

## Note from the Field

### **Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya**

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*This Note examines the nexus between international and domestic criminal justice systems. It discusses whether the International Criminal Court (ICC) can advance positive complementarity through its so-called preliminary examinations. Using Kenya as a case study, we analyze the advocacy strategies of Kenyan NGOs during the preliminary examination that took place between February 2008 and March 2010. We found that Kenyan NGOs did not use the ICC preliminary examination to “trigger” criminal justice reform or domestic accountability for crimes perpetrated during the post-election violence. Instead, these NGOs successfully focused on advocating for the ICC preliminary examination to turn into a formal investigation. Kenya’s experience with the ICC preliminary examination leads us to conclude that positive complementarity poses a paradox for NGOs: if they insist on capacity-building of the domestic justice system, they fail at demonstrating that the State is “unwilling or unable” to prosecute crimes domestically. This Note explores that paradox.*

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The views expressed in this Note are those of the authors only. They do not represent the views of the Swedish or Colombian governments.

## INTRODUCTION

Since Kenya reinstated multi-party politics in 1991, the country has experienced violence before and during elections.<sup>1</sup> By the end of 2007, yet another election crisis had materialized in Kenya. Disputed presidential election results triggered protests and violence reinforced by ethnic tensions. This time, however, the violence was more widespread; it was urban as well as rural, affecting a majority of the Kenyan provinces, and was more deadly and destructive than ever before. Ultimately, 1,133 people were killed, many more injured, and thousands of private and public properties were burned, pillaged, or destroyed, causing massive internal displacement.<sup>2</sup>

The 2007-2008 post-election violence did not emerge out of a vacuum. While the pre-election violence was mainly a clash between supporters of different candidates in response to the perceived rigging of elections, the post-election violence had a distinct ethnic dimension.<sup>3</sup> In previous elections, Kenyan politicians have used ethnic division to fuel political support for their own ethnic groups.<sup>4</sup> There is a widespread and common belief that Kenyan presidents favor their own ethnic groups.<sup>5</sup> The growth of presidential power and the lack of checks and balances on the government have led to the conviction that one's own group must be in power in order to have access to resources, especially land.<sup>6</sup> The pattern of unprosecuted election violence has contributed to a culture of impunity, which, together with poverty and unemployment, has led youths to be willing to take up arms as "mercenaries" on behalf of anyone who will pay them.<sup>7</sup> All of these tensions came to the surface during the 2007 election. One Luo woman described her experience during the post-election violence in Mombasa by stating that "it was as if we ceased to be human for a moment."<sup>8</sup>

In February 2008, President Mwai Kibaki and the opposition leader Raila Odinga signed a power-sharing agreement, which ended the violence and stopped Kenya from plunging into civil war. However, Kenya's coalition government has been averse to holding perpetrators of the post-

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1. REPORT FROM THE COMMISSION OF INQUIRY INTO THE POST-ELECTION VIOLENCE vii (Oct. 15, 2008) [hereinafter Waki Report], <http://www.dialoguekenya.org/docs/PEV%20Report.pdf> (last visited May 2, 2010).

2. *Id.* at 383.

3. *Id.* at 115.

4. ANNOTATED AGENDA AND TIMETABLE FOR THE NATIONAL DIALOGUE AND RECONCILIATION (2008), [http://www.dialoguekenya.org/docs/S\\_of\\_P\\_with\\_Matrix.pdf](http://www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf) (last visited May 2, 2010).

5. See, e.g., Joel D. Barkan, *Kenya After Moi*, 83 FOREIGN AFF. 87 (outlining the characteristics of Kenyan politics and the impact of ethnicity).

6. *Id.*

7. Interview with youth-group leader at the screening of a documentary, in Huruma (Mar. 16, 2010). Interview sources in this Note are kept anonymous in order to protect their integrity and to honor the confidentiality with which the interviews were given.

8. Interview with employee at anonymous org. no. 7, in Nairobi (Mar. 17, 2010).

election violence accountable now that both sides are sharing power. The Waki Commission, an independent task force set up to investigate the post-election violence, concluded that while the pre-election violence was a spontaneous combustion between supporters of different election candidates, the post-election violence was to a large extent organized and planned by politicians and businessmen.<sup>9</sup> The Waki Commission also found that the perpetrators were not just ordinary citizens but also members of the State Security Agencies.<sup>10</sup>

The serious deficiencies of the Kenyan criminal justice system are an undeniable reality, openly recognized even by governmental authorities.<sup>11</sup> Some of the main problems include: (i) insufficient investigative capabilities and resources on the part of the police; (ii) corruption within the police force; (iii) lack of oversight by the Office of the Attorney General (OAG) and the Director of Public Prosecutions (DPP) over the Crime Investigations Department (CID) of the police; (iv) political interference with and manipulation of the work of the police, the OAG, and the judicial chambers; and (v) lack of a disciplinary system for the police and the judiciary.<sup>12</sup>

So far, the Attorney General has initiated very few investigations and prosecutions of crimes perpetrated during the post-election violence.<sup>13</sup> There have been no prosecutions of those suspected of orchestrating the violence – that is, those who would bear the most responsibility. The difficulties in dealing with the main perpetrators through the ordinary justice system are evident: if the system is so deficient that it cannot convict even the low-level perpetrators, how will it take on high-level politicians with significant influence over the justice system? While there have been attempts to establish a transitional justice mechanism in the form of a Special Tribunal to deal specifically with the post-election violence, the Parliament has struck down or stalled several bills proposing to install such a Tribunal.<sup>14</sup>

The ICC Chief Prosecutor Luis Moreno-Ocampo started monitoring the situation in Kenya in February 2008. Under Article 15 of the Rome Statute, the Prosecutor can initiate so-called “preliminary examinations” wherein he proactively monitors and analyzes information on alleged crimes under the

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9. Waki Report, *supra* note 1, at 346-47.

10. *Id.* at 348.

11. Interview with Mutula Kilonzo, Minister of Justice, National Cohesion and Constitutional Affairs, in Nairobi (Mar. 16, 2010).

12. *Id.*; Interview with Philip Murgor, former Director of Public Prosecutions, in Nairobi (Mar. 18, 2010); Interview with Hassan Omar, Commissioner of the Kenya National Commission on Human Rights, in Nairobi (Mar. 16, 2010); Waki Report, *supra* note 1, at 28-29, 364, 394-96, 405-07, 410-11, 420, 430-32, 438, 445-55; Barkan, *supra* note 5, at 97.

13. Interview with anonymous org. no. 5, in Nairobi (Mar. 16, 2010); Waki Report, *supra* note 1, at 420 (there are no official statistics of the number of prosecutions pertaining to the post-election violence, and the reported numbers vary between five and nineteen).

14. See, e.g., Kenya: *Deliver Justice for Victims of Post-Election Violence*, HUMAN RIGHTS WATCH (Aug. 3, 2009), <http://www.hrw.org/en/news/2009/08/02/kenya-deliver-justice-victims-post-election-violence>; Kenya's *Bill for Bloodshed Nears Payment*, N.Y. TIMES (July 15, 2009), available at <http://www.nytimes.com/2009/07/16/world/africa/16kenya.html>.

