

# *Kenyatta* and the Government Shield: Leveraging Article 87(7) as a Tool for Cooperation at the International Criminal Court

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*This Note addresses the problem of noncompliance at the International Criminal Court (ICC) by analyzing the case against Uhuru Kenyatta. It begins by discussing the history of the ICC: its purpose, structure, and historic approach to managing noncooperation issues. The next Section analyzes the procedural history of the Kenyatta case, emphasizing the Court's struggle to obtain cooperation from Kenya. The Note then analyzes Article 87(7) of the Rome Statute in the context of the Kenyatta case and other cases. Ultimately, the Note concludes that the Court has taken an inconsistent approach in applying Article 87(7) and suggests that the Court utilize Article 87(7) more aggressively as a tool for cooperation moving forward.*

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## INTRODUCTION

With any other court, if you're accused of murdering five people, say, you don't get bail . . . With the [International Criminal Court (ICC or Court)] you get to go home and mobilize your community. Powerful people have powerful ways of keeping themselves out of court.<sup>1</sup>

Such was the sentiment of Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, as he reported on the effectiveness of Uhuru Kenyatta's anti-ICC rhetoric in the days leading up to Kenyatta's 2013 election as Kenya's fourth President.<sup>2</sup> Almost immediately after his victory, Kenyatta faced fierce backlash from Kenyan citizens who questioned the legitimacy of the election, in part because it was the first election in Kenya's history to utilize biometric voting technology.<sup>3</sup> Public backlash was not the only threat that Kenyatta faced as the country's President-elect: at the time of his victory, Kenyatta was also facing charges for crimes against humanity before the ICC.

Three-and-a-half years earlier, on November 26, 2009, ICC Prosecutor Luis Moreno-Ocampo requested authorization from the ICC Pre-Trial Chamber to investigate the atrocities that followed the 2007 presidential election in Kenya.<sup>4</sup> After collecting evidence linking Kenyatta to the violence, the Prosecutor formally presented his findings to the Pre-Trial Chamber and charged Kenyatta

1. Michela Wrong, Opinion, *Indictee for President!*, N.Y. TIMES (Mar. 11, 2013), <https://latitude.blogs.nytimes.com/2013/03/11/being-prosecuted-by-the-i-c-c-helped-uhuru-kenyattas-chances-in-kenyas-election/>.

2. *Id.* According to Wrong, Uhuru Kenyatta capitalized on deep-seated anti-Western, anti-British sentiment as part of his campaign platform. *Id.* Kenyatta is the son of Jomo Kenyatta, Kenya's founding President, whom British authorities tried and detained. During the pending ICC trial, Uhuru Kenyatta's campaign spoke of "reclaiming sovereignty" from the "foreign powers" of the ICC to invoke familiar images of prior colonial rule. *Id.*

3. See Miriam Azu, *Lessons from Ghana and Kenya on Why Presidential Election Petitions Usually Fail*, 15 AFR. HUM. RTS. L.J. 150, 152 (2015). Issack Hassan, the Chairperson of Kenya's Electoral Management Body (EMB), declared Kenyatta the winner of the presidential race on March 9, 2013. *Id.* This was the first election for which biometric voting technology was used, and according to Hassan, Kenyatta received 50.07 percent of all votes cast. *Id.* His closest competitor, Raila Odinga, received 43.31 percent of votes. *Id.* Hassan declared Kenyatta the President and his running mate, William Ruto, the Deputy President-elect. *Id.* Kenyans contested the counting method and Kenyatta's victory in court, but the Supreme Court of Kenya upheld the election and the final tally, holding that although the counting methodology failed in some respects, "no injustice resulted from the fact that the EMB did not use the electronic system exclusively throughout the elections." *Id.* at 152–53.

4. Prosecutor v. Muthaura, ICC-01/09-02/11-382, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 1 (Jan. 23, 2012); see also Christopher Totten, Hina Asghar & Ayomipo Ojitalayo, *The ICC Kenya Case: Implications and Impact for Propio Motu and Complementarity*, 13 WASH. U. GLOBAL STUD. L. REV. 699, 715–16 (2014).

with crimes against humanity in 2011.<sup>5</sup> Initially, the Pre-Trial Chamber found “sufficient evidence to establish substantial grounds to believe” that Kenyatta had committed the alleged crimes.<sup>6</sup> Vast evidence from journalists, the United Nations, and human rights organizations linked Kenyatta to mass atrocities that led to hundreds of civilian deaths, sexual and gender-based violence, and thousands of deportations.<sup>7</sup> Nonetheless, the Prosecutor could not secure the Kenyan government’s cooperation to collect enough evidence to prove at trial that Kenyatta orchestrated the violence.<sup>8</sup> Ultimately, after failing to obtain sufficient evidence for a prosecution, the Prosecutor was left with no choice but to withdraw the charges in late 2014.<sup>9</sup>

This Note analyzes Rome Statute Article 87(7) and its potential as an existing structural mechanism to compel signatories to the Rome Statute (“State Parties”) to comply with ICC investigations. The ICC’s failure to secure a conviction against Kenyatta provides a constructive framework for analyzing how Article 87(7) offers one method of achieving compliance yet has not been sufficiently utilized in previous ICC cases. The analysis begins with a brief history of the ICC and its structure, as well as the Court’s historic treatment of noncooperation by State Parties. The Note then discusses the political and historical context of the events that occurred in Kenya after the 2007 presidential election. It then turns to the procedural history of the *Kenyatta* case and, in particular, to the Court’s treatment of the noncooperation issues that arose prior to the withdrawal of the charges. Finally, the Note evaluates the effectiveness of the Court in securing the cooperation of other nations through its use of Article 87(7) and proposes that the Court more aggressively utilize Article 87(7) moving forward.

## II.

### A HISTORY OF IMPUNITY AND NONCOOPERATION WITH THE COURT

This Section outlines the history and purpose of the ICC, as well as some of the criticisms it has faced since its inception. In particular, the ICC has faced widespread criticism surrounding its perceived bias against African nations. Because the ICC has historically generated a substantial amount of its support from Africa, these criticisms—along with the ICC’s struggle to secure cooperation from countries whose leaders have been subject to ICC investigations and prosecution—have threatened the Court’s legitimacy and have even prompted some nations to formally withdraw their support from the Rome Statute. In Kenya,

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5. Prosecutor v. Muthaura, ICC-01/09-02/11-382 ¶ 428

6. *Id.* In light of its evidentiary findings, the Pre-Trial Chamber held that Kenyatta “must be committed to a Trial Chamber for trial on the charges as confirmed.” *Id.* ¶ 429.

7. See *infra* notes 81-90 and accompanying text.

8. See *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC (Dec. 5, 2014), <https://www.bbc.com/news/world-africa-30347019>.

9. Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges Against Mr. Kenyatta (Mar. 13, 2015).

anti-ICC sentiments soared after an arrest warrant was issued for Kenyatta while he was still a sitting Head of State, setting the stage for the ICC's struggle to obtain Kenya's cooperation in prosecuting Kenyatta.

#### A. *The Purpose and Structure of the ICC*

The ICC was created in July of 1998 and is the world's first treaty-based, permanent international criminal court.<sup>10</sup> The Rome Statute, signed by over 120 countries, created the Court and its rules of procedure.<sup>11</sup> The Statute also defines four broad categories of international crimes: crimes against humanity, the crime of aggression, war crimes, and genocide.<sup>12</sup>

The Preamble to the Rome Statute states that the ICC is meant to "be complementary to national criminal jurisdictions" and that it remains "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."<sup>13</sup> This principle, embodied in Article 17 and known as the "complementarity principle," provides that a case is inadmissible at the ICC if it is being investigated or prosecuted by the State with jurisdiction over it, unless that State is "unwilling or unable genuinely to carry out the investigation or prosecution."<sup>14</sup> Functionally, the Article permits a State to challenge the admissibility of a case when that State claims to have exclusive jurisdiction because of its own investigation into the matter.<sup>15</sup> Similarly, Articles 19(2) and 19(5) explicitly permit a State to challenge the admissibility of a case that it claims to have jurisdiction over because of its own investigation.<sup>16</sup>

In addition to defining crimes and procedures for prosecuting them, the Rome Statute enumerates State Parties' obligations to cooperate in investigations.<sup>17</sup> For example, Article 89 states that if the Court issues any arrest warrants for people or parties under investigation, "States Parties shall . . . comply

10. INTERNATIONAL CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 3, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

11. *Id.*

12. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see also *State Parties to the Rome Statute: Kenya*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/kenya.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/kenya.aspx) (last visited Nov. 2, 2019).

13. Rome Statute, *supra* note 12, Preamble; See also In the Cases of Prosecutor v. Ruto and Prosecutor v. Muthaura, Case Nos. ICC-01/09-01/11 and ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the Statute, ¶¶ 23–25 (Mar. 31, 2011).

14. See Totten et al., *supra* note 4, at 700 n.3, 713; see also Rome Statute, *supra* note 12, art. 17(1).

15. See generally Rome Statute, *supra* note 12, arts. 17, 19.

16. *Id.* arts. 19(2), 19(5).

17. The general cooperation provision states: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." *Id.* art. 86.

with requests for arrest and surrender.”<sup>18</sup> Article 93 lists other requirements for State cooperation, including, among others, helping the Court identify the locations of people and items, producing evidence, serving judicial documents, examining places or sights, protecting victims and witnesses, and preserving evidence.<sup>19</sup> In addition, Article 87 authorizes the Court to make requests to State Parties for their cooperation.<sup>20</sup> Recognizing the importance of State cooperation and the potential difficulties in securing it, Article 87(7) also grants the Court the authority to make a formal finding of noncompliance against a State.<sup>21</sup> When making this finding, the provision allows the Court to refer a noncooperating State to one of two international bodies: the Assembly of States Parties (“Assembly”) or the UN Security Council (“Security Council”).<sup>22</sup>

The Assembly is the management oversight and legislative body of the ICC, codified in Part XI, Article 112 of the Rome Statute.<sup>23</sup> Among other things, the Rome Statute tasks the Assembly with managing oversight of the Presidency and the Prosecutor; considering and deciding the Court’s budget; and “[c]onsider[ing] pursuant to article 87, paragraphs 5 and 7, any question relating to noncooperation.”<sup>24</sup> Although it is somewhat unclear what a referral under Article 87(7) requires from the Assembly, the Assembly issued a resolution outlining its general approach for noncooperation procedures in 2018.<sup>25</sup> The Assembly stated that in referred cases, the referral “requires a formal response, including some public elements . . . Depending on the specifics of the case, there may be merit in pursuing an informal and urgent response.”<sup>26</sup> In the same resolution, the Assembly stated that its noncooperation procedures must be carried out “in full respect for the authority and independence of the Court and its proceedings,” and that those procedures are “aimed at enhancing the implementation of the Court’s

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18. *Id.* art. 89(1).

