

Inside the Minds of the ICC Judges: Will They Give Ocampo the Benefit of the Doubt in Kenya?

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On 26 November 2009, the International Criminal Court (ICC) Prosecutor, Luis Moreno-Ocampo, requested permission from Pre-Trial Chamber II to conduct formal investigations in Kenya, the first time he has sought to use his *proprio motu* powers to initiate an investigation. When the Pre-Trial Chamber reconvenes this week to consider the Prosecutor's request to conduct formal investigations in Kenya, it will have the opportunity to clarify a number of contentious issues of international criminal law, including the principle of complementarity, the gravity threshold, the meaning of "interests of justice" and the definition of "crimes against humanity." The Pre-Trial Chamber's forthcoming decision is likely to be one of the most significant in the Court's short history. After providing a brief background on the conflict in Kenya and describing the applicable procedure from the Rome Statute, this essay considers some of the issues likely to be occupying the minds of the three judges of the Pre-Trial Chamber.

1. Background

Following the disputed presidential and parliamentary elections in Kenya in 2007, the country experienced two months of brutal violence. According to the Commission of Inquiry on Post Election Violence ([Waki Commission](#)), 1,113 people were killed, many hundreds were raped, and 650,000 were left homeless. On 28 February 2008, a power-sharing government was formed; and on October 15, 2008, the Waki Commission report recommended that a Special Tribunal for Kenya be established to try those responsible for the post-electoral violence. It further stated that if the Grand Coalition Government failed to establish a Special Tribunal, a list of the names of suspected perpetrators would be forwarded to the ICC Prosecutor. Since no Special Tribunal was established, on 9 July 2009, Ocampo received the list. Four months later, Ocampo for the first time elected to use his own powers under Article 15 of the Rome Statute to initiate proceedings *proprio motu*. On 18 February 2010, however, the Pre-Trial Chamber used its powers under Rule 50(4) and Regulation 28(1) to [request clarification and additional information](#) from the Prosecutor. The Prosecutor submitted the requested information on 3 March 2010, thereby inviting the Pre-Trial Chamber to provide some important guidance on the most fundamental aspects of the Rome Statute.

2. Applicable Procedure

Article 15(1) provides that the Prosecutor may initiate investigations *proprio motu* on crimes that fall within the jurisdiction of the Court. Article 15(3) provides that "if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected." Once such a request has been made, the Pre-Trial Chamber shall, in accordance with Article 15(4), authorise the investigation if it is satisfied

that there is a “reasonable basis to proceed with an investigation” and that the case “appears to fall within the jurisdiction of the Court.” Rule 48 of the Rules of Procedure and Evidence provides that in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3), the Prosecutor is required to consider the matters set out in Article 53(1), namely:

- (a) Whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed;
- (b) Whether the case would be admissible under Article 17; and
- (c) Whether, taking into account the interests of victims and the gravity of the crime, it would be in the interests of justice to proceed with an investigation.

3. Within the Jurisdiction of the Court

As the alleged crimes were committed on Kenyan territory more than two years after Kenya ratified the Rome Statute, the only issue to be determined in order to satisfy Article 12 is whether the alleged crimes amounted to crimes against humanity.

Article 7 defines “crimes against humanity” to mean the commission of one of the acts in the Article “when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.”

In [Bemba](#), Pre-Trial Chamber III held that “widespread” referred to the “large-scale nature of the attack and the numbers of targeted persons.” According to the [Waki Commission](#), the post-electoral violence lasted two months, occurred in six of Kenya’s eight provinces and resulted in deaths, displacement and rapes and sexual assaults. The Pre-Trial Chamber should therefore be satisfied that there was a “widespread” attack against a “civilian population.” The same Pre-Trial Chamber stated that “systematic” referred to the “organised nature of the acts of violence and the improbability of their random occurrence.” The [Waki Commission](#) identified several factors indicating that at least some of the post-electoral violence in Kenya was planned, including incitement to violence by politicians and business leaders, warnings sent to victims of the impending attacks, and the organised and orchestrated nature of the violence itself. It was therefore possible for the Pre-Trial Chamber to also conclude that the attacks were “systematic.”