Statute. Thus far, the Prosecutor has made a number of preliminary examinations public, including, among others, Afghanistan, Colombia, Côte d'Ivoire, Gaza, Georgia, Guinea, and Kenya. The purpose of the preliminary examination is to determine whether the Prosecutor should ask for authorization from the Pre-trial Chamber to open an investigation in accordance with statutory requirements.<sup>15</sup>

One of the purposes of making the preliminary examinations *public* – which is a relatively recent policy development initiated by Prosecutor Moreno-Ocampo<sup>16</sup> – is to notify States of potential ICC investigation and encourage them to take action themselves.<sup>17</sup> The anticipated reaction from a State under ICC scrutiny is that it will “aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it.”<sup>18</sup> Ideally, ICC preliminary examinations should therefore “trigger” domestic prosecution of international crimes, for instance through installment of transitional justice mechanisms or domestic criminal justice reforms, either complementing the Court’s limited prosecutions of the top level perpetrators or negating the need for formal investigation and prosecution at the ICC altogether. This is often referred to as “positive complementarity” and it is one of the core principles in the current Prosecutor’s strategy.<sup>19</sup> While the notion of positive complementarity was hardly contemplated during the drafting of the Rome Statute, the concept has evolved rapidly in recent years, and the idea that the ICC can have a positive impact on the functioning of domestic justice

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15. OFFICE OF THE PROSECUTOR, ICC, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR (2003) [hereinafter POLICY ISSUES], available at [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf).

16. OFFICE OF THE PROSECUTOR, ICC, DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS (2010) available at [http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP\\_Draftpolicypaperonpreliminaryexaminations04101.pdf](http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf).

17. OFFICE OF THE PROSECUTOR, ICC, PROSECUTORIAL STRATEGY 2009-2012 10 (2009) [hereinafter PROSECUTORIAL STRATEGY 2009-2012], available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>.

18. Mark S. Ellis, *The International Criminal Court and Its Implications for Domestic Law and National Capacity Building*, 15 FLA. J. INT’L L. 215, 223 (2003).

19. OFFICE OF THE PROSECUTOR, ICC, REPORT ON PROSECUTORIAL STRATEGY 4 (2006) [hereinafter PROSECUTORIAL STRATEGY REPORT], available at [http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf)); see also BUREAU OF THE ASSEMBLY OF STATES PARTIES, REPORT OF THE HAGUE WORKING GROUP ON COMPLEMENTARITY, ¶ 16 (2010) (defining positive complementarity as “all activities/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 and activities for States, to assist each other on a voluntary basis.”). For a general discussion of the positive complementarity approach, see W. W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L. J. 53 (2008).

systems has come to be both widespread and influential.<sup>20</sup>

In Kenya, however, the ICC preliminary examination did not appear to encourage Kenyan authorities to take action. Since there were no serious attempts to investigate or prosecute perpetrators of the post-election violence by the deadline agreed upon by the Prosecutor and Kenyan authorities, the Prosecutor found reasonable basis to proceed with an ICC investigation.<sup>21</sup> This is the first time the Prosecutor has invoked the power to open a *proprio motu* investigation conferred to him under Article 15 of the Rome Statute.<sup>22</sup> On March 31, 2010, Pre-trial Chamber II authorized the Prosecutor to commence a formal investigation covering alleged crimes against humanity committed during the post-election violence, and on December 15, 2010, the Prosecutor presented cases against six individuals. Requests for the issuance of summonses to appear were made for William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohamed Hussein Ali.<sup>23</sup> All held prominent positions in the Kenyan public and private spheres at the time of the post-election violence. Three were serving as Ministers in the Kenyan Cabinet, and the others included the Commissioner of the Kenyan Police, the Chairman of the National Security Advisory Committee and a radio broadcaster.<sup>24</sup> The Prosecutor believes that these six people were the main orchestrators of the post-election violence.<sup>25</sup>

## I. ANALYTICAL FRAMEWORK

This unique and complex situation – involving massive violence, a

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20. One practical example is the EU Action Plan on the ICC, recently renewed by a decision by the European Council and with a purpose of guiding the EU and its Member States in their activities and initiatives relating to the ICC. The Action Plan suggests that “the EU and its Member States should support training programs and such other initiatives as may be necessary for fostering the professionalism of national judges, prosecutors, officials, other staff or experts needed for the effective functioning of the ICC complementarity system.” COUNCIL DECISION, 2011 O.J. L 76/56 168 (Mar. 21, 2011) (emphasis added), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:076:0056:0058:EN:PDF>.

21. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Prosecution’s Response to Decision Requesting Clarification and Additional Information at ¶ B (Mar. 3, 2010), available at <http://www.icc-cpi.int/NR/exeres/95262F03-3528-43B8-B2C9-E6DEA165C659.htm>.

22. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Request for Authorization of an Investigation Pursuant to Article 15, available at <http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf>.

23. Press Release, ICC, Kenya’s Post-election Violence: ICC Prosecutor Presents Cases Against Six Individuals for Crimes Against Humanity (Dec. 15, 2010), available at <http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm>.

24. *Id.*

25. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, available at <http://www.icc-cpi.int/iccdocs/doc/doc985621.pdf>; *Situation in the Republic of Kenya*, Case No. ICC-01/09, Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, available at <http://www.icc-cpi.int/iccdocs/doc/doc985613.pdf>.

dysfunctional criminal justice system, the ICC, and a vibrant civil society – moved us to visit Kenya in March 2010. Our objective was to identify whether national NGOs were taking advantage of the ICC attention to push for national criminal justice system reform in Kenya and, consequently, whether the ICC preliminary examination was triggering domestic accountability for the post-election violence in Kenya.

In essence, this research was inspired by two main questions: what can and should the ICC do to promote or facilitate an increased functioning of domestic justice systems? What role can domestic civil society play in such a process? In order to answer these questions we undertook qualitative research in Kenya, a country that at the time was under preliminary examination by the ICC. The process, content, and scope of that research will be described *infra*. However, before exploring the findings from our research in Kenya, we will first situate the discussion within the normative and theoretical framework that guides our analysis.

#### A. The Principle of Complementarity

The ICC is equipped with complementary jurisdiction, a legal concept that has become gradually more relevant for the emerging system of global justice with cooperation over national boundaries. To ensure criminal accountability of those who have committed the core crimes over which the ICC has jurisdiction, the States Parties at the Rome conference tailored the Court's jurisdiction so that it both entitles and obliges states to investigate crimes within their own jurisdiction.<sup>26</sup> According to the rules in the Rome Statute that govern the admissibility of cases before the Court, the ICC can only assert jurisdiction if a State is "unwilling or unable" genuinely to carry out the investigation or prosecution of a case.<sup>27</sup> The individual states have a primary right and responsibility to investigate and prosecute, and the ICC can only assert jurisdiction if national courts do not fulfill their obligations.<sup>28</sup> As a permanent international mechanism of justice, the ICC is meant only to complement, not supersede, national jurisdiction, and the principle of complementarity is the procedural safeguard that ensures that the Court does not limit the sovereign rights of the States Parties. The rules governing the admissibility of cases before the ICC thus reveal a preference for domestic rather than international justice.

Commentators have further argued that domestic justice is more likely to promote reconciliation within an affected community, establish

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26. See JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 235-308 (2008); JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY 17 (2008).

27. Statute of the International Criminal Court, art. 8, July 1, 2002, 2187 U.N.T.S. 90. The specific conditions for the ICC to be able to assert jurisdiction are detailed in several other articles of the Statute.