19. *Id.* art. 93(1).

20. *Id.* art. 87(7)(a) (“The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.”).

21. *Id.* art. 87(7) (“Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”).

22. *Id.*

23. *See id.*, art. 112 (“An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisors. Other States which have signed this Statute or the Final Act may be observers in the Assembly.”).

24. *Id.* art. 112(2)(f).

25. *See generally* ICC Res. ICC-ASP/17/Res.5: Strengthening the International Criminal Court and the Assembly of States Parties, Annex II (Dec. 12, 2018), [https://asp.icc-pi.int/icedocs/asp\\_docs/ASP17/RES-5-ENG.pdf#page=24](https://asp.icc-pi.int/icedocs/asp_docs/ASP17/RES-5-ENG.pdf#page=24).

26. *Id.* Annex II(C)(10).

decisions.”<sup>27</sup> The Assembly also outlined various suggestions for how to respond to a referral from the ICC, including writing an open letter to the State reminding it of its obligations to cooperate, drafting a resolution at the next Assembly meeting that contains “concrete recommendations about the matter,” and holding an emergency meeting to “decide on what further action would be required.”<sup>28</sup>

The Security Council has been more explicit in outlining the sanctions it may impose, and has imposed, to “maintain or restore international peace and security.”<sup>29</sup> The United Nations derives its authority to impose sanctions on State Parties from its Charter,<sup>30</sup> and the ICC has entered into an agreement with the United Nations recognizing that the two bodies will cooperate to mutually enforce the provisions of both the Charter and the Rome Statute.<sup>31</sup> In the past, the Security Council has imposed a variety of sanctions on nations to restore peace, including economic and trade sanctions, arms embargoes, and travel bans.<sup>32</sup> The Security Council has emphasized that its sanctions are not meant to be punitive, but rather are “intended to support governments and regions working towards peaceful transition.”<sup>33</sup>

The original cohort of States that adopted the Rome Statute creating the ICC did so, in part, to combat the impunity of governmental leaders committing mass atrocities against civilians.<sup>34</sup> Kenya officially became a State Party on March 15, 2005, and is one of several African nations to become a signatory to the Statute.<sup>35</sup> Commentators have often observed that the Rome Statute derives much of its support from Africa, with African nations comprising 33 out of 122 State Parties.<sup>36</sup> In addition to their historic support of the ICC, a number of African

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27. *Id.*

28. *Id.* Annex II(D)(1)(b)(a), (D)(15).

29. *See* United Nations Security Council, *Sanctions*, <https://www.un.org/securitycouncil/sanctions/information> (last visited Nov. 6, 2019).

30. U.N. Charter art. 43, ¶ 1.

31. *See generally* Relationship Agreement Between the United Nations and the International Criminal Court, U.N.-I.C.C., Oct. 4, 2004, 2283 U.N.T.S. 195.

32. *Sanctions*, *supra* note 29.

33. *Id.* (“Sanctions do not operate, succeed or fail in a vacuum. The measures are most effective at maintaining or restoring international peace and security when applied as part of a comprehensive strategy encompassing peacekeeping, peacebuilding and peacemaking. Contrary to the assumption that sanctions are punitive, many regimes are designed to support governments and regions working towards peaceful transition.”).

34. *See* Rome Statute, *supra* note 12, Preamble (“The States Parties to the Statute . . . [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .”). The charges were also brought against William Ruto and Arap Sang, discussed more fully below, and were also dropped because of insufficient evidence in April 2016. *See* Press Release, ICC, Ruto and Sang Case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future (Apr. 5, 2016), <https://www.icc-cpi.int/pages/item.aspx?name=pr1205>.

35. *State Parties to the Rome Statute: Kenya*, *supra* note 12. There are currently 122 countries that are party to the Statute. *Id.*

36. *See, e.g., id.*; *see also* Bartram S. Brown, *The International Criminal Court in Africa*:

nations have taken additional measures to fight governmental impunity through measures like the formation of the African Union (“AU”).<sup>37</sup> The history of political impunity in Africa is long, complex, and uniquely intertwined with some of the challenges that continue to confront the ICC.<sup>38</sup>

### B. *The Situation in Darfur, Sudan*

Despite African countries’ initial support for the ICC, commentators have observed increasing skepticism toward the ICC from African governments since the ICC brought charges against two sitting Heads of State.<sup>39</sup> In addition to Kenyatta, who was elected as the President of Kenya in 2013, the ICC issued arrest warrants for Omar Hassan Al-Bashir, the President of Sudan, in 2009 and 2010.<sup>40</sup> The Al-Bashir warrants generated strong opposition from the AU and frustrated African support for the ICC, in part because Sudan never ratified the Rome Statute.<sup>41</sup> Therefore, the ICC could only assert its jurisdiction over Sudan because the matter was referred to the Court by the Security Council, as permitted by Article 13(b) of the Statute.<sup>42</sup> After the Court issued and disseminated warrants

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*Impartiality, Politics, Complementarity and Brexit*, 31 TEMP. INT’L & COMP. L.J. 145, 164 (2017) (“At the end of the 1998 Rome Diplomatic Conference, African States overwhelmingly endorsed the Rome Statute, and to this day there are more ICC States Parties from African than from any other single region.”).

37. The African Union (AU) was established by the Constitutive Act of the African Union on July 11, 2000. See Constitutive Act of the African Union, *opened for signature* July 1, 2000, 2158 U.N.T.S. 3 (entered into force May 26, 2001), [https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf). The AU was established for the purpose of achieving multiple objectives across the Continent, including “promot[ing] peace, security and stability on the continent,” “promot[ing] democratic principles and institutions, popular participation and good governance,” and “[p]romot[ing] and protect[ing] human and people’s rights in accordance with the African Charter on Human and People’s Rights and other relevant human rights instruments.” *Id.* art. 3. The Act also codified the establishment of a Court of Justice of the Union. *Id.* art. 18.

38. For a detailed discussion of the history of political instability in Africa and global efforts to fight impunity, see John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73 (2019).

39. *Id.* at 146–47.

40. See Alexandre Skander Galand, *A Global Public Goods Perspective on the Legitimacy of the International Criminal Court*, 41 LOY. L.A. INT’L COMP. L. REV. 125, 129 (2018). The ICC charged Al-Bashir with war crimes and crimes against humanity in 2009, and for genocide in 2010. *Id.* Al-Bashir was the first sitting President to be charged by the ICC.

41. *Id.* at 147.

42. *Id.* Rome Statute Article 13(b) states that the Court may exercise its jurisdiction in “[a] situation in which one or more of such crimes [outlined in the Statute] appears to have been committed [and] is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” Rome Statute, *supra* note 12, art. 13(b). In these situations, the entire legal framework of the Rome Statute applies. See, e.g., Prosecutor v. Al-Bashir, ICC-02-/05-01/09-302, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶ 85 (July 6, 2017) (“The Chamber finds, in line with previous decisions of other Chambers of the Court that the effect of a Security Council resolution triggering the Court’s jurisdiction under article 13(b) of the Statute is that the legal framework of the Statute applies, in its entirety, with respect to the situation referred.”). Interestingly,

for Al-Bashir's arrest to Sudanese authorities and all State Parties, the Sudanese government publicly declared that it had no intention of cooperating with the proceedings against the President.<sup>43</sup>

Even though the Rome Statute required Sudan and all State Parties to comply with the arrest warrants the ICC issued, Al-Bashir continued to evade arrest.<sup>44</sup> In fact, the ICC Office of the Prosecutor reported that Al-Bashir crossed international borders at least 131 times between 2009 and 2016; on fourteen occasions, he entered the territory of a State Party to the Statute.<sup>45</sup> Significantly, unlike in the case against Kenyatta, the Pre-Trial Chamber II actually referred Malawi, Chad, the Democratic Republic of Congo, Djibouti, and Uganda to the Security Council for failing to comply with the arrest warrants for Al-Bashir and for allowing him to travel freely within their borders.<sup>46</sup> Later, when the ICC brought additional charges against Abdallah Banda, the leader of a Sudanese opposition group, for war crimes committed in Sudan during an AU Mission, Sudan again refused to cooperate and bring Banda to the ICC for prosecution.<sup>47</sup> The ICC responded by issuing a formal finding that Sudan had failed to comply with its obligations under the Statute, and referred Sudan to the Security Council.<sup>48</sup> Despite the referral, the Security Council failed to take any further action.<sup>49</sup>

### C. *The Situation in Libya*

While not a situation in which a sitting Head of State was implicated, the prosecution of Saif Al-Islam Gaddafi, son of former Libyan leader Muammar Gaddafi, also posed cooperation challenges for the ICC. Like Sudan, Libya is not

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despite the United Nations Security Council's ability to refer cases, many early supporters of the Rome Statute wanted the Court to be independent of the United Nations. See BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 70–72 (2008).

43. Galand, *supra* note 40, at 130–31.

44. *Id.* at 130.

45. *Id.*

46. *Id.* at 130–31, n.32.

47. *Id.* at 132–33.

48. *Id.* at 133.

