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The role of the ICC in transitional justice and its contribution to reconciliation in Africa

El papel de la Corte Penal Internacional en la justicia transicional y su contribución a la reconciliación en África

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Summary: Introduction. 1. The meaning of reconciliation under transitional justice. 2. The South African Truth and Reconciliation Commission in supporting reconciliation efforts. 3. Understanding the ICC's mandate and role in reconciliation. 3.1. Prosecutions / accountability / justice. 3.2. Truth. 3.3. Reparations. 3.4. Guarantees of non-recurrence (reform and prevention). 4. The missing component supporting 'reconciliation': Plea bargaining in place of amnesties? 5. Legitimacy challenges surrounding the ICC and its impact on reconciliation in the African context. 5.1. The conflicting mandates of the ICC and the African Union. 5.2. The timing of prosecutions and the interrelated 'peace versus justice' debate. 5.3. Ineffective application of the principle of complementarity including the ICC's interaction with alternative, traditional or local justice mechanisms. 5.4. The lack of cultural awareness, proximity and outreach by the ICC. 6. Final thoughts. Conclusion. Bibliography

Abstract: This article explores the role of the International Criminal Court within transitional justice and its potential to contribute to reconciliation in Africa. While the ICC is often perceived as a purely prosecutorial body, this analysis argues for a broader interpretation of its mandate, aligning it with the core pillars of TJ: prosecutions, truth-telling, reparations, and guarantees of non-recurrence. Drawing on the South African Truth and Reconciliation Commission as a benchmark, the article proposes that the ICC, though lacking

an amnesty mechanism, can fulfill similar reconciliatory functions through plea bargaining. The analysis further identifies legitimacy deficits undermining reconciliation efforts in the African context, stemming from issues such as cultural disconnect, selective prosecutions, and a rigid understanding of complementarity. The article concludes that reconciliation is attainable if the ICC embraces a holistic, culturally sensitive approach and forges stronger cooperation with domestic and regional actors like the African Union.

Keywords: International Criminal Court, transitional justice, South African Truth and Reconciliation Commission, plea bargaining, legitimacy, reconciliation.

Resumen: Este artículo examina el papel de la Corte Penal Internacional dentro de la justicia transicional y su potencial para contribuir a la reconciliación en África. Aunque a menudo se percibe a la CPI como un órgano puramente procesal, este análisis aboga por una interpretación más amplia de su mandato, alineándola con los pilares centrales de la justicia transicional: enjuiciamientos, búsqueda de la verdad, reparaciones y garantías de no repetición. Tomando como referencia la Comisión de la Verdad y Reconciliación de Sudáfrica, el artículo propone que la CPI, aun careciendo de un mecanismo de amnistía, puede desempeñar funciones reconciliadoras similares mediante acuerdos de culpabilidad (*plea bargaining*). El análisis también identifica déficits de legitimidad que socavan los esfuerzos de reconciliación en el contexto africano, derivados de cuestiones como la desconexión cultural, los enjuiciamientos selectivos y una interpretación rígida del principio de complementariedad. El artículo concluye que la reconciliación es alcanzable si la CPI adopta un enfoque holístico y culturalmente sensible y fortalece su cooperación con actores nacionales y regionales, como la Unión Africana.

Palabras clave: Corte Penal Internacional, justicia transicional, Comisión de la Verdad y Reconciliación de Sudáfrica, negociación de la declaración de culpabilidad, legitimidad, reconciliación

Introduction

The role and mandate of the International Criminal Court (hereafter ICC or Court) within the framework of transitional justice (hereafter TJ) often diverges into two main arguments or lines of thought. The first is that the ICC is an important transitional justice mechanism, which could contribute to peace and reconciliation in transitional societies (Megret 2018). The other holds that the ICC's role and mandate must be seen as purely prosecutorial in nature equipping it with an exclusive judicial mandate to prosecute crimes of international concern, thus being devoid of any political and peace considerations (Orentlicher 1991). These polarized views have been reduced to an associated ICC terminology commonly known as the 'peace versus justice' debate. While this debate continues frequently in academic and policy circles, an examination of whether the ICC can and has meaningfully contributed to reconciliation efforts in Africa, and more broadly, remains largely unaddressed by scholars. Furthermore, there is confusion around the ICC's expected role and mandate as delineated under the Rome Statute, which currently is supported by a restrictive understanding endorsing the Court purely as a prosecutorial tool (Roestenburg-Morgan 2023).

While the *travaux préparatoires* show that the ICC does not have a formal peacebuilding mandate,¹ this article will argue that there is a logical line of reasoning that supports the argument that the ICC is a peace organization conceptually, normatively and indirectly. As this article argues, if the Court's role and mandate were to be interpreted more broadly in accordance with the object and purpose of the Rome Statute², then the ICC must be viewed as a holistic transitional justice mechanism equipped with the main mandate, purpose and function to support reconciliation efforts in transitional societies.

The article will begin with an examination of the meaning of reconciliation as understood under transitional justice and through the lens of the South African Truth and Reconciliation (hereafter SA TRC)

¹ See Statement by Canada (Working Group on General Principles, 13 June 1998), A/CONF.183/C.1/SR.8, para. 48; also see Report of the Preparatory Committee on the Establishment of an ICC, A/51/22, vol. I, para. 43. And see UN Secretary-General Statement to the Rome Conference A/CONF.183/INF/10, Address of the Secretary-General, 15 June 1998.

² The object and purpose of the Rome Statute if viewed through a teleological interpretation will be to understand the Rome Statute's real meaning. The purpose of this interpretation is to apply the law in a way that aligns with the original intent behind its creation, which can include addressing a problem or achieving a broader objective, which in this case is arguably to support reconciliation in conflict prone or war-torn societies.

Commission. Based on the success of the SA TRC, a blueprint has been developed to inform other transitional mechanisms and societies. Inspired by the SA TRC and serving as a benchmark it is therefore argued that the ICC as a result of its existing TJ attributes, has the potential to contribute to reconciliation in the African context but first it would need to improve its legitimacy with its African constituency, which currently remains compromised before this can be fully realized. The chapter will proceed to discuss the challenges giving rise to the 'peace versus justice debate' undermining the reconciliatory role that the ICC can have in post-conflict African contexts. Finally, solutions and ways forward will be proposed to support the ICC's legitimacy and reconciliatory efforts within the African context.