28. STIGEN, *supra* note 26, at 5.

permanent justice mechanisms capable of preventing the society from falling back into conflict, and offer a more pertinent sense of justice to victims.<sup>29</sup> This is not only relevant to the issue of domestic versus international justice mechanisms. A broader literature on rule of law reform and development policy has signaled the importance of avoiding one-size-fits-all solutions, instead encouraging bottom-up approaches that can guarantee better results both in terms of effectiveness of the legal institutions implemented, and in terms of their legitimacy and potential for reconciliation.<sup>30</sup>

Moreover, given the ICC's resource constraints and its policy of prosecuting only those who bear the greatest responsibility for the most serious crimes, the Court is only able to prosecute a small fraction of cases in any situation.<sup>31</sup> As a result, domestic proceedings must commence in order to prosecute a majority of international crime perpetrators. This reality is reflected in the fact that the Prosecutor will indict only six individuals for the widespread and extensive violence that took place around the latest election in Kenya, leaving the majority of the perpetrators unpunished unless prosecuted domestically.

While the argument that domestic justice is *always* superior to international justice is both hypothetical and speculative, the normative underpinning of the principle of complementarity, as well as the Court's resource constraints, lead to the conclusion that, whenever possible, domestic prosecutions should either supersede or complement the ICC's jurisdiction over international crimes. Several people have expressed the hope that the ICC's complementary function can serve as a catalyst through which States Parties are induced to comply with their obligation to investigate and prosecute ICC crimes.<sup>32</sup> On that note, the ICC Prosecutor

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29. Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 212 (2006); See also MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, *Briefing, Stocktaking: Complementarity 3* (2010), available at [http://www.ictj.org/static/publications/ICTJ\\_RSR6-complementarity\\_bp2010.pdf](http://www.ictj.org/static/publications/ICTJ_RSR6-complementarity_bp2010.pdf) (concluding that "in situ trials - that is, trials taking place in the territory where the crimes were committed - should be considered for their demonstration effect"); Brady Hall, *Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal*, 13 MICH. ST. J. INT'L L. 39, 61 (2005) (arguing that international tribunals are justified, but that when possible, domestic institutions - or at least hybrid tribunals - must take over in order to facilitate reconciliation); Donna Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 227 (2006) (concluding that if international tribunals are to achieve their aims, the local population's perception of their legitimacy is a crucial factor).

30. See DAVID M. TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (2006).

31. See POLICY ISSUES, *supra* note 15; see also PROSECUTORIAL STRATEGY REPORT, *supra* note 19.

32. KLEFFNER, *supra* note 26, at 3, 309; James A. Goldston, Exec. Dir., Open Society Justice Initiative, Remarks at the United Nations Rule of Law Panel Discussion, *Strengthening the Nexus Between International Criminal Justice and National Capacity to Combat Impunity* (Apr. 9, 2010), available at <http://www.unrol.org/files/James%20Goldston%20Rule%20of%20Law%20Speech%20.pdf>.

Luis Moreno-Ocampo has emphasized that the success of the ICC will be judged not by its number of prosecutions, but by the number of international prosecutions *avoided* because of the increased functioning of domestic legal systems.<sup>33</sup>

If the ICC's preliminary examinations can actually serve as a catalyst through which States Parties are induced to comply with their obligation to investigate and prosecute international crimes, then complementarity has wider implications than those of a mere procedural principle governing the admissibility of cases before the Court.<sup>34</sup> Under this understanding, the ICC is not merely a tool with which the international community pursues prosecutions of the main criminal perpetrators who would otherwise escape accountability, but also a potentially important mechanism for strengthening the rule of law around the globe by contributing to increased functioning of domestic criminal justice systems.<sup>35</sup>

### B. The Rule of Law

The ICC Chief Prosecutor has stated that one of the objectives of his office is to encourage and facilitate states in investigating and prosecuting crimes domestically.<sup>36</sup> The emerging focus on positive complementarity was also evident during the June 2010 ICC Review Conference in Kampala, Uganda, where the practical implications of the principle of complementarity were at the center of the review.<sup>37</sup> Since then, commentators have suggested that the ICC should be more involved in strengthening domestic institutions and that the division of labor between the Court and national jurisdictions can be constructed through a positive complementarity mechanism, for instance one similar to the International Criminal Tribunal for the former Yugoslavia's "transition team," which shared information with domestic courts when cases were referred back to national systems.<sup>38</sup>

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33. Luis Moreno-Ocampo, Chief Prosecutor, ICC, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003) [hereinafter Prosecutor's Initial Statement], available at [http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616\\_moreno\\_ocampo\\_english.pdf](http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf).

34. KLEFFNER, *supra* note 26, at 216; Prosecutor's Initial Statement, *supra* note 33, at 2; PROSECUTORIAL STRATEGY 2009-2012, *supra* note 17, ¶ 17.

35. Open Society Justice Institute, Statement to the Ninth Session of the Assembly of States Parties, New York, Promoting Complementarity in Practice: Lessons from Three ICC Situation Countries 2 (Dec. 7, 2010) available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/complementarity-in-practice-20110119/complementarity-case-studies-20101210.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/complementarity-in-practice-20110119/complementarity-case-studies-20101210.pdf) (concluding that complementarity and the rule of law are related).

36. POLICY ISSUES, *supra* note 15, at 5.

37. See ICC, REPORT OF THE BUREAU ON STOCKTAKING: COMPLEMENTARITY, TAKING STOCK OF THE PRINCIPLE OF COMPLEMENTARITY: BRIDGING THE IMPUNITY GAP ICC-ASP/8/51 (2010) [hereinafter REPORT OF THE BUREAU ON STOCKTAKING].

38. WIERDA, *supra* note 29, at 3 (concluding that the ICC primarily has a judicial mandate and its ability to contribute to domestic capacity-building will remain limited); see also Morten



Despite the current focus on the implications of positive complementarity, the Prosecutor maintains that the ICC can only contribute indirectly by encouraging states to take action themselves. As he pointed out during the UN Consultative Conference on International Criminal Justice, “complementarity is not about training judges, we passing information, we building capacity [sic]. No, complementarity is what the others are doing.”<sup>39</sup> The reality is that the ICC does not have an explicit objective to actively participate in rule of law strengthening; not only does the Court lack an express mandate to carry out the functions of a development agency, but the States Parties are unlikely to finance such direct interventions.<sup>40</sup> Moreover, as a number of critics of the rule of law discipline have pointed out, attempting to strengthen the rule of law from abroad is a recipe for failure, and, therefore, having the ICC participate directly in rule of law strengthening would most likely be counter-productive. What then can the ICC do to promote positive complementarity without getting involved in domestic affairs? This section contends that it should primarily defer to domestic public and private actors to tailor their own rule of law strengthening programs.

Throughout the twentieth century, development agencies prescribed “strengthening of the rule of law” as an elixir for economic development and democracy.<sup>41</sup> More recently, however, the idea that the rule of law can be “built” and that such a process can have direct results in terms of development and democracy has been questioned; many scholars have explored the limitations of attempting to transplant the rule of law to an apparent lawless or “failed” state.<sup>42</sup> They have concluded that rule of law strengthening from abroad, with the perspective of an “international expert,” is not only ineffective, but has serious limitations in terms of legitimacy.

The main recommendation advanced by the rule of law discipline is that although the focus on institutional capacity is important, legitimacy of

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Bergsmo, Olympia Bekou & Annika Jones, *Complementarity After Kampala: Capacity Building and the ICC's Legal Tools*, 2 GOTTINGEN J. INT'L L. 791, 793 (2010) (noting that the term positive complementarity, which had originally been used to refer to the ICC's role in the construction of national capacity, was used throughout the Review Conference to refer to the involvement of States, international organizations, and civil society in strengthening justice at the national level).

