Parallel Paths and Unintended Consequences: The role of civil society and the ICC in Rule of Law Strengthening in Kenya

Christine S Bjork, Ms., Harvard Law School
Juanita Goebertus Estrada, Ms., Harvard Law School
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Christine Bjork & Juanita Goebertus

Abstract
This paper examines the nexus between international criminal law and capacity building of domestic criminal justice systems. We question whether the ICC can contribute to either concrete domestic criminal justice reform or broader rule of law strengthening through its so-called preliminary examinations. Using Kenya as a case study, the paper discusses whether the ICC’s preliminary examination that took place between February 2008 and March 2010 (when the Pre-trial Chamber authorized the Prosecutor to open a formal investigation) has provided civil society fighting impunity for the post-election violence with a lever to trigger accountability. We assert that although Kenyan civil society has gained legitimacy from the ICC preliminary examination to pursue political goals, which in turn might lead to rule of law strengthening, they have not used the preliminary examination to pursue direct criminal justice reform. We suggest that the reasons why Kenyan civil society has not been successful in advocating for domestic criminal justice reform is primarily due to (i) the “perverse incentive” created by ICC preliminary examinations, where NGOs whose main goal is ICC intervention will focus their advocacy on what makes the country “unwilling or unable” instead of insisting on capacity building of the domestic justice system, and (ii) the lack of political transition coupled with government involvement in atrocities in Kenya, which makes the government unsusceptible to pressure. Finally, we suggest a framework for understanding how the ICC can empower civil society through preliminary examinations.

Key words: Kenya, post-election violence, ICC, preliminary examinations, NGO, international criminal law, rule of law.
1. Setting the scene: The post-election violence in Kenya and domestic prosecution

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

The post-election violence did not emerge out of a vacuum. Politicians have been using ethnic divisiveness to fuel political support for their own ethnic group in previous elections.\(^3\) The growth of presidential power and the lack of checks and balances on the government has led to a common belief that one’s own group must be in power to have access to resources, especially in respect to land.\(^4\) The pattern of lack of prosecutions for previous election violence helped establish a culture of impunity, which, together with poverty and unemployment made youths willing to take up arms as “mercenaries” on behalf of anyone who paid them. All these tensions came to the surface during the election.

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\(^2\) The Waki Report, supra note 1, at 383.


\(^4\) Id.
One Luo woman described her experience during the post-election violence in Mombasa, saying “it was as if we ceased to be human for a moment.”

In February 2008, President Mwai Kibaki and the opposition leader Raila Odinga signed a power-sharing agreement, which ended the violence and stopped Kenya from plunging into an outright civil war. However, Kenya’s coalition government has been adverse to holding perpetrators of the post-election violence accountable now that both sides are sharing power. The Waki Commission, an independent task force set up to investigate the post-election violence, concluded that while the pre-election violence was a spontaneous combustion between supporters of different election candidates, the post-election violence was to a large extent organized and planned by politicians and businessmen. The Waki Commission also found that the perpetrators were not just ordinary citizens, but also members of the State Security Agencies.

The Kenyan legal system functions poorly in and of itself and worse with respect to the post-election violence. So far, there have been only a handful prosecutions and one single conviction of perpetrators of the post-election violence. The serious deficiencies of the Kenyan criminal justice system are an outspoken reality, overtly recognized even by governmental authorities. Some of the main problems include: (i) insufficient investigative capabilities and resources on behalf of the police; (ii) the Crime Investigations Department

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5 Interview with employee at organization No. 7 (Mar. 15, 2010).
6 The Waki Report, supra note 1, at 346-47.
7 Id. at 348.
8 Interview with organization No. 5 (Mar. 16, 2010).
9 Interview with Mutula Kilonzo, Minister of Justice, National Cohesion and Constitutional Affairs (Mar. 16, 2010).
The lack of ability to prosecute the perpetrators of the post-election violence is a result of poor judicial infrastructure, but more than anything, lack of political will. The Parliament has struck down or stalled attempts to install transitional justice mechanisms, such as several Bills proposing a Special Tribunal. The difficulties in dealing with these cases through the ordinary justice system are evident: If the system is so weak that it cannot convict even the low-level perpetrators, how is it going to take on high-level politicians with significant influence over the judiciary?

The ICC Chief Prosecutor Luis Moreno Ocampo has been monitoring the situation in Kenya since February 2008. On March 31, 2010, Pre-trial Chamber II authorized the Prosecutor to commence a formal investigation. This is the first time the Prosecutor has invoked the power to open a *proprio motu* investigation conferred to him under Article 15. Most Kenyans welcome the investigation and hope it will put an end to the culture of impunity ingrained in the country’s legal system. When asked about their objectives in pushing for ICC intervention, Kenyans often respond, “to show politicians that they cannot get away with anything.” This as an expression of contempt for the arrogance of the

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10 *Id.* and interview with former Director of Public Prosecutions (Mar. 18, 2010).
11 *Id.*
political elite in Kenya, who has never had to answer to anyone. As someone put it, “Kenya suffers from 40 years of impunity.” Unsurprisingly, the prospect of ICC intervention raised high expectations – the ICC offers a new solution to the old problem of impunity for election violence. The question is what role the ICC can and should play in ending the culture of impunity in Kenya.

2. Research and methodology

This unique and complex situation – in which massive violence, a dysfunctional criminal justice system, the ICC, and a vibrant civil society coexist – moved us to visit Kenya in March 2010. The objective was to explore the relationship between three key elements: the preliminary examination conducted by the ICC Prosecutor, the empowerment of NGOs and civil society, and rule of law strengthening. In particular, we attempted to identify whether the ICC preliminary examination was triggering domestic accountability for the post-election violence in Kenya, and whether national NGOs were taking advantage of the ICC attention to push for national criminal justice system (hereinafter “NCJS”) reform in Kenya.