1. The meaning of reconciliation under transitional justice

Reconciliation as a process has in recent years come to feature more prominently and as a necessary component in the discussion under transitional justice (hereafter TJ). According to Kofi Anan, former UN secretary general, transitional justice is the "full set of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation" (Annan 2004, 4). There are a few main processes that are believed to help countries transition through to a stage of democracy, these are, justice processes, truth processes, reconciliation processes, reparation processes and institutional reform processes (Viane and Brems 2010). Truth and justice were initially the most prevalent and focal themes, but reconciliation has since gained focal relevance in the achievement of successful transitions (Clark 2010, 36). There is no exact agreed upon definition of the term 'reconciliation' because of the complexity of the process and its varied goals, but over time the term has become associated with some commonly accepted tenets (Bloomfield *et al.* 2003; Doorn 2008). The definition of the term has come to comprise a "process and a goal" (Villa-Vicencio 2010a, 2). The goal is to aspire to a specific ideal situation in which those involved are satisfied with a particular outcome, whilst the process of reconciliation, focuses on the processes involved in reaching such a goal (Bloomfield *et al.* 2003; Villa-Vicencio 2010a). Reconciliation essentially involves in the broadest possible sense, "the rebuilding of fractured and communal relationships after conflict, with a view to encouraging meaningful interaction and cooperation between former antagonists" (Clark

2010). "It is a process through which a society moves from a divided past towards a shared future" (Bloomfield *et al.* 2003).

Political reconciliation has also been distinguished from reconciliation as a process whereby there should be an acceptable level of political harmony and cooperation between former enemies so as to pursue a holistic type of justice. Reconciliation with forgiveness according to Villa-Vicencio (2010a), is almost impossible for societies to achieve, especially because it implies the healing of the psychological and spiritual scars of past suffering, which mostly always never takes place in troubled societies. Political reconciliation is therefore more of a realistic and more of a "modest goal to achieve" instead of reconciliation with forgiveness for countries undergoing transition.

Reconciliation under the framework of TJ must additionally also be distinguished from peace and its related concepts and processes such as negative and positive peace, peacekeeping and peace building given the close relationship and interconnectedness between peace and reconciliation (Clark 2010a, 36; Villa-Vicencio 2010a, 3). Peacekeeping basically refers to military interventions to end hostilities, involving diplomatic efforts to arrive at a peace agreement whilst peace building generally involves efforts to secure sustainable peace. The definition of peace comprises positive and negative peace. Negative peace is the absence of direct, physical violence such as war or armed conflict, and positive peace is the presence of social justice, equity, and harmony, which involves eliminating the underlying causes of conflict, particularly structural and cultural violence (Galtung 1964). The difference between reconciliation and peace is that peace is essentially a prerequisite for reconciliation and reconciliation a goal for sustainable peace. It is clear that reconciliation is a unique and specific process meaning that the process differs in every situation and there can be no single correct way to define and apply the process (Villa-Vicencio 2010a, 171-172). However, based on past attempts and the successes of various TJ mechanisms aspiring towards reconciliation, the main characteristics supporting successful reconciliation efforts can serve as inspiration in understanding what TJ processes are necessary in supporting reconciliation as discussed below.

2. The South African Truth and Reconciliation Commission in supporting reconciliation efforts

There have been various attempts made by a variety of transitional justice mechanisms to support reconciliatory efforts in Africa. Most

notable in this regard has been the SA TRC, which has been a unique mechanism in its own right (Minow 1998). The South African Truth and Reconciliation Commission while experimental at its inception was a pioneering TJ mechanism which showcased the way in which hurting individuals and a divided society was able to deal with a violent past and forge a new way towards a more harmonious future (Allan 2000).

The SA TRC not only contributed to restoring the moral and political equilibrium in South Africa following the devastation of apartheid but it also played a key role in healing and reconciling individuals and communities who were once considered enemies of one another. The SA TRC's goals were forged out of Christian values of reconciliation where the elements of truth, justice, mercy and forgiveness were integral to its nature and functioning. Indigenous elements drawn out of the South African philosophy of *ubuntu* incorporating elements of community, forgiveness, apology, and remorse also featured in the promotion of reconciliation (Minow 1998). Together with both religious and cultural linkages including the support of both of its founders Nelson Mandela and Desmond Tutu, the SA TRC supported the goal of national unity and reconciliation in South Africa following the dismantling of apartheid. Scholars continue to question and examine the success of the SA TRC with many citing it as a revolutionary blueprint or a global model of a TJ mechanism in promoting and supporting reconciliation during transition (Gibson 2001; Minow 1998; Allan 2000).

An in-depth study and analysis of the SA TRC reveals that apart from the inclusion of the four main classic pillars of transitional justice (Truth and Reconciliation Commission 1998), which include criminal prosecutions, truth seeking, reparations and various forms of reform and prevention, the SA TRC went a step further to focus more deliberately on restoration and forgiveness of the offender through its controversial use of amnesties in exchange for public testimonies of truth. In other words the SA TRC embodied a holistic approach to justice, which focused more deliberately on reconciliation as an end goal in South Africa (Roestenburg-Morgan 2023). The question whether reconciliation was achieved still remains debatable, as there are a number of South Africans who believe that as a result of the amnesties granted their constitutional rights were violated in the process (Sarkin 1996). Nonetheless, empirical studies conducted on the SA TRC reveals that race relations had improved significantly since 1994 and were no longer the main source of division as cited in previous years (Wale 2013). The most divisive gap currently remains class inequality given the fact that Black South Africans continue to be

the most materially marginalized group in South Africa. Unfortunately, this is part of the legacy passed down by apartheid and continues to be a challenge for reconciliation efforts in South Africa.

It is still plausible to suggest that national or political reconciliation was achieved as result of the efforts of the SA TRC given South Africa's successful transition to democracy post 1994. Through an avoidance of violence, establishment of peace, improvement of race relations, as well as an improved desire for unity by the majority of South Africans, reconciliation was nationally achieved as a result of the SA TRC and its processes in South Africa (Roestenburg-Morgan 2023).

The lessons learned from transitional societies like South Africa can be valuable in an examination and assessment of whether international justice can contribute to reconciliation in post conflict societies based on the TRC's existing blueprint. Over the past three decades international criminal justice has become an important accountability mechanism in an effort to promote the rule of law, justice, human rights and deterrence. The question on whether international criminal tribunals and more importantly the International Criminal Court (hereafter ICC) in particular can contribute to peace and reconciliation in fragile post conflict societies will be considered further below. While there might be no fixed definition to the term reconciliation in any of the instruments establishing the international criminal tribunals including the participatory documents of the ICC,³ a general understanding of reconciliation and peace must be seen as an integral aim of international justice. The ICC must not therefore be viewed as a single tool under the TJ framework as a result of its prosecutorial mandate, but instead must be viewed as a fully functional transitional justice mechanism because it embodies the four main pillars or characteristic of transitional justice. It is therefore equipped to meet the full spectrum of demands required of it as a transitional justice mechanism and actor.