49. *Id.* at 133–34. In fact, the ICC actually refused to make a finding of noncompliance against South Africa because of the Security Council's unwillingness to take any meaningful follow-up action. *Id.*; see also Prosecutor v. Al-Bashir, ICC-02-/05-01/09-302, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (July 6, 2017). The Chamber held that Article 27(2) of the Statute, which denies jurisdictional immunities to official Heads of State, means that Al-Bashir was subject to arrest by Sudan and by parties to the Statute, which included South Africa. *Id.* ¶¶ 92–97. Because South Africa failed to arrest Al-Bashir while he was in its territory, South Africa failed to comply with the Court's request for arrest and surrender. *Id.* ¶ 123. The Chamber referenced the *Kenyatta* case and the Prosecutor's motion for a finding of noncompliance, reiterating that the Chamber has discretion to consider all relevant factors before determining whether a referral is necessary. *Id.* ¶ 125. The Chamber concluded that a referral was not proper, in part, because previous referrals to the Security Council had not resulted in any measures against State Parties that failed to cooperate with the Court. *Id.* ¶ 138.



a State Party to the Rome Statute.<sup>50</sup> The ICC therefore asserted jurisdiction over Libya only after the Security Council referred the situation to the ICC in February 2011.<sup>51</sup> In June 2011, the Pre-Trial Chamber issued arrest warrants against three alleged perpetrators of crimes committed in Libya, including Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi.<sup>52</sup> As of December 2014, the same month that the ICC withdrew the charges against Kenyatta, Libya had still failed to surrender Saif Al-Islam Gaddafi to the Court.<sup>53</sup> Libya had also failed to return documents belonging to Al-Islam Gaddafi's former defense counsel, which Libyan officials had seized.<sup>54</sup> Noting that "both outstanding obligations are of paramount importance for the Court's exercise of its functions and powers in the [Libya] case," the Chamber held that a finding of noncompliance was appropriate.<sup>55</sup> In making that finding, the Chamber emphasized that a finding of noncompliance under Article 87(7) of the Statute is "value-neutral" and is not designed to sanction or criticize the State, but rather "makes available to the Court an additional tool so that it may seek assistance to eliminate impediments to cooperation."<sup>56</sup> To foster such cooperation, the Chamber decided to refer the case to the Security Council.<sup>57</sup>

#### D. Declining Support from African Nations

When the ICC eventually brought charges against Kenyatta, Kenya began advocating for a mass withdrawal of AU states from the ICC.<sup>58</sup> In September 2013, Kenya's parliament proposed a motion to withdraw from the ICC, "setting the stage to redeem the image of the Republic of Kenya" in the face of the ICC's investigation into President Kenyatta. Minister of Higher Education William Ruto

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50. *The States Parties to the Rome Statute*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Feb. 23, 2020).

51. Galand, *supra* note 40, at 134; *see also Situation in Libya*, INT'L CRIM. CT., <https://www.icc-cpi.int/libya> (last visited Mar. 24, 2019). The situation arose out of alleged crimes against humanity and war crimes against Libyan citizens, including the repression of peaceful demonstrators, systematic attacks on civilians, the plight of refugees as a result of the violence, and more, arising in part out of an armed conflict that was ongoing throughout the country. *Id.*

52. *Prosecutor v. Gaddafi*, ICC-01/11-01/11-577, Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶¶ 1, 2 (Dec. 10, 2014).

53. *Id.* ¶ 4.

54. *Id.* In June 2012, four Court staff members traveled to Libya to discuss the proceedings. *Id.* ¶ 13. During that visit, Libyan authorities arrested Court members and seized various documents belonging to Gaddafi's former counsel. *Id.*

55. *Id.* ¶ 26.

56. *Id.* ¶ 33.

57. *Id.* ¶ 35.

58. Galand, *supra* note 40, at 142; *see also African states must reject calls to withdraw from the ICC*, AMNESTY INT'L (Oct. 10, 2013), <https://www.amnesty.org/en/latest/news/2013/10/african-states-must-reject-calls-withdraw-icc/> (explaining the movement of a group of African states, including Kenya, leading a campaign against the ICC).

and radio journalist Arap Sang, both of whom were also believed to have played a role in the post-election violence of 2007.<sup>59</sup> To the relief of many, a mass exodus of African countries from the Rome Statute, which was contemplated at an AU summit later that same year, did not materialize.<sup>60</sup> Nevertheless, Kenyatta reignited his crusade against the ICC in February 2016 at the twenty-sixth ordinary summit of the AU Assembly.<sup>61</sup> There, Kenyatta asked the Open-Ended Committee of African Ministers to consider a mandate requiring that the ICC develop a procedure for withdrawing from the Rome Statute “as necessary.”<sup>62</sup> During his speech to the Committee, Kenyatta emphasized that withdrawal should only occur if the ICC failed to meet AU demands.<sup>63</sup> The AU demands included a call for certain ICC “reforms,” such as withdrawing the charges against Ruto and Sang; not applying Article 68 of the Statute, which was amended in 2013 to allow the use of prior recorded testimony in the cases against Ruto and Sang;<sup>64</sup> and amending Article 27 of the Statute to give immunity to sitting Heads of State.<sup>65</sup> At the time of the summit, the charges against Ruto and Sang were still pending at the ICC. Only three months later, the ICC dropped the charges against both defendants due to lack of evidence.<sup>66</sup>

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59. *Kenya parliament votes to withdraw from ICC*, AL JAZEERA (Sept. 5, 2013), <https://www.aljazeera.com/news/africa/2013/09/201395151027359326.html>. Ruto and Sang were both believed to have played a role in the post-election violence in 2007, and the ICC brought charges against them as well. Notably, even if Kenya withdrew its ratification of the Statute, the ICC would still have jurisdiction to prosecute Kenyatta, Ruto, and the remaining defendants. *Id.* Although some members of Kenya’s parliament did make the call to withdraw, other members opposed the motion, arguing that the country would “be seen as a pariah state . . . as people who are reactionary and who want to have their way.” *Id.* (quoting Francis Nyenze, an opponent of the motion). In addition, at least one journalist reported surveys showing that Kenyans opposed withdrawing from the Statute. *Id.*

60. Solomon Ayele Dersso, *The AU’s Extraordinary Summit decisions on Africa-ICC Relationship*, EJIL: TALK! (Oct. 28, 2013), <https://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/>. Despite a call by the AU to suspend the trials against Kenyatta and Ruto, and of any future Heads of State of any parties to the AU, until their elected terms of office were complete, not a single Member State declared its withdrawal from the ICC at the summit in October of 2013. *Id.* As Dersso points out, Article 27 of the Rome Statute requires parties that have accepted the jurisdiction of the ICC to prosecute Heads of State, and this outcome can only be prevented by amending the Rome Statute. *Id.* Therefore, the AU’s declaration lacks an enforcement mechanism for parties that continue to submit to the jurisdiction of the ICC. *Id.*

61. Peter Fabricius, *Follow me, I’m right behind you, says Kenyatta*, POLITICSWEB (Feb. 4, 2016), <http://www.politicsweb.co.za/opinion/icc-follow-me-im-right-behind-you-says-kenyatta>.

62. *Id.*

63. *Id.*

64. *Id.* This amended rule allowed five prior testimonies from witnesses in the Ruto and Sang cases to be presented in court, since four of the witnesses later recanted their testimony and the fifth disappeared. *Id.*

65. *Id.*

66. See Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya’s William Ruto*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html>.

Fear about African withdrawal from the Statute continued to loom in light of widespread criticism that the Court is biased against Africa.<sup>67</sup> As of 2017, every case brought before the ICC arose out of situations in Africa.<sup>68</sup> As candidates emphasized in Kenya's 2007 presidential election, the ICC's repeated assertions of jurisdiction in Africa raise the specter of colonialism because of the Court's rooting in Western policies and power.<sup>69</sup> Some commentators have challenged this perceived bias of the Court, noting, for example, that of the seven cases the ICC has brought in Africa, four of them were self-referrals.<sup>70</sup> These commentators have further argued that self-referrals provide evidence of African support for the Court, rather than indicating the Court's disproportionate interest in Africa.<sup>71</sup> Nevertheless, in 2016, three States—Burundi, The Gambia, and South Africa—threatened to withdraw from the Rome Statute because of perceptions that the Court was being “hijacked by powerful western countries” and “acting as a proxy’ for foreign-led government change.”<sup>72</sup> In 2017, Burundi made good on its promise, becoming the first country in the world to withdraw from the Rome Statute.<sup>73</sup>

### III.

#### THE CASE AGAINST KENYATTA

Despite detailed eyewitness reports of systemic and targeted violence emerging from Kenya after the 2007 election, the ICC struggled to obtain the evidence needed to ultimately secure a conviction against those believed to be

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67. Several commentators have written about the Court's perceived bias against Africa. For a viewpoint challenging this criticism, see Shamiso Mbizvo, *The ICC in Africa: The Fight against Impunity*, in AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE 41–45 (Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder eds., 2016). Mbizvo argues that the Court's persistence in prosecuting mass atrocities evinces support for Africa and acknowledges that African nations comprised some of the most ardent supporters of the Statute.

68. Brown, *supra* note 36, at 145.

69. *Id.* at 146. Some of the criticism comes directly from the leaders of African nations, such as Rwandan president Paul Kagame's comments that the ICC is a “court to try Africans, not people from across the world.” *Rwanda's Paul Kagame accuses ICC of bias against Africa*, AL JAZEERA (Apr. 29, 2018), <https://www.aljazeera.com/news/2018/04/rwanda-kagame-accuses-icc-bias-africa-180429050656022.html>.

70. Brown, *supra* note 36, at 146.

71. *Id.*

72. Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html>.

73. *Id.* It should be noted that the Court was conducting a preliminary examination into Burundi at the time of the State's withdrawal. *Id.* Specifically, the Court was investigating alleged crimes against humanity occurring in the wake of the election of Pierre Nkurunziza. Agence France-Presse, *Burundi becomes first nation to leave international criminal court*, THE GUARDIAN (Oct. 27, 2017), <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>. The election was met with the killing, imprisonment, torture, rape, and forced disappearances of Burundi citizens, causing an estimated five hundred to two thousand deaths and displacing over four hundred thousand other citizens. *Id.*

responsible. This Section analyzes the ICC's case against Kenyatta. In particular, it explores the Court's reluctance to seek assistance from the Security Council and the Assembly of States Parties in securing Kenya's cooperation in building and prosecuting the case against Kenyatta.

