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MUCH CRY AND LITTLE WOOL?: DETERMINING THE EXACT ROLE OF THE INTERNATIONAL CRIMINAL COURT IN TRANSITIONAL JUSTICE EFFORTS

JUAN-PABLO PEREZ-LEON-ACEVEDO*

ABSTRACT

The International Criminal Court ("ICC") is a milestone in the fight against impunity. However, the expectations for what the ICC can achieve have often been distorted. Thus, the main research question of this Article is: what exactly is the role of the ICC within transitional justice efforts? My answer consists of three parts. First, there is a need to delimit the ICC's mandate, namely, what it means to be an international criminal tribunal as opposed to other international bodies, and how the ICC is embedded in a system which includes the States Parties to the ICC Statute. Second, academics and practitioners need to bear in mind that only few perpetrators (the "persons most responsible") are prosecuted and tried by the ICC. Third, the ICC must be put in context: the ICC is a tool of both justice and peace, but within other transitional justice options that may involve amnesties.

* Dr. Juan-Pablo Pérez-León-Acevedo holds PhD (Abo Akademi University, Finland), LLM (Columbia University, USA), and LLB (Catholic University of Peru) degrees. He is a researcher and a lecturer at the Faculty of Humanities and Social Sciences (Department of Language and Communication Studies), University of Jyvaskyla (Finland). This Article is funded by the Academy of Finland, grant number 325535 ('Negotiating International Criminal Law: A courtroom ethnography of trial performance at the International Criminal Court'). He has also been an affiliated researcher (visiting researcher) at PluriCourts (Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, Research Council of Norway, project number 223274 PluriCourts), Law Faculty, University of Oslo. He held positions or visiting fellowships at diverse academic institutions. He served at inter alia the International Criminal Court, and the International Criminal Tribunal for the former Yugoslavia. The opinions expressed here are the author's own and do not necessarily reflect the views of the mentioned institutions.

The conclusions are three-fold: first, there is a need to keep in mind the ICC's mandate as an international criminal tribunal and thus limited to the determination of criminal liability of those accused of crimes under its jurisdiction. Second, the difference between the "situation" and "case" notions is necessary to identify how much governmental/state attitudes towards the ICC may change. Finally, notions of peace and justice should be understood broadly and jointly to better situate the ICC's role.

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INTRODUCTION

The establishment of the ICC is, undoubtedly, a milestone in the international criminal justice fight against impunity. This arguably corresponds to four main reasons. First, the ICC consolidates a long path of international criminal justice started by the International Military Tribunals of Nuremberg and Tokyo, and followed by the International Criminal Tribunals for the Former Yugoslavia ("ICTY")

and Rwanda ("ICTR").[1] Second, the domestic implementation of the ICC Statute has had a direct impact on the importance and manner to fight impunity, and, at least partially, has inspired new mechanisms, such as the hybrid criminal tribunals.[2] Third, unlike previous international criminal tribunals, the ICC is the first that allows victims of the most serious international crimes to directly participate in the proceedings. Not only can they intervene as witnesses, but they can also voice their own views and concerns, including the possibility of receiving reparations.[3] Fourth, the ICC is an important transitional justice mechanism.[4] Due to its intended universal dimension, and its character as the first permanent international criminal court, the ICC may have a major impact on other transitional justice mechanisms in diverse societies across the globe.

With this as the foundation for the ICC's ability and reach, expectations have raised to the point of being distorted. This Article proposes that this confusion has stemmed from two directions. From one direction, the ICC has been unduly perceived as a sort of panacea

1. *See generally* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (3rd ed., 2008) (discussing international criminal law and international/hybrid criminal courts generally); MORTEN BERGSMO ET. AL., HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW (2017); WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1–22 (5th ed., 2017); CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 113–202 (4th ed., 2019).

2. *See generally* MAX DU PLESSIS, UNABLE OR UNWILLING? CASE STUDIES ON DOMESTIC IMPLEMENTATION OF THE ICC STATUTE IN SELECTED AFRICAN COUNTRIES (Max du Plessis & Jolyon Ford eds., 2008); OVO CATHERINE IMOEDEMHE, THE COMPLEMENTARITY REGIME OF THE INTERNATIONAL CRIMINAL COURT: NATIONAL IMPLEMENTATION IN AFRICA 55–87 (2016); Daley Birkett, *Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia*, 18 CHINESE J. INT'L L. 353, 353–392 (2019).

3. Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute] (discussing reparations in arts. 75 and 79).

4. *See* Obiora Chinedu Okafor and Uchechukwu Ngwaba, *The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections*, 9 INT'L J. TRANS. J. 90, 90–108 (2015); Jaya Ramji-Nogales, *Bespoke transitional justice at the International Criminal Court*, *in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 106, 106–121 (Christian De Vos, Sara Kendall, & Carsten Stahn eds., 2015).

aimed at solving the whole package of transitional justice problems, which neglects or minimizes the existence of other transitional justice mechanisms.[5] From the other, the ICC has been portrayed as a threat to peace-making processes.[6] This negative depiction is explained via diverse motivations ranging from the legitimate, such as concerns about the fate of victims in ongoing armed conflicts, to the illegitimate and ill-intentioned, which is exemplified by the reactions of certain governments when the ICC targets some of their highest officers.

Against this general background, this Article aims to address this main research question: what is the exact role of the ICC within transitional justice efforts? This Article's answer consists of three main parts, which constitute the sections of the present article. First, there is a need for a precise delimitation of the ICC's mandate. Namely, what it means to be an international criminal tribunal as opposed to other international organizations such as human rights monitoring bodies or international peace and security organs, and how the ICC is embedded in a system which includes the States Parties to the ICC Statute as important actors. Second, there is a need to discuss a point that only a handful of perpetrators, the so-called "persons most responsible", are prosecuted and tried by the ICC. Third, the big picture must be seen. The ICC does not exist in a void; it is a tool of both justice and peace, but within a set of other transitional justice options, which may include even the controversial grant of amnesties. Concerning the methodology employed herein, the present article primarily relies on a legal analysis, which is complemented with the examination of factors such as policy considerations.

I. DELIMITATION OF THE MANDATE OF THE ICC

A. The ICC as an International Criminal Tribunal

This sub-section details the ICC's mandate and emphasizes the nature of the ICC as an international criminal tribunal. The ICC differs from human rights monitoring mechanisms or international bodies trusted with international peace and security such as the UN Security

5. *See id*. (for further discussion of the transnational justice mechanism).

6. *See* Bartłomiej Krzan, *International Criminal Court Facing the Peace vs. Justice Dilemma*, 2 INT'L COMP. JURIS. 81, 81–88 (2016) (discussing perceptions of ICC as a threat to peacemaking).

Council. The object and purpose of the ICC Statute is indicated in the Preamble of the said instrument: "Determined to put an end to impunity for the perpetrators of these crimes [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes."[7] This phrasing is also contained in Article 1 of the ICC Statute: "[the ICC] shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions."[8]

The mandate of the ICC and, particularly, its Office of the Prosecutor ("ICC-OTP"), has been identified in the ICC-OTP's policy papers. With regard to the meaning of "genuine" proceedings, which is mentioned in Article 17 of the ICC Statute, ICC-OTP's 2003 informal expert paper,[9] emphasized the importance for the states participating in the 1998 Diplomatic Conference of Rome that: "proceedings cannot be found 'non-genuine' simply because of . . . a lack of full compliance with all human rights standards."[10] The current phrasing was adopted after terms such as "effectively" were rejected because several delegations were concerned about that the ICC may judge a legal system in light of a "perfectionist" standard,[11] which corresponds to human rights monitoring bodies. The ICC-OTP's informal expert paper concluded that the applicable standard to show inability should be stringent: "the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards."[12] This conclusion is consistent with the nature of "complementarity," which addresses the question of whether a state is unable or unwilling to genuinely carry out proceedings.[13] For example, arguments put forward by some

7. ICC Statute, *supra* note 3, pmbl., ¶ 5.

8. *Id*. art. 1.

9. INT'L CRIM. CT. – OFF. OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 3 (2003) [hereinafter ICC-OTP, INFORMAL EXPERT PAPER].

10. *Id*. at 8.

11. *Id.* at 8 n.9.

12. *Id*. at 15.

13. Frank Wilczek, *The Mind-Expanding Power of Complementarity*, SCI. AM. (Jan. 12, 2021), https://www.scientificamerican.com/article/the-mind-expanding-

human rights organizations claim Uganda's legal system lacks capacity and impartiality.[14]

This analysis is also connected with the wording of Article 17 of the ICC Statute, which mentions admissibility of a "case," but not the broader notion of a "situation."[15] In other words, the ICC is not expected to take a detailed look at state's legal system as a whole because this does not correspond to the mandate of an international criminal tribunal. The standard to assess genuineness should be consistent with the nature of the ICC, which is not a human rights body or court and is not mandated to determine all the imperfections of a national legal system.[16]

As the ICC-OTP's informal expert paper points out, the admissibility assessment of cases includes both a normative dimension (understanding of legislation, case-law, and procedures) and an empirical dimension (evaluation of the actual handling of relevant cases).[17] Such a general assessment differs substantially from those used by human rights monitoring bodies. Human rights monitoring bodies use concrete recommendations on the extent of a state's fulfillment of its international human rights obligations are the outcome. Although the ICC is not a human rights monitoring body or court, human rights standards may be useful to evaluate whether proceedings are being genuinely conducted within the ICC's mandate. Thus, the ICC may consider contextual information and/or human rights concepts such as due process, the state obligation to respect/protect human rights, the right to an effective remedy, and the exhaustion of effective and local remedies.[18] Nevertheless, the case law of human rights bodies and human rights courts should be approached with caution and should not be extrapolated mechanically to the realm of complementarity under the ICC Statute's jurisdiction.

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power-of-complementarity/ (discussing how complementarity is viewing a scenario from multiple perspectives).

14. *See* MICHAEL OTIM AND MARIEKE WIERDA, UGANDA: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 4 (2010).

15. *See infra* Section III.A (distinguishing between "situations" and "cases").

16. *See* ICC-OTP, INFORMAL EXPERT PAPER, *supra* note 9, at 16.

17. *Id*. at 9.

18. *See id*. at 28 (specifically, Annex 4, which is a list of indicia of unwillingness or inability to genuinely carry out proceedings).

Moreover, the ICC establishes individual criminal responsibility,[19] and not state responsibility for violations of treaty obligations which is determined by human rights courts.

The importance of this distinction may be illustrated through the Situation in Darfur, Sudan. The African Union ("AU") mandated the AU Commission, "in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights ("ACtPHR") to examine the implications of the Court being empowered to try serious crimes fighting impunity."[20] Notwithstanding the important role held by regional human rights courts, the ICC Statute did not anticipate the exercise of those regional courts' criminal jurisdiction over crimes under the ICC's jurisdiction, which deals with state complementarity.[21] Similarly, there is not confidence that the ACtPHR has the capacity to implement that function.[22] This view distinguishing the bodies from one another is relevant when assessing the legality of amnesties and which body has jurisdiction. In the former, the question is whether perpetrators are entitled to use amnesties to shield themselves from investigation and prosecution; in the latter, states' violations of international obligations by introducing amnesties have to be determined.[23] The specific matter of the ICC *vis-à-vis* amnesties is discussed later.[24]

Regarding international peace and security, the UN Security Council is the primary stakeholder due to its mandate under Article 24 of the UN Charter, which tasks the Security Council with deciding whether peace negotiations temporarily prevail over justice.[25] The ICC Statute recognizes such a role under Article 16 of the ICC Statute, which states an investigation or prosecution cannot be commenced or proceeded for a renewable period of twelve months

19. ICC Statute, *supra* note 3, art. 25.

20. African Union [AU] Assembly, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, at 5–6, Doc. Assembly/AU/13 (XIII) (Jul. 1–3, 2009).

21. MARIEKE WIERDA, STOCKTAKING: COMPLEMENTARITY 5 (2010).

22. *ID.*

23. *See* Louise Mallinder, *Can Amnesties and International Justice be Reconciled?* 1 INT. J. TRANSITIONAL JUS. 208, 210 (2007).

24. *See infra* Section IV.B.