With these questions in mind, we undertook a qualitative research based on in-depth and open-ended interviews with eight civil society organizations: one state-sponsored human rights commission, three local NGOs and four international NGOs, staffed mainly with Kenyan professionals. This sample was complemented by two in-depth and open-ended interviews with the Minister of Justice and a former Director of Public Prosecutions.

12 Interview with organization No. 1 (Mar. 17, 2010).
Additionally, we conducted a field experiment, in which we observed the projection of a
documentary about the post-election violence and the ICC in Harare, one of Nairobi’s
largest slum areas, the reaction from the local inhabitants, and the discussion between them
and the NGO leader that screened the documentary. Our observations of this interaction
were recorded in field-note diaries that were later analyzed. Finally, we conducted a field
trip to an IDP camp in Naivasha. Our observations from the site and from the general
claims of the IDPs –who were not formally interviewed– were also recorded in our field-
ote note diaries and later analyzed.

It is important to acknowledge the methodological limitations of using a narrow
sample of qualitative sources. The conclusions that will be presented in this article cannot
be generalized as true for other case studies, suggesting that further research must be
conducted to analyze the particular relationship between ICC preliminary examinations,
NGO empowerment, and rule of law strengthening in other situations.

Having presented this disclaimer, this article will present significant evidence to
suggest that NGOs in Kenya have not gained leverage from the ICC preliminary
examination to pursue NCJS reform. This is not to say that the preliminary examination has
not had any effect in Kenya. As will be explained, alternative interpretations of the
principle of complementarity and of the meaning of “rule of law” have lead us to conclude
that Kenyan NGOs have indeed gained leverage from the ICC’s attention, which in turn
contributes to long-term rule of law strengthening even though such leverage has not been
used to spur reform of the NCJS.
In order to support these claims, this article will be structured in three main sections: First, *the complementarity principle*, where we present an understanding of this principle in relation to the ICC’s role in contributing to NCJS reform and long-term rule of law strengthening in countries under preliminary examination. Second, *strengthening the rule of law*, where we survey the critique of the rule of law discipline and question whether the ICC can empower civil society and contribute to rule of law strengthening. We also challenge the limits of understanding “rule of law strengthening” as encompassing solely or mainly reform of the NCJS. And finally, *the role of NGO’s in NCJS reform*, where we discuss the reasons why NGOs are not necessarily interested in participating directly in NCJS reform as a result of the intervention of the ICC.

In this sense, despite of the methodological limitations previously signaled, the interplay between the different areas of theory within this paper, allows us to make significant academic contributions to three issues that have generally been thought of in an independent manner: the role of the ICC and its relation to rule of law strengthening; the rule of law as more than NCJS reform; and the role of civil society and NGOs in institutional capacity building.

3. **The complementarity principle**

International criminal law obliges States to investigate and, if factual and evidentiary thresholds are met, prosecute allegations of war crimes, genocide, and crimes against humanity. In those countries that have ratified the Rome Statute, the International Criminal Court (ICC) has complementary jurisdiction over these crimes when a country is “unwilling
or unable” to carry out investigations on its own.\textsuperscript{13} The individual states have primary responsibility to investigate and prosecute, and the ICC can only assert jurisdiction if national courts do not assume their obligations.\textsuperscript{14} This means that in any given situation, the ICC Prosecutor must first assess whether crimes falling under ICC jurisdiction have been committed, and second whether competent authorities are conducting genuine investigations and prosecutions of those crimes.

The relationship between the ICC and national jurisdictions was a major concern at the establishment of the court.\textsuperscript{15} The ICC is in fact the first international court with jurisdiction that interlocks with national jurisdictions in the way that the complementarity principle prescribes. The Statutes of the two \textit{ad hoc} tribunals stipulate that they shall have primacy over the national courts of all States and that “[a]t any stage of the procedure [the Tribunals] may formally request national courts to defer to [the Tribunals’] competence in accordance with the … Statute and the Rules of Procedure and Evidence…”\textsuperscript{16}

The ICC’s complementarity principle, on the other hand, embodies a preference for domestic rather than international justice. Given its resource constraints and its policy to only prosecute those “most responsible” of international crimes, the ICC will only be able to prosecute a small fraction of cases pertaining to any situation. National proceedings aimed at prosecuting a majority of perpetrators must therefore commence to address the

\textsuperscript{13} Art. 8 of ICC’s Statute. The specific conditions for the ICC to be able to assert jurisdiction are detailed in several other articles of the Statute.
\textsuperscript{14} \textsc{Jo Stigen, The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity} 5 (2008).
\textsuperscript{15} \textsc{Jann K. Kleffner, Complementarity in the Rome Statute and National Jurisdictions} 3 (2008).
\textsuperscript{16} Article 9(2) ICTY (n 19); Article 8(2) ICTR Statute (n 20).
global impunity gap. Commentators have also argued that domestic justice is more likely to
effectively promote reconciliation within an affected community, establish permanent
justice mechanisms capable of preventing the society to fall back into conflict, and offer a
more pertinent sense of justice to victims.\(^{17}\) On that note, the ICC Prosecutor Luis Moreno
Ocampo has emphasized that the success of the ICC will not be judged by its number of
prosecutions, but by the number of international prosecutions *avoided* because of the
increased functioning of domestic legal systems.\(^{18}\) Ultimately, the ICC cannot be a
substitute for efforts to strengthen the rule of law domestically.

So far, little attention has been focused on how the ICC should encourage nations to
emerge from conflict and establish orderly systems. The academic literature is rife with
attacks on the *ad hoc* tribunals for failing to strengthen the rule of law in Rwanda and
Former Yugoslavia, but few have commented on the ICC’s responsibilities in this area.\(^{19}\)
Can the ICC—an international justice mechanism located far from the places in which it
operates and staffed entirely by foreigners—encourage a restructuring of national legal
systems?

