



ICC PRE-TRIAL CHAMBER APPROVES PROSECUTOR'S INVESTIGATION IN THE KENYA SITUATION

On March 31, 2010 the International Criminal Court's (ICC) Pre-Trial Chamber II (PTC) granted the application of the Chief Prosecutor, Luis Moreno-Ocampo, to begin an investigation into acts constituting crimes against humanity in the Republic of Kenya.¹ This is the fifth investigation by the ICC since it began its work. It is also the first investigation that the Prosecutor has requested on his own initiative. This is known as the initiation of an investigation *proprio motu*.² The following paper examines the effect of the PTC decision both on the present investigation in Kenya and future *proprio motu* investigations under the Rome Statute. US opponents of the ICC often point to the ability of the Prosecutor to act on his own initiative as a serious flaw in the Rome Statute. They charge that this power will encourage the Prosecutor to be irresponsible and subject him to the political pressure to abuse investigations. However, the PTC's decision establishes strict principles and procedures to follow for future Prosecutors asking permission to investigation on their own initiative. Therefore this paper presents these in some detail.

Proprio Motu Investigations Under the Rome Statute

The ICC prosecutor, like prosecutors in US criminal systems, may initiate investigations where there is a reasonable basis to believe that a crime that the Court could try has been committed.³ However, this capacity is limited by the judicial checks and balances that are contained within the Rome Statute.⁴ Unlike domestic prosecutors, the ICC prosecutor must show that he has enough evidence to demonstrate that the circumstances of the crime give the Court jurisdiction and that the nature of the alleged crimes makes them admissible to prosecution and trial in the ICC⁵ before the Court will allow him to proceed with a formal investigation.⁶

The jurisdiction test is satisfied where there is proof of an eligible crime – genocide, crimes against humanity, or war crimes.⁷ The crime must have taken place on the territory of or been committed by a national of a State Party. Likewise it must have happened after the Rome Statute took legal effect for the State Party.⁸ In certain instances, non-States Parties may make declarations under article 12 that will permit the Court to exercise jurisdiction in a manner similar to that over States Parties. The test for admissibility requires a determination of

¹ For a comprehensive summary of the events in Kenya and the response of the Prosecutor's office, see Tania Deigni, The ICC Prosecutor's Application for Authorization to Open an Investigation in the Situation of Kenya, AMICC, April 2010, available at http://amicc.org/usinfo/advocacy_materials.html.

² Under Article 13 of the Rome Statute, an investigation can be triggered in three ways: a State Party referral, a Security Council referral, or by the Prosecutor own initiative. Regarding the four previous situations, three – Uganda, Democratic Republic of Congo, and Central African Republic – were self-referred by States Parties and one – the Darfur region of Sudan – was referred by the UN Security Council.

³ See Rome Statute, Article 15.

⁴ Rome Statute, Article 15(4).

⁵ Beyond jurisdiction and admissibility, the third threshold in Article 53(1) is only applicable when a Prosecutor decides *not* to initiate an investigation based upon the interests of justice. See Pre-Trial Chamber II, *Situation in the Republic of Kenya Decision Pursuant to the Authorization of an Investigation*, ICC-01/09-19-Corr, March 31, 2010, para. 63.

⁶ The requirement to meet these evidentiary thresholds before a Pre-Trial Chamber only applies for investigations undertaken on the initiative of the prosecutor, and not for investigations requested by States Parties or mandated by the Security Council.

⁷ See Rome Statute, Article 5.

⁸ Matthew Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. Int'l Crim. Just. 7, 78 (2004). The Pre-Trial Chamber confirmed this in *Situation in Kenya Decision*, paras. 36-39.





whether the relevant State Party has made or is making a genuine effort to either investigate or prosecute. This is the principle of “complementarity.” It mandates that the ICC defer to all genuine state investigations or trials.⁹ In addition, the admissibility criterion involves consideration of whether the case is of “sufficient gravity”.¹⁰ In other words, it must be systematic or large-scale and cause “social alarm” in the international community.¹¹ Together the results of the jurisdiction and admissibility tests are both subject to the Court’s decision that the Prosecutor has presented evidence demonstrating a “reasonable basis” to believe that they have been met.