25. U.N. Charter, art 24.

provided that: "the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested [such effect]."[26] Although this provision may be criticized as an intrusion into justice and the ICC's independence, it reflects the complementary but differentiated mandate of the ICC versus that of the Security Council. Under Article 16, the peace-justice question is thus dealt with by an external actor,[27] namely, the Security Council. Human Rights Watch noted that the Security Council's deferral power is: "the only means by which the Rome Statute explicitly permits concerns about a peace process to 'trump' prosecutorial efforts."[28]

For instance, concerning whether the arrest warrants issued against the leaders of the Lord's Resistance Army ("LRA") constituted an obstacle to move forward in peace negotiations in Uganda, Article 16 could have been applied. This would have prevented unnecessary pressure on the ICC to withdraw those arrest warrants. Gareth Evans (former Head of the International Crisis Group) opined a similar sentiment when he identified the ICC's concrete mandate:

> The prosecutor's job is to prosecute and he should get on with it with bulldog intensity. If a policy decision needs to be made . . . it should be made by . . . those with the political and conflict resolution mandate, and that is the Security Council. The Statute allows for this in Article 16.[29]

Accordingly, deference to the Security Council would circumvent potential impasses when peacemaking should prevail over justice. It

26. ICC Statute, *supra* note 3, art. 16.

27. *See* INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, PURSUING JUSTICE IN ONGOING CONFLICT: A DISCUSSION OF CURRENT PRACTICE 12 (May 2007), https://www.ictj.org/publication/pursuing-justice-ongoing-conflict-discussion-current-practice [hereinafter ICTJ].

28. HUMAN RIGHTS WATCH, THE MEANING OF "THE INTERESTS OF JUSTICE" IN ARTICLE 53 OF THE ROME STATUTE 8 (Jun. 1, 2005), https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute#:~:text=Under%20Article%2053%20of%20the,to%20be%20considered%20by%20the.

29. *International Criminal Court Newsletter No. 9*, INT'L CRIM. CT., 5 (Oct. 2006), https://www.icc-cpi.int/NR/rdonlyres/A553E1FB-3662-497E-B06E-5B089B22D01B/278464/ICCNL9200610_En.pdf (last visited Jan. 1, 2020).

may be further argued that should the ICC Prosecutor ground his/her decisions mainly on peace and justice considerations, he/she would act *ultra vires*[30] because Article 16 of the ICC Statute expressly grants such a power to the Security Council.[31]

Unfortunately, several actors have ignored such a difference in mandates. This point is illustrated via the critical question posed by the ICC on whether protection, in ongoing armed conflicts, should embrace not only individuals who will testify before the ICC but also those broad populations impacted by the ICC's actions. To answer this, the ICC requested the opinion of Professor Antonio Cassese, who headed the International Commission of Inquiry on Darfur. Cassese adopted an excessively broad approach that is at odds with the ICC's mandate. He concluded that the ICC's obligation to protect would go "beyond the proper scope of trial proceedings and is more humanitarian in nature . . . ."[32] As the ICC-OTP correctly argued, this would obligate the ICC-OTP or the ICC Chambers to enhance security for victims in Darfur, which lacks a statutory basis.[33] Although the ICC should indirectly contribute to the protection and security of the affected civilian populations, such a responsibility corresponds to the respective state(s) and/or other actors, including the UN Security Council or the AU. In practice, the ICC cannot feasibly handle the protection and security of all the victims of the ICC country situations because of both the ICC's mandate and limited resources.

Concerning the interpretation of the expression "interests of justice,"[34] which may be considered by the ICC's Prosecutor when

30. *Ultra vires*, BLACK'S LAW DICTIONARY (19th ed. 2019) ("Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.").

31. JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY 383 (2008).

32. Situation in Darfur, Case No. ICC-02/05, Observations on Issues Concerning the Protection of Victims and the Prevention of Evidence in the Proceedings on Darfur Pending before the ICC, ¶ 2 (Aug. 25, 2006), https://www.icc-cpi.int/CourtRecords/CR2007_02007.PDF.

33. Situation in Darfur, Case No. ICC-02/05, Prosecutor's Response to Cassese's Observations on Issues Concerning the Protection of Victims and the Prevention of Evidence in the Proceedings on Darfur Pending before the ICC, ¶ 16 (Sep. 11, 2006), https://www.icc-cpi.int/CourtRecords/CR2007_02009.PDF.

34. ICC Statute, *supra* note 3, art. 53.

deciding whether to initiate an investigation and prosecution, the ICC-OTP has interpreted the scope of "interests of justice" by juxtaposing it with interests of "peace": "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."[35] Thus, the ICC Prosecutor has positioned himself/herself as an advocate for justice and he/she has not dialectically engaged with peace and justice. The ICC-OTP has seemingly left other institutions and bodies the mandate or mission to pursue peace-related interests.

This approach is consistent and compatible with the mandate of the ICC (ICC-OTP included), and is also underlain by the ICC Prosecutor's self-perception as a judicial rather than a political actor. The first ICC-Prosecutor, Luis Moreno-Ocampo, stated that: "as the Prosecutor of the ICC, I was given a clear judicial mandate. My duty is to apply the law without political considerations. I will present evidence to the Judges and they will decide on the merits of such evidence."[36] The current ICC-Prosecutor, Fatou Bensouda, has also expressed that the ICC-OTP: "cannot yield to political considerations or adapt its work according to the peace negotiations timetable. It must always conduct its work on the basis of the law and of the evidence."[37] Such a standing follows the path paved by the former ICTY/ICTR Prosecutors Richard Goldstone and Louise Arbour, who rejected political considerations while exercising their prosecutorial discretion.[38] This approach may be nuanced by future ICC Prosecutors

35. INT'L CRIM. CT. – OFF. OF THE PROSECUTOR, POLICY PAPER ON THE INTERESTS OF JUSTICE 2 (September 2007).

36. Luis Moreno-Ocampo, Prosecutor, Int'l Crim. Ct., Address at "Building a Future on Peace and Justice" Conference Nuremberg, at 3 (Jun. 24–25, 2007), https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf.

37. Fatou Bensouda, *Reflections from the International Criminal Court Prosecutor*, 45 CASE W. RES. J. INT'L L 505, 510 (2012).

38. Martin Macpherson, *Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice*, Amnesty International Index: IOR 40/023/2005, 17 June 2005, p. 13, https://www.amnesty.org/download/Documents/84000/ior400232005en.pdf
(Golstone said: "C'est pourquoi nous avons à juger les responsables quels qu'ils soient et quelles que soient les conséquences politiques qui pourraient s'ensuivre. Ces éventuelles consequences ne sont pas notre souci." Translated as: "This is why we have to judge those responsible regardless of whom they are or regardless of the

who may adopt a holistic approach; however, the limit should be marked by attempts to find a balance between justice and peace.[39] In any event, this Article sustains that the ICC Prosecutor should not mechanically privilege peace or security over justice because this falls short of the ICC's mandate.

B. Positive Complementarity and its Limits

Expectations about the ICC's mandate have also been unnecessarily exacerbated due to some myopia that has prevented actors from seeing the ICC as only a part, albeit an important part, of the "Rome System of Justice", which also includes the State Parties to the ICC Statute.[40] Underlying this system is the idea of "positive complementarity": the ICC should not merely step in when national courts fail to investigate or prosecute, but do so actively and encourage national prosecutions of crimes that fall within the ICC's material jurisdiction.[41] This approach has been adopted by the ICC-OTP. In a former ICC-Prosecutor's words: "As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions would be a major success."[42] The current ICC-Prosecutor similarly considers positive complementarity as: "a

political consequences which may ensue. Those eventual political consequences are not our concern"); *see also* Institute for War and Peace Reporting, *Arbour, Milosevic and "Yesterday's Men": Tribunal Update 128: Last Week in The Hague (May 31 – Jun. 5, 1999)* (Jun. 5, 1999), https://iwpr.net/global-voices/arbour-milosevic-and-yesterdays-men (In turn, Arbour remarked: "I don't think it's appropriate for politicians . . . to reflect on whether the indictment came at good or at a bad time; whether it's helpful to legal process. This is a legal, judicial process.").

39. WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 665–67 (2010).

40. *See* William Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM. L. F. 59, 61 (2008).

41. *See id*. at 60.

42. Luis Moreno-Ocampo, Prosecutor, Int'l Crim. Ct., Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the ICC, The Hague (Jun. 16, 2003), https://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (last visited Jan. 1, 2020).

proactive policy of cooperation and consultation, aimed at promoting national proceedings and at positioning itself . . . ready to intervene in the event of unwillingness or inability by national authorities."[43]

The two components of the Rome System of Justice are intended to contribute towards the goal of ending impunity.[44] The States Parties to the ICC Statute clearly play an important role as identified in the ICC Preamble, which refers to the state duty "to exercise . . . criminal jurisdiction over those responsible for international crimes."[45] This wording reflects the spirit of the ICC Statute because states are expected to carry the main burden of investigation and prosecution.[46]

In this context, the ICC possesses a secondary competence to exercise jurisdiction over international crimes only when States are unwilling or unable to genuinely investigate/prosecute crimes under the ICC's jurisdiction. The ICC's mandate is only a component of the Rome System of Justice that may be better grasped if one takes into account the system as a whole in light of the idea of positive complementary—even if the ICC Statute mentions neither of them explicitly. Viewing the system in such a way may prevent the ICC being overburdened with tasks that largely exceed its mandate.

Nevertheless, the adoption of a "positive complementarity" approach is not imposed on the ICC because there is no explicit ICC Statute provision detailing such an obligation. As the ICC-OTP's informal expert paper details, positive complementarity implies partnership and dialogue with states, and the ICC-Prosecutor, within his/her mandate, and without any obligation, can "encourage the State concerned to initiate national proceedings, help develop cooperative anti-impunity strategies, and possibly provide advice and certain forms of assistance to facilitate national efforts."[47] The "positive complementarity" notion may also include scenarios where there is a consensual division of labor between the ICC and the respective state.[48] For example, while the persons most responsible are prosecuted and tried by the ICC, lesser perpetrators are handled by

43. Bensouda, *supra* note 37, 507.
44. *See* ICC Statute, *supra* note 3, pmbl., ¶ 5.
45. *Id*. pmbl., ¶ 6.
46. ICC-OTP, INFORMAL EXPERT PAPER, *supra* note 9, at 3 n.24.
47. *Id*. at 4.
48. *See id*. at 19.

national jurisdiction(s). Clearly noting these inherent limits will prevent expectations from becoming over-inflated. The last point is fleshed out in three scenarios as follows.

First, when positive complementarity concerns states that are *unwilling* to prosecute international crimes even when the respective state is able to do so, the ICC's most efficient manner to push an unwilling state to exercise its jurisdiction is to make it clear that this state's decision not to investigate/prosecute will very likely trigger the ICC's intervention.[49] This should lead to a state to consider national investigation/prosecution as a better option than the ICC's intervention, especially in terms of state sovereignty. Such pressure, which is built up on a credible threat of ICC's investigation, should be backed up by a strong record of ICC's investigation into and prosecution of crimes. A direct and explicit dialogue between the ICC and states "may make the threat of international prosecution more poignant and thereby encourage national prosecution."[50] The ICC-OTP may actively monitor potential crimes within the ICC's jurisdiction, alerting the respective state(s) of the existence of such crimes in case the state may have been unaware thereof. In order not to jeopardize the ICC's scarce resources and maximize the impact of such monitoring, this action should be implemented in association with non-governmental organizations ("NGOs") and/or international organizations.

Second, when positive complementarity concerns states which are *unable* to prosecute international crimes, as William Burke-White points out, two considerations should be taken into account.[51] The first consideration is that existing international criminal tribunals have exhibited limited success in judicial reform efforts.[52] Such a hurdle may be stronger in the case of the ICC due to its broad jurisdiction, and the ICC (and ICC-OTP) spreads its resources more broadly than an *ad hoc* or a hybrid criminal court would do. The second consideration is that those efforts may have implications for

49. Burke-White, *supra* note 40, at 71.
50. *Id*.
51. *Id*. at 76–77.
52. *Id*.

subsequent admissibility challenges.[53] Any ICC's/ICC-OTP's assistance may have a direct impact on the analysis of the genuineness of national proceedings. This could cause a state, or accused, to invoke the ICC's assistance to challenge the admissibility of a case if the ICC decides to investigate or prosecute it. This potential risk may be controlled with the ICC's appropriate vigilance.[54] It would also consist of partnership with an unable state, understood as not blocking the obligations and capability of the ICC-OTP to gather information in order to verify the genuine conduction of national proceedings, and thus be "consistent with the presumption of *bona fides* toward cooperative [but unable] States, the OTP proceed with a positive, cooperative approach, albeit with some caution to avoid being exploited in efforts to legitimize or shield inadequate efforts from criticism."[55]

An example of the "unable" state scenario was the Prosecutor's decision to open an investigation in the Central African Republic ("CAR"). The CAR's government self-referred the CAR's situation to the ICC based mainly on a decision of the CAR's Cour de Cassation (CAR's highest judicial body), in which the Cour found the national justice system to be unable to investigate and prosecute the alleged crimes under the ICC's jurisdiction.[56] Whether these findings should be decisive for the ICC-Prosecutor's decision to step in is uncertain. If so, there is an undeniable risk that some states may divert their judicial workload and inappropriately allocate it to the ICC. Therefore, the ICC Prosecutor should approach these decisions more autonomously and objectively. As William Schabas remarked, the Prosecutor's discretion should not be excessively broad and the ICC

53. *Id*.

