

Due to the timing of this paper and the limited available information, any conclusions as to whether a clear situation of admissibility or inadmissibility has been made would be premature. It is however hoped that any steps taken, either by the international community or by the national authorities will be both responsive to the need to fight impunity as well the need for national reconciliation for age old conflicts.

2.1 Recommendations

This research suggests that the Prosecutor must develop a Prosecutorial strategy in exercising his discretion under Article 53. His discretion, this research humbly submits, should be guided by applying the principle of individualized justice, addressing each particular case by reference to all relevant facts and circumstances, including social factors. With specific reference to the TJRM, the author considers that the TJRM should consider giving guidelines on what must be borne in mind when considering the TJRM will be considered in place of criminal prosecutions before the ICC.



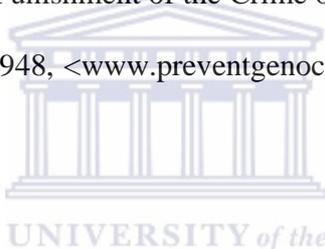
List of References

1. Primary Sources

a. International Conventions

Convention on the Non-applicability of Statutory limitations to war crimes and crimes against humanity, opened for signature on Nov. 26, 1998, 754, U.N.T.S. 73, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18).

Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. GA, 9.12.1948, <www.preventgenocide.org/> (accessed on 20th October 2009).



Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 3.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, T.L.A.S. No. 3363, 75 U.N.T.S. 85.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

Rome Statute of the International Criminal Court, *adopted* Jul. 17 1998, U.N. Doc. A/CONF.183/.

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (hereafter VCLT).

International Convention on Civil and political Rights, *Adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).

European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, European. T.S. No. 5 (*entered into force* Sept. 3, 1953).

Inter-American Convention to Prevent and Punish Torture, *adopted* Dec. 9, 1985, OEA/ser.A./42 (1986), 67 O.A.S.T.S., *reprinted in* 25 I.L.M. 519 (1986) (*entered into force* 1987).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, *adopted* Jun. 8, 1977, 1125 U.N.T.S (1977).

Rome Statute of the International Criminal Court, *adopted* Jul. 17 1998, U.N. Doc. A/CONF.183/9 (hereafter Rome Statute).

b. National Legislation

Truth Justice and Reconciliation Act No. 84 of 2008, Laws of Kenya.

c. National Reports

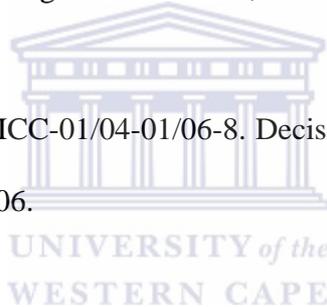
Report of the Commission of Inquiry into the Post-Election Violence in Kenya.

d. International Case-Law

Almonacid Arellano et al. vs. Chile, 26 September 200, Judgement, Series C No. 154. para. 110.

Barbie, 78 I.L.R. 132, 135 (1988) (Judgment of Jan. 26, 1984, Cass. Crim., Fr.).

Prosecutor V Lubanga, Case No. ICC-01/04-01/06-8. Decision on the Prosecutor's Application for a Warrant of Arrest, 10 Feb. 2006.



Prosecutor v Tadic, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *non bis in idem*, Trial Chamber, 14 Nov. 1995.

Prosecutor v. Anto Furundzija, ICTY, Case No. IT-95-17/1-7 (10 December 1998).

Prosecutor v. Kallon Kamara, SCSL (Appeals Chamber) Decision of 13 March 2004, paras 67 et seq.

Prosecutor v. Tadic, ICTY, (Jurisdiction) (1996) 35 ILM 35.

Velásquez-Rodríguez, 29 July 1988, Judgement, para. 162 et seq., 1996 Annual Report of the Inter-American Court of Human Rights [209], OEA/Ser.L/V/III.35, doc. 4 (1997).

2. Secondary Sources

a. Books

Aravena, C. C. 'The admissibility test before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions' in Kleffner, J. K & Kor, G. (eds.) *Complementary Views on Complementarity, Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court*, Amsterdam, T.M.C Asser Press. (2004).