Under Article 15 of the Rome Statute, the Prosecutor can initiate so-called
“preliminary examinations” where he proactively monitors and analyses information on


\(^{18}\) Luis Moreno-Ocampo, Chief Prosecutor of the ICC, Statement at the Ceremony for the Solemn
Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003), available at
“Prosecutor’s Initial Statement”].

\(^{19}\) Tal Becker, *Universal Criminal Jurisdiction: Address to the American International Law Association*, 10
Yugoslavia for failing to establish effective judicial systems crucial to prevent future conflict).
alleged crimes under the Statute. Thus far, the Prosecutor has made seven preliminary examinations public: Afghanistan, Colombia, Côte d’Ivoire, Gaza, Georgia, Guinea, and Kenya (now under formal investigation). The purpose of the preliminary examinations is to determine whether the Prosecutor should ask for authorization from the Pre-trial Chamber to open an investigation in accordance with statutory requirements. The purpose of making the preliminary examinations public – which is a recent development – is to notify States of potential ICC investigation and encourage them to take action themselves. The publicizing of the preliminary examinations therefore constitutes an active step towards strengthening the rule of law domestically.

If the ICC’s complementary function can actually serve as a catalyst through which State parties are induced to comply with their obligation to investigate and prosecute international crimes, then complementarity has wider implications than as a mere procedural principle governing admissibility of cases before the court. Under this theory, the ICC is part of a wider effort to strengthen the rule of law around the globe.

4. **Strengthening the rule of law**

The question whether ICC intervention through preliminary examinations can spur domestic criminal justice reform necessarily leads to a broader exploration of the rule of law in connection with international criminal justice. Although the outspoken objective of

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the ICC is not to actively participate in rule of law strengthening, it seems inevitable that there must be a relationship between the stated goal to “encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes” and participation in that process. The ICC Prosecutor, however, seems to refute the notion that the court should play an active role in training judges, sharing information, and building capacity. Instead, he claims that the ICC can only contribute indirectly by encouraging states to take action themselves. We will suggest that the Prosecutor’s belief that the ICC cannot actively participate in rule of law strengthening is embedded in a paradigm within the rule of law discipline, which recognizes that attempting to strengthen the rule of law from abroad is a recipe for failure, and that such strengthening encompasses much more than just criminal justice reform.

Throughout the 20th century, development agencies prescribed the “strengthening of the rule of law” as an elixir for economic development and democracy. In the case of Kenya, this does not seem to have been a completely absurd proposition. According to the World Bank ranking, Kenya has been ranked close to number 20 on a scale from 0 to 100 on rule of law strength since 2000, while dropping to 18 after the post-election violence in 2008. There seems to be an intricate relationship between the chaotic post-election violence and the weakening of the rule of law. As Mark Ellis suggests “[t]he political situation is an important indicator for the functioning of a judicial system. It is not uncommon that political unrest, caused for instance by disputed elections, will threaten the

23 Policy Issues, supra note 21, at 5.
independence of the judiciary and result in disrespect for the rule of law.”

In Kenya, this is a vicious cycle: as political and ethnic violence goes unpunished, more violence unveils, and the legal system becomes less capable and willing to punish crimes.

Despite the well-known deficiencies of the Kenyan NCJS, the idea that rule of law can be “built”, and that such a process can have direct results in terms of development and democracy has been highly questioned. Many scholars have explored the limitations of attempting to transplant a rule of law to an apparent lawless or “failed” state. They have concluded that rule of law strengthening from abroad, with a perspective of the “international expert.” is not only ineffective, but has serious limitations in terms of legitimacy. To explore this hypothesis, this section will be divided in the following subsections: (a) The conceptual vagueness of the idea of rule of law; (b) The one-size-fits all limitation, where we will discuss the problems of transplanting foreign institutions without taking into account particular cultural circumstances; and (c) The problem of ineffectiveness of the law, in which we will consider the importance of trust and legitimacy as key elements of compliance.

a) The conceptual vagueness of the idea of rule of law

The first problem that a development expert faces when attempting to design a program to strengthen the rule of law in a country, is that there is no consensus about the essence of the rule of law or about what it means to strengthen it. As Brian Z.Tamanaha

suggests, “[i]n view of this rampant divergence of understandings, the rule of law is analogous to the notion of the ‘good’, in the sense that everyone is for it, but have contrasting convictions about what it is.”

There seems to be, however, at least four elements that are commonly used to describe the rule of law: (i) An institutional conception, which suggests that “rules comply with certain requirements, internal to the legal order that make law efficacious”; (ii) a substantive conception, which “takes these formal characteristics for granted but requires that rules enshrine specific values”; (iii) an instrumental conception, for which the “rule of law is an effective mechanism to achieve whatever goals a society has set for itself”; and (iv) an intrinsic conception, which considers it “a goal in its own right.” Authors generally forward combinations of these conceptions as a notion of what it “really” means to build-up or strengthen a rule of law.

The main problem is that the rule of law debate usually fails to unveil the political contestations that underscore the strengthening of the rule of law. As Laure-Hélene Piron points out, we still “need to learn to go beyond ‘technical’ solutions and understand the political context for intended reforms.” This is especially true in the Kenyan context, where justice sector reforms attempting to increase the impartiality of the judiciary and the

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police pose a huge political threat to the executive branch.\footnote{Id.} Therefore, “unwillingness” and “incapability” are intrinsically linked.

The main recommendation forwarded by the rule of law discipline is that although the focus on institutional capacity is important, legitimacy of formal and informal institutions are key aspects in rule of law strengthening. Legitimacy does not emerge from legal reforms, but by bottom-up, grass-root work. As Jorge Esquirol suggests, there is much more to building a rule of law than reforming the national criminal justice system: “[t]he image of rule of law can be seen as the product of a combination of factors, inter alia: significant political consensus, strenuous law enforcement, ample informational resources, parallel social norms, and a dedicated class of legal scholars claiming that it is so.”\footnote{Jorge Esquirol, The Failed Law Of Latin America, 56 AM. J. COMP. L. 75, 87 (2008).}

When the ICC Prosecutor suggests that strengthening the rule of law is not about the ICC training judges and criminal investigators, but about what the people on the ground are doing to strengthen their own rule of law, his conclusion is embedded in this literature. He recognizes that what it means to build a rule of law might differ in various contexts, and most importantly, that building a rule of law is less about legal reform, and more about local contestations of political power.

