

# Contents

<b>1 Introduction</b> .....	1
1 The Prosecutor’s Promise .....	2
2 The Effectiveness of International Criminal Justice .....	4
3 Methodology .....	8
3.1 Scope.....	8
3.2 Research Method .....	9
3.3 Assessing the ICC’s Impact .....	11
4 Ending Impunity .....	12
4.1 The OTP and the End of Impunity.....	13
4.2 The Ending of Impunity for Kenyans .....	14
4.3 Assessing the End of Impunity .....	16
5 Precursors for Positive Complementarity .....	17
6 Structure of Project .....	20
Bibliography .....	24
<b>2 The Strategy of Positive Complementarity</b> .....	29
1 Origins of Positive Complementarity .....	30
1.1 Complementarity and the Rome Statute .....	30
1.2 The Birth of Positive Complementarity .....	31
2 OTP’s Understanding of Positive Complementarity .....	32
2.1 The Two Dimensions of Complementarity .....	33
2.2 Strategy for Encouraging Prosecutions.....	34
3 Positive Complementarity in Practice.....	38
3.1 Early Years and Negative Complementarity .....	38
3.2 Success Stories? .....	40
3.3 The Shadow Side of Complementarity .....	42
4 Conclusion .....	43
Bibliography .....	44

<b>3 Kenya's Post-Election Violence and History of Impunity</b> .....	47
1 Kenya's Post-Election Violence .....	48
1.1 Disputed Presidential Elections and the Road to Violence .....	48
1.2 Causes of the Violence .....	51
2 History of Institutionalised Impunity .....	53
2.1 Colonial Era .....	53
2.2 Post-Independence .....	55
2.3 The Institutionalisation of Impunity .....	59
2.4 Culture of Impunity .....	61
3 Conclusion .....	64
Bibliography .....	65
<b>4 From Nairobi to The Hague</b> .....	69
1 Phase One: Commencement of Preliminary Examinations (February 2008–July 2009) .....	70
1.1 Monitoring the Situation .....	70
1.2 The Waki Report and the Sealed Envelope .....	71
1.3 Strike One .....	72
2 Phase Two: Encouragement of Domestic Prosecutions (June 2009–November 2009) .....	74
2.1 The Complementarity Contract and the Delivery of the Sealed Envelope .....	74
2.2 Strike Two and the Division of Labour .....	75
3 Phase Three: ICC Investigations (December 2009–December 2010) .....	78
3.1 Strike Three and Investigations Proprio Motu .....	78
3.2 Continued Encouragement of Domestic Proceedings .....	80
4 Phase Four: ICC Pre-Trial Stage (December 2010–March 2013) .....	82
4.1 The 'Ocampo Six' .....	82
4.2 The 'Ocampo Four' .....	84
4.3 The 'Ocampo Three' .....	85
5 Conclusion .....	86
Bibliography .....	87
<b>5 Prosecuting Perpetrators</b> .....	91
1 A Yardstick for Success .....	91
2 The Small Fish .....	93
2.1 Prosecutions by Numbers .....	95
2.2 Prosecutions by Crimes .....	99
2.3 The OTP's Influence .....	101
3 The Big Fish .....	102
4 The Foreign Affairs Façade .....	103
4.1 The Special Tribunal and Motion Without Movement .....	104
4.2 Justice Delayed but Justice Assured .....	106
4.3 Investigating the Ocampo Six .....	108

5	Kenyans in The Hague .....	110
5.1	Local Support for ICC Intervention .....	110
5.2	A Blow to Impunity .....	114
6	Impunity Gaps.....	115
7	The Shadow Side of Complementarity .....	119
7.1	Increased Threats to Witnesses .....	119
7.2	Politicisation of the ICC.....	121
8	Conclusion .....	125
	Bibliography .....	127
<b>6</b>	<b>Don't Be Vague, Go to The Hague!</b> .....	<b>133</b>
1	An Unsuitable Strategy .....	134
1.1	Political Suicide .....	135
1.2	Domestic Inability.....	136
2	The OTP's Influence .....	139
2.1	Not the Initial Impetus .....	139
2.2	Influencing Leaders.....	142
2.3	Imminent but not Inevitable .....	147
2.4	Vested Interests .....	151
3	Foreign Affairs Façade.....	156
3.1	Reneging on Referral .....	156
3.2	Rescuing the Ocampo Six.....	157
3.3	Withdrawal from the Rome Statute.....	158
3.4	Security Council Deferral and Shuttle Diplomacy .....	159
3.5	Article 19 Application.....	160
3.6	East African Court of Justice .....	162
3.7	African Court of Justice and Human Rights .....	163
3.8	Motions Without Movement .....	164
3.9	Obstructing Investigations .....	165
4	The Shadow Side of Complementarity .....	169
4.1	Discouragement of Local Prosecutions .....	170
4.2	A Mechanism We Can Control .....	171
5	Conclusion .....	174
	Bibliography .....	176
<b>7</b>	<b>Rule of Law Reforms: Post Hoc Ergo Propter Hoc?</b> .....	<b>183</b>
1	The OTP and Rule of Law Reform.....	184
2	The Tenth Parliament's Rule of Law Reforms.....	186
2.1	Constitution.....	188
2.2	Criminal Justice System.....	189
2.3	Electoral Process.....	191
2.4	National Reconciliation .....	192
3	Catalysts for Reform .....	194
3.1	The Ongoing Reform Process.....	194
3.2	The Post-Election Violence.....	198
3.3	Legacies and Campaigns.....	200

3.4	International Pressures .....	202
3.5	Domestic Pressures .....	204
4	The OTP's Impact .....	206
4.1	The International Crimes Act 2008.....	206
4.2	Witness Protection .....	208
4.3	Judicial and Security Sector Reforms .....	212
4.4	Simultaneous but Separate .....	213
5	The Shadow Side of Complementarity .....	216
5.1	The Government of National Disunity.....	216
5.2	Delays and Distractions .....	220
5.3	Illusory Reforms .....	221
6	Conclusion .....	223
	Bibliography .....	225
<b>8</b>	<b>Culture of Impunity .....</b>	<b>233</b>
1	Ending the 'Culture of Impunity'.....	234
2	Judging the Judges .....	236
3	Policing the Police .....	239
4	The Shadow Side of Complementarity .....	243
5	Conclusion .....	246
	Bibliography .....	246
<b>9</b>	<b>Conclusion .....</b>	<b>249</b>
	Bibliography .....	254
	<b>Appendix: Timeline.....</b>	<b>257</b>
	<b>Index.....</b>	<b>265</b>