

III. THE CONCESSION OF AMNESTIES UNDER THE ROME STATUTE: BALANCING PEACE AND JUSTICE THROUGH THE LAW

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INTRODUCTION

The attempt to balance peace and justice is one of the defining elements of transitional justice.¹ In the last decade of the 20th century, international law embraced a model that emphasised justice, demanding the attribution of individual criminal responsibility to serious human rights violators.² Indeed, the Preamble of the Rome Statute ('Statute') of the International Criminal Court ('ICC') reminds States parties that 'it is [their] duty (...) to exercise [their] criminal jurisdiction over those responsible for international crimes'.³ Failure to comply could lead to the initiation of ICC investigations or prosecutions.⁴

However, it is difficult to favour retribution⁵ over interests that are, arguably, as important as accountability.⁶ Hence, it has been recognised that granting *accountable*⁷

¹ Christine Bell, Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field" 3 Int'l J. of Transitional Jus. 5, 5–27 (2009).

² Kathryn Sikkink, *The Age of Accountability The Global Rise of Individual Criminal Accountability*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY COMPARATIVE AND INTERNATIONAL PERSPECTIVES (F. LESSA & L.A. PAYNE, 1 ed. 2012).

³ Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002, https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁴ *Id.*, arts. 13, 14, & 15.

⁵ See generally Max Pensky, Amnesty on Trial: Impunity, Accountability, and the Norms of International Law 1 Ethics & Global Politics (2008).

⁶ See generally Ronald C. Slye, The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? 43 Va. J. Int'l L., 173 (2002). These include: the prompt termination of hostilities, the legitimate interest of the criminal justice system in rehabilitation and reconciliation, the provision of reparations for victims, and the implementation of measures to prevent recurrence. See UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/RES/21/15 (2012) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/174/47/PDF/G1217447.pdf>.

⁷ An accountable amnesty is characterised, among others, for: (i) its democratic enactment in accordance with national law; (ii) the exclusion of those most responsible for atrocious crimes from its personal scope of application; (iii) the limitation of its material scope of application to conflict-related or political crimes; (iv) the establishment of conditions to obtain and retain it; (v) the application of accountability measures

amnesties⁸ may be a legitimate transitional strategy. This raises a fundamental question: would States parties granting such amnesties breach their obligations under the Statute, allowing the ICC to exercise its jurisdiction?

Nothing in the Statute's text provides a definitive answer.⁹ The matter was raised during the Rome Conference¹⁰ only to be relegated to the footnotes of draft articles on double jeopardy.¹¹ Ultimately, no agreement was reached.¹² Instead, the Chairman held that the Statute reflected 'creative ambiguity', allowing the ICC to read an 'amnesty exception' in its language.¹³

Commentators have found this exception on articles 16, 17 or 53. Yet each of these alternatives is riddled with difficulties making them unlikely avenues to guarantee deference to amnesties. After studying each of these avenues in turn, I will argue that the gravity threshold of Article 17(1)(d) provides the only *legal* room for the concession of amnesties in the Statute.

I. UNSC DEFERRAL

alternative to prosecution, and (vi) the parallel adoption of measures to ensure truth, reparations and guarantees of non-recurrence. See Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L. J. 2537, 2547 (1991); See generally L. Mallinder, *Amnesty, Human Rights and Political Transitions Bridging the Peace and Justice Divide* (Hart 2008); LOUISE MALLINDER (ED.), *THE BELFAST GUIDELINES ON AMNESTY AND ACCOUNTABILITY* (2013).

⁸ Understood as measures that seek to "remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offences irrespective of whether the persons concerned have been tried for such offences in a court of law." See MARK FREEMAN, *NECESSARY EVILS. AMNESTIES AND THE SEARCH FOR JUSTICE* 13 (2009).

⁹ Anja Seibert-Fohr, The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions, 7 MAX PLANCK YEARBOOK OF U.N. L. 553, 558–59 (2003).