\textit{b) The one-size-fits all limitation}

Similarly, the rule of law discipline has also clarified the limits of attempting to transplant legal institutions from one country to another, and particularly, from the
developed West to the developing “third world.” As Thomas Carothers suggests, “trying to promote the rule of law by simply rewriting another country’s laws on the basis of Western models achieves very little, given problems with laws not adapted to the local environment, the lack of capacity to implement or enforce the laws, and the lack of public understanding of them.”

On the same note, David M. Trubek highlights that “[f]or those who thought that there was a single model good for the whole world, attention had to be drawn to the fact that working legal institutions must be embedded in diverse contexts.” The characteristics of the ICC, like any other legal institution, cannot be transplanted from one context to another without friction. Instead of attempting to impose a particular legal reform tailored on the basis of “best-practices” or “lessons-learnt” by the ICC, the Prosecutor defers to the national public and private institutions to tailor their own rule of law strengthening programs. As Rosanna Lipscomb points out, it is only when a state “accepts the challenges and responsibilities associated with enforcing the rule of law” on its own terms, that “the rule of law is strengthened and a barrier to impunity is erected.”

c) The problem of ineffectiveness of the law

A third issue discussed by the rule of law discipline is that of law’s effectiveness. Many scholars, particularly those interested in legal pluralism, have argued that non-formal institutional arrangements are usually more effective in regulating social conduct than legal

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33 THOMAS CAROTHERS supra note 28, at 25.
institutions. As E.P. Thompson explains, “[t]he essential precondition for the effectiveness of the law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.”

Practices and unspoken community arrangements have proven to be extremely important to assure compliance of the law and a culture of legality. While training police officers, reforming the rules that determine the procedure to appoint judges, and creating a new disciplinary court for the judiciary is important to strengthen the rule of law, these measures are meaningless if such institutions are not seen as legitimate and practices are not transformed. If the public does not trust such institutions, it is less likely that law compliance will increase and the rule of law will be strengthened. These considerations shine through in the ICC Prosecutor’s belief that ICC participation in the process to spur NCJS reform can only be indirect. He must give leeway to domestic entities, for instance NGOs, which can build up domestic formal and informal institutions bottom-up, through trustworthy and legitimate procedures.

Consequently, the Prosecutor’s hypothesis that the ICC cannot directly participate in rule of law strengthening seems to be aligned with the recommendations from the rule of law discipline. By not determining the content of the rule of law, avoiding transplanting foreign legal institutions, and deferring to local actors to design and implement legal institutions, the ICC is responding to a long tradition of critique to international development programs. However, if the ICC declines the responsibility to participate

actively in rule of law strengthening, how then, can the ICC be effective in its goal to encourage states to take domestic action? Is the complementary principle a “stick” with which the international community forces States to act to ensure accountability for ICC crimes? If the aspiration of the ICC Prosecutor is to put pressure on states, then why is Kenyan civil society not using the leverage that they gain by the presence of the ICC to push for NCJS reform? The following sections will explore these questions.

5. The role of NGOs in NCJS reform

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

The question, however, is how NGOs can effectively contribute to strengthening public institutions while being outside of the political system. A study about the contribution of NGOs to justice reform in Latin America, for example, concludes that “civil society has not participated in the changes that have occurred in the justice systems, as the organizations that represent particular groups with overlapping interests do not address the

topic.” The Justice Studies Center of the Americas explains the lack of civil society impact by the fact that working for the goals of specific population groups or sectors renders NGOs with more legitimacy than working towards influencing the public agenda. In this sense, both practical challenges and legitimacy issues can restrain civil society’s capacity to participate effectively in institutional reform.

This discussion is immersed in a wider debate about the relationship between civil society and the State. The distrust between civil society and the State usually resonate historical distrust, rooted for instance in mass violence, but also in understandings of the State body as independent from the civil society it is deemed to protect. As Carlos Basombrío suggests, the difference between countries in which NGOs that contribute to the performance of the government are seen as traitors and those where they are not, can be explained by the development of a “progressive civil society” that is not afraid of assuming the vocation to exercise power.

In the case of Kenya, it is widely recognized that civil society has played an important role in providing the leadership and support necessary to enable political and institutional reform. However, our research suggests that their lack of direct participation

\[\text{\footnotesize\textsuperscript{39}}\text{Id.}\]
\[\text{\footnotesize\textsuperscript{40}}\text{CARLOS BASOMBRÍO I., ACTIVISTAS E INTELECTUALES DE SOCIEDAD CIVIL EN LA FUNCIÓN PÚBLICA EN AMÉRICA LATINA 24-25 (2005).}\]
in judicial reform today is at least partially related to the way in which they have tailored
their agenda vis-à-vis the government. First, several NGOs are reluctant to advocate for
NCJS reform until the ICC actually intervenes, because they fear that improvements of the
NCJS or installment of transitional justice mechanisms would avert ICC intervention and
create impunity for the main perpetrators, who would never be adjudicated through a
domestic justice mechanism because of their strong influence over the judiciary. Second,
the NGOs that are in fact working directly or indirectly on reform of the NCJS are
convinced that the state is currently not open for reform, and they are thus working
primarily towards long-term goals, making it impossible to take advantage of the temporary
attention that the preliminary examination provided to push for immediate NCJS reform.