54. ICC-OTP, INFORMAL EXPERT PAPER, *supra* note 9, at 4.

55. *Id*. at 7.

56. *See generally* Situation in the Central African Republic, Case No. ICC-01/05-1, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic (Nov. 30, 2006), https://www.icc-cpi.int/CourtRecords/CR2007_03776.PDF; Int'l Crim. Ct., *Prosecutor Opens Investigation in the Central African Republic*, HAGUE (May 22, 2007), https://www.icc-, cpi.int/Pages/item.aspx?name=prosecutor+opens+investigation+in+the+central+african+republic (last visited Jan. 1, 2020).

Chambers should not fall in "judicial activism" as this would bring more cases than those that the ICC can efficiently handle.[57]

Third, the last scenario consists in a division of labor between the ICC and states. This is the case when a state does not challenge the admissibility of a "situation" but instead self-refers a "situation" to the ICC, namely, the "inaction" scenario.[58] The ICC-OTP's informal expert paper considered that:

> [T]o decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute . . . . This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with fight against impunity.[59]

This approach was endorsed by *inter alia* Trial Chamber II in *Katanga*, which, concerning the decision of the Auditeur Général of the Democratic Republic Congo ("DRC") to close domestic proceedings against Katanga, the Chamber concluded that this decision was not one to not prosecute under Article 17(1)(b) of the Statute, but it instead was "a decision to surrender the Appellant [(Katanga)] to the Court and to close domestic investigations against him as a result of that surrender. The thrust of this decision was not that the Appellant should not be prosecuted, but that he should be prosecuted, albeit before the International Criminal Court."[60] The division of labor between the ICC (investigation/prosecution of the most responsible individuals) and national mechanisms (dealing with the rest of perpetrators using transitional justice tools including investigation/prosecution) is in principle coherent with the ideas of the Rome System of Justice—and positive complementarity.

57. *See* William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 755–57 (2008).

58. *Id*.

59. ICC-OTP, INFORMAL EXPERT PAPER, *supra* note 9, at 8 n.24.

60. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 82 (Sep. 25, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF.

However, self-referrals should not be excessively relied upon, especially when a state is able and willing to investigate and prosecute. For instance, some critiques have been raised as to whether the *Situation in Uganda* and the *Situation in the DRC* really merited the use of ICC's resources. According to some reports, the *Situation in Uganda* seemingly did not fulfill the "inability" requirement under Article 17 of the ICC Statute since Uganda was unable to arrest the suspects, but was not necessarily unable or unwilling to investigate and prosecute.[61] This Article questions that if the real problem was enforcement, how can the ICC make a difference since the ICC also lacks—arguably to a higher degree—enforcement power?

Moreover, unlike Uganda, the judicial system in the region of Ituri was destroyed at the time of the referral.[62] As for the DRC, Lubanga and Katanga had already been in the DRC's custody awaiting trial for more serious crimes when the ICC requested their surrender because the DRC was considered not to be investigating the crimes prosecuted by the ICC. Additionally, the DRC's judicial system, at least in some areas of the country, was "able and willing."[63] By taking these points into account, one may question whether the ICC could have done better to encourage the DRC to take primary responsibility, and, therefore, the ICC should have only supported/monitored this process rather than to step in it.[64]

These cases of "inaction" and following the approach first adopted by the ICC Prosecutor and then endorsed by the ICC may trigger an important number of cases because they can be regarded as a *de facto* waiver of complementarity.[65] In turn, this may lead to an undesirable scenario where States Parties to the ICC Statute increasingly become more reluctant to investigate and prosecute, and,

61. *See*, *e.g.*, *Uganda Department of State Background*, INFOPLEASE.COM (Nov. 2007), https://www.infoplease.com/world/countries/state-department-profiles/uganda-department-of-state-background (last visited Jan. 1, 2020).

62. CITIZENS FOR GLOBAL SOLUTIONS, IN UNCHARTED WATERS: SEEKING JUSTICE BEFORE THE ATROCITIES HAVE STOPPED, THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND THE DEMOCRATIC REPUBLIC OF THE CONGO 15-19 (2004).

63. *See* Nidal Jurdi, *The Prosecutorial Interpretation of the Complementarity Principle: Does it Really Contribute to Ending Impunity on the National Level?* 10 INT'L CRIM. L. REV. 73, 94 (2010).

64. *Id*. at 95.

65. *Id*.

instead, opt for self-referrals to the ICC. Hence, should self-referrals not be scrutinized in a stricter manner, states willing and able to prosecute may take advantage of the ICC through a type of forum shopping—putting an excessive burden on the ICC's shoulders—which, in the medium or long term, can seriously jeopardize the ICC's efficiency and resources.

To avoid a potential undue instrumentalization of the ICC, it is necessary for the Court to implement a thorough "willingness" and "ability" examination of the state in question in order to avoid a "free-rider" scenario.[66] The record of the state the ICC is considering should also be examined. Using this examination, a division of labor should be set forth and, once created, the ICC should put in place effective mechanisms via a permanent dialogue and coordination to ensure this division.

II. ICC CASES: ONLY A HANDFUL OF PERPETRATORS WILL BE PROSECUTED AND TRIED AT THE ICC

A. Difference between the Notions of "Situations" and "Cases," and its Impact on Reactions of States/Governments

The difference between the notions "situations" and "cases" is important because, among other reasons, several actors perceive them differently and respond to the ICC in kind. To trigger the ICC's jurisdiction, the first step is a referral by a state or the UN Security Council, or by the ICC Prosecutor's own initiative, not of an individual case/individual cases but of a "situation" in language of the ICC Statute.[67] With regard to the notion of "situations", an ICC Pre-Trial Chamber:

> Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of Congo since 1 July 2002, entail the proceedings envisaged in the Statute to

66. *See* Burke-White, *supra* note 40, at 84.
67. *See* ICC Statute, *supra* note 3, art. 13.

> determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.[68]

Accordingly, there are three parameters to define a "situation": temporal, territorial, and personal. These parameters actually underlay the current "situations" before the ICC. As of January 1, 2020, five "situations" were triggered through self-referrals: Uganda, DRC, CAR, Mali, and CAR-II. Two were triggered through Security Council Resolutions: Darfur (Sudan). Five through the ICC Prosecutor's own investigation: Kenya, Ivory Coast, Georgia, Burundi, and Bangladesh/Myanmar.[69] Each "situation" has generated (or will generate) individual cases (twenty-seven in total as January 1, 2020), which are currently in different stages ranging from investigation to ongoing trials to completed cases.[70]

The temporal parameters of a "situation" consist in establishing a commencement date. For example, in most "situations" the said date is July 1, 2002, when the ICC entered into force. Concerning the ending point of the referral, the referral date might be presumed unless otherwise indicated.[71] For instance, as for the Kenya's "situation," November 26, 2009, was set as the ending point—when the Prosecutor asked Pre-Trial Chamber's authorization to open an investigation.[72]

Another point not mentioned in the ICC Statute is whether a "situation" can be "prospective" as well as "retroactive." For example, in the Darfur's "situation," referred by the Security Council on March 31, 2005, a prospective approach has been implicitly considered because the arrest warrant issued by a Pre-Trial Chamber against

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68. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, ¶ 65 (Jan. 17, 2006) https://www.icc-cpi.int/CourtRecords/CR2006_01689.PDF.

69. *See* Int'l Crim. Ct., *Situations under Investigation*, https://www.icc-cpi.int/pages/situation.aspx (last visited Jan. 1, 2020).

70. *See* Int'l Crim. Ct., *Situations and Cases*, https://www.icc-cpi.int/Pages/cases.aspx (last visited Jan. 1, 2020).

71. SCHABAS, *supra* note 39, at 298.

72. *See* Situation in the Republic of Kenya, Case No. ICC-01-09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 2 (Mar. 31, 2010), https://www.icc-cpi.int/CourtRecords/CR2011_03256.PDF.

Omar al-Bashir (former President of Sudan) covered acts up to the date of the arrest warrant issuance request (July 14, 2008).[73] These Security Council's open-ended referrals may pose an extra burden on the ICC Judges. This is because they will have to determine whether the referred "situation" still qualifies as a threat to peace, breach of peace, or an act of aggression: the Security Council referrals may only be grounded on its powers under Chapter VII of the UN Charter.

Concerning the territorial parameters of a "situation", some referrals have framed a situation within a state's territory.[74] In turn, the Security Council referred to Darfur, an administrative region in Sudan. In the *Situation in Uganda*, the reference was a little ambiguous since "northern Uganda" does not correspond to a concrete administrative division. Moreover, that a "situation" is confined to a specific country may be partially questioned since most of the ICC's current "situations" have regional or sub-regional dimensions, which exceeds narrow analyses of national jurisdictions. A holistic approach to transitional justice underlies this critique. As Graeme Simpson points out:

> [T]he ICC's concern with the boundaries between international and national jurisdiction risks inhibiting its ability to integrate with local approaches to justice. This restriction is at least equally problematic in grappling with conflicts in Africa which frequently do not respect national boundaries in the [back then] four countries where the ICC is currently investigating crimes . . . In its mandate, investigative orientation and entire *modus operandi*, the ICC is focused on addressing national justice solutions . . . . This may effectively preclude investigations into the role of regional actors,

73. Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 37 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

74. *See*, *e.g.*, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision to Hold Consultation under Rule 114, 2–3 (Apr. 21, 2005), https://www.icc-cpi.int/CourtRecords/CR2006_01834.PDF.

> representatives of neighbouring governments, or global non-state actors.[75]

This evidences one intrinsic limit to the ICC, which justifies the need for not gathering excessive expectations about the ICC's impact. The application of national territorial parameters may indeed cause some confusion in cases similar to that of Jean-Pierre Bemba where a DRC national and a former DRC's Vice-president was tried as part of the "situation" in the CAR rather than the "situation" in the DRC.

In some contexts, a "situation" can also be defined by personal parameters.[76] These parameters are problematic because a situation should not target specific individuals or groups. There is some ICC's practice on this regard. For example, whereas Uganda's letter of referral to the ICC mentioned the "situation concerning the 'Lord's Resistance Army' [("LRA")] in northern and western Uganda,"[77] the ICC responded that: 'the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the [LRA].'"[78] In turn, Pre-Trial Chamber II in the *Situation in Kenya* did not consider personal parameters, which should, in principle, be the trend to be followed by the ICC in order to distinguish clearly between situations and individual cases.

As mentioned, individual "cases" stem from each "situation" at the ICC. It is important to identify when exactly the ICC case stage begins because, as examined later, this allows determining how states or governments react differently to what it is categorized as "situations" versus "cases". This Article argues that whereas governments tend to be cooperative or non-obstructionist during the

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75. Graeme Simpson, *One among Many: The ICC as a Tool of Justice during Transition*, *in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 73, 78 (Nicholas Waddell & Phil Clark eds., 2008).

76. *See*, *e.g.*, Situation in the Democratic Republic of the Congo, *supra* note 68, ¶ 65.

77. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, ¶ 4 (Dec. 2, 2005), https://www.icc-cpi.int/CourtRecords/CR2006_01136.PDF (referring to "letter of referral by the Attorney General of Uganda of 16 December 2003, appended as Exhibit A to the Prosecutor's application, by which the 'situation concerning the Lord's Resistance Army' in northern and western Uganda was submitted to the Court").

78. *Id*. ¶¶ 3–4.

situation stage, governments tend to oppose the ICC once an individual case is brought, particularly when a state actor is targeted.

Just because one or more cases are filed before the ICC does not end/close the respective situation as additional cases may arise later. The procedural moment when an individual case begins is marked by the ICC Prosecutor's application to seek the issuance of an arrest warrant or a summons to appear by a Pre-Trial Chamber. The ICC Prosecutor applies for an arrest warrant/summons to appear.[79] The Prosecutor has to include: "the name of the person," "specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed," and "a concise statement of the facts which are alleged to constitute those crimes."[80] Noting the distinction between a situation and a case helps to better identify how the state government reactions may change during the two stages, as shown in the following examples.

The *Situation in Darfur*, and related cases, is a prime example of the practical importance of the above-mentioned difference. Following the beginning of its investigation in 2005, the ICC-OTP continuously sought to establish a working relationship with the Sudanese Government, which was actually responsive for approximately two years.[81] Accordingly, Sudan allowed ICC representatives to conduct five missions to Khartoum (Sudan's capital) between 2005 and 2007.[82] Even though these missions were complementarity-oriented, the ICC representatives were given access to people and documents of interest requested by them. However, Sudan stopped cooperating in 2007.[83] There is no coincidence that this change in Sudan's attitude towards the ICC corresponded to the issuance of two arrest warrants against Ahmed Harun, then-Sudanese Minister for Interior, and against Ahmed Kushayb, the leader of the state-backed militia,

79. ICC Statute, *supra* note 3, art. 53(2)(a).

80. *See id*. art. 58, subdivs. (2)(a), (2)(b), (2)(c), (7)(a), (7)(c), (7)(d).

