sexual violence perpetrated during the entire period of the post-election conflict.

The case only covers rape in Nakuru and Naivasha against evidence of rampant perpetration of rape and other forms of sexual violence in other parts of the country during the conflict. The Nairobi Women’s Hospital (NWH), together with its partners in various parts of the country, treated 900 victims of sexual and gender-based violence during the PEV. At least 524 of these victims were raped, with 50% being children. The victims who sought treatment at the hospitals came from varied parts of the country including Nairobi, Kiambu, Nakuru, Naivasha, Eldoret, Maukeni, Machakos and Ongata Rongai. CARE International also documented 40 cases of rape in the informal settlements of Kibera and Mathare in Nairobi and the Government Gender-Based Violence Recovery Center reported that 80% of the 184 cases of sexual violence it recorded between December 2007 and June 2008 were related to the PEV situation.\(^\text{148}\)

There is also a clear indication that the violence in the North Rift region resulted in incidents of rape despite the absence of related charges in the ICC case against Deputy President William Samoei Ruto and Joshua Arap Sang. Kitale Hospital covering Trans Nzoia East and West districts reported that it received 119 cases of rape and defilement related to the PEV while the Nandi Hills District Hospital treated three victims of rape.\(^\text{149}\) Further, in a study undertaken by The Center for Rights Education and Awareness (hereafter CREAW) in Nakuru, Naivasha, Burnt Forest and Eldoret between January and April 2008, respondents in Burnt Forest reported the highest incidents of sexual violence at 32% compared to 28% in Nakuru and 24%\(^\text{148}\) CIP (n 2 above) 244 & 247 – 248.
\(^\text{149}\) CIP (n 2 above) 51 – 52.
in Naivasha. The study also reported a 16% frequency of incidents of sexual violence in Eldoret.\textsuperscript{150}

Moreover, given the ICC’s exclusive jurisdiction over crimes executed pursuant to a state or organisational policy, some instances of opportunistic rape in Nakuru and Naivasha may not fit within the pattern of violence required to establish criminal responsibility in the case. This requirement to prove a link between alleged rape and an existing state or organisational policy has so far resulted in PTC II’s rejection of the prosecutor’s case against the police for rape which was perpetrated in the context of police raids in Kibera.\textsuperscript{151} It is also conceivable that many incidents of rape perpetrated as part of the attacks by Mungiki—and therefore properly falling within the pattern of attacks relevant to the case—will fall outside the temporal scope covered in the confirmed charges i.e. between 24 and 28 January 2008.

Reflecting the ICC’s prosecutorial policy, the case only focuses on the highest responsibility for rape in Nakuru and Naivasha. No charges have been instituted against the foot soldiers, members of Mungiki, who directly executed the rape in Naivasha and Nakuru or other perpetrators including organised gangs of Kalenjin warriors, Kenya Police and General Service Unit officers, and individuals known to victims such as their neighbours, relatives and friends who also raped, defiled and sexually assaulted victims in other regions.\textsuperscript{152}

Furthermore, the case focuses on rape, leaving out incidents of other forms of sexual brutality including insertion of bottles into the private parts of women and girls and genital mutilation of both male and female victims.\textsuperscript{153} Experts, including the newly appointed gender legal advisor to the ICC Prosecutor, Brigid Inder, argue that PTC II erred in its classification of forced circumcision as ‘other inhuman acts’ rather than ‘other forms of sexual violence’. Inder contends that the force and coercive environment as well as the intention of the acts of forced circumcision as an expression of political and ethnic domination by one group over the other qualifies it

\textsuperscript{150}CREAW (n 4 above) 22 & 24.
\textsuperscript{151}Note 39 above.
\textsuperscript{152}CIPEV (n 2 above) 252 – 260.
\textsuperscript{153}CIPEV (n 2 above) 348.
as sexual violence.\textsuperscript{154}

\textbf{Status of domestic accountability: No evidence to prosecute sexual violence crimes}

In February 2012, the DPP established a multi-agency task force to conduct a nation-wide review of PEV-related cases. The task force presented a press statement of its interim report in August 2012, indicating that it had received a total of 6,081 PEV-related files for review including 377 cases of rape, defilement, indecent assault and other forms of sexual violence. It established that majority of the cases of sexual violence cannot be prosecuted due to lack of sufficient evidence. In many of the cases, critical evidence had been lost as victims lodged complaints almost one year after the PEV when the 2008 PTF was established. The task force further observed that in majority of the sexual violence cases, victims were unable to identify their assailants and did not have any medical or other physical evidence to substantiate the allegations of sexual violence. The government reported in September 2012 that out of the over 6,000 files reviewed by the task force, only 26 individuals had been convicted for several PEV-related crimes including murder, theft, arson, participation in riots, and possession of offensive weapons among other offences. Rape and other forms of sexual violence were not included in this list leading to a reasonable conclusion that there have been no related convictions to date.\textsuperscript{155} Save for the media briefing in August 2012 and the government’s UPR report, the task force’s findings have not been made public.

\textbf{Positive Complementarity: A Prospect for Comprehensive & Effective Accountability for PEV Sexual Violence}

Complementarity in the context of the Rome Statute is understood as the principle that defines and organizes the relationship between domestic

\textsuperscript{154} ‘Plea to ICC over forced male circumcision’ Integrated Regional Information Networks (IRIN) April 25, 2011 \url{http://www.irinnews.org/Report/92564/KENYA-Plea-to-ICC-over-forced-male-circumcision}.

courts and the ICC with regard to jurisdiction over serious crimes. A central aspect of complementarity under the Statute is its recognition that states bear primary responsibility for the prosecution of serious crimes and of the ICC as a supplementary court with authority to intervene in exceptional circumstances, particularly when states fail or are unwilling or unable to fulfil their primary obligation. The ICC’s jurisdiction within this framework connotes a passive approach to complementarity – where the court takes no proactive steps to prosecute serious crimes except in situations of state failure. Recent developments related to the court and international community’s interpretation of the principle of complementarity have however challenged the notion of a passive ICC.

The OTP, adopted a positive approach to complementarity in its prosecutorial strategy in which it construed its mandate to extend beyond a reactive response to state failure, and undertook to proactively engage in encouraging states and cooperating with national and international actors to ensure genuine accountability for serious crimes. Nonetheless, legal questions have arisen with regard to the OTP’s ability to implement this approach. Paul Seils, an international criminal law expert, argues that the OTP has no legal basis to engage in domestic prosecution efforts as its duty ‘is to assess the willingness and ability’ of such efforts and ‘not to make states willing and able’. Seils contends that the OTP’s engagement in domestic prosecution may raise legal complexities, especially in situations where admissibility is challenged.

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Moreover, the OTP has been unable to achieve its promise of proactive engagement with national authorities to advance domestic prosecutions and has mainly used active monitoring of situations where serious crimes have occurred – some more vigorously than others – as a form of asserting pressure on states to initiate domestic proceedings. However, this approach has failed to elicit any effective responses to date.\textsuperscript{161} In fact, majority of the Court’s positive complementarity-related activities have been implemented through the offices of the Presidency and Registry rather than the OTP. Besides, the Court’s activities have been related to enhancing the capacity of local agencies to facilitate ICC’s proceedings – with the understanding that such enhanced capacities have the potential to positively impact domestic efforts – rather than direct support to specific national accountability projects or proceedings.\textsuperscript{162} As such, it is the accepted convention that the ICC can only play a limited role in supporting domestic prosecutions within the context of implementing its core judicial mandate.\textsuperscript{163}

Although the ICC’s (limited) support remains critical, it cannot suffice to effectively achieve complementarity, more so in contexts where states require direct technical and financial assistance to effectively investigate and prosecute serious crimes. Cognisant of this reality, the ICC Assembly of State Parties (hereafter ASP) resolved to ensure that states, development partners, and other international actors including non-governmental organisations (NGOs), play a significant role towards enhancing the capacity of states to effectively prosecute serious crimes.\textsuperscript{164}

\textsuperscript{161} Hall (note 53 above) 1035 – 1048.


\textsuperscript{164} ASP ‘Resolutions & declarations adopted by the Review Conference: Resolution RC/
Thus, the emerging model of positive complementarity that is envisaged to involve the ICC’s limited support to domestic efforts within the context of its judicial mandate, and robust engagement by states, donors, international agencies and NGOs, offers a valuable tool to facilitate and directly assist the government of Kenya to enhance the capacity of national authorities to effectively investigate and prosecute PEV-related sexual violence.

**Willingness and inability: Prerequisites for positive complementarity in Kenya**

Positive complementarity is contemplated in contexts where states are willing but lack the capacity to investigate and prosecute serious crimes. The High Commissioner for Human Rights, Navanethem Pillay, supported this view during deliberations on complementarity at the ICC Review Conference in 2010. Pillay stated that the Office of the High Commissioner for Human Rights (OHCHR) would be ready to provide support and assistance to states that were unable to prosecute human rights violations due to lack of capacity, but would *encourage* states that intentionally failed to prosecute such violations to do so.\(^{165}\) The ASP also notes that while unwillingness is one of the factors that could lead to a state’s inaction, ‘assistance and cooperation alone will not solve all issues relating to impunity.’\(^{166}\) Indeed, as can be observed from the developments within the ICC and ASP, positive complementarity is not intended for international and non-governmental actors to take over the responsibility of governments over serious crimes. States must have the political will and aspiration to find accountability for serious crimes as a precondition for the meaningful implementation of positive complementarity.

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\(^{165}\) Res.1 on Complementarity’ (8 June 2010). Paragraph 4 of the Rome Statute Preamble recognizes that the effective prosecution of serious international crimes should be ensured both through domestic action and enhanced international cooperation.

\(^{166}\) ICC Review Conference informal summary by the focal points on complementarity ‘Taking stock of the principle of complementarity’ paras 6-7 RC/11.

The government of Kenya's failure to establish a Special Tribunal as recommended by CIPEV and its 2009 and 2011 reports on the investigations and prosecutions of PEV-related crimes demonstrate a lack of genuine or deliberate state effort to pursue comprehensive and effective accountability for PEV-related sexual violence. This situation arguably makes consideration of positive complementarity in relation to domestic prosecutions for PEV sexual violence crimes a premature undertaking. Two recent developments provide a further basis for reflection on the government's willingness and inability, as prerequisites for the exploration of potential positive complementarity approaches to enhance investigation and prosecution of PEV sexual violence crimes.

**Establishing Inability**

The government has admitted in the past that its criminal justice system was in dire need of reform during the period following the PEV, hence its inability to effectively investigate and prosecute PEV crimes. It asserts that reforms in the judiciary, police, office of the DPP, and witness protection initiated following the promulgation of a new Constitution in 2010 now provides the government with the competence to effect its primary responsibility over PEV crimes. However, the 2012 interim report of the DPP-established multi-agency task force confirms the existence of technical, capacity and legislative gaps that present significant barriers to pursuing accountability for PEV sexual violence crimes. The task force concluded that majority of the 377 PEV sexual violence cases it had investigated and prosecuted were a result of these gaps.

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168 HRW (n 9 above) 45 – 59; HRW’s review of the status of investigations and prosecution of PEV crimes in 2011 highlighted serious capacity challenges in the investigation and prosecution of PEV crimes including poor police investigations resulting in lack of witnesses and acquittals, insufficient capacity among police prosecutors and overburdened state counsel, an unviable witness protection system and lack of a legal framework and expertise to investigate and prosecute international crimes. CIPEV (n 2 above) 438, 455 & 470 – 478; CIPEV had similar findings and recommended police reforms and review of the witness protection system to improve investigations and prosecution of politically instigated crimes.
reviewed could not be prosecuted due to lack of sufficient evidence. Some cases could not be processed due to lack of investigator reports, investigation diaries or statements from victims, and the police’s failure to record corroborating evidence from the victims. Moreover, the task force noted that sexual violence crimes could not be prosecuted without the evidence required to establish responsibility under the modes of liability recognised in the Penal Code and Sexual Offences Act which were the operative laws with regard to sexual crimes during the PEV. The task force suggested that the government should explore alternative approaches requiring a lower threshold of evidence to prove sexual offences including pursuing responsibility for such offences as international crimes under the 2009 International Crimes Act.

Assessing State Willingness

In November 2012, the Chief Justice announced that the judiciary had made considerable progress towards the establishment of a Special Division intended to prosecute mid-level perpetrators of the violence under the International Crimes Act of 2008. A task force of members of the Judicial Service Commission (JSC) constituted in May 2012 to explore the feasibility of such a Special Division recommended that it should be set up through the Chief Justice’s administrative authority. This approach would by-pass parliamentary legislative involvement which has in the past presented political obstacles for attempts to establish a Special Tribunal. The JSC also proposed that the division should be composed of seven judges and a special prosecutor appointed by the DPP to manage an independent team of investigators and prosecutors.


170 Ibid.

171 The ICA was enacted on 28 December 2008 and came into force on 1 January 2009, almost one year after the PEV. It makes provision for the prosecution of international crimes recognised in the Rome Statute including rape and other forms of sexual violence constituting crimes against humanity.

172 ‘Kenya Chief Justice announces special court’ Institute for War and Peace Reporting 10 December 2012 http://iwpr.net/report-news/kenyan-chief-justice-announces-
The A-G however projected that it may take up to two years for the court to be fully operational, particularly in consideration of the training and technical expertise that investigators, prosecutors and judges will require to effectively prosecute PEV crimes as international crimes.173

The proposed Special Division presented the most deliberate and promising attempt yet – albeit initiated by the judiciary – to hold perpetrators of PEV crimes accountable. However, this promise has been watered down by recent developments which indicate a lack of commitment to specifically address and bring closure to victims of PEV-related crimes. In April 2013, the Chief Justice and A-G issued a joint statement indicating that consultations on the establishment of the Special Division were at an advanced level. The CJ and A-G noted that the Division would have jurisdiction over international crimes as defined in the ICA and transnational crimes including terrorism and trafficking. However, the CJ’s statement merely indicated that the establishment of the Special Division was not intended to circumvent on-going ICC cases but failed to outline any specific objectives to ensure that the Division would comprehensively investigate and prosecute PEV-related crimes against humanity. Further, the A-G expressly stated that PEV cases would not be the ‘primary’ focus of the Division, and any PEV-related cases would be brought to the court at the discretion of the DPP.174 This position inevitably places victims of PEV sexual violence crimes in limbo because they can neither turn to the ordinary criminal justice system as it lacks the requisite legal jurisdiction and capacity to prosecute their cases nor the Special Division that does not envisage any special focus on PEV-related crimes. Moreover, with the backdrop of persistent lack of political will and inefficient investigations and prosecution of PEV sexual violence crimes by the DPP’s office, it seems


suspicious that a Special Division with potential jurisdiction over such cases would continue to defer the responsibility to the DPP’s office.

**Linking assistance to state willingness and technical and capacity needs for investigation and prosecution of PEV sexual violence crimes**

The proposed Special Division can only stand as a genuine and meaningful demonstration of state willingness if it is established with explicit, clear and targeted objectives to ensure effective investigations and prosecution of PEV crimes constituting crimes against humanity, including sexual violence crimes. This approach does not suggest that the Division’s jurisdiction should be exclusive to PEV crimes. Rather, it demands that the Division be provided with a specific mandate to hold perpetrators of crimes against humanity committed in the context of the PEV and to bring judicial closure to victims through technically sound and impartial investigations and prosecutions.

Moreover, the Division’s ability to successfully investigate and prosecute PEV sexual violence will be determined by the extent to which it can address the identified technical and capacity gaps that have so far hindered proper investigations and prosecution of PEV sexual violence. Three aspects are particularly central to achieving this objective. First, the Special Division must address the evidentiary gaps highlighted by the multi-agency review task force by ensuring competent and credible investigations including renewed inquiries into existing files, as well as initiation of new cases. In this regard, the Division must take cognisance of the complexities involved in investigating sexual crimes, and appreciate the distinctions between the evidence required to establish individual criminal responsibility for sexual offences as ordinary crimes and as international crimes.

Second, the Division should put in place mechanisms to ensure effective victims engagement in its proceedings, particularly by incorporating protective mechanisms, and recognising and facilitating victims’ participation in all phases of its proceedings. Third, the Division should
benefit from and reflect best practices and international standards established based on the experiences of past and existing tribunals and courts. A significant emerging practice relates to enforcing victims’ right to reparations in criminal proceedings. Moreover, the experience of past tribunals tasked with a similar mandate such as that of the proposed Special Division demonstrates that accountability for sexual violence crimes can only be meaningfully achieved through a deliberate gender strategy incorporated in all aspects of the tribunal’s operations.

Neither the judiciary nor the police and prosecutors have institutional experience in investigating and prosecuting massive sexual violence, let alone as international crimes, such as those experienced during the PEV. Thus, the potential for positive complementarity to facilitate technical assistance, capacity building and cooperation towards supporting the Special Division to achieve the foregoing goals cannot be understated. This section explores various approaches involving cooperation between the proposed Special Division and the ICC, states, development partners, international agencies and organisations towards bridging the impunity gap for PEV sexual violence crimes.

**Establishing a coherent gender policy in the design and operation of the proposed Special Division**

A clear and comprehensive articulation of the manner in which gender concerns will be considered in the Special Division’s proceedings and operations is indispensable to effective prosecution of sexual violence crimes. Gender consideration must not be construed as the exclusive concern for rape and other forms of sexual violence experienced by women, but rather it should incorporate analytical inquiries on how men and women variedly experienced the PEV. A gendered approach will enable the Special Division to ensure that violations that were distinctively experienced by women and men – particularly sexual violence including rape, as well as forced circumcision against men – are just as effectively investigated and prosecuted as other crimes affecting the general population such as murder and displacement. It will also ensure that the Special Division establishes enabling mechanisms such as specialized
units and internal gender advisors, and dedicates sufficient resources to achieve this outcome.