3. Understanding the ICC's mandate and role in reconciliation

The creation of the ICC in 2002 marked a pivotal moment in international justice, providing a permanent institution to prosecute perpetrators of genocide, war crimes, and crimes against humanity as

³ Participatory documents for the ICC include the Rome Statute, the Rules of Procedure and Evidence, and specific application forms and guides for victims and legal representatives to participate in proceedings.

well as the crime of aggression.⁴ The ICC was tasked with establishing accountability, deterring future crimes, and contributing to global justice (Dukic 2007). Africa has since been central to the ICC's work; however, the court's interventions in African states have generated both support and controversy. The African continent, with its history of colonialism, conflict, and recent debates on human rights, presents unique challenges and opportunities for the ICC's mission, particularly under transitional justice (Roestenburg-Morgan 2023).

As Africa advances its own transitional justice and most recently through its newly released African Union Transitional Justice Policy (AUTJP) (2019), the ICC must reconsider its mandate role and approach on the continent following a number of interventions on the continent. Thus far, the ICC's impact on reconciliation remains limited due to many reducing the Court's mandate and function to a purely punitive one (Human Rights Watch 2005; Open Letter to the Chief Prosecutor of the International Criminal Court 2005). Although, the core objectives of international tribunals and that of the ICC, falls on retribution and punishment, one must look further and embrace the implied goals and objectives of international criminal justice which is mainly striving for peace and reconciliation in the global community. This was confirmed in the *Erdemovic* sentencing decision at the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) where it was held that the ICTY in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty through its judicial functions to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth...⁵ This was also one of the founding objectives of the International Criminal Tribunal for Rwanda (ICTR), which was to ensure that those responsible for serious breaches of international humanitarian law and acts of genocide would be prosecuted and at the same time that "prosecution would contribute to the process of national reconciliation and to the restoration and maintenance of peace."⁶

While no direct reference has been made to the ICC's role in reconciliatory efforts, one may infer this based on a teleological reading of the Rome Statute. If correctly interpreted, the main purpose or goal for which the ICC was established is essentially to support

⁴ See Article 5 of the Rome Statute.

⁵ *Prosecutor v Erdemovic* (Case No. IT-96-22-S), Sentencing Judgment, 5 March 1998.

⁶ Security Council Resolution 955(1994), 8 Nov 1994, which established the ICTR.

international prosecutions and peace and reconciliation on a global level. In the *Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III noted that:

[A] teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be 'interpreted so as to give it its full meaning and to enable the system [...] to attain its appropriate effects'⁷, while preventing any restrictions of interpretation that would render the provisions of the treaty 'inoperative'.⁸

This refers to interpreting the Rome Statute with the goal to arrive at an interpretation that is both faithful to the treaty text and effective in achieving its intended outcomes in the international sphere.⁹ Since the ICC represents the interests of the world community in the prosecution of international crimes, it is therefore the most competent authority in balancing the interests of prosecution with the interest of peace and reconciliation (Seibert-Fohr 2003).

Another argument is that the legal personality of the ICC should "follow from a reasoning similar to that which has been applied to the United Nations," meaning that its implied powers can be inferred (Luder 2002). This position finds support in the Advisory Opinion of the International Court of Justice in the *Reparations for Injuries Suffered in the Service of the United Nations*, under the doctrine of implied powers, where it was held that an organisation like the UN must be deemed to have powers not necessarily evident in the Charter, but "conferred upon it by necessary implication as being essential to the performance of its duties."¹⁰ In other words additional powers associated with the ICC while not necessarily evident can be implied. In other words, contributing to peace and reconciliation are essential goals based on the performance of the ICC's primary duty, which is to

⁷ Appropriate effects in this particular instance refers to interpreting the Rome Statute with the goal to arrive at an interpretation that is both faithful to the treaty text and effective in achieving its intended outcomes in the international sphere.

⁸ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, ICC-01/05-01/08-388, para. 36. Also *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', ICC-01/18 Date: 5 February 2021

⁹ Art 31 of the Vienna Convention on the Law of Treaties 1969.

¹⁰ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: ICJ Reports 1949, p. 182.

prosecute those that threaten the international peace and security of the world in the likelihood of securing peace.

While it is most commonly held (Schabas 2011; Human Rights Watch 2004; Coalition for the International Criminal Court 2022; Mendes 2010) that the ICC's mandate is restricted to the realm of prosecution *only*, as outlined in its Preamble, which affirms that the "most serious crimes of concern...must not go unpunished and that their effective prosecution must be ensured,"¹¹ it must also be kept in mind that the ICC is an international organization representing a new form of international organisation, namely an integrated international judicial organisation. Traditionally, the typology of international organisations under international law, were such that there was always a distinction made between international peace organisations and other international organisations. According to Luder (2002, 85), the ICC is an international peace organisation because its underlying mandate peace is intimately linked to its primary mandate justice. So, the ICC's institutional structure, in other words, is peculiar and makes it different from other international judicial institutions on account of its innovative structure and function (Luder 2002, 86). Thus by virtue of its implied powers it must automatically take international peace concerns and reconciliation into account.

This is clearly apparent from the fact that the ICC fulfills four main classic pillars of TJ which include undertaking criminal prosecutions thereby ensuring accountability, establishing the truth or contributing to truth-telling, providing reparations to victims and survivors, and supporting guarantees of non-recurrence also known as reform and prevention measures. These individual processes each contribute to reconciliation in some measure and when combined are far more effective as a holistic mechanism capable of achieving reconciliation as will be demonstrated below at the level of the ICC.

3.1. *Prosecutions / Accountability / Justice*

The ICC's mandate to prosecute as stated in the Preamble of the Rome Statute, affirms that the "most serious crimes of concern... must not go unpunished and that its effective prosecution must be ensured."¹² In terms of their human rights obligations states are

¹¹ See Preamble of the Rome Statute of the International Criminal Court: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>

¹² Preamble RS.

obligated to prosecute very egregious violations of human rights such as genocide and torture as well as crimes against humanity in accordance with the various human rights treaties to which they have signed up to (Orentlicher 1991). Separate to this, they could also have a duty to do so under customary law (Orentlicher 2007). The duty to prosecute under international law is furthermore compelling under international human rights law, international humanitarian law and international criminal law.

Prosecution is geared towards prevention and deterrence of future crimes. It also provides a measure of restoration or reparative justice for those victims and survivors who choose accountability over forgiveness. If victims know that perpetrators are likely to be punished, there is a likelihood that they may receive closure. Punishment prevents a culture of impunity from continuing because atrocious crimes are addressed which might discourage perpetrators from committing future crimes. It also works to reinforce democratic values amongst citizens who were part of the old regime (Orentlicher 1991). Without international punishment, there might be an absence of retributive justice and victims might feel the need to take the law into their own hands, thereby promoting vigilantism. Punishment also gives 'teeth' to human rights obligations, which are generally considered ineffective at the international level, because some states might not easily abide by them for lack of effective enforcement machinery (Orentlicher 1991).