¹⁰ US DELEGATION TO THE ROME CONFERENCE, PAPER ON STATE PRACTICE REGARDING AMNESTIES AND PARDONS, Non-Paper/WG.3/No.7 (1997), http://www.legal-tools.org/uploads/tx_ltpdb/doc19358.pdf

¹¹ PREPCOM, WORKING GROUP ON COMPLEMENTARITY AND TRIGGER MECHANISMS, ARTICLE 35 ISSUES OF ADMISSIBILITY, 2, A/AC.249/1997/WG.3/CRP.2 (1997), http://www.legal-tools.org/uploads/tx_ltpdb/doc19273.pdf; PREPCOM, DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW, 32, A/AC.249/1998/CRP.8 (1998), http://www.legal-tools.org/uploads/tx_ltpdb/doc25766.pdf> accessed 15 February 2017.

¹² ROME CONFERENCE, REPORT OF THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT ADDENDUM, 41, A/CONF.183./2/Add.1 (1998), <http://www.uchastings.edu/faculty/roht-arriaza/classwebsite/intl-human-rights/docs/hrs09.ICCdraftprovisionsforsimulation.pdf>.

¹³ Michael P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court 32 CORNELL INT'L L. J. 507, 522–23 (1999).

Article 16 authorises the United Nations ('UN') Security Council ('SC') to request the deferral of an ICC investigation or prosecution pursuant to a Chapter VII Resolution.¹⁴ A deferral is binding upon UN Member States¹⁵ and it takes primacy over other international obligations.¹⁶ Therefore, it has been considered "the vehicle for resolving conflicts between the perceived requirements of peace and justice where the [UNSC] assesses that the peace efforts need to be given priority over international criminal justice".¹⁷ As such, it would be the most important guarantee of ICC deference to national amnesties.¹⁸

However, a deferral would entail finding that ICC intervention *itself* threatens international peace and security. This risks subordinating its judicial mandate to the political determinations of the UNSC. A deferral is hard to justify and politically costly.¹⁹ Hence, the UNSC would request it only in exceptional circumstances. In fact, it abstained from requesting deferrals in the case against *Al-Bashir*²⁰ and the Kenya

¹⁴ Rome Statute of the International Criminal Court, *supra* note 4; U.N. Charter, <https://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

¹⁵ Article 25 of the Charter of the United Nations imposes upon its Member States an unqualified obligation "to **accept and carry out the decisions of the Security Council** in accordance with the present Charter". See U.N. Charter, art. 25 (emphasis added). Furthermore, the International Court of Justice found that: "when the Security Council adopts a decision under Article 25 in accordance with the Charter, **it is for member States to comply with that decision**, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter". See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971, I.C.J., Rep. 16, ¶ 116 (June 21).

¹⁶ In accordance with Article 103 of the UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, **their obligations under the present Charter shall prevail**". As stated above, one such obligation is to carry out the decisions of the UNSC in accordance with Article 25. See U.N. Charter and Statute of the International Court of Justice, art. 103 (emphasis added).

¹⁷ Morton Bergsmo, Jelena Pejic & Dan Zhu, *Article 16* in The Rome Statute of the International Criminal Court: A Commentary (Otto Triffterer & Kai Ambos eds., 3rd ed, 2016), 770, 774.

¹⁸ Scharf, *supra* note 14, 522–24.

¹⁹ Bergsmo, Pejic & Zhu, *supra* note 17, 774–75. In accordance with articles 27(3) and 39 of the UN Charter, nine members of the UNSC, including the P-5, would have to conclude that an ICC investigation or prosecution constitutes a threat to the peace and vote in favour of its deferral. Thus, any such determination would cause tension between the values of international peace and security on the one hand, and international criminal justice on the other. Furthermore, it would put the main political organ of the UN in a collision course with the judiciary of the ICC.