Affirming the imperative of a gender policy, Patricia Viseur Sellers, former legal advisor for gender to the Office for the Prosecutor in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), notes that while a ‘gender strategy cannot resolve all the ills of a judicial institution… it is not a luxury. Its absence is an absurdity, bordering on a grant of impunity for conduct that is criminal’.175 Sellers observes from her experience that a clear and deliberate gender strategy can significantly influence the prospects and outcome of accountability for sexual violence. During her tenure as gender legal advisor at the ICTR and ICTY, Sellers worked with the OTP to develop comprehensive guidelines on gender-integrated investigation teams; facilitated trainings for the court on investigating and prosecuting gender-based crimes; and monitored all gender aspects relating to the prosecution of sexual violence in the courts. A consistent and deliberate gender investigation and prosecution strategy during Sellers tenure at the ICTY and ICTR, including creative interpretation of the guiding laws and rules of procedure resulted in ground-breaking jurisprudence that has influenced development in international criminal law, including the Rome Statute, recognising rape and sexual violence as crimes against humanity, genocide and war crimes.176

A wealth of lessons and best practices evolving from the missteps and achievements of past and existing courts and tribunals can be mined to provide useful guidance to the Special Division on the development and implementation of its gender strategy. Experts including gender advisors, investigators, prosecutors and judges from domestic-based courts and international tribunals that have had considerable experience in investigating and prosecuting massive sexual violence crimes such as

the Special Court for Sierra Leone, the War Crimes Chamber of Bosnia and Herzegovina, ICTY and ICTR are strategically placed to support the Special Division in exploring alternatives for an effective gender strategy based on their experiences. International and local organisations that have monitored the work of such courts and tribunals can also provide useful analysis of the successes and failures of various gender approaches adopted by the courts. The United Nations (hereafter UN), international organisations, development partners and states can provide targeted financial and technical assistance to support recruitment of competent personnel, establishment of relevant units, training of court staff and judges, and establishment of relevant linkages with organisations and networks for the effective development and implementation of a court-wide gender strategy.

Investigations & prosecutions:

The foregoing assessments attest to the fact that investigations are undoubtedly a critical component of prosecuting sexual violence crimes. Ineffective investigations overseen by incompetent and biased police investigators have significantly contributed to the prevailing impunity for PEV sexual violence.177 Thus, an independent, technically competent and sufficiently resourced investigations and prosecutions mechanism or unit of the Special Division cannot be overlooked.

The identified evidentiary gaps in the 377 cases reviewed by the multi-agency task force and the need for accountability in hundreds of other cases that remain unaddressed or unreported will potentially require victims to submit original, new or additional testimonies to the Special Division. Investigators and prosecutors will require specialised training to be able to deal with the unique challenges posed by the sensitive nature of sexual violence crimes and their impact on victims, particularly in the course of obtaining statements and witness testimonies during court proceedings.178

177 HRW & CIPEV (n 65 above).
178 KT Seelinger, H Silverberg & R Mejia ‘The investigation and prosecution of sexual violence’ working paper of the sexual violence and accountability project, Human
Further, as the first instance in which the ICA may be applied to adjudicate sexual violence as constituting crimes against humanity, investigators, prosecutors and judges of the Special Division will require substantial capacity building to gain an in depth understanding of the different modes of liability, and forms and threshold of evidence required to establish criminal responsibility for international crimes as distinguished from ordinary crimes. More particularly, the Sexual Offences Act (hereafter SOA) requires proof of an individual’s forceful or coercive penetration of another’s genital organs or body to establish criminal liability for rape or sexual assault, respectively.\(^{179}\) However, to prove liability for rape and other forms of sexual violence as crimes against humanity, a prosecutor must prove the commission of the sexual crimes and link it to an existing state or organisational policy. Moreover, in the latter case, the prosecutor moves beyond identifying crimes at an individual level to establishing trends and patterns to demonstrate widespread and organised criminal activity.\(^{180}\)

**Capacity building and technical assistance from the UN, international agencies and non-governmental organisations**

The ICTR\(^ {181}\), United Nations Office of Drugs and Crimes (UNODC)\(^ {182}\), World Health Organisation (WHO)\(^ {183}\) and various other international and national non-governmental organisations have developed guidelines on successful techniques for interviewing and documenting sexual violence.\(^ {184}\) These guidelines can provide the Special Division with significant guidance. The UNODC or WHO may also provide training to the Special Division on engaging with victims of sexual violence. In addition, the UN, and other international agencies and donors could facilitate knowledge transfer

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179 The Sexual Offences Act, Chapter 3 of 2006 secs 3, 5 & 10.
180 Seelinger et al (n 80 above) 6 – 8.
183 WHO ‘WHO Ethical and Safety Recommendations for researching, documenting and monitoring sexual violence in emergencies’ (2007).
184 Seelinger et al (n 80 above).
between the Special Division and the SCSL, ICTY and ICTR which have tested various modes of liability to prosecute rape and sexual violence as international crimes. Further, as the SCSL, ICTY and ICTR completion strategies get underway the UN could explore the feasibility of ‘seconding’ experts from the three courts to provide capacity building and technical support to the Special Division on investigations, prosecution and adjudication of sexual violence crimes.

**ICC assistance**

Article 93(10) of the Rome Statute provides the most direct avenue through which the ICC may assist the Special Division in the course of its investigations. Under this provision, Kenya can, as a state party to the Rome Statute, request the Court to transmit statements, documents or other evidence it may have collected in the course of its investigations to support domestic investigations or trials for PEV sexual violence. Some of the information and evidence that could be directly relevant to the investigations and prosecution of PEV sexual violence may be found in information and evidence collected by various organs of the Court in assessing police responsibility for rape and forced circumcision in Kibera and Kisumu, respectively.

The government of Kenya has twice unsuccessfully attempted to use this provision. In the first instance, the government sought for authorisation for the OTP to submit all information and evidence gathered in relation to investigations into the Kenyan situation generally and specifically in relation to cases against the suspects before the court. In the second instance, the government additionally requested transmission of confidential un-redacted materials provided by the OTP and other parties to the court during confirmation of charges hearings. PTC II’s decisions rejecting both of the government’s requests provides useful guidance to determine the extent to which cooperation with the Court can be

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185 Request for assistance on behalf of the government of the Republic of Kenya pursuant to Article 93(10) and Rule 194’ (21 April 2011) ICC-01/09.
186 Request for assistance on behalf of the government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194’ (16 September 2011) ICC-01/09.
anticipated, particularly with regard to information gathered in the course of the OTP’s investigations on the police involvement in PEV sexual violence.

In the first ruling, PTC II held that the language of Article 93(10) anticipates cooperation in the context of concluded or active investigations or trial proceedings, and that the government had failed to demonstrate that any such proceedings formed the basis of its request. The Chamber also pointed out that the Court is not obligated to comply with a cooperation request and has the discretion to make a determination based on an evaluation of the request together with other supporting materials. PTC II further noted that the use of the term ‘Court’ in Article 93 (10) meant that a cooperation request could be made to any organ of the Court which would have the discretion to provide information in its own possession. In this regard the Chamber indicated that it could not order the Prosecutor to comply with the request but could only make a determination in relation to information in its own possession. In the second request, the Chamber held that it could not provide confidential information in its possession to the government due to reports from the Prosecutor and Victims and Witnesses Unit (hereafter VWU) indicating incidents of threats and harm against witnesses, and leaks of confidential information related to prosecution witnesses. PTC II emphasised that the safety of victims and witnesses is an obligation expressly required of the Court in consideration of cooperation requests under Article 93(10).

It therefore follows that the government may make a request for cooperation with any organs of the court including the OTP, Chambers, Victims Participation and Reparations Section and other units. However, in doing so, the government must be able to demonstrate that the cooperation is required to support on-going investigations. As such, the

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188 Ibid, para 29.
189 ICC (n 89 above) para 30 – 32.
190 ICC ‘Decision on the second request for assistance submitted on behalf of the government of the Republic of Kenya pursuant to Article 93(10) and Rule 194 of the Rules of Procedure and Evidence’ para 21 (12 July 2012) ICC-01/09.
Special Division must initiate its own investigations and can only rely on information from the court to the extent that it considers the information necessary to advance its own proceedings. Besides, even in situations where the required criterion is met, the Court is still obligated to ensure that its cooperation does not prejudice the safety and well-being of victims and witnesses. It should however be less complicated to achieve cooperation with Court in relation to non-confidential reports that may not be in the public domain such as experts’ and mapping reports among other information that can assist the Special Division in establishing the patterns and scope of PEV sexual violence.

Protection of Victims and Witnesses

The participation of victims of PEV sexual violence is critical to the success of accountability processes for several reasons. First, victims’ testimonies often form the base upon which existence of a pattern of widespread and organised violations, and mid to high level responsibility for crimes against humanity can be drawn. Second, in many instances victims witness the commission of crimes first hand and can testify in prosecution proceedings. Third and paramount, while responsibility for crimes against humanity is sought at a high level, justice for victims must remain at the core of accountability processes. Thus, victims’ experiences of sexual violence need to be heard and acknowledged throughout the process. However, in the current context of continued intimidation, harassment and threats to ICC witnesses, including potential witnesses, victims will be apprehensive to participate in domestic accountability processes unless a mechanism exists to guarantee their physical protection.191 Moreover, beyond fear of reprisals, victims of sexual violence are also concerned about the protection of their dignity.192

The government created a Witness Protection Agency (hereafter WPA) pursuant to the Witness Protection (Amendment) Act of 2010. The WPA is

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191 PTC II ‘Prosecution’s response to ‘request for assistance submitted on behalf of the government of the Republic of Kenya pursuant to Article 93(10) and Rule 194 of the Rules of Procedure and Evidence’ (6 October 2011) ICC-01/09.

192 CREAW (n 4 above) 35.
mandated to provide protection to any person who faces threat or risk by virtue of providing evidence in court or other proceedings relating to the commission of an offence on behalf of the state or otherwise, or for issuing a statement to the police or other law enforcement agency in relation to an offence. The WPA may also provide protection to a person who is at risk due to their relation to a witness, on account of a testimony given by a witness or ‘for any other reason which the Director may consider sufficient.’ However, the Act adopts a narrow threat-based approach that fails to take into consideration the privacy and psychological aspects of protection for victims of sexual violence.

The Rome Statute provides a model for a holistic protection framework. Under Article 68 of the Statute, ICC is required to protect the ‘safety, physical and psychological well-being, dignity and privacy’ of victims and witnesses during investigations and prosecutions. The Court may employ special measures including in-camera hearings and presentation of evidence by electronic or other special means for the testimony of vulnerable victims such as victims of sexual violence. The measures taken by the Court to ensure protection of victims and witnesses include evacuation, external resettlement, redaction of information identifying victims or witnesses from public documents, closed sessions, and concealing victims and witnesses identities through voice or image distortion.

A protection mechanism incorporating aspects of the existing framework and initiating a new process to address gaps may be considered. However, this approach is likely to affect the operations of the Division due to concerns over the WPA’s lack of independence by virtue of the composition of its Advisory Board. The Board consists of representatives of state security bodies including the Kenya Police that has been accused of complicity in the intimidation of witnesses.

Victims and witnesses protection is core to the Special Division’s mandate in relation to prosecuting sexual violence and establishing high to mid-level responsibility. It is also a state obligation recognised in the

194 HRW (n 9 above) 54.
Constitution.\textsuperscript{195} It therefore presents a critical area for technical assistance and capacity building. The UNODC which has provided sustained assistance to the government in the creation of the WPA should consider extending its expertise to support the formulation of a broader legal framework for protection akin to the Rome Statute model. It may also provide direct technical assistance to the Special Division in designing and implementing an effective witness protection system. Other UN agencies and international actors can also play a role in facilitating knowledge transfer from the ICTR and SCSL in relation to emerging best practices for court-run independent witnesses and victims protection programmes. While the ICTR’s experience falls short of a model that should be replicated elsewhere it nonetheless can serve as a demonstration of the pitfalls of integrating protection mechanisms as an afterthought. The SCSL on the other hand provides an exemplary illustration of the manner in which psychosocial aspects can be incorporated in the protection of victims and witnesses.\textsuperscript{196}

Given the resource intensive nature of witness protection programmes, states and other development actors should step in to support the government through direct financial and technical assistance. Possibilities for cooperation with the ICC’s Registry, particularly through its Victims and Witnesses Unit, can also be explored to the extent that any form of assistance and support provided by the Court does not compromise its judicial independence and within the parameters of the criteria established by PTC II i.e. with paramount consideration for the safety and well-being of victims and witnesses.

**Conclusion**

This chapter underscores state willingness as a determinant for positive complementarity interventions and identifies the proposed Special Division of the High Court of Kenya as a prospective avenue through which cooperation, technical assistance and capacity building can be provided to close the existing impunity gap in relation to accountability.

\textsuperscript{195} *The Constitution of Kenya* art 50(9) obligates parliament to enact legislation providing for the protection, rights and welfare of victims of offences.

\textsuperscript{196} C Mahony *The justice sector afterthought: witness protection in Africa* (2010).
for PEV sexual violence. This chapter determines that the ICC’s potential to influence domestic prosecutions for PEV sexual violence is likely to be limited to exploring opportunities for information sharing with paramount consideration for protection of victims and witnesses. The VWU may also cooperate with the Division when it is clear that its involvement will not compromise the Court’s independence. The measures discussed focus on three areas critical to enhancing accountability for PEV sexual violence including the Special Division’s overall gender strategy, investigations and prosecutions, and victims and witnesses protection. However, it should be noted that effective accountability will entail consideration of broader areas for positive complementarity including victims’ participation and reparations as envisaged in the Rome Statute and the extent to which these aspects of complementarity can be achieved within Kenya’s legal system. Moreover, with an appreciation of the limitations of criminal justice, cooperation and assistance to meet broader justice needs of victims including acknowledgement and rehabilitation must also form part of the discourse of positive complementarity for sexual violence crimes.
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Statutes

Constitution of Kenya

Rome Statute

Sexual Offences Act of 2006

The Witness Protection Act of 2008

Truth Justice and Reconciliation Act of 2008
The Challenge of Delivering the Principle of Complementarity in Uganda.

By Stephen A. Lamony
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Introduction

The engagement of the International Criminal Court (ICC) in Uganda can be traced to the country’s participation in the Rome Conference which culminated in the 14th of June 2002 signing and ratification of the Rome Statute. The situation in northern Uganda was referred to the ICC by President Yoweri Museveni in 2003.\(^{197}\) Five months later, on April 1, 2002, many civil society organisations (CSOs) working in northern Uganda attempted to halt the ICC process in the country when they wrote a letter to Luis Moreno Ocampo, the prosecutor of the ICC\(^{198}\) mentioning the principle of complementarity for the first time. The CSOs were convinced that Ugandan courts were not weak and were able to prosecute the Lords Resistance Army (LRA) rebels for the crimes which were referred to the ICC.\(^{199}\) The CSOs opined further that the prosecutor should allow Uganda’s national courts to have jurisdiction over the crimes committed by the LRA under the principle of complementarity.\(^{200}\) This opposition to the ICC process was based on the fact that referral only highlighted the crimes of one party to the conflict the LRA.\(^{201}\)

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197 President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC, press release, ICC-20040129-44.  
198 Letter Prosecutor ICC, CSOPNU, 1 April, 2004, para 2.  
199 Emphasis added.  
200 Letter Prosecutor ICC, (n2 above).  
201 Benson Olugbuo, Positive complementarity and the fight against impunity in Africa, 1
A key objective of this chapter is to interrogate the meaning, or perception of complementarity in Uganda’s context and the possibilities of positive complementarity. Furthermore, this chapter will identify the impunity gaps in the administration of international criminal justice as well as the weaknesses of the criminal justice system in Uganda. Ultimately, the chapter will conclude that every situation is unique depending on the context and hence complementarity should be approached differently in every situation.

The Principle of Complementarity in the Uganda Context

To contextualize the Principle of Complementarity in Uganda requires an understanding of what it means to the Ugandan people since the term has been freely used to mean different things to different people. According to ICC Judge Hans Peter Kaul, complementarity means “in normal circumstances, states will investigate or prosecute offences.” While, Adriaan Bos refers to complementarity as “… a bridge between international and national jurisdiction”

To settle the contestation as to the definition of the principle of complementarity, a new term – positive complementarity – has emerged that attempts to encapsulate all the elements of complementarism. A Briefing Paper issued during the Rome Statute Review Conference defines positive complementarity as “all activities and actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute without involving the court in capacity building, financial support, and technical assistance, but instead leaving these actions for states, to assist each other on a voluntary basis.” The argument advanced here is that the Office of the Prosecutor could act as a catalyst for these

203 Ibid, Adriaan Bos, in Carsten Stahn (n2 above) xvii.
205 Ibid, ICTJ (n2 above).
types of domestic prosecutions because once the state feels the threat of an investigation by the ICC, as was the case in Kenya, they will become motivated to act to avoid international sanction.

This point is well captured by David Tolbert who notes that “...the ICC cannot fill the impunity gap in situations where there are hundreds or thousands of perpetrators. National judicial structures must be afforded the support necessary to enable them to better bear the burden of ending impunity.” Tolbert’s view is seconded by Marieke Wierda, who argued that, "domestic justice, if enforced to certain standards, can carry a high degree of legitimacy, can escape some of the limitations on jurisdiction that accompany the ICC, and can also be better suited to or framed within the local context.”