81. SULIMAN BALDO, SUDAN: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 4 (May 2010).

82. *See* INT'L CRIM. CT. – OFF. OF THE PROSECUTOR, TENTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1593 ¶ 44 (2005) [hereinafter ICC-OTP, TENTH REPORT OF THE PROSECUTOR] .

83. *Id*.

"Janjaweed."[84] Sudan's hostility to the ICC increased when the investigation and prosecution targeted senior leaders at the top of the chain of the command in the army and security agencies.[85]

Although the ICC Prosecutor in his/her reports on Darfur to the Security Council has documented flaws in the Sudanese Government's cooperation with the ICC since 2005, the flaws deepened once the arrest warrants were issued.[86] This became more notorious when the Prosecutor applied for the arrest warrant of then-sitting President of Sudan, Al-Bashir, in mid-July 2008.[87] Immediately afterwards, official spokespersons for President Al-Bashir's government as well the ruling National Congress Party threatened to retaliate against the humanitarian and peacekeeping operations in Darfur.[88] Such a backlash did not take place, however, and Sudan implemented another way to obstruct the ICC's Darfur-related cases: launching a comprehensive diplomatic campaign oriented to mobilize its political allies to press for a deferral of the ICC's action in application of Article 16 of the ICC Statute using the argument that the arrest warrants were supposedly disrupting the achievement of peace in Darfur.[89] Consequently, the AU, the League of Arab States, and the Organization of the Islamic Conference issued statements before and after the Prosecutor's public announcement of application for the arrest warrant of al-Bashir, strongly criticizing the ICC's actions as destabilizing peace efforts in Darfur.[90]

For over ten years, the tension between the need to implement the ICC arrest warrants against Al-Bashir, paired with the negative and

84. Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, 3 (Apr. 17, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02902.PDF; Prosecutor v. Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 3 (Apr. 27, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02908.PDF.

85. *See* ICC-OTP, TENTH REPORT OF THE PROSECUTOR, *supra* note 82.

86. *See* BALDO, *supra* note 81, at 5.

87. *ICC Prosecutor Applies for Arrest Warrant of Al-Bashir*, INT'L BAR ASS'N, https://www.ibanet.org/ICC_ICL_Programme/ICC_Darfur_Al_Bashir.aspx; *see also* Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF.

88. *See* BALDO, *supra* note 81, at 5.

89. *Id*.

90. *Id*.

reluctant attitudes from African states, became an important factor in the deterioration of the relationship between the ICC and African states considered, individually and as members of the AU.[91] However, since April 2019 Al-Bashir is no longer President of Sudan after being overthrown by his own people.[92] In fact, he now faces a trial for corruption charges.[93] Together, these constitute important developments in potentially improving the relationship between the ICC and African states. In turn, these developments should enable the implementation of the arrest warrants against Al-Bashir so that he is finally tried by the ICC.

The *Situation in Kenya* constitutes another example of how much the position of a government can change towards the ICC during the transition from the "situation" to the "case" phase. As a result of post-electoral violence that occurred following Kenya's 2007 elections, the Prosecutor started considering information about the commission of crimes under the ICC's jurisdiction. Kenya cooperated with the ICC not only before the opening of the situation, e.g., the governmental delegation's visit to the ICC, but also once Pre-Trial Chamber II (based on the request of the Prosecutor) found reasonable basis to believe that crimes against humanity were committed in Kenya during the post-election violence, and that their gravity met the ICC's threshold, thereby authorizing the Prosecutor to open an investigation.[94] Kenya's cooperative attitude was illustrated by the Minister of Justice who, after the Pre-Trial Chamber II's decision, affirmed the government's commitment to cooperate with the ICC under Kenya's obligations as a State Party to the ICC Statute.[95]

However, the ICC Prosecutor's subsequent applications requesting the issuance of summons for six prominent members of the

91. *See generally* ILLIAS BANTEKAS, THE INTERNATIONAL CRIMINAL COURT AND AFRICA (Charles Chernor Jalloh & Ilias Bantekas eds., 2017) (discussing the relationship between the ICC and Africa).

92. *See Omar al-Bashir: Sudan's Ousted President*, BBC NEWS, Aug. 14, 2019, https://www.bbc.com/news/world-africa-16010445.

93. *Id*.

94. *See generally* Situation in the Republic of Kenya, Decision Pursuant to Article 15, *supra* note 72.

95. CHRISTINE ALAI AND NJONJO MUE, KENYA: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 4 (2010).

two leading Kenyan political parties—three from each side—due to their alleged responsibility in the commission of crimes against humanity,[96] were opposed by the Kenyan Parliament.[97] It overwhelmingly voted to withdraw Kenya from the ICC Statute.[98] Although the Kenyan Parliament lacked the power to directly cause immediate changes in relation to the ICC, its members sent a message to the Kenyan government to start withdrawing.[99] This opposition to the ICC Prosecutor's applications for summons to appear was explicitly voiced by members of the Executive Power.[100]

After the expressed intent to withdraw, and the charges and trial against the Kenyan President Uhuru Kenyatta and Kenyan Deputy President William Ruto, the relationship between the ICC and Kenya worsened. Despite strong declarations of intent by both the ICC and Kenya, the cases against Kenyatta, Ruto, and others were withdrawn or vacated due to the lack of sufficient evidence.[101]

These Kenyan cases and the case against former Sudanese President Al-Bashir prompted African states to conduct a series of actions, individually and as part of the AU to, undermine the ICC. First, there was the non-enforcement of arrest warrants against Al-Bashir when he was still President and was in South Africa, which is a

96. *See* Int'l Crim. Ct., *Press Release*, Dec. 16, 2010, http://www.icc-cpi.int/NR/exeres/C3D48F4D-8132-46AC-A84D-94D87F3C64C4.htm (for further background on alleged Kenyan responsibility in the commission of crimes against humanity).

97. *See* Michael Onyiego, *Kenya's Politicians Look to Withdraw from ICC as Suspects Named*, VOICE OF AM., Dec. 15, 2010, https://www.voanews.com/africa/kenyas-politicians-look-withdraw-icc-suspects-named.

98. *Kenya MPs vote to leave ICC over poll violence claims*, BBC NEWS, Dec. 23, 2010, http://www.bbc.co.uk/news/world-africa-12066667.

99. *Id*.

100. *Id*. (The Energy Minister, Kiraitu Murungi, said: "It is only Africans from former colonies who are being tried at the ICC . . . No American or British will be tried at the ICC and we should not willingly allow ourselves to return to colonialism.").

101. *See* Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11-1005, Decision on the withdrawal of charges against Mr Kenyatta, ¶ 4 (Mar. 13, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02842.PDF.

state party to the ICC Statute.[102] Second, the discussion and proposals at the AU to proceed with a collective withdrawal from the ICC Statute.[103] Third, the adoption of the so-called "Malabo Protocol" to establish a sort of African regional criminal court without acknowledging the existence of the ICC.[104]

In certain circumstances, a state may decide to not wait until individuals are singled out by the ICC. For instance, Burundi's decision to withdraw from the ICC Statute, which took effect on October 27, 2017,[105] is directly related to the opening of the investigation into the *Situation of Burundi*, which involves crimes that allegedly involved the current Burundian President Pierre Nkurunziza.[106] Finally, if the difference between "situation" and "case" is kept in mind, there should be more awareness of state/governmental attempts to manipulate the ICC to prosecute only political adversaries. The DRC exemplifies this point because of its "mixed record" cooperation with the ICC depending on the case.[107] Whereas the DRC cooperated with the ICC in *Lubanga*, Ntaganda remained at large for a while.[108] This was arguably because the latter integrated the Congolese army while the former as a leader of the

102. *See, e.g.*, Thomas Weatherall, *Inviolability Not Immunity: Re-evaluating the Execution of International Arrest Warrants by Domestic Authorities of Receiving States*, 17 J. INT'L CRIM. JUST. 45–76 (2019).

103. *See*, *e.g.*, AU Assembly, *Decision on the International Criminal Court*, at 2, ¶6, AU Doc Assembly/AU/Dec. 622 (xxviii) (Jan. 31, 2017). *See generally* AU Assembly, *Decision on the International Criminal Court*, at 1–4, AU Doc Assembly/AU/Dec. 672 (xxx) (Jan. 29, 2018).

104. *See* AU Assembly, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, arts. 4–6, AU doc. Assembly/AU/Dec. 529 (XXIII) (June 27, 2014).

105. *See*, Int'l Crim. Ct., *Burundi*, ICC-CPI, https://www.icc-cpi.int/burundi (last visited Jan. 1, 2020).

106. Situation in Burundi, Case No. ICC-01/17-9-Red, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, ¶¶ 42–43 (Oct. 25, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06720.PDF.

107. Mirna Adjami and Guy Mushiata, DEMOCRATIC REPUBLIC OF CONGO: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 4 (May 2010).

108. Int'l Crim. Ct., *Case Information Sheet*, https://www.icc-cpi.int/CaseInformationSheets/NtagandaEng.pdf (last visited Jan. 1, 2020).

political/military movement Union of Congolese Patriots fought state forces.[109]

B. Prosecution of Cases Test: the Importance of the "Persons Most Responsible" Criterion to Narrow Down and Select the Real Universe of ICC Cases

The admissibility test, which is laid down in the ICC Statute, refers to cases and not to situations. Article 17 of the ICC Statute establishes that: "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where."[110] Accordingly, the real tension caused by the application of the ICC's principle of complementarity takes place not during the situation stage but during the case stage (i.e., once individuals are identified and against whom arrest warrants/summons to appear are issued).

With regard to the ICC's work, it does not really matter in practice whether a state investigates and prosecutes the whole universe of cases concerning lower-ranked offenders or how well the state does so. As explained later, the real overlap between the ICC and domestic jurisdictions consists in a tiny portion of such a vast universe.[111] This minuscule portion, however, holds the utmost importance in regards to those who are allegedly the most responsible for international crimes. Moreover, these individuals are generally still in power or, in case of non-state actors, hold enough capacity to destabilize a country. Thus, a state whose judiciary and/or transitional justice mechanisms generally exhibit impeccable standards may still lead to cases before the ICC if one individual, over whom the aforementioned overlap applies, is somehow shielded from justice. This should be borne in mind to prevent a misleading representation of what the ICC stands for and what the ICC can legally and factually do.

In order to prosecute a case before the ICC, a three-pronged test has to be fulfilled: (1) the case involves crimes under the ICC's jurisdiction; (2) the admissibility test under Article 17 is met, (i.e.,

109. *Id*.
110. ICC Statute, *supra* note 3, art. 17.
111. *See infra* Section III.A.

when a state is "unwilling" or "unable" genuinely to carry out the investigation or prosecution plus the gravity threshold is satisfied); and (3) the interests of justice including, among other things, circumstances, such as the gravity of the crime and the perpetrator's role in the alleged crime.[112]

I address the above-mentioned second circumstance herein as this is arguably the decisive criterion to draw the line between those who ICC's real targets and those who are not. First, there is a general reference to how other international and hybrid criminal tribunals have dealt with this matter. Second, the approaches followed by the ICC Prosecutor and the ICC Chambers are analyzed.

The ICTY and the ICTR focus on the persons most responsible for international crimes. As part of the completion strategy of both tribunals, the Security Council in Resolution 1534 asked each *ad hoc* international tribunal: "to ensure to any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant tribunal."[113] Similar phrasing had already been contained in Rule 28(A) of the ICTY Rules of Procedure and Evidence. With regard to hybrid criminal tribunals, the requirement that only those persons: "who bear the greatest responsibility for serious violations of international humanitarian law" be prosecuted was codified in the Statute of the Special Court for Sierra Leone ("SCSL").[114] Although the UN Secretary General correctly interpreted the expression "greatest responsibility" as prosecutorial strategy,[115] the SCSL case-law showed that lesser offenders were neither prosecuted nor tried at the SCSL.[116] This outcome is coherent with the limited resources that affected the SCSL during its existence.[117] Likewise, the personal jurisdiction of the

112. ICC Statute, *supra* note 3, art. 53(2)(c).

113. S.C Res. 1534, ¶ 5 (Mar. 26, 2004). *See generally* S.C. Res. 1503 (Aug. 28, 2013).

114. S.C. Res. 1315, 2, ¶ 3 (Aug. 14, 2000).

115. Letter from the Secretary General Addressed to the President of the Security Council (Jan. 12, 2001), U.N. Doc. S/2001/40, ¶¶ 2–3.

