Prosecutorial Power: Proprio Motu in the International Criminal Court

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The International Criminal Court is a distinct international organization in that it deals with individuals. The Court prosecutes individuals, accepts complaints and communications from individuals, and allows for an independent official to initiate prosecutions. Independent officials in international organizations have always created controversy among international relations theorists and state authorities. At the root of this debate, is the argument over whether international organizations do or do not have independence from state power and if they should have independence. While realists believe that international organizations have minimal power and influence and serve as tools through which states exercise power, institutionalists and constructivists believe international organizations have the capacity for independent action. States have always been weary of giving international organizations and officials the authority and autonomy to act independently because of fear that they will impede on national sovereignty. These larger arguments were the foundation of the debate that took place at the Rome Conference regarding the role of an independent prosecutor of the Court.

In the first draft of the Rome Statute, produced by the International Law Commission (ILC) in 2004, a prosecutor was not allowed to initiate an investigation without either a state party complaint or a United Nations Security Council recommendation because there was much concern that an independent prosecutor could lead to politically motivated or insignificant cases.[1] However, when negotiations turned to the Preparatory Committee, delegates began to argue that a prosecutor should be able

[1] "Draft Statute for the International Criminal Court", *Report of the International Law Commission on the Work of its Forty-sixth Session*, UN GAOR, 49th Sess., Supp. No. 10, at 43, UN Doc. A/49/10 (1994).

to initiate an investigation based on information from nonstate sources such as non-governmental organizations (NGOs).[2]

Hence, this idea of *proprio motu*, or a prosecutor's ability to initiate Court investigations, became a controversial subject in the development of the Rome Statute and the Court since many people were concerned about the Court's legitimacy and accountability and were unsure if an independent prosecutor could foster these principles. While opponents of *proprio motu* were concerned about prosecutorial abuse, proponents believed that an independent powerful prosecutor would make the Court appear more legitimate and not tied up in the political concerns of independent states or the Security Council. The United States became particularly vocal in this debate and argued against an independent prosecutor, instead arguing that a prosecutor's powers be heavily limited by the Security Council. Eventually, this position was rejected and *proprio motu* was adopted, since the delegates at the Rome Conference believed that making the Court subject to the discretion of political institutions such as the Security Council would be incompatible with the purpose of the Court.[3] However, *proprio motu* is still subject to judicial review and dependent on authorization by a Pre-Trial chamber.

This capstone focuses on understanding the Prosecutor's power to open investigations in the International Criminal Court. More specifically, what process and standard must the Prosecutor use when examining a communication and initiating an investigation? The Court has been in existence since 2002 and yet, it has only opened investigations involving five countries: the Democratic Republic of Congo (DRC),

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[2] Silvia A. Fernandez de Gurmendi, "The Role of the International Prosecutor", *The Making of the Rome Statute,* 177.

[3] Allison M Danner. "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court." *The American Journal of International Law* 97.3 (2003): 510-52. *JSTOR*. Web. 17 Sept. 2010. http://www.jstor.org/stable/3109838, 514.

Uganda, the Central African Republic (CAR), Sudan, and Kenya. The Court's first investigation occurred in the DRC and although the DRC eventually referred itself to the Court, it was the first time the Prosecutor threatened to use his *proprio motu* powers to initiate the investigation. Seven years later, the Prosecutor actually used his powers for the first time to initiate an investigation in Kenya.

Before discussing the Prosecutor's decisions on whether to authorize investigations or not, it is important to identify the applicable law that determines exactly what powers *proprio motu* gives a prosecutor. Although the Prosecutor has the authority to initiate investigations, the creators of the Rome Statute placed strict restrictions on when a prosecutor may do so for several reasons. Danner believes "the first objective is to establish that there is sufficient evidence that the accused has committed a crime within the jurisdiction of the Court to warrant a trial; the second, to ascertain whether the case both merits the international forum and cannot or will not be tried by the courts of any state with jurisdiction over the crime."[4]

The Law Behind Proprio Motu

The applicable law details that in order for the Prosecutor to open an investigation through *proprio motu*, there must be a reasonable basis to proceed with an investigation based on the Court's jurisdiction and admissibility, provided that it does not go against the interests of justice. Article 15 of the Rome Statute explicates that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the Court's jurisdiction.[5] Specifically, paragraphs 2 and 3 of Article 15 mandate that if the Prosecutor concludes there is "a reasonable basis to proceed" with an investigation thane

[4] Danner, 516.
[5] Article 15 of the Rome Statute, International Criminal Court.

he must submit a request for authorization of an investigation to the Pre-Trial Chamber for review.[6] The reasonable basis standard is not defined explicitly in Article 15 and hence many scholars are weary of prosecutorial abuse. However, *Rule 48* of the Rules of Procedure and Evidence and the Regulations of the Office of the Prosecutor specify that the Prosecutor must determine there is a reasonable basis to proceed with an investigation under Article 15(3) by considering factors described in Article 53, paragraph 1(a) to (c).[7]

Article 53 details the requirements for determining what a reasonable basis for an investigation constitutes. Article 53 paragraph 1(a) says that the Prosecutor must provide a reasonable basis to believe that a crime within the Court's jurisdiction has been committed.[8] According to the Appeals Chamber's judgment of December 14, 2006, the Prosecutor must evaluate *ratione materiae*, or subject matter jurisdiction as specified in Articles 5 through 8,; *ratione personae*, or jurisdiction over persons as specified in Articles 12 and 26,; *ratione loci*, or territorial jurisdiction as specified in Articles 12 and 13(b),; and ratione temporis, or temporal jurisdiction as specified in Article 11.

Furthermore, Article 53 paragraph 1(b) states that the cases must be admissible under Article 17, which specifies that the standard of gravity must be met and complementarity must be assessed before a case is admissible.[9] Both gravity and complementarity are two major requirements any case must meet. Although any crime falling within the jurisdiction of the Court is a serious matter, the Statute includes an additional consideration of gravity; the Office must determine that a case is of sufficient

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[6] Article 15 of the Rome Statute, International Criminal Court.
[7] *Rule 48* of the Rules of Procedure and Evidence of the Rome Statute, International Criminal Court.
[8] Article 53 of the Rome Statute, International Criminal Court.
[9] Article 53 of the Rome Statute, International Criminal Court.

gravity to justify further action by the Court. In the view of the Office, factors relevant in determining gravity include:

- the scale of the crimes;
- the nature of the crimes;
- the manner of commission of the crimes;
- and the impact of the crimes.[10]

For assessing complementarity, the Appeals Chamber confirms that the first question the Prosecutor must ask is whether there are or have been any relevant national investigations or prosecutions. If the Court finds no evidence of complementarity, then it is the duty of the Court to assess unwillingness or inability of national judicial courts to initiate investigations.[11]