*A. The 2007 Presidential Election and Subsequent Violence*

Rumblings of potential election-related violence circulated prior to the 2007 Kenyan presidential election and have been attributed, in part, to the country's history of deep-seated ethnic rivalries. The Maasai and Kikuyu ethnic groups have long disputed the allocation of land since Kenya gained independence from colonial rule.<sup>74</sup> Historically, Kenyan elected officials have harnessed ethnic divisions as a campaign tool, dividing the political allegiances of the country's citizens along ethnic lines.<sup>75</sup> In 2007, the presidential race was primarily between Mwai Kibaki, the incumbent President and a member of the Party of National Unity (PNU), and Raila Odinga, then-Prime Minister and a member of the Orange Democratic Movement party (ODM).<sup>76</sup> The PNU was primarily comprised of citizens of Kikuyu ethnicity, while the ODM received its support from citizens of Luo, Luhya, Kalenjin, and Maasai ethnicities.<sup>77</sup>

Opposition leader Odinga led the popular vote by over one million votes up until the final hours of the tallying process, when votes for the incumbent Kibaki soared, swiftly and inexplicably giving him the victory.<sup>78</sup> Kibaki's victory was especially suspect in light of ODM's majority representation in parliament; ODM won ninety-nine seats compared to PNU's forty-three.<sup>79</sup> After five electoral commissioners publicly denounced the seemingly fraudulent results, the head of

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74. Totten et al., *supra* note 4, at 703; *see also* U.N. High Commissioner for Human Rights, *Rep. from OHCHR Fact-finding Mission to Kenya*, at 5–6 (Feb. 6–28, 2008), <https://www.ohchr.org/documents/press/ohchrkenyareport.pdf>. For example, the Government Lands Act regulates former colonial land and gives the sitting President of Kenya the power to appoint a Commissioner of Lands, who can then lease land for 99-999 years. *Id.* at 6. As a result, land has often been used by political figures as a means of rewarding loyalty. *Id.* at 5-6.

75. Totten et al., *supra* note 4, at 703. In addition, according to some reports, prior to the 2007 election, affiliates of leading candidates circulated leaflets and transmitted text messages containing hate speech about the opposing candidates, inflaming hostilities that later erupted into mass violence. *Id.* at 704. In fact, the Kenya National Commission on Human Rights reported at least seventy deaths from pre-election-related violence in Kenya during campaign rallies. In addition, the Commission reported that over two thousand families had fled their homes in one region, and over twenty thousand registered voters risked being disenfranchised because of the violence. *See* KENYA NAT'L COMM'N ON HUM. RIGHTS, STILL BEHAVING BADLY: SECOND PERIODIC REP. OF THE ELECTION MONITORING PROJECT 6 (Dec. 2007), [https://www.rwi.lu.se/NHRIDB/Africa/Kenya/Kenya\\_KNCHR\\_Election\\_Report\\_2007.pdf](https://www.rwi.lu.se/NHRIDB/Africa/Kenya/Kenya_KNCHR_Election_Report_2007.pdf).

76. Totten et al., *supra* note 4, at 703 n.15.

77. *Id.*

78. HUM. RIGHTS WATCH, BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 22 (Mar. 2008), <https://www.hrw.org/sites/default/files/reports/kenya0308web.pdf>.

79. *Id.*

the Electoral Commission announced that even he could not determine which candidate actually won.<sup>80</sup> Almost immediately after the Electoral Commission announced the final tally at the Kenyatta International Conference Centre in Nairobi on December 30, 2007, journalists were instructed to leave.<sup>81</sup> The Kenyan government ordered broadcasters to cease live broadcasting,<sup>82</sup> and violence and chaos quickly engulfed the country.<sup>83</sup>

Reporters detailed how thousands of men burst into a small town waving sticks, destroying shacks, throwing stones, and fighting soldiers.<sup>84</sup> Witnesses reported that in small towns throughout the country, gangs invaded homes, dragged their inhabitants into the street, and clubbed them to death.<sup>85</sup> Gangs of young men invaded cities, burning homes, killing civilians, and looting businesses.<sup>86</sup> In one instance, a mob set fire to a church filled with citizens fleeing the violence, burning them alive.<sup>87</sup> Human rights experts and health centers reported numerous incidents of gang rape and other sexual violence, which was

80. *Id.* The co-chairwoman of the Kenya Election Domestic Observation Forum, who witnessed the presentation of tally sheets to the election commission, reported that some tally sheets were missing signatures, others were missing stamps, and in some areas, more people voted than the number of registered voters. See Jeffrey Gettleman, *Disputed Vote Plunges Kenya Into Bloodshed*, N.Y. TIMES (Dec. 31, 2007), <https://www.nytimes.com/2007/12/31/world/africa/31kenya.html>.

81. *BALLOTS TO BULLETS*, *supra* note 78, at 22–23.

82. *Id.* In addition, Kibaki was quickly sworn in to beat the onslaught of public outrage, which would have potentially compromised his victory. Totten et al., *supra* note 4, at 704. Nevertheless, the violence raged on, with gunshots heard in the distance as Kibaki was being sworn in. Gettleman, *supra* note 66.

83. According to the United Nations, large scale violence against Kikuyu families started as early as thirty minutes after the announcement of Kibaki's victory. See *OHCHR Fact-finding Mission to Kenya*, *supra* note 74, at 9. Some of the violence began with confrontations between law enforcement and crowds, and some cases involved youth vigilantes believed to have received money from ODM supporters to target PNU supporters or the Kikuyu community. *Id.* at 8. In one instance, 1320 houses belonging to Kikuyu families were attacked simultaneously, further suggesting that perpetrators were targeting individuals along ethnic lines. *Id.*

84. Gettleman, *supra* note 66.

85. *Id.*

86. Xan Rice, *Death toll nears 800 as post-election violence spirals out of control in Kenya*, THE GUARDIAN (Jan. 28, 2008), <https://www.theguardian.com/world/2008/jan/28/kenya.international>. In one incident in Naivasha, nineteen people were burned in their homes or hacked to death by rival tribal gangs. *Id.* The violence was perpetrated along ethnic lines, with gangs of Kikuyus burning the homes and cars of Luos and destroying the businesses of non-Kikuyu citizens. *Id.* In one town, almost two-thirds of the buildings, including a school, were burned in the middle of the night. *Id.* One prominent Kikuyu criminal gang, the Mungiki, was believed to be leading revenge attacks on communities supporting the opposition. *Id.*

87. *Kenya's Post-Election Violence Kills Hundreds*, NPR (Jan. 2, 2008), <https://www.npr.org/templates/story/story.php?storyId=17774507>. At least one human rights expert, when reporting on the violence, expressed “profound[] alarm[] [at] the reports of incitement to racial hatred and the growing frictions between the different ethnic groups,” and called on authorities and ethnic and religious leaders to stop “what may become the dynamics of inter-ethnic killings . . . in the light of historical precedents in the region.” *Id.*

reported by many to be based along ethnic lines.<sup>88</sup> After two months of brutality, Human Rights Watch reported that more than one thousand Kenyans had been killed and up to five hundred thousand people had been internally displaced.<sup>89</sup> In its fact finding report, the United Nations noted that although post-election violence along ethnic lines had occurred in the past, the systematic burning of property in the Rift Valley after the 2007 election suggested that this time, the intention was to permanently displace certain ethnic groups.<sup>90</sup>

### B. *The Charges Against Kenyatta*

Nearly two years after the post-election violence erupted, ICC Prosecutor Luis Moreno-Ocampo asked the Pre-Trial Chamber to authorize an investigation into the parties responsible for the violence in Kenya.<sup>91</sup> The Pre-Trial Chamber granted the requisite authorization on March 31, 2010, and the Prosecutor began his investigation into alleged crimes against humanity that occurred in Kenya between June 1, 2005 and November 26, 2009, including the post-election period.<sup>92</sup> During his investigation, the Prosecutor found evidence<sup>93</sup> linking Kenyatta and five other government officials and public figures to the violence: William Samoei Ruto, Minister of Higher Education, Science and Technology; Henry Kiprono Kosgey, a member of parliament; Joshua Arap Sang, the Head of Operations of the radio station Kass FM; Francis Kirimi Muthaura, Head of Public Service and Secretary to the Cabinet; and Mohammed Hussein Ali, Chief Executive and Head of the National Postal Corporation and former Police

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88. See *250,000 Kenyans displaced by post-electoral violence, UN estimates*, UN NEWS (Jan. 4, 2008), <https://news.un.org/en/story/2008/01/244932-250000-kenyans-displaced-post-electoral-violence-un-estimates>. Reports from specialized health centers serving female survivors of sexual assault and sexual violence after the election suggested that gangs of men were targeting women and children of particular ethnic groups, and that sexual violence accompanied other physical brutality toward these victims. Nairobi Women's Hospital and the Coast General Hospital in Mombasa reported double to triple the number of women seeking treatment for sexual assault in the months following the beginning of the violence. Humanitarians and physicians were especially concerned about sexual violence because of the high prevalence of HIV throughout the country. See *Sexual Violence Threatens Women and Girls in Kenya's Post-Election Crisis*, UNITED NATIONS POPULATION FUND (Mar. 5, 2008), <https://www.unfpa.org/news/sexual-violence-threatens-women-and-girls-kenyas-post-election-crisis>.

89. *BALLOTS TO BULLETS*, *supra* note 78, at 2.

90. *OHCHR Fact-finding Mission*, *supra* note 74, at 10 ("Of particular note . . . is that contrary to previous incidents of electoral violence, which had led to the temporary displacement of Kikuyu families, this time property was systematically burned and razed and some villages renamed under Kalenjin appellation, leaving little doubt as to the intent to evict any perceived 'outsiders' for good.").

91. *Prosecutor v. Muthaura*, ICC-01/09-02/11-382, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 1 (Jan. 23, 2012).

92. *Id.*

93. *Id.* The evidence consisted primarily of eyewitness reports, including reports from members of the Mungiki organization that was widely believed to be responsible for the organized attacks. *Id.* ¶ 119. Some of the witnesses reported that the attacks were planned and alleged that Kenyatta's associates were responsible. *Id.* ¶ 147. The Prosecutor also relied on reports from other organizations that investigated the violence and the surrounding circumstances. *Id.* ¶¶ 121–22.

