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The ICC Reform Process from the Perspective of African States Parties to the Rome Statute

Better Late Than Never

*Charles C. Jalloh**

Abstract

The relationship between African States with the permanent International Criminal Court (ICC) is critical to the continued success of the ICC and the development of international criminal law. One of the main criticisms of the ICC by some African States has centred on the question of how best to sequence peace with justice, or justice with peace, in situations of ongoing conflict such as in Uganda and Sudan. This article examines the history of the peace-justice clashes on the African continent in the context of the 2019 Assembly of States Parties mandated process of ICC reform, considering the ICC Office of the Prosecutor's (OTP) Policy Paper on the Interests of Justice. Regrettably, despite the long-standing African State Party concern about the peace-justice interface, the September 2020 ICC independent expert report produced for the Assembly of States Parties missed the opportunity to expressly address this important issue. The author submits that, while the OTP appears to have embraced a more nuanced view of the interests of retributive justice and how they relate to the interests of sustainable peace, it may be timely for the formal ICC review process to consider how to bring further clarity to the resolution of this issue in the context of the ongoing ICC reform discussions. Formally giving the OTP some guidance on how to balance the interests of justice considerations after it begins a formal investigation into a situation should help limit some of the criticisms

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directed towards the ICC as it engages in the challenging task of dispensing justice for victims of atrocity crimes in Africa and other parts of the world.

Keywords: International Criminal Court, ICC reform process, Independent expert review process, Africa and the International Criminal Court, Article 53 of the Rome Statute, African concerns about ICC.

1 Introduction

The International Criminal Court (ICC or the Court) was established with the declared goal of helping end impunity for the perpetrators of the most serious crimes of concern to the international community. Article 1 of the Rome Statute grants the Court jurisdiction over "persons for the most serious crimes of international concern".[1] These crimes are genocide, crimes against humanity, war crimes and, for some of the ICC's States Parties, the crime of aggression.[2] The Assembly of States Parties (ASP), which meets at least once a year, sets general policies for the administration of the Court and provides oversight. During these meetings, the States Parties review the activities of the various organs of the ICC, discuss new projects and adopt the ICC's annual budget. The ASP also periodically elects the Court's principal officials and is formally entrusted with addressing broad policy questions, including those related to non-cooperation.

Many African States have participated in ASP discussions since the beginning of the ICC's establishment. At its inception, although each state had separate positions, the African States generally enthusiastically supported the work of the ICC and were optimistic about the Court's potential to help address the impunity arising from many conflicts that were unfolding in their region. Four concerns emerged from the collective and individual statements of African States during the plenary negotiations in Rome in 1998. The four aspirations were succinctly set out by South Africa's delegate, on behalf of the sixteen-member Southern African Development Community, on the opening day of the Rome Conference. He stated that African States desired that

– The Prosecutor should be independent and have the authority to initiate investigations and prosecutions on his or her own initiative without interference from States or the United Nations Security Council, subject to appropriate judicial scrutiny and the independence of the Court must not be prejudiced by political considerations;
– The Court should contribute to furthering the integrity of States generally, as well as the equality of States within the general principles of international law;

1 Rome Statute of the International Criminal Court Art. 1 (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002, 2187 *U.N.T.S. 3*.

2 *See Id*. Art. 5 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.").

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– The Court… should be an effective complement to national criminal justice systems and should also have competence in the event of the inability, unwillingness or unavailability of national criminal justice systems to prosecute those responsible for grave crimes under the Statute, while respecting the complementary nature of its relationship with such national systems; and
– The Court is a necessary element for peace and security in the world… and [its] establishment… would not only strengthen the arsenal of measures to combat gross human rights violations but also ultimately contribute to the attainment of international peace.[3]

On 1 July 2022, the ICC celebrated the twentieth anniversary of the entry into force of its founding treaty. The four concerns raised by the African States in the summer of 1998 are as relevant today as they were more than twenty years ago, especially considering the fact that today, Africa constitutes the largest single regional bloc of States to ratify the Rome Statute.[4] Many African scholars, legal experts and, perhaps even more importantly, the African Union (AU), the regional body comprising all fifty-five African States, have voiced concern that the ICC has primarily focused on pursuing African suspects and defendants.[5] This potentially skewed focus appears troubling because, if it is reflective of a bias, it would be inconsistent with the underlying idea of an ICC Office of the Prosecutor (OTP) that is required to exercise its powers with independence and impartiality. Some states have even claimed that the Court is "susceptible to political manipulation in that it has ignored atrocities committed by other major world powers, such as the United States and China".[6]

3 *See* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, at 65, A/CONF.183/13 (Vol. II) (2002) ("The establishment of an international criminal court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace. In view of the crimes committed under the apartheid system, the International Criminal Court should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished.").

4 Of the 123 ICC member states, 33 are from Africa, 28 Latin America and the Caribbean, 25 from Western Europe and other states, 19 from Asia-Pacific, and 18 from Eastern Europe. *The States Parties to the Rome Statute, Int'l Crim. Ct*, https://asp.icc-cpi.int/states-parties#:~:text=123%20countries%20are%20States%20Parties, Western%20European% 20and%20other%20States [https://perma.cc/B9ME-2DJY] (last visited 13 May 2022).

5 For analysis of the ICC-Africa tension, *see* for example, Charles C. Jalloh, *Regionalizing International Criminal Law?*, 9(3) Int'l Crim. L. R. 445 (2009); Charles C. Jalloh, *The International Criminal Court on Trial, in* Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay 478-518 (Chile Eboe-Osuji, ed., 2010); Charles C. Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation?*, 34(2) N. C. Cent. L. R. 203 (2012); Charles Jalloh & Ilias Bantekas, *Introduction, in* The International Criminal Court and Africa 2 (Charles Jalloh & Ilias Bantekas eds., 2017) ("Several African states began to perceive the Court not as a court for Africa, but one against it."); Cannon et al., *The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative*, 2 Afr. J. Int'l Crim. Just. 6, 7 (2016) ("[A] number of scholars and the African Union (AU) are unhappy that the ICC thus far has focused mostly on punishing African defendants.").

6 Cannon et al., *supra* note 5.

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As a result, over the years, several African State Parties have submitted proposals to 'fix' the Rome Statute system. These proposals have included amendments to the ICC Statute's preamble to extend the application of complementarity to *regional* courts, not just *national* courts,[7] which includes recommendations to strengthen national criminal justice systems;[8] amendments to substantive provisions of the treaty, such as Article 16 of the Rome Statute, to permit deferrals of situations by the U.N. General Assembly if the currently mandated Security Council fails to do so within a six-month period;[9] and amendments to the irrelevance of official capacity clause under Article 27 of the Rome Statute to provide for some temporary immunity from prosecution for incumbent government officials until they are no longer in office.[10] There have been additional African State proposals to amend the ICC Rules of Procedure and Evidence to permit accused persons to be excused from being present during trial in certain circumstances; and proposals for extending the jurisdiction to offences against the administration of justice and to Court officials; and clarification of the role of the independent oversight mechanism.[11]

For various complex reasons, including a seeming failure by African States to properly motivate their proposals or direct the necessary follow-ups to the right forum for ICC States Parties (such as the working group on amendments), nearly all proposals have been unsuccessful. Perhaps due to the several failed proposals for amendments and partly due to the perception that the Court is being used to harass and humiliate only African leaders, there have been discussions of a collective withdrawal of African states from the ICC system.[12] To date, *collective* withdrawal, a concept unknown in international treaty law, has not occurred. However, individual African countries, such as Burundi, the Gambia and South Africa, have tried to withdraw. Of course, as a consent-based system, *individual* States may withdraw from the treaty under the rules of general international law

7 Assembly of State Parties, *Report of the Working Group on Amendments*, at 3, ICC-ASP/ 14/34 (16 November 2015), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP14/ICC-ASP-14-34-ENG.pdf [https://perma.cc/A965-K7M3] (Kenya's proposed amendment 5).

8 African Group Written Submissions, *Review of the International Criminal Court and the Rome Statute System African States Parties Written Submission*, 31 July 2020, p. 6.

9 South Africa, Proposal of Amendment, at 5 (30 November 30), https://treaties.un.org/doc/Publication/CN/2009/CN.851.2009-Eng.pdf [https://perma.cc/6CFM-95BS].

10 *Kenya, Proposal of Amendment*, at 7 (14 March 2014), https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf [https://perma.cc/MH25-XQHM]. Kenya's proposals included five substantive amendments to several provisions of the Rome Statute. That regarding modification of substantive Art. 27 would introduce a new sub-paragraph that would read: "Notwithstanding paragraph 1 and 2 above, serving Heads of State may be exempt from prosecution during their current term of office. Such am [sic] exemption may be renewed by the Court under the same conditions." Kenya's Proposed Agenda Items for The 12th Session of The Assembly of State Parties, http://scribd.com/doc/183221222/Kenya-s-proposed-agenda-items-for-the-12th-Session-of-the-Assembly-of-State-Parties [https://perma.cc/ZSP7-QDTP]. For commentary critical of that proposal, *see* Charles C. Jalloh, *Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa*, 7 *Afr. J. Legal Stud*. 43, 44-59 (2014).

11 Kenya, *supra* note 10.

12 Jalloh & Bantekas, *supra* note 5, at 4.

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since the Rome Statute does not prohibit it and, in fact, addresses withdrawal under Article 127.[13]

Each of the three African States mentioned had its own reasons for seeking withdrawal, which relate more to domestic politics than a principled stance against the ICC itself. Burundi, which was under a preliminary examination that implicated interests of the highest State officials, proceeded to be the first country to withdraw.[14] This seemed to be in anticipation of the Pre-Trial Chamber III authorization of the Prosecutor to formally investigate the situation although the Rome Statute clearly states that a State shall not be discharged, by reason of its withdrawal, from the obligations arising from the treaty, including those of a financial nature and those concerning criminal investigations commenced before the withdrawal and the duty of the withdrawing State to cooperate in respect of such investigations.[15] South Africa, which surprised many because of its typically strong support for the ICC, initiated withdrawal from the Rome Statute following what was seen by the government as an embarrassing local judicial ruling, that South Africa had failed to comply with its obligations to arrest and surrender Sudanese president Omar Al-Bashir when hosting an AU leaders' summit.[16] There was an initial decision to appeal the ruling to a higher court. The appeal was withdrawn by the government thereafter. South Africa's formal withdrawal notification was subsequently withdrawn following a successful legal challenge by the official opposition party and civil society organizations on 22 February 2017, which found that national parliamentary procedures for withdrawal had not been complied with by the executive branch of the government.[17]

For its part, in a symbolically important move, given its status as the home country of the then-ICC Prosecutor, Gambia rescinded its notice of withdrawal due to a fortuitous change of government.[18] The earlier Jammeh government, which initiated the withdrawal process, was widely criticized for its human rights record,

13 *Rome Statute, supra* note 1, Art. 127.

14 *See* Manisuli Ssenyonjo, *State Withdrawals from the Rome Statute of the International Criminal Court South Africa, Burundi, and The Gambia, in* The International Criminal Court and Africa 214, 217-220 (Charles Jalloh & Ilias Bantekas eds., 2017) ("Burundi's head of state and other state officials did not want the Prosecutor to proceed with the preliminary examination started in April 2016 into alleged crimes under the ICC jurisdiction committed in Burundi.").

15 *Id*., at 217-218.

16 *See* Erika de Wet, *The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law*, 13 J. of Int'l. Crim. Justice 1049-1071 (2015) (discussing the lack of basis in international law for South Africa's decision and possible reasons for it); *see also* Dire Tladi, *The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law*, 13 J. of Int'l. Crim. Justice 1027-1047 (2015) (presenting further commentary, on the domestic and international legal implications).

17 *See* Ssenyonjo, *supra* note 14, at 215 ("South Africa's minister of international cooperation and development, acting for the executive and without seeking or receiving *prior* approval of the South African parliament or any public consultation, unilaterally submitted to the UN Secretary-General notification of South Africa's withdrawal.").

18 Merrit Kennedy, Under New Leader, Gambia Cancels Withdrawal from the International Criminal Court, NPR (14 February 2017), https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court [https://perma.cc/UG43-X9FD].

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both inside and outside Africa. The 2021 Gambia Truth and Reconciliation Commission report confirmed that serious violations of human rights, including crimes such as torture and enforced disappearances, were allegedly committed during Jammeh's rule.

At the AU level, several political and legal steps have been taken at different points in the ICC-Africa relationship to counter what is often perceived as a biased court acting selectively against African leaders. One aspect of this has entailed holding an extraordinary heads of state summit to rally support for a common African position of grievance against the ICC,[19] establishing a special ministerial committee of foreign ministers to coordinate political action,[20] mobilizing diplomatic support at the United Nations for deferral requests of investigations and prosecutions in relation to the Sudan and Kenya situations,[21] putting direct political pressure on the ICC to drop certain cases through demarches to the President of the Court, and in a marked improvement in its practise, the more recent AU appearances as *amicus curiae* in the Kenya[22] and Sudan[23] situations to present legal arguments before the ICC judges either of its own initiative or through acceptance of an invitation by the ICC Appeals Chamber. In the case of Kenya, the AU Commission with the present writer acting as external counsel, sought standing to present legal arguments before the ICC. Interestingly, the Appeals Chamber did grant the AU Commission the right of audience to make submissions but denied those of Kenya, Uganda and Namibia, which had also separately applied to present their individual views as State Parties. In the Sudan situation, the ICC Appeals Chamber was more proactive and expressly invited State Parties and international organizations, including the AU, to make submissions. The AU, perhaps unsurprisingly, given that its members can claim to be among the most affected, was the only organization to accept the invitation, although it had also clearly indicated its preference for "African solutions to African problems".[24] The latter policy posture has been accompanied with resuscitation of an old idea, first presented by African jurists in the late 1970s, to vest a regional court – what is now the African Court of Human and Peoples' Rights – with jurisdiction over core

19 *See* Solomon Ayele Dersso, *The AU's Extraordinary Summit decisions on African-ICC Relationship*, EJIL: Talk! Blog of the Eur. J. Int'l L. (28 October 2013), https://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/ [https://perma.cc/88RS-FP3J] (discussing the summit, its objectives, and its decisions).

20 A.U. Dec. Assembly/AU/Dec.590, para. 10, Decision on the International Criminal Court (30-31 January 2016).

21 U.N.S.C, Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to Secretary-General and the President of the Security Council, U.N. Doc. S/2013/624 (22 October 2013).

22 *Prosecutor v. Ruto*, ICC-01/09-01/11, The African Union's *Amicus Curiae* Observations on the Rule 68 Amendment at the Twelfth Session of the Assembly of States Parties (19 October 2015).

23 *The Prosecutor v. Al-Bashir*, ICC--02/05-01/09-370The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir" (16 July 2018).

24 African Union, *Transitional Justice Policy* at v (February 2019), https://au.int/en/documents/20190425/transitional-justice-policy [https://perma.cc/U8LM-SWK6] [hereinafter AU *Transitional Policy Paper*].

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international crimes, such as crimes against humanity, alongside the exercise of material jurisdiction over *general* and *human rights* matters.[25]

The permanent ICC, whose very existence represents the triumph of an ambitious idea – effectively initiated in 1919 but only realized in 1945, and meaningfully so in 1998 – has, for the most part, been met with high and evidently unrealistic expectations of what it can accomplish. The ASP has responded to the AU concerns in part by convening a special debate on the African government concerns at a meeting of the Assembly of States Parties, in which this author was privileged to participate as an independent academic expert based on nomination by the African Group, and by welcoming proposals on how to address those concerns.[26] As might be expected, ICC organs such as the OTP and the Presidency have also taken a strong stance, defending the institution, with the then ICC's Gambian prosecutor and Nigerian president personally stressing the important ICC efforts in pursuing justice for African *victims* rather than for African *elites*.

With the Africa-ICC relationship still in a state of flux and the ASP decision in December 2019 to establish a review process in response to increasing, and perhaps hyperbolic, commentary describing the Court as being in "crisis" or "trouble",[27] friends of the ICC must ask whether it is time for a reality check and culture change at The Hague. Not only has the ICC seemingly been unable to deliver on its promise of justice for the victims of atrocity crimes in Africa, but in situations such as those in the Ivory Coast and Kenya, the reality of what it has *actually accomplished* compared to the modern ad hoc international penal tribunals that preceded the ICC seems sobering given its relatively large budget and relatively broad jurisdiction. Some even appeared to have concerns about the ICC's future as it moved forward with politically sensitive investigations of individuals in Afghanistan and Palestine, two countries with powerful allies adverse to the ICC. So, to the question, does the ICC need some reform? The easy answer seems to be yes. This seems true even

25 *See* Charles C. Jalloh, *The Place of the African Court of Justice and Human and Peoples' Rights in the Prosecution of Serious Crimes in Africa* (Charles C. Jalloh & Ilias Bantekas eds., 2017) (discussing the evolution of international criminal law in the African Criminal Court) and Charles C. Jalloh, *A Classification of the Crimes in The Malabo Protocol, in* The African Court of Justice and Human and People's Rights in Context 57-108; 225-256 (Charles C. Jalloh et al. eds., 2019), https://doi.org/10.1017/9781108525343 [https://perma.cc/NG6G-X7DT] (discussing the nature of the crimes in the statute of the African Court).

26 *See* ICC ASP, Special segment as request by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", Informal summary by the Moderator, U.N. Doc. ICC-ASP/12/61 (27 November 2013) (summarizing the meeting by the moderator).