The arguments for and against the principles of complementary have dominated the transitional justice scene in Uganda ever since the LRA cases were referred to the ICC. Complementarity to some Ugandan legal analysts refers two things. First, the use of both the formal and informal justice mechanisms to deal with past atrocities. In terms of formal mechanisms, Uganda domesticated the Rome Statute through the enactment of the ICC Act in 2012. Second, complementarity means learning from best practices around the world and applying the lessons learnt to the Ugandan context, since the efficacy of Transitional Justice (TJ) mechanisms are context specific. In addition, complementarity may mean building capacity of Ugandan actors in the justice sector to conform to contemporary TJ issues and apply them. For example, technical support from the ICC is more often than not required. Complementarity may also mean that the ICC has no business since Uganda can undertake judicial prosecutions for international crimes domestically.

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206 Impunity must be fought at the national level: podcast with David Tolbert, December 05, 2011. Available at: http://ictj.org/news/impunity-must-be-fought-national-level-podcast-david-tolbert
207 The Potential of Complementarity”, September 01, 2009. ICTJ; Marieke Wierda
208 Ibid
209 Email exchange with UVF Staff member (May 10 &11, 2012)
Initially, the CSOs were against the idea of the Uganda cases being referred to the ICC on the grounds that the local courts are capable of handling the matter and that the cases referred to the ICC failed to include members of the Uganda Peoples Defence Force (UPDF) who committed similar atrocities. The rallying call among the CSOs was the promotion of peace and stability and for this to occur they argued that peace initiatives should be given preeminence.

The CSOs in Uganda stressed the need for alternative justice mechanisms to try UPDF soldiers accused of committing crimes in northern Uganda. However, the problem with holding the UPDF accountable for crimes allegedly committed in northern Uganda was that most of these crimes occurred before the 1st of July 2002 and so the ICC would not have jurisdiction over these crimes. The CSOs such as the Civil Society Organisations for Peace in Northern Uganda (CSOPNU) called for a deferral of the situation in northern Uganda in the “spirit of complementarity.”

The joint paper by Uganda Coalition on the International Criminal Court (UCICC) and Joseph Angole opposes complementarity arguing that the court may not enhance the capacity of national courts to handle cases because it would be overwhelmed by too many responsibilities. It identifies a number of challenges to complementarity in Uganda, namely; inadequate victims’ facilities and a generalized concern of political interference in the activities of the Ugandan International Crimes Division (ICD). Furthermore, there is a lack of consensus on the most viable transitional justice option for Uganda. In addition, two potential impunity gaps have been identified, notably, the amnesty act. Specifically, law enforcement agents have not been collecting enough evidence of

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210 Ibid, (n2 above)
212 UCICC and Joseph Angole, “The International Criminal Court and national jurisdictions; a critical analysis of the principle of complementarity: Uganda’s experience: A paper to inform discussions during the forthcoming ICC Review conference to be held in Kampala, p.9
213 Ibid (n3 above) 11&13
214 Ibid, (n3 above) 13
215 Ibid, (n4 above)
crimes committed in northern Uganda as victims die. Furthermore, there are concerns that traditional justice processes pressurize coerced reconciliation between the victim and perpetrator under the ICC. Due to these shortfalls the authors recommend that the ICC should be a supranational court instead of a court of last resort.

Benson Olugbuo identifies the following impunity gaps. That the ICC 2010 Act is non-retro-active, and he questions whether the ICD can prosecute the LRA with the current state of the criminal justice system and if the prosecution of the LRA would be perceived as shielding the LRA from the ICC. Olugbuo proposes that the OTP should share evidence with the ICD on the LRA in order for them to be prosecuted domestically. He also recommends the participation of victims in the proceedings of the ICD and gives them the same rights as provided for by the Rome Statute.

Alexander Greenawalt notes that to the contrary, some “reconciliation process” aims to end a conflict by providing amnesty, which could shield perpetrators from punishment. Reconciliation advocated by a Ugandan traditional justice known as the Mato Oput ceremony, requires the admission of guilt through truth-telling and eventually compensation to victims, which avoids letting perpetrators avoid a form of sanction for their violations.

Jurdi raises the issue of if an accused is arrested domestically, whether the case remain admissible to the ICC? He notes that Uganda or the accused could challenge a posteriori the jurisdiction of the ICC arguing that proceedings may be carried out genuinely at the national level through for example, by setting up the ICD or domesticating the provisions of the Rome Statute.

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216 Ibid, (n5 above), 13
217 Ibid, (n6 above)
218 Benson Olugbuo (n3 above) 273
219 Ibid (n4 above) p.274
220 Ibid, (n5 above)
222 Nidal Nabil Jurdi, “The Prosecutorial Interpretation of the Complementarity Principle:..."
Mohammed El Zeidy argues that Uganda’s self-referral “implies a sort of waiver of the state to exercise complementarity.” El Zeidy questions the legal permissibility and interrogates the consequences of a waiver. He identifies the following weaknesses in Uganda’s judicial system; lack of independence and poor administration, corruption of the judiciary, police corruption, understaffed courts, lack of sufficient judicial administration, transport challenges, delayed justice suffered by victims, and denial of free legal assistance. El Zeidy sums up that the trial of the Ugandan case at the ICC is in the interests of justice.

Amidst all the opposition and criticisms of the courts operations in Uganda, in 2008, the Pre-trial Chamber of the ICC acted on its own initiative in furtherance of the principle of complementarity by examining the admissibility of the LRA case under Article 19(1) of the Rome Statute. In March 2009, the Chamber ruled that the court would continue to have jurisdiction over the proceedings in Uganda and national trials would give effect to the principle of complementarity. It could be argued that this examination was influenced by three other factors, namely: the court acting on its own initiative; creation of the Special Division of the Ugandan High Court; or the ICD is an existing division of the High Court. It has not been disbanded. Three Judges and a Registrar still continue to hold the docket of Judges and Registrar of the ICD. The court hasn’t heard many cases since the cessation of the Kwoyelo trials. Even when its jurisdiction

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224 Ibid (n3 above)112.
225 Ibid ( n4 above) 113.
226 Ibid ( n5 above) 114.
227 Ibid ( n6 above) 115.
228 Ibid (n7 above) 116.
229 Ibid (n8 above) 117.
231 Ibid, (n2 above).
was expanded to try cases of terrorism and human trafficking, not many cases have been filed before the court. In fact the only ongoing case before the court is that of human trafficking. On 16 September, 2012, the High Court convicted and sentenced Idris Nsubuga and Mahmood Mugisha, who pled guilty, to 25 years for terrorism and five years for conspiracy. Other terrorism cases referred to the court have also stalled because the suspects have petitioned the constitutional court challenging their trial. That challenge has been heard and awaits a judgment. The case against the remaining 12 suspects was pending at year’s end. Hussein Hassan Agarde is still on trial. Idris Nsubuga and Hussein Hassan also argue that the ICD does not have the jurisdiction to try them. Academic debates on the trial of the LRA and the possibility of an admissibility challenge; and opposition to the Ugandan government and the work of the ICC including halting of the ICC process in the country as explained above.

Given that the ICC was monitoring the discourse on its operations in Uganda, it is arguable that immense pressure from CSOs for prosecutions at the national level and requests for deferral of the situation could have influenced the decision of the Court to evaluate the situation in Uganda. Despite the civil society concerns and pressure on the government to invoke the principle of complementarity at that time; it is worth noting that Uganda has never attempted to reclaim the case by challenging the admissibility of the LRA case at ICC. It would indeed be contradictory for Uganda to refer the situation and thereafter challenge admissibility of the case.

It could be argued that intense advocacy and pressure from CSOs in northern Uganda for national prosecutions could have in a way influenced the decision of the ICC Pre-trial Chamber judges given that the examination was done after complaints had been raised in Uganda. This is coupled with threats of a return to war by the LRA during the 2007 Juba peace negotiations if the ICC arrest warrants were not dropped resulting in Ugandan President Yoweri Museveni accepting the idea that the ICC arrest warrants should be withdrawn, if an agreement is to be signed.232

The requirement of annexure to the final peace agreement on accountability and reconciliation that a special division of the High Court of Uganda is established to prosecute perpetrators of serious international crimes and ensure accountability also raised concerns among supporters of the ICC that national trials of the LRA personnel233 would subvert the ICC’s case in Uganda234. The establishment of the Ugandan special division also brought the reality the ICC would not remain as the exclusive mechanism for justice and that Ugandans preferred lasting peace over prosecution of perpetrators as indicated in the press release by Refugee Law Project (RLP) and Human Rights Focus and the letter from CSOs in northern Uganda to the ICC prosecutor.

Unique Situation in Uganda: Identifying the Impunity Gaps in the Administration of International Criminal Justice in Uganda

When it comes to the administration of international justice it has become evident that every situation is unique depending on the context. What is vital is to eschew a one-size-fits-all approach when dealing with situations in different countries.

Unconsolidated and Conflicting Laws

Uganda was one of the first countries to domesticate the Rome Statute of the International Criminal Court. This move was seen as a great achievement in that it closed the evident gaps that lay in Uganda’s legal system which by then, did not clearly provide for international crimes such as crimes against humanity. However, what was not foreseen was the fact there was some overlap, and indeed some gaps left open, by the creation of a whole new legal structure which did not take into consideration the previously existing one.

Before the Ugandan ICC Act, of 2010, there was some provision for crimes included in international crimes such as murder and rape in pre-

233 The WCD of the Ugandan high court was established in 2008 to try individuals suspected of committing war crimes, genocide and crimes against humanity.
234 IWPR, (n2 above)
existing laws, notably the Penal Code Act and the Geneva Conventions Act. Moreover, the ICC Act has a limited jurisdiction that only extends over crimes committed after 2002 therefore leaving an impunity gap for any crimes prior to this period, which given Uganda’s troubled history includes a significant number of atrocities. This makes it very difficult especially for the prosecutors to compile a good case against accused persons from the plethora of different laws that are scattered around, which is not entirely aligned with the broad corpus of the international criminal law.

In the recent case of Thomas Kwoyelo v Attorney General, this issue was brought to light because although this was a well-known armed militia commander of the LRA who was accused of crimes involving murder, torture and rape in northern Uganda, he could not be charged under the ICC Act since the offences alleged against him were committed in a period not under the jurisdiction of the Act.

Another gap displayed in the same case is the fact that the legal structure available to ensure prosecution also had a number of inconsistencies. The current Ugandan Amnesty Act offers blanket immunity to persons that were involved in crimes within the jurisdiction of the new ICC Act. Because of this Act, Kwoyelo was able to argue successfully, that his prosecution was an act of discrimination, before the Constitutional Court which subsequently ordered his immediate release. The issue is currently being appealed to the Supreme Court and civil society as well as government bodies concerned were engaged in discussions over the relevance of the Amnesty Act in light of new developments such as the International Crimes Division of the High Court charged with trying perpetrators of serious international crimes. Despite recommendations from CSO and a report from the Uganda Justice, Law and Order Sector (JLOS) of the Ministry of Justice on the Amnesty Act, on February 5 2012, the Ugandan government decided not to grant amnesty.  

235 "No more amnesty for LRA rebels as law expires”, new vision, 29 May 2012
The seclusion and focus on prosecution as opposed to other forms of justice

International criminal justice is an evolving area of law which seeks to incorporate all forms of justice that strive to enable a society that has been devastated by the human rights atrocities, through processes of accountability, to a state of sustainable peace. Unfortunately, currently, the only form of justice that has been provided to the victims of northern Uganda is prosecution, yet it is well known that victims of such egregious crimes require much more than court sentences in order to recover their human dignity. It is imperative that the focus be on whatever methods are available to offer to these victims the entire justice including employment of the traditional methods of justice such as Mato Oput, offering conditional amnesty to lower level perpetrators, reparation and other transitional justice mechanisms. The Justice, Law and Order Sector, transitional justice sector, is currently working on a national policy to integrate these approaches into Uganda's international criminal justice sector.

Insufficient funding

This is a general problem faced in all the sectors involved in the implementation of international justice including investigation, collection of evidence, witness protection, payment of officers etc. It is well known, or can be inferred from the budgets of the international criminal or criminalised tribunals, that prosecution of international crimes requires a large amount of funding in order to meet the high international standards. Without external assistance, a country like Uganda can only afford to support this sector to a certain extent and this may prove fatal to these prosecutions if they fail to meet international standards.

The absence of a victim and witness protection mechanism at the International Crimes Division of the High Court which is inherent in the Common Law system does not create the conditions for the effective participation of victims. This is in stark contrast with the well-endowed International Criminal Court system.
There is the absence of a reparations policy for victims specifically focused on persons who have suffered harm as a result of the conflict. This, in line with the growing norm on the right to a remedy and reparations remains uncovered in Uganda.

There are gaps in interpretation, legal defences as well as a contrast between penalties issued for crimes. For example, Uganda still has the death penalty in its statute books, but it is absent in the Rome Statute and the ICC Act of Uganda.

1. Victims in Uganda requested the Amnesty Act\textsuperscript{236} which is unprecedented. This resulted in 26,200 Ugandans benefitting from amnesty.\textsuperscript{237} Otwili and Lonergan explain that the victims in Northern Uganda want amnesty because their children are still missing\textsuperscript{238}, while others wanted peace and an end to hostilities.\textsuperscript{239} There is no consensus among the broad range of stakeholders, on whether prosecutions or transitional justice mechanisms should be used or a combination of both.

There is no clarity on the law that is applied by the International Crimes Division of the Uganda High Court. Key issues that remain to be addressed include whether Uganda will apply the ICC Act or Geneva Conventions Act? Another issue concerns retro-activity, specifically, Article 28(7) of the 1995 Constitution of the Republic of Uganda provides that “no person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence”\textsuperscript{240}. Therefore, the ICD will not be able to prosecute offences before 10\textsuperscript{th} March 2010.

\textsuperscript{236} Closing speech by Hon. Hillary Onek, Minister of Internal Affairs, during a Dialogue: The crossroads of amnesty and justice, November 11, 2011.

\textsuperscript{237} Louise Mallinder, Notes for UCICC consultation on “to abolish or keep the Ugandan amnesty act”, 4 April 2012, p.1.

\textsuperscript{238} Justice and Reconciliation Project, Issue 1-2012 Voices. “Sharing Victim-centered views on Justice and Reconciliation in Northern Uganda”, p. 10.

\textsuperscript{239} Closing speech by Hon. Hillary Onek, (n2 above).

The constitution of the republic of Uganda, 1995, p.41.
Another problem is the selective prosecution of cases involving international crimes. This is an issue which has been illuminated in the current endeavours to bring justice to Northern Uganda. The focus is solely on the LRA rebels even amidst abundant evidence pointing to the fact that the government’s own UPDF soldiers had a role to play in the devastating 20-year war. Specifically, there is evidence that the government forces also raped, murdered and looted villages during this war and for the prosecution to point fingers at one side only is rather hypocritical and worse still, it leaves these identified perpetrators free from any form of accountability.

**Structural weaknesses of the criminal justice system in Uganda**

The Thomas Kwoyelo case was before the Supreme Court of Uganda, even though there were structural challenges facing this tribunal due to the fact that it is not fully constituted to hear any constitutional appeal or applications. Ugandan lawyers are restricted from making comments on the case that might be prejudicial to the proceedings. That aside, a lot of the issues below as identified by Ugandan defence lawyers do not appear to be challenges to the Kwoyelo case per se, but rather indications of the overall structural weakness in the criminal justice system especially in the trials of international crimes. It ought to be noted that the challenges arise due to the fact that the assumption is made that since Uganda adopted provisions for international crimes legislation, all of its national proceedings must conform to those of the ICC. Yet, when the Rome Statute is domesticated; it becomes part of the law of the country which allows for prosecution of the international crimes along the provisions of this legal framework.

**Still need for training in International law and International fair trial standards for judges, defence lawyers and prosecutors.**

The ICD was created through an administrative procedure as a division of the High Court of Uganda. It is not a special court created under an act of parliament. The need for the court arose from the recommendations of the Juba peace process. Specifically, Agenda item no 3 stated that “Formal
Courts provided for under the constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes during the course of the conflict.”\textsuperscript{241} It is much the same as the criminal, civil, family or land division of the High Court. One view is that the court itself is constitutional because the laws permit the Principle Judge to create administrative structures for the smooth running of the High Court.

As regards to the law that the court will apply, first, since it is a division of the high court, it has unlimited jurisdictions in matters of international crimes. It can apply the ICC Act, the Penal Code and the Geneva Convention Act. Indeed in the Kwoyelo trials, the indictment has been brought under the Penal Code Act and the Geneva Convention Act. Note the court can also apply the ICC Act provided it relates to cases that occur after the enactment of the Act.