Commissioner.<sup>94</sup> In December 2010, the Prosecutor requested that the Pre-Trial Chamber find reasonable grounds to believe that Kenyatta and the others committed various crimes within the ICC's jurisdiction and issue a summons for all of them to appear before the tribunal.<sup>95</sup> The Pre-Trial Chamber granted the motion, and Muthaura, Kenyatta, and Ali voluntarily appeared before the tribunal on April 8, 2011.<sup>96</sup>

The Prosecutor charged Kenyatta and the other defendants with multiple crimes against humanity in violation of the Rome Statute, including murder, deportation, or forcible transfer of population; rape and other forms of sexual violence; other inhumane acts; and persecution.<sup>97</sup> In particular, the Prosecutor alleged that Kenyatta helped conspire to organize attacks against ODM supporters by soliciting the aid of the Mungiki criminal organization and the local police force.<sup>98</sup>

Kenyatta's defense team initially challenged the ICC's jurisdiction, arguing that Kenyatta had not attacked any civilian population pursuant to a State or "organizational" policy within the meaning of Article 7(2)(a)<sup>99</sup> of the Statute.<sup>100</sup> The defense argued that any "organization" within the meaning of the Rome Statute must take on the characteristics of the State government. Because none of the ICC's evidence linked any of Kenyatta's crimes to any State-sponsored "organizational" policy, the defense argued that the allegations against him did

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94. Ocampo bifurcated the situation in Kenya into two separate cases. In the first case, Ocampo charged defendants Ruto, Kosgey, and Sang, whose radio station was allegedly affiliated with one of the two political camps. *See* Galand, *supra* note 40, at 141; *see also* Totten et al., *supra* note 4, at 744. Kenyatta was implicated separately, along with Muthaura and Ali. Galand, *supra* note 40, at 141; Totten et al., *supra* note 4, at 744.

95. Situation in the Republic of Kenya, ICC-01/09-31-Red, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Public Redacted Version) (Dec. 15, 2010).

96. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 4. Prior to the confirmation of charges, the Chamber received a number of filings and issued a number of decisions dealing with pre-trial issues. *Id.* ¶ 5. In total, the Chamber received over 280 filings and issued 90 decisions between the suspects' initial appearance on April 8, 2011 and the issuance of the Pre-Trial Chamber's decision concerning the Confirmation of Charges on January 23, 2012. *Id.* This Note does not address all of these filings and instead limits its discussion to the most salient decisions and filings pertaining to Kenya's cooperation in the investigative and adjudicative process.

97. *Id.* ¶ 21. The Pre-Trial Chamber charged Muthaura with the same crimes and included him in the same counts, and it charged Ali with the same crimes in separate counts. *Id.* The elements of the charged crimes can be found in the Rome Statute, *supra* note 12, at Article 7.

98. *Id.* ¶¶ 287-90.

99. Article 7 of the Statute defines "crimes against humanity" as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population." Rome Statute, *supra* note 12, art. 7(1). After enumerating the various acts constituting a crime against humanity, the Statute defines the term "attack directed against any civilian population" in Article 7(2)(a) as "a course of conduct involving multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." *Id.* art. 7(2)(a).

100. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 27.

not fall within the purview of Article 7(2)(a).<sup>101</sup> The Pre-Trial Chamber dismissed these challenges and held that the defense was functionally attacking the merits of the Prosecutor's case rather than challenging the threshold jurisdictional question.<sup>102</sup> As an additional threshold matter, the Pre-Trial Chamber determined that the case rose to the level of gravity required to justify further action by the Court.<sup>103</sup>

The Pre-Trial Chamber then evaluated the sufficiency of the Prosecutor's evidence to determine whether it demonstrated "substantial grounds" to believe that Kenyatta committed the charged crimes, as required by Article 61(7) of the Statute.<sup>104</sup> Drawing upon its evidentiary standard in the case against Jean-Pierre Bemba Gombo, the Pre-Trial Chamber noted that the Article 61(7) evidentiary threshold required the Prosecutor to offer "concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations."<sup>105</sup> The Pre-Trial Chamber also stated that it independently assesses each piece of evidence, including an evaluation of relevance and probative value, to determine whether there are substantial grounds to believe that the suspects committed the charged crimes.<sup>106</sup> After analyzing the evidence presented, the Pre-Trial Chamber found substantial grounds to believe that Kenyatta was criminally responsible as a coconspirator of crimes against humanity.<sup>107</sup> These evidentiary grounds included: witness statements from members of the Mungiki organization,<sup>108</sup> reports from various humanitarian and international aid organizations,<sup>109</sup> eyewitness accounts of Kenyatta's meeting with high-ranking

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101. *Id.*

102. *Id.* ¶¶ 30, 35.

103. *Id.* ¶¶ 39–40. Ali challenged the admissibility of the case under Article 17(1)(d), arguing that the case against him did not rise to the level of gravity required by the Statute. *Id.* ¶ 40. The Pre-Trial Chamber again rejected this argument, holding that his case met the sufficient gravity requirement and was therefore admissible. *Id.* ¶ 50.

104. *Id.* ¶ 51. The relevant portion of the Statute states that "[t]he Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." Rome Statute, *supra* note 12, art. 61(7).

105. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 52 (quoting Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/04-01/07-717, ¶ 65).

106. *Id.* ¶ 75.

107. *Id.* ¶ 428. The Pre-Trial Chamber did not find that there was sufficient evidence to charge Ali, however. *Id.* ¶ 429. Judge Hans-Peter Kaul issued a separate dissenting opinion, arguing that the crimes alleged were not committed in furtherance of a policy of an organization within the meaning of Article 7(2)(a) of the Rome Statute. Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Dissenting Opinion by Judge Hans-Peter Kaul (Jan. 29, 2012).

108. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 119.

109. *Id.* ¶¶ 121–22.



Mungiki officials before the crimes,<sup>110</sup> and eyewitness accounts of Kenyatta giving money to those officials in exchange for the attacks.<sup>111</sup>

### C. Kenya's Noncooperation and the Withdrawal of Charges

Prior to making an initial appearance before the Pre-Trial Chamber, the Kenyan defendants again filed an application challenging the ICC's jurisdiction, this time basing their objections on the complementarity principle.<sup>112</sup> In essence, the Kenyan defendants argued that Kenya had undertaken a number of constitutional and judicial reform measures, and took some steps to investigate lower-level perpetrators of the violence in the wake of the 2007 election.<sup>113</sup> The Pre-Trial Chamber ultimately concluded that Kenya had taken no "concrete steps" against the defendants and that it had no plans to do so.<sup>114</sup> It also scrutinized Kenya's assertions that the country had taken affirmative steps to investigate and prosecute those responsible for the post-election atrocities.<sup>115</sup> In its motion challenging the Court's jurisdiction, Kenya condemned the Prosecutor's allegations that the Kenyan government's failure to provide access to witnesses and documents in the prosecution of Muthaura constituted only limited assistance.<sup>116</sup> Kenya also responded to the Prosecutor's allegations of noncompliance, expressing its concerns about the consequences of the ICC's portrayal of Kenya's efforts. Specifically, Kenya argued: "It cannot be right that

110. *Id.* ¶ 307.

111. *Id.* ¶¶ 334–35.

112. In the cases of Prosecutor v. Ruto and Prosecutor v. Muthaura, Case Nos. ICC-01/09-01/11 and 01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011).

113. *Id.* ¶¶ 2, 6. In particular, Kenya argued that in the wake of the violence, it adopted a new constitution incorporating a bill of rights that strengthened fair trial rights and procedural guarantees, and strengthened the ability of national courts to hear cases relating to the post-election violence. *Id.* ¶ 2. Kenya also outlined a timeline of steps it intended to take in order to investigate and prosecute those responsible for the violence. *Id.* ¶¶ 14–20. In addition, Kenya outlined the investigative steps it took after the election and after the Pre-Trial Chamber authorized an investigation into Kenya, including the establishment of the Commission of Inquiry into Post-Election Violence (CIPEV), the Truth, Justice and Reconciliation Commission, and the Independent Review Commission on the General Elections. *Id.* ¶¶ 34–37; *see also* Totten et al, *supra* note 4, at 736–37.

114. *Id.* ¶ 60.

115. *See* Prosecutor v. Kenyatta, ICC-01/09-02/11-713, Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the Alternative, Application for Leave to File Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (Apr. 8, 2013); *see also* Prosecutor v. Muthaura, ICC-01/09-02-11-673, Public Redacted Version of the Additional Prosecution Observations on the Defence's Article 64 Applications, Filed in Accordance with Order Number, ¶ 24 (Mar. 8, 2013) ("[T]he Prosecutor took the following investigative steps . . . [including] multiple steps to interview senior members of the Kenya Police – interviews that were blocked by a preliminary injunction, supported by the Government of Kenya ("GoK"), that remains in place two years later, despite the Prosecution's repeated requests to the GoK to ask the Court to designate judges to hear the case on the merits . . .").

116. Government of Kenya's Submissions on the Status of Cooperation, ICC-01/09-02/11-713 ¶ 3.

a State's internal security is suborned by an outside agency's ill-supported allegations of non-cooperation which has the potential to erode national regard for the institutions of Government and their compliance with the rule of law."<sup>117</sup> Kenya again cited several of its actions in the wake of the 2007 post-election violence as evidence of its cooperation, including: the government's affirmative decision not to withdraw from the Rome Statute after the ICC launched an investigation;<sup>118</sup> the establishment of various commissions and task forces to investigate the post-election violence;<sup>119</sup> and the senior government officials' testimony before the Pre-Trial Chamber, which, according to the Kenyan government, constituted "a remarkable degree of engagement and cooperation."<sup>120</sup>

Despite Kenya's protestations, the Prosecutor filed a motion for a finding of noncompliance under Article 87(7) of the Rome Statute.<sup>121</sup> The party seeking an Article 87(7) finding bears the burden of demonstrating that the State did not make a good faith effort to cooperate.<sup>122</sup> The Prosecutor argued that for nineteen months, she attempted to secure financial records pertaining to Kenyatta's conduct that were critical to determining his guilt. In particular, the Prosecutor argued that information pertaining to Kenyatta's finances was crucial for proving that Kenyatta helped fund the post-election violence in 2007.<sup>123</sup> The Prosecutor initially reached out to the Kenyan government in 2012 seeking these records and asking the government to freeze all of the defendants' assets.<sup>124</sup> The Kenyan government initially responded to the requests by asking for more details about what specific information the Prosecutor sought, and after nearly five months, the government still had not produced the requested information.<sup>125</sup> The Prosecutor even traveled to Kenya and spoke to then-President Kibaki, specifying the

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117. *Id.* ¶ 15.

118. *Id.* ¶ 25.

119. *Id.* ¶ 27.