²⁰ See S.C. Res. 1828, U.N. Doc. S/RES/1828 (July 31, 2008) [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1828\(2008\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1828(2008)).

situation²¹ despite pressure to stay ICC proceedings. Furthermore, if the UNSC fails to renew a deferral every 12 months, the ICC is automatically allowed to carry on with its proceedings where they were left off.²² In a controversial example, the deferral of prospective investigations against nationals of non-States parties deployed as peacekeepers²³ was renewed only once.²⁴ Consequently, the ICC recovered its ability to investigate their potential wrongdoing in the territory of States parties.²⁵ Since amnesties are meant to be permanent measures,²⁶ Article 16 becomes an unwieldy provision to achieve respect for them.²⁷ Lastly, the ICC could exercise a limited judicial review²⁸ of the deferral to ascertain whether the UNSC acted within its purview,²⁹ in accordance with the objects and purposes of the UN Charter. Hence, it would be unwise to assume that the ICC would abide by every single UNSC request under Article 16.

II. COMPLEMENTARITY TEST

Alternatively, respect for national amnesties may be sought in the complementarity regime contained in Article 17. Pursuant to this provision, the ICC shall determine that a case³⁰ is inadmissible if genuine investigations or prosecutions are being (or were)

²¹ The dialogue initiated between the UNSC, Kenyan representatives to the UN and the AU in 2011 and 2013 did not lead to a deferral of the Kenya situation either. See DEBORAH RUIZ, *The Relationship between the International Criminal Court and the UN Security Council*, in The Law and Practice of the International Criminal Court (Carsten Stahn ed., 2015), 30, 55–57.

²² Bergsmo, Pejic & Zhu, *supra* note 17, 778.

²³ S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 21, 2002).
[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1422\(2002\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1422(2002)).

²⁴ S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003).
[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1487\(2003\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1487(2003)).

²⁵ Of course, the question that lingers is whether the Court ever truly lost it at all.

²⁶ See Freeman, *supra* note 8, at 16.

²⁷ JESSICA GAVRON, *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L. Q. 91, 109 (2002).

²⁸ Rome Statute of the International Criminal Court, *supra* note 3, art. 119(1).

²⁹ TRISTAN GARCÍA, *Amnesties and the Rome Statute: A Legitimate Bar to Prosecution?* 13 AUSTL. INT'L L. J. 187, 200–202 (2006); Scharf, *supra* note 14, 522–24

³⁰ Situation in the Republic of Kenya, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 40–45 (March 31, 2010).

conducted at the national level. Scholars have argued that non-judicial mechanisms³¹ empowered to recommend prosecution³² or amnesty could satisfy this requirement.³³ To do so, they should conduct individualised,³⁴ “diligent, [and] methodical effort[s] to gather the evidence and ascertain the facts (...) in order to make an objective determination”.³⁵ In those conditions, granting an amnesty could be construed as a decision not to prosecute within the meaning of Article 17(1)(b).³⁶ Moreover, waiving prosecution for the achievement of peace may not *really* be aimed at shielding the person concerned from criminal responsibility.³⁷ Thus, a State in such cases would not be “unwilling *genuinely* to carry out” the prosecution as required by Article 17.³⁸

Nevertheless, ICC practice indicates that non-judicial mechanisms will be treated as domestic inaction, triggering an international response to crime.³⁹ On the one hand, States must conduct *criminal* proceedings. Indeed, Pre-Trial Chamber (‘PTC’) II found that the absence of penal investigations concerning those most responsible for the 2007 Post-Election Violence rendered the Kenya situation admissible.⁴⁰ Being seized of the matter, the Appeals Chamber held that those investigations should encompass the ‘taking of steps directed at ascertaining whether those suspects are *responsible* for that conduct’.⁴¹ On the other hand, the ICC has developed a stringent complementarity test

³¹ ELIZABETH LUDWIN KING, *Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures* 45 GEO. WASH. INT’L L. REV. 85, 114 (2013).