In terms of procedures, the rules committee developed a statutory instrument for guiding the court. The problem with the rules of procedure of the court is that they are not crafted in a manner as to ensure a fair trial and the participation of victims beyond being state witnesses. For instance there is no provision in the rules for disclosure of exculpatory evidence, full disclosure of prosecutorial statements and documents to be relied upon during trial, the rights and modes of participation of victims during the trial, witness protection et al. It was on this basis that a judge of the court, Justice Anup Singh Choudry wrote a scathing letter to the Principal Judge on a range of issues. Choudry’s take on the procedures of the ICD is that “... we are not equipped with the procedures to deal with such war crimes or international crimes and an attempt to do so would be a travesty of injustice”\textsuperscript{242}

\textbf{Unclear and uncertain government policy on prosecution of war / International crime}

There is no need for a policy on trials of international crimes. What is needed is clarity in terms of the law. The problem with the Uganda legal

\textsuperscript{241} Agreement on Accountability and Reconciliation, p6.
\textsuperscript{242} “Judge faults Ugandan war crimes court”, new Vision, July 5, 2011.
regime is the contradictions in the laws enacted by government. While the ICC Act has been passed, the government will not extend the Amnesty Law, which in essence it will be an incentive for other rebels to surrender, given the perception that trial justice is problematic in Uganda. It is worth noting that the Amnesty Law was a drawback to prosecutions of the crimes committed by rebel groups. Those are the contradictions that concern some lawyers. Secondly, the selective and political application of the laws on who to prosecute appears to be a fundamental issue that needs to be addressed. Some critics have alleged that the office of the Director of Public Prosecutions (DPP) prefers charges motivated by political considerations rather than on strict legal criteria.

**No victim participation during trials at the ICD:**

Under the Uganda criminal justice system a victim is only a witness for the state. They play no further role in the prosecution and there is no victims/witness protection system or law.

**Absence of facilities for Defence lawyers from the court.**

Legal aid and the right to representation of the accused guarantees equality before the Court. The defence lawyers could have taken state briefs, but this is constrained by the limited financial resources available to facilitate any meaningful preparations for a defense. Among other considerations - including the perception that would have been created of defence lawyers for Kwoyelo being actors of the State - the Kwoyelo defence team did not take advantage of the state briefs, nor did it take any money from the state. Defence counsel for Kwoyelo prosecuted the case pro bono in the hope that they would be able to secure independent funding, which did not materialize.

**Five key questions related to complementarity in Uganda**

**Within the complementarity framework, does the ICC plug the impunity gap? Does ICC involvement generate new impunity problems?**
The ICC’s investigations in Uganda raised a lot of debate initially. The ICC was rejected by many CSO, religious and traditional leaders due to its potential impact on peace especially with regards to the Juba peace talks initiated in 2006. However, after Ugandans witnessed the failure of commitment by the LRA leader in signing the final peace agreement, there was an emerging sense that the ICC had a role to play. There are still unresolved questions to date about indictment of only the then top five commanders, subsequently now the only top three, as an impunity issue. It could be stated that the ICC addresses the impunity gap especially with the initiation of domestic prosecutions where they are not being pursued. Some Ugandans accept that the ICC contributes towards addressing impunity. There are concerns among some sectors of the Ugandan society that state actors such as the personnel from the UPDF are still walking freely and have not been arrested. This also applies to the low ranking non-state actor perpetrators who have gotten away under the blanket amnesty. It has also been suggested that if addressing the impunity gap could be managed exclusively through legal mechanisms then the situations in Ivory Coast, Mali, Heglig-Sudan, Darfur-Sudan, Syria, Libya, and Kenya, would not happen. In all situation countries, the conflict has not ended and violence continues to be committed. In the case of Uganda, the conflict has not concluded but the violence has only been displaced to the Democratic Republic of Congo and other regional countries. Whether it raises impunity problems is a question of capacity of the ICC in terms of how far they can go in prosecution of individuals where there are national processes and where they rely on national co-operation. Hence, the ICC may not be an adequate plug but is sufficient.

**The Politics around ICC involvement- Selective Prosecution? What happens to the middle and low-level perpetrators?**

The precedent set at the ICD during the Kwoyelo trial reveals that low ranking perpetrators are supposed to be tried under domestic law. In a related development, the Director of Public Prosecutions of Uganda has indicated that Caesar Acellam, who was accused of war crimes and crimes against humanity, will not be granted amnesty due to his seniority in
command and control\textsuperscript{243}. This implies that he will most likely be prosecuted by the ICD. There is also a presumption of guilt with regard to all LRA fighters. Their ethnicity and participation (voluntarily or as former abducted children) in armed rebellion against the government of Uganda is seen as a basis for distrust or suspicion. When these former fighters try to return to the communities in which they have once lived, this stigma marks them as someone to be prosecuted for war crimes, crimes against humanity or to be closely monitored (regardless if they themselves were victims of this conflict). The presumption of guilt that exists for these former LRA rebels generates hatred and distrust in the broader communities. In the Ugandan criminal justice system, prosecutors or judges oftentimes presume one’s guilt; consequently, lives are destroyed and horrific injustices take place. The government of Uganda needs to address this problem by conducting investigations into past and current crimes of both sides of the conflict: the former LRA rebels and the UPDF soldiers.

**Where does the ICC fit within transitional justice mechanisms chosen by actors- AU policy guidelines on Transitional Justice and ICC?**

**Enabling African Union (AU) member states and CSOs participation**

In policy development on TJ is an important step in addressing past human rights abuses, repression and mass conflicts and achieving sustainable peace and reconciliation. On 12 and 13 September 2011, the AU Department of Political Affairs (DPA) conducted consultations with experts on transitional justice in Cape Town, South Africa. The aims of the consultation were to:

1. develop a clear and more coherent understanding of contemporary applications of transitional justice in Africa in light of the ongoing processes towards the development of an African policy framework on transitional justice\textsuperscript{244},

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\textsuperscript{244} “AU Commission Consultation with African Union Member States on Transitional Justice, Consultation Report” Cape Town South Africa, 12-13 September 2011, p. 4.
II. contribute to the elaboration, improvement and review of the proposed transitional justice framework which was included in the report adopted by the panel of the wise\textsuperscript{245}, and

III. to find an agreement on the role of the AU in transitional justice processes on the African continent\textsuperscript{246}

The AU policy guidelines are still under consideration. The Panel of the Wise has published a draft of the prospective AU TJ Policy through the International Peace Institute (IPI). There are challenges with advancing the AU TJ policy as regards controversy over the ICC segment of the report, but this work is ongoing.

**ICC Links with the AU policy guidelines on TJ**

When addressing the role of the ICC as it concerns and influences mechanism of transitional justice within the AU, the recurring concern is that that the ICC may function to facilitate a new form of colonialism\textsuperscript{247}. Because the ICC is not an African generated judicial system, and specifically because of the United Nation’s Security Council (UNSc) role in referring cases to the ICC, many members of the AU are concerned that the ICC as a court has become politicized and is not dispensing impartial justice\textsuperscript{248}. This concern initially arose after the Omar al Bashir case was referred to the ICC by the UN Security Council\textsuperscript{249}. The AU member states expressed concern that indicting Bashir, a sitting head of state, violated internationally recognized immunities under customary international law. This situation was unprecedented, and because it was the first, UNSc referral that targeted a head of state, who was also an African and Arab, AU representatives became concerned that the ICC was targeting African nations, and being utilized by the UNSc for regime change. Subsequently,

\textsuperscript{245} Ibid, (n2 above).
\textsuperscript{246} Ibid, (n3 above) 7.
\textsuperscript{247} Ibid, (n4 above) 32.
\textsuperscript{249} “AU backs Sudan president in ICC row; Khartoum rejects hybrid court” Sudan Tribune, 3 February 2009.
in 2011, the UNSC also referred the late Muammar Gaddafi, former leader of Libya to the ICC, which has further entrenched the idea that there is a pattern emerging of ICC excluding non-African and especially the western leaders who should respond to allegations of war crimes.

Further concerns about the ICC include its threat to sovereignty\textsuperscript{250}, non-retroactive jurisdiction and relationship with national courts throughout the AU\textsuperscript{251}. Proponents of the ICC are hopeful that it can work cooperatively with national courts\textsuperscript{252}, and encourage the growth of domestic courts that are functional while also bringing international war criminals to justice\textsuperscript{253}. Opponents to the ICC claim that it is a politically motivated organ that is not driven by justice, but by the interests of colonial powers\textsuperscript{254}.

It seems that in order for the ICC to continue its growth as a positive and effective system of bringing justice to victims of war crimes, the Rome Statute needs to review the UNSC system of referrals. Either the ICC needs to accept narrowing the scope of its jurisdiction and rescind the UNSC referral system (thereby limiting its jurisdiction so that it sees exclusively cases that concern its member states) or it needs to create a more specific outline of how and why UNSC referrals work and their function. If there were a well-defined referral process, that demonstrated a system of justice based equity that is exempt from political interests, then UNSC referrals might be able to gain credibility. But as it stands the UNSC referrals seem to be more limiting than anything despite the fact that they are intended to broaden the judiciary reach of the ICC.

**Africa’s Role in creating the ICC:**

So far as Africa’s role in creating the ICC is concerned, one may wish to refer to the SADC Principles as well as the DAKAR Declaration as evidence of Africa’s contribution to the negotiations of the Statute. It may also be worth mentioning that the Organization of African Unity (OAU) now

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\textsuperscript{250} Ibid, Draft Report on non-impunity (n2 above) 15.
\textsuperscript{251} Ibid, AU Consultation Report, (n6 above) 30.
\textsuperscript{252} Ibid, (n7 above) 29.
\textsuperscript{253} Ibid, (n8 above) 32.
known as the AU was represented by its Legal Advisor who coordinated African positions on various issues.

In addition, African countries were actively involved in the establishment of the International Criminal Court and the Rome Statute since negotiations for the Court began in earnest more than 20 years ago.

Delegations from African states including Lesotho, Malawi, Swaziland, Tanzania and South Africa participated in discussions as early as 1993 when the International Law Commission (ILC) presented a draft statute to the United Nations General Assembly for consideration.

47 African states were present for the drafting of the Rome Statute, the founding treaty of the ICC, at the Rome Conference in July 1998. A significant number of these countries were members of the Like-Minded Group which pushed for the adoption of the final statute. Of the 47 African countries involved in the drafting of the Statute, the vast majority of them voted in favor of adopting the Rome Statute and establishing the ICC.

Ultimately, the core values included in the AU’s key documents demonstrated the importance of the issues and are indicative of the form that transitional justice that is taking root in the continent. The main document of the AU is the Constitutive Act which acknowledges the need to promote peace, security and stability as a prerequisite for the implementation of Africa’s development and integration agenda while also promoting and protecting human and peoples’ right.

Amnesty, Truth and Reconciliation and local remedies (Special Tribunals): is the ICC in conflict with the ultimate peace and reconciliation that holistic TJ stands for? E.g. Uganda.

There are an additional set of issues that need to be addressed firstly whether the ICC’s interventions are in conflict with the ultimate goals of peace and reconciliation? Secondly, there is an assumption that amnesty, truth and reconciliation, and local remedies equates to holistic reconciliation. This is an assumption but not necessarily an accurate one as
it depends on the relationship between these processes, and the mandates of each process individually, as well as how reconciliation is defined and understood. Also given that there is no truth process in Uganda at present, the assumption of holistic reconciliation seems hypothetical. The issue of truth telling in Uganda is instructive in this regard; one can contextualize this by assessing its processes from the start of the rebellion in northern Uganda in 1986 and contrasting them with contemporary issues relating to truth telling.

For more than two decades, truth telling and reconciliation emerged as Uganda continued to struggle with transitioning to democracy from oppressive dictatorial regimes. Truth and Reconciliation Commissions (TRCs) had increasingly acquired the status as being the preferred universal method of dealing with this transition. It is evident that a universal application of truth commissions without a contextual understanding of how they can impact on a situation would inevitably lead to a flawed process. For example, according to a recent national reconciliation and transitional justice audit done at the grassroots level in the Gulu district of northern Uganda, truth telling and reconciliation were desired by traditional leaders. This section will examine the normative concept of truth in Uganda as well as traditional truth telling mechanisms that can be found in Northern Uganda. The second issue pertains to key issues in truth telling.

**The normative concept of truth in Uganda/traditional practices of truth-seeking and truth telling:**

In the context of truth telling, it is extremely pertinent to examine legal systems that may be considered by some to be peripheral, but in reality have had a huge impact on the truth-telling process historically in Uganda. Traditional justice systems have been in existence in Uganda long

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255 Refugee Law Project, Brief 1: Gulu District power point presentation on file with the author.

256 Traditional justice systems throughout this paper refer to non-normative or informal modes of justice. The Northern Ugandan practice is just one example of many forms of transitional justice found around the world.
before the British established an institutionalized legal system, considered by some to be the sine qua non legal system in Uganda. However, to not investigate Ugandan traditional legal systems would be to deny a rich and complex history and culture that many Ugandans share. The Acholi people in the northern Uganda region, often called Acholi-land, share one such system deserving further investigation.

Within Acholi culture, justice is premised on “trust, a voluntary process, compensation and restorative justice.” With these four goals in mind, Acholi tradition calls for the justice and truth process to begin with the voluntary offering of a confession by the perpetrator of a crime. Along with this prescription, it is also encoded into Acholi tradition that if a crime is committed, shame and guilt will surround the perpetrator so that a confession becomes the only way in which a person committed of a serious crime can continue to live their life. This moral imperative facilitates the process of truth telling as something not to be feared but in fact a process that will allow for redemption and restoration. The truth process in Acholi culture is also aided by Elders who act as trusted investigators – talking to witnesses and parties involved and getting statements in order to further establish the truth. The entire process culminates in the ceremony of Mato Oput, in which the two sides come together to “wash away their bitterness” by drinking a bitter herb (Oput) and sacrificially slaughtering two sheep. While this ceremony is not useful in its literal interpretation, the values and morals that it represents may be indispensable for the restoration of peace within Uganda.

After the protracted violence and war in northern Uganda, however, many of these restorative practices have been lost as people have been forced from their communities and placed in displacement camps around the north. There has now been a movement to re-establish these lost practices within post-conflict Uganda. Ker Kwaro Acholi (KKA), the original cultural institution of Acholi, has been going to camps around Northern Uganda attempting to re-implement traditional conflict resolution practices.
within the camps.258

Even in regions of Uganda where Mato Oput is not practiced, truth telling is morally encoded into the culture. In Teso, in the Eastern region of Uganda, truth telling is considered one of the highest virtues within society. Moses, a long-time resident of Teso writes,

“Everywhere you hear people say “ainer abeit”, [which means truth telling.] [T]elling the truth is a virtue that everyone cherishes. Now when it comes to situations of conflict, it still applies across the board. This means that truth telling is a virtue! In terms of two people [who need to] to settle a dispute, people always invoke the ‘spirit’ of truth, so to [speak]. Now when it comes to victims, of whatever magnitude, people will always insist on what the truth of a matter [is], say, if someone is aggrieved. This is when they call upon whoever has the evidence that the victim is [truly] the victim of any misdemeanor, this will always assist in resolving such conflict.”259

Truth is a universally cherished quality throughout the nation of Uganda. Any attempts at reparation must be predicated on truth telling and seeking in order to uphold this valued feature of Ugandan culture.

Is the ICC in conflict with ultimate peace and holistic reconciliation?

The phrase ‘ultimate peace,’ encompasses something more than merely an absence of violence260, but rather something akin to Johan Galtung’s conception of positive peace. Galtung described this term as entailing the integration of human society and the absence of physical violence, but also of structural and cultural violence.261 This understanding of peace mirrors definitions of reconciliation as rebuilding relationships. Of course, the concept of ‘reconciliation’ is a highly ambiguous and often disputed

258 Roco Wat I Acoli:(n2 above) ii.
259 Cewarn staff member (n2 above).
261 Ibid (n2 above).
term, which can range from establishing ‘simple coexistence’ between previously warring factions, to creating conditions where former enemies ‘must not only live together non-violently but also respect each other as fellow citizens’. Furthermore, reconciliation can occur at different levels within society: (1) individual; (2) inter-personal; (3) communal; (4) national; and (5) international.

Where the impact of the ICC is considered in relation to peace and reconciliation, these terms are often understood as relating only to national reconciliation or peacemaking in the form of reaching peace agreements or creating power-sharing governments. The impact of the ICC on inter-personal or communal reconciliation is rarely considered.

At the national level, the two positions are whether (1) the threat of ICC arrest warrants creates an obstacle to the LRA leaders signing a comprehensive peace agreement; or (2) whether the threat of the ICC prosecutions delegitimizes the LRA causing them to lose backing of their secondary actors.

Depending on what position one adopts in relation to the ICC either perspective can be argued, but based on contemporary events, the ICC arrest warrants have neither prompted the signing of a comprehensive peace agreement nor deterred the LRA from committing serious human rights violations in the DRC and elsewhere. However, arguably the LRA are less strong now than they were previously. Determining causality here is difficult and unlike more legal perspectives that view justice as distinct from political determinations, it must be remembered that the ICC is only one factor in a more complex situation and there are a variety of factors that can influence the signing of a peace agreement and the establishment of processes for national reconciliation. Therefore a simplistic answer on whether the ICC is in conflict with peace or reconciliation is difficult to provide, and will depend on the facts on the ground.

At the communal level, it is generally argued that international prosecutions taking place in the Hague can have little bearing at the grassroots, although there does seem to have been improvements in
recent years with the outreach of international tribunals. In addition, international tribunals such as the ICC can only ever prosecute a small number of offenders, so perhaps it is not realistic to expect them to achieve more grassroots forms of reconciliation. Instead, that could perhaps be pursued in parallel or instead of ICC prosecutions through the work of truth commissions or traditional justice. Where this occurs the ICC has the potential to complement rather than conflict with peace and reconciliation.

**To the extent that the ICC limits local action by dictating measures to be taken, or is it an obstacle to achieving the goals of transitional justice?**

There are those who will argue that the ICC is an obstacle because it does not encourage reconciliation and re-integration. However, if one looks at South America, Asia, South Africa, Sierra Leone and Kenya, a different conclusion may be drawn.