116. *See* Abdul Tejan-Cole, *The Complementarity and Conflicting Relationships between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139, 148 (2003).

117. *Id*.

Extraordinary Chambers in the Courts of Cambodia ("ECCC") was restricted to: "senior leaders of Democratic Kampuchea and those who were most serious responsible . . . ."[118]

Even though neither the ICC Statute nor the ICC Rules of Procedure and Evidence contains a similar explicit provision on the persons most responsible for crimes under the ICC's jurisdiction, the ICC Prosecutor has adopted the policy of focusing the investigation and prosecution on the most responsible. In the former ICC-Prosecutor's own words: "the worst perpetrators, responsible for the worst crimes, those bearing the greatest responsibility, the organizers, the planners, the commanders."[119] The current ICC-Prosecutor has highlighted that such focused prosecution: "encourages marginalization of high level suspects which may lead to demobilization of armed groups."[120]

Further, the ICC Statute emphasizes the criterion of gravity of the crime to identify which cases can reach the ICC. The Preamble of the ICC Statute reads: "the most serious crimes of concern to the international community as a whole must not go unpunished . . . [the ICC] with jurisdiction over the most serious crimes of concern to the international community as a whole."[121] Similar phrasing is included in Article 5 of the ICC Statute which deals with material jurisdiction.[122] Finally, as previously mentioned, gravity is present under Article 17 of the ICC Statute: "[a case is inadmissible when it] is not of sufficient gravity to justify further action by the Court."[123] The emphasis the ICC Statute places on gravity should not lead us to disregard the importance of "the persons most responsible" criterion, which is actually imbedded in gravity since "gravity" is not solely attached to the act constitutive of the crime but also considers the level of participation of those who committed the crime.[124]

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118. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia Oct. 27, 2004, art. 2 new (Cambodia).

119. Moreno-Ocampo, *supra* note 36, at 4.

120. Bensouda, *supra* note 37, at 510.

121. ICC Statute, *supra* note 3, pmbl., ¶¶ 4, 9.

122. *Id*. art. 5.

123. *Id*. art. 17(1)(d).

124. INT'L CRIM. CT. – OFF. OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 6–7 (Sep. 2003) [hereinafter ICC-OTP, PAPER ON SOME POLICY ISSUES].

Although the ICC-OTP has theoretically considered targeting individuals who are not necessarily at the highest levels of power for successful prosecution of those most responsible for international crimes, it has so far targeted only senior state and non-state individuals.[125] Therefore, it is not expected that low- or intermediate-ranked perpetrators be indicted since national criminal jurisdiction(s) should deal with them. The ICC-OTP itself acknowledges factors, such as logistic constraints, to limit its actions to the persons who are regarded as the most senior offenders.[126]

However, as the Director of the Prosecutions Division of the ICC-OTP, Fabricio Guariglia, remarked, the determination of who are the persons most responsible for international crimes needs to be done only after thoroughly analyzing all the evidence.[127] The ICC-OTP has nuanced its position by stating that the legal threshold of ICC cases admissibility is not as stringent as the policy threshold of the persons most responsible for crimes under the ICC's jurisdiction.[128] Nevertheless, the ICC-OTP itself has explicitly put in place a policy to focus on such offenders. In practice, only cases involving the persons most responsible for international crimes are prosecuted and tried by the ICC. The ICC-OTP has relied on the approach of positive complementarity, namely, it will only deal with the "big fish," whereas national jurisdictions do their work concerning other perpetrators.[129]

In any event, it would be sufficient if the ICC takes note of the precedent set by the relationship between the ICTY and the Bosnian War Crimes Chamber. If it does, the ICC may decide to implement mechanisms to share information concerning cases which are related but prosecuted at different jurisdictional forums.[130] Additionally, this

125. *Id*. at 7.

126. *Id*.

127. Fabricio Guariglia, *The Selection of Cases by the Office of the Prosecutor of the International Criminal Court*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 209, 215 (Carsten Stahn & Goran Sluiter eds., 2009).

128. *Id*.

129. *See* ICC-OTP, PAPER ON SOME POLICY ISSUES, *supra* note 124, at 7–8.

130. *See* WIERDA, *supra* note 21, at 4.

communication may, according to the circumstances of each situation, require the establishment of hybrid criminal tribunals.

As for certain cases, the ICC-OTP has considered that: "the focus of an *investigation* by the Office of the Prosecutor may go wider than high-ranking officers, if investigation of those crimes lower down the chain of command is necessarily for the whole *case*."[131] This Article suggests that this finding should be interpreted as follows: investigation during the situation stage may include intermediate/low level suspects, but this is only to better build up individual cases against the most senior perpetrators which corresponds to the prosecution stage. In other words, investigation into crimes committed by individuals other than "the persons most responsible" (situation phase) is not the same as the prosecution of crimes at the ICC (case phase). Thus, the ICC-OTP's policy in this point becomes clearer is important to avoid an excessive emphasis on legalistic interpretations of admissibility as "admissibility" is only an intermediate step to reach the decision of prosecuting and then trying someone before the ICC. Such an approach may also avoid misleading expectations about who the ICC can prosecute.

The occasional lack of clarity from the ICC-OTP is illustrated in a potential situation: Colombia, which has been under a preliminary investigation by the ICC-OTP since 2006, involving Prosecutor's official visits. The Justice and Peace Law[132] has received a big deal of attention from the ICC-OTP, who has even qualified it as a potentially positive example of complementarity in practice.[133] However, this law was criticized as not reflecting a prosecutorial strategy aimed at those who are the most responsible for international crimes.[134] Rather, cases mainly concerned perpetrators related to particular incidents without helping to expose the liability of superiors.

Moreover, several senior paramilitary commanders were extradited on drug trafficking charges to the United States in 2008-2009.[135] Therefore, the practice surrounding the first years of the said

131. ICC-OTP, PAPER ON SOME POLICY ISSUES, *supra* note 124, at 3 (emphasis added).

132. *See generally* Law No. 975 [Congressional Decree] Jul. 25, 1999.

133. *See* AMANDA LYONS & MICHAEL REED-HURTADO, COLOMBIA: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 3 (May, 2010).

134. *Id*.

135. *Id*. at 4.

law arguably indicated that the ICC-OTP's initial assessment of the law as a good example of complementarity in practice was prematurely and excessively optimistic. This seemingly contributed the debate over whether the situation concerning Colombia being excessively prolonged. Even worse, the ICC's lack of clarity was arguably used by the Colombian government to politically interfere and shield those most responsible from justice. In the end, it does not matter for the ICC cases whether the Colombian Judiciary system in general is able and willing to investigate and prosecute 99% of cases if Colombia presents either unwillingness or inability to investigate and/or prosecute the very few cases that may overlap with the ICC's jurisdiction, namely, those cases concerning the most senior leaders.

In recent times, there have been some uncertainties and challenges concerning Colombia's Special Jurisdiction for Peace, which belongs to the Transitional Justice System agreed in the revised Final Peace Agreement between the Colombian Government and the Revolutionary Armed Forces of Colombia-People's Army ("FARC").[136] The opening of the Situation in Colombia at the ICC may still be advisable concerning those who are the most responsible for international crimes regardless of how impeccable the Colombia's Judiciary and Colombian transitional justice mechanisms may be. Nevertheless, caution must guide any appraisal of the ICC's further action so as not to raise "unrealistic expectations of an international answer to Colombia's long-standing problems with impunity."[137] The very specific mandate of the ICC has to be emphasized to avoid misrepresentations of what this judicial institution may feasibly achieve within its limited powers.

When it comes to the ICC Chambers, their position on the point under discussion may be qualified as not fully consistent. For instance, Pre-Trial Chamber I in *Lubanga* considered that, viewed against the background of the ICC Statute preamble, "gravity" contained in

136. *See* INTERNATIONAL COMMISSION OF JURISTS, THE SPECIAL JURISDICTION FOR PEACE, ANALYSIS ONE YEAR AND A HALF AFTER ITS ENTRY INTO OPERATION - EXECUTIVE SUMMARY 5–7 (Jun. 2019); *see also UNCERTAINTY FOR COLOMBIA'S SPECIAL JURISDICTION FOR PEACE (JEP)*, RELIEFWEB (Mar. 21 2019), https://reliefweb.int/report/colombia/uncertainty-colombia-s-special-jurisdiction-peace-jep.

137. LYONS & REED-HURTADO, *supra* note 133, at 6.

Article 17(1)(d) is a "key tool provided by the drafters to maximize the Court's deterrent effect."[138] Pre-Trial Chamber I established that the ICC's deterrent effect would be the greatest if the ICC only focuses on the highest ranking perpetrators and, therefore, cases should be initiated only against the "most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court."[139]

The ICC Appeals Chamber considered this statement as "questionable" and found it difficult to understand how the deterrent effect could be higher if perpetrators other than leaders could not be brought before the Court: "It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court."[140] However, when the Appeals Chamber overruled the Pre-Trial Chamber's finding, it provided no guidance concerning the scope of article 17(1)(d).[141] This caused some subsequent decisions of ICC Pre-Trial Chambers, depicted the Appeals Chamber's ruling, as merely an "*obiter dictum*"[142] and, hence, raised doubts about the binding authority of the Appeals Chamber's position.[143]

Such unclear or contradictory approaches are counterproductive in terms of predictability or certainty, which is an element of the rule of law to assess the practice of any international court or institution.[144] Although I will come back to the analysis of the potential deterrent

138. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ¶ 48 (Feb. 10, 2006), https://www.icc-cpi.int/CourtRecords/CR2017_06642.PDF.

139. *Id*. ¶ 50.

140. Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ¶ 73 (Jul. 13, 2006), https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF (italics original).

141. SCHABAS, *supra* note 39, at 349.

142. *Obiter dictum*, BLACK'S LAW DICTIONARY (19th ed. 2019) ("A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").

143. SCHABAS, *supra* note 39, at 349.

144. *See* JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 59–60 (2011).

effect of the ICC prosecutions,[145] I now discuss arguments that justify the standing of the Pre-Trial Chambers, namely, the focus on cases concerning the most senior leaders at the ICC. As determined by Darryl Robinson, pragmatic, legal, and moral arguments can be raised.[146]

Regarding pragmatic arguments, Miriam Aukerman highlights that prosecutions "are necessarily limited and selective."[147] This selectivity corresponds to a scenario of a: "wake of such widespread guilt, [where] only a small number of even the worst perpetrators will ever stand trial."[148] This "[s]elective prosecution in the transitional justice context . . . takes place despite compelling evidence that the perpetrators have committed the most heinous of crimes, and have done so without justification."[149] Should these observations be sound when applied to national criminal prosecutions, this Article considers that, with greater reason, they are completely valid when extrapolated in the ICC's context. It is well-known the financial and logistic limitations faced by any international criminal tribunal, the ICC included. Those limitations definitively constrain the ICC's ability to handle cases other than those targeting those who are truly the most responsible for international crimes. In Graeme Simpson's words, "no criminal justice system can prosecute all of those responsible."[150] This also applies to the ICC in order to select cases against the most senior leaders.

Concerning legal arguments, the duty to prosecute in transitional justice arguably solely refers to the persons who are the most responsible for international crimes. Diane Orentlicher has remarked that:

145. *See infra* Section IV.A.

146. Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commission and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 493–95 (2003).

147. Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 61 (2002).

148. *Id*. at 51.

149. *Id*. at 53.

150. Simpson, *supra* note 75, at 74.

> [C]ustomary law would . . . not require prosecution of every person . . . Prosecution of those who were most responsible for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations would seemingly discharge governments' customary law obligation . . . provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.[151]

Even though this comment concerns the state obligation to prosecute, it may be considered as a path to avoid jurisdictional conflicts between the ICC and national criminal jurisdictions. In other words, if the states themselves are in principle obligated to prosecute the most responsible persons/senior leaders (and not necessarily all the perpetrators), the ICC, due to its complementary nature, has greater reason to focus solely on those perpetrators regarded as the most responsible individuals. Additionally, lesser perpetrators are excluded from the ICC's docket as those cases are expected to be dealt with domestically.

Finally, regarding moral arguments, Robinson opines that, "there is a significant difference between the situation of the low level-perpetrator and those who orchestrate the crimes or who distinguish themselves with their sadistic enthusiasm."[152] This moral or ethical consideration may actually prove to be decisive in extreme scenarios such as the DRC where child soldiers are not only low-level perpetrators but also victims of war crimes of conscription, which, in turn, led to the trial and conviction of the most senior offenders, such as Lubanga at the ICC.

151. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2599 (1991).