27 For a discussion of this commentary regarding the Court, see Douglas Guilfoyle, Part I – This is not fine: the International Criminal Court in Trouble, EJIL: Talk! Blog of the Eur. J. Int'l L. (21 March 2019), https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/ [https://perma.cc/8ZVA-FL9T]; Douglas Guilfoyle, Part II – This Is Not Fine: The International Criminal Court in Trouble, EJIL: Talk! Blog of the Eur. J. Int'l L. (22 March 2019), https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/ [https://perma.cc/ZD5HHFZS]; Douglas Guilfoyle, Part III – This is not fine: The International Criminal Court in Trouble, EJIL: Talk! Blog of the Eur. J. Int'l L. (25 March 2019), https://www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/ [https://perma.cc/9949-RKZ4].

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among the 123 States Parties, including countries from outside Africa.[28] However, as always, principled State Party acceptance of the need for reform is just the beginning. The follow-up question becomes inevitable: what concrete changes can be made for real reform at the ICC and how can they be made without undermining the independence of the institution?

A simple response might be that the whole institution requires a holistic review to discern areas of potential reform. That said, from an African government perspective, the role of the ICC OTP seems crucial and would likely be perceived as particularly important. The OTP is effectively the engine that drives the ICC accountability bus through its investigation and prosecution of alleged crimes. Consequently, and perhaps unsurprisingly, the OTP, as an organ, has drawn the ire of some dissatisfied African States and, in the context of the Sudan situation, led them to mobilize withholding cooperation from the Court as a whole. Therefore, although there are other areas that might merit attention for reform, from an African State Party perspective, a focus on the OTP and its work could be one of the most important aspects. This seems to even be an agreed-upon point among the ASP members given the reform process also flagged the importance of that organ.

Beyond the OTP, there appears to be more that can feasibly be done to align the Court with its initial purpose and vision. Some reform suggestions have called for the establishment of an ombudsperson or other internal staff grievance procedures; gender and geographical balance in recruitment, especially at the most senior levels; enhancement of transparency in preliminary examinations, case selection and investigations; and greater rigour and transparency in the election of judges, presidents and vice-presidents. Moreover, since the ICC's first two decades focused heavily on Africa, rather than dismiss offhand the African State criticisms of the ICC, it is apparent that for the Court to avoid some missteps and succeed during the next two decades, it would be beneficial for constructive discussions of reforms to also draw on and reflect the African State experience and concerns. It is the most important aspect of that experience that this article proposes to focus. Structurally, the article is divided as follows. To set a wider context, Part II will provide background on the review and reform process. Parts III and IV will then address the ICC and prior African government reform suggestions, which predated the formal ASP-driven review and reform process. Part V will then focus on Article 53 of the Rome Statute which speaks to the initiation of investigations and prosecutions and the current interpretation of the 'interests of justice' by the OTP in its policy papers. Part VI discusses the ICC's interpretation of the interests of justice, and Part VII focuses on the Security Council's use of Article 16 of the Rome Statute. Thereafter, Part VIII analyses the peace-justice conundrum in the context of two sensitive situations to come before the ICC, those of Uganda and Sudan, contrasting the OTP position on those two situations with the OTP position on Colombia.

28 Andrew Murdoch, Legal Director to the International Criminal Court Assembly of States Parties, UK statement to ICC Assembly of States Parties 17th session (5 December 2018), https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session (urging to the ASP that "we cannot bury our heads in the sand and pretend everything is fine when it isn't").

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Finally, Part IX offers a handful of general proposals for reforming the OTP policy, the rules of procedure and amendments to the Rome Statute.

2 Background: Context of the ICC Review Process

On 13 June 2019, the ASP Bureau held a retreat in the Netherlands to address some of the current challenges facing the Court and to explore ways in which States Parties could address them with the overall aim of strengthening the Court and the Rome Statute system. This was in response to a proposal by the three ICC principals in a May 2019 letter from the President of the ICC, Judge Chile Eboe-Osuji, to the Bureau of the ASP calling for an independent external review of the ICC's work.

About half a year later, in a resolution adopted at the Eighteenth Assembly of States Parties on 6 December 2019, the ASP formally recognized the multifaceted challenges facing the ICC and established an Independent Expert Review (IER) Panel.[29] The goal of the IER Panel was to establish an "inclusive State-Party driven process for identifying and implementing measures to strengthen the Court and improve its performance".[30] Under its Terms of Reference, the IER was mandated to conduct a thorough review of the ICC under the three thematic clusters of (1) governance, (2) the judiciary and (3) investigations and prosecutions with the goal of presenting "concrete, achievable, actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole".[31] The ASP also identified four priority issues for the States Parties to directly address through standing working groups: (1) strengthening cooperation, (2) addressing non-cooperation, (3) complementarity and the relationship with national jurisdictions and (4) equitable geographical representation and gender balance. Curiously absent from the specific topics for examination was the substantive role of the ASP and the individual ICC States Parties themselves. This seems like an omission with potentially far-reaching implications, given the statutory functions reserved for the ASP to provide institutional oversight of the ICC.

The IER, chaired by former Constitutional Court Judge Richard Goldstone of South Africa, presented its final report to the ASP in September 2020. This was in line with the deadline in the initial mandate and is commendable for such a potentially far-reaching assessment. On the other hand, as the process was envisaged before the global outbreak of the COVID-19 pandemic, legitimate doubts remain whether the process was not affected by the challenges of carrying out meaningful consultations under such disruptive conditions. In essence, having been first convened in January 2020, an IER had a relatively short timeframe of nine months to complete its work, including consultations with relevant

29 ICC ASP Res. ICC-ASP/18/Res.7, para. 6 (6 December 2019). ("Review of the International Criminal Court and the Rome Statute system.").

30 *Id*. para. 6.

31 *Id*., at Annex I, paras. 1, 2.

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stakeholders, such as States Parties and civil society.[32] The IER report, which also seemed to skip the commonsense step of having the relevant organs of the ICC review their draft report for errors, as had been seen in other reviews of other tribunals, contained 384 recommendations intended for both short- and long-term implementation. Four chapters of the IER report focus on the OTP as an organ and address a range of critical matters, including prosecutorial strategies on the situation and case selection and prioritization of those cases, preliminary examinations, investigations and internal OTP quality control mechanisms.

Yet, in what seemed like a missed opportunity, the final report of the independent experts does not address the well-known and frequently stated concerns of African States. In a report that was about 348 pages long, including four substantive chapters that specifically discussed strengthening the OTP and included many recommendations to that effect, the African States' concerns were not expressly highlighted or addressed nor were their various reform proposals, some of which reflected the shortcomings of the prosecution's interpretation of her power on the issue of interests of justice, formally engaged by the study. This significant omission seems to have been missed by most commentators, as the report was generally positively received by members of the international criminal justice community. By taking up this issue, even if only in a preliminary manner, this article aims to highlight this missing piece of the African government's long-standing concern, considering the expected continuation of the ICC review and reform process over the next several years.

To be clear, the goal here is not to pass judgement on the merits of the views of African States, which, vis-à-vis African *academia* and *civil society*, might be contested and sometimes hotly so. Rather, for our limited purposes, we take the African government's complaints at face value. The African States' direct exposure to the ICC system over the past two decades is something the institution should benefit from. At the same time, it is apparent that progress has been made on the ICC side with implicit acknowledgement that not all is well. To the credit of the ICC leadership and the ASP, their progress in acknowledging that the institution can be improved has led to the implementation of a process that could lead to improvement of the ICC's performance.

This does not suggest that even as we focus on their broad outlines, there is necessarily a single African State view of the ICC. In fact, even among African States themselves, there is a wide variety of views on any number of issues concerning international justice, including the ICC-Africa relationship itself. However, this is to be expected when one lumps the countries in the second largest continent together into one large geographic group.

Moreover, some of the more prominent criticisms of the ICC are in fact those of the regional organization, the AU, which has its own separate legal personality and does not equate to the views of the individual members. From the perspective

32 ICC ASP, Interim Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System (30 June 2020); Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System (30 September 2020), https://asp.icc-cpi.int/en_menus/asp/Review-Court/Pages/default.aspx (last visited 20 December 2021).

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of the Rome Statute and, for that matter, international law, the views of the individual States Parties themselves rather than the AU would officially carry more weight. The two sets of views are not the same. However, they are often conflated. Therefore, the attribution of a single legal position to the African region, the second largest continent comprising around fifty-five countries, only thirty-three of which are currently parties to the ICC, should be taken with a necessary degree of circumspection. Even the official positions of the AU, which often relies on consensus (which can mean the absence of strong objections of the few States often present in the room), may in reality only reflect the views of a small group of particularly active States rather than a majority of the African countries themselves.

3 ICC Reform in the Context of the Africa-ICC Relationship and Peace-Justice Conundrum

Since its creation, the ICC has had a complicated on-off relationship with African States. It has, among other things, faced criticism about its regionally focused prosecutions, the challenge of how best to sequence peace and justice, selective *referrals* by the U.N. Security Council, and the selective *deferrals* by the Security Council.[33] Only more recently, perhaps partly in response to the criticisms of the African governments, has the ICC OTP extended investigations into other regions such as Afghanistan, Bangladesh/Myanmar and Georgia.[34] The geographic spread of the ICC's reach appears much better if preliminary *examinations* are also considered.[35] Nonetheless, African States have still been critical. One of the harshest critiques of the Court came from Gambia when it announced its intention to withdraw from the Rome Statute stating that "[d]espite being called an International Criminal Court, [it] is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans".[36]

However, the most significant African State Party criticism of the ICC has centred on how best to sequence peace with justice or justice with peace under the Rome Statute system. In this context, the term 'peace' means a state of tranquillity and the absence of violence or armed conflict. Similarly, the term 'justice' means

33 *See* Jalloh, *supra* note 5 (providing an early flag for the possibility of a potential chasm between the ICC and Africa, in terms of political and legal concerns of African States); See also Emily Wkesho Ngolo, *Analysing the Future of the International Criminal Justice in Africa: A Focus on the ICC*, 1 Strathmore L. Rev. 99 (2016) (analysing the ICC-Africa tension and whether there is a future for the ICC in Africa), Africa and the International Criminal Court (Gerhard Werle et al. eds., 2014), Africa and The ICC: Perceptions of Justice (Clarke et al. eds., 2016), The International Criminal Court and Africa (Charles C. Jalloh & Ilias Bantekas eds., 2017), and The International Criminal Court and Africa: One Decade on (Evelyn A. Ankumah ed., 2017), for books that perhaps serve as an indication of the complexity of the ICC-Africa relationship.

34 *See generally* Kamari Maxine Clarke, Affective Justice – The International Criminal Court and the Pan-Africanist Pushback 218 (2019).

35 The OTP carries out a two-step analysis of situations. In the first part, it examines information it has, or is supplied to it through outsider submissions, whether an investigation is warranted under the legal criteria under the Rome Statute. Second, if it finds a reasonable basis to proceed, then it proceeds to a formal examination with the authorization of the Pre-Trial Chamber.

36 Clarke, *supra* note 34, at 217, 229.

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retributive or criminal justice of the kind typically administered by the Rome Statute system. These, of course, are only working definitions for the limited purposes analysed here. A broader conception of justice, of the kind advocated by African States, would include additional mechanisms that are not retributive but more restorative. The peace-justice concern, which is also at the heart of the ICC's core mandate to investigate and punish atrocity crimes, stems partly from the ICC's involvement in situations of *ongoing* conflict in Africa and partly from the controversial interpretation of Article 53 of the Rome Statute by the ICC OTP. This is often referred to as the peace *versus* justice or peace *and* justice dilemma. We will return to this issue.

Other AU concerns relate to the applicability of the legal regime of the Rome Statute with respect to the immunity of incumbent government officials, whether from States Parties such as Kenya or non-parties such as Sudan and Libya, and the implications of such application on the stability and governance of often fragile post-colonial African States. Many of the AU's additional criticisms link the peace and justice questions to these issues or to the question of the proper exercise of prosecutorial discretion. In particular, in its Policy Paper on the Interests of Justice, the OTP adopted the view that the 'interests of justice' are not necessarily inclusive of the interests of peace. Thus, the broader issue of peace and security is said *not* to fall within the OTP's responsibility, but rather within the mandate of other institutions such as the U.N. Security Council.

The result of the peace/justice distinction is that, after ICC involvement, when circumstances change on the ground and there is a desire to temporarily halt a prosecution to give peace a chance; this opportunity for peace can only be secured through the use of the deferral mechanism contemplated by Article 16 of the Rome Statute. Article 16 enables the U.N. Security Council, acting under Chapter VII of the Charter of the United Nations, to request the ICC to defer an investigation or prosecution for a renewable period of twelve months. Therefore, the OTP's reading of the Rome Statute passes a crucial decision affecting prosecutorial discretion to an external political body over which the OTP has no control, even if that body's (i.e., U.N. Security Council) powers to do so is formally recognized under the Rome Statute.

African States have also consistently raised the peace-justice issue in relation to the conflicts in Uganda, Sudan and Kenya, thereby implicating the official interpretation of Article 53 of the Rome Statute. Article 53 arguably provides discretion for the prosecution to temporarily halt investigations or prosecutions for reasons of 'interests of justice'.[37]

37 *See* Jalloh, *supra* note 5 (Several African Union Assembly of Heads of State and Government decisions since 2009 have warned about the need to balance the imperatives of peace against those of justice. This article provides a detailed discussion of this peace-justice issue as well as other African State concerns voiced several years ago.)

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4 Prior African State Proposals for Reform and the Link between Deferrals and the Peace-Justice Nexus

Since the Court's inception, various *actors* and *entities* have advanced recommendations on ways to improve the working methods of the ICC and even amendments to the Rome Statute to strengthen practical operations. These recommendations encompass a wide spectrum of topics from victim participation in criminal proceedings to questions about the application of Articles 16 and 53.[38]

As mentioned briefly above, Kenya also proposed an amendment of the preamble of the Rome Statute that could influence the interpretation of Article 17, governing complementarity, in an attempt to apply the principle in relation to *regional* criminal courts as opposed to *national* courts alone.[39] An additional proposal, which faced some pushback from African civil society as well as some governments, was to amend Article 27[40] of the Rome Statute to provide temporary immunity from prosecution for sitting African government officials even when they are allegedly implicated in international crimes. The amendment proposed provided that sitting presidents and their deputies, or anybody acting or entitled to act as such, may be exempt from prosecution during their current term of office. The AU's Malabo Protocol initially matched its non-immunity clause to the Rome Statute standard but now contemplates a temporary exemption from prosecution

38 *See generally* Just. Hassan B. Jallow, Prosecutor UN-ICTR & UN-MICT, *Statement to the United Nations Security Council* (3 June 2015) (discussing the important of complementarity and that the burden to prosecutor perpetrators of international crimes falls first to the State before it falls to the international community); Dr. Guénaël Mettraux et al., *Expert Initiative on Promoting Effectiveness at the International Criminal Court*, at 1 (December 2014) (stating the main areas of ICC reform related to: investigations, the confirmation process, disclosure from the ICC, admission and evidence, interlocutory appeals, orality, victim participation, deference before the ICC, institution building, and cooperation in witness protection); *Moving Reparation Forward at the ICC: Recommendations, Redress* (November 2016) (recommending the ICC improve the reparation application and procedure process); Open Soc'y Just. Initiative, *Open Letter to States Parties to the Rome Statute of the International Criminal Court* (December 2019) (recommending the ICC have a more transparent processes in the appointment of judges); Elizabeth Wilmshurst CMG, *Strengthen the International Criminal Court*, Chatham House (12 June 2019), https://www.chathamhouse.org/expert/comment/strengthen-international-criminal-court (recommending the Court set clear expectations for States parties which would ultimately make the Court more effective and address some of the Courts current criticisms).

39 *See* Kenya, *supra* note 9 (Kenya, in fact, presented five proposed amendments to the Rome Statute. These concerned various clauses relating to the presence of the accused, complementarity, immunity, offences against the administration of justice, implementation of an oversight mechanism.).

40 *Id*. Also see, African Group Written Submissions, *Review of the International Criminal Court and the Rome Statute System African States Parties Written Submission*, 31 July 2020, p. 7, para. 15 (g), which calls for an amendment to Art. 27 "to include a provision exempting democratically elected serving Heads of State and Government from the application of the article during their democratic term of office".

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for an amorphous and ill-defined category of 'senior officials'.[41] The African Group of States Parties has also requested a declaration of interpretive clarification of the relationship between Articles 27 and 98, relating to cooperation with respect to waiver of immunity and consent to surrender.[42] Other African proposals concerned other issues.[43]

Nonetheless, it is helpful to address the ICC reform recommendations from legal scholars who studied one of the most far-reaching proposals of African States that centred on an element of peace and justice as manifested through Article 16 of the Rome Statute.

In 2010, a group of three African academics, including the present author, conducted an independent assessment of the African government's proposed reform of the deferral mechanism under the Rome Statute.[44] The proposal was meant to address situations where the Security Council failed to decide on the request for a deferral within six months of receipt of the request. In such a case, the requesting Party could request the U.N. General Assembly to assume the Security Council's responsibility consistent with Resolution 377(V) of the U.N. General Assembly.