Overall, the level of cooperation between the government and civil society is low in
Kenya. While we found that each NGO had its own dialectic with the state, on average,
local NGOs have the most distant relationships with the state, whereas international NGOs
seem to have closer partnerships. Whereas some of the local NGOs have a bottom-up
approach to NCJS reform, primarily promoting accountability of political leaders and a new
system for electing political leaders, international NGOs lobby for reform of the NCJS by
engaging and cooperating more directly with the government.

Many NGOs saw a re-structuring of the Kenyan state, which entails ending
corruption, reform of the electoral process, and ethnical cohesion, as the ultimate objective
of their advocacy. Others had more limited and pragmatic goals such as police,
prosecutorial, and judicial reform as well as establishing domestic transitional justice
mechanisms, e.g. a Special Tribunal and a Truth, Justice and Reconciliation Commission (TJRC).

All of the NGO’s we met expressed overall support for ICC intervention, but NGOs with a distant relationship with the state viewed ICC intervention as crucial for any kind of justice in Kenya, whereas NGOs with a closer relationship with the state primarily sought accountability through the NCJS and the transitional justice system (i.e. a Special Tribunal and the TJRC).

None of them, however, suggested that the preliminary examination conducted by the ICC, has been utilized to forward NCJS reforms. The following sub-sections discuss possible explanations of why this is so. The first set of explanations (“lack of transition”) explores why the government is not receptive to pressure from civil society or the ICC, and the second set of explanations (the “perverse incentive”) pertains to why civil society do not want to use the preliminary examination as a lever to push for NCJS reform.

a) Lack of transition

The anticipated reaction from States under ICC scrutiny is that they “aggressively and fairly [will] pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it.” In Kenya, the ICC Prosecutor’s preliminary examination has not had that anticipated effect. In March 2010, notwithstanding almost two years of public scrutiny

42 Mark Ellis, supra note 27, at 223.
through the preliminary examination, the government still seemed utterly unconcerned about initiating domestic justice mechanisms to avoid the international embarrassment of ICC indictments. The threat of ICC intervention thus seems to have fallen on deaf ears. There are three major reasons as to why the government has been largely unresponsive and why NGOs have had difficulties leveraging the threat of ICC intervention into reform of the NCJS.

(i) Government involvement coupled with lack of political transition

When the post-election violence ended with an internationally brokered power-sharing agreement in February 2008, the coalition government was part of a transitional “package solution.” The coalition was supposed to lead the process of implementing the Agenda Item Four issues, which outlines four overarching, long-term reform measures necessary to transition Kenya out of the post-election crisis: (i) undertake legal and institutional reform; (ii) tackle poverty; (iii) consolidate national cohesion and unity; and (iv) address transparency, accountability, and impunity.43 Many of the measures in the Agenda Item Four were supposed to take place within 12 months. However, so far, there has been little or no actual transition in Kenya. Some people have even argued that the international community intervened prematurely and that the establishment of the coalition government preempted what could have been a real transition for Kenya.44

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43 Agenda 4, supra note 3.
44 Interview with organization No. 3 (Mar. 17, 2010).
International criminal prosecution after government involvement in atrocities has traditionally followed an ousting of the implicated regime.\textsuperscript{45} It is often said that transitional states have a “window of opportunity” to come to terms with its past immediately following a period of violence.\textsuperscript{46} In Kenya, the “window of opportunity” never materialized after the post-election violence. The political and economic elite that financed much of the post-election violence is still operating and has significant influence over the justice system.\textsuperscript{47} For instance, the Attorney General acts as the legal advisor to the government as well as head of state prosecution, which clearly compromises his neutrality and hinders domestic prosecution of perpetrators.\textsuperscript{48} As someone suggested, even if there was a way to overcome the present deadlock and create a Special Tribunal, “the government will create a justice mechanism that acquits them.”

The lack of political transition has led many NGOs to advocate for the election of new political leaders instead of for NCJS reform.\textsuperscript{49} These NGOs believe that the only way to spur real reform of the NCJS is to first oust the current leaders. Several people also claimed that enacting a new Constitution, which is currently under review, is a prerequisite for any type of reform of the NCJS. Not even the NGOs with a closer relationship with the state, who are in fact working on reform of the NCJS, are pushing for immediate reforms or installment of domestic transitional justice mechanisms, such as a Special Tribunal. Instead,

\textsuperscript{45} Rosanna Lipscomb, \textit{supra} note 18, at 189.
\textsuperscript{48} Interview with former Director of Public Prosecutions, \textit{supra} note 10.
\textsuperscript{49} Interviews with organization No. 7, (Mar. 14-15, 2010) and organization No. 6 (Mar. 17, 2010).
they are working towards long-term objectives, with an intention of pushing for implementation of reforms after, as they say, “the government’s thinking has evolved.”

(ii) Kenyan “exceptionalism”

One element that often came up in our conversations with NGO representatives is the notion of Kenyan “exceptionalism.” The post-election violence caused instability and sent shock waves in the entire region. Given Kenya’s geopolitical and historical role as one of the “anchor states” in Sub-Saharan Africa, the international community was concerned about the broader implications if Kenya was to plunge into civil war or become a “failed state”, and was thus quick to intervene and broker the power-sharing agreement that ended the violence. Predictably, there has been substantial pressure on the ICC Prosecutor to intervene and stabilize the situation. However, Kenyan “exceptionalism”, the notion that Kenya is a stable and developed state in comparison to many of its neighbors, has led to a common belief amongst politicians that ICC intervention was not a real threat. The fact that the Kenyan government simply does not identify with being incapable of dealing with the post-election violence domestically is one of the reasons why the Prosecutor’s preliminary examination has not caused the Kenyan government to react.

(iii) The Political Cycle of Reform

The role of civil society in Kenya has evolved over the years. Around elections in 2002, political parties subsumed civil society and many NGO representatives who had fought to overturn President Moi’s government were co-opted into government, eager to

50 Interview with organization No. 2 (Mar. 18, 2010).
finally implement many of the ideas they had fought for so long.\textsuperscript{52} At that time, NGOs generally believed that the benefits of working with the government outweighed the costs, which resulted in closer partnerships with the state.\textsuperscript{53} The government, in turn, was elected on a reform agenda and they needed the expertise provided by NGOs to implement many of the reforms.