The vast majority of states at the Rome Conference supported giving the Prosecutor the ability to begin an investigation approved by the judges. They wanted the Court to be able to act on grave international crimes which countries were resistant to refer to the ICC.¹² However, this outcome was not universally accepted, as many states were wary of a prosecutor who could start an investigation on his own and without oversight into whether a crime had occurred.¹³ The Rome Statute met these concerns by establishing a supervisory role for the Pre-Trial Chambers. It requires the judges to ensure that a Prosecutor has extensively prepared and has solid evidence before an investigation is approved.

Analysis of the Decision: Judges Determine High Thresholds in the Statute

The supervision of the Prosecutor through a system of checks and balances is designed to prevent the Prosecutor from investigating a situation without credible evidence, or for politicized reasons.¹⁴ In its Kenya decision, the PTC explicitly acknowledged this intent of the Rome Statute and claimed that they would base their judgment on it.¹⁵ Specifically, the PTC interpreted the criterion of “admissibility” and the evidentiary test of “reasonable basis” to impose strict requirements on the Prosecutor.

In order to satisfy the criteria of admissibility, the court found that the Prosecutor must present, along with evidence, a “potential case” of suspects and their specific alleged crimes.¹⁶ The Rome Statute does not explicitly mention the submission of such a list of suspects and crimes before the start of an investigation. However, the court interpreted the Rome Statute to find that this information is necessary in order to “facilitate

⁹ Morten Bergsmo and Pieter Kruger, Article 53 Initiation of an investigation, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, at 708 (O. Triffterer ed., 1999).

¹⁰ This gravity requirement is the one found under article 17(1)(d), and not the one within article 53(1)(c). This second requirement is only relevant when a prosecutor declines to proceed with requesting an investigation. See supra note 5.

¹¹ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case of Mr Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, February 24, 2006, Annex I, *Decision on the Prosecutor’s Application for a warrant of arrest, Article 58*, February 10, 2006, para. 46.

¹² Silvia Fernandez de Gurmendi, *The Role of the International Prosecutor*, *The International Criminal Court: The Making of the Rome Statute*, at 178 (R. Lee ed., 1999).

¹³ Morten Bergsmo and Jelena Pejic, Article 15 Prosecutor, in Triffterer, at 362-363. See Also William Schabas, *An Introduction to the International Criminal Court*, at 160 (3rd ed. 2007).

¹⁴ Other safeguards for this include ASP oversight and right of dismissal, the application of the principle of complementarity at all stages of the judicial process, and Security Council deferrals under article 16 of the Rome Statute.

¹⁵ *Situation in Kenya Decision*, para. 18.

¹⁶ *Situation in Kenya Decision*, paras. 49-50. This list, annexed to Office of the Prosecutor, *Prosecution’s Response to Decision Requesting Clarification and Additional Information*, ICC-01/09-16, March 3, 2010, was not made publicly available.





a mutual understanding between the Court and the relevant State(s)” about the role of complementarity, which is a statute requirement that gives primacy in all cases to genuine state investigations or trials.¹⁷ The interpretation poses a significant hurdle for the Prosecutor since it may be difficult to construct a list of suspects and their alleged crimes before the permission to investigate and collect evidence is granted. However, the requirement will make it easier for a State to exercise its Rome Statute right to immediately claim jurisdiction over the matter. Finally, the court stated that it will analyze the potential case list for complementarity and the sufficient gravity threshold, both aspects of admissibility.