The three experts analysed the AU proposals to amend Article 16 while also providing their own recommendations.[45] Essentially, the AU proposal contemplated three primary ways forward for Article 16 amendments. First, the proposal, formally presented by South Africa on behalf of the African States Parties to the Rome Statute, recommended that Article 16 be amended to function as a dual mechanism that could be used by both the Security Council and General Assembly.[46] The thinking behind this recommendation was as follows: Article 16 ought to be modified to provide authority to both the General Assembly and the Security Council to use this Article, as this would become more democratic and less politicized, recognizing that the Security Council's exercise of its Chapter VII authority is inherently political.[47] However, the experts also recognized the 'cool' reception of other ASP members regarding this proposal; therefore, they did not

41 Wayne Jordash Q.C. & Natacha Bracq, *Modes of Liability and Individual Criminal Responsibility, in* The African Court of Justice and Human and People's Rights in Context 743-792 (Charles Jalloh, Kamari Clarke & Vincent O. Nmehielle eds., 2019); Dire Tladi, *Article 46A Bis, in* The African Court of Justice and Human and People's Rights in Context 850-865 (Charles Jalloh, Kamari Clarke & Vincent O. Nmehielle eds., 2019).

42 African Group Written Submissions, *Review of the International Criminal Court and the Rome Statute System African States Parties Written Submission*, 31 July 2020, p. 6, para. 15 (f).

43 . *See, e.g.*, ICC ASP, Res. ICC-ASP/8/Res.6 (26 November 2009) (proposing an amendment to the Rome Statute on the crime of aggression). Also see, African Group Written Submissions, *Review of the International Criminal Court and the Rome Statute System African States Parties Written Submission*, 31 July 2020.

44 Dapo Akande, Max du Plessis & Charles Chernor Jalloh, Position Paper – An African expert study on the African Union concerns about Art. 16 of the Rome Statute of the ICC (Institute for Security Studies, 2010) [hereinafter African expert study on AU concerns about Art. 16].

45 *Id*., at 17.

46 *Id*.

47 *Id*.

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foresee this proposal advancing.[48] This projection, which can now take advantage of the benefit of hindsight, turned out to be correct.[49]

Since the independent experts' analyses and recommendations discussed above, the Africa Group of States Parties, in their written submissions to the IER in 2020, recommended amending Article 16 to allow the requesting Party to ask the U.N. General Assembly to assume the Security Council's responsibility under paragraph 1, consistent with Resolution 377 (v) of the U.N. General Assembly, if the U.N. Security Council fails to decide on the request by the State concerned within six (6) months of receipt of the request.[50] They also called for the trigger mechanism in Article 16 to be reexamined to allow for greater transparent decision-making, and that this would also

> bear relevance to case selection and prioritization and consideration given to article 53 and the OPT's policy on the 'Interest of Justice' to build national justice mechanisms that complement peace processes.[51]

It is no surprise that this proposal did not gain traction either.

The second proposal by the AU was similar and suggested that Article 16 be amended to include authority with a two-third General Assembly vote for deferral or a two-thirds ASP vote.[52] However, the expert group again recognized the challenge of this proposal for various reasons. This included that States may be opposed to providing more U.N. organs with this authority as it could potentially spread the same political issues into two additional U.N. organs and raise constitutional problems about the allocation of competences between the General Assembly and the Security Council under the United Nations Charter.[53]

The third proposal suggested that the ASP play an *advisory* role in consideration of deferrals. Deferrals could be discharged by an ASP working group that could then adopt a recommendation that could then be taken to the Security Council on behalf of the group by a State or group of States.[54] This final proposal was seen as advantageous for several reasons, but primarily because it would remove the exclusive deferral authority from the Security Council and allow for considerations of justice to play a part in the ICC process.[55] It could have the further merit of centering the decision on deferral requests within the Rome Statute system, thereby alleviating the resort to an external body, such as the Security Council, over which the ICC has no legal control. Further, it was recognized that the advisory ASP organ would comprise only of State Parties to the Rome Statute.[56] This

48 *Id*.
49 *Id*.
50 African Group Written Submissions, *Review of the International Criminal Court and the Rome Statute System African States Parties Written Submission*, 31 July 2020, p. 8, para. 16 (b).
51 *Id*. para. 16 (d).
52 *Id*.
53 *Id*.
54 *Id*., at 17-18.
55 *Id*.
56 *Id*.

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limitation to such decisions in an advisory group solely made up of Rome Statute members appeared to indicate that it could be potentially advantageous for African States.[57] Additionally, this proposal identified the need for regional representation while not having every ASP State on the advisory panel.[58]

Despite these benefits, there were limitations. If this proposal were adopted, nothing would indicate that the Security Council would be bound by the ASP's advisory recommendation on deferral. Nonetheless, it appeared to provide some transparency and legitimacy to the inner workings of the ICC and perhaps even motivate the Security Council to develop some transparent criteria for the exercise of its discretion in relation to Chapter VII powers in matters involving the ICC's accountability mission.[59]

The expert group then analysed the situation in Sudan.[60] Although the theoretical next steps of the ICC discussed in the article may now be obsolete due to the recent decisions of the ICC Appeals Chamber[61] and the potential for the future surrender of Al-Bashir by a new Sudanese government, the expert group's discussion on the 'interest of justice' question is still relevant today.[62] It also remains relevant because, like in Sudan, there will be many ongoing conflicts with which the ICC is bound to engage in the future. The more recent efforts of Colombia to reach a peace settlement after a long civil war between the government and Fuerzas Armadas Revolucionarias de Colombia (FARC) rebels only underscores the importance of this topic and its relevance for all ICC regions beyond the African States Parties.

Returning to the Sudan peace and justice debate, the ad hoc expert group recognized that the prosecutor must be guided in her/his decision based on the guidelines set forth in Article 53 of the Rome Statute, but the group also recognized the Prosecutor could choose to have a broader range of discretion.[63] In recognizing the wider breadth of prosecutorial discretion, it was argued that there are alternative mechanisms to prosecution that have already been used by States and are familiar in international criminal law.[64] The expert paper recognized that internationally supported accountability may not always come in the form of *prosecution*s and that justice could be provided by other alternative means without defeating the core purpose of criminal accountability for those allegedly bearing the greatest responsibility for crimes before the ICC.[65]

57 *Id*., at 18.
58 *Id*.
59 *Id*.
60 *Id*., at 21; *see also infra* notes 231, 232 (discussing the Security Council and ICC's treatment of Al-Bashir in Sudan).
61 *Prosecutor v. Al-Bashir*, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal (6 May 2019) holding that the Court had the power to exercise jurisdiction over the situation in Darfur, Sudan, based on the referral by the Security Council, and therefore that Jordan had failed to comply with the Court's request to surrender Sudanese leader Omar Hassan Ahmad Al-Bashir).
62 African expert study on AU concerns about Art. 16, *supra* note 45, at 21.
63 *Id*.
64 *Id*. (referring to the Truth Commission in South Africa and the *gacaca* process in Rwanda).
65 *Id*.

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However, this suggestion of creating space for a wider range of justice mechanisms was not intended as a grant of impunity but instead as a recognition that justice for victims of international crimes and accountability for these crimes come in various forms.[66] A one-size-fits-all solution does not work, given the variety of complex situations around the world in which the ICC is bound to operate at any given time. The international community may demand investigation and prosecution for these crimes. This may be the goal at an early stage of a conflict prompting the ICC to get involved. However, where circumstances fundamentally change on the ground, it might not always be wise or in the best interest of the concerned State or even the victims to pursue immediate trials. Other forms of justice, such as restorative and reparative justice, might prove preferable to criminal prosecutions, at least in the short term. The history of transitions in different countries and regions of the world suggests that a complex array of punitive and non-punitive mechanisms might be more useful for societies seeking to transition from conflict to peace.

The expert group recognized that these alternative means must still have some form of legitimacy for the Prosecutor to exercise discretion and refrain from continuing exercising the Court's jurisdiction.[67] The same was true of Security Council deferrals. Ultimately, in light of the current 'peace and justice' question, the expert group advanced four specific recommendations for African States to consider as a potential way forward.[68]

First, the group recommended continued engagement among the AU, Security Council, ICC and ASP.[69] This recognized that each of these bodies played not only an important and distinct but also a complementary role in the search for peace and security. The Security Council, of course, enjoys a robust mandate to address issues of global peace and security through the use of extraordinary measures pursuant to its Chapter VII authority in the U.N. Charter. The Security Council creatively invoked that power in 1993 and again in 1994 to establish international criminal tribunals to prosecute atrocity crimes in the former Yugoslavia and Rwanda.[70] This reopened the door to accountability for atrocity crimes at the international level after being closed for several decades following the Nuremberg Trials at the end of the Second World War.[71] That same body could also use that power to complement the ICC efforts, especially by requiring all States to cooperate with the ICC, at least with respect to referred situations. In its recommendation, the group recognized the need for continued cooperation between the States and the ICC to ensure that when there is a potential for Article 16 to be invoked by the Security Council, States

66 *Id*.
67 *Id*.
68 *Id*.
69 *Id*., at 22.
70 S.C. Res. 955 (8 November 1994); S.C. Res. 827 (25 May 1993).
71 *See* U.N. Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal – History and Analysis*, at 11-12, U.N. Doc. A/CN.4/5 (1949) (quoting President Harry Truman and the UN Secretary-General as they advocate for codification of the principles of the Nuremberg Charter). This memorandum provides one example of the historic role the United States played in the development of international law.

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clearly lay out the factors in favour of deferral, such as possible disruptions of an ongoing peace process.[72] Further, it was proposed that African States coordinate lobbying efforts to ensure a unified message for the African position.[73]

Second, the expert group recommended that States subject to the deferral process should engage all relevant actors and engage all relevant U.N. procedures.[74] A plan had to be developed to establish what would be achieved during a deferral period and ensure transparency. This would help build political support for the deferral, including among Security Council members, so that the ICC is not asked to suspend its work in active investigations and prosecutions of a situation temporarily with no useful purpose in mind. Such a plan, in the view of the expert group, would show good faith. It would also demonstrate that the States seeking deferrals are still serious about providing justice to victims of alleged crimes potentially falling within ICC jurisdiction.

The third recommendation suggested that States subject to ICC investigation should present credible alternative justice mechanisms to the ICC Prosecutor. This would allow the Prosecutor to consider the 'interest of justice', in a concrete manner, and the States and the Prosecutor to collaboratively determine whether an ICC prosecution is the best option as the factual situation on the ground changes.[75] This third option was notable as it did not require a treaty amendment but rather required the ICC Prosecutor to adopt new internal policies for the office, possibly including formally revisiting the Policy Paper on the Interests of Justice.[76] Incidentally, we return to the merits of some basic policy recommendations towards the end of this article.

The fourth and final proposal recommended that African States Parties emphasize domestic prosecutions under the complementarity principle. This was because the Rome Statute expects that States be given 'first-choice' to investigate and prosecute perpetrators of international crimes, as long as there was a credible judiciary in place.[77] In other words, that they endeavour to use the ICC as a court of last, rather than first, resort that is the basis of the whole Rome system. On the part of the ICC, recognizing the efforts and challenges confronting the States that actually want to follow through by providing some type of capacity building and assistance could go some way to alleviating pressures on the institution.

The Africa Group of States Parties has also since called on the IER to make recommendations to guide the use of the deferral power, especially in relation to peace negotiations and immunity of the sitting Head of State to avoid politicization of deferral, which is indicative of the Security Council's action/inaction in certain matters.[78]

72 African expert study on AU concerns about Art. 16, *supra* note 45, at 22.
73 *Id*.
74 *Id*.
75 *Id*.
76 *Id*., at 23.
77 *Id*., at 24.
78 African Group Written Submissions, *Review of the International Criminal Court and the Rome Statute System African States Parties Written Submission*, 31 July 2020, p. 8, para. 16©.

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Over the years, there have been a number of proposals for key amendments envisaged by some States Parties from Africa to the Rome Statute system. The above discussion, which linked the debate on the use *or non-use* of the deferral power under Article 16 of the ICC Statute to the peace-justice interest of African States, is only one such example. The focus here is merited for at least three reasons. First, it confirms that this is not a new issue that has suddenly arisen; it has been a matter of concern for several years. Second, it is an issue that could arise in any region of the world that is the subject of ICC's atrocity investigation and prosecution efforts, which brings to the fore the centrality of revisiting the peace-justice issue in the context of ICC reform discussions. Finally, it demonstrates that the notion of peace and justice and the need for the sequencing of the two sits within a legal architecture that offers potential means to address such concerns, under Article 16, with or without formal amendments to the Rome Statute. That leaves space for a focus specifically on Article 53 of the Rome Statute, which implicates more directly the role of the OTP and the exercise of prosecutorial discretion.

5 Peace and Justice under Article 53 of the Rome Statute

For many of the African States, which early on embraced ICC involvement in accountability challenges confronting them,[79] the nexus between justice and peace has led to soul searching at the regional level about how best to structure a transitional process for countries torn apart by conflict. In a not-so-indirect rebuke, the AU initiated a process that eventually led to the adoption of a Transitional Justice Policy Framework in February 2019, which now attempts to advance a holistic approach to transitional justice in Africa. This includes the element of how best to sequence retributive criminal justice with the search for sustainable peace. The framework policy document of the AU now formally recognizes that in fragile post-conflict settings, "a balance and compromise must be struck between peace and reconciliation on the one hand and responsibility and accountability on the other".[80] At least six policy considerations that should be borne in mind are then set out to provide some kind of balancing. This policy, if embraced and implemented by individual African States, may represent part of an emerging Africanization of international criminal law. This appears to show that taking up the peace and justice issue in the ongoing reform discussions could be fundamental for current situations in African countries. The same is potentially true for situations of ongoing conflict or other fragile post-conflict contexts in other parts of the world, as the debates concerning other ongoing ICC situations elsewhere already demonstrate.[81]

79 For works detailing the history and evolution of Africa's sentiments towards the ICC, *see* Charles C. Jalloh et al., *Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court*, 4 Afr. J. L Studies 5-50 (2011); *and* The International Criminal Court And Africa (Charles C. Jalloh & Ilias Bantekas eds., 2017).

80 AU *Transitional Policy Paper, supra* note 24, at para. 38.

81 *Id*.

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5.1 The Approach to Interpretation of the Rome Statute

Part of the reason for the complications in the Africa-ICC relationship was the general perception that the OTP has taken too narrow a view of its powers conferred under the Rome Statute with respect to investigations and prosecution of core crimes within the ICC's jurisdiction. This was particularly so with regard to the activities of the OTP in the Uganda and Sudan situations and, to a lesser extent, the Kenya situation. The issue turned on interpretations of the meaning of Article 53 of the Rome Statute.

In the interpretation of a treaty such as the Rome Statute, which was the starting point, even for the ICC, is the Vienna Convention on the Law of Treaties (VCLT).[82] The VCLT provides the necessary guidance in Articles 31 and 32 in the form a general rule of treaty interpretation and a supplementary means of interpretation.[83] In the VCLT scheme, *first*, one must examine the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.[84] The context for the purpose of the interpretation of a treaty and any relevant rules of international law applicable to the relations between the parties and any special meanings given to a term by the parties.[85]

Second, if the meaning of the term is unclear based on a plain reading of the text, recourse may be made to *supplementary means of interpretation*, including the preparatory work of the treaty and the circumstances of its conclusion, to *confirm* the meaning resulting from the application of Article 31 or to *determine the meaning* when the interpretation according to Article 32 (a) leaves the meaning ambiguous or obscure or (b) leads to a result that is manifestly absurd or unreasonable.[86]

In the context of this study, the debate about Article 53 appears not so much to be about the *first* step of the VCLT treaty interpretation framework (the ordinary meaning of the terms) but the *second* (recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion). This is because the ordinary language of Article 53 of the Rome Statute arguably supports a flexible interpretation that is more in line with the African State interpretation. It would appear that many scholars would share the view that alternative, or rather additional, forms of justice, such as truth commissions and consideration of matters of peace and security, can be factors that the ICC prosecution takes into account when deciding whether or *not* to

82 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969) 1155 U.N.T.S. 331, entered into force 27 January 1980.

83 *Id*., at Arts. 31-32; Richard Gardner, Treaty Interpretation (2nd ed., 2015).

84 *See* Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at Ch. IV (2018) (Subsequent agreement and subsequent practice in relation to the interpretation of treaties, draft conclusions and commentaries adopted on second reading) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.").

85 *Id*.

86 *Id*. para. 15, at 56.

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pursue a criminal investigation, or once an investigation has already taken place, whether to pursue a subsequent prosecution.[87]

5.2 Ordinary Meaning of Article 53 of the Rome Statute

Consistent with the VCLT framework, we briefly start with the ordinary meaning of the relevant provision, before proceeding to confirm the interpretation using supplementary means. Article 53 of the Rome Statute, which is the central provision, provides the following and is worth setting out in full.