Finally, Article 53 paragraph 1(c) mandates the Prosecutor must consider whether the case is against the interests of the justice.[12] This requirement is much less rigid than meeting jurisdiction and admissibility through gravity and complementarity. The Prosecutor is not required to prove that an investigation is *in* the interests of justice, but instead has a duty to show whether there are specific circumstances in the situation that give substantial reasons to believe the case *is not* in the interests of justice. In 2007, the Office of the Prosecutor (the Office) released an analysis on the interest of justice requirement and determined that Article 53 paragraph 1(c) is an exceptional requirement and that whenever criteria for an investigation has been met according to Article 53 paragraph 1(a) and (b) there is a presumption in favor of investigating.[13] Additionally, the analysis noted that there was a distinction between the interests of justice and the interests of peace, which is not within the mandate of the Prosecutor or the Court, and that the

[10] "Investigations," Office of the Prosecutor.
[11] "Investigations".
[12] Article 53 of the Rome Statute, International Criminal Court.
[13] "The Interests of Justice," Office of the Prosecutor, September 2007.

criteria for determining the interests of justice would be guided by the Court's purpose—"the prevention of serious crimes of concern to the international community through ending impunity."[14]

In the first four years of the Court's existence alone, the Office received 1,732 communications from 103 countries concerning situations in 139 countries in the world.[15] Because the Office maintains confidentiality to protect the interests of the individuals involved and victims, it most often only discloses the reasons for a case's dismissal to the author(s) of the communication. However, the Office has released statements regarding its decisions to both authorize and dismiss investigations in specific situations.

Most studies on *proprio motu* were written before the Prosecutor had ever used his discretionary powers and therefore do not provide a comprehensive view now that the Prosecutor has opened an investigation in Kenya. Those that have analyzed the use of *proprio motu* in Kenya have dealt with understanding why yet another African country has become the target of an investigation and if the Court is an effective international court of justice. Payam Akhavan argues that the Court may in actuality serve as a disincentive for peace since the Court's jurisdiction will deter war criminals from reaching reconciliation within nations in conflict.[16] Furthermore there has been much controversy among scholars in understanding why the Court's five cases have all concerned African countries. While President Paul Kagame of Rwanda has labeled the Court as a new mechanism of imperialism and tool of Western foreign policy, the Court

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[14] The Interests of Justice".
[15] Chandra Lekha Sriram, Olga Martin-Ortega, and Johanna Herman. *War, Conflict and Human Rights: Theory and Practice*. London: Routledge, 2010, 222.
[16] Payam Akhavan. "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism." *Human Rights Quarterly* 31.3 (2009): 624-54.

has emphasized that its role is to prosecute the gravest crimes and the situations in Africa have met this criteria.[17]

Hence, there has not been much academic work studying how the applicable law has lead to these five cases and attempting to understand how the Prosecutor comes to the conclusions he has reached on the communications he has received since Kenya. In order to assess the Prosecutor's method in evaluating cases I will use the Office's statements regarding the situation in Kenya to determine why this is the only case the Prosecutor has considered using his powers to authorize. By using the same resources the Prosecutor used in his investigation, specifically reports from human rights groups such as Human Rights Watch and the International Crisis Group, I will determine how Kenya met the law's requirements for jurisdiction, admissibility and the interests of justice. Additionally, I will assess the only two public dismissals the Office has released—Iraq and Venezuela—to analyze why the Prosecutor has determined these situations did not meet the Court's criteria.

Since the Prosecutor's decision to investigate Kenya, the most recent situation the Prosecutor has examined for a possible investigation is Guinea. While the Office has determined that the situation in Guinea meets the jurisdiction requirement and the gravity requirement, the Court believes Guinea may be able to operate complementarily.[18] Hence, this capstone will also discuss what factors may influence the Prosecutor's decision on whether or not to initiate an investigation in Guinea. By analyzing the past cases that the Office has authorized or dismissed I will be able to see what factors the Prosecutor will likely take into account for the preliminary examination of Guinea and

[17] Alexis Arieff, Marjorie Ann Browne, and Rhoda Margesson. "International Criminal Court Cases in Africa: Status and Policy Issues." Congressional Research Service, 14 July 2009.
[18] "Press Release on Guinea," Office of the Prosecutor.

provide an analysis of whether Guinea meets the jurisdiction, admissibility, and interests of justice criterion of the Court.

By answering these questions, I will gain an understanding of how *proprio motu* is practically being used in the Court currently and determine how the Prosecutor will utilize and develop his powers in the future.

Proprio Motu in Action

Each case study will begin with a brief history of the alleged crimes as well as a history of how the case was brought to the Prosecutor's attention. Then I will see how each case does or does not meet the requirements for *proprio motu* through 1) jurisdiction 2) admissibility (gravity and complementarity) and 3) not being against the interests of justice. Finally, I will study policy considerations that potentially affected the Prosecutor's decisions on these cases. I will evaluate how these cases would affect the Court's goals of maintaining relevancy, helping deterrence, and ensuring compliance. Additionally, I will evaluate how these cases could affect the Court's role as a non-state actor because of interactions with the UN Security Council and other international organizations, the influence of major powers, and pressure from NGOs.

Iraq

On March 11, 2003, the Court officially opened in a ceremony at the Hague, Netherlands, during which the eighteen judges of the Court were sworn in. Noticeably absent at this ceremony was Clifford Sobel, United States ambassador to the Netherlands, who had declined his invitation to attend. Just five days before the selection of Luis Moreno-Ocampo as the first Chief Prosecutor of the Court, U.S. troops had invaded Iraq. Although there was much controversy over the legality of the Iraq War, there was also

concern over the conduct of U.S.-led Coalition forces during the Iraq War and the high number of deaths of Iraqi civilians. In December of 2003, Human Rights Watch released a report investigating the conduct of troops during the Iraq war to determine if violations of international humanitarian law have occurred and identify patterns of civilian casualties and suffering that might have been avoidable by U.S. troops.

The investigation showed that while Iraqi forces committed a number of violations of international humanitarian law, U.S.-led Coalition forces took precautions to avoid civilian deaths and made some efforts to uphold their legal obligations.[19] Nonetheless, Human Rights Watch identified Coalition tactics that led to unnecessary civilian casualties in air and ground warfare and post-conflict interactions.

