**A CRITICAL ANALYSIS OF THE DOCTRINE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL JUSTICE WITH REFRENCE TO KENYA**

**Abstract:**

The cardinal offshoot of sovereignty is the exercise of criminal justice by states for and their behalf without any external influence. The creation of an international criminal court with unlimited jurisdiction to try the most grievous of offences was a threat to the sovereignty of states as mentioned earlier. To solve this dilemma of state sovereignty, a meeting point between national criminal jurisdiction and the criminal jurisdiction of the ICC had to be reached hence the provision of Article 1 of the Rome statute which makes the ICC complementary to the national jurisdiction of states. The post-election violence of 2007 in Kenya hit the country with all manner of violence such as crimes against humanity. Following these crimes, the ICC exercised its jurisdictional rights and began prosecuting perpetrators and there arose a lot of issues on jurisdiction which in turn gave birth to complementarity discourse in the case of Kenya. This paper will talk on the principle of complementarity under the Rome statute of the ICC with Article 17 as its guide.

**A Critical Analysis of the Doctrine of Complementarity in International Criminal Justice with Reference to Kenya**

# Introduction

Following a competitive electoral process in Kenya, in which the main presidential candidates, Raila Odinga and the then incumbent President Mwai Kibaki (now retired), disputed over presidential election results led to massive violence in the country in the late 2007. Even though the post-election violence may have been a brief one, lasting about two months, it had some of the most significant outcomes. International reports indicated that more than 1000 people lost their lives, massive internal displacement of people, as well as destruction of property worth millions of dollars. Owing to the failure of the two main election rivals to agree on the results, international pressure and diplomacy, led by the Kofi Annan, created a grand coalition government that gave a power sharing deal to the main election contenders.

A commission of inquiry was formed to develop an internationalized criminal tribunal, or involve the International Criminal Justice mechanisms in seeking justice for the victims. The Grand-Coalition Government made a commitment to establish a hybrid tribunal and also cooperate with the ICC in seeking justice for the victims, promises many have argued that the government has failed to honor. This legal quagmire, therefore, requires a critical analysis of the key principles of admissibility in the Rome Statute, including gravity and complementarity. More particularly, this discussion focuses on the issue of complementarity of the ICC with the domestic judicial systems of Kenya[[1]](#footnote-1).

# The Doctrine of Complementarity in International Criminal Justice

The entire process of the involvement of the ICC into the Kenyan cases is an opportunity to analyze and understand the evolution of the ICC’s understanding of complementarity, gravity, and the idea of positive complementarity[[2]](#footnote-2). In this case, it is important to understand the extent of effectiveness of the ICC’s involvement in creating a culture of peace and justice, in which leaders in the country would act in manners that do not lead to violence and other crimes against humanity. The violent protests that followed the announcement of the presidential results had credible reports indicate that senior political leaders, business tycoons and other influential people were responsible for organizing and executing the violence in different target areas.

The nature of involvement and the role of politicians and other wealthy citizens resembled the 1990 occurrence, in which innocent citizens who sought multiparty democracy also received violent confrontation from the police[[3]](#footnote-3). However, the most critical concern in such cases is that the domestic courts had never made successful attempts to deliver justice to the victims. Furthermore, even as the 2007/2008 violence occurred, there was little to no prospects that the local Kenyan courts would take an action to bring justice by prosecuting and punishing the culprits[[4]](#footnote-4). This state of atrocities against citizens, with reference to the lack of responsiveness of the domestic courts in delivering justice, that necessitates the role of the International Criminal Court. The Kenyan cases, forms a typical case, among others reported from across the world, that the ICC should claim its jurisdiction, or prosecute.

# Kenya before the ICC. A case of Complementarity and Gravity

The Kenyan involvement with the International Criminal Court took a significant turn when the Chief Prosecutor, Louis Moreno Ocampo, requested the Pre-Trial Chamber II for authority to open investigations into the Kenyan circumstances surrounding the post-election violence. The prosecutor based his application on the basis that the circumstances would constitute crimes against humanity, within the jurisdiction of the court[[5]](#footnote-5). As indicated in the introductory sections, the opening of the Kenyan cases made it as the first effort to launch such as case *proprio motu,* following the persistent failure of the Kenyan Government to fulfil the recommendations made by the Waki Commission on the formation of a hybrid tribunal[[6]](#footnote-6).

Before the prosecutor made a request to open and conduct investigations into the circumstances surrounding the post-election violence, reports indicate that there was sufficient evidence upon which to build the case. For instance, reports indicated that the Office of the Prosecution (OTP) did not only rely on the evidences sealed in the Waki Commission’s report, but also crucial knowledge that were available across many sources, including individual witnesses, domestic and international NGOs[[7]](#footnote-7). The pursuit of the Kenyan cases of crimes against humanity provides a fresh opportunity to interpret the two, but often under-defined provisions of the Rome Statute, such as complementarity and gravity.