³² CARSTEN STAHN, *Complementarity, Amnesties and Alternative forms of Justice: Some Interpretative Guidelines for the International Criminal Court* 3 J. INT’L CRIM. JUST. 695, 711–12 (2005).

³³ Rome Statute of the International Criminal Court, *supra* note 3, art. 17(1)(a).

³⁴ Stahn, *supra* note 32, 710–11.

³⁵ DARRYL ROBINSON, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court* 14 EUR. J. INT’L L. 481, 500 (2003).

³⁶ WILLIAM SCHABAS & MOHAMED EL ZEIDY, *Article 17* in The Rome Statute of the International Criminal Court: A Commentary (Otto Triffterer & Kai Ambos eds., 3rd ed, 2016), 781, 808.

³⁷ Rome Statute of the International Criminal Court, *supra* note 3, art. 17(2)(a).

³⁸ Seibert-Fohr, *supra* note 9, 203.

³⁹ OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE, ICC-01/04-01/07-1008-AnnxA, 14–18, 28–31 (2009). <<https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>>; The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-1497, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009).

⁴⁰ *Kenya*, *supra* note 30, ¶¶ 183–187.

⁴¹ The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-307, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial

that measures domestic proceedings against the same *individuals* and substantially the same *conduct* of interest to the ICC.⁴² If they fail to sufficiently mirror⁴³ the case being investigated by the Prosecution, the ICC will enter a finding of admissibility. Applying this test, PTC I found that an Ivorian investigation into Simone Gbagbo's alleged crimes against the State did not 'cover the same conduct that [was] alleged in the case before the Court'.⁴⁴ Thus, it dismissed a challenge to the admissibility of the case against her.⁴⁵ The implication of this precedent is that cases in which a non-judicial mechanism grants amnesties to persons of interest to the ICC will likely be considered admissible.⁴⁶

IV. INTEREST OF JUSTICE

Finally, the 'amnesty exception' could be read into Article 53. It has been proposed that its reference to the interests of justice goes beyond '*retributive, criminal justice*'.⁴⁷ Hence, it should afford the Prosecution enough discretion⁴⁸ to give precedence to peace or

Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ¶ 41 (Aug. 30, 2011) (emphasis added).

⁴² The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-274, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ¶ 39 (Aug. 30, 2011).

⁴³ The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-547-Red, Appeals Chamber, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ¶ 73 (May 21, 2014).

⁴⁴ The Prosecutor v. Simone Gbagbo, ICC-02/11-01/12-47-Red, Pre-Trial Chamber I, Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ¶ 49 (Dec. 11, 2014).

⁴⁵ See *id.*, ¶ 79. This finding was upheld on appeal; see The Prosecutor v. Simone Gbagbo, ICC-02/11-01/12-75-Red, Appeals Chamber, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', ¶¶ 99–101 (May 27, 2015).

⁴⁶ For instance, the Office of the Prosecutor has hinted that it will apply the complementarity test to measure the compliance of non-judicial mechanisms with the Statute. Given that such alternatives do not serve the same purposes as a criminal trial, it is likely that their implementation at the domestic level will not render a potential case inadmissible. See Office of the Prosecutor, Informal Expert Paper, *supra* note 40, ¶¶ 72–73; Office of the Prosecutor of the International Criminal Court, Policy Paper on Preliminary Examinations, ¶¶ 69, (2013) https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.

⁴⁷ Robinson, *supra* note 35, 488.

⁴⁸ The Office of the Prosecutor has considered that alternative forms of justice – which may include the concession of amnesties – are better framed as a matter of prosecutorial discretion under this provision. See Office of the Prosecutor, *supra* note 39, ¶ 71.