39. Consultative Conference on International Criminal Justice, United Nations Headquarters (Sept. 9-11, 2009), available at <http://www.internationalcriminaljustice.net>.

40. See REPORT OF THE BUREAU OF STOCKTAKING, *supra* note 37.

41. See, e.g., Álvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253 (David M. Trubek & Alvaro Santos eds., 2006). For the theories that supported the policies promoted by those agencies, see, e.g., A.V. DICEY, THE LAW OF THE CONSTITUTION 188 (1959); FRIEDRICH HAYEK, THE ROAD TO SELFDOM 80-96 (1944); AMARTYA SEN, DEVELOPMENT AS FREEDOM 17 (1999); MAX WEBER, ECONOMY AND SOCIETY (1968); Joseph Raz, *The Rule of Law and its Virtues*, 93 LAW Q. REV. 195 (1977).

42. PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 17 (Thomas Carothers ed., 2006).

formal and informal institutions are key aspects in rule of law strengthening. Legitimacy emerges not from legal reforms, but through bottom-up, grassroots work. As Jorge Esquirol suggests, there is much more to building the rule of law than reforming the national criminal justice system: “[t]he image of rule of law can be seen as the product of a combination of factors, inter alia: significant political consensus, strenuous law enforcement, ample informational resources, parallel social norms, and a dedicated class of legal scholars claiming that it is so.”<sup>43</sup> Domestic actors, such as NGOs, are generally better equipped than the ICC – an international justice mechanism located far from the places in which it operates and staffed primarily by foreigners – to contribute to these complex and intertwined processes of strengthening the rule of law.

Local practices and community arrangements have proven to be extremely important to assure compliance with the law and a culture of legality. For instance, though training police officers, reforming the rules that determine the procedure to appoint judges, and creating a new disciplinary court for the judiciary are important features to strengthen the rule of law in Kenya, these measures are meaningless if such institutions are not legitimate. If the public does not trust these institutions, it is less likely that law compliance will increase.

Additionally, many rule of law strengthening programs fail to unveil the political contestations that underscore their work. As Laure-Hélène Piron points out, we still “need to learn to go beyond ‘technical’ solutions and understand the political *context* for intended reforms.”<sup>44</sup> This is especially true in Kenya, where justice-sector reforms attempting to increase the impartiality of the judiciary and the police pose a huge political threat to the executive branch, which currently has significant influence over these institutions.<sup>45</sup>

Thus, when the ICC Prosecutor suggests that strengthening the rule of law is less about the ICC training judges and criminal investigators than about what the people on the ground are doing to strengthen their own rule of law, his statement can be seen as embedded in the critique of the rule of law movement. By not determining the content of the rule of law, avoiding transplanting foreign legal institutions, and deferring to local actors to design and implement legal institutions, the ICC, in practice, has responded to a long tradition of critique of international development programs. This approach, however, leaves local actors with the important task of advocating for and implementing domestic criminal justice reforms in States that are unwilling or unable to hold perpetrators of international crimes accountable. When States are unwilling to fulfill their obligations under the Rome Statute, the primary local actor that can push the State to

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43. Jorge Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 87 (2008).

44. Laure-Hélène Piron, *Time to Learn, Time to Act in Africa*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 42, at 287.

45. *Id.*

implement reforms is civil society, for instance in the form of NGOs advocating for and tailoring justice reform programs.

In the case of Kenya, NGOs have historically been known for their capacity to enable political and institutional reform.<sup>46</sup> However, their particular role in the contemporary strive for domestic accountability for the post-election violence – and their ability to utilize the pressure exerted by the ICC to advance the necessary reforms – requires further analysis. The following section will address this issue.

## II. FINDINGS

We visited Kenya in March 2010. At the time, we were both LL.M. candidates at Harvard Law School with specific interests in criminal justice, law and development, and justice sector reform. The objective of our research was to identify whether Kenyan NGOs were taking advantage of the ICC preliminary examination to push for national criminal justice system reforms and, consequently, whether the ICC preliminary examination in Kenya could potentially trigger domestic accountability for the post-election violence. Our fieldwork allowed us to make connections between three crucial issues that are often viewed in isolation: the role of the ICC and its relationship to rule of law strengthening, the rule of law as more than national criminal justice system reform, and the role of civil society and NGOs in institutional capacity-building.

On site in Nairobi, we undertook qualitative research based on in-depth, open-ended interviews with eight civil society organizations: one state-sponsored human rights commission (the Kenya National Commission on Human Rights), three local NGOs (InformAction, the Movement for Political Accountability, and the Kenya Human Rights Commission), and four international NGOs staffed mainly with Kenyan professionals (the International Commission of Jurists, the International Center for Transitional Justice, the Open Society Institute for Eastern Africa, and the Agency for Cooperation and Research in Development). We assembled this sample of NGOs with the intention of covering a wide array of organizations with different structures and agendas, taking into account the various approaches to justice reform and ICC intervention in Kenya. We will recapitulate the statements of the people we interviewed from each organization without revealing their identity, thereby honoring the confidentiality with which the statements were given, and insuring the integrity of our sources.<sup>47</sup>

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46. Matilda Lasseko, *The Role of Civil Society in Transitional Justice Process: The Evolving Kenyan Experience* 195, 196, in JUDICIARY WATCH REPORT, ADDRESSING IMPUNITY AND OPTIONS FOR JUSTICE IN KENYA: MECHANISMS, ISSUES AND DEBATES (Waruguru Kaguongo & Godfrey M. Musila eds., 2009) [hereinafter JUDICIARY WATCH REPORT].

47. Each organization was coded with a number to identify its statements, e.g., “anonymous org. no. 1.” In each case the source organization has been kept anonymous in order to protect its integrity and to honor the confidentiality with which information was

The interviews with NGO representatives were complemented by two in-depth and open-ended interviews with the Minister of Justice and former Director of Public Prosecutions, Philip Murgor. Additionally, we visited Huruma, one of Nairobi's largest slum areas, where we observed the screening of a documentary about the post-election violence and the ICC, and the subsequent discussion between the local inhabitants and the NGO that screened the documentary. Finally, we conducted a field trip to a camp for internally displaced persons (IDPs) in Naivasha. We recorded our observations from the site and the general statements of the IDPs, who were not formally interviewed.

At the outset, it is important to acknowledge the methodological limitations of using a narrow sample of qualitative sources like this one. First, the findings presented in this paper are not representative of the work of all civil society organizations in Kenya, nor of their diverse agendas. Second, while this paper explores the relationship between ICC preliminary examinations and the increased functioning of domestic criminal justice systems, we do not attempt to make broad causal claims. This paper intends to reflect particular schemes of interaction between the ICC, domestic NGOs, and government officials in Kenya.