> Initiation of an investigation
>
> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
>
> (b) The case is or would be admissible under article 17; and
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
>
> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
>
> 2. If, upon investigation, the Prosecutor concludes that there is no sufficient basis for a prosecution because
>
> (a) There is no sufficient legal or factual basis to seek a warrant or summons under article 58;
>
> (b) The case is inadmissible under article 17; or

87 See, *e.g.*, Talita de Souza Dias, *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(1)(c) and 2(c) of the Rome Statute of the International Criminal* Court, 30 Leiden J. of Int'l L. 731, 751 (2017) ("[I]t is possible to advance that Article 53(2)(c) allows the ICC Prosecutor to balance, against the gravity of the crime and other factors weighing in favour of prosecution, all the circumstances related to any of international criminal justice's functions, including the interests of victims, the situation of the accused, peace and security considerations, and non-prosecutorial measures."); Janine Natalya, *Clark, Peace, Justice and the International Criminal Court Limitations and Possibilities*, 9 J. of Int'l. Crim. Just. 521, 541-543 (2011) ("[W]hile critics of the ICC's work in Uganda submit that peace should come before justice, the complexities and particularities of individual post conflict societies demand contextually sensitive and tailored responses rather than general formulae."); Int'l. L. 481-505 (2003) ("The most likely point at which deference could be accorded to non-prosecutorial reconciliation measures would be the exercise of prosecutorial discretion not to proceed with an investigation or prosecution.... Article 53(2) ... governs the decision of the Prosecutor, following the investigation, as to whether to continue to the next stage, namely, prosecution."). The Emerging Practice of the International Criminal Court 187, 189 (C. Stahn and G. Sluiter eds., 2009) ("[I]n cases of Security Council referrals, such prosecutorial discretion is inconsistent with basic principles of international law and the proper role of the Security Council.").

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> (c) A prosecution is not in the interests of justice, considering all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
>
> the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
>
> 3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
>
> (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is solely based on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
>
> 4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.[88]

The first paragraph of this provision requires the Prosecutor, after having evaluated the information made available to her, to – in order to establish the truth – *initiate an investigation* to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility. The Prosecutor must do so, and note the negative condition, "*unless* he or she determines that there is no reasonable basis to proceed" under the Statute.[89]

In deciding whether to investigate, several considerations expressed in the first paragraph become relevant and are required for their deliberation, namely, (a) whether the available information provides a reasonable basis to believe that a crime within the Court's jurisdiction has been or is being committed; (b) whether the case is or would be admissible under Article 17 of the Rome Statute; and (c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice.[90] One commentator explains that paragraph 1(a) of Article 53 aims to ensure that potential crimes are within the jurisdiction of the Court and that cases are not pursued on frivolous or political grounds.[91]

88 Rome Statute, *supra* note 1, Art. 53.

89 *Id*. Art. 53, para. 1 (emphasis added).

90 *Id*. Art. 53, para. 1(a)-(c).

91 Commentary on the Law of the International Criminal Court 388, 389-390 (Mark Klamberg ed., 2017); *See also* Fatou Bensouda, ICC Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction* (20 December 2019), https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine [https://perma.cc/F4JP-6XBN] ("I am satisfied that there is a reasonable basis to proceed with an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute … However, given the unique and highly contested legal and factual issues attaching to this situation, namely, the territory within which the investigation may be conducted, I deemed it necessary to rely on article 19(3) of the Statute to resolve this specific issue.").

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Article 53, paragraph 1, in essence, aims to ensure that the crimes are of the type admissible before the Court.[92] Specifically, this provision recalls the complementarity principle and the gravity requirement.[93] In considering these two elements, the Prosecutor must weigh the involvement of both groups and individual perpetrators.[94] First, under the complementarity principle, the Prosecutor must determine what, if any, type of national proceedings have been conducted or are being conducted.[95] The Prosecutor's assessment of complementarity at the preliminary stages is without prejudice to the reconsideration of complementarity at the indictment stage.[96]

Second, the Prosecutor must address the gravity of the alleged crimes.[97] This assessment refers to the general gravity of the crimes committed by those "who may bear the greatest responsibility" and whether those individuals or groups are potentially subject to the Court's mandate.[98]

Paragraph 2 of Article 53 also provides an opportunity for the Prosecutor to exercise discretion in "interests of justice", but only following the conduct of *the investigation*.[99] Unlike the first paragraph, which focuses on the *initiation or start* of an investigation and speaks to a decision in that regard, Paragraph 2 addresses not prosecuting because of the interests of justice if, upon investigation, the Prosecutor concludes that there is no sufficient basis for *a prosecution*.[100] Notice that the Prosecutor bears a higher burden here than under Paragraph 1, as the Prosecutor must now have a *sufficient* rather than *reasonable* basis to believe crimes have been committed within the Court's jurisdiction.[101] However, even where there is such a sufficient basis and the jurisdictional requirements are met, Article 53(2)(c) allows the Prosecutor to essentially balance

> all the circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator and his or her role in the alleged crime

92 Commentary on the Law of the International Criminal Court, *supra* note 92, at 391.
93 *Id*.
94 *Id*.
95 *Id*.
96 *Id*.
97 *Id*., at 392.
98 *Id*., at 392; *See* Fatou Bensouda, ICC Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met"* (6 November 2014), transcript available at https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-06-11-2014 (closing the investigation into the Gaza Strip bombing of humanitarian aid); *but see* Luis Moreno-Ocampo, Statement by Chief Prosecutor Luis Moreno-Ocampo (14 October 2005) (ICC Prosecutor statement announcing the issuing of five arrest warrants for member of the LRA and announcing the LRA crimes were of higher gravity than the crimes of the UPDF).
99 Rome Statute, *supra* note 1, Art. 53, para. 2.
100 *Id*., at 394.
101 *Id*., at 395.

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in the decision-making process of whether or not prosecuting a specific individual on particular charges is in the interests of justice.

The Prosecutor's discretion under Articles 53(1)(c) and (2)(c) is broad. It has been argued that the discretion contemplated by paragraph (2)(c) is even broader than that contained in paragraph (1)(c).[102] The Prosecutor's discretion under the former is broader due to the non-enumerated elements and the interpretation given in the OTP Policy Paper, which established that, under this subparagraph, the Prosecutor could also look at other justice mechanisms as factors in justifying a non-prosecution.[103] However, Article 53(1)(c) does not set out the precise set of factors to be considered in making the interests of justice decision, while paragraph (2)(c) does mention some factors that may be considered. However, the list of factors that may be considered in paragraph (2)(c) is by no means confined to those listed because the Prosecutor is urged to "tak[e] into account all the circumstances", *including* those factors listed.[104]

Unlike subparagraphs (a) and (b) of Article 53 (1) and (2), subparagraph (c) provides a basis for the Prosecutor to elect not to pursue an investigation in "the interests of justice".[105] It should be noted that the language of Article 53(1)(c)

> treats the interests of justice as a countervailing consideration to the gravity of the crime and the interests of victims, which, at the stage of the initiation of a formal investigation, following preliminary examinations, are more likely to weigh in favor of criminal proceedings.[106]

The language seems clear that the interests of justice are not necessarily equal to those of the victims or limited to retribution. Furthermore, the term 'justice' is quite broad and could be used to encompass either a narrow meaning such as retributive justice or a wider meaning that speaks to a larger scheme of restorative justice and even peace.[107] Given the seeming lack of clarity by the drafters, a considerable amount of discretion is left to the Prosecutor to determine the scope and meaning of the 'interests of justice'.[108] However, this discretion is not absolute, as the Prosecutor must provide 'substantial reasons' for not prosecuting.[109]

102 *Id*., at 396.
103 *Id*., at 397.
104 Rome Statute of the International Criminal Court Art. 54 para. 1(b), 1 July 2002, 2187 U.N.T.S 3.
105 *Id*.; *See* Commentary on the Law of the International Criminal Court, *supra* note 92, at 393 ("Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.").
106 Dapo Akande & Talita De Souza Dias, *Peace Negotiations as 'Interests of Justice', in* The International Criminal Court: Contemporary Challenges and Reform Proposals 329, 331 (Richard H. Steinberg ed., 2020).
107 *See* Commentary on the Law of the International Criminal Court, *supra* note 92, at 393 ("Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.").
108 *Id*.
109 Rome Statute of the International Criminal Court Art. 53, para. 1(c), 1 July 2002, 2187 U.N.T.S 3.

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Importantly, the Prosecutor's provided reasons are also reviewable by the Pre-Trial Chamber.[110]

While the Prosecutor's decision is broad, paragraph 3 of Article 53 ensures that the Prosecutor's decision to pause an investigation or prosecution for the 'interests of justice' are not unrestrained.[111] The power given to the Prosecutor is not an ultimate grant of authority because it is subject to review by the Pre-Trial Chamber.[112]

Two possibilities are captured here. First, the State or the Security Council (in the cases of referrals), may request the Prosecutor to reconsider.[113] Then, the Pre-Trial Chamber may request the Prosecutor to reconsider the decision, either wholly or partially.[114] Second, the Pre-Trial Chamber can act on its own initiative and ask the Prosecutor to review a decision made using the 'interests of justice' prong of the provision.[115] In this situation, if the Prosecutor decides not to investigate or prosecute on account of the interests of justice, the pre-trial judges must confirm the decision. If they do not do so, and this point is further clarified in the Rules of Procedure and Evidence, the Prosecutor must proceed with the investigation or prosecution.[116] This has again been subject to mixed views because of the lack of clarity within the provision.[117]

Finally, and especially important for our purposes in light of the African government's arguments about better sequencing of peace with justice, paragraph 4 of Article 53 provides the Prosecutor with the power to reconsider, at any time, a previous decision to not investigate or prosecute "based on new facts of information".[118] The final provision is crucial as the ICC is continuously investigating situations that are currently in conflict. Therefore, the Prosecutor may have an opportunity to temporarily postpone or halt an investigation or prosecution in light of the current peace process and retain the authority for later prosecutions if the peace process collapses. The decision taken at one phase can be revisited at a later stage. The language does not suggest that the decision, once made, is

110 *See* Commentary on the Law of the International Criminal Court, *supra* note 92, at 397 ("In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on para. 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pretrial Chamber.").

111 Rome Statute of the International Criminal Court Art. 53, para. 3, 1 July 2002, 2187 U.N.T.S 3.

112 *See* Commentary on the Law of the International Criminal Court, *supra* note 92, at 397 ("In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pretrial Chamber.").

113 Rome Statute of the International Criminal Court Art. 53, para. 3, 1 July 2002, 2187 U.N.T.S 3.

114 *Id*.

115 *Id*.

116 *Id*. Art 51.

117 *See* Commentary on the Law of the International Criminal Court, *supra* note 92, at 398 ("However, the existence of such a power, in the absence of any express decision not to proceed, has occasionally been contested by the Prosecutor.").

118 *Id*., at 399; *See also* Fatou Bensouda, ICC Prosecutor, Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq (13 May 2014), https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014.

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irreversible. It actually confirms the inbuilt safeguard that the Prosecutor is not estopped from making a different decision at a later stage.

5.3 Foundation Provided by the International Law Commission and the Drafting History of Article 53 Interests of Justice Standard

The above analysis focuses on the plain meaning of the text of the Rome Statute. It now seems useful to review the drafting history of what eventually became Article 53 to establish whether it might be possible to confirm the ordinary reading suggested in the preceding section. A better understanding of the original purpose of the provision's inclusion in the Rome Statute helps explain whether and how the article can be better interpreted and applied by the OTP and the rest of the Court within the ICC system. Lessons learned from the review of the preparatory works could then feed into reform proposals for the Rules of Procedure and/or future policy papers on the 'interests of justice'.

Of course, having gone back and forth for several decades, it was in 1981 that the U.N. General Assembly again requested the International Law Commission (ILC) to resume its study on the Draft Code of Offences Against the Peace and Security of Mankind.[119] The study was linked closely to the question of international criminal jurisdiction, a matter that had been on and off the ILC agenda for decades, dating back to the late 1940s.[120] Based on this request, the ILC subsequently worked on defining some core international crimes led by the Senegalese jurist Doudou Thiam in his capacity as Special Rapporteur, laying the foundation of what would become the Rome Statute based on the draft codes presented in both 1994 and 1996.[121] Interestingly, within the ILC's first draft articles in 1994, there was no mention of the 'interests of justice' nor was there any mention of the 'interests of justice' within the General Assembly debates.[122] In the ILC draft, there was a provision that discussed the powers of the Prosecutor to initiate investigations upon the receipt of a complaint. That provision included a caveat of circumstances in which the Prosecutor could decide that there was no basis for further action by the Court.

The phrase 'interests of justice' did not appear in the July 1994 ILC draft and was also not proposed by the Ad Hoc Committee of the U.N. General Assembly

119 G.A. Res. 36/106 (10 December 1981).

120 *See* Ricardo J. Alfaro, Special Rapporteur, *Question of International Criminal Jurisdiction*, U.N. Doc. A/CN.4/15 (3 March 1950), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.4/1950/Add.1 (The question of international criminal jurisdiction was one of the first topics given to the ILC to work on, with Ricardo J. Alfaro being appointed Special Rapporteur).

121 Gilbert Bitti, *The Interests of Justice – where does that come from? Part I*, EJIL: Talk! Blog of the Eur. J. Int'l L. (13 August 2019), https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-i/; James Crawford, *The Work of the International Law Commission, in* The Rome Statute of the International Criminal Court: A Commentary Volume IA 23-144 (Cassese et al. eds., 2009).

122 Bitti, *supra* note 122.

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established to study the draft. This remained the case until 1996.[123] In the 1996 preparatory discussions, the United Kingdom's discussion paper proposed an amendment to ILC draft Article 26 (later Art. 53). The British delegation proposed that the Prosecutor, in the context of deciding whether there is a sufficient evidentiary basis to proceed or determine the admissibility of a case, be conferred wide discretion to decide when *not* to investigate despite having evidence of international crimes.[124] This proposal was meant to encompass specific cases.[125] In the proposal, the United Kingdom suggested conferring "wide discretion on the part of the prosecutor to decide not to investigate comparable to that in (some) domestic systems".[126] For example, when a suspected offender was very old or very ill, the Prosecutor could exercise this discretion. Significantly, the proposal also provided a catch-all stating, "or if, otherwise, there were good reasons to conclude that a prosecution would be counter-productive".[127]

Further, the preliminary 1996 discussions solely related to the "interests of justice" discretion being used only after the investigation stage and before prosecution.[128] However, by 1997, the preparatory meetings had expanded the discussion to include the "interests of justice" discretion at both the *investigation* and *prosecution* stages.[129] The 1997 proposals also required the Prosecutor to consider the victims and the gravity of the crime in relation to the 'interests of justice' requirements. These proposals were ultimately added to the adopted Rome Statue provision[130] and, importantly, created affirmative consideration for the Prosecutor.[131]

During the final negotiations in 1998, the language of what would eventually become Article 53 remained consistent and continued to provide the Prosecutor discretion at both the *investigation* and *prosecution* stages.[132] Although the article

123 *Id*.; United Kingdom, UK Discussion Paper International Criminal Court Complementarity (29 March 1996), https://www.legal-tools.org/doc/45b7f5; United Kingdom, Complementary: Suggested Amendments to ILC Draft (26 March 1996), https://www.legal-tools.org/doc/6d426f; United Kingdom, International Criminal Court Complementarity (26 March 26), https://www.legal-tools.org/doc/03c007.

124 United Kingdom, International Criminal Court Complementarity, para. 30 (26 March 26), https://www.legal-tools.org/doc/03c007.

125 *Id*.

126 William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (2nd ed., 2016).

127 United Kingdom, *supra* note 126.

128 Bitti, *supra* note 122; Jun Yoshida (Rapporteur to the Preparatory Comm. on the Establishment of an Int'l Crim. Ct.), *Summary of the Proceedings of the Preparatory Committee during the Period 25 March – 12 April 1996*, U.N. Doc. A/AC.249/1, at 96 (7 May 1996).

129 *Id*.; Bitti, *supra* note 122; Preparatory Comm. on the Establishment of an Int'l Crim. Ct., Revised Abbreviated Compilation Art. 26 Investigation of alleged crimes, U.N. Doc. A/AC.249/1997/WG.4/CRP.4 (14 August 1997).

130 Preparatory Comm. on the Establishment of an Int'l Crim. Ct., Revised Abbreviated Compilation Art. 26 Investigation of alleged crimes, U.N. Doc. A/AC.249/1997/WG.4/CRP.4, at 2 (14 August 1997).

131 Bitti, *supra* note 122.

132 *See* Preparatory Comm. on the Establishment of an Int'l Crim. Ct., Rep. of the inter-sessional mtg. from 19 to 30 January 1998 in Zutphen, the Netherlands, U.N. Doc. A/AC.249/1998/L.13, at Art. 51 (4 February 1998) ("Commencement of prosecution").

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remained consistent in its language, the provision was not without concern. So much so that, in the Report of the Working Group on Procedural Matters, a cursory footnote explained that States were concerned with the "interest of justice language".[133] While it is notable that this comment was included, the reasons for the concerns were not elaborated. Potential concerns could have included the vagueness of the concept of interests of justice and the possibility that the concept's malleability could be abused in the first international court that would subject all member states to its jurisdiction.

In the absence of official *travaux preparatoires* for the Rome Statute, the perspective of participants in the negotiations at Rome is generally seen as useful and assists in filling gaps.[134] The same is true even for the ICC judicial interpretation of its own statute with ample references to the works of those who were present in Rome. It is useful, against such a wider context, to refer to Gilbert Bitti, a member of the French delegation, who offers helpful insights in this regard.[135] His essays helpfully trace, among other things, the origins and evolution of this important language that eventually found its way into the ICC Statute. He recalled the origin of the language and explained that fear was expressed that the more influential States would be able to use this "interests of justice" language to their advantage and avoid investigation and prosecution for the purpose of protecting their own nationals.[136]

Moreover, there were apparently repeated concerns by smaller States that they would not be able to capitalize on global influence and would be subjected to the Court's jurisdiction more often than their more influential peers.[137] The delegate recalled the discussions in this regard and the strong opinion of some States that such a provision could impair the prosecution mandate of the Court.[138] However, these concerns were ultimately alleviated by the implementation of a *procedural* mechanism that included the Pre-Trial Chamber, thereby ensuring that the Prosecutor's discretion was not unchecked.[139] Furthermore, in terms of framing

133 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Working Group on Procedural Matter*, U.N. Doc. A/CONF.183/C.1/WGPM/L.2Add.7, at 2 (13 July 1998); *See also* Crawford, *supra* note 122, at 82 (discussing negotiations and concerns relating to veto authority by permanent members of the Security Council).