120. *Id.* ¶ 34. The government went on to remind the Chamber that under the Statute, it only has a duty to cooperate, so "whether or not [the evidence it provides] is viewed as helpful or unhelpful to the prosecutor is irrelevant." *Id.* In sum, Kenya argued that the Prosecutor was attempting to attribute the Prosecutor's own failure to obtain enough evidence to Kenya's inaction. *Id.*

121. See Prosecutor v. Kenyatta, ICC-01/09-02/11-866, Prosecution Application for a Finding of Non-compliance Pursuant to Article 87(7) Against the Government of Kenya (Dec. 2, 2013).

122. Prosecutor v. Kenyatta, ICC-01/09-02/11-982, Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute, ¶ 42 (Dec. 3, 2014). "[T]he Chamber's assessment is based not on whether all of the materials sought in the Revised Request have been supplied, but rather on whether the Kenyan Government has taken reasonable steps to execute the request." *Id.* ¶ 74.

123. Prosecutor Application for a Finding of Non-compliance, ICC-01/09-02/11-866 ¶ 30; see also Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 384 ("[T]he evidence placed before the Chamber shows that [Kenyatta] was in charge of the provision of financial and logistical support to the direct perpetrators of the crimes . . .").

124. Prosecutor Application for a Finding of Non-compliance, ICC-01/09-02/11-866 ¶ 6.

125. *Id.* ¶¶ 8–10.

information needed and emphasizing the urgency of the request, yet the Kenyan government continued to refuse to provide the necessary information.<sup>126</sup>

All of those attempts, according to the Prosecutor, failed because of Kenya's "obfuscation and intransigence."<sup>127</sup> With only two months remaining before trial, the Kenyan government still had not complied with the Prosecutor's attempts to secure the records, hindering the Prosecutor's ability to investigate the facts of the case and the Trial Chamber's ability to exercise its truth-seeking function.<sup>128</sup> The Prosecutor asked the Chamber to make a formal finding of Kenya's noncompliance in the investigation against Kenyatta, emphasizing Kenya's lack of meaningful attempts to comply with records requests and its failure to identify any specific legal impediments that would justify its inability to satisfy those requests.<sup>129</sup> In sum, the Prosecutor alleged that Kenya's repeated, lengthy delays and ineffective responses evinced a deliberate disregard of its obligation to cooperate and that the Chamber should make a finding of noncompliance and refer the matter to the Assembly of States Parties.<sup>130</sup>

Although the Trial Chamber concluded that Kenya met the threshold for a finding of noncompliance, it nonetheless rejected the Prosecutor's Article 87(7) application.<sup>131</sup> In its decision, the Chamber first noted its broad discretion under Article 87(7) of the Statute, and explained that a finding of noncompliance is not appropriate in every instance where a State fails to adhere to the Court's request.<sup>132</sup> The Chamber asserted that cooperation between *both* parties is key: "[B]oth the requesting entity and the requested State should make genuine efforts to resolve any difficulties in order to facilitate the execution of a request."<sup>133</sup> After evaluating both the Prosecutor's and Kenya's attempts to cooperate in the fact finding process, the Chamber concluded that Kenya failed to provide sufficient

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126. *Id.* ¶¶ 11–14.

127. *Id.* ¶¶ 1–2. In its revised request, the Prosecutor sought to obtain various documents pertaining to Kenyatta. These documents included: records of companies, businesses or partnerships in which Kenyatta maintained an ownership interest; records relating to Kenyatta's real property; records identifying Kenyatta's income tax and value added tax returns; records relating to Kenyatta's vehicles; records relating to Kenyatta's financial accounts, including savings and other accounts; records relating to financial transactions at foreign exchange institutions; telephone numbers used by Kenyatta; and any records of information contained by Kenyan security and intelligence services concerning Kenyatta's activities. *See* Decision on Prosecution's Application for a Finding of Non-compliance, ICC-01/09-02/11-982.

128. Prosecution Application for a Finding of Non-compliance, ICC-01/09-02/11-866 ¶ 2. "Information regarding to the Accused's finances is directly relevant to the Prosecution's allegation that he helped fund the violence following the election in Kenya in 2007, and therefore is likely to assist the Chamber in adjudicating the charges against him. In the absence of this material, the Chamber's ability to determine the truth is severely curtailed." *Id.* ¶ 30.

129. *Id.* ¶¶ 25, 28.

130. *Id.* ¶¶ 25, 31.

131. Decision on Prosecution's Application for a Finding of Non-compliance, ICC-01/09-02/11-982 ¶ 88.

132. *Id.* ¶ 40.

133. *Id.*

explanations for its inability to produce certain documents, failed to consider alternative approaches to obtaining the necessary information, and took no meaningful steps to comply with the Prosecutor's requests.<sup>134</sup> Thus, according to the Chamber, Kenya satisfied the threshold for noncompliance under Article 87(7).<sup>135</sup>

The Trial Chamber next considered whether or not Kenya's noncompliance affected the Court's ability to exercise its powers and functions under the Rome Statute.<sup>136</sup> Despite concluding that Kenya's actions had this effect,<sup>137</sup> the Trial Chamber rejected the Prosecutor's request to make a formal finding of noncompliance under Article 87(7). The Trial Chamber reasoned that referring the case to the Assembly of States Parties might prolong the proceedings, especially in light of the Prosecutor's own admissions that the evidence sought might not be sufficient to secure a conviction.<sup>138</sup> In addition, the Trial Chamber expressed dissatisfaction at the Prosecutor's "complaisant approach" throughout the investigation, suggesting that the Prosecutor should have challenged Kenya's refusals to submit evidence at an earlier stage in the proceedings.<sup>139</sup> Despite concerns about Kenya's lack of cooperation, the Chamber was "not persuaded that the circumstances warrant[ed] referral on the basis of exhaustion of judicial measures at this stage."<sup>140</sup>

Only two days after the Trial Chamber issued its decision on noncompliance, the Prosecutor withdrew the charges of crimes against humanity against Kenyatta, citing a lack of evidence proving Kenyatta's criminal responsibility beyond a reasonable doubt.<sup>141</sup> Prosecutor Fatou Bensouda, who replaced Ocampo during the Kenya investigation, issued a public statement calling the withdrawal of charges "a dark day for international criminal justice."<sup>142</sup> Bensouda criticized Kenya for its lack of cooperation in the investigation, noting that several witnesses

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134. *Id.* ¶¶ 74–78.

135. *Id.* ¶ 78. It should be noted that the Chamber also identified several alternative methods of investigation and evidence collection that the Prosecutor could have taken. *Id.* ¶¶ 49–50.

136. *Id.* ¶ 79.

137. *Id.* ("[T]he Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfill its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute.").

138. *Id.* ¶ 82.

139. *Id.* ¶ 88. "[T]he approach adopted by the Prosecution to the cooperation was, in some respects, not reflective of a prosecutorial and investigative body effectively seeking to obtain the requested materials. If the primary objective of pursuing the cooperation request at this time was to actually obtain the requested materials, the Chamber would have expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecution." *Id.*

140. *Id.* ¶ 89.

141. Prosecutor v. Kenyatta, ICC-01/09-02/11-983, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014).

142. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta*, INT'L CRIM. CT. (Dec. 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2&ln=en>.

had died or recanted their statements while other witnesses refused to testify out of fear, and that the Kenyan government refused to surrender documents critical to proving the elements of the crimes charged.<sup>143</sup> The Prosecutor clarified, however, that she withdrew the charges without prejudice, leaving the door open for a potential prosecution if new evidence became available in the future.<sup>144</sup> On March 13, 2015, the Trial Chamber confirmed the withdrawal and terminated the proceedings against Kenyatta.<sup>145</sup>

#### IV.

##### A NEW PATH TO COOPERATION: ARTICLE 87(7)

The perception that the ICC is targeting Africa and the lingering fear of African countries' withdrawal from the Statute are not the only threats to the Court's legitimacy. The lack of cooperation the ICC has tolerated in its investigations and prosecutions up to this point, which is permitted by the discretionary nature of Article 87(7) of the Statute, has also endangered the Court's legitimacy. As one scholar noted, compliance at the ICC is "associated with social legitimacy[,] as the former signals whether the State believes that the institution has the right to rule."<sup>146</sup> Part IX, Articles 86–102 of the Rome Statute explicitly address the issue of State compliance. However, only Article 87 expressly dictates the consequences that State Parties to the Statute will face if they refuse to comply with investigations pending at the Court. Specifically, Article 87(7) authorizes the ICC to refer matters of State noncompliance to the Security Council or to the Assembly of States Parties, even though the Statute does not further outline the purpose or consequence of such a referral.<sup>147</sup>

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143. *Id.*

144. *Id.*

145. Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the withdrawal of charges against Mr Kenyatta (Mar. 13, 2015). The Prosecutor had dismissed the charges against Muthaura in March of 2013, nearly two years before dismissing charges in the *Kenyatta* case. In that case, too, the Prosecutor cited insufficient evidence due to "investigative challenges, including a limited pool of potential witnesses, several of whom have been killed or died since the 2007-2008 post-election violence in Kenya, and others who are unwilling to testify or provide evidence to the Prosecution." Prosecutor v. Muthaura, ICC-01/09-02/11-687, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura (Mar. 11, 2013). Further, the Prosecutor noted that "[d]espite assurances of its willingness to cooperate with the Court, the Government of Kenya has in fact provided only limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may have been useful in the case against Mr. Muthaura." *Id.*

146. Galand, *supra* note 40, at 145. For a compelling sociological discussion of various sources of legitimacy and the current adequacy of the ICC in ensuring legitimacy, see generally *id.*

147. Rome Statute, *supra* note 12, art. 87(7) ("Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.").

Despite Article 87(7)'s delegation of power to the ICC to make a finding of noncompliance and to refer such matters to other international political bodies like the Security Council, the Court has not consistently or sufficiently applied this provision to significant instances of State noncompliance. The contrast between the Court's application of the provision in the *Kenyatta* and *Gaddafi* cases, which were decided within a week of one another, offers an illustrative example.