The ICC should positively complement local processes through technical assistance or otherwise. As long as they want to maintain autonomy in the pursuit of Justice, they will be viewed as obstructing justice. It has been proven in most post conflict societies that informal justice processes have been more meaningful to the affected communities. Formal justice like the ICC is distant, delayed/protracted and not well understood by the local communities. If positive complementarity is exercised, it will work under the realm of TJ.

**Legacy: does the ICC weaken or strengthen local criminal justice? Is over reliance on the ICC an issue? Until now, international tribunals in places like Rwanda, Sierra Leone have done little towards reforms of the criminal justice systems in which they operate. Is the ICC different?**

The legacies of hybrid tribunals have been tremendous when one considers their jurisprudence and the ICC is not any different. The ICC
has strengthened the criminal justice sector in Uganda. Ugandans now have the ICD dedicated to core crimes and a number of reforms are being undertaken like transcription in Court, witness protection, court recording, security of all parties, capacity building of the prosecution, police, and judiciary and forensics department is being enhanced to match international standards.\footnote{Email exchange with MOJCA Staff member (May 11, 2012)}

**Post-ICC owning the process- does the challenge of a foreign prosecution lessens benefits of deterrence etc?**

There is currently no conviction or sentence by the ICD as yet, it may be too early to assess this. However, the communities have mentioned concern about LRA serving their sentences in comfortable prison cells and not facing the hard conditions locally.

**Making positive complementarity a possibility**

Certainly, if the aforementioned challenges and weaknesses in Uganda’s criminal justice system are addressed, then Uganda can have a dream positive complementarity.

**Conclusions**

This chapter has outlined Uganda’s experience with complementarity. It is hoped that Uganda’s experience will help other countries design their home grown solutions to implement complementarity in practice nationally; the chapter evaluated some of the perceptions and meanings of complementarity and examined the impunity gaps in the administration of international criminal justice and structural weaknesses in criminal justice process in Uganda.

It is noted that as with any situation, the situation in Uganda is unique because it offers an alternative way of thinking about complementarity given that there is no silver bullet to complementarity in any country.
In this concluding section several issues are raised. First, the issue of judicial and police corruption needs to be addressed if the ICD is to function well and dispense justice. The police should prevent victims from suffering justice delays by collecting relevant evidence of alleged crimes while the victims are still alive.

Secondly, there is need for effective provision of legal aid to the ICD by the Ugandan government. The legal aid budget should be administered by the court and this legal aid should be made available to defence counsel of an accused person/s.

Thirdly, there is need to put in place procedures at ICD for the exchange of information between the prosecution and defence. Only on this basis can complementarity become a reality in Africa.
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<th>Abbreviation</th>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>CEWARN</td>
<td>Conflict Early Warning Analysis Research Network</td>
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<td>CSO</td>
<td>Civil Society Organisation</td>
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<td>CSOPNU</td>
<td>Civil Society Organisations for Peace in Northern Uganda</td>
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<td>DPA</td>
<td>Department of Political Affairs</td>
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<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>International Crimes Division</td>
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<td>ICTJ</td>
<td>International Centre for Transitional Justice</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>JLOS</td>
<td>Justice Law and Order Sector</td>
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<td>LRA</td>
<td>Lords Resistance Army</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>OTP</td>
<td>Office of the Prosecutor</td>
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<td>TJ</td>
<td>Transitional Justice</td>
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<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
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<td>UCICC</td>
<td>Uganda Coalition for the International Criminal Court</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UPDF</td>
<td>Uganda Peoples Defence Force</td>
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<td>WCD</td>
<td>War Crimes Division</td>
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“Political” Complementarity and the ICC’s Engagement in Darfur, Sudan

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“Political” Complementarity and the ICC’s Engagement in Darfur, Sudan

1 Introduction

An assessment of the notion of complementarity in the Sudan situation before the International Criminal Court (ICC) generates unique dilemmas. The principle of complementarity derives from the acknowledged deference that international mechanisms should grant to national jurisdictions, in the realm of prosecutions for crimes. The ICC is meant to operate as a court of last resort and the primary responsibility for investigating and prosecuting international crimes falls onto states. The principle of complementarity has multiple components. First, as just described, it places a positive obligation on states to prosecute crimes that take place within their territory. In this way, complementarity also limits the jurisdiction of the ICC. Article 17 of the Rome Statute\(^{263}\) specifies the circumstances in which the ICC will not exercise jurisdiction in the place of national justice processes – in effect if national jurisdictions are able or willing to genuinely investigate and prosecute, the ICC will not have jurisdiction. Moreover, the principle of complementarity has also been elaborated over time to include the notion of positive complementarity, an obligation on the part of the ICC and the international community to assist states in fulfilling their obligations to carry out domestic prosecutions.

\(^{263}\) 2187 U.N.T.S. 90, entered into force July 1, 2002.
In several situation countries, positive complementarity has continued to grow, as described in other chapters. In Sudan, however, hopes of positive complementarity have receded. Ultimately, positive complementarity demands at least nominal state cooperation. Unfortunately, since 2007 when arrest warrants were issued for two high-ranking Sudanese individuals, the relationship between the government of Sudan and the ICC has been adversarial and hostile. Accordingly, there have been no credible domestic prosecutions and the ICC has made no progress with cases against indicted state actors from Sudan.

Instead, the Sudan situation has become a case study in what one might describe as political complementarity. Despite consistent ICC claims that the body is outside the realm of politics and is nothing more than a neutral arbiter of the law, the political component of ICC action cannot be ignored, especially in the case of the Sudan. Indeed, Article 17 of the Rome Statute draws the ICC into political analyses with its requirement that the Court examine the willingness of a state to carry out investigations and prosecutions. Essentially, the Court is required to analyse, among other factors, the extent of political will in a situation country. As Article 17 states, the Court’s jurisdiction depends not only on a state’s ability or capacity to undertake investigation and prosecution, but on the “unwillingness” of a state “genuinely to prosecute.” Willingness and genuineness are at least in part, political assessments. Lack of political will often leads to all manner of interference with ICC and domestic judicial processes. “Some cases of such subterfuge are rather obvious, while in other cases it can be significantly more difficult and time consuming to discern intent.”

In the case of Sudan, from 2007 onward there has been little difficulty in discerning the intent of Sudan’s government. It refuses to cooperate with the ICC and denied that the ICC has any jurisdiction over the crimes in Sudan. The government has orchestrated – partly in collaboration with its neighbor Kenya – a public relations and political backlash against the ICC as an institution. The domestic accountability processes in Sudan have been generally acknowledged as pretextual.

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In light of this reality, and the absence of any current chance for positive complementarity as envisioned in the Rome Statute, how can a discussion of complementarity and the Sudan situation proceed? More than three years after the arrest warrant for Sudan’s president was issued by the ICC, nothing has changed from a criminal justice perspective, but much has changed from a political perspective. Accordingly, instead of discussing complementarity from the perspective that most other articles in this publication do, this chapter raises the idea of political complementarity. This chapter will assess what we can make of a notion of “political” complementarity. For the ICC, a body that consistently describes itself as apolitical and an objective arbiter of the law, the Sudan situation raises serious questions. Did the ICC operate as a political actor in the Sudan situation? How can the ICC be characterized as a political actor? How should the ICC deploy its legal tools to political effect, and when? Can politics complement accountability and narrow the impunity gap? In what way should it do so and should the ICC Prosecutor and a few judges be those who decide?

This chapter proceeds first by describing the background to the ICC’s involvement in the situation in Darfur, Sudan. It then discusses the initial cooperative phase of the Sudan situation in which positive complementarity seemed to be a possibility. It then reviews the concerns raised about the politicization of the ICC in relation to the Sudan case, highlighting the reality of the ICC as a political actor. Finally, the article looks at the current impacts being felt from the ICC’s engagement in Sudan, virtually all of which are political, instead of justice-related. This article makes the case for a more explicit consideration of the ways in which the ICC’s actions operate politically and perhaps guidelines on managing such political effects.

The context and crimes in Sudan

At the time when the ICC became involved in the Darfur situation in 2005, north and south Sudan were still unified as a single country. In 2011, following a referendum, South Sudan became an independent country. This chapter will locate the background discussion in the period when
Sudan was a unitary state. Sudan was one of the largest countries in the world at 2.5 million square kilometers; it had land borders with nine other diverse and volatile countries, including Egypt, Libya, Chad, the Central African Republic, the Democratic Republic of Congo, Uganda, Kenya, Ethiopia and Eritrea, and had a maritime border with Saudi Arabia just across the Red Sea. Its geographic position alone made it one of the most important countries in Africa. The fact that its borders contained a substantial proportion of the Nile River, and that it ultimately became clear that the country was rich not only in timber and other natural resources, but also in oil, solidified Sudan’s geopolitical importance.

The colonial legacy played, and continues to play, an important role in Sudan, particularly in the land sector and in inter-ethnic relations. According to some scholars there are more than 600 tribal groups and more than 400 languages in unified Sudan. Many of these groups have traditional territory that crosses national borders. In Darfur alone, the International Crisis Group (ICG) notes that there are between 36 and 90 tribal groupings. Much of the discussion of Darfur in particular reduces this diversity to “Africans” and “Arabs”, but this dichotomy is disputed by some scholars who note that all Darfuris are Africans, are primarily Muslim, and have virtually indistinguishable physical features from their compatriots. Sudan’s ethnic diversity overlaps with substantial religious diversity – while there are large Muslim, Christian, and animist populations each of these broad categories contains substantial diversity; for instance, the largely north-based Muslim population is classified into multiple sects. The region of Darfur, which is the subject of the ICC’s involvement in Sudan, is one of the most marginalized in the country. There has been conflict in Darfur for decades as a result of land policy, ethnic and livelihood diversity, lack of government authority, and, recently as a result of climate change. In the early 2000s, conflict between pastoralists and agriculturalists began to escalate. Some reports indicate that the Southern Sudanese armed militia group the South Sudan Peoples Liberation Movement (SPLM),

supported agriculturalist rebel groups to resist pastoralist incursions in Darfur.\textsuperscript{268} Ultimately, these Darfuri groups rebelled against the Al-Bashir central government in Khartoum.\textsuperscript{269}

In March and April 2003, in the midst of the Government’s peace talks with the SPLM, Darfur-based armed militia groups began attacking government installations across the Darfur region. An April 2003 attack on El Fashir, the capital of North Darfur, shortly after President Bashir had visited the area for security talks with the president of Chad (who is a member of one of the ethnic groups that straddles the Chad-Darfur border), is often acknowledged as the spark that ignited the Darfur conflict. The rebel attack killed “many”\textsuperscript{270} or “hundreds”\textsuperscript{271} of government military personnel and destroyed buildings as well as planes on the ground. The attack led to what is generally acknowledged as a hugely disproportionate government counter-insurgency response.

The conflict in Darfur persists today, though it has diminished somewhat in intensity. During the height of the conflict however, the government’s counterinsurgency actions led to human rights and humanitarian violations on a massive scale. The tragedy in Darfur led to the development of a well-orchestrated international advocacy response as well, known as Save Darfur.\textsuperscript{272} The controversy surrounding the Save Darfur campaign is beyond the scope of this chapter, but the campaign did play a substantial role in the political response to the Government of Sudan’s actions. In part in reaction to international advocacy on Darfur, and after months of debate, the United Nations Security Council in 2004 passed Resolution 1564\textsuperscript{273}, establishing the United Nations Commission of Inquiry into the Darfur situation (UNCOI).

\textsuperscript{268} International Crisis Group, \textit{supra} note 4.
\textsuperscript{269} \textit{Ibid}.
\textsuperscript{271} Bechtold, \textit{supra} note 3.
\textsuperscript{272} See http://www.savedarfur.org/ for more information about Save Darfur.
The UNCOI concluded that between 2003 and 2005 the Government of Sudan, often through its proxy militia the Janjaweed, was responsible for: … serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children.274

The UNCOI’s report went on to make clear that the “alleged crimes that have been documented in Darfur meet the thresholds of the Rome Statute as defined in articles 7 (1), 8 (1) and 8 (f).”275 The UNCOI did not conclude that there had been a government policy of genocide in Darfur, although it did not rule out the possibility that individual government officials had acted “with genocidal intent.” It also noted that rebel commanders also were suspected of involvement in crimes against humanity.276 These findings would prove important in the later political controversy over the actions of the ICC in relation to the situation in Darfur.

In keeping with the UNCOI’s recommendation, the UN Security Council referred the situation in Darfur to the International Criminal Court in March 2005. Given that Sudan is not a state party to the Rome Statute, the Security Council used for the first time ever its jurisdiction under Chapter VII of the UN Charter and Article 13(b) of the Rome Statute. Article 13(b) states that the Court will have jurisdiction in the event that “… one or more such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”277 This referral made clear that, given the right political

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274 UNCOI, supra note 8, p. 4.
275 Ibid., p. 5.
276 Ibid.
climate, even states that had not agreed to be bound by the Rome Statute could be held accountable through their membership in the United Nations. Accordingly, four members of the Security Council abstained – Algeria, Brazil, China and the U.S. – but none voted against the referral. Both African members of the Security Council, Benin and Tanzania, voted in favor of the referral.

The use of the United Nation’s Chapter VII power to bring a non-state party under the jurisdiction of the ICC made many states nervous, including the United States, and made easy fodder for those who were inclined to see the ICC as just another political tool of a neo-imperial, Western-dominated United Nations. Immediately, many commentators rhetorically asked why the Security Council had not used similar powers to address crises in Iraq, Afghanistan, Northern Ireland or Palestine. As de Waal described, “the neo-colonial charge resonates. Western powers are ready to subject Africa to intrusive experiments in governance that they would never allow at home and could never impose on major powers.” While this apparent double standard opened the door on the ICC as a political tool, it was only the beginning of the political complexities to come.

2 Initial ICC involvement and hope for complementarity

Complementarity is a critical component of the Rome Statute framework. As described briefly in the introduction, complementarity restricts ICC jurisdiction; if a state is able and willing to carry out genuine investigations and prosecution of particular international crimes, the ICC has no jurisdiction. Moreover, complementarity has a positive aspect, in which the international community and the Court itself have an obligation to positively assist states in prosecuting international crimes. Positive complementarity includes cooperation by other states with prosecutions for international crimes, as described in Part IX of the Rome Statute. This includes donor aid to states attempting to end impunity for international

278 See, de Waal, supra note 5.
280 de Waal, supra note 5.
281 Open Society Justice Initiative, supra note 2.
crimes, often in the form of training, capacity building, and infrastructure development for domestic judicial process, and support and assistance from the Court itself in domestic accountability processes. Positive complementarity is a legacy in many respects of the operation of the International Criminal Tribunal for the former Yugoslavia, and the Special Court for Sierra Leone whose objectives included enhancing the operation of post-conflict justice systems.

Initially, it appeared that perhaps the ICC’s intervention in Sudan might contribute over time to the development of the principle of complementarity, including its positive complementarity aspect. Indeed, several scholars have written detailed analyses of the process of complementarity determination for the purposes of admissibility in the Sudan situation, given that it was the first case that was not a self-referral to the ICC by the government of the state in which the alleged crimes took place.

Despite a number of judicial and investigative efforts cited by Sudan as evidence that the situation was inadmissible to the ICC under the complementarity principle, there was general acknowledgement that Sudan’s internal processes ultimately were insufficient to meet the threshold for the ICC not to proceed under Article 17, especially from the perspective of willingness. The UNCOI describes:

The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts.

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283 UNCOI, supra note 8, p. 5.
Others pointed to specific immunity provisions that protected government officials from any prosecutions, among other problems in the national accountability scheme. After investigations, the Prosecutor also determined that there were no bars to admissibility under Article 17. As Baldo argues “Sudan’s legal response consisted of the establishment in June 2005 of the Special Criminal Court for Events in Darfur, days after the ICC Prosecutor had announced the launch of his investigation…” Furthermore, Baldo observes that “the performance of these courts and the related proceedings of a Judicial Investigation Committee and Special Prosecutions Commissions … failed to persuade local observers and international monitors of the seriousness of the Government of Sudan about ending impunity in Darfur and bringing justice to the victims.”

Although there was little belief, from the outset, that Sudan was able or willing to investigate and prosecute the crimes referred to the ICC, especially for the high-level perpetrators involved, there was some hope that positive complementarity could still operate in the Sudan situation. Sudan initially offered at least nominal cooperation with the ICC process. Indeed, observers have suggested that the Sudanese justice system did benefit from initial interaction with the ICC process, through capacity building of local judicial mechanisms during the initial investigations period.

The ICC also maintained a conciliatory posture, wanting to preserve Sudan’s cooperation in both the Darfur situation and the Lord’s Resistance Army (LRA) insurgency situation in Uganda. Initially, the then Prosecutor, Louis Moreno-Ocampo, did not seek warrants for the first two indictees before the Court, assuming that they might voluntarily appear. However, as soon as it became public who the Prosecutor intended to indict, the Government of Sudan withdrew its cooperation, the Court decided to

286 Ibid.
287 E.g., Pichon, supra note 20.
issue warrants of arrest given the changing climate of cooperation, and the prospects for positive complementarity in Sudan receded.

In February 2007, the Prosecutor asked for charges against one government official and one government-associated militia leader. In April 2007, the Court issued warrants of arrest for Ahmad Muhammad Harun, then Minister of the Interior, and for Ali Kushayb, a Janjaweed militia leader. Harun is accused of being individually criminally responsible for both crimes against humanity and war crimes, including murder (article 7(1)(a)); persecution (article 7(1)(h)); forcible transfer (article 7(1)(d)); rape (article 7(1)(g)); inhumane acts (article 7(1)(k)); imprisonment or severe deprivation of liberty (article 7(1)(e)); and torture (article 7(1)(f)); attacks against the civilian population (article 8(2)(e)(i)); destruction of property (article 8(2)(e)(xii)); rape (article 8(2)(e)(vi)); pillaging (article 8(2)(e)(v)); and outrage upon personal dignity (article 8(2)(c)(ii)).