Our fieldwork allowed us to map the agendas of a number of NGOs in Kenya, particularly taking into account their positions vis-à-vis ICC intervention and their level of cooperation with the government on justice reform issues. In general, we were able to conclude that the level of cooperation between the government and civil society in Kenya is low. While we found that each NGO has its own dialectic with the State, on average, local NGOs have limited interaction and partnership with the State, whereas international NGOs seem to have a higher level of cooperation.<sup>48</sup>

One of the local organizations we interviewed, for example, is not exactly an NGO, but rather a national initiative that uses information and media to spark action in civil society. Instead of engaging in criminal justice reform to increase domestic accountability for the post-election violence, their representatives have decided to work with local communities to educate people about the ICC's functions and create consensus about the importance of ICC intervention. Domestic justice reform programs are not their priority as they have lost hope that any top-down reforms will be realized. Their preference for ICC intervention over domestic accountability is a result of their distrust of the Kenyan government. They aim to contribute to a process of mass critical-reasoning that allows people to participate in political processes as informed citizens and elect better leaders. For them, this is the only way to avoid a repetition

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given.

48. Compare anonymous local orgs. nos. 5, 6, and 7, and anonymous international orgs. nos. 1, 2, and 3.

of massive violence during the next national elections in 2012.<sup>49</sup>

Similarly, a majority of the other local NGOs have a bottom-up approach to reforms, several of them promoting a new system for electing political leaders. One of these NGOs is a domestic grassroots political group that organizes political rallies, advocates for voting based on issues rather than on ethnic politics, and supports grassroots political leaders who are willing to make transparency and accountability pledges. The organization's activities, therefore, target communities instead of the State. From a long-term perspective, they might contribute to reforms of the national criminal justice system by contributing to a new generation of politicians coming to power who believe in reform and transparency, but, as the organization points out, it is unlikely that its efforts will be reflected in the 2012 elections.<sup>50</sup>

International NGOs, on the other hand, seem to have a more ambivalent relationship with government institutions. They express the same distrust that local NGOs do, but they interact somewhat more with government officials and institutions on various levels. For instance, some of them are involved in training judges and prosecutors on human rights issues, which constitutes a form of capacity building of the justice system. One of the organizations we interviewed is an international NGO dedicated to the legal protection of human rights in Kenya and the African region. The fact that this organization both funds other NGOs and conducts its own advocacy allows it to engage with the government on the one hand and support critical advocacy on the other.<sup>51</sup>

Although all of the NGOs we met with expressed overall support for ICC intervention, NGOs with limited partnership with the state viewed ICC intervention as crucial for any kind of justice in Kenya, whereas NGOs with higher levels of cooperation with the state sought accountability primarily through the national criminal justice system and the transitional justice system (i.e. a Special Tribunal or the Truth, Justice and Reconciliation Commission).

At the time of our visit, a local NGO was screening a documentary that depicted the post-election violence from the perspective of victims, emphasizing the fact that all offenders and victims came from different ethnic groups. It introduced the ICC as the main option to achieve justice and advanced the idea that without accountability, Kenya was doomed to repeat the post-election violence in the forthcoming elections. It also illustrated the lax response by Kenyan authorities, depicting a corrupt and inaccessible judiciary and a violent police, both incapable and unwilling to search for justice.

The representative we met from one international NGO dedicated to promoting accountability and creating just and peaceful societies after

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49. Interviews with anonymous org. no. 7, in Nairobi (Mar. 14-15, 2010).

50. Interview with anonymous org. no. 6, in Nairobi (Mar. 17, 2010).

51. Interview with anonymous org. no. 2, in Nairobi (Mar. 18, 2010).

conflict or mass human rights violations stated that the organization's official position had originally been that Kenya should create the Special Tribunal and seek justice, truth, and reparations through national mechanisms. However, after three failed attempts (one Cabinet refusal and two rejected parliamentary bills) they came to believe that the only hope for justice for the victims of the post-election violence was ICC intervention.<sup>52</sup> The representative mentioned the executive branch's direct intervention in judicial matters, a general lack of trust in the judiciary, and the lack of police investigative capacities as reasons that led them to advocate ICC intervention rather than the advancement of national proceedings.<sup>53</sup>

The same applies to other NGOs that we interviewed, including one organization dedicated to working with poor and marginalized communities on issues involving livelihood, conflict, gender equality, and HIV. The main focus of this organization is gender-driven violence. Representatives explained that during the two months of post-election violence, sexual violence was used as "ethnic punishment"; women were raped and men were forcefully circumcised because of their ethnicity.<sup>54</sup> They stated that even though they do not believe that the ICC is the best solution for bringing justice to Kenya - because it will neither prosecute the actual perpetrators of sexual violence nor give compensation to the victims - ICC intervention is still crucial for ending impunity in Kenya. They emphasized deficiencies in the national criminal justice system and the stalemate in the Truth, Justice and Reconciliation Commission.<sup>55</sup> They recognized, furthermore, that the ICC preliminary examination has raised international concern about sexual violence during the post-election violence, giving unprecedented exposure to these issues and, for the first time, allowing Kenyans to talk about being victims of sexual violence.

Our research led us to conclude that, in most cases, even the NGOs that actually had the power to impact national criminal justice system reform were inclined, instead, to encourage ICC intervention at the time that the preliminary examination was being conducted.

There are several examples of this tendency. One of the oldest and most well recognized local NGOs in Kenya was started in the early 1990s with the mission of working for democratization. It led the movement for the removal of the ban on opposition parties. Today it has two branches: one dedicated to monitoring judicial reform and one dedicated to human rights advocacy. This organization appeared to be more willing than other domestic NGOs to interact with governmental institutions: its members lobby the Parliament, participate in human rights training for police officers, conduct civilian oversight of national proceedings of low-level perpetrators of the post-election violence, contribute to evidence gathering

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52. Interview with anonymous org. no. 3, in Nairobi (Mar. 17, 2010).

53. *Id.*

54. Interview with anonymous org. no. 4, in Nairobi (Mar. 18, 2010).

55. *Id.*

in national criminal procedures, present class actions, and litigate to prosecute perpetrators in national and regional courts. Yet this organization nonetheless envisioned the ICC as a necessary means to eradicate political unwillingness to try high- and mid-level perpetrators of the post-election violence.<sup>56</sup> In this sense, their efforts have primarily been directed at attaining international justice, rather than domestic accountability.

Other organizations described a similar understanding of the situation in Kenya. One organization that is particularly influential within Kenyan civil society is an international NGO that administers grants for other NGOs and media organizations working on human rights and impunity issues. They finance report-writing, monitoring, advocacy, witness coordination, and the taking of victim testimony. One of the more unique and interesting features of this organization is that it serves as an “informational bridge” between national and international NGOs, international organizations, and members of the Kenyan government. They explained that they use the materials produced by the organizations they sponsor to criticize and influence policymaking and national and international opinion.<sup>57</sup> The organization has an “under-the-table” approach, built on its experience and contacts, which allows it to influence decision-making without compromising their sources or their loyalties.<sup>58</sup> Representatives from this organization recognized that they could directly impact government officials with the power to push for the implementation of a Special Tribunal. Strikingly, however, they were not utilizing these channels for fear of deterring or at least delaying the ICC from opening up a formal investigation in Kenya.<sup>59</sup> Even if the criminal justice system were reformed, justice for the victims of the post-election violence would be unlikely to be achieved through national mechanisms. This organization had therefore decided to advocate for ICC intervention instead of pushing for reform of the national criminal justice system.

In this sense, while several NGOs took advantage of the ICC preliminary examination to strengthen the rule of law through grassroots advocacy, not one NGO appeared to have an immediate agenda for reforming the criminal justice system with the intent of enabling prosecutions of perpetrators of the post-election violence.<sup>60</sup> The next section of this Note will address the incentives that disincline Kenyan NGOs from participating directly in such reforms.