While restorative proponents see punishment as contradictory to reconciliation because it is usually always associated with revenge or vengeance, TJ recognizes the importance of punishment in the justice process. According to Crocker (2002), punishment should not be seen as the extraction of vengeance. It is not retaliatory in nature. The aim of punishment is to hand out proportionate and reasonable punishment while at the same time providing satisfaction to victims and survivors. It has strong "reconciliatory potential", which is necessary for achieving peace in the long run (Uprimny and Saffon 2006). Punishment meted out by the ICC is consequently an "intrinsic element of durable peace,"¹³ and the value of retributive justice cannot be ignored or underestimated in the achievement of sustainable peace and reconciliation (Crocker 2002).

¹³ Justice, Reconciliation and the Role of the ICC. 2008. Speech by Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, 6th February, Brussels

3.2. *Truth*

Establishing and acknowledging the truth on the violations committed during conflict is one of first steps towards social dialogue and even reconciliation (Gonzalez and Varney 2013). All parties to the conflict, and most importantly victims and their families, have the right to make their voice heard and their questions answered. Society at large also has the right to know the truth about past events and the perpetration of heinous crimes (Gonzalez and Varney 2013). This is pivotal to address past abuses, but it also works to prevent the recurrence of similar violations in the future. International trials it may be argued contribute to uncovering the truth and to developing a historical record of the truth (Naqvi 2006). While the previous tribunals like the ICTY and ICTR did not expressly refer to the right to truth, the ICC clearly does so under 54(1)(a)¹⁴ and 69(3)¹⁵ of the Rome Statute. Through the use of mixed civil and common law legal traditions which combine adversarial methods alongside inquisitorial methods of fact finding, the judges of the ICC actively seek to find the material truth during the relevant trial proceedings (Ambos 2003). Furthermore by allowing the active involvement of the judges and victims during trial proceedings the ICC may be in a good position to establish a historical record of the wrongs committed aside from only establishing the guilt and innocence of an accused. The advantages of incorporating a truth telling processes include re-contextualizing the conflict, creating a historical record of violations and abuses, addressing impunity, responding to the needs of the victim and survivor and ultimately promoting healing and reconciliation (Shaw 2005). Similarly, these advantages featured congruently at the level of the SA TRC.

3.3. *Reparations*

The International Criminal Court also provides support to victims who have suffered as a result of the conflict they have lived through.

¹⁴ In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

¹⁵ The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

Reparations are directly provided to victims or indirectly to their family members who have suffered as a result of the victim's loss as stipulated and pursuant to article 75 of the Rome Statute. A person must first qualify as a 'victim' before reparations may be granted.¹⁶ The Court may also further "order individuals to pay reparations to other individuals and it has the option of granting individual and collective reparations which may take the form of "restitution, indemnification and rehabilitation" (Sriram et al. 2013) Reparations, may also more broadly impact victims' families and the wider communities by contributing "to the rebuilding of war-torn societies, by advancing truth and by acknowledging the gravity of the crimes committed" (The Redress Trust and Forensic Risk Alliance 2003). Reparations contribute to war-torn communities by addressing both the material and emotional consequences of conflict, such as rebuilding infrastructure and providing psychological care, while also acknowledging past harms and promoting reconciliation through symbolic acts and institutional reforms. They are seen as a way to make amends, restore dignity, and create conditions for lasting peace by addressing the root causes and ongoing effects of violence (Maiese 2003). Therefore, the purpose of reparations is restorative in nature essentially meant to elevate victims' rights to a higher status than is generally accorded in the international justice process making it a legitimate concern for the public to take into account (Ingber 2025).

Article 75 of the RS provides for the establishment of a Trust Fund for Victims (hereafter TFV), which outlines the ICC's reparations mandate and gives victims a voice in order to exercise their rights under the international criminal justice system.¹⁷ The creation of the TFV is an important mechanism to allow for the effective implementation of reparations ordered by the Court and is central to the success of the ICC where reparations both individual and collective are meant to support victims and their communities.¹⁸ In the *Katanga* case the Chamber in its view held that "collective reparations could foster reconciliation." It further went on and held that... "wherever

¹⁶ See ICC Rules of Procedure and Evidence, Victims should meet the definition as spelled out in the Rules of Procedure and Evidence. Rule 85 of the ICC Rules of Procedure and Evidence (RPE) define "victims" as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC".

¹⁷ See article 75 of the Rome Statute.

¹⁸ See *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute.

Case No. ICC-01/04-01/07-3728, para. 289, p. 101. See: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05121.

possible, reparations should foster reconciliation between the convicted person, the victims of the crimes and the affected communities.” In other words reparations should promote reconciliation between the convicted person, the victims, and affected communities, in the interest of peace.

So far, the TFV through the implementation of reparations has proven to be a critical source of assistance to victims, their families and the larger community by contributing to peace building, restorative justice and reconciliation with the aim of addressing both the material and emotional consequences of conflict (REDRESS 2019). In doing so this has contributed to peacebuilding and reconciliatory efforts.

3.4. *Guarantees of non-recurrence (reform and prevention)*

Guarantees of non-recurrence usually include reforms of justice by transforming justice and security institutions into more effective and democratic institutions (OHCHR 2023). The ICC has focused on the institutional and legal reform of domestic legal systems through its principle of complementarity. The principle of complementarity dictates that national jurisdictions have the primary right to undertake their own investigations and prosecutions unless they are genuinely unwilling and unable to do so, at which point the ICC can intervene.¹⁹ Linked to the principle of complementarity is the idea that national jurisdictions must comply with their obligations under the Rome Statute. Part of this means strengthening their domestic legal systems to deal with international crimes. This is made apparent in the Rome Statute’s preamble, which states that “effective prosecution must be ensured by taking measures at the national level and enhancing international cooperation.”²⁰ Some of these measures include adopting corresponding legislation into domestic law that is similar or identical to the provisions laid down in the Rome Statute (Yang 2005).

By encouraging national courts to establish systems that mimic the Rome Statute in order to try international crimes, the ICC makes an essential contribution to the prevention of atrocity crimes through the principle of complementarity. Complementarity encourages states to build and strengthen their domestic judicial systems. Arguably a state with strong judicial institutions and respect for the rule of law is less

¹⁹ Article 17 of the Rome Statute.