In his initial [Request for Authorisation](#), however, the Prosecutor elected not to name individual suspects or groups. This exemplified a divergence of interpretation between the Prosecutor and the Pre-Trial Chamber. The difference of opinion concerned the *mens rea* requirement for crimes against humanity. Article 7(2)(a) requires that the attack against a civilian population be “pursuant to or in furtherance of a State or organisational policy to commit such an attack.” The Prosecutor argues that the authorisation of an investigation pursuant to Article 15 “is not the opportunity to proceed with the identification of individual criminal liability.” ([Request for Authorisation, para 102](#)) Instead, the Prosecutor is asking the Pre-Trial Chamber to find that there is a reasonable basis for believing that *some* persons in Kenya committed crimes in furtherance of a State or organisational policy, even if the Prosecutor is unwilling or unable to disclose *which persons in particular* may have had this

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mental element. For the Pre-Trial Chamber, the failure of the Prosecutor to identify those who are alleged to have been responsible is unsatisfactory. The judges were likely to have been influenced by the ICC's [Explanatory Note on Elements of Crimes](#), which looks to the mental element of the *alleged perpetrator*. Further, the approach of other Pre-Trial Chambers has been to consider whether there were reasonable grounds for believing that the *alleged perpetrator* knew that the acts being committed were part of a widespread or systematic attack. (See, for example, [Katanga](#); [Chui](#); and [Bemba](#),). Consequently, so that it could decide whether there is a "reasonable basis" for believing that crimes against humanity have been committed, in its [Request for Clarification](#), the Pre-Trial Chamber requested that further information be provided on the identity of the local leaders, businessmen and politicians alleged to have been responsible for the violence. On 3 March 2010, the Prosecutor provided the Pre-Trial Chamber with this information, stating in its [response](#) that "senior leaders from both PNU and ODM parties" are believed to have been responsible for the violence, before providing the names of 20 persons in a confidential annex. The Pre-Trial Chamber will now consider this list of 20 persons to determine whether there is a reasonable basis for believing that attacks were made "in furtherance of a State or organisational policy."

4. Admissibility under Article 17

Assuming that the Pre-Trial Chamber finds that there is a reasonable basis for concluding that crimes against humanity have been committed, it must then consider whether the case would be admissible under Article 17. This essentially requires the Pre-Trial Chamber to consider two issues:

- (a) Whether the principle of complementarity has been satisfied; and
- (b) Whether the requirement of sufficient gravity has been satisfied.

(a) The Principle of Complementarity

Pre-Trial Chamber I, in [Lubanga](#), stated that the principle of complementarity is the "first part of the admissibility test." Article 17(1)(a) provides that a case will be inadmissible where it is "being investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

In [Katanga](#), the Appeals Chamber stated that "inaction on the part of a State having jurisdiction ... renders a case admissible before the Court." In his [Request for Authorisation](#), the Prosecutor argued that the failure of the Grand Coalition Government to establish a Special Tribunal for Kenya amounted to inaction because it has resulted in no investigations or proceedings pending against those bearing the greatest responsibility for the crimes allegedly committed.

The Pre-Trial Chamber's first concern in relation to complementarity was revealed in its [Request for Clarification](#) where it requested the Prosecutor to provide further information on the specifics of the alleged incidents and the identity of the alleged perpetrators. The Pre-Trial Chamber appears to be of the view that it is not possible to identify whether alleged suspects have been investigated and prosecuted, without first knowing who those alleged

suspects are. As mentioned above, this information was provided to the Pre-Trial Chamber on 3 March 2010.

Many other thoughts are now likely to occupy the Pre-Trial Chamber judges' minds. First, can it be said that a State is "willing" to prosecute when leaders of its government publicly support the trial of suspected perpetrators but then fails to establish the necessary implementing legislation? Second, how long should the ICC be expected to wait for domestic investigations and prosecutions to commence? Finally, in the absence of any prosecutions, does the existence of the Truth Justice and Reconciliation Commission, which begins its work later this year, make the Kenyan cases inadmissible under Article 17?

While it has been nearly 18 months since the Waki Commission recommended the establishment of a Special Tribunal, of concern to the Pre-Trial Chamber is that discussions on how to establish a Special Tribunal are likely to [continue in Cabinet meetings](#). Indeed, it may well be that the very process of the Prosecutor initiating a *proprio motu* proceeding restarts the debate on the Special Tribunal. It is therefore possible that, following the decision of the Pre-Trial Chamber to authorise formal investigations, a Special Tribunal may be established, thereby rendering the Kenyan cases inadmissible before the ICC. The Pre-Trial Chamber may therefore be reluctant to authorise official investigations while domestic investigations and prosecutions remain a possibility.