reconciliation even if it means relinquishing ICC action.⁴⁹ However, the Prosecution endorsed a narrower approach, assessing the ‘interests of justice’ in terms of justice in a specific case, rather than on general policy considerations.⁵⁰ These include: the gravity of the crime,⁵¹ the interest of victims in ‘seeing justice being done’,⁵² their need for protection,⁵³ the role of the accused in the commission of the crime,⁵⁴ their health, and respect for their human rights.⁵⁵ The Prosecution also argued that these interests may only rebut the presumption that exists in favour of initiating proceedings in exceptional circumstances.⁵⁶ Finally, it drew a distinction between ‘the interests of justice and the interests of peace, the latter of which falls outside the Prosecutor’s mandate’.⁵⁷ Hence, the ICC will not renounce prosecution in a case covered by a national amnesty on the grounds that it would not be in the interest of justice to disregard it.⁵⁸

It has been shown that some interpretations of the Statute may allow for deference to amnesties. However, none of them offer legal certainty. To be in accordance with the Statute, amnesties should only cover crimes that fail to meet the threshold of sufficient gravity of Article 17(1)(d).

⁴⁹ Robinson, *supra* note 35, 488.

⁵⁰ Stahn, *supra* note 30, 718.

⁵¹ OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON THE INTERESTS OF JUSTICE, 5 (2007), <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>.

⁵² *Id.*, 5.

⁵³ *Id.*, 5.

⁵⁴ *Id.*, 7.

⁵⁵ *Id.*, 7.

⁵⁶ *Id.*, 3.

⁵⁷ Morton Bergsmo, Pieter Kruger & Olympia Bekou, *Article 53 in The Rome Statute of the International Criminal Court: A Commentary*, (Otto Triffterer & Kai Ambos eds., 3rd ed, 2016) 1352, 1374. This position was upheld in the Policy Paper on Preliminary Examinations. See Office of the Prosecutor, Policy Paper on Preliminary Examinations, *supra* note 46, ¶ 69.

⁵⁸ Quite tellingly, the Prosecutor “note[d], with satisfaction, that the final text of the peace agreement [signed between the Republic of Colombia and the FARC] *excludes amnesties* and pardons for crimes against humanity and war crimes under the Rome Statute’. See ‘Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army’, <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia>.

IV. SUFFICIENT GRAVITY

Gravity is ‘a mandatory component for the determination of (...) admissibility’⁵⁹ under Article 17.⁶⁰ Pursuant to this provision, the ICC ‘shall determine that a case is inadmissible where: (...) [it] is not of sufficient gravity to justify further action’.⁶¹ The imperative language of the Statute leaves no room for interpretation: although all the crimes punishable under Article 5 are serious,⁶² the ICC cannot prosecute cases that fail to meet a higher threshold of gravity.⁶³ This refers to the gravity of the crime(s) and to the level of responsibility of the accused.

A. Gravity of the Crime(s)

Only cases dealing with crimes that meet high standards of quantitative and qualitative gravity will be admissible before the ICC.⁶⁴ The Court must assess the scale, nature and impact of the crimes, the means employed for their commission, and the harm caused to the victims and their families.⁶⁵ Adopting these criteria, the Prosecution decided not to open an investigation into the *Flotilla* situation.⁶⁶ PTC I requested the Prosecutor to reconsider her decision based on the same criteria.⁶⁷

⁵⁹ *Kenya*, *supra* note 30, ¶ 57.

⁶⁰ Schabas & El Zeidy, *supra* note 36, 811–16.

⁶¹ Rome Statute of the International Criminal Court, *supra* note 3, art. 17(1)(d) (emphasis added).

⁶² *Kenya*, *supra* note 30, ¶ 56.

⁶³ The Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ¶ 30 (Feb. 8, 2010); *Kenya*, *supra* note 30, ¶ 56; Office of the Prosecutor, *supra* note 51, 5.

⁶⁴ *Abu Garda*, *supra* note 64, ¶¶ 28–34.

⁶⁵ *Kenya*, *supra* note 31, ¶ 62; *see also* Situation in the Republic of Côte d'Ivoire, ICC-02/11-14-Corr, Pre-Trial Chamber III, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire’, ¶ 204 (Nov. 15, 2011).