In the *Kenyatta Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*,<sup>148</sup> the Trial Chamber acknowledged that *Kenyatta* was the Court's first opportunity to adjudicate the issue of a State failing to comply in the investigation phase of a case.<sup>149</sup> The Chamber divided its noncompliance analysis into two parts. First, the Chamber considered whether the State failed to comply because of "unjustified inaction or delay, or a clear failure to have in place appropriate procedures for effecting the cooperation."<sup>150</sup> If so, the Chamber could exercise its discretionary power to determine "whether making a finding pursuant to Article 87(7) of the Statute is appropriate in the circumstances."<sup>151</sup> The Chamber further noted that a State's compelling justifications for failures to comply may be a valid consideration under both prongs of the analysis.<sup>152</sup> After analyzing eight categories of evidence that Kenya failed to turn over to the Prosecutor, the Chamber held that Kenya did not provide a sufficient justification for its failures and took no meaningful steps to comply with evidentiary requests. Thus, the Chamber found that the first prong of the noncompliance analysis was satisfied.<sup>153</sup>

In evaluating the second part of the analysis, the Trial Chamber considered whether a formal finding of noncompliance would "promote the functions of the Court and assist a fair trial."<sup>154</sup> It emphasized that a finding of noncompliance would ultimately leave the remedial question to the Assembly of States Parties or the Security Council.<sup>155</sup> The Trial Chamber also noted that the Prosecutor bore the burden of demonstrating that Kenya's conduct warranted such a finding.<sup>156</sup> With these considerations in mind, the Trial Chamber concluded that a finding of noncompliance was inappropriate in *Kenyatta's* case, despite Kenya's

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148. Prosecutor v. *Kenyatta*, ICC-01/09-02/11-982, Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute (Dec. 3, 2014).

149. *Id.* ¶ 38. Article 98 of the Rome Statute requires States to comply in any and all investigations and lists various forms of assistance that State Parties are required to provide. The Chamber contrasted this request with previous requests for noncompliance findings under Articles 89(1) and 91 of the Statute for State failures to cooperate by failing to arrest and surrender subjects under investigation. *Id.*

150. *Id.* ¶ 42.

151. *Id.* ¶ 39.

152. *Id.*

153. *Id.* ¶¶ 74–78.

154. *Id.* ¶ 80.

155. *Id.* ¶ 81.

156. *Id.* ¶ 80.

noncooperation. The Chamber reasoned that a referral might result in further uncertainty and delay in the proceedings; that the Prosecutor had conceded that the evidence fell below the standard required for trial, even if the records requests were to be fully executed; and that a referral would not facilitate a fair trial or be in the interest of justice.<sup>157</sup>

Critically, the Trial Chamber left open the possibility of referring a case to the Assembly of States Parties under Article 87(7) in cases where such an action would promote future cooperation, or when the noncooperation at issue “is of a serious nature.”<sup>158</sup> The Trial Chamber also seemingly suggested, however, that the impetus is on the Prosecutor to issue cooperation requests under Article 98(1) of the Statute and to follow up on its requests “expeditiously, thoroughly and meaningfully.”<sup>159</sup> Interestingly, the plain text of Article 93 does not include any prosecutorial “diligence” requirement. Rather, Article 93 places the burden of cooperating in all aspects of the investigation squarely on the State.<sup>160</sup> Nevertheless, in *Kenyatta*, the Chamber criticized the Prosecutor for failing to demonstrate sufficient efforts in obtaining the requested information, which the Chamber ultimately determined to be fatal to a finding of noncompliance under Article 87(7).<sup>161</sup>

Critically, the Trial Chamber’s implication that the Prosecutor has the burden of continually seeking evidence States deliberately and persistently refuse to provide seems to undercut the applicability of Article 87(7) altogether.<sup>162</sup> Further, in its decision, the Chamber gives no guidance about how far this burden extends, and at what point the Prosecutor’s obligation to continue attempting to obtain information ends and the Court’s obligation to make a referral to the Assembly of

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157. *Id.* ¶ 82. The Chamber also noted that, in a decision issued on the same day, it had denied the Prosecutor’s request to delay the trial until its evidentiary basis for pursuing charges improved. *Id.* ¶ 83.

158. *Id.* ¶ 84.

159. *Id.* ¶ 85.

160. See Rome Statute, *supra* note 12, art. 93 (“State Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions.”). At least one scholar has acknowledged that the investigation stage highlights the differences between international and national justice systems. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 104 (William A. Schabas, 1st ed. 2001). Schabas stated: “Under a national justice system, the prosecuting authority has more or less unfettered access to witnesses and material evidence, subject to judicial authorization where search or seizure are involved. The matter is not nearly as simple for an international court, because the prosecutor must conduct investigations on the territory of sovereign States. The investigation depends on the receptivity of the domestic legal system to initiatives from the Prosecutor’s office. This will be especially difficult in the case of States that are not parties to the Statute or States that find themselves threatened by such an investigation, both of them rather probable scenarios.” *Id.* at 104.

161. Decision on Prosecution’s Application for a Finding of Non-compliance, ICC-01/09-02/11-982 ¶¶ 85–87.

162. This clearly contradicts the Court’s own characterization of Article 87(7) as a “tool . . . to eliminate impediments to cooperation.” See *supra* note 52 and accompanying text.

States Parties or the Security Council begins.<sup>163</sup> Despite the Chamber's insistence on the discretionary nature of its decision to refer the matter to the Security Council or the Assembly of States Parties, *Kenyatta* demonstrates that Article 87(7) cannot operate with any functional utility if the Chamber's discretion is limitless.

In the *Gaddafi* case, however, the Pre-Trial Chamber took a different approach in its noncompliance analysis. When Libya failed to surrender a defendant to the Court and to return defense counsel documents that Libyan officials had seized, the Pre-Trial Chamber again faced the issue of whether or not to make a formal finding of noncompliance.<sup>164</sup> The Pre-Trial Chamber first acknowledged that Libya had a duty to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor."<sup>165</sup> However, the Pre-Trial Chamber noted that "a finding of non-compliance under [A]rticle 87(7) of the Statute only requires an objective failure to comply, regardless of the State's underlying motives."<sup>166</sup> It then concluded that because Libya objectively failed to surrender Gaddafi to the authorities and return the missing documents, a noncompliance finding under Article 87(7) was appropriate, as was a referral to the Security Council.<sup>167</sup> Significantly, despite its declaration that this finding was based solely on Libya's failure to comply with its obligations to the Court, the Pre-Trial Chamber seemed to consider other factors in its analysis. For example, the Pre-Trial Chamber noted that "both outstanding obligations" to surrender the defendant and the documents were of "paramount importance for the Court's exercise of its functions and powers in the present case."<sup>168</sup> Furthermore, the Pre-Trial Chamber emphasized that Gaddafi's continued detention in Libya deprived

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163. Decision on Prosecution's application for a finding of non-compliance, ICC-01/09-02/11-982 ¶ 88 ("If the primary objective of pursuing the cooperation request [under Article 98] at this time was to actually obtain the requested materials, the Chamber would have expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecution. The Chamber does not accept that the Prosecution has no independent means of taking such an approach. It ought to be pursued both throughout the course of the cooperation and when ultimately seeking to persuade the Chamber that a finding under Article 87(7) of the Statute is warranted.")

164. Prosecutor v. Gaddafi, ICC-01/11-01/11-577, Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 4 (Dec. 10, 2014).

165. *Id.* ¶ 21. The Pre-Trial Chamber did not reference Article 93, however, which explicitly requires parties subject to the Court's jurisdiction to comply with requests for cooperation issued by the Prosecutor.

166. *Id.* ¶ 33.

167. *Id.* ¶¶ 34–35.

168. *Id.* ¶ 26. The Chamber went on to state that "the initial appearance of Saif Al-Islam Gaddafi before the Chamber upon his surrender to the Court is a necessary precondition under the Statute for the proceedings in the present case to unfold and move forward to the stage of the Chamber's consideration on whether the available evidence is sufficient to commit Saif Al-Islam Gaddafi to trial." *Id.* ¶ 27.



him of his right to participate in his defense before the ICC<sup>169</sup> and deprived the victims of his crimes of their rights to justice.<sup>170</sup>

Although the *Kenyatta* and *Gaddafi* Article 87(7) decisions were issued within a single week of each other, both the Pre-Trial and Trial Chambers' conclusions and analyses in these cases remain at odds with one another. As a preliminary matter, it is unclear why the Pre-Trial Chamber utilized an "objective" test to determine whether or not it should make a finding of noncompliance in *Gaddafi*, but the Trial Chamber did not do the same in *Kenyatta*. This difference seems particularly anomalous given that the Pre-Trial Chamber expressly acknowledged that Libya had shown a commitment to the Court and had made efforts to cooperate, but the Trial Chamber expressly reached the opposite conclusion in *Kenyatta*.<sup>171</sup> Another particularly significant disparity in the two cases is the weight given to victims' rights in the noncompliance analysis. While the Pre-Trial Chamber considered victims' rights in *Gaddafi*, the Trial Chamber inexplicably made no mention of them in *Kenyatta*.

Furthermore, the Trial Chamber's decision in *Kenyatta* implied that a referral under Article 87(7) and the attendant noncompliance finding should be reserved for cases in which noncooperation is of a "serious nature."<sup>172</sup> However, it is unclear why one State's deliberate, unjustifiable refusal to produce critical evidence does not rise to the level of seriousness contemplated by the Trial Chamber.<sup>173</sup> The *Gaddafi* case illustrated noncooperation of a "serious nature."<sup>174</sup> In that case, the Pre-Trial Chamber correctly identified the Court's obvious inability to administer justice when a State fails to surrender a charged suspect.<sup>175</sup> However, the contrasting results in *Kenyatta* and *Gaddafi* concerning the appropriateness of noncompliance cannot be justified simply because one State failed to produce a charged suspect and the other failed to produce critical evidence. Of course, it is axiomatic that a prosecution is simply not possible if the subject at issue fails to ever appear before the Court. However, as the *Kenyatta* case demonstrated to both the ICC and the rest of the world, prosecution is likewise impossible if States refuse to meaningfully participate in an investigation.<sup>176</sup>

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169. *Id.* ¶ 28.

170. *Id.* ¶ 29.

171. *Id.* ¶ 31.

172. Prosecutor v. *Kenyatta*, ICC-01/09-02/11-982, Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute, ¶ 84 (Dec. 3, 2014).

173. *Id.*

174. *Id.*

175. See Prosecutor v. *Gaddafi*, ICC-01/11-01/11-577, Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 32 (Dec. 10, 2014) ("[T]he Chamber cannot ignore its own responsibilities in the proceedings and its duty to deploy all efforts to protect the rights of the parties and the interests of victims.").