152. Robinson, *supra* note 146, at 494.

III. THE ICC AS A TOOL OF PEACE AND JUSTICE BUT UNDERSTOOD IN A SET OF OTHER TRANSITIONAL JUSTICE OPTIONS

A. Peace and Justice not as Opposed but as Mutually Complementary Concepts[153]

A necessary starting point is determining what "peace" and "justice" mean in the context of transitional justice mechanisms, which include prosecution of cases by the ICC. A large number of misrepresentations about the ICC exist depicting it as either a threat to peace-making efforts or as a panacea to solve transitional justice issues beyond its mandate and capability stem from the content to be given to the notions of "peace" and "justice." With regard to peace, Graeme Simpson identifies that there is "a failure to distinguish between *positive* and *negative* peace", namely, while negative peace "prioritise[s] ending violence in the shorter term", positive peace focuses on "building more durable peace through addressing the underlying causes of violence."[154]

One problem exists regarding peace processes as if they were the be-all, end-all of the entire peace-making process.[155] This means the adoption of a narrow-minded approach to treating "peace" only as negative peace. A similar problem may also exist concerning the notion of "justice" when justice is mistakenly perceived as solely prosecution, which Graeme Simpson remarks in the following terms: "the ICC represents one instrument in a panoply of available judicial and non-judicial mechanisms. Justice during transition involves much more than punitive judicial accountability meted out through ICC prosecutions."[156]

153. U.N. General Assembly, Annex to Letter dated June 13, 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary General, Nuremberg Declaration on Peace and Justice, 4, U.N. Doc. A/62/885 (Jun. 19, 2008) (discussing the complementarity between peace and justice concepts) [hereinafter Nuremberg Declaration on Peace and Justice].

154. Simpson, *supra* note 75, at 74. *See generally* GRAEME SIMPSON, TRANSITIONAL JUSTICE AND PEACE NEGOTIATIONS (2008).

155. Simpson, *supra* note 75, at 74.

156. *ID.*

If "peace" is associated only or mainly with the notion of "negative peace" and, on the other one, "justice" is treated as synonym with prosecutions, the notions of "peace" and "justice" remain diametrically opposed to each other. Hence, a sound approach that reconciles peace and justice should adopt the notions of "positive" peace and "broad" justice. Thus, an approach to a peace and justice continuum, is sounder because "diverse accountability mechanisms can contribute to peace building efforts, rather than compromise them. In this framework, the ICC is but one mechanism among many."[157]

This continuum approach may hold special significance concerning the victims' interests and voices. Both those who advocate the need for justice and those who stand up for peace normally claim to be speaking on victims' behalf in order to strengthen their respective positions. However, closer attention drawn to victims' perceptions would allow decision-making actors to realize that "peace" and "justice," in victims' perceptions, are not necessarily opposed.

Moreover, victims' perceptions and opinions normally evolve or may change because the ICC's investigations, trials, and reparation implementation can jointly take many years—and there are diverse and interconnected political and legal developments during such long periods. For example, in the *Lubanga* case, the warrant of arrest was issued on February 10, 2006, the trial judgment was issued on March 14, 2012 (confirmed in appeals on December 1, 2014), and the amount of Lubanga's liability for collective reparations was set on December 15, 2017.[158]

The following conclusions relevant to this sub-section, based on survey analyses on perceptions of victims and their communities concerning the ICC conducted over ten years,[159] include: (1) the need

157. *Id*. at 75.

158. *See* Int'l Crim. Ct., *The Prosecutor v. Thomas Lubanga Dyilo*: *Case Information Sheet* (Dec. 15, 2017), https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf.

159. *See*, *e.g*., HUMAN RIGHTS CENTER BERKELEY LAW SCHOOL, THE VICTIMS' COURT? A STUDY OF 622 VICTIM PARTICIPANTS AT THE INTERNATIONAL CRIMINAL COURT (2015). *See generally* Stephen Cody & Alexa Koenig, *Procedural Justice in Transnational Contexts*, 58 VA. J. INT'L L 1, 1–29 (2018); PHUONG PHAM ET AL., FORGOTTEN VOICES: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA (Jan. 2005); PHUONG PHAM ET AL., WHEN THE WAR ENDS: PEACE, JUSTICE, AND SERIOUS

for accountability, in a higher or a lower degree, is present in all ICC situations regardless of considerations of peace as a more important priority than justice; (2) prosecutions as an important but not unique accountability mechanism, being considered alongside other parallel transitional justice options ranging from compensation to amnesties; (3) accountability is regarded as a factor contributing to peace and prevention of future violence; and (4) the ICC is perceived not only as a mechanism of justice but also as contributing to peace.[160] The overall conclusion is that even members of communities affected by ongoing armed conflicts or situations of political instability do not regard justice and peace necessarily as opposed but actually as complementarity notions. Such a perception is stronger when one moves from short-term to long-term scenarios.

Another to challenge the misrepresentation that peace and justice are irreconcilable notions is to evaluate how the ICC's deterrent effect may actually contribute to moving forward in peace-building processes. This Article considers previous experiences and then address whether the ICC's deterrent effect has contributed to peace. As a preliminary point, attention should be drawn to the constraints of prosecutions in transitional justice scenarios, which Miriam Aukerman accurately summarizes:

> Prosecutions may deter some future human rights abusers, and prosecutions may even have a greater deterrent value than alternative justice mechanisms. However, it is unlikely that post-atrocity prosecution is the most effective way to prevent future

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RECONSTRUCTION IN NORTHERN UGANDA (Dec. 2007); PHUONG PHAM & PATRICK VINCK, TRANSITIONING TO PEACE, A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION IN NORTHERN UGANDA (Dec. 2010); PATRICK VINCK ET AL., LIVING WITH FEAR: A POPULATION BASED-SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO (Aug. 2008); SOUTH CONSULTING, SITUATION ANALYSIS OF POST-ELECTION VIOLENCE AREAS, MAY 2009, 26–28; SOUTH CONSULTING, SITUATION ANALYSIS OF POST-ELECTION VIOLENCE AREAS (Jan. 2010); 24 HOURS FOR DARFUR, DARFURIAN VOICES: DOCUMENTING DARFURIAN REFUGEES' VIEWS ON ISSUES OF PEACE, JUSTICE AND RECONCILIATION (Jul. 2010); PATRICK VINCK & PHUONG PHAM, BUILDING PEACE, SEEKING JUSTICE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT ACCOUNTABILITY AND SOCIAL RECONSTRUCTION IN THE CENTRAL AFRICAN REPUBLIC (Aug. 2010).

160. *See generally id*.

> atrocities . . . [if] the goal is to deter future human rights abusers by making potential abusers afraid to act, the international community has bigger sticks to shake than the threat of trial.[161]

Therefore, the expectations about the deterrent effect of prosecutions, including those conducted by the ICC, should not be inflated.

The ICTY provides some important lessons on impact of prosecutions and the timing of charging. The first example is the indictments of self-styled Bosnian Serb President, Radovan Karadzic, and General Ratko Mladic in 1995, just a few months before the Dayton peace negotiations. There was a lot of concern coming from American and European diplomats and the then-UN Secretary General, Boutros Ghali, about the negative impact of those indictments on the peace-building negotiations in Bosnia.[162]

Although the breaking point in Bosnia was the American strategy to consider Karadzic and Mladic as useless interlocutors as opposed to Milosevic,[163] those indictments also played a critical role. The indirect deterrent effect consisted of the exclusion of Karadzic and Mladic from the negotiation process, which facilitated the participation of the Bosnia's Muslim-led government.[164] With the benefit of hindsight, it is apparent that the indictments did not, at minimum, disrupt the peace negotiation process in Bosnia.

The second example is the indictment of Yugoslav President Slobodan Milosevic in 1999 during the NATO's Operation Allied Force.[165] Although the indictment seemingly had little impact on Milosevic's decisions during the armed conflict, he later agreed on a ceasefire with the UN's governance of Kosovo supported by NATO troops without the promise of amnesty for him. Even though a set of factors, including international pressure, pushed Milosevic to take that decision, the indictment seemingly was one of those factors.

161. Aukerman, *supra* note 147, at 70–71.

162. *See* RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 103 (2000).

163. *See* ICTJ, *supra* note 27, at 2–4.

164. GOLDSTONE, *supra* note 162, at 103.

165. *Slobodon Milosevic Trial – the Prosecution's Case*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIB., https://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case (last visited Feb. 18, 2021).

Moreover, the deterrent effect of the indictment against Milosevic should not be examined solely within the context of the ICTY. It needs to be appreciated in a dimension beyond the ICTY because it was the first time that an international indictment was brought against a sitting Head of State.

The ramifications of such a bold step may be associated with other cases, including the ICC case against the Sudanese President Al-Bashir—who is no longer in power. The two examples presented out of the ICTY's experience seem to prove that "peace" and "justice" are notions that do not have to be regarded as contradictory or irreconcilable. In fact, the idea of positive peace was embraced when indicting Karadzic and Mladic: "A peace masterminded by and in order to accommodate the concerns of vicious war criminals defiant of all fundamental international law prescriptions or norms is no such effective or enduring peace."[166]

A similar tension between "peace" and "justice" arose in the context of the SCSL when the Prosecutor David Crane unsealed the indictment of then-President of Liberia, Charles Taylor, while Taylor was attending preliminary peace talks aimed at ending the Liberian civil war in Accra (Ghana) in August 2003. Although this was qualified by the Secretary of the Organization of West States, Mohamed Ibn Chambas, as putting a "'damper on the negotiations,'"[167] the immediate effect was that Taylor abandoned the peace conference and rapidly returned to Liberia.[168] This indictment was perceived as transforming that peace conference into a serious peace-making process and Taylor "was effectively delegitimized, marginalized and removed from any role in a future political settlement. After [two and a half] months the Ghana peace talks

166. Richard Goldstone, *Bringing War Criminals to Justice during Ongoing War*, *in* HARD CHOICES, MORAL DILEMMAS IN HUMANITARIAN INTERVENTIONS 195, 204 (Jonathan Moore ed., 1998).

167. James Goldston, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. J. 383, 399 n.74 (2010) (quoting V. Lasch, *Liberian President indicted for war crimes*, CRIM. WAR PROJECT, 16 June 2003, available at http://www.crimesofwar.org/onnews/news-liberian.html).

168. *Id*.

produced a comprehensive agreement."[169] Further, "Peace Talks for Liberia . . . were directly strengthened and invigorated by [Taylor's indictment]."[170] As discussed above, however, it is important not to jump to conclusions. Even though that indictment contributed to forcing Taylor out of office by eroding his demands to continue in the Presidency, it can hardly be argued that the indictment alone forced Taylor out of office.[171]

At this point, this Article examines how the contribution of the ICC's prosecution to the peace-processes in the country-situations went through the analysis of the first situation at the ICC, namely Uganda, as complemented with some references to one of the longest standing situations at the ICC, namely, Darfur (Sudan). Considering that the ICC in January 2004 announced the opening of its investigation concerning crimes allegedly committed in Uganda, the ICC's first impact may be traced back to the "Betty Bigombe" peace negotiation process, which peaked from December 2004 to February 2005.[172] This can be read as LRA leaders considering both the opening of the Ugandan situation and its potential individual cases because they approached the Ugandan government in peace-negotiations.[173]

Even though the ICC Prosecutor adopted a "low profile" approach,[174] there was a lot of controversy, voiced through the peace first, justice later[175] demand, which evidences the importance of considering not only whether to take the decision to indict but also

169. Priscilla Hayner, *Seeking Justice as War Crimes Rage On*, CHI. TRIB., Jun. 16, 2008, https://www.chicagotribune.com/news/ct-xpm-2008-07-16-0807150373-story.html (last visited Jan. 1, 2020).

170. *Id*.

171. ICTJ, *supra* note 27, at 7.

172. *See Betty Bigome: The woman who befriended a warlord*, BBC NEWS (Aug. 7, 2019), https://www.bbc.com/news/world-africa-49269136; *see also Betty Bigome: Building Peace in Uganda*, U.S. INST. PEACE, https://www.usip.org/public-education/educators/betty-bigombe-building-peace-uganda (last visited Feb. 18, 2021).

173. ICTJ, *supra* note 27, at 5–6.

174. *ID*. at 5.