## Analysis of The principle of Complementarity

The principle of complementarity provides for the circumstances under which the International Criminal Court can take up a case of crimes against humanity in any country who is a signatory to the Rome Statute. Under this principle, the ICC can only take up to investigate, prosecute and deliver a judgement of justice, on cases in which the countries involved lack the capacity within their jurisdictions, or have declined, or lack an adequate sense of cooperation among stakeholders[[8]](#footnote-8). This principle reflects the fact that the international jurisdictions recognize the domestic jurisdictions, and gives priority to such countries to utilize their internal jurisdictions to handle the cases. The principle of complementarity was created as a principle of admissibility of cases into the international court[[9]](#footnote-9).

In the Rome Statute, just as in the cases admitted in other courts, the principle of complementarity plays a pivotal role in the process of deciding on the admissibility of any potential case. It forms the point of balance between the point when the ICC decides to extend their jurisdiction into the international matters, and the preservation or application of a national sovereignty of a national jurisdiction[[10]](#footnote-10). Usually at the ICC, the prosecutor may request for authority from the Pre-Trial Chamber II to open investigations for a case, just as was witnessed in the Kenyan cases, yet there may not be sufficient evidences or witnesses to sustain the case[[11]](#footnote-11). Nonetheless, at this stage, the judges, led by the presiding judge, have a duty to consider the admissibility of the potential case, as provided under Article 53(1) (b) of the Rome Statute.

Under such considerations, the judges, such as Judge Chile Eboe-Osuji, who has been the presiding judge in the Kenyan cases, have to consider both the complementarity and the gravity of the cases to the court[[12]](#footnote-12). It is important to note that the process of considering the admissibility and gravity of any potential case to the ICC is outlined in Article 17(1) of the Rome Statute, even though the procedure and standards relate more to the admissibility of individual cases, other than potential cases whose investigations have either begun, or yet to begin[[13]](#footnote-13). Analyzing the context with reference to the Kenyan cases, it is evident that the Pre-Trial Chamber I showed more considerations to the potential cases in determining the opening of investigations by the Office of the Prosecutor. The Pre-Trial Chamber utilized the standards provided in Article 17(1) on the principle of complementarity[[14]](#footnote-14).

The court will not have jurisdiction, according to Article 17(1)(a), if “The case is under investigation or prosecution by a State which has jurisdiction over it unless the State is unwilling, or lacks a genuine capacity to carry out the investigation or prosecution”. In principle, then, only a sincere investigation or prosecution by a jurisdictional state can operate as a bar to the admissibility of a case. It means that the court may be compelled, in some instances, to assess the nature of national proceedings for accountability[[15]](#footnote-15). The language of the Rome Statute suggests that the question of complementarity hinges on the presence of actual investigations or prosecutions, not prospective ones. It also appears to depend upon official, state-level action, not local or traditional justice measures, although the latter has been proposed by among others the government of Uganda for crimes in the north of the country, despite its referral of the situation

to the ICC[[16]](#footnote-16). The Rome Statute’s requirement of an investigation or prosecution, rather than only the prosecution has led some analysts to speculate that investigations without trials, including through bodies, such as commissions of inquiry (for instance, Kenya’s Waki Commission), could suffice for Article 17(1)(a).

# The Office of the Prosecutor’s (OTP) Approach: A Positive Complementarity

However, the Office of the Prosecutor has taken the view that beyond complementarity as a pure question of admissibility, as elaborated in the Rome Statute, complementarity might be viewed as a tool to promote national proceedings, or what it terms “positive complementarity”[[17]](#footnote-17). It is something of a variation on what William Burke-White has advocated as “proactive complementarity.” Positive complementarity is not envisaged in the statute, but rather is an

interpretation of the OTP, elaborated in prosecutorial documents in 2006 and 2010[[18]](#footnote-18). The prosecutorial strategy of 2010 explains that the ICC’s promotion of genuine national proceedings can occur through various measures, including contacting country officials, experts, and lawyers to encourage participation in investigation and prosecution, and providing information to national judiciaries.

The expectation is that the ICC can advocate national action that renders ICC action unnecessary. Some have argued, for example, that the scrutiny by the ICC of Colombia’s Justice and Peace Law helped to propel national reconsideration and accountability efforts[[19]](#footnote-19), although to be clear, the revision of the legislation was achieved through a decision of the Colombian Constitutional Court. Beyond the advancement of national accountability mechanisms, the concept of positive complementarity envisages a preventive effect on the court[[20]](#footnote-20). The prosecutor has suggested that crimes falling within the court’s jurisdiction may deter further abuses, and the strategy proposes helping NGOs to maximize any preventive impact[[21]](#footnote-21). However, the strategy is clear that the tribunal will not engage in capacity-building, nor is it expected to participate in direct support to national legislatures and judiciaries[[22]](#footnote-22).