²⁰ Preamble, paragraph 4, Rome Statute of the International Criminal Court.

likely to reach the level of societal upheaval within which international crimes are most often committed (Roestenburg-Morgan 2023). Through positive complementarity which is a more proactive form of complementarity the ICC can cooperate with states and use its “political leverage” to encourage and where necessary assist states in undertaking their own investigations and prosecutions. This will ensure that governments fulfill their obligations to promote accountability and foster greater institutional reform domestically. Strong judicial institutions will help stabilize societies and foster respect for both judicial and governmental structures contributing to more democratic and stable societies supporting reconciliation (Burke-White 2008).

4. The missing component supporting ‘reconciliation’: Plea bargaining in place of amnesties?

Based on the four classic pillars of transitional justice, the ICC must be seen not only as a prosecutorial mechanism rather as a fully functional transitional justice mechanism equipped with the necessary characteristics to promote peace and reconciliation upon ICC intervention in post-conflict societies (Luder 2002, 85). The ICC as a transitional justice mechanism, based on its institutional structure and its mandate ensures that its typology cannot solely be confined to the realm of prosecutions and judicial matters but extends more broadly to issues of international peace and reconciliation. The elements highlighted above all contribute to the process of reconciliation, which is important for durable peace. The ICC possesses all of these functions except for one, namely the provision of amnesty in exchange for truth telling or testimony.

Notably the SA TRC known to be a successful blueprint of a TJ mechanism provided for individual amnesties to ensure for a successful transition and political reconciliation in South Africa. Amnesties have often been employed by governments in the past especially when there was no hope for a ceasefire or for a peaceful settlement (Sooka 2010). The contention surrounding the use of amnesties is that they are at odds with international law and the Rome Statute because they violate the rights of victims (Mallinder 2007), and therefore cannot be endorsed by the ICC whose position is generally retributivist. This view however is not necessarily shared by stakeholders who are supportive of a political process during transitions, and who view amnesties as a “necessary price to pay” for ending “conflict and political oppression”. Some proponents, view amnesties as a fundamental component within

the transitional justice setting because they are capable of managing political transitions by “alleviating internal pressure, protecting state agents from prosecution, and promoting peace and reconciliation, responding to international pressure, providing reparations, encouraging exiles to return and adhering to cultural or religious traditions” (Mallinder 2007). While the political power of amnesties in peace building processes cannot be underestimated caution must still be heeded against its casual use and the true motivation behind its benefactors. Villa-Vicencio (2010b) for instance cautions that where amnesties have the potential to promote peace, it also has the potential to ‘polarize and embitter,’ so each political situation requires the right response to ensure long-term reconciliation.

A justification for the use of amnesties at the level of the ICC may be re-envisioned if one considers the use of plea bargains instead (Burens 2013)²¹ because it can be argued that they are to a large extent analogous to post-conflict amnesties. As Lenta (2023) points out post-conflict amnesties may in some way be equated to plea bargains in that they allow for a reduction of a perpetrator’s sentence and/or punishment in return for a guilty plea, or for providing testimony, and/or other incriminating evidence by the perpetrator against superiors or accomplices (Lenta 2023). The use and justification of plea bargaining is not foreign to international criminal law in the quest for post-conflict reconciliation. Its use may be gleaned from the ICC’s predecessors namely the ICTY and the ICTR where in a number of cases at both these tribunals plea bargains were used.²² One of the arguments used to support the use of plea bargains in both contexts was that a guilty plea helps in truth finding and in fostering reconciliation because perpetrators admit their wrongdoing and show remorse, which assists victims to heal (Clark 2009).

The impact of plea bargaining or guilty pleas on reconciliation is however dependent on the establishment of the truth. This was acknowledged in the *Erdemović* case at the UN-ICTY where it was held that “discovering the truth is a cornerstone of the rule of law and a

²¹ Plea bargaining consists of sentence bargaining and charge bargaining. The former refers to the case in which the defendant receives a sentence reduction for pleading guilty based on an agreement between him and the prosecution. The latter includes cases in which the prosecutor drops some charges in exchange for a guilty plea of the defendant for one of the other charges

²² In a number of cases plea agreements entered into by Obrenović, Momir Nikolić and Biljana Plavšić contributed to the admission of responsibility under Bosnian Serb Leadership for the Srebrenica Massacre.

fundamental step on the way to reconciliation.²³ The same was reiterated in the *Plavšić* case where during sentencing it was held that that the guilty plea of the accused “helped to establish the truth and was a fundamental step in furthering reconciliation in the former Yugoslavia”.²⁴ In instances where plea bargains are used to support reconciliation it is expected that such plea bargains are sincere and conducted in good faith otherwise this would undermine the truth finding process including establishing an accurate historical record (Clark 2009). Plea-bargaining can support the main goals of international criminal justice if used carefully with due regard given to certain factors such as “justice, legitimacy of the Court, peace and reconciliation, the role of victims, the rights of the defendant, the costs of the proceedings, and access to evidence” (Rauxloh 2011). These factors need to be properly balanced against the use of plea bargains.

At the ICC the use of plea bargains initially remained open ended. Article 65(5) neither prescribes nor forbids the use of plea-bargaining leaving open the possibility for its use.²⁵ In other words, the ICC Statutes do not have a clearly defined negotiated guilty plea agreement process in place.²⁶ While the ICC allows for admissions of guilt under a strict judicial inquiry and while the Prosecutor may offer sentence reductions in exchange for cooperation, the Judges and not the parties control the outcome. This means that the Judges of the Court have the final discretion in sentence reduction when it comes down to the negotiated agreements between the Prosecutor and an accused who has made an admission of guilt.²⁷ According to Rauxloh (2011) plea bargaining should be allowed at the ICC in the following two circumstances namely if “a) the plea bargain leads to the defendant offering new evidence or contributes to reconciliation and b) if high standards of safeguards can be enforced”. An admission of guilt by an accused has already been tested in the *Al Mahdi* case²⁸, which is the first case whereby the

²³ See Prosecutor v. Dražen Erdemović Case No. IT-96-22-T bis, Second Sentencing Judgment (5 Mar.1998), at para. 21.

²⁴ See Prosecutor v. Biljana Plavšić, Case No. IT-00-39 & 40/1-S, Sentencing Judgment (27 Feb. 2003), at para 73.

²⁵ See Article 65(5) of the Rome Statute which reads “Any discussions between the Prosecutor and the defense regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.”

²⁶ This is not present in both the Rome Statute and the ICC’s Rules of Procedure and Evidence.

²⁷ Article 65 of the Rome Statute.