175. *See generally* REFUGEE LAW PROJECT, *WHOSE JUSTICE? PERCEPTIONS OF UGANDA'S AMNESTY ACT 2000: THE POTENTIAL FOR CONFLICT RESOLUTION AND LONG-TERM RECONCILIATION* (Refugee Law Project, Working Paper No. 15, Feb. 2005) (As an example of a critical position towards the ICC).

when to do so. Nevertheless, the ICC and its Prosecutor deserve credit for actually waiting for the outcome of the Betty Bigombe process (which failed in 2005) before deciding to unseal the arrest warrants against the LRA leaders in October 2005.[176] Although in the case phase, it is arguable that the ICC arrest warrants were an important factor to make the LRA engage in new negotiations with the Ugandan government, leading to the signature of the first Cessation of Hostilities Agreement on August 26, 2006. Yet, the subsequent negotiations as part of the "Juba"[177] process were marked by the LRA's pressure over the Ugandan government concerning the withdrawal of the ICC arrest warrants and the grant of amnesties as conditions to reach peace.[178]

In any event, the Juba process failed, but, at the same time, relative peace returned to northern Uganda and the internally displaced persons have returned in a widespread manner. However, Michael Otim and Marieke Wierda soundly point out that the contribution of the ICC's prosecutions of the LRA leaders to such an outcome is only *one* factor, and it was not even the main one, but: "what is much clearer is that the ICC arrest warrants had a significant impact on the contents of the negotiation and on the accountability agreement in particular."[179] This also corresponds to the lack of a specific doctrine on deterrence or prevention of crime in the ICC-OTP's policy because proof of the link between prevention of crimes and the ICC's action may be very complicated.[180] All in all, as of 2019, Uganda is not at risk of armed violence on the scale of the armed conflicts that affected Uganda in the 1980s or the armed conflict against the LRA which took place in the 1990s and 2000s.[181]

176. ICTJ, *supra* note 27, at 5.

177. Press Release, Security Council, Security Council Press Statement on Juba Peace Agreement (Sudan), U.N. Press Release SC/14323 (Oct. 5, 2020) (discussing the Juba Peace Agreement).

178. OTIM & WIERDA, *supra* note 14, at 2–3.

179. *ID.* at 5.

180. ICTJ, *supra* note 27, at 6.

181. *See Uganda's Slow Slide into Crisis*, INT'L CRISIS GROUP (Nov. 21, 2017), https://www.crisisgroup.org/africa/horn-africa/uganda/256-ugandas-slow-slide-crisis.

Concerning the situation in Darfur, the ICC's intervention arguably changed the balance of power between the Sudanese government and the Justice and Equality Movement ("JEM").[182] This is illustrated by the following incidents. First, knowing that the ICC would make public its decision on the arrest warrant against Al-Bashir on March 4, 2009, the Sudanese government concluded a "Goodwill and Confidence-Building Agreement to Resolve Darfur Conflict" with the JEM on February 17, 2009.[183] Second, by building upon that Agreement, the other rebel group the Sudan Liberation Movement ("SLM")—later renamed Liberation and Justice Movement ("LJM")—joined the negotiations leading the government to sign two separate agreements with the JEM and the LJM in mid-February and mid-March 2010 respectively.[184] In the end, South Sudan became a new state in July 2011.[185] In turn, it is expected that the post-Bashir landscape enhances the maintenance of a society free of armed conflicts in Sudan.[186]

The two examples provided show that the ICC has, at minimum, indirectly impacted moving forward to either peace negotiations or a decrease in hostilities. Nevertheless, the ICC should not be misunderstood as a panacea to solve many problems of "peace" and "justice" in the ICC situations. Even just considering the notion of justice, the ICC is only one among many mechanisms to be weighed in transitional justice scenarios since "justice" is identified in the Nuremberg Declaration on Peace and Justice: "combines elements of criminal justice, truth-seeking, reparations and institutional reform as well as the fair distribution of, and access to, public goods and equity within society at large."[187]

182. *See* BALDO, *supra* note 81, at 2.

183. *Id*. at 6.

184. Jeffrey Gettleman, *After Years of Struggle, South Sudan Becomes a New Nation*, N. Y. TIMES, Jul. 9, 2011, https://www.nytimes.com/2011/07/10/world/africa/10sudan.html.

185. *Id*.

186. *See*, *e.g*., *Safeguarding Sudan's Revolution*, INT'L CRISIS GROUP (Oct. 21, 2019), https://www.crisisgroup.org/africa/horn-africa/sudan/281-safeguarding-sudans-revolution.

187. Nuremberg Declaration on Peace and Justice, *supra* note 153, at 4.

B. The ICC and Amnesties

Unlike the "provisions on prohibitions on"/"lack of effect of amnesties" contained in the ECCC Law, the SCSL, and the Special Tribunal for Lebanon Statutes,[188] the ICC Statute contains no explicit mention concerning the relationship between the ICC and national amnesties related to cases before it. In any event, and with regard to the ICC's work, attention must be primarily drawn to cases where national amnesties include the persons most responsible for international crimes, i.e., those targetable by the ICC regardless of what may be situation concerning intermediate and low-ranked perpetrators. However, when discussing whether the ICC may defer to national amnesties, some scholars include an assessment of whether states are obligated by international law to prosecute international crimes.[189] Once it is concluded that international law binds the state with the duty to prosecute international crimes, national amnesties should be inapplicable, which would facilitate the ICC's actions. Nonetheless, such a premise is unfortunate because, even considering the existence of such a state obligation as for crimes under the ICC's jurisdiction, it does not mean that the ICC shall automatically take over that duty.[190]

As emphasized above, the ICC's mandate is highly specialized and limited by the "persons most responsible" criterion (i.e., only a reduced number of situations and individual cases will be investigated, prosecuted, and tried by the ICC).[191] This point is intrinsically connected with the ICC Statute's recognition of the ICC-Prosecutor's discretion[192] even in cases where the jurisdiction and admissibility requirements are met. These points, when analyzing the ICC's

188. *Compare* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia Oct. 27, 2004, art. 40new (Cambodia), *with* S.C. Res. 1315, (Aug. 14, 2000), art. 10, *and* S.C. Res. 1757, Statute of the Special Tribunal for Lebanon Statute, art. 16 (May 30, 2007).

189. *See generally* Drazan Dukic, *Transitional justice and the International Criminal Court-in "the interests of justice"?* 89 INT'L REV. RED CROSS 691–718 (2007).

190. STIGEN, *supra* note 31, at 431.

191. *See* discussion *supra* Section II.A.

192. ICC Statute, *supra* note 3, art. 53(2)(c).

intervention *vis-à-vis* national amnesties, should lead to consider that: "even if amnesties *per se* were considered as illegal under international law, the ICC would be under no duty to interfere."[193] This has been implicitly reckoned by the ICC-OTP when analyzing the compatibility of amnesties with the ICC Statute's principle of complementarity: "the ICC is entrusted with a specific Statute mandate to help ensure that the most serious crimes do not go unpunished."[194]

As previously detailed, the "persons most responsible" criterion sheds light on the nature of the most serious crimes referred to in the ICC Statute. This criterion was identified as a critical factor by the ICC-OTP's informal expert paper in evaluating the relationship between the ICC and national amnesties via this question: "Are conditional amnesties/alternative measures made available only to lower-ranked offenders? Or, are they available to the persons most responsible (PMR)?"[195] Moreover, the ICC-OTP's informal expert paper explicitly acknowledges that amnesties which exonerate those lower-ranked perpetrators are not incompatible with the ICC; however, it was expressed a different approach when amnesty's personal scope includes those considered as the most responsible for international crimes:

> There may be logistical, moral, and legal grounds to treat lesser offenders through alternative measures [e.g., amnesties] – particularly following mass crimes where the number of offenders is overwhelming- but it is more problematic where PMR obtain lenient treatment. The ICC may properly focus on the PMR and be more prepared to insist on prosecution, and yet have less reason to intervene in the handling of lesser offences by recovering societies.[196]

Even though granting amnesties to lower-ranked perpetrators normally raises some controversy, this Article considers that the grant of amnesties corresponds to their use as a transitional justice mechanism alongside criminal prosecutions, reparations, truth seeking

193. STIGEN, *supra* note 31, at 432.
194. ICC-OTP, INFORMAL EXPERT PAPER, *supra* note 9, at 23.
195. *Id*.
196. *Id*.

mechanisms, lustration, etc. ICC prosecutions need to be regarded as only a transitional justice tool within the myriad of other mechanisms designed to balance peace and justice. This underlying idea arguably shed light on the approach adopted by the AU High-Level Panel on Darfur ("AUPD"). Accordingly, the AUPD did not challenge the ICC's jurisdiction as the AUPD embedded the ICC's actions within a comprehensive and holistic transitional justice approach. The ICC was therefore regarded as "a court of last resort, which complements the national judicial systems. It is also a court of limited capacity."[197]

> Among other measures to promote justice and reconciliation, the AUPD recommended the constitution of a truth, justice and reconciliation Commission—pardon-granting power where appropriate included—and a hybrid tribunal with competence over the most serious crimes.[198]

Concerning the legal principles relating to amnesties, the SCSL, for example, only dealt with amnesties as a preliminary/incidental question before it considered properly the merits of the case.[199] The same can be *mutatis mutandis* said about the ECCC.[200] It is inaccurate to fall to the temptation of mechanically extrapolating human rights monitoring bodies'/regional courts' case-law regarding the legality of national amnesties to the realm of international criminal justice institutions .[201] This is because those bodies/courts establish state

197. African Union High-Level Panel on Darfur [AUPD], Report of the African Union High-Level Panel on Darfur, PSC/AHG/2(CCVII), 91, ¶ 339 (Oct. 29, 2009).

198. *Id*. ¶ 25.

199. *See*, *e.g*., Prosecutor v. Kallon & Kamara, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Special Court for Sierra Leone [SCSL], (Mar. 13, 2004), http://www.worldcourts.com/scsl/eng/decisions/2004.03.13_Prosecutor_v_Kallon_Kamara.pdf.

200. *See* Prosecutor v. Nuon, Case 002, Case No. 002/19-09-2007/ECCC/TC, Decision on Ieng Sary's Rule 89 Preliminary Objections, Extraordinary Chambers in the Courts of Cambodia [ECCC], ¶¶ 37–53 (Nov. 3, 2011), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E51_15_EN.PDF.

201. *See generally* Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 75 (Nov. 30, 2001),

responsibility (whether or not the state in question has violated its obligation to prosecute serious human rights violations by passing or implementing amnesty laws).

Nevertheless, the ICC's mandate is limited to criminal liability of *individuals* who are regarded as the most responsible for international crimes under the ICC's jurisdiction. Precisely, the rest of this sub-section addresses whether, in a scenario where the persons most responsible for the said crimes benefit from an amnesty, an exception to the ICC's competence may be invoked. As a matter of principle, national amnesties whose personal scope includes the "persons most responsible" for international crimes directly overlap with the ICC's personal scope. As explained above, there is a general consensus, based upon legal, moral, and pragmatic arguments, about the necessity of prosecuting and trying those who are "the most responsible" either at the national or the international level while, eventually, sparing lower-level perpetrators from prosecution.[202]

An avenue considered by some scholars as the most important with respect to a potential amnesty exception is Article 16 of the ICC Statute.[203] Accordingly, the Security Council holds the legal authority to request the ICC to respect an amnesty—which may include the most senior perpetrators—thereby prohibiting the commencement of an investigation or prosecution deferring any proceedings already under way. This has to meet two requirements: (1) the determination of a threat to the peace, a breach of the peace or an act of aggression under Article 39 of the UN Charter;[204] and (2) the resolution requesting the ICC's deferral has to be consistent with the purposes and principles of the UN listed under Article 24 of the UN Charter.[205] However, the second requirement may cause difficulties in terms of a potential tension between two purposes and principles of the UN, namely: (1) maintenance of international peace and security and (2) the promotion and respect for human rights and fundamental

https://iachr.lls.edu/sites/default/files/iachr/Cases/Barrios_Altos_v_Peru/benson_barrios_altos_v._peru.pdf.

202. *See supra* Section III.B.

203. Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 522 (1999).

204. U.N. Charter art. 39.

205. U.N. Charter art. 24, paras. 1–7.

freedoms.[206] Thus, deferring an ICC case that, almost by definition, targets the persons who are the most responsible for the most serious crimes is not coherent with one of the UN purposes and principles.

Even if this obstacle is circumvented, the so-called "compétence de la competence" (Kompetenz-Kompetenz),[207] may provide the ICC a means not to follow the UN Security Council. Nevertheless, the hierarchical superiority of the Security Council's resolutions, which stems from the UN Charter,[208] over the ICC Statute would probably prevail. Be that as it may, Article 16 can only defer the investigation or prosecution of the most responsible individuals up to a renewable twelve-month period.[209]

Regardless, a majority of votes of the UN Security Council is needed to obtain the said renewal, but this may be difficult in practice. In actuality, concerning the most responsible persons, the AU tried unsuccessfully to trigger Article 16, following the announcement by the ICC Prosecutor that he was seeking an arrest warrant against the then-President of Sudan. The AU called upon the UN Security Council to apply Article 16 and "defer the process initiated by the ICC".[210] Moreover, the AU's subsequent call to apply Article 16 after the issuance of the arrest warrant against Al-Bashir was also unsuccessful.[211] By taking into account these outcomes, it is likely that the UN Security Council would hardly defer the ICC's prosecution of one of the most senior offenders who benefited from an amnesty even, if another international organization exerts pressure.