Kushayb is accused of individual criminal responsibility for a substantially similar list of crimes. Harun reportedly was investigated by the government of Sudan, with an ultimate finding that no prosecution was warranted. He remained a critical figure in Sudan’s government, indeed controlling policy related to Darfur and also to key regions in the south such as Abyei. Kushayb has been detained, released and rearrested by the central government, but has not yet been tried. Sudanese officials, claiming that the ICC does not have jurisdiction, have repeatedly stated that they will never turn over Sudan’s nationals to the ICC.

By mid-2013, there had been no movement on prosecutions of those against whom the ICC had issued warrants. All three accused remain at large and Al-Bashir remains in power. Since 2007, the ICC and the


291 International Crisis Group, supra note 4.

government of Sudan have been in an adversarial posture. As Baldo described, “far from strengthening national justice mechanisms, the ICC process has exposed the manipulations of the judiciary by the executive and security branches of government in Sudan. However, the ICC’s [involvement] developed into a local political reality that’s difficult to ignore.”293 With the end of prosecutorial, investigatory, and judicial complementarity came the era of “political” complementarity.

3 Ongoing ICC involvement and emerging political complementarity

In July 2008, Prosecutor Ocampo, requested the Pre-Trial Chamber to issue a warrant of arrest against Sudanese President Omar Hassan Ahmad Al Bashir. During the previous month, in his June 2008 report to the UN Security Council, the Prosecutor laid out his strategy for the continuing ICC involvement in Sudan. The Prosecutor made clear that he would be indicting high-ranking officials who were “promoting” those who had previously been indicted. Ocampo also made sweeping statements describing the situation on the ground in Darfur, a region that he had never visited, and alluded to an ongoing genocide.294 His comments and the request for the warrant raised concerns amongst numerous parties – it was not well-understood why Ocampo did not ask for a sealed warrant, as had been done in the case of Charles Taylor, which would have had a better chance of being executed.295 Given the government’s clear non-cooperation, what chance did an open warrant have of being executed? The request for a genocide charge also led to consternation and charges of political motivation.

On 4 March 2009, the ICC issued an arrest warrant against the Sudanese president, only the second sitting president to be charged before an international criminal justice tribunal. The warrant accused the Sudanese

293 Baldo, supra note 23.
295 International Crisis Group, supra note 4, p. 27.
president of indirect criminal responsibility for war crimes and crimes against humanity including murder, extermination, forcible transfer, torture, rape, intentionally directing attacks against a civilian population as such or against individual civilians and pillaging, but did not confirm the genocide charges. In July 2010, a second warrant for Al-Bashir was issued, amending the charges to include counts of genocide.

The first arrest warrant in and of itself had a dramatic impact, none of them seemingly in the interests of justice – the government of Sudan reacted immediately by expelling humanitarian NGOs and closing down Sudanese human rights groups. The expulsion affected millions of already suffering Darfuris, ending their access to critical food, water and health care services.

But the negative reaction was not only from Sudan. Respected Sudan experts claimed that the ICC Prosecutor was losing his way in Darfur, and that he was describing a Sudan they did not recognize from their work on the ground. It was suggested that the Prosecutor had exaggerated the numbers of monthly deaths in Darfur after 2005, so as to support his claims of ongoing genocide. Others noted that it seemed Ocampo’s duties as a Prosecutor had been usurped by his public relations effort in an attempt to garner political will to arrest the Sudanese indictees.

Indeed, given the evident fact of Sudan’s complete non-cooperation at that point, one could reasonably inquire what the Prosecutor’s goals were in seeking the warrant against Al-Bashir, other than to apply political pressure in a number of ways. Scholars have raised reasonable questions

298 International Crisis Group, supra note 4, p. 27.
301 International Crisis Group, supra note 4; Bechtold, supra note 3.
about whether the Prosecutor’s interpretation of the facts is erroneous, or at minimum a stretch, especially with regard to whether Al Bashir’s statements and actions demonstrate the “mens rea” or mental intent required to prove the crime of genocide. For instance, genocide was not part of the application for warrants against either of the first two indictees in the Sudan situation. This is not to say that serious crimes have not been perpetrated in Darfur, almost certainly the crime of persecution, but much international legal literature agrees that the Prosecutor likely overstepped in seeking a genocide indictment, and as such opened himself and the ICC to condemnation as a politically motivated body.

The timing of the Al Bashir indictment requests also supported claims of politically motivated actions by the Prosecutor’s office. Because Al Bashir was indicted only after he refused to hand over top officials, it appeared to many that the ICC Prosecutor’s decision to go after Al Bashir was in fact in retaliation for Sudan’s lack of cooperation. American scholar Peter Bechtold went so far as to describe the fact that the Prosecutor “has engaged in a virtual crusade against Bashir and Khartoum in a lecture tour, using highly incendiary language seemingly at odds with the responsibilities of a senior official on an international court.”

Apart from a backlash from several Sudan scholars and legal experts, African and Arab governments also expressed frustration, and sometimes outrage, at the Court’s actions. The African Union in particular argued that ongoing efforts to negotiate peace, both in Darfur and in South Sudan, had been seriously compromised by the unilateral actions of the ICC. Specifically, the government of Qatar had been working to negotiate peace in Darfur, and hosted a peace meeting in early 2009 between the government of Sudan and representatives of one of the main rebel groups in Darfur, the Justice and Equality Movement (JEM). After the warrant for Bashir was issued in March 2009, the rebel group refused any further

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303 Ibid.
304 E.g., Nouwen and Werner, supra note 26.
305 Bechtold, supra note 3.
negotiation, noting that they would not negotiate with a “criminal.”\textsuperscript{306} There also were reasonable fears that the ICC action would lead to the collapse of the South Sudan Comprehensive Peace Accord (CPA). The warrants against Bashir, coupled with the subsequent actions of the ICC and the Security Council in rejecting any suggestion that the cases be deferred in the interest of peace and security led to what has become the African Union “backlash” against the ICC – with threatened withdrawals of ratification of the Rome Statute and resolutions ensuring that AU members would not comply with the ICC’s warrant.\textsuperscript{307} In 2011 the African Union Assembly of Heads of State and Government issued a resolution requesting that the Security Council invoke Article 16 of the Rome Statute and suspend ICC actions against President Al Bashir, noting that:

…the Security Council would be acting in accordance with its responsibilities for the maintenance of international peace and security and would greatly facilitate the ongoing efforts by the AU to help the Sudanese parties achieve lasting peace, security, justice and reconciliation.\textsuperscript{308}

The backlash has become an identity war, pitting African, and some Arab, governments against Western governments to constituencies of activists outside Sudan. The clash of identities seems to have little relation to international criminal justice and everything to do with politics. African commentators have accused the Prosecutor of distorting “the entire history of Darfur” in order to make his case\textsuperscript{309} and of not caring “about African sensibilities.”\textsuperscript{310} The New African described the backlash against the ICC as Africa finally refusing to take Western bullying “lying down.”\textsuperscript{311} Others have parroted Khartoum’s characterization of the ICC warrants as a vast Western conspiracy designed to bring about regime change. These polemic statements reflect a real concern, however, about the way

\textsuperscript{306} Ibid.
\textsuperscript{307} Warham, Olivia. “Can World Court Survive African Union’s Attack?” CNN.com 15 June 2012.
\textsuperscript{309} Mamdani, supra note 38.
\textsuperscript{310} “Selective Justice”, supra note 17.
\textsuperscript{311} Ibid.
that the ICC’s actions are having effects both from a political and justice perspective.

4 Political complementarity – does it exist and what does it mean?

There is little question that ICC actions have political consequences; many have written on and analysed this issue. Recognizing those discussions as well as the goal of this publication this chapter has framed the notion of political complementarity to allow discussion of the continuing political role of the ICC when positive complementarity is no longer part of the discussion, as in Sudan. Political complementarity refers to the manner in which the ICC deploys its legal tools for political effect so as to complement its justice objectives in a given situation. The argument here is not that the ICC has a political agenda in the sense that any government might. Furthermore, the point is not that the ICC is in the business of pursuing regime change as a state might do (this does not deny that some might hope to use the ICC in this way). Nevertheless, the ICC has interests that can readily be described as political, for instance, proving itself to be a credible, functional institution on the international scene, ensuring that states cooperate through execution of warrants, proving the value of retributive justice and due process of law.

However, part of the ICC’s recognized value is its assumed apolitical nature. The ICC was created out of a notion that justice must come before politics, that so-called realpolitik in which justice might be sacrificed in order to pursue political objectives would no longer hold sway. The ICC itself reinforces this perception continually, describing itself as an objective arbiter of a law that stands above political interference or power plays. On the contrary, however, the Sudan situation made manifest


313 Although this article focuses on Sudan, many others have argued that the Lybian situation as well as the Kenyan and Ugandan situations subsequently manifested the ICC’s politicization.
the embedded nature of the ICC within the political realm, and especially the ICC’s overt political manifestations – manifestations of both political power and complete lack thereof.

The Prosecutor has multiple tools, many falling under the rubric of traditional prosecutorial discretion, that can both advance the cause of justice and have overt political ramifications. For instance, the Prosecutor can choose open or sealed warrants, the timing of announcements, the sequencing of selected indictees, and ultimately the choice of charge, amongst many other tools. Pretending that the Rome Statute and other incontrovertible legal principles determine these choices from some objective standard is the image that the Court might like to maintain. As Alex de Waal described, “The Prosecutor likes to project an image that he is an essentially powerless individual, battling the world’s dictators and war criminals, armed only with the truth. But his decisions have real consequences.”\textsuperscript{314} In reality, prosecutorial discretion often is exercised in the interests of politics.

The notion of political complementarity goes beyond the Prosecutor as well. As pointed out by Sarah Nouwen and Wouter Werner, the Court’s and Registry’s decisions also provide political fodder. The timing of the Court’s decisions in the Sudan case is one example - in February 2010 the Court ordered the Pre-Trial Chamber to reconsider its decision not to charge Al-Bashir with genocide, and only a few days later declined to confirm the charges against one of the Sudanese rebel leaders.\textsuperscript{315}

Although in some situations before the ICC, these tools might be deployed and choices made with less consequence than in others, they would nonetheless demonstrate political complementarity. Sudan provides the opportune situation in which to consider the use of these tools because of its geopolitical importance. The volatility of the situation in Sudan, the fate of millions of suffering people in Darfur, and the interlinked nature of Bashir’s interactions across the East African region, made every choice a critical one. When the ICC’s tools are deployed in manner that

\textsuperscript{314} De Waal, \textit{supra} note 5.
\textsuperscript{315} Nouwen and Werner, \textit{supra} note 26.
works effectively to advance justice and complement political processes, political complementarity serves all parties involved and is little remarked. However, as in the case of Sudan, when seemingly every tool the prosecutor deployed did little to advance justice and instead caused a political backlash, it becomes clear that political complementarity is a phenomenon that must be articulated and confronted.

As described above, the use of an open warrant against Al Bashir, the timing of the warrants, the choice of a genocide charge, and the sequencing of the warrants all were criticized from multiple perspectives, including their possible negative political consequences and, in the case of the genocide charge in particular, its failure to accurately reflect the facts or the law. The Sudan case also demonstrates the subservience of justice to the political, exactly the thing that the ICC was designed to avoid, when tools of political complementarity are used ineffectively as they were here. Five years after the first warrants were issued in the Sudan situation, political interests seem to have largely trumped those of justice. As Bechtold described, “the actions by the ICC in July 2008 have had several negative consequences. One was to... generate almost unnatural enthusiasm for President Bashir. Even his staunchest opponents have closed ranks and rushed to his defense...”316 No international justice processes have been able to effectively proceed, and domestic prosecutions have not touched government officials. Al Bashir remains in power, and the political processes of which he was a critical center have continued onward toward their political conclusions.

As stated earlier, the southern half of Sudan seceded after a planned referendum in 2011. Key players in the CPA such as Kenya and the United States, moved forward with their engagement on the peace process after the warrant for Al-Bashir’s arrest was issued. The Obama administration’s envoy on Sudan, Scott Gration, seemed to have little interest in enforcement of the warrant against Bashir and instead made saving the CPA a top priority.317 Kenya also made clear political calculations, weighing its role as a state party to the ICC and as one of the countries with perhaps the

316 Bechtold, supra note 3.
317 E.g., Ibid.
most to lose if the CPA process collapsed. When Kenya invited Al-Bashir to attend the celebrations for the adoption of Kenya’s new Constitution, there was an outcry that Al-Bashir should either be arrested or uninvited. Kenya did neither. Instead a Kenyan government spokesperson, Alfred Mutua, made clear that Kenya’s first duty was to its own political interests. “In the context of Omar Al-Bashir’s case, Kenya’s obligation was first to the AU and then to ICC. If Sudan (is) destabilized it is us who would suffer, not the West,” said Mutua.318 As other commentators noted, Kenya was entirely focused on saving the CPA, and ensuring that its interests in South Sudan were protected.319

The Kenyan government’s actions did not go unchallenged, but there was no serious impact on Kenya’s diplomatic operations. Some international partners demanded explanations, but the issue went no further. Internal challenges in the country have proven to be more problematic. The Kenyan Section of the International Commission of Jurists lodged a court case demanding that a domestic warrant for Al-Bashir’s arrest be issued. The judiciary responded in November 2011 by issuing a warrant under Kenya’s International Crimes Act, the statute that domesticates the Rome Statute. The government of Kenya appealed this decision and has demonstrated no intention to arrest Al-Bashir.320 The Sudanese president was invited to the inauguration of the new Kenyan President in 2013, and was assured there would be no arrest despite the warrant.321

In relation to the Darfur peace negotiations, despite the initial refusal of the Justice and Equality Movement (JEM) rebel faction to continue in negotiations after the warrant for Al-Bashir was issued, the Qatar-led process has continued. At the time of writing, the government in Khartoum and certain factions of the JEM had reaffirmed their commitment to

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321 Peter Ng’Etich and Walter Menya, Kenya will not arrest Bashir says Kariuki, The Star, April 9, 2013.
negotiations and had restarted talks in Qatar. Other rebel groups however, have variously rejected the Doha framework for peace, and continue to do so.

It remains to be seen how the impacts of the ICC’s actions will continue to reverberate through the region. For the moment, however, it appears that the political battle will continue for some time before any justice is done.

5 ICC politics – can it be made explicit and managed?

Part of the reason to frame the discussion in terms of political complementarity is to consider whether the case of Sudan, and other situations in which the ICC’s actions have led to serious political controversy, should encourage the development of a political management framework. Just as there is emerging clarity and guidance around the notion of complementarity generally, including positive complementarity, should the international community be more cognizant and practical in its discussions of the political dimensions, the political complementarity, of the ICC?

There seems to be more and more consideration of this type of strategy – either the ICC must recognize its political role and explicitly address it, or the political consequences of its actions could ultimately undermine the institution. A July 2012 experts’ conference on the ICC identified political considerations as the number one challenge facing the Court. The literature also reflects an increasing desire to see the ICC effectively manage its political complementarity.


Nouwen and Werner, for instance, make a strong case for the ICC’s inherent political role and the need to manage it. They argue that one of the main functionalities of the ICC is its role in validating the labeling of individuals as either friends or enemies of the international community.\textsuperscript{325} “On account of this power to distinguish between a soldier or a terrorist, a policeman or a criminal, the ICC is a powerful weapon in political struggles.”\textsuperscript{326} Those who cooperate with the ICC are friends, those who fight the ICC become enemies. This has certainly been the case in Sudan where Al-Bashir’s status as a less-than-preferred leader, was ratcheted up to pariah status by his failure to cooperate with the ICC. This is in contrast to the Sudanese rebels, who by agreeing to cooperate with the ICC gained enhanced credibility and status as “reasonable” proponents of justice and the rule of law.\textsuperscript{327} In making their arguments for the ICC as a tool for branding political friends and enemies of the international community, and accordingly of humanity itself, Nouwen and Werner are careful to reiterate their support for the ICC as an institution, but also note that “Rather than defining the political as something which needs to be limited and civilized by law, international lawyers should take up the question what sort of politics is enacted in concrete cases.”

\section{Conclusion}

It remains unknown what course the situation in Darfur will take going forward, but there is little doubt that wherever it leads will be fraught with political controversy. This chapter has proposed the idea of political complementarity to frame the discussions of the politicization of the ICC towards something that could perhaps be managed and guided.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{326} Id.
\item \textsuperscript{327} Nouwen and Wouter contrast the situation in Sudan with the situation in Uganda, in which the ICC was used politically in exactly the opposite way to brand a rebel movement as enemies of the international community and to shield the government as a rational partner in the international criminal justice system.
\end{itemize}
\end{footnotesize}
As there is an obligation under the principle of complementarity to carefully manage the ICC’s jurisdiction over crimes that could otherwise be handled by domestic courts, this article poses the question whether there is an international obligation to critically and explicitly examine the way in which the ICC’s legal tools have political impacts and whether guidelines for managing those effects would be of value. Proposing a framework for managing the ICC’s political impacts would doubtless be complex and controversial. Some may argue that with the installation of a new Prosecutor at the ICC, which happened in 2012, such a project may not be necessary. While Prosecutor Louis Moreno Ocampo may have been particularly controversial, the fundamental issue is not one of personality but of theoretical perspective. Are members of the international community and the staunchest advocates of the ICC ready to relinquish the notion that the ICC is above politics, a completely neutral arbiter with no political interests of its own? The Sudan situation before the Court, and the collapse of positive complementarity, was the catalyst for the political backlash against the ICC. It may perhaps take other political controversies, such as the situation in Libya and the struggles over the Ugandan cases, to create sufficient momentum to explicitly recognize the ICC as a political tool, perhaps under the rubric of political complementarity, and to consider when and how it should most effectively be deployed.
Debunking the Conspiracy Theory: Analysing the failure to achieve complementarity and the responsibility to protect in Kenya and other jurisdictions

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Debunking the Conspiracy Theory: Analysing the failure to achieve complementarity and the responsibility to protect in Kenya and other jurisdictions

Introduction

The purpose of this article is to debunk the myth that the actions of the International Criminal Court (ICC) in Kenya are not impartial, and that they represent a threat to national sovereignty and are part of a continuing practice of Western neo-colonialism. This rhetoric of victimhood has been articulated by those Kenyans accused by the ICC. This position ignores the principle of complemenarily and the due process followed in the procedure of bringing cases before the Court.