Particularly, the systematic use of cluster munitions, especially by U.S. and U.K. ground forces, caused hundreds of civilian casualties. Cluster munitions are "large weapons containing dozens or hundreds of submunitions" and they are particularly dangerous to civilians "because of their broad dispersal, or 'footprint,' and the high number of submunitions that do not explode on impact."[20] U.S. Central Command (CENTCOM) reported that it used 10,782 cluster munitions, which could contain at least 1.8 million submunitions.[21] Additionally, the British used seventy air-launched and 2,100 ground-launched cluster munitions, containing a total of 113,190 submunitions. U.S. and U.K. ground forces routinely used these cluster munitions in attacks occurring

[19] "Off Target," Human Rights Watch, December 2003, 5.
[20] "Off Target," 6.
[21] U.S. CENTCOM, executive summary of report on cluster munitions, 2003, provided to Human Rights Watch by Paul Wiseman, *USA Today*.

in residential neighborhoods. Although Coalition air forces also used cluster munitions in a manner that resulted in civilian casualties, they occurred to a much lesser degree.[22]

The Office received over 240 communications concerning the situation in Iraq.[23] These communications expressed the concern of citizens and organizations regarding the launching of military operations in Iraq and the human deaths that resulted. In response, the Office reviewed all communications, identified those containing substantiated information, and examined the relevant evidence provided. In addition, it conducted an exhaustive search of open source information, including media, governmental and non-governmental reports such as materials from Amnesty International and Human Rights Watch. In February 2006, the Office release a public response to the communications concerning Iraq that concluded that an investigation in Iraq did not meet the judicial requirements as specified by the Court's mandate.

Judicial Requirements

Iraq is not a State Party to the Rome Statute and has not signed a declaration of acceptance under Article 12(3), thereby accepting the jurisdiction of the Court. Therefore, in accordance with Article 12, acts on the territory of a non-State Party fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction (Article 12(2)(b)).[24] Furthermore, the Court does not have jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq.

Some communications submitted legal arguments that nationals of States Parties may have been accessories to crimes committed by nationals of non-States Parties. The

[22] "Off Target," 6.
[23] "Public Dismissal of Iraq".
[24] Article 12 of the Rome Statute, the International Criminal Court.

analysis of the Office applied the reasonable basis standard to determine individual criminal responsibility as defined by Article 25.[25] Many of the communications received related to concerns about the legality of the armed conflict. While the Rome Statute includes the crime of aggression, the Court cannot exercise jurisdiction over the crime under Article 5(2) because the crime of aggression has not yet been defined. Though the Court has a mandate to examine the conduct during the conflict, it cannot assess the legality of the decision to engage in armed conflict.

After analyzing all the available information, the Prosecutor concluded that there was no reasonable indicia that Coalition forces had "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such", as required in the definition of genocide under Article 6.[26] Similarly, the available information provided no reasonable indicia of the required elements for a crime against humanity, such as a widespread or systematic attack directed against any civilian population, under Article 7.[27] However, the Prosecutor did conclude that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely willful killing and inhuman treatment. Moreno-Ocampo believed there was an estimated 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment, totaling in all less than 20 persons. Hence, the Prosecutor proceeded to evaluate the gravity of these crimes

For war crimes, a specific gravity threshold is set down in Article 8(1), which states, "the Court shall have jurisdiction in respect to war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such

[25]" Public Dismissal of Iraq".
[26] "Public Dismissal of Iraq".
[27] "Public Dismissal of Iraq".

crimes."[28] Although this threshold is not a strict requirement, the Court was designed to focus on situations and cases of war crimes meeting these requirements. The Prosecutor determined that the criterion of Article 8(1) was not satisfied.[29]

Furthermore, the Prosecutor argued that even if one were to assume that Article 8(1) had been satisfied, it would then be necessary to consider the general gravity requirement under Article 17(d) and the crimes in Iraq did not meet this standard either.[30] The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as willful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation—4 to12 victims of willful killing and a limited number of victims of inhuman treatment—was of a different level than the number of victims found in other situations under investigation or analysis by the Office.[31]

In light of the conclusion reached on gravity, it was unnecessary for the Prosecutor to reach a conclusion on complementarity. However, the Office did also collect information on national proceedings and concluded that judicial proceedings had been initiated with respect to each of the relevant incidents. Additionally, the Prosecutor did not have to determine if the investigation was against the interest of justice because of his conclusion on the gravity of the crimes.

Policy Considerations

In early 2003 the Court was faced with two competing interests: the need to have concrete cases that would demonstrate the Court's relevance and the need to reassure the

[28] Article 8 of the Rome Statute, the International Criminal Court.
[29] "Public Dismissal of Iraq".
[30] "Public Dismissal of Iraq".
[31] "Public Dismissal of Iraq".

major powers that the Court's role as a non-state actor would not be threatening. In the first few months of Moreno-Ocampo's office, he took steps to ensure that the major powers, particularly the United States, would not feel threatened by the Court's first steps. Moreno-Ocampo recruited American attorney Christine Cheung to his team and thus sent an important political message to the United States that it would strive to include United States citizens in the building of the Court as an institution. Despite receiving numerous complaints from human rights groups concerning the Iraq War and the mistreatment of prisoners at Abu Ghraib prison, the Court never indicated that an investigation of abuses in Iraq was in consideration.

The Court is not mandated to make public dismissals and most often, for confidentiality reasons, only responds to the authors of the communications. It was only in 2006, after much of the controversy over the legality behind the Iraq War had subsided that the Prosecutor decided to respond publicly to communications regarding these potential crimes. By this time, the Court already had its first case and arrest in hand. Around this time, the Office also released a "Report on Prosecutorial Strategy" that identified objectives for the next three years that were guided by three principles: a positive approach to complementarity, focused investigations and prosecutions, and maximizing the impact of the Office's activities and its deterrent effect.[32] Though the Office did not state its motivations behind the public dismissal of Iraq, the public dismissal was likely made to show the Office's determination to follow these principles and achieve its objectives. Additionally, the public dismissal of Iraq helped prove the Court's desire for transparency and its relevancy as a judicial institution outside of

[32] "Report on Prosecutorial Strategy," Office of the Prosecutor, September 2006.

Africa, as well as reassure major powers that the Court was not interested in political prosecutions.

It is worth keeping in mind that the Office was investigating three situations involving long-running conflicts, in Northern Uganda, the DRC, and Darfur, at the same time. Each of the three situations under investigation involved thousands of willful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they resulted in the displacement of more than 5 million people.[33] Other situations under analysis also featured hundreds or thousands of such crimes. Hence, by releasing a public dismissal of communications regarding Iraq, the Prosecutor was showing the major powers that the Court was not interested in prosecuting cases that did not involve the most serious crimes. The Court would not be using any loopholes to prosecute American citizens or to send a political message to the major powers when crimes fell outside the Court's mandate. Additionally, this public dismissal showed that the Court had its eyes on places outside of Africa, which became especially important as the Court began to prosecute more and more African countries and was accused of being a court that merely interfered in Africa.