A second possible exception may exist under Article 53(2)(c) of the ICC Statute. This provision refers to the consideration of all the circumstances, including, but not limited to, the factors explicitly listed therein, when the ICC Prosecutor exercises his/her discretion to

206. *See* U.N. Charter art. 1, paras. 1, 3; *see also* U.N. Charter art. 2, para. 3.

207. *See* Scharf, *supra* note 203, art. 523 (discussing the power of any court to determine whether it has jurisdiction).

208. *See* U.N. Charter art. 103.

209. *See* U.N. Charter art. 16.

210. AU Peace and Security Council Decision, PSC/MIN/Comm (CXLII), ¶¶ 3, 5, 9, 11(i) (Jul. 21, 2008).

211. *See* AU Assembly, *Decision on the Meeting of the African States Parties to the ICC Statute*, at ¶¶ 9–10, AU Doc. Assembly/AU/13(XIII) (Jul. 3, 2009).

take the decision to prosecute.[212] It has been suggested the existence of an "exception of necessity" when a state faces a "grave and imminent threat," which governments would not be required "to press prosecution to the point of provoking their own collapse."[213] The question would be whether it is correct to extrapolate that conclusion from the realm of national criminal prosecution to the international level, especially in light of the ICC's highly-specialized mandate.

The analysis definitely has to be conducted on a case-by-case basis. The solution, in principle, negative unless amnesties, which include those most responsible, are adopted in scenarios where it is highly likely that the ICC's prosecutions will immediately and unavoidably trigger a humanitarian crisis the likes of 1994 Rwanda.[214] In other words, the "exception of necessity" must be construed very narrowly under a high threshold. Otherwise, governments may distort the "exception of necessity" as a blackmailing strategy to, among other things, grant amnesties and shield the most responsible offenders from justice. This is the manner in which the said exception may be regarded as a decisive circumstance not to prosecute the individuals who are most responsible for international crimes, and an implementation consistent with the phrasing of Article 53(2)(c) of the ICC Statute, which contains an open-ended clause on prosecutorial discretion: "A prosecution is not in the interests of justice, taking into account all the circumstances, including . . . ."[215]

Another possible exception may exist when the absence of amnesties shielding the "persons most responsible" has no impact on the feasibility of prosecuting them due to extreme difficulties to meet evidentiary thresholds. Nevertheless, this scenario is arguably much more controversial than the previous one because the existence of enough direct and/or circumstantial evidence to find an accused guilty beyond any reasonable doubt is, by definition, determined only during trial. The only counter-argument may be some pragmatic approach wherein the ICC-OTP uses its scarce resources to pursue cases where it has better chances to succeed. This means that, even among cases

212. ICC Statute, *supra* note 3, art. 53(2)(c).

213. Orentlicher, *supra* note 151, at 2548.

214. *See Rwanda genocide: 100 days of slaughter*, BBC NEWS (Apr. 9, 2019), https://www.bbc.com/news/world-africa-26875506.

215. ICC Statute, *supra* note 3, art. 53(2)(c).

involving the "persons most responsible," the ICC-OTP should select cases regarded as truly potentially successful, which requires the ICC Prosecutor to thoroughly evaluate the evidence at hand.

As part of its guiding criteria to assess national amnesties, the ICC-OTP's informal expert paper has considered additional factors other than the "persons most responsible" criterion.[216] However, if those factors prove to be difficult when it comes to amnesties as applied to lesser perpetrators, the acceptance as for the most responsible offenders seems to be extremely unlikely. One factor, "international legitimation,"[217] would barely be present, if at all, in cases of amnesties such as sweeping or blanket amnesties. For example, the Lom**é** agreement for Sierra Leone, which included the persons most responsible for international crimes. Nor would self-amnesty laws be given such legitimacy as the laws in Argentina, Chile, or Peru, which were passed by dictatorial regimes to exonerate themselves from criminal liability.[218]

There is a firm trend in the international community, particularly at the UN's policy level, to be more reluctant to amnesties that include international crimes, as observed by the UN Secretary General: "Ensure that peace agreements and Security Council resolutions and mandates . . . reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity . . . ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court."[219] The last part of this quote is particularly relevant because the UN created and/or assisted those courts to precisely deal with the persons most responsible for international crimes as the ICC does. Therefore, amnesties that protect these

216. ICC-OTP, INFORMAL EXPERT PAPER, *supra* note 9 at 13–15.

217. *Id*. at 23.

218. *See Argentina: Amnesty Laws Struck Down*, HUMAN RIGHTS WATCH (Jun. 14, 2005), https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down (Argentina); *see also* Guadalupe Marengo, *Chile: Amnesty law keeps Pinochet's legacy alive*, AMNESTY.ORG (Sept. 11, 2015), https://www.amnesty.org/en/latest/news/2015/09/chile-amnesty-law-keeps-pinochet-s-legacy-alive/ (Chile); Lisa J. Lapante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 916, 944–55 (Peru).

219. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 64(c), U.N. Doc. S/2004/616 (Aug. 23, 2004).

individuals should not be considered legitimate and the ICC-OTP should intervene, provided the admissibility test is met and the interests of justice so demand.

The last possible avenue to invoke an exception to the ICC's jurisdiction in context of amnesties involving the 'persons most responsible' is the prohibition of double jeopardy or "*ne bis in idem*,"[220] which the ICC Statute phrases as follows:

> No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court or (b) Otherwise were not conducted independently or impartially . . . .[221]

The accused, including the most responsible offenders, could argue that their confessions before an amnesty-granting truth commission was equivalent to being tried and convicted of the same offense they are currently charged with at the ICC.[222] As Michael Scharf has remarked, however, there are two issues with Article 20(3) of the ICC Statute that present problems in cases of the most responsible offenders: (1) it refers to a trial by "another court," which a truth commission is not; and (2) Article 20 is not applicable to proceedings that are "inconsistent with an intent to bring the person concerned to justice." [223]

In terms of practice, the ICC in the case of *Saif Gaddafi* has provided some analysis of the relationship between national amnesties and admissibility of cases at the ICC. In March 2020, the ICC Appeals Chamber[224] confirmed most of the amnesty-related findings of the

220. *Non bis in idem*, BLACK'S LAW DICTIONARY (19th ed. 2019) ("Not twice for the same thing.").

221. ICC Statute, *supra* note 3, art. 20(3).

222. *See* Scharf, *supra* note 203, at 525 (quoting Int'l Crim. Ct., Rome Statute of the International Criminal Court, art. 17(2), U.N. Doc. A/Conf. 183/9 (July 17, 1998)).

223. *Id*.

224. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11-695, Appeal of Gaddafi Against decision of Pre-Trial Chamber I Entitled "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c),

ICC Pre-Trial Chamber.[225] First, a Libyan amnesty law (Law 6/2015) was not applicable to the accused because this law explicitly excluded the crimes alleged against him.[226] In other words, the Gaddafi's self-protecting law was inapplicable in the ICC. Second, Law 6/2015 lays down conditions requiring applicants to manifest repentance, adopt steps to reconcile with victims, and commit not to re-offend, all of which were not met.[227] Third, the Law 6/2015 requires a competent judicial authority to render a reasoned decision terminating the criminal proceedings against the accused, which Gaddafi did not show.[228]

As for the compatibility of the Libyan amnesty law with international law, the ICC Pre-Trial Chamber in *Gaddafi* found that "there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law."[229] Nevertheless, the ICC Appeals Chamber considered that this matter is not settled, and "[f]or present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties . . . . In these circumstances, the Appeals Chamber will not dwell on the matter further."[230]

Lastly, it is important to examine how pardons fit into this scheme. Amnesties and pardons are different; the latter, in words of the UN High Commissioner for Human Rights, are: "an official act that exempts a convicted criminal or criminals from serving his, her or

19 and 20(3) of the Rome Statute'", ¶ 3 (Mar. 9, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00904.PDF [hereinafter Gaddafi Appeal].

225. Prosecutor v. Gaddafi, ICC-01/11-01/11-662, Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute," ¶ 57 (Apr. 5, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF [hereinafter Gaddafi Decision].

226. *See* Gaddafi Appeal, ¶¶ 85–95; *see also* Gaddafi Decision, ¶¶ 56–60.

227. *See id*.

228. *Id*.

229. Gaddafi Decision, ¶ 61.

230. Gaddafi Appeal, ¶ 96.

their sentences."[231] Pardons do not face the first problem noted above because there was actually a criminal conviction by a court. The second problem regarding inconsistency of proceedings must be analyzed on a case-by-case basis. However, a pardon still stands a chance to prevent the ICC's jurisdiction, even in cases concerning the most responsible offenders because "unlike amnesties, pardons are not ambiguous about the guilt of the recipient . . . . Pardons thus remove punishment, but unlike amnesties, do not disturb the accountability and truth functions of justice."[232]

CONCLUSION

First, the ICC's mandate, as an international criminal tribunal, is limited to the determination of criminal liability of those accused of committing crimes under its jurisdiction. Accordingly, when the ICC Prosecutor and the ICC Chambers assess whether the principle of complementarity has been triggered, it is not part of their mandate to fully evaluate the respective national system. That matter is reserved to human rights bodies.

Also, as the ICC Prosecutor holds a legal rather than a political mandate, he/she has no obligation to privilege considerations of peace and security over justice when deciding whether to prosecute an individual. This is because the ICC's mandate is not to maintain international peace and security, which corresponds to institutions such as the Security Council. The ICC's mandate is part of the "Rome System of Justice," which has the State Parties to the ICC Statute as key actors.

In light of a positive complementarity approach to the relationship between the ICC and national jurisdictions, the ICC is only a court of last resort, which is complementary to national criminal jurisdictions, although the ICC should/may encourage and/or assist national prosecutions. Such a positive complementary approach, however, cannot be exaggerated because the ICC has no obligation to encourage/assist (especially in "unable" state scenarios) a state to

231. Office of the U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, 43, HR/PUB/09/1 (2009).

232. Ronald Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 235–236 (2002).

investigate and prosecute the generality of cases which are in principle outside the ICC's admissibility. The ICC needs to increasingly engage into a division of judicial tasks. This means the ICC prosecutes and tries the most responsible/senior individuals through national criminal jurisdictions that deal with lesser offenders and/or other transitional justice mechanisms in order to avoid an instrumentalization of the ICC through self-referrals when a state is indeed able and willing to investigate and prosecute. Such a move would better preserve the ICC's scarce resources.

Second, the difference between the notions of "situation" and "case" must be noted in order to identify how much the governmental/state reactions may change. States/governments, broadly speaking, tend to be cooperative or, at least, not obstructive, when there is only an ongoing investigation into the general context of a "situation" at the ICC.

However, once the ICC Prosecutor moves from the "situation" phase to the "case" phase by applying for the issuance of arrest warrants or summons to appear and, especially when one accused is a high-ranking state officer, the same state/government tends to become hostile to the ICC. This change in reaction illustrates the real tension takes place not during the investigation into a situation, but when individuals are targeted/prosecuted by the ICC. This is intrinsically connected with the fact that only a handful of perpetrators are prosecuted and tried by the ICC in application of the criterion of 'the persons most responsible' which is decisive during prosecution. Within the framework of the ICC's prosecutions, if even one of the most responsible persons is shield from justice, it does not really matter whether a state's judiciary is overall impeccable, or whether other transitional justice mechanisms are properly implemented. Accordingly, the ICC will step in provided that the prosecution test is met.

Third, the notions of "peace" and "justice" should be broadly understood. A notion of "positive peace" that does not limit peace to end violence in the immediate term, and "justice" includes several accountability mechanisms and not only prosecution. Bearing in mind these distinctions, the ICC may be a tool of peace and justice in a set of other transitional justice options.

The victims' perceptions do not accurately conceive peace and justice as necessarily irreconcilable and, therefore, the ICC is perceived as an instrument to foster both peace and justice.

Additionally, the misrepresentation of the ICC as a threat to peace-building making has generally proved to be unjustified because disruptions of peace have neither occurred in similar contexts tackled by other international/hybrid criminal tribunals, nor have they clearly occurred in the ICC's practice. Conversely, prosecutions of those who are the most responsible offenders have shown to contribute to build up positive peace. Nevertheless, the ICC's role in this peace and justice continuum is limited and should not be exaggerated. This is illustrated via the relationship between the ICC and national amnesties. The ICC, strictly speaking, lacks mandate to evaluate the legality of national amnesties provided that they do not shield the "persons most responsible for international crimes from justice," namely, those persons who the ICC target. Concerning cases of the most responsible offenders, under very exceptional, strict, and specific conditions, such as a narrow application of Article 16 of the ICC Statute, the exception of necessity or pardon, or the amnesty exception might potentially and extraordinarily be invoked to preclude the prosecution of a case before the ICC.