The standard of “reasonable basis” establishes a legal test by which the sum of the Prosecutor’s evidence relating to the tests of jurisdiction and admissibility will be judged.¹⁸ The Rome Statute is silent and therefore leaves to the judges to determine in greater detail what is meant by the “reasonable basis” standard. As it is the lowest of the four evidentiary tests within the Rome Statute, and since it arises at the extreme beginning of the process – at the pre-investigation stage – it would stand to reason that the judges would interpret it as a test with limited requirements. However, taking into account other factors, and bearing in mind the importance of their supervisory role, the PTC rejected interpreting reasonable basis as a “reasonable suspicion.”¹⁹ The Prosecutor’s evidence must point towards a “reasonable conclusion.”²⁰ This appears to rule out the presumption in favor of the Prosecutor that some analysts had thought would be the case.²¹

Analysis of the Decision: The Evidence from Kenya

In its decision, the PTC found that the evidence supported a reasonable basis to believe that crimes against humanity had been perpetrated upon the civilian population of Kenya. These included murder, rape and other forms of sexual violence, deportation and forcible transfer of populations, and other inhumane acts.²² The crimes occurred in 136 of 210 constituencies – electoral districts for selecting members of parliament – within six of Kenya’s eight provinces, although the most significantly affected areas were the districts in Nairobi and in the West, including the Rift Valley.²³ The evidence, communicated to the ICC was collected primarily from reports into the violence by NGOs, IGOs and the Kenyan government.²⁴ It supported a reasonable basis to believe that the definitions, or contextual elements, of crimes against humanity and the specified underlying acts had been committed.²⁵ This included acts planned by the Orange Democratic Movement, then an opposition party, and by the Party of National Unity which formed the government following the election.²⁶ As

¹⁷ *Situation in Kenya Decision*, para. 51.

¹⁸ Article 15(4), Rome Statute

¹⁹ *Situation in Kenya Decision*, paras. 31-32.

²⁰ *Situation in Kenya Decision*, para. 33.

²¹ See Bergsmo and Pejic, *supra* note 10.

²² *Situation in Kenya Decision*, para. 73.

²³ *Situation in Kenya Decision*, paras. 176-177.

²⁴ Among the most important were the government-established Waki commission report, a report by the NGO the Kenyan National Commission on Human Rights, and a Human Rights Watch report.

²⁵ *Situation in Kenya Decision*, paras. 100-138 and 141-171.

²⁶ *Situation in Kenya Decision*, paras. 104-106.





the jurisdictional and admissibility criteria had been met,²⁷ the Court authorized the Prosecutor to begin an investigation in Kenya.²⁸

The Decision's Additional Significance for the Kenya Situation: A Limited Scope of Investigation

Despite the strict requirements on admissibility and the application of rigorous requirements regarding evidence, the facts presented to the court compelled the PTC to accept the Prosecutor's request to open an investigation.²⁹ However, in accepting the request, the Court, again after considering its supervisory role, decided to rigidly limit the scope of the investigation.³⁰ The Prosecutor would be permitted to investigate only within the parameters determined by the court. In total, this will limit the crimes that are allowed to be investigated, the locations of the investigation, and the permitted timeframe of the alleged crimes under investigation.

First, as only evidence for crimes against humanity was presented, the Prosecutor may only investigate this single category of crimes. Expansion to other crimes within the jurisdiction of the court would require a second, equally demanding Pre-Trial Chamber authorization.³¹ The Prosecutor is likewise restricted to investigate solely crimes occurring on the territory of Kenya. Therefore, any crimes relating to the situation committed by Kenyans in, for example, Tanzania would necessitate further authorization before an investigation of them could commence.

Despite the lack of specific dates within the request of the Prosecutor, the PTC established the allowable timeframe in the Kenya investigation as running from June 1, 2005, the date of the Rome Statute's entry into force in Kenya, until November 26, 2009, when the Prosecutor filed his investigation request. This long time period was an oddity when compared to the strict limits on the rest of the investigation. Indeed the Prosecutor, though not providing firm dates, had indicated that his reasonable basis for believing that crimes had been committed only ran during the "post-election period, including but not limited to the time period between 27 December 2007 and 28 February 2008," when most of the violence had occurred.³² As the election had occurred on December 27, 2007, the "post-election period" could only have begun on that date. Nevertheless,

²⁷ *Situation in Kenya Decision*, paras. 99-200.

²⁸ The ICC Prosecutor will begin leading the investigations in Kenya on a visit May 8-12, 2010. See ICC, Press Release, ICC Prosecutor to visit Kenya to meet victims and listen to all Kenyans, May 4, 2010, available at <http://www.icc-cpi.int/Menu/Go?id=f39c6639-aa8d-4f1c-bba9-083d1dd46fb2&lan=en-GB>.