Bassiouni, C.M. *The Legislative History of the International Criminal Court*, 1, New York, International Publishers, (2005).



Greppi, E. 'Inability to Investigate and Prosecute under Article 17' in Mauro Politi & Federica Gioia (eds.). *The International Criminal Court and National jurisdictions*, (2008).

Hayner, P. B. *Unspeakable Truths: Facing the Challenge of Truth Commissions* London, Routledge, (2001).

Henckaerts, J. and Doswald-Beck, L. *Customary International Law*, 1, Cambridge University Press, Cambridge, (2005).

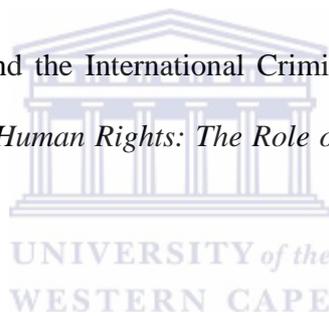
Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (The Hague, London, Boston), Kluwer, (1999).

Huyse L., "Justice", in *Reconciliation after Violent Conflict: A Handbook*, Bloomfield, D, Barnes, T, and Huyse, L (eds), Stockholm, International Idea. (2003).

Kleffner, J. K & Kor, G. (eds.) *Complementary Views on Complementarity, Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court*, (2004).

Minow, Martha. "The Hope for Healing: What Can Truth Commissions Do?" In *Truth V. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, Princeton and Oxford: Princeton University Press, 2000.

Naomi Roht-Arriaza, 'Amnesty and the International Criminal Court', in Dinah Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*. Transnational Publishers, (2009).



Politi, M. & Nesi.G. (eds.) *The International Criminal Court and the Crime of Aggression*, Ashgate, England. (2005).

Politi, M. & Nesi.G. (eds.) *The International Criminal Court and the Crime of Aggression*, England, Ashgate. (2005).

Robert I. Rotberg and Dennis Thompson (eds.) *Truth V. Justice: The Morality of Truth Commissions*, Oxford: Princeton University Press, (2000).

Roth-Arriaza, N. 'The New Landscape of Transitional Justice', in Roth-Arriaza/Mariezcurrena (eds.), *Transitional Justice in the twenty-First Century*. Cambridge, Cambridge University Press, (2006).

Schabas, W. *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press. (2001).

Steven, R.R and Jason, S.A. 'Accountability for Human Rights Atrocities in International law, beyond the Nuremberg Legacy' New York, Oxford University Press, (1997).

Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court Observers' notes, Article by Article 2nd Edition*, C.H.Beck.Hart.Nomos, (2008).

Werle, G. *Principles of International Criminal Law*, T.M.C Asser Press, (The Netherlands). (2009)

b. Articles

Balint, J.L. 'The Place of Law in Addressing Internal Regime Conflicts' (1996) *Law & Contemporary Problems*.103.

Bassiouni, C. M. 'International Crimes, *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law & Contemporary Problems*. 63.

Clark, T.H. 'The Prosecutor of the International Criminal Court, Amnesties and the Interests of Justice: Striking a Delicate Balance' (2005) 4 *Washington University Global Studies Law Review*. 389.

Dugard, J. 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International law*.

Gavron, J. 'Amnesties in the light of Developments in International law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly*. 91.

Goldstone, J.R. & Fritz, N. "'In the Interests of Justice' and the Independent Referral: The ICC Prosecutor's Unprecedented Powers' (2000) 13 *Leiden Journal of International law*. 655.

Jallow, B.H. 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice*. 145.

Keller, M. L. 'Achieving Peace with Justice: The ICC and the Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International law*. 209.

Keller, M.L. 'The False Dichotomy of Peace versus Justice and the International Criminal Court' (2008) 3 1 *Hague Justice Journal*. 12.

Kourabas, M. 'A Vienna Convention Interpretation of the 'Interests of Justice' Provision of the Rome Statute, The Legality of Domestic Amnesty Agreement, and the Situation in Northern Uganda: A great qualitative step forward' or a Normative Retreat?' (2007) 14 *UC Davis Journal of International Law and Policy*. 59.