Venezuela

In 2002, as the Court was gaining momentum and developing as an institution, violence was breaking out in a country that would soon become a State Party to the Court: Venezuela. After Hugo Chávez was elected president of Venezuela he attempted to overhaul the political system and bring credibility through the creation of a new constitution in 1999. The 1999 Constitution gave international rights obligations

[33] "Public Dismissal of Iraq".

precedence over domestic law and hence provided more human rights guarantees.[34] Additionally, it created a new, independent Supreme Court that would serve as the mechanism that would guarantee these fundamental human rights.[35] Furthermore, on June 7, 2000, Venezuela deposited its instrument of ratification to the Rome Statute, and sent a message to the international community that it was serious about bringing legitimacy to the government and protecting human rights.

Just two years later, a coup d'état that temporarily removed Chávez from office and replaced him with an unelected president occurred. This unelected president made it his first priority to dismantle the democratic institutions by disbanding the new Supreme Court and the legislature.[36] Although order was restored and Chávez returned to office just 40 hours later, these 40 hours had done enough damage to end Chávez's progressive attitude towards human rights concerns and justice. Since 2002, the coup has provided a pretext for government policies that ignore the human rights protections set out in the 1999 Constitution.

On April 11, 2002, during the coup, violent clashes between supporters and opponents of President Hugo Chávez resulted in over fifty individuals who allegedly suffered injures. Hence, a complaint was filed in January 2003 on behalf of these individuals and Chávez and 24 other officials were charged with crimes against humanity and acts of terrorism.[37] In total, the Office received twelve communications concerning the situation in Venezuela. While most of the communications relate to crimes allegedly

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[34] "A Decade Under Chávez," 7.
[35] "A Decade Under Chávez," 7.
[36] "A Decade Under Chávez," 7.
[37] "Venezuela's Chavez Accused of Violating Human Rights at International Criminal Court," *Latin American Herald Tribune*, December 19, 2008 (http://www.laht.com/article.asp?ArticleId=323545&CategoryId=10717).

committed by or on the behalf of the Venezuelan government, one of the communications related to crimes allegedly committed by groups opposed to the Venezuelan government.[38] In February 2006, the Prosecutor released a public dismissal saying there was no evidence of a widespread or systematic attack against any civilian population and hence the court did not have the jurisdiction to initiate a formal investigation.[39]

Judicial Requirements

Pursuant to Articles 11(1) and 126(1), the Court has jurisdiction over crimes perpetrated in the territory or by nationals of Venezuela after July 1, 2002, when the Rome Statute entered into force since Venezuela ratified it in 2000.[40] The alleged crimes detailed in the communications occurred on the territory of Venezuela and were perpetrated by Venezuelan citizens. A large number of the allegations referred to incidents that were connected to the short coup in April 2002 and hence occurred prior to July 1, 2002. Because these events occurred prior to the temporal jurisdiction of the Court, they cannot be considered as the basis for any investigation according to the Rome Statute.

However, the Office thoroughly investigated any allegations that did fall within the temporal jurisdiction of the Court. These communications alleged that Venezuelan government officials had committed crimes against humanity against political opponents. The allegations within the temporal jurisdiction of the Court included 45 victims of murder, 39 to 44 victims of unlawful imprisonment, 42 victims of torture and significant numbers of victims of persecution.[41] Many of the allegations of persecution did not

[38] "Public Dismissal of Venezuela ," Office of the Prosecutor, February 9, 2006.
[39] "Public Dismissal of Venezuela".
[40] "Public Dismissal of Venezuela".
[41] "Public Dismissal of Venezuela".

appear to satisfy the elements needed to meet the definition of a crime against humanity under the Rome Statute. Specifically, Article 7(1) of the Rome Statute provides that particular acts must have been committed as part of a widespread or systematic attack directed against any civilian population to constitute a crime against humanity.[42] The Prosecutor concluded that the available information did not provide a reasonable basis to believe that the requirement of a widespread or systematic attack against any civilian population had been satisfied, even on a generous evaluation of this definition.[43]

Based on the available information concerning events in Venezuela since July 1, 2002, the Prosecutor concluded the situation did not meet the definition of armed conflict. Hence, there is also no reasonable basis to believe that war crimes were committed within the jurisdiction of the Court.[44] Since the Prosecutor believed that the crimes committed in Venezuela did not fall under the jurisdiction of the Court, he made no assessment on gravity, complementarity, or whether the investigation would be against the interests of justice.

Policy Considerations

The Office released the public dismissal of communications regarding Venezuela in 2006, alongside the public dismissal of communications regarding Iraq. Although the Office did not release its motivations for the public dismissal, undoubtedly the Prosecutor decided to release a public dismissal for investigating Venezuela rather than just responding to the authors of the communications for many of the same reasons. Specifically, the public dismissal of Venezuela was essential in showing the Court's

[42] "Public Dismissal of Venezuela".
[43] "Public Dismissal of Venezuela".
[44] "Public Dismissal of Venezuela".

desire for transparency and its relevancy as a judicial institution outside of Africa, as well as reassuring major powers that the Court was not interested in political prosecutions.

Furthermore, the public dismissal of Venezuela was important in sending a message to states party to the Court, including Venezuela itself. By signing the Rome Statute, states have made a commitment to having accountable government leaders. Though the Court is only legally allowed to prosecute crimes that fall within its jurisdiction, it is free to preliminarily examine a state when it suspects leaders may be committing crimes against humanity or persecution. Hence, the public dismissal also served as a warning to Chávez and the Venezuelan government that the Court was watching and would authorize an investigation if crimes within the Court's jurisdiction were indeed committed.

Since the 2002 coup, discrimination on political grounds has frequently occurred and become a defining feature of the Venezuelan government and the President himself. On December 17, 2008 a group of Venezuelan lawyers filed another complaint against Hugo Chávez to the Court, accusing Venezuela's current president of crimes against humanity based on recurrent violations of human rights of political and common prisoners in the country. Hence while the 2006 public dismissal was meant to be a tool of deterrence for the Court, it has had limited impact on curbing political discrimination in Venezuela.

Nonetheless the Court was also sending a message to states not party to the Court. This public dismissal showed states that they would not have to fear prosecution any time there was violence or government misconduct if they became a State Party. The Court is only interested in prosecuting the gravest crimes that fall within its mandate and

upholding justice. Hence, the public dismissal of Venezuela made the Court appear less threatening to sovereignty and encouraged nations to become a State Party.