The notion of complementarity envisages the ICC as a court of last resort when domestic measures have failed. This needs to be borne in mind when considering criticisms of selective prosecution. Kenyans who have been summoned by the ICC seek to portray themselves as suffering under the yoke of neo-colonialism rather than defending themselves against the accusations and relying on legal criteria. Furthermore, the accused and their supporters are predisposed to glossing over the continued attempts to initiate domestic proceedings since the signing of the peace accord in 2008. The idea of emphasising complementarity is vital because Kenyan cooperation with the ICC is not guaranteed should the Court’s judges find
the accused Kenyan’s guilty, hence they may escape punishment as the ICC has no enforcement capability. The politicians who have been summoned by the ICC, have sought to gloss over the atrocities they stand accused of planning in order to garner sympathy and mobilize patriotic sentiments to their political advantage.

This chapter will argue that the ICC’s intervention has been in line with the Rome Statute establishing the Court as well as in line with the accepted process in exercising complimentarily. This chapter will further argue that the antagonistic perceptions towards the ICC, in Kenya, must be examined within a wider context of other on-going cases that the Court involved in, as well as situations where there intervention has been called for but has not materialised.

Finally, this chapter will examine the contention that the ICC represents a form of neo-colonialism, given its current selective focus on cases primarily on the African continent, which has precipitated an increase in anti-ICC sentiment\(^{328}\). Through a brief examination of the ICC’s cases, an image of a recurring failure by states to meet their obligations to undertake local prosecutions emerges; this in turn vindicates the ICC’s intervention. It is important when considering African opposition to the court that in situations where a national judicial system is unwilling or unable to prosecute its own citizens, then in some instances one can also witness the unwillingness of these states to cooperate with the Court and their predisposition to criticizing the Court.\(^{329}\)

**Complimentarily and the Responsibility to Protect**

The responsibility to protect and prevent mass atrocities, it may be argued is the basis for the establishment of the international criminal justice regime. Atrocities of global concern such as war crimes, crimes against humanity and genocide fall under international jurisdiction because these crimes invoke the need for collective responses. This is treated not just as a right, but as a responsibility which includes the protection

\(^{328}\) http://www.iar-gwu.org/node/87.

\(^{329}\) P68 The IC challenges to achieving justice and accountability.
of citizens across borders against such crimes. According to the United Nations General Assembly:

“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”

It is when states fail in this responsibility that the international community may become involved, where such crimes are concerned this has now become the mandate of the ICC which is a permanent and independent judicial body. One key tenet of the ICC is complementarity which seeks to frame how domestic justice systems can work in tandem with the Court.

Article 17 of the Rome Statute, sets out the basis for the principle of complementarily under which domestic judicial instruments take primacy with the ICC functioning as a Court of last resort. The ICC’s role essentially is to intervene, or to strengthen local systems, when they are not able to prosecute international crimes, when states are unable or unwilling to undertake judicial prosecutions in ‘good faith’. Essentially, domestic proceedings must be carried out in such a way as not to shield the suspect from prosecution. If domestic proceedings are carried out in such a manner then the ICC may intervene to prosecute, if the conditions stipulated in Article 17 apply. This principle can overrule the ne bis in idem principle, which is the doctrine that legal actions cannot be carried out twice for the same cause of action. This also relates to the quality of the trial, it must be “conducted independently” and in accordance with “the norms of due process recognised by international law”.

Contrary to one of the key criticisms levelled against the ICC, about its violation of sovereignty, the idea of complementarily was intended to give power to domestic courts and avoid the imposing demands of a

331 Rome Statute Article 20 (3) B.
supra national institution. In essence, the ICC would seek to prosecute a limited number of individuals from a state and in practice such a process would be lengthy and costly.

Local justice institutions have a comparative advantage over the ICC in terms of specialised knowledge of the in-country situation, access to evidence and witnesses, and in some cases a judicial system with a countrywide presence. Complementarity came to the fore in the 1930’s.332 Since then the International Criminal Tribunals of Yugoslavia and Rwanda have further stressed the importance of local jurisdictions, the idea of a division of labour between domestic and international jurisdictions.333 Following the end of the Cold War a report for an International Justice system was drafted in 1994 that was submitted to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in 1998. The conference results were presented as a draft to the Rome Conference.334

The ICC is only supposed to intervene in cases where the local justice systems are unable or unwilling to genuinely prosecute international criminal offences as stipulated in Article 17 of the Rome Statute. Unwillingness includes judicial processes that are not impartial, conducted properly or undertaken with the purpose of shielding those on trial from justice. Within the African context this is often the case in situations in which “political pressure may be too great for national justice systems to cope with.”335 The case of the recently convicted former leader of Liberia Charles Taylor, is instructive as the sitting President, Ellen Johnson Sirleaf requested that his trial be conducted at the Hague due to the support he still enjoyed in the country, which would make it difficult to prosecute in

333 Ibid p 10.
When the Statute talks about inability it is referring to the state of national justice systems, whether they have the capacity including specialised knowledge of international crimes to try them. According to Article 17 this is the case when

1) the states national judicial system has substantially or totally collapsed
2) the states national judicial system is unable to obtain the accused or the necessary evidence or otherwise unable to carry out its proceedings

This central argument in this article is that in the Kenyan case and other African cases before the court the option of domestic prosecution has not been a viable one.

The precursors for this system are the Nuremberg tribunals and much more recently and pertinently the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Nuremberg courts set a precedent for the prosecution of war crimes, most notably genocide, a crime which was new on the world stage at the time. The Nuremberg tribunal led to the acceptance that certain crimes warranted universal jurisdiction and that they must be fought wherever they occur and “gave rise to a new system of international criminal justice.” These trials took place because the German legal system was not in a position to try the crimes itself, hence the birth of the idea of complementarity. The Nuremberg tribunals were in a sense “victor’s justice”, something which the ICC has strived to avoid particularly through this principle of complementarity.

When the ICTY was set up, few believed that it would be successful due to the biased nature of the prosecutions; it managed to achieve this to a large extent simply because it provided a forum for the airing of grievances and

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336 http://www.charlestaylortrial.org/trial-background
338 Applying the principles of Nuremberg in the International Criminal court Phillipe p502
339 Ibid p505.
due to mutual cooperation in Yugoslavia.\textsuperscript{340} The ICTR arose in a case where like the Balkans there was a clear case to be made that international crimes had taken place. The ICTR has not prosecuted members of the victorious Rwandan Patriotic Front (RPF) and its mandate does not extend beyond the conflict of 1994, which suggests that any violations that may have been committed by the Rwandan government are not under scrutiny.\textsuperscript{341} The ICTY and ICTR were able to undertake a number of prosecutions due to the Both of these succeeded because there was political will and hence cooperation from the states concerned, which are key to the ICC doctrine of complementarity.

It is said that complementarity “poses one of the most significant challenges to the ability of the ICC to carry out a prosecution”\textsuperscript{342} On the flip side however, when complementarity works it is the ICC’s greatest asset.

The ICC can begin an investigation into a state in one of three ways:

First, under article 13 of the Rome Statute and most contentiously through a United Nations Security Council referral. This provision was mainly put into place to avoid non-signatory states that cannot otherwise be referred, breaking international criminal law without consequences. Due to the political nature of an organ such as the Security Council however, this provision raises questions of selective prosecution. This also raises charges of selective prosecution mainly because the United States is not party to the statute, and can refer other states, by virtue of its veto will not be referred and most importantly is seen as the reason why allegations of war crimes in Iraq and human rights violations in Palestine have not been prosecuted by the ICC. This has been used to refer Libya and the crisis in Darfur, both African, but also both situations in which there was a consensus, among the Permanent Five members of the UNSC, that crimes of an international nature had been committed.

\textsuperscript{340} The Tribunals Four Battles –Mirko Harin JICJ 2 2004 546-557 p557.
\textsuperscript{341} The ICTR Ten years on – Back to the Nuremberg paradigm? Luc Reyydams JCIJ 3 2005 977-988.
\textsuperscript{342} Matthew R(2004)Prosecutorial discretion within the ICC JCIJ pp71-95 p79.
Secondly, pursuant to article 15 the proceedings can be initiated by prosecutorial discretion. Once again the question of impartiality may have been evident in the minds of the framers. Due to the political nature of the Security Council (an organ which during the Cold war rarely reached consensus, a problem exhibited from 2011 with the situation in Syria) the ICC prosecutor can initiate proceedings, subject to control by the pre-trial chamber.343 Supporters of selective prosecution have said that this essentially give the office of the prosecutor a free hand to pick and choose which cases can be taken on.

The former ICC prosecutor Luis Moreno Ocampo has been accused of this, Jean Ping, the AU commissions chairman stated that “frankly speaking, we are not against the International Criminal Court, what we are against is Ocampo’s justice – that is the justice of a man”344 The prosecutor has only used this prerogative once, in the Kenyan case. This followed attempts to set up domestic proceedings that failed because of political machinations and a recommendation by a Kenyan commission of inquiry to open investigations should timetabled commitments to justice not be met.

**Finally**, under Article 14, of the Rome Statute, a state party can trigger referral. Four out of the seven cases currently being handled by the ICC in Africa out of a total of seven (the other three being Kenya, Libya and Sudan) were brought to the court in this fashion. When one considers charges of selective prosecution not only is this fact very pertinent but it displays complementarity in action. The states in question understood that they needed these crimes to be prosecuted and worked in tandem with the ICC to make this happen.

**Kenya in Context**

In 2007, a controversial presidential election resulted in a narrow win for the incumbent among claims of vote rigging. What initially began as political protests degenerated along the same ethnic lines that roughly


344 http://justiceinconflict.org/2012/02/22/is-the-icc-racist.
split the two main contenders, Raila Odinga and the President Mwai Kibaki. This violence resulted in the death of more than 1,000 people, the mass displacement and destruction of property. Organised gangs of militia actively sought out members of other ethnic groupings to evict them from ‘ancestral’ lands or kill them. The office of the prosecutor began a preliminary investigation into the case as the situation escalated. Eventually a peace settlement was reached between the two principals and violence ceased.

As a result of the peace agreement investigations into crimes committed during the post-election violence were to be carried out and the Commission of Inquiry on Post-Election Violence (CIPEV) also known as the Waki commission was set up to look into this. This committee concluded that a special tribunal needed to be set up with local and international members and that should there be one within a set timetable or the report and supporting evidence would be passed on to the ICC including a list of whom the commission considers the most responsible, the now infamous Waki envelope which would eventually lead to the prosecutor indicting Kenyan suspects.

On 5 February 2008, the Office of the Prosecutor first opened preliminary investigation and formally received authorization to begin an investigation in March 2010. During this time the government wasted six chances to set up a local tribunal or convince the prosecutor that actions were being taken to try these crimes. These included failed votes in parliament, trips to the Hague where an agreement was signed pledging action within a specified time frame, pleas from the panel of eminent persons and discussions about using domestic criminal courts rather than a special tribunal. Three different attempts were made to set up local tribunals which were undercut by political elites demonstrating a lack of political will. This also included attempts to set up the necessary legal frameworks which were eventually rejected by parliament and attempts at shuttle

345 http://www.icckenya.org/background/timeline.
346 http://www.nation.co.ke/News/politics_Cabinet+lost +chances+to+form+tribunal +/-1064/1311698/-/item/1/-/maty94z/-/index.html.
347 Ibid.
348 Journal of International Criminal Justice 7 2009 pp1063-1076 Antonina Okinta –
diplomacy. These last minute attempts at shuttle diplomacy were a “blatant attempt”\textsuperscript{349} to delay the proceedings using the influence of other states, for example through directly lobbying for United Nations Security Council intervention.

The events leading up to the indictment of Kenyan suspects at the Hague clearly demonstrates that the political class in Kenya was not willing to bring to justice perpetrators of post-election violence. The ICC is a court of last resort, and only when it became clear that the Kenyan special tribunal would not be established, did the court take action.

The Kenyan judiciary is undergoing reform and “in its current form will not be able to handle prosecutions for international crimes effectively.”\textsuperscript{350} Further the public did not have faith in the judicial system as a whole evidenced by the resolution of essentially a legal matter, electoral irregularities in the 2007 presidential elections through protests and violence. Thus the Kenyan government was both ‘unwilling’ and ‘unable’ to prosecute thereby justifying recourse to the ICC.

Following the commencement of the investigation the Kenyan parliament voted to withdraw itself from the Rome statute amid some MP’s calling it an imperialist court.\textsuperscript{351} Six suspects were named from the Waki envelope and four are set to undergo trials. Two of these, Uhuru Kenyatta and William Ruto were presidential candidates in the 2013 general elections; subsequently both were both duly elected as President and Deputy President respectively. The Kenyan political class jumped on the same bandwagon as Sudan and the AU in denouncing the ICC as an imperialist court that targets African nations.


\textsuperscript{351} http://www.standardmedia.co.ke/?id=2000025340&cid=4&articleID=2000025340.
These two politicians succeeded in galvanising campaigns around this rhetoric. These appeals had the effect as public support for the trials in the Hague dropped since the warrants were first issued. William Ruto and Uhuru Kenyatta have managed to portray themselves as victims of Western interests and the whole ICC debate is now being portrayed as Ocampo and the West persecuting Kenyans. The President has shown his support for these politicians publically.

This rhetoric demonstrates one a lack of knowledge about the court and its proceedings, a point that will be further illustrated below. In addition, a tendency to use anti-Western sentiments and direct them at the ICC. The same applies to other charges of selective prosecution, in four out of seven African cases the states themselves called upon the ICC taking advantage of the doctrine of complementarity. Other cases such as Palestine cannot fall within the courts mandate yet are often cited as proof that the court is biased.

Selective Prosecution, Anti-ICC and Anti-Western Sentiments

Many of the criticisms within the African context and the Kenyan situation tends to disregard the concept of complimentarily, failing to give credit to the role played in the initial stages of an investigation by the state and on the whole displaying a lack of understanding of not just court procedures but events leading up to these. One of the most damming facts used against the ICC is that all of its current cases are African, and that all those it has prosecuted have been African. However, no other continent has felt the dearth of genuinely effective judicial institutions than the African continent and unfortunately it is also certainly the site of a relatively large

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amount of conflict\textsuperscript{355}. According to Human Rights Watch it should indeed be seen as a plus that the court is concerned with Africa.\textsuperscript{356} However, they also caution that the perception that the court is biased against Africa is its biggest challenge to date.\textsuperscript{357}

Furthermore the African continent as a whole has the most signatories to the convention and was instrumental in the establishment of the Hague tribunal. Of the cases in the docket four out of seven were referred to the tribunal by African states themselves\textsuperscript{358} the same cases which are cited by critics as evidence that the ICC only prosecutes Africans The current groundswell of anti-ICC feelings began primarily with the indictment of Sudan’s president Omar Al Bashir a bandwagon that Kenya has jumped upon. This movement has seized upon the general anti-Western come Pan-African sentiment among the populace and made the ICC a target.

The anti-Western sentiment that has been redirected towards the ICC raises questions of state sovereignty and interference by major powers, or the West, where the ICC is seen as an institution of the West. This stems from a tendency to lump together all things foreign under the rubric of Westernization or globalization. This includes the policies of the World Bank and International Monetary Fund, and the intervention of Western powers militarily on the African continent, for example, US intervention in Somalia and Uganda, or French intervention in Côte d’Ivoire and Mali. From this point of view it is simple to link the ICC and its proceedings to Western neo-colonialism particularly when one considers the knowledge of these doctrines against complementarity and the ICC mandate.

The legacy of proxy wars fought on the continent at the whims of the great powers “produced immense misery and suffering and turned whole

\textsuperscript{356} http://www.youtube.com/watch?v=mTSfKeD189o&feature=relmfu Kenneth Roth HRW.
\textsuperscript{357} Ibid
regions of the world bitterly against the United States”. The fact that the United States is not a signatory to the Rome Statute does not however deter it from using the United Nations Security Council, as part of the P5, to refer matters or more importantly being lumped together with the neo-colonial contention. Furthermore, its decision not to sign the treaty demonstrates a lack of commitment to international justice. The role played by the West in these civil wars produced untold suffering and for many are partly to blame for the state of politics and some of the conflicts in which there have been crimes that fall under the Rome Statute.