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56. Interview with anonymous org. no. 5, in Nairobi (Mar. 16, 2010).

57. Interview with anonymous org. no. 1, in Nairobi (Mar. 17, 2010).

58. *Id.*

59. *Id.*

60. *Id.*; interview with anonymous org. no. 3, *supra* note 52; interview with anonymous org. no. 5, *supra* note 56; interview with anonymous org. no. 6, *supra* note 50; interviews with anonymous org. no. 7, *supra* note 8.

## III. ANALYSIS OF FINDINGS

Studying the role of NGOs in reforming national criminal justice systems – which by definition is a governmental function – might seem paradoxical. However, the fact that such organizations are neither financed nor directed by governments does not mean that their objectives are not related to broad social and political issues that also concern governments. It is not strange then, that an international NGO like the International Commission of Jurists identifies as one of its main objectives “[a]dvanc[ing] the independence of the judiciary and the legal profession and the administration of justice in full compliance with standards of international law.”<sup>61</sup>

The question, however, is how NGOs can effectively contribute to strengthening public institutions while remaining outside the political system. This discussion is part of a wider debate about the relationship between civil society and the state. The distrust between civil society and the state is usually grounded in historical circumstances, including massive human rights abuses, but also in understandings of the governing state body as independent from the civil society it is supposed to protect. As Carlos Basombrío suggests, in countries where NGOs can contribute to the performance of the government without being seen as traitors, there is a “progressive civil society” that is not afraid of assuming the vocation to exercise power.<sup>62</sup>

In Kenya, NGOs have widely diverse agendas, and attempting to foresee what their role should be in rule of law strengthening goes beyond the objectives of this paper. What we can suggest, however, is an analytical framework for understanding the dialectic between the ICC, civil society, and rule of law strengthening. Ideally, the ICC’s preliminary examinations should trigger domestic prosecution of international crimes. Hypothetically, the preliminary examination can aid NGOs working on overcoming impunity in two distinct ways. First, by extending NGOs the legitimacy of an international mechanism of justice to advance their claims for domestic accountability; and second, by providing a “stick” against the state through the stigma that is associated with ICC intervention. In the case of Kenya, however, these explanations seem to fall short. This section will first explore the logic behind “legitimacy” and “stigma,” then explore why those incentives have not translated into NGOs working directly toward national criminal justice system reform.

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61. INT’L COMM’N OF JURISTS, *Statute*, art. 3(2), <http://www.icj.org/default.asp?nodeID=392&langage=1&myPage=Statute>.

62. ACTIVISTAS E INTELLECTUALES DE SOCIEDAD CIVIL EN LA FUNCIÓN PÚBLICA EN AMÉRICA LATINA [CIVIL SOCIETY ACTIVISTS AND INTELLECTUALS IN PUBLIC SERVICE IN LATIN AMERICA] 24-25 (Carlos Basombrío Iglesias ed., 2005).



### A. Legitimacy

Identifying the sources of NGOs' legitimacy can aid in analyzing their motives and why certain causes are incorporated into their agendas while others are not. A study about the contribution of NGOs to justice reform in Latin America, for example, concluded that "civil society has not participated in the changes that have occurred in the justice systems, as the organizations that represent particular groups with overlapping interests do not address the topic."<sup>63</sup> The Justice Studies Center of the Americas explains the lack of civil society impact with the idea that working for the goals of specific population groups or sectors affords NGOs more legitimacy than working towards influencing the public agenda.<sup>64</sup> In this sense, both practical challenges and legitimacy issues can restrain civil society's capacity to participate in institutional reform.

Provided that the ICC is perceived as a legitimate institution, preliminary examinations can afford NGOs the opportunity to advance their arguments for particular causes, such as accountability for the high-level perpetrators that organized the post-election violence, backed by the extended legitimacy of an international mechanism of justice. When the arguments and reasoning of an NGO align with those of the ICC, the NGO receives added rational basis and moral support for its claims, thereby increasing its legitimacy.

In the case of Kenya, we found that although NGOs have indeed gained legitimacy from the ICC Prosecutor's preliminary examination, they have not used it to advocate for domestic accountability or for national criminal justice reform, but rather to advocate for the effective intervention of the ICC. Using the position of the international society as proof of the inadequacies of their current leaders, several NGOs are instead mobilizing public opinion to oust the political establishment and change the basis on which politicians are elected. This was evident when we attended the screening of the documentary *Getting Justice: Kenya's Deadly Game of Wait and See* in Huruma. After the screening, people rallied against the political leaders, shouting, "Send them to The Hague!," thus signaling their disapproval of the political establishment and agreement with the NGOs' narrative of events.

### B. Stigma

The mere possibility of being branded as "unwilling" or "unable" should encourage states to initiate reforms and capacity building of the

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63. CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS [CENTER FOR JUSTICE STUDIES OF THE AMERICAS], JUSTICIA Y SOCIEDAD CIVIL: EL PAPEL DE LA SOCIEDAD CIVIL EN LA REFORMA JUDICIAL: ESTUDIOS DE CASOS EN ARGENTINA, CHILE, COLOMBIA Y PERÚ [JUSTICE AND CIVIL SOCIETY: THE ROLE OF CIVIL SOCIETY IN JUSTICE REFORM: CASE STUDIES OF ARGENTINA, CHILE, COLOMBIA AND PERU] 7 (2003).

64. *Id.*

national criminal justice systems.<sup>65</sup> Hypothetically, domestic NGOs should be able to utilize the preliminary examination as a “stick” to push the state to initiate these reforms in order to avoid triggering ICC jurisdiction. After all, a preliminary examination is an unmistakable caution by the ICC: “If you don’t prosecute, we will.” In Kenya, however, NGOs seem to have had difficulties, or have been reluctant, to utilize the “stick” supposedly provided by the preliminary examination to push for justice reform at the national level.

International criminal prosecution after government involvement in atrocities has traditionally followed an ousting of the implicated regime.<sup>66</sup> It is often said that transitional states have a “window of opportunity” to come to terms with their past immediately following a period of violence.<sup>67</sup> In Kenya, however, the “window of opportunity” never materialized after the post-election violence. The political and economic elite that financed much of the post-election violence is still operating and has significant influence over the justice system.<sup>68</sup>

That lack of political transition has led many NGOs to advocate for the election of new political leaders instead of for reform of the national criminal justice system.<sup>69</sup> These NGOs believe that the only way to spur real reform is to first oust the current leaders. Not even the NGOs working on justice reform at some level appeared to be pushing for immediate reforms or for the installment of domestic transitional justice mechanisms to deal with the post-election violence, because they do not believe that the Kenyan authorities are susceptible to such pressure. Instead, they were working toward long-term objectives, with an eye toward pushing for implementation of reforms after, as they stated, “the government’s thinking has evolved.”<sup>70</sup>

Additionally, several of our interviewees claimed that since governments have historically been elected on reform agendas, the Kenyan government continuously goes through “cycles” in which it actively pursues reforms immediately before, during, and immediately after elections.<sup>71</sup> Hence, when election time is not fast approaching, the government stagnates and becomes less interested in implementing reforms. Politicians will still engage with civil society and “talk the

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65. STIGEN, *supra* note 26, at 474-76.

66. Lipscomb, *supra* note 29, at 189.

67. Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View From Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 216 (2000).