There is a risk, however, that states seeking to evade ICC scrutiny may use the concept of positive complementarity to delay. The delay may occur through the creation of sham tribunals, in what Christopher Keith Hall has referred to as “perverse complementarity”. Thus, in a case such as that of Uganda, the government has created a Special Division within the High Court to try leaders of the Lord’s Resistance Army, shielding them in theory from ICC prosecutions[[23]](#footnote-23). The delays and machinations in Kenya included proposals for a special tribunal, the suggestion that the TJRC could have judicial functions and the promise of judicial reform so that domestic trials might proceed[[24]](#footnote-24).

In such circumstances, it becomes cumbersome to determine the genuineness of national proceedings. For instance, if the Kenyan parliament had adopted the first hybrid tribunal bill, what types of limiting clauses designed to protect many perpetrators, including the possibility of presidential pardon, would have caused the ICC judges to have viewed the tribunal as not genuine? Such a judgement might be only possible, if at all, after the completion of enough trials to identify a clear pattern of actual accountability for the crimes[[25]](#footnote-25). However, the limited steps towards accountability undertaken or promised by the Kenyan government discussed below appear to be attempts to hijack the concept of positive complementarity and the Kenya-specific three-pronged strategy in order to prevent accountability[[26]](#footnote-26). The interpretation of complementarity for cases arising from post-election violence in Kenya might thus prove particularly interesting[[27]](#footnote-27).

## The Interpretation of Complementarity for Kenya

The situation in Kenya provides the opportunity to investigate the emerging standards of complementarity that the Office of the Prosecutor and the judges utilize[[28]](#footnote-28). It is of particular interest because Kenya is the first country in which investigation was sought through the exercise of the Prosecutor’s *proprio motu* powers, unlike earlier situations of state self-referral. Under Article 15 of the Rome Statute, the Prosecutor can initiate investigations *proprio motu* into crimes under the jurisdiction of the Court, rather than wait for state or UN Security Council referral[[29]](#footnote-29). Where states have themselves sought the court’s intervention, and either declared themselves unwilling or unable to pursue specific cases, the determination that they were indeed unwilling was made potentially much easier[[30]](#footnote-30). However, where a state declares itself capable of pursuing domestic prosecutions, but takes relatively few steps to pursue cases, and pursues none against alleged high-level perpetrators while engaging in delaying tactics, complementarity must be closely assessed.

The Rome Statute does not specifically indicate a timeframe in which to take action, but rather refers, in Article 17 (2) (b), to an unjustified delay in proceedings which is inconsistent with the intent of bringing the person concerned to justice[[31]](#footnote-31). Nor does it provide any detailed guidance for assessing unwillingness or inability to pursue cases or for judging where sham proceedings occur, or stalling tactics are being utilized, but rather refers, in Article 17(2) (a, c) to proceedings undertaken with the purpose of shielding a person from prosecution, or where proceedings are being conducted in a manner inconsistent with the intent of bringing a person to justice[[32]](#footnote-32).

In Kenya, the delays and ultimate failure to establish a hybrid tribunal occurred under the watchful eye of the Office of the Prosecutor, with warnings issued and deadlines set by it. As noted above, the Kenyan government repeatedly delayed action, which in turn postponed the ICC prosecutor’s request for a formal investigation. This would suggest that complementarity is not just assessed at the moment that an inquiry is contemplated, but rather that the prosecutor will allow time for states to put prosecutions into place, instead of taking an immediate decision about inability or unwillingness of a state to prosecute[[33]](#footnote-33). It also suggests, however, that the leeway given to domestic systems is not infinite: the political maneuvering lasted nearly a year before Moreno-Ocampo officially requested an investigation. The rather implausible promise of internal reforms and trials at an unspecified future date was not sufficient to prevent the eventual request for the inquiry.

# Conclusion

The International Criminal Court is an infant global institution which has major political expectations and pressures on its operations. Its structure allows it to perform its fundamental function of cringing justice to the victims of crimes against humanity, among other atrocities committed by senior leaders such as politicians and wealthy citizens, especially where such countries have failed to manifest genuine efforts to investigate and prosecute culprits. In its structure of the relationship between the judges in the trial chambers and the OTP, there is the fundamental factor of complementarity. Simply put, the principle of complementarity provides for the ICC to give a chance for domestic judicial mechanisms for handling crimes reported against humanity, before it can take up such cases under conditions of incapacitation of the country in question. In the Kenyan cases, the principle of complementarity applied when the Kenyan Government failed to form a hybrid tribunal as earlier promise, based on the recommendations of the Waki Commission of Inquiry. The ICC had a duty to launch investigation through the Ocampo-led OTP, and build cases against the initial 6, then 4, and the final 2 suspects. However, it is evident that the ICC’s faces major forces of significant influence on its jurisdiction, including the pressure from the AU heads of states for a drop of the Kenyan cases.