134 *See generally* Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History*? 107 Am J. In'tl L. 780 (2013).

135 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Working Group on Procedural Matter*, U.N. Doc. A/CONF.183/C.1/WGPM/L.2Add.7, at 2 (13 July 1998); Gilbert Bitti, *The Interests of Justice – Where Does that Come from? Part II*, EJIL: Talk! Blog of the Eur. J. Int'l L. (14 August 2019), https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-ii/.

136 Bitti, *supra* note 122.

137 *Id*.

138 *Id*.

139 *See* Preparatory Comm. For the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.1 (2 November 2000) ("The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the Statute.")

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the statutory obligation, the requirement that the Prosecutor demonstrate that the prosecution or investigation was *not* in the interest of justice was seen as an extra barrier between the Prosecutor and this exercise of discretion.[140] The nature of duty was framed negatively, not positively.

Ultimately, the preliminary negotiations and final language contained in the Rome Statute appear to confirm that States were concerned about the Court's authority and its susceptibility to potential political influence from States. Looking forward approximately twenty years since the statute entered into force, it seems clear that the negotiating States' concerns were valid and that they predicted the Court's complicated future. This is because the vagueness of the interests of justice standard has raised issues in practice, including but not only, for African States.[141] The OTP's decision not to halt its proceedings in the Uganda and Sudan situations, when some African entities requested it, came under scrutiny based on the perception that the ICC was choosing to continue the OTP proceedings at the risk of hindering the peace processes in those countries.

At the same time, it should be evident that even by the terms of the language of the initial proposals, it was an intentional choice to provide considerable, if not substantial, leeway to the ICC Prosecutor if there are, in the words of the UK proposal, "good reasons to conclude that a prosecution would be counter-productive".[142] This language, which seemed to have been embraced by other States since the British proposals were eventually included in the Rome Statute, suggests that a relatively large margin of discretion was left for the Prosecutor to determine what to do in a situation even after the ICC had carried out an initial investigation. This is not to say that, on the other hand, the margin would be so wide as to allow the prosecution to undermine its own function by constantly declining to investigate or prosecute cases if that proved to be politically more convenient.

In any event, if the factual circumstances of a situation changed, nothing would preclude the Prosecutor from changing their mind and discontinuing cases that could be counterproductive to the accountability and other legitimate purposes sought by the ICC. In the end, several themes are apparent from the preamble and text of the Rome Statute as well as the instrument as a whole. Retributive, deterrent and preventive functions are all part of the overarching statutory scheme.[143] This has led one thoughtful commentator to rightly conclude that the object and purpose of the ICC seems consistent with the view that

140 Bitti, *supra* note 122.

141 *See* Linda M. Keller, *Comparing the "Interests of Justice": What the International Criminal Court Can Learn from New York Law*, 12 Wash. U. Global Stud. Rev. 1 (2013) (This article concludes that the potential for contradictory or seemingly arbitrary outcomes based on vague and contested criteria may outweigh the benefits of more detailed factors regarding the 'interests of justice.'").

142 UK Discussion Paper, International Criminal Court Complementarity (29 March 1990), https://www.legal-tools.org/doc/45b7f5/.

143 Human Rights Watch, *The Meaning of "Interests of Justice" in Article 53 of the Rome Statue*, Policy Paper (1 June 2005), https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute#.

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"alternative justice mechanisms, peace and security considerations and other objectives of international criminal justice, could be in the 'interests of justice'".[144]

The preceding view appears to be confirmed by the text and purpose behind paragraph 4 and indeed Article 53. Indeed, it may be that, where the Prosecutor does not find sufficient basis for a prosecution, the Prosecutor could rely on the interests of justice as well to justify a prosecution. In some respects, it is ironic that where the ICC is now operating, mostly in Africa, state parties that might not have been perceived as sufficiently powerful now seek to invoke the exercise of prosecutorial discretion.[145] Not so much to avoid accountability or confer impunity, but rather as a way to stave off the possible further commission of international crimes.[146] It is no wonder that African States would reject an unyielding interpretation of Article 53 that fails to accommodate changed or changing circumstances on the ground, which may, in their view, require the short-term interests to secure peace and stability to be prioritized over a preference for issuance of indictments and prosecutions of individuals, at least in a limited set of situations.

In the OTP Policy Paper, the Prosecutor argues that the interest in justice is mainly about the retributive process, which is why peace, which plays into a broader scheme of justice, may not be considered.[147] This interpretation by the Prosecutor, though at first blush eminently reasonable in light of the express statutory role of the OTP to pursue investigations and prosecutions of Rome Statute crimes, seems unnecessarily narrow and may contradict the intent of the drafters of the ICC Statute. As explained above, when the United Kingdom proposed adding the 'interests of justice' language to the Rome Statute, the intention was apparently to provide *broad* discretion to the Prosecutor in determining when a situation would not be in the interest of justice to proceed. Moreover, the drafting history further seems to confirm that the United Kingdom's proposal was intended to allow the Prosecutor to not prosecute when "there were good reasons to conclude that a prosecution would be counterproductive".[148] The keyword in the United Kingdom's proposal seems to be the use of 'counterproductive', which should be interpreted in light of the Court's overall mandate. The mandate of the ICC is to provide accountability for perpetrators of grave international crimes and justice to victims of atrocities. Thus, these broad themes seem to provide space for considering both retributive justice and broader aspects of justice such as restorative justice. Sight should not be lost of the fact that, unlike other courts that preceded it, the ICC

144 Dias, *supra* note 88, at 747.

145 U.N. Security Council, Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc S/2013/624 (22 October 2013).

146 *Id*.

147 Int'l Crim. Ct. OTP, *Policy paper on case selection and prioritization* (2007) [hereinafter OTP, *Case Selection Policy Paper 2007*].

148 United Kingdom, *supra* note 126; *see also* Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, 22 Leiden Journal of International Law 99-126 (2009) (for a thoughtful academic argument favouring a broad and contextualized use of discretion in political negotiations).

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even provided a means of reparations for victims of crimes, including restitution, compensation and rehabilitation and even a trust fund. Such means go beyond just jailing convicts and expressly contemplates repairing the needs victims may have, including repairing their injuries through payment of reparations. Therefore, when the Prosecutor's interpretation of the term is considered within the drafter's context and the statute as a whole, the Prosecutor's narrow interpretation is hard to sustain.

The Prosecutor further justifies the current narrow policy position on the interaction between peace and justice by suggesting that the consideration of a potential political issue would politicize a Court mandated to remain independent.[149] Such concerns should be taken seriously. Although it is true that the Court must remain an independent body, if its mission is to have a chance of success, the Prosecutor seems to imply equating the considerations of a potentially political issue with being a political body. The Prosecutor assumes that if his office were allowed to consider peace, the Court would evolve into a political body.

There are difficulties with this position. For one thing, such a position forgets that in the drafting history of Article 53, the States imposed an oversight mechanism on the prosecution when exercising its discretion under the interests of justice. As established in the drafting history, briefly reviewed above, the Pre-Trial Chamber was given a role in reviewing the exercise of the Prosecutor's broad discretion.[150] Therefore, if a situation were to arise in which the Prosecutor used purely political motivations for applying Article 53 discretion without legal reasoning, the Pre-Trial Chamber could deny the request and require more legal reasoning from the Prosecutor. The oversight mechanism within the Pre-Trial Chamber further supports the Prosecutor's broad discretion and being able to consider peace as part of the interests of justice. If the Prosecutor becomes too political, the oversight mechanism in the Pre-Trial Chamber should, all things being equal, 'reign-in' the Prosecutor as part of its exercise of its judicial review function. Indeed, in national criminal prosecutions, where there is a longer history of prosecutorial authorities weighing and balancing different factors before proceeding with cases in at least some jurisdictions, prosecutors often have to consider other policy interests in their investigative and charging decisions. These decisions range from narrower technical factors regarding the likelihood of securing convictions in their cases to broader policy considerations. The latter would include the availability of resources to determine whether the prosecution in a given case achieves the purposes of the criminal law to other even wider societal considerations. The consideration of these non-legal or extra-legal factors does not make the ultimate decision a political one. Therefore, given that the ICC Prosecutor's interpretation of the 'interest of justice' is arguably in opposition to the intent of the drafters, it should not be applied as such. One might go so far as to argue that it should be considered "manifestly absurd or unreasonable" as per Article 32 of the

149 *Id*., at 8.

150 *See Draft Statute for an International Criminal Court* [1994] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.4/1994/Add.1 (The ILC considered the roles of a Pre-Trial Chamber during the initial stages of drafting what would become the Rome Statute).

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VCLT.[151] Although it has been argued that is manifestly absurd or an unreasonably high threshold, it can arguably be met here.[152] The interpretation can be seen as manifestly unreasonable because it contradicts both the intent of the drafters and the mandate captured in the preamble. First, as will be explained below, the Prosecutor's interpretation seems contrary to the intent of the drafters, who wanted the Prosecutor to enjoy broad discretion. Second, it seems to contradict the mandate of the Court to provide justice for victims, which can be defined to include both retributive justice as well as reparative and restorative justice. The fact that the ICC mechanism contemplates the provision of reparations and even a trust fund for victims may help settle any doubts in that regard.

5.4 A Subtle Shift? – The OTP Policy Paper on Case Selection and Prioritization

The Prosecutor published their 2016 Policy Paper on case selection and considerations that would guide the Prosecutor's decision to pursue a case.[153] Although the paper only briefly addresses the interests of justice, the newly expanded consideration of the Prosecutor may be relevant to States when requesting the Court or the Security Council to defer prosecution. The Prosecutor explained that the purpose of the Policy Paper was to improve transparency between the working methods of the Court and the public.[154] This is a laudable policy stance. Additionally, the Prosecutor explained that there is a difference between a "situation" and "case", as the latter refers to a specific incident and the former refers to general temporal, territorial and personal matters.[155] This article provides new enumerated considerations that solely apply to "cases".[156]

In explaining the intent of the OTP, the Prosecutor reiterated that, as in the 2007 Policy Paper, the Prosecutor must at all times be guided by the mandate of the Court as established in the Rome Statute's preamble.[157] Moreover, they continued to reiterate that the goal of the Statute is to "combat impunity and prevent the recurrence of violence" and that the Court could fulfil this goal by both prosecutions at the ICC and by assisting and encouraging national proceedings.[158] Further, the Prosecutor stated that the Court would "cooperate with States who are investigating and prosecuting individuals who have committed or have facilitated the commission of Rome Statute crimes".[159] Although the Rome Statute mandates complementarity and deference to national proceedings, this explicit statement by the Prosecutor is important as it recognized the cooperation of the Court with domestic proceedings, which prioritizes legitimate national proceedings over ICC prosecutions.

151 Vienna Convention on the Law of Treaties Art. 32, 23 May 1969, 1155 U.N.T.S. 331.
152 Oliver Dorr & Kristen Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 571-586 (2012).
153 Int'l Crim. Ct. OTP, *Policy paper on case selection and prioritisation*, para. 4 (2016) [hereinafter OTP, *Case Selection Policy Paper 2016*].
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*, at para. 5.
158 *Id.*, at para. 7.
159 *Id.*

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The Policy Paper also establishes that the selection of cases must be guided by independence, impartiality and objectivity.[160] First, concerning independence, the Prosecutor stressed the importance of ensuring that all actions by the OTP are undertaken, irrespective of the wishes of certain State actors.[161] Specifically, the Prosecutor identified that although a Security Council referral and State comments would give the Prosecutor the authority to investigate and prosecute, the Prosecutor was not required to investigate and prosecute simply because it was given the authority to do so.[162] Moreover, the Prosecutor is not limited to the information presented in these referrals when deciding whether a prosecution is appropriate.[163] This is surely the correct legal position, which is also in line with the expectations of an independent prosecutor.

Second, the OTP must remain impartial in its case selection.[164] The Rome Statute in Articles 21(1) and 42(7) mandates that the Prosecutor acts uniformly in all circumstances and applies a standard set of processes, methods, criteria and thresholds in all cases.[165] Additionally, although speaking more about the treatment of all persons equally, Article 27 requires that uniform application of the law requires the Prosecutor to disregard official capacity when determining if a person should be subjected to the Court to the extent that the state is a party.[166] Discussing impartiality, the Prosecutor explained that despite the application of the same principles, every situation was different and there would not always be the same outcome.[167] The latter is surely correct. In any event, it was stated that the Prosecutor could not pursue a case for the purposes of parity.[168] This latter comment is relevant to the historical criticism that international tribunals have acted as "victor's justice" courts in which only the "losing" side of the conflict has been prosecuted.[169] The Prosecutor's position here clearly establishes that despite this known criticism, the OTP should not attempt to prosecute both sides of a conflict *unless* conduct by both sides genuinely falls within the jurisdiction of the Court.[170]

Third, the Prosecutor's decision to select a case must be objective and based on evidence-driven assessment.[171] This evidence-based process requires the Prosecutor to develop a hypothetical case in which both the incriminating information and exonerating information is considered.[172] Further, before applying for an arrest

160 *Id*., at para. 16.
161 *Id*., at para. 17.
162 *Id*., at paras. 17-18.
163 *Id*., at para. 18.
164 *Id*., at para. 19.
165 *Id*., at paras. 19-20.
166 *Id*., at para. 19.
167 *Id*.
168 *Id*.
169 *Id*.
170 *Id*., at para. 20.
171 *Id*., at para. 21.
172 *Id*., at para. 22.

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warrant, the Prosecutor must consider whether the evidence presented during the investigation stage has a "reasonable prospect" of conviction.[173]

Fourth, the Prosecutor must abide by the legal criteria established within the Rome Statute. Under the Rome Statute, the Prosecutor must ensure proper jurisdiction and admissibility and that the prosecution is supported by the interests of justice.[174] In relation to jurisdiction, the Prosecutor has an enumerated list of trigger mechanisms that can place a case before the Court. The overall jurisdiction of the Court is merely a procedural element with limited factual considerations,[175] whereas admissibility requires a heavy fact-based analysis of the situation.[176] Admissibility requires the Prosecutor to consider both complementarity and the gravity of a specific case.[177] When assessing complementarity, the Prosecutor stated that this is an evolving analysis that can be revised based on new facts, but that the Prosecutor must determine if there are legitimate State proceedings that are either investigating or prosecuting the specific case.[178]

Moreover, the Prosecutor imposed a higher burden on itself for considering the adequacy of complementary prosecutions, requiring the Court to defer to national prosecution unless the national prosecutions are almost non-existent.[179] Once the complementarity assessment is carried out, the Court must then determine if the crimes are of the level of gravity required by the Court. The latter is a very broad analysis that allows the prosecutor to use both quantitative and qualitative values to determine whether there is sufficient gravity.[180] Finally, the Prosecutor must consider the "interests of justice". Unfortunately, the Prosecutor's consideration of this issue lacks elaboration and full consideration as the Prosecutor simply referred to the 2007 Policy Paper on the topic and reiterated the importance of considering the interests of victims and the ability of the Court to protect victims under the Rome Statute.[181]

Although the Prosecutor's analysis of how the OTP should select cases is not necessarily new, the consideration of case selection conjunctively with case prioritization is insightful. Within the same Policy Paper, the Prosecutor discusses how cases will be prioritized within the Court.[182] As a statutory and practical

173 *Id*., at para. 23; *see also* Richard Goldstone, *Acquittals by the International Criminal Court*, EJIL: Talk! Blog of the Eur. J. Int'l L. (18 January 2019), https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/ ("Before issuing arrest warrants against leaders that result in their incarceration for many years, lengthy trials and high expectations on the part of victims, prosecutors must be satisfied that their cases against the defendants, in the absence of rebutting evidence, establish guilt beyond a reasonable doubt.").

174 OTP, *Case Selection Policy Paper 2016, supra* note 156, at para. 25.

175 *Id*.

176 *Id*., at para. 26.

177 *Id*., at para. 29.

178 *Id*., at paras. 30-31.

179 *Id*., at para. 31 ("If the national authorities are conducting, or have conducted investigations or prosecutions against the same person for substantially the same conduct, and such investigations or prosecutions have not been vitiated by an *unwillingness* or *inability* to genuinely carry them out, the case will not be selected for further investigation and prosecution.") (emphasis added).

180 *Id*., at para. 32.

181 *Id*., at 33.

182 *Id*., at para. 47.

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matter, the Court cannot prosecute all cases that fall within its jurisdiction; therefore, there must be some system to guide the selection of cases, from which situations, that should be prosecuted and when.[183] The Prosecutor identified five prioritization criteria: (a) a comparative assessment across the selected case situations based on the same factors that guide case selection, (b) whether a person or members of the same group have already been subject to investigation or prosecution by either the Office or a State for another serious crime, (c) the impact of investigations and prosecutions on the victims and affected communities, (d) the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes and (e) the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis.[184] The first and second points seem to be repetitions of enumerated requirements already within the Rome Statute under admissibility and complementarity. However, the third and fourth seem to provide broad discretion to the Prosecutor to consider the impact of prosecution on conflict and how peace may play a role.