68. Godfrey M. Musila, *The Accountability Process in Kenya: Context, Themes and Mechanisms*, in THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, 8 JUDICIARY WATCH REPORT, *supra* note 46, at 28, 52.

69. Interviews with anonymous org. no. 7, *supra* note 49; interview with anonymous org. no. 6, *supra* note 50.

70. Interview with anonymous org. no. 2, *supra* note 51.

71. Interview with former Director of Public Prosecutions, *supra* note 12; interview with anonymous org. no. 1, *supra* note 57.

language of human rights,” but they simply defer reforms to the future.<sup>72</sup> The next election in Kenya is in 2012, and during the ICC preliminary examination, the government was apparently not at a point in the political cycle where it could be compelled to realize reforms in order to retain its mandate. This situation compromised the opportunities for NGOs to leverage the stigma of ICC intervention into reforms of the national criminal justice system. Many people commented that the government is an extremely sophisticated and devious collaborator; one person even described it as “schizophrenic.”<sup>73</sup> When an NGO can bring expertise to the table or when the government wants to appear pro-reformist, it welcomes involvement and treats NGOs as allies, but when NGOs demand reforms, the government is ultimately non-responsive. Consequently, many of the local NGOs have largely stopped pushing for reform, whereas the international NGOs, who still interact with the state, mainly focus on capacity-building and training and do not pressure the state to implement reforms to ensure accountability for the post-election violence.

“Legitimacy” and “stigma” could serve as an analytical framework to understand how NGOs can seek constructive ways of taking advantage of an ICC preliminary examination to catalyze domestic prosecutions and push for institutional reform. However, the extent to which an NGO actually chooses to do so depends on the NGO’s particular advocacy agenda. Thus, although the legitimacy and stigma frameworks are useful insofar as they point to two powerful potential incentives for NGOs to use the ICC as an aid when advocating for domestic accountability, they fall short in trying to explain why NGOs in Kenya have chosen to advocate for international over national justice.

### C. The “Perverse Incentive”: NGOs and the Lack of National Criminal Justice System Reform in Kenya

Our research suggests that the lack of direct NGO participation in criminal justice system reform in Kenya today is at least partially related to the way in which NGOs have tailored their agenda in anticipation of the government’s response. First, several NGOs expressed that they were reluctant to advocate for reform until after the ICC actually intervened because they feared that improvements of the criminal justice system or installment of transitional justice mechanisms would avert ICC intervention and create impunity for the main perpetrators.<sup>74</sup> Second, the NGOs that were in fact working indirectly on criminal justice system reform were convinced that the state was currently not open to such reform; they were

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72. Interview with anonymous org. no. 1, *supra* note 57.

73. Interview with anonymous org. no. 3, *supra* note 52.

74. Interview with anonymous org. no. 1, *supra* note 57; interview with anonymous org. no. 5, *supra* note 56; interview with anonymous org. no. 6, *supra* note 50; interview with anonymous org. no. 7, *supra* note 49.

thus working primarily toward long-term goals, making it impossible to take advantage of the temporary attention that the preliminary examination provided to push for immediate reform.<sup>75</sup>

Since the ICC can only assume jurisdiction when a State Party has either not taken any action to investigate and prosecute, or has proven unwilling or unable to do so,<sup>76</sup> preliminary examinations might create a “perverse incentive” for NGOs: should they focus their advocacy on ICC intervention, claiming that the State is unwilling or, due to deficiencies in the criminal justice system, unable to prosecute perpetrators? Or should they advocate for domestic capacity building to increase the functioning of the domestic legal system in line with the idea of positive complementarity? This dilemma creates a situation where NGOs might prefer *not* to advocate for reform on the national level because it could preclude ICC intervention. For example, one NGO representative recognized that he could use his informal contacts with the government to educate and inform members of Parliament and the executive branch about the probability of ICC intervention and how it might be avoided. When asked why he has not utilized this channel, he responded with surprise: “And warn them?” Instead of pushing for domestic reforms, this NGO representative preferred to keep the government in the dark so that the ICC would in fact move forward and intervene in Kenya.<sup>77</sup>

This perverse incentive is the product of a belief among NGOs and the Kenyan public in general that the ICC can satisfy goals that a domestic justice mechanism cannot.<sup>78</sup> In the case of Kenya, the ICC is perceived to serve two sets of objectives that national mechanisms cannot. The first set of objectives is related to both concrete and symbolic consequences that are more likely to be expected from ICC intervention than from national justice mechanisms. These include setting a breaking point between an old and a new regime, ousting some of the current political leaders, engendering

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75. Interview with anonymous org. no. 3, *supra* note 52; interview with anonymous organization no. 2, *supra* note 51.

76. It should be noted that the Rome Statute does not affirmatively address the allocation of the burden of proof for establishing admissibility issues. However, according to the ICC Statute, the Prosecutor must conclude that there is reasonable basis to proceed with an investigation before requesting authorization to proceed from the Pre-trial Chamber. Statute of the International Criminal Court, art. 15(3), July 1, 2002, 2187 U.N.T.S. 90. The Rules provide that admissibility is a relevant factor in the “reasonable basis” determination. *See id.* arts. 53(1) (b), 17. If this were not the case, the Prosecutor could violate the sovereignty of a country by commencing an investigation on the basis of article 15 against a national of a State Party that was willing and able to do so. For further discussion, *see, e.g.,* Megan A. Fairlie, *Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?*, 39 INT’L L. 817, 819-820 (2005) (noting that the Rome Statute does not place the burden of proof with regard to admissibility on the Prosecutor or any other specific party and arguing for specific solutions to overcome this uncertainty); Mohammed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 899 (2002) (arguing that Article 17 provides that the Prosecutor has a burden of proof with regard to admissibility/complementarity determinations).

77. Interview with anonymous org. no. 1, *supra* note 57.

78. Brian Concannon, Jr., *supra* note 67, at 240.

wide international visibility, promoting transparency, and deterring future violence. The second set of objectives is composed of broader rule of law strengthening and social development expectations implicitly created by ICC intervention. These include ending impunity, introducing a new system of public accountability, effecting poverty relief, development, and peace, and restructuring the Kenyan state, all of which are unlikely to result from any other justice mechanism. We explore both sets of objectives in order to facilitate the understanding of why NGOs choose to advocate for international justice rather than domestic accountability and national criminal justice system reform.

#### D. Concrete and Symbolic Consequences of ICC Intervention

The general sentiment about ICC intervention is that it will send Kenyan political leaders an important symbolic message about accountability. This perception is reflected in the Kenyan reaction to Prosecutor Moreno-Ocampo talking about Kenya in the international media. The notion is that, if the ICC prosecutes the main political leaders of the country, the whole world will know about it, and therefore politicians will realize that they cannot get away with orchestrating mass violence to stay in power. Several NGOs view ICC intervention as a form of catharsis. They suggest that the symbolic act of simply trying a few perpetrators will “eradicate political unwillingness” and “open up opportunities” for installment of additional domestic accountability procedures, such as a Special Tribunal.<sup>79</sup>

Many of the NGO representatives we interviewed also mentioned that, while ICC proceedings would be transparent and legitimate, any type of national procedure, be it ordinary or transitional, would be corrupt and politicized. Under a cost-benefit analysis, they would rather have the ICC indict two or three people than have a Special Tribunal indict many more under a corrupt system.<sup>80</sup> The underlying presupposition of this type of calculation is a very deep level of distrust of the current government.