²⁹ A delay occurred owing to a Pre-Trial Chamber request for Prosecutor information on a potential case list. See Pre-Trial Chamber II, *Decision Requesting Clarification and Additional Information*, ICC-01/09-15, February 18, 2010; and Office of the Prosecutor, *Prosecution's Response to Decision Requesting Clarification and Additional Information*, ICC-01/09-16, March 3, 2010.

³⁰ *Situation in Kenya Decision*, para. 208. See also *Situation in Kenya Decision*, paras. 203 and 211.

³¹ This has great ramifications for potential situations if the crime of aggression becomes functioning. It negates the concern that a duplicitous prosecutor would be able to start an investigation on concrete grounds, but then pursue frivolous charges that are politically motivated. For example, if there were serious evidence of war crimes within an inter-state conflict, the judges would prevent the Prosecutor from expanding their investigation beyond war crimes into the crime of aggression without proof of credible evidence.

³² Office of the Prosecutor, *Request for authorisation of an investigation pursuant to Article 15*, ICC-01/09-3, November 26, 2009, para. 93. See also *Situation in Kenya Decision*, para. 202. It should be noted that the Prosecutor also stated his desire to investigate "in relation to the post-election violence" in paragraph 114, but this was clearly delimited by his early declaration regarding the extent of his reasonable basis to believe.





the PTC instructed the Prosecutor to go further back as to do otherwise would be “inconsistent” with parts of the Rome Statute.³³

A Dissenting Judge Declines to Accept Evidence of Crimes Against Humanity

The PTC decided the Prosecutor’s request by a majority of two to one. Judge Hans-Peter Kaul wrote a dissenting opinion. It will not affect the Kenyan investigation, but it could influence future Prosecutor requests and PTC decisions on *proprio motu* investigations. After general observation on the need for the court to respect sovereignty³⁴ and to address only the most serious crimes,³⁵ Judge Kaul proceeded to use three authoritative, non-English versions of the Rome Statute to argue the legal point that crimes against humanity could only be committed by members of *permanent* organizations or by governments.³⁶ The groupings of political and business leaders in Kenya who organized the violence were recent and ephemeral, and once the ends of violence had been accomplished they no longer continued to meet or be organized. This disqualified them as organizations of the type that the definition of crimes against humanity requires. Additionally, in regard to the Kenyan government, Judge Kaul, contrary to the opinion of the court, found that there was insufficient evidence to determine links between police crimes and the government at any applicable level.³⁷

Conclusion

The PTC confirmed the request of the Prosecutor to start an investigation into the violence in Kenya. In doing so, the court upheld the checks and balances within the Rome Statute that are designed to prevent the Prosecutor from initiating politicized investigations without sufficient evidence. The PTC required the Prosecutor to meet substantial evidentiary standards, and it placed strict limitations on the extent of the investigation it granted him. The PTC thus established an important, detailed precedent for future requests for Prosecutor-initiated investigations. If this decision holds, it should go a long way toward silencing US critics of the Prosecutor’s power to conduct these investigations.

*Researched and drafted by Douglas Dunbar
Updated May 7, 2010*

³³ *Situation in Kenya Decision*, para. 205.

³⁴ *Situation in Kenya Decision*, Dissenting Opinion of Judge Hans-Peter Kaul, para. 10.

³⁵ *Id.*

³⁶ *Id.*, paras. 37-38 and 51. Paragraph 3 of the Introduction to the Elements of Crimes against humanity was also raised as evidence in paragraph 39 of the dissent. It should be noted that some jurists support this interpretation – including Schabas – although the court ultimately did not. See *Situation in Kenya Decision*, para. 50, note 54.

³⁷ *Situation in Kenya Decision*, Dissenting Opinion of Judge Hans-Peter Kaul, paras. 81, 92, 101, 111, 118, 126, 136 and 145. The opinion of the court on this matter of evidence is at *Situation in Kenya Decision*, paras. 106, 128, 134 and 138.