176. For a discussion on the implications of the Statute's limitations on investigation, see

The *Kenyatta* case posed significant challenges for the ICC. The Court faced the scrutiny and backlash of an entire continent because of its pursuit of an investigation into atrocities committed against civilians for political gain. The Court struggled to secure Kenya's cooperation from the start, in large part because Kenyatta, like many other defendants the ICC has attempted to prosecute, was in a position of power to influence Kenya's cooperation with the Court.<sup>177</sup> In pursuing the investigation, the Court was forced to confront a fundamental question about how to operate effectively on a global scale: How does an international body adequately prosecute crimes when the individuals most able to facilitate the investigation are the very individuals subject to investigation?

The answer may lie in Article 87(7), but that provision is not self-executing. Although Article 87(7) authorizes a referral to two different international bodies with the power to impose sanctions, it does not *require* sanctions, nor does it require the Court to take any action at all. Notwithstanding the provision's shortcomings and the historical unwillingness of the Assembly of States Parties or the Security Council to take meaningful action when a referral is made, the ICC erred by declining to make a formal finding of noncompliance in *Kenyatta*. By failing to do so, the ICC implicitly ratified certain kinds of noncompliance that are just as detrimental to the successful prosecution of defendants as a State's failure to surrender defendants to the Court. By showing parties to the Rome Statute that there are no consequences for thwarting the Court's efforts to investigate, failing to make a finding of noncompliance under Article 87(7) may help States obtain the very result that they seek by their noncooperation: a dismissal of the charges against them.

In light of the ICC's failure to make a finding of noncompliance, the ICC eliminated the possibility of sanctions or any remedial action that the Assembly of States Parties or the Security Council had the authority to make.<sup>178</sup> Although

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Christian M. De Vos, *The International Criminal Court: Between law and politics*, in INT'L CRIM. L. IN CONTEXT (Philipp Kastner ed., 2nd ed. 2018). De Vos argued: "More directly, such methods [of limited investigation] have also imperiled the ICC's credibility; indeed, while the withdrawal of charges against Kenyatta and other Kenyan accused was undoubtedly the most damaging for [the Office of the Prosecutor], to date nearly one-third of those individuals brought before the Court have had the charges against them dismissed by the pre-trial chamber or later withdrawn." *Id.* at 250.

177. Kenyatta was the President of Kenya throughout the duration of his prosecution at the ICC, and during that time, several witnesses mysteriously disappeared or recanted their statements. Emmanuel Igunza, *Kenya ICC witness killing haunts Eldoret family*, BBC (Jan. 9, 2015), <https://www.bbc.com/news/world-africa-30716696>. Igunza asks, "So why is it that unlike any other case at the ICC, it is witnesses in the Kenyan prosecutions that have been so vulnerable to intimidation? The answer may be that they were all high-profile figures with wide networks of supporters." *Id.* Another case of witness tampering occurred in the trial of former Congolese opposition leader Jean-Pierre Bemba Gombo. After Bemba was found guilty at the ICC of war crimes and crimes against humanity, the ICC began its prosecution of Bemba and four associates—including a member of the Congolese Parliament—for bribing witnesses to give false testimony in Bemba's trial. Jennifer Easterday, *Witness Tampering Case Opens at the ICC*, INT'L JUSTICE MONITOR (Sept. 29, 2015), <https://www.ijmonitor.org/2015/09/witness-tampering-case-opens-at-the-icc/>.

178. To fully capitalize on the utility of Article 87(7), it is imperative that the International Criminal Court work with the Assembly of States Parties and the Security Council to ensure that all

it is unclear whether or not the Assembly or the Security Council would have taken any action had a referral been made, the Prosecutor's decision to withdraw charges for lack of sufficient evidence was inevitable without any assistance from either the Court or outside political bodies to obtain the evidence and testimony that Kenya so adamantly tried to suppress. Consequently, the *Kenyatta* case resulted in the ICC's failure to secure the conviction—or even the trial—of a leader charged with organizing brutal attacks on the same citizens he was later re-elected to govern.<sup>179</sup>

#### CONCLUSION

The ICC's failure to make a formal finding of noncompliance against Kenya has contributed to the erosion of support for the ICC, and has raised questions about the Court's willingness and ability to hold those who commit crimes against humanity accountable.<sup>180</sup> More importantly, the Court's failure to make a formal finding of noncompliance took any chance of seeing justice away from the victims of the government-orchestrated crimes. Some of Kenya's citizens sang and celebrated in the streets of the capital at news that their President would return to Kenya after the ICC dropped the charges against him. Nearly twenty thousand others confronted a harsh reality: in addition to their pain and suffering in the wake of the 2007 election, they would continue to be governed by the same man who orchestrated unspeakable violence and destruction against them and their loved ones.<sup>181</sup>

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three bodies exercise their commitments and obligations to international criminal justice. This would require the Assembly of States Parties and the Security Council to begin imposing the sanctions that they are authorized to impose, or to more seriously consider the imposition of sanctions or other remedial measures that the Rome Statute expressly leaves to their discretion. This Note does not address the specific actions that the Assembly of States Parties or the Security Council should take, but the author acknowledges that a different approach by both bodies is necessary for Article 87(7) to fully serve its intended purpose of securing State compliance.

179. See *Kenya Election: Kenyatta Re-elected in Disputed Poll*, BBC (Oct. 30, 2017), <https://www.bbc.com/news/world-africa-41807317>. Kenyatta was re-elected in October of 2017 after initially being declared the general election winner in August. *Id.* However, the Kenyan Supreme Court annulled the August vote due to "irregularities" that, according to the court, were not attributable to Kenyatta or his campaign. *Id.* At least one news outlet reported that about fifty people died in post-election violence after the August election. *Id.* As of the date of the publication of this Note, Kenyatta still serves as Kenya's President.

180. For another perspective offering insight into the potential for the legitimacy of the Court, see generally MICHAEL J. STRUETT, *THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY* 153 (2008). Struett argues that "[s]ince the ICC is a permanent court, it can avoid many of the criticisms of ad hoc war crimes tribunals. Because of its permanence, it can build on its successes over time. This permanence strengthens the ICC's pretensions to enforce universal norms, and as such it is logically in a position to command greater legitimacy." *Id.* In addition, in a survey by Gallup International and the Worldwide Independent Network of Market Research, approximately sixty percent of survey respondents said that they support the existence of an international court that is not under the authority of their own State. JAMES MEERNIK, *INTERNATIONAL TRIBUNALS AND HUMAN SECURITY* 145 (2016).

181. See Marlise Simons & Jeffrey Gettleman, *International Court Ends Case Against Kenyan*

A more aggressive application of Article 87(7) is one way for the ICC to show countries under investigation, victims, and the rest of the world that the Court will not be complicit in State Parties' noncooperation. Although Article 87(7) is supposed to foster the pursuit of justice by giving the Court a mechanism to sanction noncompliance, the Court's unwillingness to utilize Article 87(7) permits the very impunity the Court was created to combat. The need for a more liberal application of Article 87(7) is particularly relevant because, as of the time of writing, the ICC is investigating ten States and has launched preliminary examinations against eleven others.<sup>182</sup> History indicates that the Court will likely continue to face evidentiary struggles moving forward.<sup>183</sup> Evidentiary issues are especially likely considering that many of these cases implicate high-ranking government officials who, like Kenyatta, are in a position to harass, intimidate, or kill witnesses; destroy evidence; or otherwise evade the Court's power to prosecute.<sup>184</sup>

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*President in Election Unrest*, N.Y. TIMES (Dec. 5, 2014), <https://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html>. After the decision was announced, hundreds of celebrating citizens blocked the main highway in one town. *Id.* The chairman of a displaced persons camp, Peter Kariuki, stated: "We are thankful to God, as our president is now free." *Id.* Meanwhile, Fergal Gaynor, a lawyer representing some of the victims of the post-election violence, told the BBC that there was a "widespread feeling of disappointment" when the charges were dropped and that victims had been "robbed" of justice. *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC (Dec. 5, 2014), <https://www.bbc.com/news/world-africa-30347019>. In addition to the victims of the post-election violence, victims of violence stemming from their involvement in the criminal investigation were also left without justice. In one instance, a woman's husband was found murdered in a small town where several families reported the "mysterious disappearance" of relatives who were connected with the ICC during the investigation against Kenyatta. *See* Igunza, *supra* note 177.

182. *See* INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/#> (last visited Apr. 26, 2019). As of the time this Note was written, the following States are under preliminary examination: Afghanistan, Bangladesh/Myanmar, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Ukraine, and Venezuela. *Id.* The following states are under investigation: Democratic Republic of the Congo, Uganda, Sudan, Central African Republic, Kenya, Libya, Côte d'Ivoire, Mali, Georgia and Burundi. *Id.*

183. For an interesting perspective about how Luis Moreno Ocampo, the original Prosecutor in the *Kenyatta* case, overcame some of the investigative difficulties of prosecuting international crime, see Luis Moreno Ocampo, *The International Criminal Court*, in THE FOUNDERS: FOUR PIONEERING INDIVIDUALS WHO LAUNCHED THE FIRST MODERN-ERA INTERNATIONAL CRIMINAL TRIBUNALS (David M. Crane, Leila N. Sadat & Michael P. Scharf eds., 2018). Ocampo stated, "The ICC prosecution may also be required to act where such national forces are themselves committing the crimes. In both scenarios, the classic investigations methods used by functioning national states could not be available for the ICC investigations." *Id.* at 96.

184. For example, the situation in the Philippines arises out of alleged extra-judicial killings of individuals involved in illegal drug use or drug dealing. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela*, INT'L CRIM. CT. (Feb. 8, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>. It is also alleged that these crimes occurred, in part, through the use of the police force. *Id.* Similarly, in Venezuela, the preliminary investigation arises out of alleged excessive force and abuse used by State security forces to silence protestors. *Id.* Both of these situations raise the specter of high-ranking official involvement, much like in the *Kenyatta*

To regain legitimacy, and to more faithfully execute its function as a justice-administering body, the International Criminal Court must begin aggressively utilizing its power under Article 87(7) at all stages of State investigations and criminal proceedings, combatting impunity by refusing to excuse it.