Kenya

Prior to the presidential election of December 27, 2007, Kenya was viewed by the international community as a source of both economic and political stability in Africa. However, the violence that erupted in Kenya after the controversial presidential election shocked not only the international community, but Kenyans as well. While election scandals and injustice were not new to Kenyan history, never before had there been such violent backlash that erupted in ethnic violence leaving over 1,000 dead and up to 500,000 people internally displaced in just two months.[45] In the 2002 general elections, Kenyans had voted overwhelmingly for an end to dictatorial government and the corruption, violence, and abuse of office that came with it. The National Rainbow Coalition (NaRC), led by Mwai Kibaki, had promised to institute a new constitution, create police reform, and address concerns of the unemployed and landless when it came to power.[46] Instead the Kibaki regime became corrupt and unjust as the NaRC coalition became dismantled. The rigging of the 2007 presidential election was the last straw for many Kenyans who felt betrayed by Kibaki's change in platform.

On December 27 voting occurred with not only record numbers of registered voters but also a record turnout. On December 29, the parliamentary results were announced with major losses for the ruling party, Party of National Unity (PNU). Unfortunately, the presidential election did not occur as smoothly. Before the result was announced on December 30, protests were already occurring across Kenya as many

[45] "ICC: Judges Approve Kenyan Investigation," Human Rights Watch, March 31, 2010, http://www.hrw.org/en/news/2010/03/31/icc-judges-approve-kenyan-investigation.
[46] "ICC: Judges Approve Kenyan Investigation".

began to suspect election fraud had occurred since the announcement had been delayed.[47] As a result, the government banned public gatherings and the police confronted street protests with excessive force. The police used live ammunition to kill and wound hundreds of peaceful demonstrators.[48] Meanwhile, some people took advantage of the chaos to loot, rape, and violently riot.

The 2007 election campaigns had emphasized a competition between ethnic groups and therefore strong ethnic tensions emerged in the post-election violence. The opposition Orange Democratic Movement (ODM) built a political coalition based on the widespread perception that the tribal Kibaki government had governed primarily in the interests of the Kikuyu community.[49] The PNU in turn targeted Luo cultural traditions by claiming that an uncircumcised man could not rule Kenya.[50] Citizens opposing the PNU, particularly in the Rift Valley and Nairobi, attacked the Kikuyu, whom they assumed had voted for Kibaki and angry Kikuyu then fought back.

The violence did not emerge spontaneously but rather through the coordination of local leaders. During the election campaign many leaders called meetings to urge violence in the event of a Kibaki victory, arguing that if Kibaki was announced as the winner it must mean the polls had been rigged and the reaction should be "war" against local Kikuyu residents.[51] Furthermore, after the election victory was announced, local leaders often meticulously planned attacks. Likewise, PNU supporters and local

[47] "Ballots to Bullets," Human Rights Watch, March 2008, 8.
[48] "Ballots to Bullets," 8.
[49] "ICC: Judges Approve Kenyan Investigation".
[50] "ICC: Judges Approve Kenyan Investigation".
[51] "ICC: Judges Approve Kenyan Investigation".

businessmen called meetings, raised funds, and directed youth in their attacks against opposition supporters.[52]

Before initiating an investigation, the Prosecutor received 30 communications from individuals and groups in regards to the post-election violence in the Republic of Kenya pursuant to Article 15(2) of the Rome Statute.

Judicial Requirements

According to Article 126(1), the Republic of Kenya deposited its instrument of accessions to the Rome Statute on March 15, 2005, which entered into force on June 1, 2005.[53] The Prosecutor's preliminary examination of the situation in Kenya revealed that crimes against humanity were committed through murder under Article 7(1)(a), rape and other forms of sexual violence under Article 7(1)(g), deportation or forcible transfer of population under Article 7(1)(d), and other inhuman acts under Article 7(1)(k).[54] These crimes against humanity were committed at the end of 2007 and the beginning of 2008 and hence fall under jurisdiction *ratione temporis*. Additionally, since these crimes were committed on Kenyan territory, they fall under jurisdiction *ratione loci* and *ratione personae*.

The scale of the post-election violence resulted in a reported killing of 1,133 to 1,220 civilians, more than 900 documented acts of rape and other forms of sexual violence, the internal displacement of 350,000 civilians, and 3,561 reported acts of serious injury.[55] Furthermore, the violence led to widespread looting in local

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[52] "ICC: Judges Approve Kenyan Investigation".
[53] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," Office of the Prosecutor.
[54] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya".
[55] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya".

communities and the destruction of commercial and residential buildings and areas. These crimes were committed in six out of eight Kenyan regions and occurred in the Kenya's most populated areas including Nairobi, the Rift Valley, and the Nyanza and Western provinces.[56] Hence, it is evident that these crimes against humanity were committed widespread and systematically and that the threshold of gravity according to Article 17(d) was met. In many instances the crimes were organized and planned so that specific segments of the Kenyan civilian population were targeted.[57] The perpetrators of these crimes deliberately targeted civilians belonging to distinctive ethnic groups or political affiliations. Often the perpetrators attacked, killed and displace members of the minority ethnic group in regions.

The Prosecutor assessed complementarity through the December 16, 2009 Agreement signed by the President and Prime Minister of Kenya. In this agreement, the President and Prime Minister expressed their belief that it was necessary to establish a special tribunal to ensure national judicial proceedings on the post-election violence. However, the Kenyan Parliament did not pass the Bill presented in February 2009 or hold a quorum to discuss the draft in November 2009 that would mandate domestic prosecution for the crimes against humanity committed in Kenya.[58]

Nonetheless, there have been some domestic prosecutions for less serious crimes committed in the aftermath of the election. According to the "Review of Post Election Violence-Related Cases in Western, Nyanza, Central, Rift Valley, Eastern East and

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[56] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya".
[57] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya".
[58] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya".

Nairobi Provinces," 156 cases were opened for crimes involving "malicious damage," "theft," "house braking," "possession of offensive weapon," "robbery with violence," and "assaulting a police officer."[59] However there has been no national investigation or judicial proceedings against those bearing the greatest responsibility for the crimes against humanity committed in Kenya. Additionally, the Prosecutor did not find the existence of national proceedings in any other state with jurisdiction. Hence, the Prosecutor is eligible to prosecute cases for the most severe crimes with complementarity in mind.

Finally, the Prosecutor concluded that based on the available information there is no reason to believe that authorizing a formal investigation in Kenya would not be in the interests of justice. The post-election violence meets the criteria of Article 53 paragraph 1(a) and (b) and as the Office's analysis on the interests of justice notes, there is a presumption in favor of investigation when this criteria has been met.[60] Additionally, it is clear that the situation in Kenya falls under the Court's vision to prosecute the most serious crimes of concern to the international community.

The investigation in Kenya was authorized by a majority of three judges sitting in one of the Court's Pre-Trial Chambers. However, in a dissenting opinion, Judge Hans-Peter Kaul held that the crimes committed during the post-election violence were not under the Court's jurisdiction since there was no reasonable basis to believe that the crimes were a part of state or organizational policy, which is required to meet the standard for a crime against humanity under article 7(2)(a) of the Rome Statute.