⁶⁶ Situation on Registered Vessels of Comoros, Greece and Cambodia, Office of the Prosecutor, Article 53(1) Report, ¶¶ 138–141 (Nov. 6, 2014), [https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53\(1\)-report-06nov2014eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53(1)-report-06nov2014eng.pdf).

⁶⁷ Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, PTC-I, ICC-01/13-34, Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, ¶¶ 25–26 (scale), 27–30 (nature), 31–43 (manner of commission) (July 16, 2015).

Finally, the Prosecution made them an integral part of its case selection policy.⁶⁸ Consequently, cases that do not meet this threshold will be inadmissible. Moreover, admissible cases will not be selected for prosecution if they do not satisfy a ‘stricter test’ of gravity.⁶⁹

B. Responsibility of the Person Concerned

Since 2003, the Prosecution has conducted focused investigations aimed at those individuals who bear the most responsibility for international crimes.⁷⁰ Military commanders,⁷¹ political leaders,⁷² and heads of State⁷³ represent a majority of the individuals who have had the dubious honour of sitting in the dock at the ICC. Recently, the Prosecution declared that it would consider conducting open-ended investigations covering ‘lower level perpetrators to build the evidentiary foundations for case(s) against those most responsible’.⁷⁴ This could be seen as an indication that focussed prosecutions were simply a matter of policy.⁷⁵ However, the settled

⁶⁸ OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON CASE SELECTION AND PRIORITISATION, ¶ 32 (2016), https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf.

⁶⁹ *Id.* ¶¶ 35–36.

⁷⁰ OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, ‘PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR’, ¶ 3 & 7 (2003), https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf; OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, PROSECUTORIAL STRATEGY 2009–2012, ¶ 19 & 34 (2010), <https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>; OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, STRATEGIC PLAN JUNE 2012–2015, ¶¶ 19, 21, 22 & 45 (2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>.

⁷¹ Situation in Uganda, ICC-02/04-01/05-57, Pre-Trial Chamber II, Warrant of Arrest for Dominic Ongwen, (July 8, 2005); The Prosecutor v. Thomas Lubanga Dyilo, , ICC-01/04-01/06-2-tEN, Pre-Trial Chamber I, Warrant of Arrest (Feb. 10, 2006); The Prosecutor v. Germain Katanga, , ICC-01/04-01/07-1-US-tENG, Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga (July 2, 2007); The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-15-tENG, Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest Issued on 23 May 2008 (June 15, 2009).

⁷² Situation in the Republic of Côte d’Ivoire, ICC-02/11-01/11-1, Pre-Trial Chamber III, Warrant of Arrest for Laurent Koudou Gbagbo, (Nov. 23, 2011) *Côte d’Ivoire, supra* note 65; The Prosecutor v. Charles Blé Goudé, ICC-02/11-02/11-30, Pre-Trial Chamber III, Warrant of Arrest for Charles Blé Goudé (Dec. 21, 2011).

⁷³ The Prosecutor v. William Samoei Ruto et. al., ICC-01/09-01/11-1, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (March 8, 2011); The Prosecutor v. Francis Kirimi Muthaura et. al., ICC-01/09-02/11-1, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (March 8, 2011).

⁷⁴ Office of the Prosecutor, *supra* note 68, ¶ 42.

⁷⁵ IGNAZ STEGMILLER, *The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda*, 9 INT’L CRIM. L. REV. 547, 552 (2009).

jurisprudence of the ICC weighs in favour of a legal rule excluding cases that are not aimed at the apex of criminal responsibility. While the Appeals Chamber did not uphold the test of ‘seniority’ adopted by PTC I in the DRC Situation,⁷⁶ it found that:

The particular role of a person (...) should not be *exclusively* assessed or predetermined on *excessively formalistic grounds* (...) individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes.⁷⁷