In this sense, NGO representatives believe that the concrete results of ICC intervention (in terms of transparency and top-level accountability) and its symbolic effects (the cathartic moment of public and international recognition that the post-election violence was unacceptable), constitute the only means for deterring a repetition of massive violence around the 2012 elections.

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79. Interview with anonymous org. no. 5, *supra* note 56; interview with anonymous org. no. 7, *supra* note 49.

80. *Id.*

### E. Rule of Law and Development Expectations About ICC Intervention

A second set of objectives that the ICC is expected to achieve – and that the national criminal justice system and transitional justice mechanisms apparently cannot fulfill – is related to broader rule of law strengthening and development goals.

Several NGOs hope that ICC intervention can end the culture of impunity and create a system of accountability in Kenya. Although they recognize that the ICC would not participate directly in reforming the national criminal justice system, they believe that ICC intervention will spark these processes.<sup>81</sup>

Other organizations, particularly grassroots organizational leaders, advocate ICC intervention as a “window of opportunity” to restructure the state, reduce poverty, and produce development and stability.<sup>82</sup> Although many NGO representatives we encountered were working on countering these expectations, the reality is that ordinary citizens have in part come to prefer the ICC to domestic justice mechanisms because they associate Prosecutor Moreno-Ocampo – whose face can be seen depicted on public transportation buses in Nairobi – with the opportunity for a better life. In our visit to Huruma, locals referred to lack of water, lack of food, lack of housing, corruption in the political class, and lack of political accountability as the type of problems they expected the ICC to solve.

Thus, expectations about the ICC are advanced as arguments for why ICC intervention is preferable to domestic justice. Those who expect the ICC to satisfy goals that the national criminal justice system cannot stress the lack of will and limited capacity of the justice system rather than advocating for reforms. Inevitably, this situation poses a paradox for NGOs: if they increase the capacity of the national criminal justice system to try perpetrators of the post-election violence, they can no longer build a case at the ICC that the State is unwilling or incapable of doing so. In practice, this means that NGOs are unlikely to contribute to positive complementarity during preliminary examinations.

In Kenya, the “perverse incentives” created by the preference for international over domestic justice and the lack of trust in the current government discourage the formation of a civil society movement for national criminal justice system reform in Kenya.

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81. Interview with anonymous org. no. 1, *supra* note 57; interview with anonymous org. no. 2, *supra* note 51; interview with anonymous org. no. 3, *supra* note 52; interview with anonymous org. no. 5, *supra* note 56; interview with anonymous org. no. 7, *supra* note 8.

82. Interview with anonymous org. no. 6, *supra* note 50; interview with anonymous org. no. 7, *supra* note 8.

## CONCLUSION

As previously noted, one of the key objectives of the current ICC Prosecutor's understanding of complementarity is to improve the performance of States in fulfilling their obligation to investigate and prosecute the crimes addressed by the Rome Statute.<sup>83</sup> In Kenya, we did not see the effects of a successful preliminary examination. Since state authorities remained inactive in terms of prosecuting perpetrators of the post-election violence, the Prosecutor asked the ICC Trial Chamber for authorization to open a formal investigation, indicating that he did not see any prospect of succeeding with his aspirations to encourage national prosecutions.

However, as we have shown, the potential impact of ICC preliminary examinations in terms of encouraging positive complementarity amounts to more than institutional capacity building. In Kenya, the ICC might still be able to empower civil society and contribute to rule of law strengthening. Several NGOs in Kenya were indeed taking advantage of the ICC preliminary examination to further their objectives, which, although not directly related to national criminal justice system reform, contributed indirectly to strengthening the rule of law. NGOs have taken advantage of the legitimacy afforded by the ICC to work with communities, creating awareness about the importance of choosing better leaders and reducing ethnic divisiveness.

In particular, NGOs with bottom-up approaches, dedicated to spurring community demand for accountability, have been successful in leveraging ICC attention. Some work with communities toward critical reasoning that can contribute to the election of new leaders on the basis of principles and interests rather than ethnic group.<sup>84</sup> This indirectly contributes to strengthening the rule of law, as it sets the basis for democratic political renovation of leadership, opening the way for a new generation of politicians who believe in accountability and transparency and can lead future justice reform. Other NGOs work with communities to help them create and accept a collective narrative around the fact that the post-election violence implicated perpetrators and victims of all ethnicities in Kenya, and therefore, that those held responsible will (and must) come from all ethnicities.<sup>85</sup> This also contributes to strengthening the rule of law as it prepares society to accept judicial decisions – and therefore increases compliance – regardless of the ethnicity of those prosecuted. Yet other NGOs are dedicated to self-sustaining programs for communities, under the premise that peace building and reconciliation must come hand in hand with a development program.<sup>86</sup> These activities contribute to strengthening

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83. POLICY ISSUES, *supra* note 15, at 5; KLEFFNER, *supra* note 26, at 216.

84. Interview with anonymous org. no. 6, *supra* note 50.

85. Interview with anonymous org. no. 7, *supra* note 49.

86. Interview with anonymous org. no. 4, *supra* note 54.

the rule of law as they push communities up from a level where some people would agree to become “mercenaries” for a few shillings, to a situation in which they can pause and exercise their rights and duties as citizens.

In this sense, the ICC has contributed to a process in which NGOs are working to empower communities in their quest to demand accountability, elect their own representatives, and gain a stake in the system. This may not be what the Prosecutor intended when he said that the ICC shall “encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes,”<sup>87</sup> but it can certainly contribute to strengthening the rule of law over the long term. Thus, while we found that NGOs did not take advantage of the ICC preliminary examination to advocate for criminal justice reform, this does not mean that they have not taken any advantage of the ICC preliminary examination to forward their agendas.

If one should draw any general conclusion from the Kenyan case, it must be that NGOs can indeed gain leverage from the ICC, but, as obvious as it may sound, only to advance the objectives on their own agenda. For the NGOs we interviewed in Kenya, domestic criminal justice system reform does not seem to be a priority at the moment. This appears to be due in part to present political constraints, and in part to the “perverse incentives” described above. When judicial reform is not what NGOs desire because they do not believe the system will be strong enough to prosecute the main perpetrators, the ICC is precluded from realizing the Prosecutor’s stated objective of encouraging domestic prosecutions. Thus, the extent to which ICC preliminary examinations might actually “trigger” domestic prosecution of international crimes depends partly on whether NGOs will seek new sources of legitimacy and stigma from the ICC and attempt to contribute more directly to domestic institutional strengthening.

The discussion about the “perverse incentives” explains why NGOs in Kenya prefer demonstrating the incapability and unwillingness of the Kenyan authorities, rather than participating directly in criminal justice system reform. Hence, one important question to be addressed within the context of advancing positive complementarity is what can be done to incentivize NGOs to adopt domestic accountability as part of their agendas. That, however, goes beyond the scope of this paper.

At this point, what can be concluded is that the ICC preliminary examination, through its capacity to confer extended legitimacy and stigma, *could* serve to support a more direct participation in domestic justice reforms, at least in countries where the level of distrust between NGOs and the State is not as deep as in Kenya. For example, instead of merely advocating against the State as a whole and for the election of new leaders, NGOs could take advantage of the rule of law strengthening discourse of

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87. POLICY ISSUES, *supra* note 15, at 5.



the ICC, and use it to influence the domestic public agenda. This is not only the objective of the current ICC Prosecutor but also the underlying meaning of an international criminal system based on the principle of complementarity.