Policy Considerations

[59] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya".
[60] "The Interests of Justice."

Although the Court had been in existence for five years, the Prosecutor had never used *proprio motu* to authorize an investigation when Kenya was being preliminarily examined. Kenya was an ideal case to demonstrate the importance of *proprio motu* and reassure states that it would not result in prosecutorial abuse. The Court had been brought into existence to end the type of injustice and violence that marked Kenya's history with elections. In previous elections in 1992 and 1997, the perpetrators of violence were never brought to justice and as a result post-election violence repeatedly occurred. Additionally, due to the severity of the 2007 post-election violence, interest in Kenya was extremely high in the media and the international community.

Furthermore, Kenya has agreed to cooperate with the Court and conduct trials for the election violence as well, since the Court can only prosecute the most serious crimes. While the Court was preliminarily examining Kenya, it made efforts to reach out to the Kenyan public and inform them of the Court's purpose and what an investigation of Kenya would mean, to ensure it would have support not only from Kenyan government officials but from the citizens as well. This cooperation is essential to the Court because in past cases the Court has struggled to show its legitimacy, since the number of people it has arrested and imprisoned is extremely low considering it has been in existence for eight years. Hence, by investigating Kenya, the Court is very likely to have a successful case in which arrests are enforced and the Court is seen as an effective mechanism for ensuring justice.

After the Prosecutor announced he would be applying to the Pre-Trial Chamber for an authorization of an investigation in Kenya, the Court began to face severe accusations that it had become a tool of colonialism and imperialism that only looked to

prosecute crimes in Africa. Although it was clear in the case of Kenya that the Court had jurisdiction and that a successful investigation would be in the interests of justice and the Kenyan people, this backlash has become a major concern for the Court and will likely significantly affect the Court's selection of future cases.

Guinea

On Monday morning, September 28, 2009, tens of thousands of Guineans gathered in a stadium in Guinea's capital, Conakry, protesting the increasingly harsh military rule. At around 11:30 a.m., Guinea's security forces burst into the stadium and began firing upon the peaceful protestors. Just hours later, at least 150 Guineans lay dead or dying in the stadium complex.[61] Dozens of women were sexually assaulted with object including sticks, batons, and bayonets and many were gang raped by security forces. While grieving Guineans looked desperately for loved ones, the security forces attempted an organized cover up by sealing off the stadium and morgues and hiding bodies in mass graves. Additionally, in the days after, the security forces continued to beat, murder, rape, and pillage within the neighborhoods of the protestors. Meanwhile, opposition protestors were arbitrarily detained and tortured in police and army camps.

On the morning of September 28, tens of thousands of opposition supporters walked toward the stadium from the villages surrounding Conakry. Security forces attempted to stop the unarmed demonstrators from reaching the stadium by firing live ammunition into groups of marchers. In retaliation, marchers looted and set a police station on fire, wounding one police officer.[62] When political opposition leaders entered the stadium at around 11 a.m., they found it packed with tens of thousands of supporters chanting pro-

[61] "Blood Monday," Human Rights Watch, December 2009, 8.
[62] "Bloody Monday," 34.

democracy slogans, singing, dancing, and marching around the stadium carrying posters and the Guinean flag.

Around 11:30 a.m., a combined force of several hundred Presidential Guard troops, together with gendarmes working for the Anti-Drug and Anti-Organized Crime Unit, some members of the anti-riot police, and dozens of civilian-clothed irregular militiamen arrived at the stadium area.[63] After quickly deploying around the stadium perimeter and positioning themselves near the stadium exits, anti-riot police fired tear gas into the stadium, causing panic to spread among the protestors. Soon after, the security forces, led by the Presidential Guard, entered the stadium, firing directly into the unarmed crowd.

One group of soldiers advanced slowly down the stadium's playing field as they fired, leaving a trail of injured and dead in their wake. A second group headed for the stands and attacked the opposition party leaders and their associates gathered there, beating some of them so severely that they lost consciousness. Many other soldiers blocked the exits both from inside and outside the stadium giving protestors no opportunity to escape.

Hospital and humanitarian organization records confirm that more than 1,400 persons were wounded during the attack.[64] On the other hand, Human Rights Watch did not find evidence that any member of the security forces was wounded or killed inside the stadium. Hence it has become apparent that the violence perpetrated by the security forces was one-sided and atrocious in its excessive nature.

Sexual assaults began minutes after the security forces stormed the stadium gates.

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[63] "Bloody Monday," 34.
[64] "Bloody Monday," 46.

It is not known how many women were raped but a coalition of health and human rights groups had, as of mid-October 2009, identified 63 victims of sexual violence.[65] However, because Guinea's society is largely conservative and Muslim there is a strong stigma attached to victims of sexual violence and undoubtedly many victims have not come forward for medical treatment.

The women sexual assaulted also experienced degrading insults, death threats, and extreme physical brutality. The victims described being kicked, pummeled with fists, and beaten with rifle butts, sticks, and batons before, during, and after the sexual assault. During the sexual assaults against girls and women of Peuhl ethnicity, assailants frequently made ethnically biased comments, insulting and appearing to threaten the Peuhl in particular.

Numerous witnesses described groups of up to 10 girls and women being raped simultaneously on the field and elsewhere in the stadium complex.[66] The Presidential Guard also took many women from the stadium and, in one case from a medical clinic where they were awaiting treatment, to private residences where they endured days of gang rape. The frequency and number of sexual assaults that took place during and after the protests suggests that it was part of a widespread and organized pattern of sexual abuse, not isolated and random acts by rogue soldiers.

Subsequent investigations of the events of September 28 have found strong evidence, such as testimony of confidential military sources and medical personnel, that the military engaged in a systematic effort to hide the evidence of their crimes and significantly decrease the number of deaths. Hence, while the government reported the

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[65] "Bloody Monday," 15.
[66] "Bloody Monday," 62.

official number of dead to be 57, Human Rights Watch's investigation found that the actual death toll of the violence on September 28 and the following days is likely to be between 150 and 200.[67]

On October 14, 2009, Moreno-Ocampo, announced that the situation in Guinea was under preliminary examination. Moreno-Ocampo met with State Parties in the region, particularly the Head of the State of Burkina Faso, President Blaise Compaore, in order to explain the actions he was taking.[68]

Judicial Requirements

An examination of the stadium massacre reveals that crimes against humanity were committed through murder under Article 7(1)(a), rape and other forms of sexual violence under Article 7(1)(g), and other inhumane acts under Article 7(1)(k).[69] These crimes against humanity were committed on September 28, 2009 and soon after and hence fall under jurisdiction *ratione temporis*. Additionally, Guinea is a State Party to the Court and since these crimes were committed on Guinean territory by citizens, they fall under jurisdiction *ratione loci* and *ratione personae*.