²⁸ *The Prosecutor v. Ahmad Al Faqi Al Mahdi, Case Number ICC-01/12-01/15*, Situation in the in the Republic of Mali: <https://www.icc-cpi.int/mali/al-mahdi>

accused pleaded guilty to the crimes he was charged with in accordance with article 65 of the Rome Statute (Whiting 2016). The accused, *Al Mahdi*, further publicly demonstrated a show of remorse by taking responsibility for the crimes he had committed, which consisted of “intentionally directing attacks against 10 buildings of a religious and historical character in Timbuktu, Mali (Dutton 2023). In its judgment the Trial Chamber emphasized the point that *Al Mahdi*’s admission may “further peace and reconciliation in Northern Mali by alleviating the victims’ moral suffering through acknowledgement of the significance of the destruction.”²⁹ The Trial Chamber also took note of the fact that the admission by the accused could additionally have a deterrent effect on others tempted to commit similar acts in Mali and elsewhere. The *Al Mahdi* case has significant value because the accused entered a voluntary guilty plea under Article 65 of the Rome Statute and based on his negotiation and cooperation with the Prosecutor he received a lower sentence than a contested trial might have produced. This outcome it arguably suggests and opens the possibility to establish a future practice around plea-bargaining, which may be instrumental in contributing to peace and reconciliation in certain instances (Whiting 2016; ACCORD 2017). To provide more clarity on the legal gaps concerning plea agreements ICC’s Office of the Prosecutor (OTP) published a set of guidelines upon the conclusion of the *Al Mahdi* case to support a better understanding surrounding plea agreements or negotiated settlements at the ICC.³⁰ These guidelines further reinforce the OTP’s unambiguous support for negotiated justice at the ICC (Biazatti 2020). It still however remains to be seen if the practice of plea bargaining will become entrenched in future practice at the ICC.

Plea-bargaining has the potential to make a valuable contribution to peace and reconciliation but whether the opportunity for this to become an embedded practice at the ICC will depend on the circumstances in each particular case and therefore cannot be claimed as a general rule of thumb. If the ICC uses plea bargaining more frequently it will need to make sure that the impact of each plea bargain is evaluated individually and carefully with due regard paid to strict safeguards where the rights of victims, survivors and perpetrators

²⁹ See Situation in The Republic of Mali in the Case of The Prosecutor v. Ahmad Al Faqi Al Mahdi, Public Judgment and Sentence, Case No. ICC-01/12-01/15, delivered on 27 September 2016. Accessed November 25, 2024: https://www.iccpci.int/sites/default/files/CourtRecords/CR2016_07244.PDF

³⁰ Office of the Prosecutor, Guidelines for Agreements Regarding Admission of Guilt, October 2020

are upheld and where peace considerations are given stronger recognition in support of reconciliation. To do so less circumspectly while leading to quick “convictions or uncontested convictions” could instead lead to the loss of the ICC’s legal or normative legitimacy whereby the Court’s fair trial standards will be brought into question (Rauxloh 2011). This loss of legitimacy could then subsequently impact the ICC’s efforts in promoting reconciliation.

5. Legitimacy challenges surrounding the ICC and its impact on reconciliation in the African context

Challenges of legitimacy are not a new phenomenon facing the ICC. This has been one of the most important topics that the ICC has been grappling with for the past decade, and particularly within the African context (Roestenburg-Morgan 2023). Legitimacy as it relates to the ICC refers to both the ICC’s normative/legal and political/sociological legitimacy. Very briefly normative understandings of legitimacy correspond with normative criteria such as fairness, justice and rights, and are thus assessed against a normative framework (Danner 2005), which is the Rome Statute. Political legitimacy refers to the popular support of the court by its relevant stakeholders based on their perceptions of the ICC. The latter essentially focuses on individuals’ beliefs about the “moral operation of a system rather than the actual operation of a system” (Thomas 2013, 14).

Until very recently all cases before the International Criminal Court were opened exclusively in Africa.³¹ An ensuing result was the perception of selective prosecutions by the ICC against Africans, which exacerbated ties with the African Union (hereafter AU) who subsequently threatened mass withdrawal from the ICC.³² As a result continued tensions built between the AU and ICC. Further developments building on the existing tensions were the failed Kenyan cases which culminated in the then Prosecutor being forced to drop charges against Kenyan President Kenyatta for lack of evidence in the case brought against him, mainly as a result of failed state cooperation by the government of Kenya.³³ Other developments also saw South

³¹ See ICC Caseload available online at <https://www.icc-cpi.int/cases>.

³² See African Union Withdrawal Strategy Document: https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf

³³ The Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Case Information available online at <https://www.icc-cpi.int/sites/default/files/>

Africa threatening to formally deposit its instrument of withdrawal from the ICC, as well as The Gambia and Burundi following through with withdrawal. These and other developments have led to a deficit of popular support for the Court within the AU and many African states (Roestenburg-Morgan 2023).

Based on recent empirical research conducted on the root causes of the ICC's compromised legitimacy in Africa there are three major areas of concern that require attention in the Courts relationship with African states.³⁴ These are institutional factors, jurisdictional factors and cultural factors that hinder the ICC's legitimacy and in turn its ability to promote and contribute to reconciliation within the African context. While the list is not exhaustive some of the main factors compromising the ICC's legitimacy and lack of ability to support reconciliation in the African context are as follows:

5.1. *The conflicting mandates of the ICC and the African Union*

The juxtaposition of the mandates of the African Union and ICC reveal tensions that do not support joint efforts to ensure for peace and reconciliation on the African continent. The African Union's mandate is perceived as linked to peace and security issues while the ICC's mandate to prosecutions and justice only. The ICC's adherence and exclusivity in its mandate which is one mainly dedicated to prosecutions or retributive justice has implications for reconciliation especially if the Court remains ignorant of its higher calling which is the maintenance of international peace. The AU's mandate supports the principle of non-indifference through acts of mediation, diplomacy and peacekeeping rather than military intervention. The AU has used this public image and this primary role to engender support from its member states. However, undermining the AU's independence and legitimacy is the continuous and growing instability and fragility on the African continent supported by a host of social and economic factors that aside from diplomacy and peacekeeping efforts requires a robust transitional justice response that also include the use of prosecutions

CaseInformationSheets/KenyattaEng.pdf. Also see *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Case Information available online at <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/RutoSangEng.pdf>

³⁴ Please note an empirical study conducted by Roestenburg-Morgan has revealed three major areas of concern compromising the ICC's legitimacy in Africa.

and ICC intervention. The exclusivity of mandates as interpreted by both institutions undermines the ability for effective cooperation in post-conflict African societies and the opportunity for working together to achieve reconciliation (Roestenburg-Morgan 2023).