The third point may be particularly relevant to African States. Some have argued that ensuring peace should be a priority before prosecutions.[185] The former can sometimes be more important to many victims who have long endured decades of civil war. This point has also been recognized in the African Union's Transitional Justice Policy regarding the need for the peace process to end ongoing violence and remove the possibility of future violence.[186]

The fourth element, addressing the impact of prosecutions on future crimes, should not be underestimated. Perhaps the best example of this is Sudan. During the Sudanese conflict, the government was in peace negotiations with the rebel groups; however, once the ICC approved the arrest warrant for President Al-Bashir, the rebels refused to continue peace negotiations with a "war-criminal".[187] The loss of a chance for a peace agreement between the warring parties would inevitably mean that the civil war would continue, ultimately resulting in more violence, more victims and more conflict. This continual perpetuation is in opposition to the mandate of the ICC and its purpose of deterrence. This situation seems like a prime example, assuming peace actually had strong prospects, of when the ICC Prosecutor's non-prosecution would have been better for victims in the long term.

In addition to the prioritization of cases, the Prosecutor determined that the Office would consider the "operational viability" of the case.[188] These considerations include (a) the quantity and quality of the incriminating and exonerating evidence already in possession of the Office, as well as the availability of additional evidence

183 *Id*., at para. 49.
184 *Id*., at para. 50.
185 AU *Transitional Policy Paper, supra* note 24, at para. 43.
186 *Id*.
187 *See* Alarabiya News, *Sudanese Rebels Call on Libya's NTC to Arrest Bashir during Tripoli Visit* (8 January 2012), https://english.alarabiya.net/articles/2012%2F01%2F08%2F187049 ("Sudanese rebels seeking to overthrow President Omar al-Bashir have asked Libya on Sunday to arrest the accused war criminal during his visit to Tripoli.")
188 OTP, *Case Selection Policy Paper 2016, supra* note 156, at para. 51.

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and any risks to its degradation; (b) international cooperation and judicial assistance to support the Office's activities; (c) the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time, including the security situation in the area where the Office is planning to operate or where persons cooperating with the Office reside, and the Court's ability to protect persons from the risk that might arise from their interactions with the Office; and (d) the potential to secure the appearance of suspects before the Court, either by arrest and surrender or pursuant to a summons.[189] Finally, the Prosecutor noted the possibility of reevaluating the case at any time. These considerations by which the OTP seem to recognize the recent difficulties the ICC has faced in both State cooperation in the surrender of suspects, such as President Al-Bashir, and more broadly in the additional cases in which the individuals are still considered at large.

6 ICC Chambers' Interpretation of the "Interests of Justice"

Based on the concern that the Prosecutor's authority may be used to institute frivolous prosecutions, the drafters of the ICC Statute added into Article 15 "checks and balances" subjecting the exercise of the *proprio motu* power of the Prosecutor to initiate an investigation to oversight by judges who must provide authorization of an investigation before it can proceed.[190] Recently, the scope of this article has come under scrutiny in the Pre-Trial Chamber decision on the Situation in Afghanistan.[191] The Pre-Trial Chamber was faced with a request by the Prosecutor to start an investigation on the grounds that they believed there was a reasonable basis to believe that various international crimes within ICC jurisdiction had occurred.[192] The Pre-Trial Chamber acknowledged that the initiation of an investigation had the lowest standard of review, with the Prosecutor only needing to demonstrate that there is a "reasonable basis to proceed", which the Chambers have previously defined as a finding of "sensible and reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed".[193] Moreover, it construed this standard to be interpreted with consideration of the mandate of Article 15(4), which is to ensure that the Prosecutor does not proceed with "unwarranted, frivolous, or politically motivated investigations that could have a negative effect on [the Court's] credibility".[194]

Furthermore, the Pre-Trial Chamber determined that it had an affirmative duty to find that the initiation of an investigation would be in the interests of justice.[195] The Pre-Trial Chamber ultimately determined that, based on the evidence presented by the Prosecutor, there was a reasonable basis to believe that

189 *Id.*
190 Crawford, *supra* note 122, at 83.
191 Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (12 April 2019).
192 *Id.*, at para. 5.
193 *Id.*, at para. 31.
194 *Id.*
195 *Id.*, at para. 35.

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international crimes within ICC jurisdiction had occurred.[196] However, the Pre-Trial Chamber did not authorize the investigation despite also finding there were no domestic proceedings occurring and that the crimes were of sufficient gravity to be admissible within the Court's jurisdiction.[197] The Pre-Trial Chamber denied the authorization of an investigation on the grounds that such an investigation was not in the interests of justice. The Court considered

> (i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time… (iii) the likelihood that both relevant evidence and potential relevant suspects might still be within reach of the Prosecution's investigative efforts.[198]

Further, the Pre-Trial Chamber noted the considerable political complexity of the situation and the cost of resources for the investigation in the Court's dwindling budget.[199] Therefore, mostly on the grounds of the lack of feasibility for justice, the Court denied the Prosecutor's request to initiate an investigation.[200]

The Pre-Trial Chamber's decision to deny an investigation was reversed by the Appeals Chamber.[201] The Appeals Chamber reversal held that considerations under Article 15 of the Rome Statute do not require the considerations listed in Article 53, specifically the interest of justice question.[202] Although the Appeals Chamber narrowed the scope of the Pre-Trial's authority to exclude the interest of justice considerations, this could provide a new opportunity for the Prosecutor to revisit its own considerations of the 'interests of justice' in light of the reasoning provided in the Pre-Trial and Appeals Chamber decisions. It is also noteworthy that there is a leadership change at the helm of the OTP.[203] This presumably gives fresh impetus to reconsider the ICC's experience 20 years after the entry into force of the Rome Statute.

7 Security Council's Use of Article 16

Although no formal public reports by the Security Council have been provided on its consideration of the 'interests of justice' question, the organ's use of Article 16 may provide insight into what the Security Council considers when determining if a situation raises concerns for international peace and security. The use of this

196 *Id*., at para. 47.
197 *Id*., at paras. 72-76.
198 *Id*., at para. 91.
199 *Id*., at paras. 94-95.
200 *Id*., at para. 96.
201 Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the appeal against the decision on the authorization of investigation into the situation in the Islamic Republic of Afghanistan (5 March 2020).
202 *Id*., at 34.
203 ICC, *New ICC Presidency Elected for 2021-2024*, March 11, 2021, https://www.icc-cpi.int/Pages/item.aspx?name=pr1576.

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power, which ultimately signals peace, can sometimes be prioritized over immediate criminal prosecutions and therefore be instructive.

The first invocation of Article 16 by the Security Council was at the behest of the United States during the early days of the Court.[204] Resolution 1422 is notable not only for its swift enactment, less than two weeks after the Rome Statute's entry into force, but also for its vagueness.[205] Although the resolution did not directly relate to the United States and referred generally to the Court not pursuing any cases "involving current or former officials or personnel from a contributing State not a Party to the Rome Statute", it was known that this resolution was adopted at the request of the United States.[206] The request for a twelve-month deferral of the nationals of non-Party States was then extended the following year.[207]

The deferral resolutions driven by the request of the United States seem to be in stark contrast to the Kenyan request for a Security Council deferral. Kenya submitted a formal letter justifying its request for deferral on the grounds that prosecution of post-election officials would disrupt peace and potentially encourage violence regionally in the Horn of Africa and East Africa.[208] Moreover, the request was supported by forty-five African States.[209] Despite extensive support for the deferral, it was ultimately denied with only seven votes for deferral and eight abstentions.[210] The explanatory statements of the eight abstaining states are notable and demonstrate the tensions in the Security Council at the time.[211]

The request for deferral did not gain support. However, the explanations of the votes provide some insights. They confirm differing readings of the intention behind Article 16 and whether the threshold of a threat to peace and security under Chapter VII of the U.N. Charter had been met, thus triggering its applicability. For example, Luxembourg believed that the situation needed to amount to a threat to *regional* peace and security, whereas Argentina, Australia and the United Kingdom

204 Robert Cryer et al., An Introduction to International Criminal Law and Procedure 174 (3rd. ed., 2014).

205 *Id*.; S.C. Res. 1422 (12 July 2002).

206 Cryer et al., *supra* note 207; *See generally* Aly Mokhtar, *The Fine Art of Arm-twisting: The US, Resolution 1422 and Security Council Deferral Power under the Rome Statute*, 3 Int'l Crim. L. Rev. 295 (2003); Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14(1) Eur. J. Int'l L. 85 (2003); *See* U.N.S.C., 57th Sess., 4568th mtg., at 4, U.N. Doc. S/PV.4568 (10 July 2002) (Canada – "The negotiating history makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation – for example, a dynamic of a peace negotiation – warrant a 12-month deferral").

207 S.C. Res. 1487 (12 June 2003); *See also* S.C. Res. 1497 (1 August 2003) (limiting the Court's jurisdiction in relation to citizens of non-State parties in relation to the Liberian conflict and ceasefire).

208 U.N.S.C., Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2013/624 (22 October 2013).

209 *Id*.

210 Press Release, Security Council, Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favor, 8 Abstaining, U.N. Press Release SC/11176 (15 November 2013), https://www.un.org/press/en/2013/sc11176.doc.htm.

211 *Id*.; U.N.S.C., 58th Sess., 7060th mtg., U.N. Doc. S/PV.7060 (15 November 2013).

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demanded a higher threshold of a threat to *international* peace and security.[212] Regarding Luxembourg's concern, the question could be asked on what more could have been provided to raise the threat to regional peace and security than the signature of forty-five African States stating that if Kenyan leaders were removed it would be a threat to regional peace.[213]

Other States, such as the United States and Korea, justified their abstentions by stating that the proper place for this discussion was not within the Security Council but within the ASP.[214] This final reasoning seems perhaps more deferential to the ICC and its States Parties and could be welcomed. At the same time, if the OTP is taking the position that the Security Council can act on matters of peace, then we might have the paradoxical situation of each of the responsible entities taking no responsibility to act. This could lead to a vacuum on both sides that should not exist because the Security Council has explicitly been given such a mandate under Article 16 of the Rome Statute and in accordance with its functions in Chapter VII of the U.N. Charter. Although the ASP may be another forum for these discussions to occur and less sensitive, as it is at least made up of the ICC States Parties, this does not mean that the ASP as a forum could assume the Security Council's responsibility to ensure the maintenance of international peace and security in the post-World War II system (a role that is rooted in the U.N. Charter itself).[215]

Overall, the decision on Kenya's deferral request demonstrates a lack of clarity on what is required for an Article 16 request to be granted. This suggests that, while there could be clear situations where threats to international peace will manifest (for example, the conflict in Sudan), there will also be situations, such as in Kenya, where that will not be the case. Unfortunately, this is the extent of insight that is publicly available on the Security Council's decision process as there is no indication that the prior AU request for deferral in the situation in Sudan was ever voted on.

212 *Id*.

213 *Id*.

214 *Id*.

215 *See* G.A. Res. 68/305 (16 September 2014) (failing to acknowledge the denial of the deferral request by Kenya and the request for referral in the situation Sudan by the AU); *See also* A.U. Dec. Assembly/AU/Dec.493(XXII), Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, at para. 6 (30-31 January 2014) (expressing its "deep disappointment that the request by Kenya supported by AU, to the United Nations (UN) Security Council to defer the proceedings initiated against the President and Deputy President of the Republic of Kenya in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon to date").

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8 Case Study on ICC Interactions with Three Situations on Peace-Justice Concerns

When the ICC was initially created, its foundation stemmed from the work of the tribunals in Nuremberg, the former Yugoslavia and Rwanda.[216] For the most part, the conflicts had ended or were about to end when those ad hoc courts were established. However, the ICC's situation substantially deviates from these tribunals in that it operates in current conflict situations, whereas its predecessors operated predominantly in post-conflict situations. This distinction between conflict and post-conflict situations provides an added layer of complexity to the operations of the Court as justice can look different at each of these stages of a conflict. This diverging view of justice on an ongoing conflict is the basis in which a large part of the African government argument is based. The African government position does not argue for impunity over peace, but rather for a more deferential approach to national and regional groups in determining the timing and sequencing of peace *and* justice.

To fully appreciate the African position, a brief analysis of the situations in Uganda, Sudan and Colombia is useful. The challenge of seeking justice and how the situation in Colombia is ultimately attempting to address the goal of justice without jeopardizing the prospects of peace confirms, if there is any doubt, that this is not an issue specific to Africa. Rather, this issue will likely arise in other ICC situations as long as the conflict is ongoing, irrespective of the region. This shows the importance of understanding this matter with an eye towards the future. Perhaps, the manner in which the more recent non-African situation of Colombia has been dealt with offers, if it leads to a good outcome in the future, hope that the OTP may be adopting a more nuanced and arguably more realistic view of peace and its relationship with justice. The African States might wish to support the position taken on the Colombian peace process in relevant ASP discussions, given the promise it holds for the continent and what it might portend for the success of the ICC itself.

8.1 Uganda and Sudan

First, the situation in Northern Uganda is an interesting example. Uganda was an early signatory to the Rome Statute and the first self-referral by a State Party to the ICC.[217] The Ugandan referral to the ICC has faced criticism because it was to investigate the Lord's Resistance Army (LRA).[218] This immediately generated criticism because of the implication that crimes committed by government forces

216 *See Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment (21 May 1999); *see also Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia 2 October 1995) (these cases provide examples of where the ICC based its foundation).

217 *Uganda*, International Criminal Court, https://www.icc-cpi.int/uganda (last visited 31 May 2020).

218 Press Release, Int'l Crim. Ct, ICC – President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, U.N. Press Release ICC-20040129-44 (29 January 2004), https://www.icc-cpi.int/Pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc.

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might not be captured within the scope of the referral.[219] The Prosecutor's response to the Ugandan government clarified that the referral would apply to the whole of the situation. Although the situation was later retitled to "the referral of the situation in Northern Uganda",[220] the five arrest warrants ultimately produced were solely related to the LRA.

In the Prosecutor's justification for these arrest warrants, they established that throughout the process of the investigation, there was evidence that the LRA committed crimes against humanity and war crimes in the Northern Uganda.[221] Further, the Prosecutor stated that the gravity of the crimes was 'much higher' than the gravity of the crimes allegedly committed by the Uganda People's Defense Forces (UPDF).[222] The Prosecutor has yet to return to the investigation of the actions of the UPDF. The longer time passes, the more unlikely it seems that the Prosecutor ever will.

The Ugandan relationship with the ICC Prosecutor remained strong until the Ugandan government attempted to broker a peace deal with the LRA, which would include domestic prosecutions rather than extradition to the ICC.[223] The position of the Prosecutor during the peace talks with the LRA seemed more concerned with the ability of the ICC to prosecute the LRA members than the concern for peace, which would have included some domestic prosecutions.[224] If the Ugandan government had been able to conclude a peace deal with the LRA and agree to domestic prosecutions or amnesties, this could have made the LRA cases at the ICC inadmissible under the complementarity principle. The Prosecutor clearly opposed this idea. It was reported that they even went as far as saying that they would "fight any admissibility challenge in Court" regardless of the apparent genuineness of the domestic prosecutions.[225]

The Prosecutor's strict approach in this regard can be criticized for seemingly being aimed at ensuring that the ICC received credit for prosecuting alleged war criminals rather than focusing on its mandate of accountability and statutorily required deference to genuine national prosecutions (in line with the complementarity principle). It should be noted that in 2006 Uganda went on to amend its domestic Amnesty Act to allow for certain individuals to be excluded from amnesty eligibility.[226] Specifically, the 2006 amendments allowed the Minister

219 Hum. Rts. Watch, *ICC: Investigate all Sides in Uganda Chance for Impartial ICC Investigation into Serious Crimes a Welcome Step* (4 February 2004), https://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda (HRW calling on the Court to investigate all parties to the conflict including the Uganda People's Defense Forces).

220 *See generally Uganda*, International Criminal Court, https://www.icc-cpi.int/uganda (last visited 31 May 2020).

221 Luis Moreno-Ocampo, ICC Prosecutor, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (14 October 2005), https://www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf.

222 *Id*., at 2.

223 Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 Eur. J. Int'l L. 941, 942 (2011).

224 *Id*., at 954.

225 *Id*.

226 Transitional Justice Working Grp., *The Amnesty Law (2000) Issues Paper*, at 6 (April 2002).

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to declare an individual ineligible for amnesty; however, the declaration would not be finalized until it was affirmed by the Ugandan parliament.[227] However, the 2006 amendment did not provide for specific circumstances in which a person may be considered ineligible for amnesty, such as crimes under international law. Instead, the revision left room for broad discretion on behalf of the Minister and parliament.[228] Initially, the amendment to the Amnesty Act led some to believe that the Ugandan government was seeking a way to give some perpetrators of the civil war amnesty while still ensuring high-level offenders, such as Joseph Kony, were nonetheless prosecuted by the ICC.[229] Despite the initial optimism surrounding the amendment, the Ugandan government did not use this provision to exclude Kony from receiving amnesty. Instead, as stated earlier, in an attempt at peace, the Ugandan government offered Kony "total amnesty" as an "olive branch" at the beginning of the peace negotiations.[230]

Ugandan leaders explained that the offer of total amnesty to Kony was an effort to garner peace and end a nineteen-year long civil war.[231] Although such a grant of amnesty would arguably be in contradiction to obligations owed under the Rome Statute, the Ugandan government has made other efforts to further develop the international rule of law in its country through the creation of the International Crimes Division within the High Court of Uganda.[232] The creation of this special division can not only help strengthen and develop domestic jurisprudence relating to international crimes but also allow Uganda to have a stronger argument with the ICC for complementary prosecutions in the future.