The scale of the post-election violence resulted in the killings of 150 to 200 civilians and the rape and sexual violence of hundreds of women. Although numerically, the massacre in Guinea is not as grave as the other cases the Court has chosen to prosecute, the number of deaths and rape that occurred in the course of a couple of hours classifies these crimes as crimes against humanity and indicate that the threshold of gravity has been met. Article 17(d) simply states that a case is inadmissible when it is not

[67] "Bloody Monday," 16.
[68] "Press Release on Guinea".
[69] Article 7 of the Rome Statute, the International Criminal Court.

of sufficient gravity to justify further action by the Court.[70] The Appeals Chamber released a ruling on gravity in relation to the cases against Lubanga and Ntiganda of the DRC that emphasized the need to assess qualitative factors rather than quantitative ones in determining if gravity has been met in order for the Court to operate as a deterrent force for crimes against humanity.[71] The Appeals Chamber ruled for a broad definition of gravity that did not limit the admissibility of cases when the definition of war crimes or crimes against humanity and their requirements for systematic and planned violence are met and argued for the prosecution of all individuals with responsibility, not just leaders with the most power.[72]

There is strong evidence that the crimes were a part of state or organizational policy, which is required to meet the standard for a crime against humanity under article 7(2)(a) of the Rome Statute. Through an in-depth, on the ground investigation of the September 28 massacre, Human Rights Watch concluded that the Guinean security forces committed crimes against humanity and are susceptible to prosecution by international law if Guinea fails to hold individuals responsible. Based on the coordinated efforts of soldiers blocking exits of the stadium and the simultaneous arrival of various security units, the report concluded that it was not rogue soldiers who committed the massacre, but rather organized members of the elite Presidential Guard.[73] Particularly, the unit that was directly responsible for the personal security of the CNDD or military junta President Moussa Dadis Camara murdered and raped the protestors in conjunction with gendarmes, police, and men dressed in civilian clothes carrying machetes and knives. The crimes

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[70] Article 17 of the Rome Statute, the International Criminal Court.
[71] Beth Van Schaack, "The Concept of Gravity before International Criminal Courts," *Accountability,* Winter 2008-2009, http://www.asil.org/accountability/winter2009/winter2009_1.html.
[72] Van Schaack, "The Concept of Gravity before International Criminal Courts."
[73] "Bloody Monday," 105.

appear to be premeditated since the protestors did not appear threatening yet the forces failed to use non-lethal methods of dispersing the crowd and were strategically placed around the stadium in anticipation of the fleeing crowd. Hence, it is evident that these crimes against humanity were committed widespread and systematically and that the threshold of gravity as stated in Article 17(d) is met.

In a statement released by the Office, the Deputy Prosecutor declared after a trip to Guinea, "this visit has left me certain that crimes constituting crimes against humanity were committed. And these few days of work in Guinea have confirmed that the Guinean institutions and Court could operate complementarily. Either the Guinean authorities themselves can prosecute those bearing the greatest responsibility or they can turn to the Court to do so."

Following the massacre, CNDD President Moussa Dadis Camara, aware of the international fury soon to come, vowed to conduct an investigation of the events of September 28.[74] Opposition parties and the Guinean civil society rejected the government's initial attempt to form a national commission of inquiry on October 7. Finally, on October 30, the CNDD created a reformed 23-member independent national commission of inquiry by decree to investigate the events on and in the days after September 28.[75] The decree made no mention of whether the commission would make recommendations about accountability. On November 2, they announced the names of members of the commission—a group that included magistrates, lawyers, forensic

[74] "Guinea opposition protest killed 157, 1,200 wounded, human rights group says; government vows probe," Associated Press, September 29, 2009.

[75] Guinean government decree, "Ordinance No. 057/CNDD/SGG/2009 portant modiciation de certaines dispositions de l'Ordonnance No. 053/CNDD/2009 relative à la création d'une commission nationale d'enquête indépendante," October 30, 2009.

experts, and five international representatives with consultative status.[76]

Furthermore, UN Secretary-General Ban Ki-moon established an African Union and Economic Community of West African States (ECOWAS)-proposed international commission of inquiry on October 30, 2009. While the commission only includes three members, Chairman Mohamed Bedjaoui of Algeria, Françoise Ngendahyo Kayiramirwa of Burundi, and Pramila Patten of Mauritius, it also has support from a team of the UN Office of the High Commissioner for Human Rights.[77] On October 20, the Guinean foreign minister met with Court officials at the Hague and expressed that the judiciary in Guinea is able and willing to ensure justice for the alleged crimes committed during the September violence.[78] However, as of yet, Guinea has made no attempt to hold the Guinean soldiers responsible accountable despite having established an investigative commission. Hence, the Prosecutor is eligible to prosecute cases for the most severe crimes with complementarity in mind.

On the basis of available information, there is no reason to believe that authorizing a formal investigation in Guinea would not be in the interests of justice. The stadium massacre appears to meet the criteria of Article 53 paragraph 1(a) and (b) and as the Office's analysis on the interests of justice notes, there is a presumption in favor of investigation when this criteria has been met.[79] Additionally, it is clear that prosecuting those responsible for the murder and rape of hundreds of Guineans in the course of several hours falls under the Court's mission to prosecute the most serious crimes of

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[76] "Guinea opposition shuns new massacre probe," Agence France-Presse, November 3, 2009.
[77] "Secretary-General Announces Members of Guinea Commission of Inquiry to Investigate Events of 28 September," Office of the UN Secretary-General press release, SG/SM/12581, AFR/1902, October 30, 2009, http://www.un.org/News/Press/docs/2009/sgsm12581.doc.htm (accessed November 24, 2009).
[78] "Press Release on Guinea".
[79] "The Interests of Justice".

concern to the international community.

Policy Considerations

Guinea's image with the international community began deteriorating at the start of the December 23, 2008 coup d'état and this only accelerated after the September 28 massacre. After the coup, major international actors, such as ECOWAS, the African Union, France, the United States, the European Union, and the United Nations, consistently and strongly condemned the repeated delays in organizing elections and the military's routine abuses. This response was organized through an International Contact Group for Guinea that pressured the CNDD to promptly hold elections and value human rights.[80]

This international pressure has magnified after the massacre, as neighbors have begun to push Guinea to investigate and prosecute those responsible. African governments as well as regional and internationals organizations have banded together to condemn the September 28 violence through sanctions.[81] The ECOWAS and the European Union imposed an arms embargo on Guinea. Meanwhile, the European Union, the United Sates, and the African Union imposed travel bans and asset freezes of CNDD members and the European Union and France withdrew economic and military assistance to Guinea. With the principle of "command responsibility" the military commanders and leaders in authoritative positions are criminally liable for the crimes committed by the soldiers under their commander.[82] Hence, Guinea has faced international pressure to investigate these crimes against humanity and hold anyone who participated in the

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[80] African Union, "Situation in Guinea," art. 217, December 29, 2008, http://www.aumission-ny.org/article.php?numero=217 (accessed November 24, 2009).