The inheritance of colonialism, oppression and marginalization in international affairs, plays heavily on the psyche of African citizens making it relatively simple for populist politicians to paint the ICC in this light. Initiatives to strengthen democracy, conditionality attached to aid and the like are all seen as an attempt to control Africa, tied to Western ideals as well as Western economic models all of which ultimately benefit the West. The international criminal justice regime has been accused of constituting a form of “moral imperialism hidden behind Western legal categories” Tied to this and key to the argument against the ICC is the question of state sovereignty a particularly contentious subject given Africa’s colonial history.

All of these factors make it simple for the international justice system to be painted in a negative light by politicians as is the case in Kenya, or for the AU to garner support for non-cooperation. The theoretical underpinnings of this argument then are self-evident to most on the continent despite the fact that citizens may generally be committed to ending impunity. They wish to do so on their own terms not on Western terms. In this regard, the ICC focus on Africa rather than the principle of complementarity designed to avoid such a scenario has taken centre stage.

It is important to note that the questions of sovereignty and Western domination gained momentum following the indictment of Sudanese

president Omar Al-Bashir; this represented a watershed moment as a sitting head of state had been indicted. Such a move immediately placed other African heads of state on notice that they could be prosecuted and they have resorted to protecting themselves even when “there exists strong evidence of genocide in the Darfur region”.361

**State Sovereignty and Neo-colonialism in Question**

These arguments are based on two main premises one of which is state sovereignty the other being the maintenance of peace and security. The fact that greater objections have arisen in the Sudanese case than the Libyan one (for which a more compelling case of neo-colonialism can be made due to the intertwining of the ICC with the NATO forces present).362 This situation demonstrates that the prosecution of Al Bashir and the precedent it sets for heads of state is behind the African Unions vociferous objections.

The involvement of the ICC in Libya and Sudan are the most contentious and most open to accusations of neo-colonialism as they were United Nations Security Council referrals. In essence these amounts to the great powers deciding on the basis of their possibly subjective judgement about which states require ICC involvement. However, in the case of Sudan, there had been numerous chances given to the government of Sudan to initiate local proceedings and address the genocide in Darfur prior to referral. United Nations Security Council Resolution 1564 in July 2004 called for this and expressed concerns over the situation in Darfur. Under a Security Council Resolution the government is obliged to take action, by the year 2007 the Office of the Prosecutor concluded that the government had failed to take appropriate actions.363 In 2007, the report of the office of the Prosecutor noted that Sudanese government efforts were not sufficient to warrant inadmissibility, by virtue of having effective local proceedings

362  Libya the ICC and Complimentarity A test for shared responsibility Carsten Stahn JCIJ 10 2012 pp325-349.
Neither of these states were signatories to the Rome Statute and neither enjoyed particularly warm relations with the West however, that is not to say that they were referred to the ICC by the Security Council for that reason alone though it undoubtedly did play a factor in making it more politically palatable for the Security Council.

The Libyan case was referred to the ICC by the United Nations Security Council under the responsibility to protect doctrine which is meant to address cases of genocide war crimes ethnic cleansing and crimes against humanity. This doctrine tasks the international community with the obligation of safeguarding all citizens of whatever state against these crimes, when the state in which they reside has failed to do so. The responsibility to protect is a wide ranging concept involving diplomatic measures, economic sanctions; military measures and even in this case the referral of a case to the ICC.

This is because in tandem with the responsibility to protect, there is also an equally important responsibility to prevent. In a sense then the ICC was used as a way to constrain the violence as well as a justification for military action, when Gaddafi had failed to protect his citizens. From this line of reasoning then, the Security Council cannot merely ask the ICC to intervene and investigate in countries it considers to be necessary but it can also accompany this with military intervention. The close linkages to NATO actions and the referral of the ICC gave it a “poisoned chalice” to work with as it became part and parcel of the political power plays surrounding intervention in Libya.

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367 Ibid 327.
In Libya the speed with which the preliminary investigation was undertaken, a mere two days from the Security Council referral\textsuperscript{368} raises questions as to the quality of the investigation as well as during which time complementarity was to come into play. When was the domestic system supposed to initiate investigations into these crimes? Or was it decided that the system could not? The implication from this is that if the ICC works quickly and is accompanied by a military action from the Security Council, then it can in a sense do what it likes and assume primacy over domestic processes rather than function as a court of last resort. This clearly demonstrated political pressure from the United Nations Security Council can have an impact upon the ICC.

The ICC has also been accused of falling to investigate alleged violations of international law by NATO forces in Libya. The ICC has indicated that it would look into the alleged NATO atrocities in Libya, though its decision to do so is viewed more as being reactive then proactive coming soon after allegations surfaced.\textsuperscript{369} Whether the ICC is subject to political pressures which may force its hand on where to prosecute, is however not the same as saying that it is guilty of selective prosecution. There is no doubt that the ICC is constrained in its operations by these pressures. The ICC nonetheless moved to prosecute where there existed crimes and where there was a majority perspective that crimes were being committed. In the Libyan case there was also the view that that local authority was unable at the time to prosecute and indeed the new institutions were still lacking the capacity to do so.\textsuperscript{370} There was a convergence of great power interest not evident in the Sudan situation. Nonetheless, the speed with which these investigations were carried out raised questions about whether the principle of complementarity was indeed adhered to in this instance.

However, despite these political questions what remains most pertinent after all these permutations when considering the charges of selective prosecution, is whether or not there were crimes that fall under the rubric

\textsuperscript{368} Ibid.
\textsuperscript{369} Ibid.
of the Rome Statute which were committed. Certainly the Security Council was convinced of this fact when it authored resolution 1970, the court has issued several arrest warrants and its preliminary investigations determined that “evidence collected has confirmed the fears and concerns expressed” at the outset. The Office of the Prosecutor had until then displayed a tendency to only open investigations into cases where it believed, that it could present a strong case and “acting only when it possesses enough evidence to provide strong prospects for a successful investigation”.

Nonetheless, one can see how intervention in Libya can be seen as selective prosecution in line with the wishes of the West, even though Russia and China hold vetoes in the Security Council. The speed with which the ICC acted to issue warrants brings into question the principle of complementarity although political considerations made it highly unlikely that the Gaddafi regime would have investigated itself, let alone during an uprising or whether it had the capacity to do so.

Furthermore, in the Libyan case the quick implementation of the responsibility to protect doctrine, involvement of the ICC and the Security Council being able to react to events on the ground, in practice represents a positive step in enforcement of international law. This can be considered a positive development when one considers that the ICC has only got cases from seven African countries in its docket since its inception, and that it often is a lengthy bureaucratic process to investigate and try a single individual. In addition, ICC interventions generally require the consent of the governments who may be committing international crimes. The Libyan case can be seen as an important watershed despite the political undertones in its implementation.

American involvement in Iraq and Israeli actions in Palestine are often cited when accusing the ICC of selective prosecution. The war in Iraq galvanised public opinion around the world in opposition, and by

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371 http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/reports%20to%20the%20unsc/statement%20to%20the%20united%20nations%20security%20council%20on%20the%20situation%20in%20the%20libyan%20arab%20jamahiriya_%20pur.

372 Law politics and Pragmatism p38.
extension opposition to American foreign policy and globalisation, Roger Cohen talks of “global America hating” as a consequence of United States foreign policy in the aftermath of the September 9 attacks in 2001. There have been very public allegations of human rights violations in Iraq and Saddam Hussein was not brought before the ICC. These appear to make a strong case for selective prosecution. Hence it is no surprise that the Office of the Prosecutor received numerous complaints about this conflict.

In his reply to the numerous complaints former prosecutor Luis Moreno Ocampo stated that a large number were about the legality of the conflict which was what generated the most consternation. This Ocampo argued is an issue that is clearly outside the courts mandate. Furthermore, neither the United States or Iraq are signatories to the Rome Statute and therefore once again their actions fall outside the ICC’s mandate. In light of the numerous complaints received the ICC did however examine evidence pertaining to human rights abuses by coalition forces in Iraq. The Office of the prosecutor found that there was evidence of wilful killing and ill treatment, but not on a large enough scale to warrant prosecution when compared to the gravity of the other cases it was investigating, coming across four to twelve victims.

What the Iraqi case demonstrates is a common feature of most arguments and accusations against selective prosecution by the International Criminal Court system. On the question of Iraq, there is a lack of awareness of the mandate of the court, of what it can and cannot do. The court could not prosecute either the Iraqi state or the United States as they are not signatories and any UN Security Council (UNSC) referral would most likely be vetoed by the Americans. Secondly, the scale of the crimes did not warrant ICC investigations, the Prosecutor also found that a number of the cases were already the subject of domestic proceedings.

376 Ibid.
The same can be said about allegations of international crimes in Israel, accusations that the court is not involved in Israel are informed by a lack of knowledge of the ICC and opposition to Israeli polices in Palestine, which are tacitly supported by the US. Israel is not a signatory to the Rome Statue, the United States would veto any attempt to get a UN Security Council referral, and the ICC has indicated that it cannot allow the Palestinian authority to sign the Statute as it has been granted observer status by the United Nations not that of a state.377

The argument that the ICC is a neo-colonial instrument illustrates these two problems:

“Yet, a cursory glance at the world also tells of many crimes committed against ordinary citizens – from Palestine to Afghanistan, to Libya and, of course, Iraq. Who bears responsibility for these crimes? Are we suggesting that the lives of Iraqi, Libyan and Palestinian children and women do not matter? How come no one is facing so-called justice in The Hague?”378

The recent massacre in Syria has augmented calls for intervention by the United Nations by the media and the international community at large; the United Nations Human Rights Council has called for the referral to the ICC. This will not happen however as Russia has promised to veto any resolutions relating to Syria that advocate military intervention, and has done so in the past due to its concerns over the effect such a referral would have on peace and security within that state.379

Syria is also not a signatory to the Rome Statute and therefore cannot be investigated by the Prosecutor of his own discretion and it is highly improbable that the Bashar Al-Assad regime would refer itself. Therefore, it seems that no actions will be taken by the ICC in this case. Certainly, Syria which experienced massive crimes against humanity, including the use of chemical weapons against its citizens, is not an African country and the

case for international prosecution seems quite compelling arguments facts that may be used by the AU and others who claim the ICC is biased against Africa. However, in the same vein as other cases such as Palestine or the war in Iraq, there are legal constraints which prevent ICC investigations. Hence the ICC is acting within legal limits rather than on ‘racist grounds’ or selectivity.

African countries that oppose the ICC do so to a large extent because of the politics they see manifesting through the Court’s interventions. A key concern is the ability of the Security Council to refer and defer cases. On this basis and given the dominance of the Permanent Five members (US, UK, France, Russia and China) of the UNSC, the functioning of the ICC is “subject to the uneven and imbalanced landscape of global politics” and its “skewed institutional power of the United Nations Security Council creates an environment in which it is more likely that action will be taken against accused from weaker states than those from powerful states, or those protected by more powerful states”

This disparity is seen as a threat to state sovereignty. On the other hand it should be noted that as alluded to earlier Africa was instrumental in the build up to the creation of the Court and it has the largest number of signatories to the Statute. Further, these objections escalated not just after the ICC opened its investigations into Sudan, but after they issued an indictment for President Al Bashir. Following this the African Union adopted a policy of non-cooperation with the ICC and despite Bashir travelling to several African nations they have not met their obligations to arrest him. The African Union cited concerns over peace and stability as a result of the indictment and the effect this would have on the peace process.

380 http://justiceinconflict.org/2012/02/22/is-the-icc-racist.
381 ISS ICC That Africa wants p1.
382 Ibid.
Prior to this process however, the ICC had engaged Sudan following its referral by the Security Council. An initial investigation by the United Nations found evidence of war crimes and recommended an ICC intervention. In time, response Sudan had set up a local tribunal and managed to try a few lower level perpetrators. The ICC began to issue arrest warrants for more prominent leaders culminating in the indictment of Omar Al Bashir, the President of Sudan. The Sudanese government had refused to cooperate with the earlier indictments citing the already existing local trials which would excuse it from ICC trials and the fact that it was not a signatory to the Rome Statute therefore not obliged to fulfil all the obligations of the same as a state party would have to.

In response to concerns about peace and security the African Union Panel on Darfur (AUPD), or Mbeki panel, was established by the African Union and endorsed by the Security Council to investigate the situation in Darfur, including matters of peace and security. The Mbeki Panel found that there was evidence of human rights violations and these needed to be acted upon. It suggested the establishment of a hybrid court which would be part of the AU to try these crimes. The AU embraced this idea, however under the Rome Statute, deference can be made only to national systems not regional ones and Sudan rejected the idea because it would contain foreign elements. The Mbeki panel also concluded that ICC involvement was necessary and that the people “are strongly opposed to any suspension of the ICC action, seeing it as an escape route for the Government from the demands of justice.” From December 2009, to date there has been no significant progress on the implementation of these recommendations.

Despite the level of African involvement in this case it has still acted as a rallying cry for African nations against the ICC with charges of Western

385 P348 Peace justice or neither.
justice being imposed. The former President of Malawi, Bakilu Muluzi, reiterated that they don’t “have the right to tell us what to do in Africa.”\textsuperscript{389} The Mbeki Panel report also determined that justice was needed for peace and security in the region as a means to demonstrate that the new government and structures coming into place would not accept impunity, a condition which would be required ostensibly increasing faith in their ability to govern with all its knock-on effects.\textsuperscript{390}

When considering Sudan therefore, it is difficult to make a case for selective prosecution. The initial United Nations inquiry found evidence of war crimes, as did the subsequent AU panel. In between this Sudan set up systems to try these crimes but made little progress. Under the principle of complementarity, domestic jurisdiction had been given priority and the ICC only came in when they failed to prosecute. This aspect of complementarity is ignored by those who accuse Sudan of selective prosecution and as illustrated earlier demonstrates firstly a lack of understanding of the ICC’s work and secondly a manifestation of anti-Western sentiment. The head of the African Union Jean Ping has questioned, with reference to the case in Sudan, why Africa is being made an “example” of to the world.\textsuperscript{391}

Despite their criticisms of the ICC, African countries have lobbied hard to ensure that the next prosecutor is African.\textsuperscript{392} Out of the seven situation countries in Africa, two Libya and Sudan were Security Council referrals where it was clear that violations of international law had taken place. Four were self-referrals by states which recognised that they lacked the capacity to try international crimes themselves. Finally, Kenya where after efforts and commitments from the government to locally deliver justice failed, due to the inability to establish a Special Tribunal, following the independent Kenyan investigation Waki Report, a recommendation for ICC

\textsuperscript{389} Sudan Tribune AU moves aggressively to shield bashir from prosecution Thu July 29 2010.
\textsuperscript{390} http://allafrica.com/stories/201010290430.html.
\textsuperscript{392} http://justiceinconflict.org/2012/02/22/is-the-icc-racist.
investigations were opened by the prosecutor. In these cases, it is clear to see that complementarity played a large role in the lead up to ICC action. The ICC actions were those of last resort not imposition as implied by its critics. The principle and application of Complementarity is a significant counterpoint to charges of selectivity and anti-African bias.

Complementarity in Libya and Sudan present two different interpretations. In Libya the speed at which investigations were carried out and investigations represent a hard-line approach whereas Sudan was given far more leeway, time to initiate proceedings and the like a form of positive complementarity. Indeed the same leeway was given to Kenya to set up a local tribunal. Other cases outside Africa are being examined by the ICC it is currently looking into the situations in Afghanisatin, Georgia, Colombia, Korea and Honduras. In Colombia, for example, the ICC is investigating numerous crimes but is currently facilitating efforts by the Colombians through its justice and peace law, which has its critics. However, it has been argued that simply by placing the situation under scrutiny the ICC has actually speeded up the pace of investigations and hence contributed to positive complementarity. Further in Colombia despite calls for intervention, a number of crimes in Colombia fall outside the temporal restrictions of the Rome statute. The focus on the disputes between the AU and the ICC has also distracted attention from the growing interest of the ICC in this case.

**Conclusion**

The Kenyan case illustrated complementarity at work as a gradual process that unfortunately did not produce domestic prosecution for international crimes as it is hoped will be the case in Colombia. It started out as a form of positive complementarily, the pressure of possible ICC indictments creating internal pressure as evidenced by the Waki Report.

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393 Libya the ICC and Complimentarity A test for shared responsibility Carsten Stahn JCIJ 10 2012 pp325-349 p333.
394 http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases.
396 http://sas.academia.edu/ParEngstrom/Papers/1428421/In_the_Shadow_of_the_ICC_Colombia_and_International_Criminal_Justice p9.
and a series of repeated attempts to create the Special Tribunal. Eventually these failed and it was decided that the state was unwilling to prosecute as well as lacking the legal mechanisms to do so. Therefore in the interests of upholding international law and seeking justice for victims of the post-election violence the ICC acted. This trend replicates itself in other situation countries, attempts at local jurisdiction have failed and so as a last resort the ICC intervenes. This is a key counterpoint to charges of selective prosecution. As illustrated this often arises from a lack of knowledge of the ICC procedures and mandates for example questions over Iraq.

Secondly, the nascent anti-Western sentiment pervading the African continent has been tapped into and is being used to accuse the ICC of being an imperial project. Complementarity however means that these states have had a large degree of input and been given a chance to create domestic solutions for their problems. Further, African states were instrumental in the adoptions of the Rome Statute. This is also characterised by a lack of knowledge. In Kenya this rhetoric is being used to garner sympathy and overlook or forget the various failed attempts to try Kenyans at home.

In conclusion, it is the principle of complementarity that places domestic systems first that ensures the ICC is not biased. Should these local systems succeed there is no need for ICC intervention. The idea of selective persecution is populist rhetoric create the idea that the ICC is biased giving impunity a chance to survive that relies on a lack of understanding of the courts mandate and prevailing perceptions of neo-colonialism.