Second, the situation in Sudan is notable given the Security Council's exercise of its Chapter VII powers to refer a non-State Party for an investigation by the Court.[233] The situation with Sudan quickly escalated to direct tension between the ICC and the AU when the ICC Prosecutor sought the issuance of an arrest warrant for sitting President Al-Bashir for allegedly committing crimes against humanity, genocide and war crimes in Darfur.[234] Immediately after the arrest warrant for President Al-Bashir was issued, albeit for only some, not all, of the charges requested, the AU issued a decision stating its deep concern about the indictment and urged the Security Council to exercise its authority under Article 16 of the Rome Statute to defer consideration of the issue for twelve months.[235]

227 *Id*.

228 *Id*., at 6-7.

229 Jeevan Vasagar, *Lord's Resistance Army Leader Is Offered Amnesty by Uganda*, The Guardian (4 July 2006), https://www.theguardian.com/world/2006/jul/05/uganda.topstories3.

230 *Id*.

231 *Id*.

232 Hum. Rts. Watch, *Justice of Serious Crimes before National Courts: Uganda's International Crimes Division* (15 January 2012), https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division.

233 U.N. S.C. Res. 1593 (31 March 2005).

234 Press Release, Int'l Crim. Ct, ICC Issues a warrant of arrest for Omar Al-Bashir, President of Sudan, U.N. Press Release ICC-CPI-20090304-PR394 (4 March 2009).

235 A.U. Dec. Assembly/AU/Dec.221(XII), Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan (1-3 February 2009).

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Despite the AU's request, the Security Council did not vote on the request for deferral, which subsequently led the AU to publicly announce that it "deeply regrets" the Security Council not using its Article 16 authority and once again reiterated its request for deferral by the Security Council.[236] Moreover, in the same decision, the AU expressly urged all AU Member States not to comply with the request to execute the arrest warrant for President Al-Bashir.[237] Since the issuance of the arrest warrant, President Al-Bashir, who, before he was deposed, travelled to several African States and was never arrested and surrendered to the ICC.[238] The non-cooperation of African States reflects the collective AU decision that had been taken at Sirte, Libya, in 2008, which expressly requested African States not to cooperate with the ICC in relation to the arrest and surrender of the Sudanese leader.[239]

Although the ICC Appeals Chamber has determined that the immunity of President Al-Bashir was implicitly waived via the Security Council referral in a recent decision regarding Jordan, the African Union has nonetheless supported African States' non-compliance with the arrest warrant, partly based on the legal justification that President Al-Bashir enjoyed immunity under customary

236 A.U. Dec. Assembly/AU/Dec.245(XII) Rev. 1, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (1-3 July 2009); A.U. Dec. Assembly/AU/Dec.270(XIV), Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC) (31 January-2 February 2010) (suggestion by AU to amend Art. 16 of AU Statute to allow for General Assembly vote).

237 *Id*.

238 *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (13 December 2011); *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Decision under Art. 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (6 July 2017); *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Decision under Art. 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir (11 December 2017); *Prosecutor v. Al-Bashir*, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal (6 May 2019).

239 *See* Elise Keppler, *Managing Setbacks for the International Criminal Court in Africa*, 56 J. Afr. L. 1-14 (2011) ("The call for non-cooperation in President al-Bashir's arrest is contrary to ICC states parties' obligations to cooperate with the ICC under the Rome Statute."

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international law.[240] Despite the Appeals Chamber judgment, the AU has maintained its decade-long position of requesting that the Security Council defer President Al-Bashir's case for twelve months, and now, clearly contrary to the ruling of the Appeals Chamber, instructed African States Parties to the ICC not to comply with the arrest warrant.[241]

Further, it could even be argued that the Sudanese government was perceived as an "enemy" of the Court because it was not a State Party to the Rome Statute and was only subjected to the Court's jurisdiction by a Security Council resolution.[242] It likely did not help that the relationship between Sudan and the ICC was strained when the Sudanese government alleged the Court was being used by Western States to influence governmental relations in Sudan, followed by billboards in Sudan stating its disdain for the ICC Prosecutor and disregard for the charges.[243] The Sudanese criticism appeared partially correct because even if the Court is not directly intending to change a government, it is at least doing so in an implicit manner because the removal of a sitting president for prosecution at the ICC will, at minimum, have the effect of placing another Head of State in authority.[244] Further, it remains contentious whether the indictment of the sitting president at

240 A.U. Dec. Assembly/AU/Dec.221(XII), Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan (1-3 February 2009); A.U. Dec. Assembly/AU/Dec.245(XII) Rev. 1, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (1-3 July 2009); A.U. Dec. Assembly/AU/Dec.296(XV), Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) (25-27 July 2010); A.U. Dec. Assembly AU/Dec.334(XVI), Decision on the Implementation of the Decisions on the International Criminal Court (ICC) (30-31 January 2011); A.U. Dec. Assembly/AU/Dec.366(XVII), Decision on the Implementation of the Assembly Decisions on the International Criminal Court (30 June-1 July 2011); A.U. Dec. Assembly/AU/Dec.397(XVII), Decision on the Progress Report of the Commission on the Implementation of the Assembly Decision on the International Criminal Court (ICC) (29-30 January 2012); A.U. Dec. Assembly/AU/Dec.419(XIX), Decision on the Implementation of the Decisions on the International Criminal Court (ICC) (15-16 July 2012); A.U. Dec. Assembly/AU/Dec.493 (XXII), Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court (30-31 January 2014); A.U. Dec. Assembly/AU/Dec.547 (XXIV), Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) (30-31 January 2015); A.U. Dec. Assembly/AU/Dec.590(XXVI), Decision on the International Criminal Court (30-31 January 2016); A.U. Dec. Assembly/AU/Dec.616(XXVII), Decision on the International Criminal Court (XXIX) (17-18 July 2016); A.U. Dec. Assembly/AU/Dec.622(XXVIII), Decision on the International Criminal Court (ICC) (30-31 January 2017); A.U. Dec. Assembly/AU/Dec.672(XXX), Decision on the International Criminal Court (28-29 January 2018); A.U. Dec. Assembly/AU/Dec.738(XXXII), Decision on the International Criminal Court (10-11 February 2019); A.U. Dec. Assembly/AU/Dec.789(XXXIII), Decision on the International Criminal Court (9-10 February 2020). *But see* Hum. Rts. Watch, *AU: Do Not Call for Suspending ICC's Investigation of President al-Bashir Letter to the African Union Peace and Security Council* (19 September 2008), https://www.hrw.org/news/2008/09/19/au-do-not-call-suspending-iccs-investigation-president-al-bashir.

241 *Id*.

242 Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 Eur. J. Int'l L. 941, 951 (2011).

243 *Id*., at 955.

244 *Id*., at 955-956.

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the time did more harm than good to Sudan. Not only did it result in the first tense standoff between the AU and the ICC, but it has been reported that Sudanese rebel groups began to refuse peace negotiations because it gave them an opening to argue that they could not negotiate with a "war criminal".[245]

8.2 Colombia

The situation in Colombia, which occurred many years after Uganda and Sudan, had a rather different interaction with the ICC. Colombia, like many other States before the ICC, has faced a long-enduring internal conflict between government forces and armed groups for nearly fifty years.[246] Although the conflict began its "final" peace process as early as 2005, there were still armed groups that continued to operate autonomously.[247] The OTP began investigating the situation in Colombia in June 2004.[248] Colombia became a signatory to the Rome Statute in 2002 while providing a declaration excluding war crimes until 2009.[249] Therefore, pursuant to Article 15 of the Rome Statute, the Prosecutor's preliminary investigation focused on the alleged crimes against humanity and war crimes committed by government forces, paramilitary groups and rebel groups.[250]

In 2011, the OTP presented a preliminary report on the alleged activities.[251] Before the report, the Prosecutor received eighty-six communications related to the situation in Colombia, of which only sixty-nine were within the Court's jurisdiction.[252] The preliminary analysis determined that there was a "reasonable basis to believe" that crimes against humanity had been committed and that war crimes "may" have been committed.[253] The Prosecutor continued to address the current actions of the Colombian government to hold individuals accountable for these egregious crimes.[254] The Prosecutor recognized that the Colombian government had initiated proceedings against illegal armed groups, paramilitary leaders, police and army officials and politicians associated with armed groups.[255]

In light of the work of the Colombian government to indict and prosecute perpetrators of international crimes, the Prosecutor decided that she would continually monitor the situation, but at the same time, welcomed the efforts of Colombia and supported the exercise of the complementarity principle.[256] While deferential to national efforts, the Prosecutor did not discontinue the investigation

245 *Id*., at 957. *See* Sarah M.H. Nouwen, *Sudan's Divided (and divisive?) Peace Agreement*, 19 Hague Y.B. Int'l L. 113 (2011); *see also Regionalizing International Criminal Law?, supra* note 5, at 465 (discussing the AU's prioritization of peace then justice).

246 OTP, Report on Preliminary Examination Activities, at para. 63 (13 December 2011) [hereinafter Rep. of Preliminary Activities 2011].

247 *Id*., at para. 64.

248 *Colombia*, International Criminal Court, https://www.icc-cpi.int/colombia.

249 *Id*.

250 *Id*.

251 Rep. of Preliminary Activities 2011, *supra* note 249, at paras. 61-87.

252 *Id*., at para. 61.

253 *Id*., at paras. 72-73.

254 *Id*., at para. 81.

255 *Id*., at paras. 74-82 (discussing the various indictments and prosecutions that had occurred).

256 *Id*., at para. 84.

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into Colombia and noted that there was no basis to believe the current prosecutions were disingenuous but wisely argued that they would nonetheless "continue to monitor the commission of new crimes and the judicial developments".[257]

In 2012, the OTP once again reviewed the status of the situation.[258] The 2012 report acknowledged the continuing efforts in Colombia to prosecute the leaders of the conflict and the notable guerilla groups, the FARC and Ejército de Liberación Nacional (ELN).[259] The Prosecutor recognized the use of transitional justice mechanisms that allowed former combatants to surrender and confess their crimes in exchange for lower sentences.[260] In total, there were 218 FARC prosecutions, twenty-eight ELN prosecutions and an unspecified number of *in absentia* prosecutions of senior leaders of the FARC and ELN.[261]

Moreover, the Prosecutor stated that it would have expected more prosecutions under a confession-based system, but this delay in prosecution did not mean that there was an unwillingness on the part of the Colombian government to prosecute.[262] However, there was some inadequacy in the prosecutions relating to crimes of sexual violence. Out of the entirety of the proceeding, only four were related to crimes of rape and other sexual violence.[263] Finally, the Prosecutor stated that considering the work of the Colombian government, the Prosecutor's next steps would be to follow the Colombian legislative initiatives on peace and accountability and follow the proceedings relating to paramilitary groups, forced disappearances, sexual violence and false-positive cases.[264]

By 2013, the Colombian prosecution and efforts towards peace had further developed into active peace talks between the Colombian government and the FARC.[265] The peace talks could be considered successful because there had been a settlement on two of the six issues surrounding a peace agreement.[266] The Prosecutor addressed the wide variety of legislative action taken by the Colombian Congress in an effort to prosecute perpetrators of international crimes.[267] The Prosecutor's office had also conducted visits to Colombia to assess the proceedings, and the Prosecutor had met with President Juan Manual Santos to discuss peace and justice in Colombia.[268] Finally, the Prosecutor concluded that over the next year, the office would continue to monitor the proceedings within Colombia and follow any cases that may fall within the ICC's jurisdiction.[269]

257 *Id*., at paras. 85-87.
258 OTP, Report on Preliminary Examination Activities (November 2012) [hereinafter Rep. of Preliminary Activities 2012].
259 *Id*., at para. 108.
260 *Id*.
261 *Id*.
262 *Id*., at para. 111.
263 *Id*., at para. 116.
264 *Id*., at paras. 118-119.
265 OTP, Report on Preliminary Examination Activities, at para. 123 (November 2013) [hereinafter Rep. of Preliminary Activities 2013].
266 *Id*.
267 *Id*., at paras. 134-35.
268 *Id*., at paras. 147-150.
269 *Id*., at paras. 151-152.

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In 2014, the Prosecutor continued to monitor the work of the Colombian government in prosecutions for various international crimes and further conducted two in-person consultations with the Colombian government.[270] Once again, because the Colombian government was taking active steps to prosecute those most responsible, the ICC elected not to issue any indictments. It again stated that it would continually monitor the national prosecutions.[271]

In 2015, the Prosecutor provided two notable interactions during its annual assessment of the situation in Colombia. First, while participating in the national discussions relating to peace in Colombia, ICC Deputy Prosecutor James Stewart gave a keynote speech providing insight into the role of the Prosecutor in Colombia.[272] The Deputy Prosecutor, in his speech, noted that the ICC was intended to be a "court of last resort" and that the duty to investigate and prosecute international crimes was vested in the State Party prior to vesting in the ICC.[273]

Further, the Deputy Prosecutor stated that "[t]ransitional justice measures offer broad scope" as long as these measures comply with the mandate and purpose of the ICC.[274] The Deputy Prosecutor continued to recognize that transitional justice mechanisms aim to ensure accountability, justice and reconciliation, which most commonly occur through criminal prosecutions, truth commissions, reparations programmes and institutional reforms.[275] The Deputy Prosecutor continued to address the specific situation in Colombia and the deference the ICC prosecutor must give to national prosecutions under the complementarity principle.[276]

In addition, he explained that due to the continued perpetration of international crimes, the Prosecutor elected to keep open the preliminary investigations into Colombia without formally starting an investigation, as the Colombian government had not yet demonstrated they were unwilling or unable to prosecute these crimes; therefore, the complementarity principle prohibited the ICC's exercise of jurisdiction.[277] Although the Deputy Prosecutor noted that the prosecutions for the most accountable were continuing, there was no complete accountability in relation to sexual violence crimes and false-positives crimes, which raised concerns for the Prosecutor.[278] The Deputy Prosecutor was clear in his concern that if false-positives were not further investigated or prosecuted, these were of the type of crimes that could be subject to the ICC's jurisdiction if national officials failed to hold these individuals accountable.[279]

270 OTP, Report on Preliminary Examination Activities (2 December 2014) [hereinafter Rep. of Preliminary Activities 2014].
271 *Id*., at paras. 128-131.
272 James Stewart, Deputy Prosecutor of the International Criminal Court, "Transitional Justice in Colombia and the Role of the International Criminal Court" (13 May 2015), https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.
273 *Id*., at 2.
274 *Id*.
275 *Id*., at 4-5.
276 *Id*., at 6.
277 *Id*.
278 *Id*., at 7.
279 *Id*.

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Additionally, the Deputy Prosecutor provided insightful information on the Prosecutor's ability to consider the peace ramifications in pursuing justice at the ICC. It was stated that peace negotiations could affect national proceedings, which could ultimately impact the Prosecutor's considerations for "discharging" its duties in light of national prosecutions.[280] For the Prosecutor to discharge her duties in light of national prosecutions, the proceedings must

> not be undertaken merely to shield persons concerned from criminal responsibility; do not suffer from an unjustified delay that is consistent with an intent to bring the persons to justice; and are conducted independently and impartially in a way that is consistent with the intent to bring the persons to justice.[281]

As the Colombian government had executed prosecutions *in absentia* for leaders of the FARC and ELN, the proceedings were subject to execution of sentences to satisfy the genuineness requirement.[282]

Finally, the Deputy Prosecutor addressed the "interest of justice" consideration that had notably "generated some confusion".[283] An important distinction was made establishing that the question of the 'interest of justice' is a question posed after a case is determined to be admissible, in that there are no adequate national proceedings occurring.[284] Moreover, the question of 'interest of justice' is not a question of complementarity, as complementarity was intended to relate to the admissibility of a case.[285] Further, it was reiterated that the Prosecutor was required to consider statutory considerations, such as the gravity and interest of victims, and that the considerations of peace and security *ordinarily* are outside the scope of the Prosecutor's considerations.[286] The Deputy Prosecutor then referred to the explicit considerations of the Prosecutor as those stated in the 2007 Policy Paper.[287]

The second notable interaction was the creation of the Special Jurisdiction for Peace by the Colombian government.[288] The Special Jurisdiction was created to "investigate, prosecute and punish those responsible for the most serious human rights violations committed during the armed conflict in Colombia".[289] The creation of this Special Jurisdiction was expressly welcomed by the Prosecutor with the

280 *Id*., at 8.
281 *Id*., at 9.
282 *Id*.
283 *Id*., at 15.
284 *Id*.
285 *Id*., at 16.
286 *Id*.
287 *Id*., at 17.
288 Int'l Comm. of Jurists, *Colombia: The Special Jurisdiction for Peace, Analysis One Year and a Half After Its Entry into Operation* (2019), https://www.icj.org/wp-content/uploads/2019/09/Colombia-Jurisd-para-la-paz-Exec-Summary-PUBLICATIONS-Reports-Fact-finding-mission-report-2019-ENG.pdf.
289 *Id*., at 1.