Several NGO representatives we met with explained that since governments have historically been elected on reform agendas, the Kenyan government continuously goes through a “cycle” where it actively pursues reforms before, during, and after elections. Hence, when election time is not fast approaching, the government stagnates and becomes less interested in implementing reforms. They will still engage with civil society and “talk the language of human rights”, but they simply push reforms to the future.\textsuperscript{54}

The next upcoming election in Kenya is in 2012, and during the preliminary examination, the government was thus not in the point of the political cycle when they were compelled to realize reforms to keep their mandate. This obviously compromises the opportunities for NGOs to work constructively with the government. Many people commented on how the government is an extremely sophisticated and devious collaborator; one person even described it as “schizophrenic.”\textsuperscript{55} When NGOs can bring expertise to the table or when the government wants to appear pro-reformist, they welcome involvement and treat NGOs as allies, but when NGOs demand reforms, the government is non-

\textsuperscript{52} Okalle Makanda, \textit{Role of Civil Society Organizations in Enhancing the Rule of Law} 185, 201, \textit{in 7 JUDICIARY WATCH REPORT, READINGS OF THE RULE OF LAW IN AFRICA} (J Osogo Ambani, ed., 2008).

\textsuperscript{53} \textit{Id.} at 204.

\textsuperscript{54} Interview with organization No. 1 \textit{supra} note 12.

\textsuperscript{55} Interview with organization No. 3, \textit{supra} note 48.
responsive. Consequently, many of the local NGOs have largely stopped interacting with the government and pushing for reform, whereas the international NGOs, who still interact with the state, mainly focus on capacity building and training, and are not pressuring the state to implement reforms to ensure accountability for the post-election violence.

The NGOs who are primarily advocating for the election of new leaders have obviously not gained leverage from the preliminary examination to push for NCJS reform, because such reforms must inevitably be realized through the state. Because of the present political constraints, out of the NGOs who are in fact pushing for reform of the NCJS, not one appears to have an immediate, comprehensive reform agenda. Consequently, the attention that the ICC preliminary examination brings has not had any effect on how these NGOs work, because the potential effect or leverage of the preliminary examination will only materialize if NGOs are actually pushing for immediate, instead of long-term, reforms of the NCJS.

b) The perverse incentive of ICC preliminary examinations

Since the ICC will only resume jurisdiction when a country is “unwilling” or “unable”, preliminary examinations create a “perverse incentive” for NGOs: Should they focus their advocacy on ICC intervention, thus advocating for why the NCJS is “unwilling” or “unable”, or should they advocate for domestic capacity building? This leads to a situation where NGOs might prefer not to advocate for NCJS reform because it will avert ICC intervention. One of the NGO representatives we talked to recognized that he could utilize his informal contacts with the government to educate and inform members of Parliament and the executive branch about the probability of ICC intervention and how it
can be avoided. When asked why he has not utilized this channel, he responded with surprise “and warn them?” Instead of pushing for domestic reforms, this NGO representative preferred to keep the government in the dark so that the ICC in fact moves forward and intervenes in Kenya.\(^{56}\)

This perverse incentive occurs when there is a belief amongst NGOs that the ICC can satisfy goals that a domestic justice mechanism cannot.\(^{57}\) Conversely, if the NGOs do not believe that the ICC is serving particular objectives (e.g. punishing perpetrators too leniently or not punishing actual rape perpetrators, but only those with command responsibility\(^{58}\)), then NGOs are more inclined to work on strengthening domestic justice mechanisms.

In the case of Kenya, there appears to be two sets of objectives that the ICC is perceived to serve that national mechanisms cannot. The first set of objectives is related to both concrete and symbolic consequences that are more likely to be expected from ICC intervention than from national justice mechanisms. These include setting a breaking point, ousting some of the current political leaders, wide international visibility, transparency, and deterring future violence. The second set of objectives is composed of what we believe are misconceived expectations about the implications of ICC intervention. These include ending impunity, introducing a system of accountability, producing poverty relief,

\[^{56}\text{Interview with organization No. 1, supra note 12.}\]
\[^{57}\text{Brian Concannon, Jr., supra note 50, at 201, 240.}\]
\[^{58}\text{Interview with organization No. 4 (Mar. 18, 2010)}\]
development, and peace, and re-structuring the Kenyan state, which are unlikely results of any justice mechanism. Let us explore both sets of objectives.

(i) Concrete and symbolic consequences of ICC intervention

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

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

Finally, NGO representatives believe that the concrete effects of ICC intervention (in terms of transparency and top-level accountability), and its symbolic effects (the cathartic moment of public and international recognition that the post-election violence was not
acceptable) is the only prospect of deterring a repetition of massive violence around the 2012 elections.

(ii) Rule of law and development expectations about ICC intervention

A second set of objectives that the ICC is perceived to fulfill—and that the NCJS and transitional justice mechanisms apparently cannot—is related to broader rule of law strengthening and development goals.

Several NGOs hope that ICC intervention can end the culture of impunity and create a system of accountability in Kenya. Although they recognize that the ICC would not participate directly in reforming the NCJS, they believe that ICC intervention will spark these processes. Unfortunately, it is highly uncertain whether ICC intervention can transform the NCJS in a way that would translate into less impunity and more accountability. Such transformation is inevitably tied to national, political, institutional, and cultural circumstances.