5.2. *The timing of prosecutions and the interrelated 'peace versus justice' debate*

The meaning of justice has taken on a narrow definition in the determination of 'interests of justice' by the ICC's Office of the Prosecutor whereby prosecutions may be supported by the ICC on the basis that it might be in the "interests of justice" to do so despite evidence to the contrary which indicate that peace processes may be derailed and conflict may re-ensue as a result of ICC interventions. This was witnessed in the situations of Uganda and Ivory Coast where in the ICC's pursuit of prosecution, reconciliation efforts were undermined (Roestenburg-Morgan 2023). Some proponents argue that the potential clash between peace and justice objectives can be potentially circumvented by pursuing more of a sequential approach for example by ensuring that peace agreements are concluded first while dealing with prosecutions and justice later (Murithi 2015). However, the danger of sequencing without deeper consideration of the context is that "neglecting accountability for egregious crimes in the aftermath of concluding a peace agreement can be and often is detrimental to long-term stability" (Human Rights Watch Report 2010). The peace versus justice debate persists between both the African Union and the ICC and has not as yet been settled. As a result of these tensions between peace and justice, the true meaning of justice necessary for reconciliation, becomes eclipsed given the stark differentiation between the two concepts and its related processes.

5.3. *Ineffective application of the principle of complementarity including the ICC's interaction with alternative, traditional or local justice mechanisms*

This is an additional challenge that may undermine the ICC's contribution to reconciliation in post conflict societies. It is important for the ICC to recognize the primacy and sovereignty of states to undertake their own investigations and prosecutions as intended by the principle of complementarity. If this involves the use of alternative/

traditional/local justice mechanisms then these mechanisms should not be immediately dismissed by the ICC on the basis of not being able to meet international due process standards of law but could be assessed according to domestic due process standards instead. Alternative justice mechanisms which are quick solutions and poorly constructed by states with no real or genuine intention of exacting accountability would not suffice in meeting ICC standards based on the lack of genuineness, as well as the lack of a prosecutorial option and the lack of due process standards (Roestenburg-Morgan 2023). Alternative justice mechanisms are usually proven to be effective in meeting transitional justice demands if they include both retributive strands justice combined with restorative strands of justice.

The value of alternative/traditional/local justice within politically laden contexts is that they act as catalysts for the promotion of unity and reconciliation. They draw on cultural and religious linkages of interconnectedness that are of value to many African societies, such as the way in which tenets of *ubuntu* were ingrained into the SA TRC process and traditional strands of *Gacaca* was adapted and conformed into a modern version of a mechanism that was able to deal with the main justice concerns in post-conflict Rwanda. In other words, a “culturally familiar and socially secure” alternative justice mechanism that is essentially geared both towards accountability and restoration makes such mechanisms accessible and legitimate to local populations thereby promoting and facilitating reconciliation in some post-conflict societies (Roestenburg-Morgan 2023).

Traditional justice mechanisms are thus important because they offer culturally rooted, community-trusted ways of resolving harm, often with a stronger focus on reconciliation, restoration, and social harmony than formal courts. They are accessible, flexible, and capable of addressing high volumes of disputes, making them especially valuable where state institutions are weak or mistrusted. By emphasizing dialogue, truth-telling, apology, and reintegration, they help repair relationships and rebuild the social fabric in ways that formal legal systems alone often cannot.

The fact that the use of alternative / traditional or local justice mechanisms are often used and preferred by some African states places constraints on a determination of admissibility at the ICC because there is not enough clarity as to the legal requirements and qualification for its use. As a result, this places a state’s ability to advocate for and meet a challenge of admissibility under pressure (Roestenburg-Morgan 2023). So a proposal made by a state to use an alternative justice mechanism undermines what may be seen as the

state in question's active efforts in carrying out their own investigations and prosecutions and creates a tension with the ICC especially if efforts to undertake their own investigations and prosecutions are easily hampered or dismissed by the ICC.

Aside from the limited political will witnessed at the regional level by African states to various AU initiatives and protocols; in essence does not diminish a state's sovereign right in alignment with the ICC's principle of complementarity to carry out its own domestic investigations and prosecutions. The lack of political will in terms of African states to join up to various African Union Protocol's for instance, speaks to different and more deeper issues related more broadly to the African Union. A state's sovereign and available right should not be confounded with its political will.

Therefore, the sovereign right of states to utilize traditional justice mechanisms which are locally owned and considered legitimate by the local population should be given meaningful consideration by the ICC and not simply rejected on face value especially where the likelihood of reconciliation may be in view.

5.4. *The lack of cultural awareness, proximity and outreach by the ICC*

Cultural deficits between the ICC and African states have also contributed to the growing rift between the ICC and its African constituency. In particular the lack of cultural awareness, proximity and outreach by the ICC are some of the factors facilitating such a rift. Some have felt that the ICC as a Court of law is too far removed from African culture and its affected communities and that because of this reason; the Court cannot adequately appreciate or understand the cultural context and pressing concerns on the African continent. The Court's lack of proximity to affected regions also contributes to its diminishing legitimacy since lack of accessibility and lack of trust by locals hampers its reconciliatory role in transitional societies (Roestenburg-Morgan 2023).

6. Final thoughts

It is apparent from the preceding discussion that the ICC has the potential to be an effective transitional justice mechanism when intervening in transitional contexts because it is designed and equipped with the necessary pillars and functions required of a robust

transitional justice mechanism. Supporting the ICC's reconciliatory potential is its implied mandate which is the maintenance of international peace and security. Therefore, the sole emphasis placed on its prosecutorial mandate cannot be sustained by proponents who are averse to its role in the maintenance of peace and reconciliation in transitional contexts. The concept of justice should thus be re-conceptualized with a broader consideration of peace within the understanding of justice. This would be amenable to states grappling with mass violence and complex transitional justice demands.

In order to ensure for successful transitions, the ICC must recognize that it has the potential to disrupt peace and reconciliation processes if its interventions are ill timed. Proposed solutions of sequencing or postponing prosecutions to a later period will not always be viable especially if one considers that the ICC's key purpose, is to prosecute those most responsible, and in this way deter egregious crimes notwithstanding the impact that delayed justice will have for victims and survivors' rights. The effect of sequencing could in some instances furthermore undermine the credibility and legitimacy of the Court if justice is delayed for a longer period of time. As a result, it may be more useful to rely on prosecutorial discretion when the peace justice nexus presents a problem (Human Rights Watch Report 2010). It must therefore be incumbent upon the ICC Prosecutor to consider all relevant circumstances, including ongoing peace processes as well, before determining whether it will be in the 'interests of justice' to initiate a prosecution or not.

Furthermore, it will also be important for the Prosecutor to consider the value of plea-bargaining when suitable as a tool that can function in a similar fashion to amnesties in order to provide sentence reductions for perpetrators in exchange for guilty pleas so as to contribute to truth-telling, supporting a degree of closure for victims and relatedly an acknowledgement of responsibility, as well as a demonstration of genuine remorse by perpetrators for the crimes that they have committed. The aforementioned reasons may contribute to reconciliation as long as plea bargains are carried out circumspectly with due regard to the necessary safeguards for victims and survivors.