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additional hope that amnesty would not be granted for international crimes committed.[290]

In 2016, the Prosecutor welcomed the success of the peace negotiations and the continued discussions between OTP and the Colombian government in light of the peace agreement and accountability for those most responsible.[291] In 2017, the Prosecutor's office's annual report on preliminary investigations offered interesting analysis on the prosecution of false-positive cases.[292] Unlike previous reports in which the Prosecutor was very optimistic about the prosecutions, the Prosecutor identified twenty-nine commanders potentially responsible for false-positive killings and further noted that only seventeen of these individuals were currently being prosecuted.[293] The Prosecutor continued to criticize the supplemental legislation to the Special Jurisdiction that deviated from the Rome Statute and customary international law.[294] In discussing the Prosecutor's relationship with Colombia that year, it seems the Prosecutor had a much more authoritative role in suggesting that her office discovered a list of individuals who may be responsible for international crimes and if there were no prosecutions of these individuals these cases may thereby fall within the ICC's jurisdiction.[295] The 2017 report seemed much more critical of the Colombian prosecutions than in previous years.

By 2018, the Colombian government had responded to the concerns raised by the Prosecutor in her 2017 report.[296] In relation to the Prosecutor's concerns about legislation deviating from customary international law, the Colombian Constitutional Court upheld the narrower definition of command responsibility and amended its war crimes definition to no longer include a systematic requirement.[297] Overall, unlike the 2017 report, which seems unusually critical of the Colombian response, the 2018 report returned to a much more supportive viewpoint.[298] Before the 2019 report, the Prosecutor outlined in detail the series of steps taken by the Colombian government toward accountability for various international crimes.[299] Most notably, although many will likely be critical of this decision, the Prosecutor concluded that in light of the Colombian efforts, his office would look to end the preliminary investigations in Colombia in the subsequent

290 Fatou Bensouda, ICC Prosecutor, Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia (24 September 2015), https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_24-09-2015; OTP, Report on Preliminary Examination Activities, at para. 160 (12 November 2015) [hereinafter Rep. of Preliminary Activities 2015].

291 OTP, Report on Preliminary Examination Activities, at paras. 258-263 (14 November 2016) [hereinafter Rep. of Preliminary Activities 2016].

292 OTP, Report on Preliminary Examination Activities, para. 135 (4 December 2017) [hereinafter Rep. of Preliminary Activities 2017].

293 *Id*.

294 *Id*., at paras. 143-148.

295 *Id*., at paras. 149-153.

296 OTP, Report on Preliminary Examination Activities, paras. 125-165 (5 December 2018) [hereinafter Rep. of Preliminary Activities 2018].

297 *Id*., at paras. 156-159.

298 *Id*.

299 OTP, Report on Preliminary Examination Activities, paras. 84-133 (5 December 2019) [hereinafter Rep. of Preliminary Activities 2019].

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year.[300] The closure of the preliminary matters was subject to the Colombian government meeting certain benchmarks, conditions, proceedings and legislative developments.[301] Although the closure of the preliminary examination did not officially occur until recently,[302] the Prosecutor's actions in the situation in Colombia may have created a strong foundation for the future working relationship between the ICC and countries afflicted with ongoing conflicts where the ICC is simultaneously considering exercising its jurisdiction.

In October 2021, the new ICC Prosecutor, Karim Khan, officially concluded the preliminary examination of the situation and entered a Cooperation Agreement with Bogota.[303] He explained that he was satisfied that "complementarity is working today in Colombia".[304] The signature of this agreement, the first of its kind in OTP practice, reflected a series of undertakings by each side that would see the national authorities lead the accountability and domestic transitional justice processes.[305] This decision can be seen as either a welcome or controversial decision, depending on how one views the role of the ICC in a particular country. If the role is to be a catalyst for domestic efforts and make complementarity meaningful and concrete without seeking uniformity in national judicial systems, then it would be a positive. And perhaps, even a turning point for the ICC. If, on the other hand, the ICC is seen as a supervisory court that should override domestic efforts, for the sake of prosecutions, the Colombia outcome could be seen as a negative. Not enough time had passed to make judgement. Thus, in the view of this author, the jury remains out on this, and only after sufficient time has elapsed can informed observers determine whether this model was successful or not.

Overall, the progressive engagement and actions of the Prosecutor in the situation in Colombia seem to be in stark contrast to the actions of the Prosecutor in Uganda and Sudan. This may be partially attributable to the fact that the Uganda Situation was the first to come before the ICC, while the Colombia Situation arose much later. Different prosecutors held the position during each of the situations, although the current prosecutor was a deputy at the time. However, ultimately, a review of their actions in the respective situations could provide insight for the Court on how to proceed in the future. The Prosecutor in the Colombian situation

300 *Id*., at 132.

301 *Id*., at paras. 132-133.

302 *See* Press Release, Int'l Crim. Ct, The OTP concludes mission to Colombia, ICC-OTP-20200123-PR1510 (23 January 2020) (noting the development of benchmarks was still occurring).

303 *Id*.

304 *Id*.

305 *See* Press Release, Int'l Crim. Ct, ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice (icc-cpi.int) (28 October 2021). *See also* the Cooperation Agreement Between the OTP of the ICC and the Government of Colombia, 20211028-OTP-COL-Cooperation-Agreement-ENG.pdf (icc-cpi.int).

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was clearly much more deferential to the actions of the Colombian government and willing to provide them with time to create a domestic accountability process.[306]

Ultimately, seemingly with the assistance and oversight of the Prosecutor, the Colombian government was able to develop its national prosecutions and accountability mechanism and ensure compatibility with the Rome Statute. This not only strengthened the State's relationship with the ICC but also appeared to positively impact the national judicial system, which is an essential requirement of sustainable peace.[307] The Prosecutor's decision not to immediately proceed with a formal investigation in 2011 once she had established her 'reasonable basis' should be instructive for future Prosecutors, as her 'wait and see' approach seemed to contribute beneficially to the long-term goal of achieving justice. The latter has now led to the conclusion of the preliminary examination.

It will take some time before we can thoroughly assess whether this experience was a success. Much will depend on whether the government proceeds to fulfil its side of the agreement. If it does, without negatively affecting the situation of victims, Colombia could serve as a turning point and perhaps even as a model of ICC engagement in other situations, including in Africa. However, if it proves to be a failure, it might lead to the opposite effect and even embolden those who prefer a top-down court that dictates to national justice systems.

9 Conclusion

While there have been many African government complaints against the ICC, with some being more credible than others, this article has argued that the experience of African States and the Court over the past decade indicates a clear need for reform in relation to several critical issues, especially the question of how best to sequence peace and justice. The issue is not a new one. Yet, it was not tackled head on by the IER report, which seemed to prefer to skirt the more difficult issues in favour of addressing operational questions. There is no doubt that operational effectiveness is beneficial for the ICC and that careful implementation of the IER recommendations, with the cooperation of the relevant organs and in line with the letter and spirit of the Rome Statute, would be a welcome opportunity to enhance the effectiveness of the ICC. To avoid another decade of African State criticism of the Court, the ICC should provide unambiguous guidelines on how the interests of justice are considered in ongoing conflicts. A balance must be struck between the imperative of the ICC to act, investigate and prosecute, and the imperative of peace, or rather a sustainable peace. At least in certain circumstances.

306 *See* Diego Acosta Arcarazo, Russel Buchab & Rene Urueña, *Beyond Justice, Beyond Peace? Colombia, The Interests of Justice, and the limits of International Criminal Law*, 26 Crim. L. F. 291 (2015); *See also* Open Soc'y Just. Initiative, *Improving the Operations of the ICC OTP: Reappraisal of Structures, Norms, and Practices*, at 13 (15 April 2020) (noting that the "exit" process should occur during the early states and involve affected communities, a buy-in approach, and provide victims an opportunity to speak and provide them with realistic expectations as to "what a post-ICC situation looks like").

307 U.N.S.D., Sustainable Development Goals, at 54 (2019), https://unstats.un.org/sdgs/report/2019/The-Sustainable-Development-Goals-Report-2019.pdf (discussing the importance of strong institutions in creating sustainable peace).

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Further, African States and others benefit from having clear criteria that ultimately allow States to have more meaningful participation during accountability discussions and can further reduce the perception of politics in international prosecutions. Indeed, reforms should be aimed at fulfilling the Court mandate of acting as a Court of last, not first, resort. This means that the ICC could develop clear guidelines on the use of alternative justice mechanisms, peace processes and transitional justice schemes. The Court can also empower States to maintain sovereignty and improve domestic institutions while nonetheless advancing the Court's broad purpose of ensuring greater accountability and justice for the victims of some of the world's worst crimes.

Now, at the turn of a new decade, there is an opportunity for ICC reforms. Regrettably, in the reform report, the admittedly challenging and long-standing concerns of African States, such as the peace-justice question discussed in this article, have not been addressed. The African experience has been crucial to the transformation of the Rome Statute from ideals on paper to reality on the ground. Indeed, it is on the back of African atrocity crimes that the practice of the ICC has developed since the entry into force of the statute in July 2002. It is therefore only befitting that the region that has the most experience with the ICC gives back and shares its valuable introspection into the work of the Court and how to better improve it. The African claims of selectivity, disruption of peace and mandate for justice above all else are not unique but are certainly at the centre of what could be the boldest accountability experiment in history.

This author was unable to find any reason for this curious situation whereby the obvious concerns of African States expressed over many years did not feature, directly, in the final IER report. After months of work and 278 interviews, and meetings with 246 current and former officials of the ICC, nine states parties and 12 ASP bodies and 54 NGOs, and with the presence of three eminent African jurists, one of whom was chair, it is a rather strange outcome. The expert report suggests that the focus was on actionable proposals focused on systemic issues, leaving the question open that they did not consider it their task to engage with substantive questions that could give rise to statutory amendments. Indeed, interestingly, the report indicates that this meant that they avoided amendment proposals to the Rome Statute or suggestions that could give rise to the need for budgetary increases. However, the report contained a handful of proposals that called for statutory amendments on several specific issues. Some of the proposals required changes to secondary documents, such as the rules of procedure or internal ICC documents. In fairness, the experts did, in a single paragraph of their final report, attempt to address the relationship between the ICC and regional and other international organizations with a particular highlight of the AU. However, this was done in the context of emphasizing the importance of strengthening understanding of the value of and support for the ICC rather than engaging in substantive concerns raised by African States.[308]

308 See para. 379 of the IER Report, *supra* note 31, (which incidentally *contained* the sole reference to the 'African Union' in the entire report).

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Considering the detailed analysis provided above, which seeks to examine the African State perspective on the ICC's timely reform process, there are at least four preliminary recommendations that African States and civil society can consider as part of their efforts to push for ICC reform that will prove beneficial to African States, the ICC and indeed the international criminal justice project, which has now entered a critical phase. However, these recommendations might be prefaced with a brief note on strategy. Overall, the African State position may be best advanced by States Parties selecting a recommendation and jointly supporting that recommendation in both the plenary debate and private meetings of the ASP. Experience with past reform proposals indicates that it is not enough for African States to present an issue during the plenary debate. The States must go further and partner to actively pursue their recommendations during the relevant meetings of the relevant State Party-driven working groups. Without support during both plenary meetings and private meetings, the African State recommendations will not likely succeed. The recommendations are as follows:

9.1 Recommendation 1: Revise the OTP Policy Paper on the 'Interests of Justice'

A revision of the OTP Policy Paper to include clearer guidelines and broader criteria on what the Prosecutor will consider as falling within each element of the balancing test. Such a revision is essential for a broader and more uniform application of Article 53(1)(c) and (2)(c). It is suggested that the Prosecutor provide more substantive guidelines to the criteria that need to be met by States.[309]

Moreover, it is suggested that the revised Policy Paper includes clear definitions of alternative justice mechanisms that are suitable for transitional justice systems.[310] Additionally, it is suggested that a revised Policy Paper should acknowledge that the ICC Statute does not debar the Prosecutor from taking peace negotiations into account as part of the interests of justice considerations under Article 53. The revision should then provide further guidance on how peace processes may play a role in decisions regarding investigation and prosecution, with reference to recent best practices that have satisfied the Court.

For example, it has been suggested that the Prosecutor may consider the following non-exhaustive factors in assessing the extent to which peace processes will be considered when determining the interests of justice:[311]

- the extent of support for the peace process from relevant stakeholders, particularly victims;
- social inclusiveness, meaning the degree of participation that the process affords to relevant stakeholders;
- transparency and public scrutiny;

309 OTP, *Case Selection Policy Paper 2007*, *supra* note 145, at 6 (discussing the specific example of the interest of victims in the LRA, Uganda cases).

310 *See generally* Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 Harv. In'tl L. J. 1 (2019).

311 Dapo Akande & Talita De Souza Dias, *Peace Negotiations as 'Interests of Justice', in* The International Criminal Court: Contemporary Challenges and Reform Proposals 329, 336-342 (Richard H. Steinber ed., 2020).

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– inclusion within the process of a "justice component";
– the security situation on the ground, particularly the risk of escalation of violence.

Finally, a revision to the OTP processes may also prove beneficial. Given the procedures of the Prosecutor in Colombia, it seems that there could be a benefit to allowing the national jurisdiction an opportunity to develop its transitional justice schemes before the ICC immediately demands accountability.[312]

9.2 Recommendation 2: Revise the Rules of Procedure to Clarify the Meaning of 'Interests of Justice'

The ICC Rules of Procedure, an instrument subordinate to the Rome Statute but adopted by States Parties in the ASP, could be amended to clarify the meaning of the 'interests of justice', to make a connection to complementarity requirements and the wider powers of the OTP. A discussion of how limited amnesty or non-prosecution arrangements fit into the wider powers of the Prosecutor under Article 53 would provide useful guidance to States Parties that may come within the ICC jurisdiction during conflicts.

Alternatively, State Parties may adopt an interpretative declaration or understanding, along the lines of those adopted with the Kampala Aggression Amendments, which offers guidance to the Prosecutor and State Parties as to the meaning of the interests of justice provision.

9.3 Recommendation 3: Amend the Rome Statute to Allow the ASP to Recommend to the Security Council a Case for Deferral under Article 16

As the ICC reform report presents recommendations for amendments to the Rome Statute, although not necessarily ones addressing the peace-justice issue, this might have opened the door for consideration of other amendments. In particular, this might be an opportunity for the ASP to develop some criteria that could be used to guide the exercise of deferral power, at least in relation to the role of peace negotiations to end armed conflict. In this regard, an amendment could be proposed to the Rome Statute. If that is not possible, a separate agreement or understanding, such as that adopted following the adoption of the Kampala Amendments, could be adopted and serve as a basis to offer guidance to the Security Council on the preference of Rome Statute members about the circumstances that would warrant grants of Article 16 deferral requests.

312 *See* Open Soc'y Just. Initiative, *supra* note 309 ("Others reflected that there might be benefits to engaging with locally based development or transitional justice actors to push the international justice project further in a given context. For example, experts suggested that reopening the conversation between the ICC and transitional justice actors could expose common ground and opportunities to take advantage of funding and support for the ICC's role in helping states achieve SDG16.").

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9.4 Recommendation 4: Amend the Rome Statute to Require the Security Council to Develop a Clear Application Process for States Requesting the Organ to Exercise Its Article 16 Authority

An amendment to Article 16 of the Rome Statute could provide a clearer roadmap for States requesting that the organ exercise its deferral powers. It can, therefore, be recommended that the Security Council establish a non-enumerated list of publicly announced criteria that it expects States to provide in their submissions to the Security Council when requesting a deferral. Moreover, States should be clear in their request for deferrals that a deferral is not a grant of impunity, but an opportunity for States to develop their national system or stabilize the national system that could later support a State in fulfilling its obligations under the Rome Statute. This proposal will likely face pushback from some States over concerns that a deferral will result in an indefinite suspension of justice and fraudulent peace negotiations. Therefore, States should be clear when proposing this amendment that the continued granting of a deferral request would be *dependent* on that State fulfilling its initial obligations under the first deferral and that if the State fails to comply with any of the requirements of the deferral mandate, the deferral will not be renewed.

Moreover, the Security Council could even set shorter deadlines for States in three-, six- or even nine-month increments to allow States and regional bodies to have clear expectations on their responsibilities and obligations during this deferral period. Further, the Security Council could leave open the opportunity for the deferral to be terminated earlier than twelve months if the State fails to meet its interim obligations. All this means is that there are many options available to the Security Council. Consequently, this concern of indefinite impunity can be overcome. In relation to the second concern about fraudulent peace negotiations, the Security Council could impose stricter requirements so that the peace process has both objective and subjective requirements to ensure a legitimate process.[313]

Ultimately, this formalized request process could eliminate some of the political barriers facing the organ and allow for a more methodological assessment of situations on a case-by-case basis. This criterion should provide an opportunity for regional groups to provide recommendations or views on the deferral requests. Moreover, it should encourage the Security Council to give greater weight to the recommendations of regional arrangements attempting to pursue a larger scheme of peace and justice in their region in line with the recognition of their place in Chapter VIII of the Charter of the United Nations.

Finally, the criteria should include a requirement that the Security Council must submit a formal report on the deferral of a situation, the State comments submitted and the reasoning of the organ's ultimate decision. On the part of the Security Council, an ad hoc panel of independent experts appointed every three years with one member from each region (similar to that created by the ASP for the

313 *See* AU *Transitional Policy Paper, supra* note 24, at paras. 42-100 ("Assessments should be done transparently, using clear criteria on an individual basis by a legitimate and publicly accountable institution.").

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election of the prosecutor) could even be tasked with studying the requests and providing non-binding recommendations on whether to grant the deferral request.

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