Other organizations, particularly grass-root organizational leaders, advocate that ICC intervention is a “window of opportunity” to re-structure the state, reduce poverty, and produce development and peace. Although many NGO representatives we encountered are working on countering these false expectations, the truth of the matter is that ordinary citizens have in part come to prefer the ICC over domestic justice mechanisms, because they have identified the face of Prosecutor Moreno Ocampo with the opportunity of a better life. In our visit to a slum in Nairobi, locals referred to lack of water, lack of food, lack of
housing, corruption in the political class, and lack of political accountability as the type of problems they expected the ICC to solve.

Thus, both relatively fair and completely misconceived expectations about the ICC are forwarded as arguments for why ICC intervention is preferable over domestic justice. Inevitably, those who expect the ICC to satisfy goals that the NCJS cannot are stressing the lack of will and capability of the NCJS rather than advocating for reforms.

In conclusion, Kenyan civil society is not using the preliminary examination as a lever to spur NCJS reform, either because they have other goals, because they are working on a long-term agenda, or because they perceive the government as unresponsive to actual reform. The perverse incentives created by having to demonstrate that the national system is unwilling or incapable and the lack of trust in the current government both emerge as a recipe against NCJS reform in Kenya.

6. The ICC as a catalyst: An analytical framework

As previously noted, one of the key tasks of complementarity is to improve the performance of States in fulfilling their obligation to investigate and prosecute the crimes included in the Rome Statute.59 In Kenya, we did not see the effects of a successful preliminary examination; since Kenya’s status as “unable or unwilling” continued, the Prosecutor decided to ask for permission to open a formal investigation, indicating that he

59 JANN K. KLEFFNER, supra note 16, at 216.
did not see any prospect of succeeding with his aspirations to encourage national prosecutions for the post-election violence. The answer to the question that we initially posed –*how* can the ICC encourage NCJS reform– will therefore be left unanswered. However, as we will show, the potential impact of the ICC’s preliminary examinations amounts to more than institutional capacity building. As in the case of Kenya, where the hurdles to national prosecutions are as much political as they are institutional, the ICC can still empower civil society and contribute to strengthening the rule of law.

As we have shown, NGOs in Kenya have widely diverse agendas, and pretending to foresee what their role should be in rule of law strengthening goes beyond the objectives of this paper. What we can suggest, however, is an analytical framework to understand the dialectic between the ICC and civil society. Hypothetically, ICC’s preliminary examinations can aid civil society working on overcoming impunity in two distinct ways: *First*, by extending legitimacy, and *second*, by providing a “stick” against the state through the stigma that is associated with ICC intervention. In the following sections, we will suggest that these two categories can be a useful framework for analyzing whether NGOs are being successful in taking advantage of the leverage provided by the ICC’s preliminary examination.

*a) Legitimacy*

As discussed in chapter 3, legitimacy is a determinant drive for NGOs. As any other societal organization, NGOs seek approval among their community. In this sense, identifying the sources of NGO legitimacy can aid in the process of analyzing what drives them and why certain causes are incorporated into their agendas while others are not. One
of the main sources of power already afforded to NGOs through their independence and credibility is their ability to put forth persuasive reasons for the adoption of particular norms. When the arguments and reasoning of an NGO align with the ICC’s, the NGO receives added rational basis and moral support for its claims. Thus, as long as the ICC is perceived as a legitimate institution, preliminary examinations afford NGOs the opportunity to advance their arguments for particular reforms backed by the extended legitimacy of an international mechanism of justice.

In Kenya, for example, we found that domestic NGOs have indeed gained legitimacy from the Prosecutor’s preliminary examination. Using the glare of the international society as proof of the inadequacies of their current leaders, several NGOs are mobilizing public opinion to change the way politicians are elected. This was evident when we visited a screening of the documentary “Getting Justice: Kenya’s Deadly Game of Wait and See.” After watching the documentary, which introduces the ICC and its functions and communicates that the ICC disapproves of the way current leaders have acted, people rallied against the political leaders, shouting “send them to the Hague.”

Particularly NGOs with bottom-up approaches, dedicated to work with communities spurring a demand for accountability, have been successful in leveraging ICC attention. Some work with communities in building a critical-reasoning that can contribute to the election of new leaders on the basis of principles and interests instead of their ethnic group. This indirectly contributes to rule of law strengthening as it sets the basis for democratic

political renovation of leadership, opening the way for a new generation of politicians who believe in accountability and transparency and can lead future justice reform. Other NGOs work with communities to help them accept and create a collective narrative around the fact that the post-election violence implicated perpetrators and victims of all ethnicities in Kenya, and therefore, that those held responsible will (and must) come from all ethnicities. This also contributes to rule of law strengthening as it prepares society to accept judicial decisions –and therefore increases compliance and deters subversion– regardless of the ethnicity of those prosecuted. Yet other NGOs are dedicated to self-sustaining programs for communities, under the premise that peace building and reconciliation must come hand in hand with a development program. These activities contribute to rule of law strengthening as they push communities up from a level where they would do anything for a few shillings, to a situation in which they can actually stop for a second and exercise their rights and duties as citizens. The possibility of ICC intervention clearly added strength to the message of these NGOs.

In this way, the preliminary examination has rendered NGOs with the legitimacy necessary to contribute to strengthening the rule of law in Kenya, not necessarily in terms of institutional capacity-building, as it is generally understood, but as a process in which communities are empowered to create their own rules, elect their own representatives, and have a stake in the system. This is probably not what the Prosecutor intended when he said that the ICC shall “encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes,” but this is definitely long-term rule of law strengthening.
The discussion about the “perverse incentives” presented in chapter 3 explains why NGOs seem to gain more legitimacy in demonstrating the incapability and unwillingness of the Kenyan authorities, than in participating directly in NCJS reform. However, it is important to recognize that the legitimacy gained by the glare of the ICC could also serve to support direct participation in NCJS reform, at least in countries where the level of distrust between NGOs and the State is not as deep as in Kenya. For example, instead of merely advocating against the state as a whole and for the election of new leaders, NGOs could take advantage of the rule of law strengthening discourse of the ICC, and use it to influence the public agenda.

b) Stigma

On the other hand, the role of NGOs must also be analyzed from the perspective of how much they are able to leverage the attention of the ICC to put pressure on governments and push for NCJS reform. This can only happen, however, when NGOs have consciously shifted their source of legitimacy into one that allows them to work constructively with the government to strengthen the rule of law.