Majzub, D. 'Peace or Justice? Amnesties and the International Criminal Court', (2002) 3 *Melbourne Journal of International law*. 247.

Morris, H. M. 'International guidelines facilitating accountability' (1996) 59 *Law and Contemporary Problems*. 33.

Moy, A. 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity' (2006) 19 *Havard Human Rights Journal*. 267.

Naqvi, Y. 'Amnesty for War Crimes: Defining the Limits of International Recognition', (2003) 85 *International Review of the Red Cross*. 583.

Olson, M. L. 'Provoking the dragon on the patio, matters of transitional justice: Penal Repression vs. Amnesties' (2006) 88, *International Review of the Red Cross*. 275.

Orentlicher D. "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency', (2007) 1 *The International Journal of Transitional Justice*. 10.

Orentlicher, D.F. 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1990-199) 100 *Yale Law Journal*. 2537.

Oyelade, O.S, 'Conflict Resolution and Human Rights in Traditional African Society' (2005) 45 *2 Indian Journal of Human Rights*. 201.

Dugard, J. 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law*.

Scharf M. P. 'The Amnesty exception to the Jurisdiction of the International Criminal Court.' (1999) 32 *Cornell International law Journal*. 507.

Stahn, C. 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice*. 695.

c. United Nations Documents

Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons guilty of war crimes and crimes against humanity. G.A. Res. 3074, 28 U.N.GAOR Supp. (No 30) at 79, U.N. Doc. AI 9030 (1973).

Security Council Resolution 827(1993) of 25 May 1993 Preamble para 6. Resolution 955(1994) S/RES/955(1994) 8 November 1994.

Statement of the President of the Security Council of 15 July 1993, Resolutions and Decisions of the Security Council 1993, 48 SCOR, at 126, UN Doc.S/26633(1993).

UN Security Council Resolution 808 (1993) of 22 Feb 1993 para 9 preamble; Security Council Resolution 827(1993) of 25 May 1993.

UN Security Council Resolution 808 (1993) of 22 Feb 1993.

d. Official Papers

Amnesty International, Transitional Justice and Reparation: Establishing an effective Commission, 11 June 2007, AI Index: POL 30/009/2007).

Human Rights Watch, Special Issue: Accountability for past Human Rights Abuses 2 Dec. 1989.

U. S. Delegation Draft (Rev.) to the ICC Preparatory Committee (August 1997).

e. Interviews

Scharf, M. interview with President Phillip Kirsch of the ICC in Strasbourg, France, 19 November 1998) on the issue of amnesties in the Rome Statute.

f. Lecture

Werle, G. 'Without Truth, No Reconciliation. The South African *Rechtsstaat* and the Apartheid Past' Lecture delivered on 18th May 1995 at the Law Faculty of Humboldt University of Berlin.

g. Internet Resources

<http://www.iccnw.org/?mod=interestofjustice&idudctp=21&show=all#21>.

<http://www.icc->

[cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr456?lan=en-](http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr456?lan=en-)

[GB;http://edition.cnn.com/2009/WORLD/africa/09/30/kenya.election.icc/index.html](http://edition.cnn.com/2009/WORLD/africa/09/30/kenya.election.icc/index.html).

<http://www.amnesty.org/en/library/asset/POL30/009/2007/en/7988f852-d38a-11dd-a329-2f46302a8cc6/pol300092007en.html>.

<http://www.icc-cpi.int/NR/exeres/2E58546F-0337-479F-9EC5-DE2F489EBFDC.htm>

http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.

2009<http://www.standardmedia.co.ke/commentaries/InsidePage.php?id=1144026328&cid=15>

h. Newspapers

Standard Newspaper, Kenya, 14/10/2009.

i. Unpublished Dissertation

Bore, L. 'International Justice Mechanisms: An analysis of Retributive versus Restorative mechanisms' (2006) (Unpublished), *Dissertation, University of Nairobi* (In file with Author).