Thus, the ICC focusses on an individual’s *material* involvement in the commission of the crime both to determine the admissibility of a case and to decide whether it should be selected for prosecution.⁷⁸ Building from this understanding, PTC II held that the admissibility of a situation depends on the fact that potential cases ‘capture those who may bear the greatest responsibility for the alleged crimes’.⁷⁹ Some argue that the fact an investigation ‘must include those most responsible does not mean that those less responsible cannot also be prosecuted’.⁸⁰ Yet, PTC I’s finding in the *Flotilla* situation that ‘the Prosecutor erred (...) by failing to consider whether the persons likely to be the object of the investigation (...) would include those who bear the greatest responsibility for the identified crimes’⁸¹ indicates that the ICC requires focussed

⁷⁶ Situation in the Democratic Republic of the Congo, Article 58, ICC-01/04-520-Anx2, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for Warrants of Arrest, ¶ 51 (Feb. 10, 2006) (holding that ICC should initiate cases ‘only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation’).

⁷⁷ Situation in the Democratic Republic of the Congo, ICC-01/04-169, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, ¶¶ 76–77 (July 13, 2012) (emphasis added).

⁷⁸ Office of the Prosecutor *supra* note 68, ¶ 43 (stating that “[t]he notion of the most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence. As the investigation progresses, the extent of responsibility of any identified alleged perpetrator(s) will be assessed on the basis of, *inter alia*, the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity”).

⁷⁹ *Kenya*, *supra* note 30, ¶ 60. PTC-III followed the same approach when it authorised the initiation of an investigation into the Côte d’Ivoire situation. *See supra* note 65, ¶¶ 205–206.

⁸⁰ MARGARET DEGUZMAN, *The International Criminal Court’s Gravity Jurisprudence at the Ten 12* WASH. U. GLOBAL STUD. L. REV. 475, 483 (2013).

⁸¹ *Registered Vessels*, *supra* note 67, ¶¶ 22–23.

investigations as a matter of law. As stated above, this criterion is material not formal. Thus, cases against perpetrators located at the lower echelons of a criminal apparatus could still be admissible if their conduct has been particularly grave or notorious.⁸² Similarly, they could be prosecuted by the ICC if the evidence establishes that they bear a high degree of responsibility for the alleged crimes.⁸³

CONCLUSION

The Statute represents the highest point of an international commitment to justice. Its terms are clear: States parties must genuinely investigate and prosecute those most responsible for the gravest crimes. Failure to do so could lead to the initiation of ICC proceedings. However, its language also allows member States facing a transitional process a degree of flexibility that could prove vital to balancing the interests of peace and justice.

The gravity threshold enshrined in Article 17(1)(d) of the Statute imposes a legal limitation to the ICC's exercise of its jurisdiction, barring it from 'investigating, prosecuting and trying peripheral cases'.⁸⁴ The ICC must focus on cases that involve serious, large-scale criminality, committed by organised or powerful individuals, and causing significant harm caused to the victims and their environment. Furthermore, its enquiries must encompass those individuals who bear the highest degree of *material* responsibility for the crimes.

As a consequence, States parties do not have to investigate and prosecute every single individual allegedly involved in the commission of international crimes to avoid ICC

⁸² Office of the Prosecutor, *supra* note 68, ¶ 42.

⁸³ To arrive at a conclusion on the degree of responsibility of an accused, the Prosecution will weigh factors such as: 'the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity'. See Office of the Prosecutor, *supra* note 68, ¶ 43.

⁸⁴ Côte d'Ivoire, *supra* note 65, ¶ 201

intervention. Instead, they could ascertain the responsibility of those who did not play a major role through non-judicial mechanisms empowered to grant an *accountable* amnesty. This could assist the quest for long-term peace, stability, and reconciliation not at the expense of justice but in accordance with the law that defines its reach.⁸⁵

⁸⁵ M. CHERIF BASSIOUNI, *Combating Impunity for International Crimes* 71 U. CO. L. REV. 409, 421 (2000) (stating that “[t]he ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlement, is no longer accepted. It asserts that impunity...is no longer tolerated....It affirms that justice is an integral part of peace”.)