The rationale behind this framework of analysis is that the purpose of making the preliminary examinations public is not just to highlight to States that the Prosecutor is looking into the situation, but also to push states to adequately deal with cases domestically to avoid the embarrassment and stigma of having the ICC intervene. The hypothesis is that the mere possibility of being branded as “unwilling” or “unable” should encourage states to
initiate reforms and capacity building of the NCJS. Ideally, domestic NGOs should be able to utilize the preliminary examination as a “stick” to push the state to initiate these reforms to avoid triggering ICC jurisdiction. After all, ICC intervention is an axe over the governmental head, saying: If you don’t prosecute, we will.

But in the case of Kenya, NGOs seem to have had difficulties utilizing the “stick” supposedly provided by the preliminary examination to push for justice reform at the national level. Jann K. Kleffner has highlighted the limits of the ICC acting a catalyst for national prosecutions after government involvement in atrocities: “If [...] crimes have been committed by officials of a State in the implementation of a plan developed on the highest level of political authority, for instance, then the perceived costs for that State to comply with the obligation to investigate and prosecute could outweigh the perceived benefits as long as the political regime remains unchanged. [...] The interest of that State’s leaders to protect themselves and to stay in power would prevail over the benefits of retaining jurisdiction over the cases at hand and the reputation for compliance.”

In this sense, how much an NGO can shift its objectives to contribute to the public agenda, and do so remaining legitimate, depends on how responsive the government is to the NGOs agenda. The deeply held belief that ICC intervention was not going to be a reality in Kenya coupled with the lack of political transition and the current state of the “political cycle of reform” all add to the difficulties for NGOs to use the preliminary examination as a “stick” to push for reforms. These circumstances, plus the perverse

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61 JO STIGEN, supra note 14, at 474-76.
incentives not to push for reform and the fact that Kenyan NGOs are so distrustful in the
government, further diminish their opportunities to use the threat of ICC intervention to
force NCJS reform. When judicial reform is not what NGOs desire because they don’t
believe the system will be strong enough to prosecute the main perpetrators, ICC’s
objective of encouraging domestic prosecutions is refuted.

“Legitimacy” and “stigma” can therefore work as an analytical framework to
understand the role of NGOs as they leverage the attention of the ICC, and use it as a
catalyst to spur domestic prosecutions. However, the extent to which an NGO can leverage
preliminary investigations to seek new sources of legitimacy, and constructive ways of
taking advantage of the stigma against the state, is obviously dependent on the NGOs
advocacy agenda as well as the overall political context in which it operates.

7. **A way ahead – rule of law strengthening in Kenya**

If one should draw any general conclusions from the Kenyan case, it must be that
NGOs can indeed gain leverage from the ICC, but as obvious as it may sound, only to
forward the objectives on their own agenda. Pretending that such leverage should
necessarily be used to push for NCJS reform is misleading. For NGOs in Kenya, rule of
law strengthening does not seem to be about NCJS reform at the moment.

Although we did not find that NGOs were given any leverage by ICC attention to
advocate for criminal justice reform, as we have shown, that does not mean that they have
not gained any leverage at all. Rule of law strengthening is more than NCJS reform. NGOs
got leverage through the extended legitimacy of ICC attention to work with communities to empower them socio-economically, create awareness about the importance of choosing better leaders, and reducing ethnic divisiveness. In this sense, there are NGOs in Kenya that are indeed taking advantage of the intervention of the ICC to further their objectives, which although not directly related to NCJS reform, contributes indirectly to strengthening the culture of rule of law. Thus, through parallel paths and unintended consequences, the ICC preliminary examination in Kenya seems to be spurring rule of law strengthening.
Appendix A: Description of Kenyan organizations interviewed

Organization No. 1:

Organization that administers grants for NGOs and media organizations that work on human rights and impunity issues. The types of activities that they finance include report writing, monitoring, advocacy, witness coordination and victim networking and organization to document their testimonies. It also serves as an informational bridge between national and international NGO’s, international organizations and members of the Kenyan government.

Organization No. 2:

Branch of an international NGO dedicated to the legal protection of human rights in Kenya and the African region. Some of its main areas of advocacy work include judicial reform, training of grass-root organizations, legal research for policy advocacy, and human rights national and international litigation.

Organization No. 3:

Branch of an international NGO dedicated to promote accountability and create just and peaceful societies after conflict or mass human rights violations. Their principal lines of action include NGO capacity-building, institutional reform and serving as a transitional justice think tank.
**Organization No. 4:**

International NGO working in 17 countries in Africa, dedicated to raise awareness in poor and marginalized communities and allow them to ask for accountability, particularly in issues of livelihood, conflict, gender equality, and HIV. They have three main lines of work: capacity-building, research, and advocacy.

**Organization No. 5:**

One of the oldest and most experienced NGOs in Kenya whose original mission was to work for democratization and remove the ban on opposition parties. Today, they are dedicated to judicial reform monitoring, human rights advocacy and witness protection.

**Organization No. 6:**

Grass-roots political organization that seeks to mobilize citizens for the election of better leaders. To do so, they organize political rallies, advocate for exercising the right to vote on the basis of issue politics instead of ethnic politics, and identify and support grass-root political leaders that are willing to make transparency and accountability pledges.

**Organization No. 7:**

National organization that uses information and media to spark action in civil society. Through a bottom-up approach, it aims to contribute to a process of mass critical-reasoning, that can allow citizens to participate and elect better leaders.
Organization No. 8:

Public institution created by statute and funded by the government with a mandate to investigate human rights violations and formulate policy recommendations.