(b) The Principle of Sufficient Gravity

Article 17(1)(d) provides that a case will be inadmissible where it is "not of sufficient gravity to justify further action by the Court." The term "gravity" is not defined in the Rome Statute, nor in the Rules of Procedure and Evidence, but in [Lubanga](#), the Pre-Trial Chamber held that "gravity" requires two factors to be considered:

- (a) whether the situation was "systematic" or "large-scale"; and
- (b) whether the situation caused "social alarm" in the "international community."

This approach, however, was rejected by the [Appeals Chamber](#) in a decision delivered on 13 July 2006. Despite rejecting the approach of the Pre-Trial Chamber, however, the Appeals Chamber did not hand down an alternative test, thereby leaving some uncertainty over how Article 17(1)(d) should be interpreted. In his [Request for Authorisation](#), the Prosecutor makes no submissions on how the term "gravity" should be interpreted, merely stating in paragraph 20 that "the gravity threshold established by the statute is reached."

As deGuzman has argued, it may be necessary to distinguish between gravity in a relative sense and gravity in a threshold sense.¹ The first involves the Court in comparing the situation and cases in question with other situations and cases to ensure that those that are selected for prosecution are the "most grave". By contrast, the latter involves the Court in measuring the situation and cases in question against some objective criteria to determine

¹ Margaret M. deGuzman, "Gravity and the Legitimacy of the International Criminal Court" (2009) 32 *Fordham International Law Journal* 1400.

whether a particular threshold of gravity has been met. It would appear that the use of the word “sufficient” in Article 17(1)(d) suggests that the second test of gravity is the appropriate test to adopt at the admissibility stage. The [Request for Authorisation](#) provides the Pre-Trial Chamber with an opportunity to define the threshold that must be met, and the criteria that must be considered when deciding this question.

This raises many interesting questions for the Pre-Trial Chamber. First, to whom is the situation required to be grave – the affected population, the region, or the international community? Second, what factors are relevant in determining gravity – the crimes committed, the identity and rank of the perpetrator, the number of victims, the geographical scope, the temporal scope, or a combination of each? The Pre-Trial Chamber is likely to be conscious of the need to avoid adopting any sort of rigid test to determine “gravity”. While such a test would not be binding, it may create a persuasive authority that prevents the Court from hearing certain serious cases in the future.

5. Interests of Justice

Once the Prosecutor has taken into account the gravity of the crime and the “interests of victims”, Article 53(1)(c) then states that the Prosecutor must consider whether there are “substantial reasons to believe that an investigation would not serve the interests of justice.” The Prosecutor is of the [opinion](#) that, where the other criteria in Article 53 have been satisfied, there is a presumption in favour of investigation. In other words, the Prosecutor believes that he is not required to establish that an investigation or prosecution is in the interests of justice, but rather he shall proceed with the investigation unless there are particular circumstances that provide substantial reasons why it is not in the interests of justice to do so.

As there is no real threat of ICC investigations further destabilising the region, it seems reasonable to assume the proceeding with investigations in Kenya would be in the interests of justice. The [Request for Authorisation](#) nevertheless provides the Pre-Trial Chamber with the opportunity to state whether its understanding of the provision is the same as the Prosecutor’s.

6. Conclusion – Is There a “Reasonable Basis” Upon Which to Proceed?

Ultimately, the decision of the Pre-Trial Chamber in relation to each of these issues identified in this essay will be heavily influenced by how it chooses to define “reasonable basis.” The Rome Statute provides four different standards of certainty, depending on the issue under consideration. In descending order, these are:

- (1) Conviction of the accused where his guilt is “beyond a reasonable doubt” (Article 66(3));
- (2) Confirmation of charges against the accused where there are “substantial grounds” for believing he committed the crimes charged (Article 61(7));
- (3) Issue of a warrant against the accused where there are “reasonable grounds” for believing he committed the crimes charged (Article 58(1)); and

- (4) Initiation of an investigation where there is a “reasonable basis” for believing crimes were committed.

With the Prosecutor only being required at this stage of the proceedings to satisfy the lowest of these four standards of certainty, the Pre-Trial Chamber may have concerns over whether each of the elements of Article 53 are satisfied, but may nevertheless grant the Request for Authorisation, thereby providing the Prosecutor with the benefit of any doubt. Regardless of the Pre-Trial Chamber’s conclusion, the reasoning in the decision may provide greater clarity on several crucial elements of the Rome Statute.

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