# References

An Introduction to International Criminal Law and Procedure, (Cambridge: Cambridge University Press, 2010) chapters 3 and 4.

Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454.

Dancy, Geoff, and Florencia Montal. "Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions." In *American Society of International Law Conference, Chicago IL*. 2014.

De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004).

Haile, D, Accountability for crimes of the past and the challenges of criminal prosecution. The case of Ethiopia (Leuven University Press, Leuven 2000).

Holmes J T ‘The principle of Complementarity’ in R S Lee (ed) The International Criminal Court, The making of the Rome Statute: issues, negotiations, results (Kluwer law Publication, The Hague 1999) 41-78.

Jann K. Kleffner, Complementarity in the Rome statute and National Criminal Jurisdictions (oxford: Oxford university press 2008)

Nouwen, Sarah MH. *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan*. Cambridge University Press, 2013.

Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst,

Werle, Gerhard, and Florian Jessberger. *Principles of international criminal law*. OUP Oxford, 2014.

1. An Introduction to International Criminal Law and Procedure, (Cambridge: Cambridge University Press, 2010) chapters 3 and 4. [↑](#footnote-ref-1)
2. Werle, Gerhard, and Florian Jessberger. *Principles of international criminal law*. OUP Oxford, 2014. [↑](#footnote-ref-2)
3. An Introduction to International Criminal Law and Procedure, (Cambridge: Cambridge University Press, 2010) chapters 3 and 4. [↑](#footnote-ref-3)
4. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-4)
5. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-5)
6. Dancy, Geoff, and Florencia Montal. "Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions." In *American Society of International Law Conference, Chicago IL*. 2014. [↑](#footnote-ref-6)
7. An Introduction to International Criminal Law and Procedure, (Cambridge: Cambridge University Press, 2010) chapters 3 and 4. [↑](#footnote-ref-7)
8. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-8)
9. Werle, Gerhard, and Florian Jessberger. *Principles of international criminal law*. OUP Oxford, 2014. [↑](#footnote-ref-9)
10. Holmes J T ‘The principle of Complementarity’ in R S Lee (ed) The International Criminal Court, The making of the Rome Statute: issues, negotiations, results (Kluwer law Publication, The Hague 1999) 41-78. [↑](#footnote-ref-10)
11. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-11)
12. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-12)
13. Dancy, Geoff, and Florencia Montal. "Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions." In *American Society of International Law Conference, Chicago IL*. 2014. [↑](#footnote-ref-13)
14. An Introduction to International Criminal Law and Procedure, (Cambridge: Cambridge University Press, 2010) chapters 3 and 4. [↑](#footnote-ref-14)
15. Werle, Gerhard, and Florian Jessberger. *Principles of international criminal law*. OUP Oxford, 2014. [↑](#footnote-ref-15)
16. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-16)
17. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-17)
18. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-18)
19. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-19)
20. Nouwen, Sarah MH. *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan*. Cambridge University Press, 2013. [↑](#footnote-ref-20)
21. Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, [↑](#footnote-ref-21)
22. An Introduction to International Criminal Law and Procedure, (Cambridge: Cambridge University Press, 2010) chapters 3 and 4. [↑](#footnote-ref-22)
23. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-23)
24. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-24)
25. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-25)
26. Werle, Gerhard, and Florian Jessberger. *Principles of international criminal law*. OUP Oxford, 2014. [↑](#footnote-ref-26)
27. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-27)
28. De Wet, E, The Chapter V11 Powers of the United Nations Security Council (Hart Publishing oxford 2004). [↑](#footnote-ref-28)
29. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-29)
30. An Introduction to International Criminal Law and Procedure, (Cambridge: Cambridge University Press, 2010) chapters 3 and 4. [↑](#footnote-ref-30)
31. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-31)
32. Haile, D, Accountability for crimes of the past and the challenges of criminal prosecution. The case of Ethiopia (Leuven University Press, Leuven 2000). [↑](#footnote-ref-32)
33. Cronin-Furman, Kate. "Managing expectations: international criminal trials and the prospects for deterrence of mass atrocity." *International Journal of Transitional Justice* 7, no. 3 (2013): 434-454. [↑](#footnote-ref-33)