Through treaty interpretation consistent with the Vienna Convention and the spirit and purpose of the Rome Statute, broader interpretations of the phrase 'interests of justice' must support the ICC's role and mandate in favor of larger societal goals such as peace security and reconciliation where justice is not necessarily seen as synonymous with prosecutions only. Therefore with respect to a determination on the 'interests of justice' the Prosecutor should grant

more leeway and a broader interpretation in such a determination. This is because in a transitional justice setting states are seeking their own unique reconstructive means to ensure for successful transitions towards peace. As a result, the meaning of justice takes on a broader notion of peace. While guidelines or documentation accompanying prosecutorial discretion may in certain instances support a determination on the 'interests of justice' opting for the use of concrete guidelines must be avoided or determined circumspectly on a case-by-case basis by the Prosecutor. Consequently, the use of guidelines can provide clarity and avoid controversy around a discretionary issue on meaning of the 'interests of justice' (Roestenburg-Morgan 2023).

Following the recognition of the ICC as a holistic transitional justice mechanism, it is also essential that the Court interpret the principle of complementarity as what its initial benefactors intended it to be namely as a transitional justice mechanism of last resort. The role that the ICC should play as envisioned under the principle of complementarity is one that actively ensures that states parties investigate and prosecute international crimes. In other words, there must be active involvement of the ICC with its member states to provide guidance and assistance if states face hurdles or capacity shortfalls at the domestic level. The ICC should be proactive with states parties because regular collaboration with individual states parties can establish relationships of trust and contribute to the overall visibility and awareness of the ICC at the domestic level. In the African context this can be favorable in advancing the legitimacy of the ICC because many African member states share an overlapping membership with both the AU and ICC.

Furthermore, given the tendency of African states to utilize alternative/traditional or local justice mechanisms, does not necessarily mean that such mechanisms should be dismissed on face value following an admissibility challenge by states supporting its use. The viability of alternative justice mechanisms in the transitional justice landscape, while subject to a number of considerations can function in tandem with the ICC under the principle of complementarity. For such mechanisms to function effectively, restorative processes focusing on forgiveness and restoration ought to be accompanied by prosecutions and reparations in order to be found acceptable. This is because the meaning of justice is contingent on a society's and an individual's personal experiences and beliefs where in some cases retribution may be favored over restoration or vice versa. Based on an analysis of successful transitional justice mechanisms such as the SA TRC, the

creation of a safe space which encourages truth telling, discussion, sincere admission of guilt and apology as well as sincere acts of forgiveness are of significant importance for the optimal functioning and success of alternative justice mechanisms.

A shared national narrative is also essential for the promotion of national unity and reconciliation. While this must primarily be state-led, such narratives should aim to be politically and historically sensitive, concise and representative of the realities of the specific society concerned, to avoid any misrepresentations of the facts (Roestenburg-Morgan 2023). Furthermore in instances where prosecutions are carried out, they should be carried out as fairly as possible with cognizance given to genuineness and due process of the law expected at the domestic level. The success of alternative/traditional/local justice mechanisms additionally depends on the professionalism of local personnel who are well equipped and educated in dealing with the transitional processes involved.

It is clear that cultural realities are important for the ICC to consider in the context of Africa. The ICC's decisions in supporting the concerns of African states will be of major importance in building up the Court's legitimacy for future purposes. Legitimacy both from a political and normative perspective is what the ICC needs capitalize on because legitimacy will eventually ensure for the establishment of a democratic and trustworthy ICC, which will increase its reconciliatory potential in post-conflict Africa and more globally.

The difficulty of a global or multicultural constituency means that the ICC would require a deeper cultural understanding of its various constituents and member states if it is to be perceived by those groups as institutionally legitimate and democratic. The ICC would thus need to become more culturally aware and attuned to diverse views represented by its various constituencies in order to ensure for popular acceptance on the African continent. The value of cultural legitimacy for the ICC and international criminal law can be best envisioned through the conduit of legal and cultural pluralism, which might be best suited to meet the demands and paradoxes that culture presents and creates in the international legal context.

Conclusion

This paper has delved into an examination of the role of the ICC under TJ and its contribution to reconciliation in Africa. Through an examination of the ICC's mandate and its expected role to promote

reconciliation in transitional societies, this chapter has demonstrated that the ICC has an extended mandate both of justice and peace in the furtherance of reconciliation. Furthermore, drawing from the blueprint of a successful transitional justice mechanism which has functioned in post conflict South Africa, namely the SA TRC, this chapter argues that the ICC can borrow from such a blueprint since it is already endowed with four out of the five pillars intrinsic to the SA TRC. It was suggested that the missing pillar of amnesty, although contentious, nevertheless remained an important component for supporting reconciliation in the South African case. At the level of the ICC it was held that amnesties could have parallels or be equated with the use of plea bargains made in exchange for guilty pleas that support truth finding and reconciliation in post conflict societies.

However, it was determined that the use of plea-bargaining must be carried out circumspectly with due regard paid to the particular context and the required safeguards in place to support victims, survivors and perpetrators rights. Failing to do so would have an impact on the ICC's fair trial standards and hence its normative legitimacy. In furtherance of the discussion of legitimacy, which is linked indelibly to reconciliation this article further explored the tense relationship between the AU and ICC and the ICC's relationship with African states to briefly explore reasons or factors for the deficit of legitimacy that is undermining the ICC's reconciliatory potential in post conflict Africa.

The ICC's role in supporting reconciliation can only be successful if the ICC together with all its states parties share in the responsibility for the peace and security and the well-being of the world including the punishment and prevention of the most serious crimes of concern which must be genuinely acknowledged by ICC member states on the one hand and which must be fairly prosecuted by the ICC on the other hand. This shared responsibility that both the ICC and its member states owe to the "victims of unimaginable atrocities"³⁵ should open up the space for cooperation and dialogue based on the merits of respect, equality and fairness.

The road to reconciliation must be a place where justice and peace both meet and paradoxically not where they collide. Both objectives can be reconciled and realized if they are not viewed as competing objectives, but rather as complementary ones, dependent on the concerted efforts of institutions like the AU and ICC including its states

³⁵ See Preamble of the Rome Statute.

parties. Most importantly the legitimacy of the ICC in relation to its global constituencies in the fair enforcement of international justice is fundamental for its efficacy. Once there is recognition and acceptance of the comprehensive mandate of the ICC will the potential to secure justice, peace and reconciliation on the African continent become a reality.

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