[81] "Final Communiqué," Extraordinary Summit of ECOWAS Heads of State and Government, Abuja, October 17, 2009.

[82] Article 7 and Article 28 of the Rome Statute, the International Criminal Court.

massacre or efforts to hide evidence of the massacre responsible.

While the Court has not made any announcements about the progress of the investigation, it has formally requested written information of the crimes and government documentation of plans to investigate and prosecute as necessary. It will be difficult for the Court to fully assess complementarity however, since Guinea is currently undergoing major political transformations.

On December 3, 2009, Camara's aide-de-camp attempted to assassinate him and Camara was wounded and evacuated to Morocco for medical treatment where he began a prolonged rehabilitation process.[83] CNDD Minister of Defense Brigadier General Sekouba Konate became interim President of the Republic. In January 2010, Camara was flown to Ouagadougou at the invitation of Burkinabe President Blaise Compaore, the ECOWAS-appointed mediator to the Guinean political crisis, to strike a deal between Camara and Konate. This deal became known as the January 15 Ouagadougou Accords, in which Camara agreed to remain outside of Guinea for an extended period of time and to officially appoint General Konate as the interim President of the Republic.[84]

With the signing of the January 15 Ouagadougou Accords, General Konate agreed to establish a transition government that would hold elections within six months in conjunction with the leadership of a civilian prime minister and to organize elections within six months. Konate chose opposition political leader Jean-Marie Dore, who was one of the protesters outside the Stadium on September 28, as Prime Minister in January.[85] While twenty-four ministers of the cabinet were civilians appointed by Dore,

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[83] United States Department of State Background Note: Guinea http://www.state.gov/r/pa/ei/bgn/2824.htm.
[84] "Guinea junta names civilian Dore as prime minister," BBC News, January 19th, 2010, http://news.bbc.co.uk/2/hi/africa/8467298.stm.
[85] "Guinea junta names civilian Dore as prime minister".

the remaining 10 positions were military officers appointed by the CNDD.

Most partners were encouraged by the January 15 Ouagadougou Accords and the setting up of a transitional government in Guinea, and now are considering moving toward normalizing relations. Although Camara still has some supporters, particularly in the Forest Region, citizens are hopeful as usual about the prospect of Konate's leadership and the chance to establish a civilian transitional government through recent elections.

It is difficult to believe that international pressure will force Guinea to hold the perpetrators of the September 28 massacre and sexual violence responsible. There has been a highly influential and nearly unified voice from the international community both condemning the atrocities and punishing Guinea for allowing these injustices to occur without proper investigation. However, the recent events and the promise of a return to civilian rule through the January 15 Ouagadougou Accords have pacified the international critics who have been pushing for justice. As Guinea and its global neighbors become more involved with ensuring political reform carries out while President Camara remains abroad, they will begin to see this as the solution to the September 28 massacre and simply hope that once civilian rule returns, justice will occur. However, the new government will likely be hesitant to make prosecuting those responsible for the massacre a priority when it must reinstate a constitution and prevent possible coup d'états by former military leaders. Nonetheless, the Court is a court of last resort and hence it will not be able to authorize an investigation in Guinea until it is fully able to determine that the new government will not be able to or is unwilling to conduct national proceedings.

Additionally, the Africa bias accusations that emerged with the investigation of Kenya will make the Court hesitant to authorize another investigation in an African country. While the Court has its hands full with Kenya, it may not want to tackle the Guinean massacre, which is not as grave as the other Court's cases, and face further questions about the Court's purpose as an international court.

Authority and Relevancy for the Court

The Prosecutor's careful selection of which cases to pursue and which cases to dismiss publicly is a reminder of how fragile the Court's reputation is. Since the Court's inception in 2002 it has fought to gain accountability and legitimacy as a court acting in the interests of justice, deterring violent leaders and individuals, and prosecuting the most serious crimes. Though the battle regarding the Court's existence is over, the Court is still fighting to prove its relevancy as a judicial institution.

In *Rules for the World*, Barnett and Finnemore use a constructivist approach that identifies international organizations such as the Court as influential because they promote important ideas, values, and discourse.[86] They argue that international organizations have some capacity to act independently and thus are political actors in their own right. Because the Court is a judicial institution, the Prosecutor as an official of this institution has a challenging position that requires he assert independence without appearing as a political actor. By treating international organizations as bureaucracies with both authority and autonomy Barnett and Finnemore argue against the realist notion that international organizations have minimal influence on state behavior and the

[86] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004), 22.

institutionalist belief that international organizations merely are influential and relevant because they facilitate cooperation and reduce transaction costs.

By classifying international organizations such as the Court as bureaucracies, Barnett and Finnemore identify that they possess a hierarchy with delegated tasks, continuity and standardization, impersonality or neutrality, as well as expertise. Based on these bureaucratic qualities, they identify three types of authority international organizations have: delegated authority, moral authority, and expert authority.[87] However, the Court has still not been able to assert three types of authorities and thus continues the struggle to show its authority and relevance to the world.

As a treaty-based institution, the Court has some delegated authority from State Parties. However, it has not gained the support of many of the major powers including the United States, Russia, China, India, and Turkey. Though the Court has expert authority in that it is a Court that prosecutes the most serious crimes and the only permanent court in the world that prosecutes individuals for war crimes and crimes against humanity, it is struggling to prove its expertise since there is a large gap between the number of indictments the Court has issued and the number of arrests it has made. The Court has no police force of its own to enforce its sentencing and therefore must rely on states to cooperate with the Court in order for it to maintain expert authority. Likewise, the Court is lacking moral authority, which is particularly detrimental to it as a judicial institution. In the first few years of its existence the Court needed to both reassure major powers and State Parties that the Court would follow its mandate and was not interested in political prosecutions. Additionally, now that the Prosecutor has used *proprio motu* to investigate Kenya it is facing accusations of being a biased Court, a

[87] Barnett and Finnemore, 25.

neocolonial tool of Western countries wanting to target African countries. As of yet, the Court has only dealt with failed states and thus states are unsure how the Court will react if or when it will have to prosecute a major power. Until the Court is able to fully assert its delegated, expert, and moral authority the battle for the Court's relevancy and fear of prosecutorial abuse will be ongoing and thus the Prosecutor will have to continue using *proprio motu* carefully in authorizing future investigations.

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