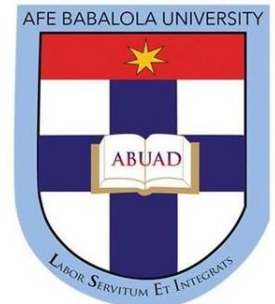




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UNVEILING THE POWERS OF THE ICC PROSECUTOR: PROMOTING ACCESS TO JUSTICE AND ACCOUNTABILITY THROUGH SUSTAINABLE DEVELOPMENT GOAL 16

Oriola O. Oyewole*

ABSTRACT

Criminal prosecution, as one of the transitional justice mechanisms, aims to address the legacies of serious human rights violations and international humanitarian law. The mandate of the International Criminal Court (ICC) is to bring perpetrators of atrocity crimes to justice by initiating investigations, issuing arrest warrants and conducting criminal trials. At the heart of ICC's mandate is the Prosecutor, whose powers are indispensable for achieving peace, access to justice and accountability in the international community. Sustainable Development Goal 16 (SDG 16) is characterised by its focus on nurturing peaceful and inclusive societies, ensuring access to justice, and strengthening effective institutions. This paper explores the intersection of SDG 16 with the discretionary powers vested in the ICC Prosecutor in investigating and prosecuting atrocity crimes. Employing a doctrinal approach, it critically examines legal frameworks, principles, and case precedents to unravel the intricacies and implications of prosecutorial discretion. The paper reveals the diverse array of influences that guide the ICC Prosecutor's selection of situations and cases, encompassing legal and extra-legal considerations. Notably, the paper emphasises the substantial impact of the ICC Prosecutor's discretionary powers on the advancement of SDG 16, particularly in investigations, case prioritisation, and collaboration with national jurisdictions. Furthermore, the paper recommends proactive cooperation and positive complementarity among states to effectively realise the objectives of SDG 16.

Keywords: Accountability, ICC, the gravity of crimes, Prosecution, Sustainable Development Goal 16.

1. INTRODUCTION

SDG 16 recognises that peaceful and inclusive societies are essential for sustainable development. They form the basis for achieving the other SDGs, such as environmental protection, economic growth, sustainable cities, etc. This interconnectedness of the SDGs underscores the intricate and

interdependent nature of sustainable development, necessitating a holistic approach. The ICC (Court) Prosecutor may be described as the gatekeeper of the Court,¹ who filters the situations and cases eligible for investigations and trials. The Prosecutorial powers are set out in Articles 53 and 54 of the Rome Statute 1998, which begs the question of the scope of the ICC prosecutor powers. It is worth mentioning that the extent of the Prosecutor's powers was one of the contentions of the Rome negotiations.² Eventually, the delegations agreed to grant the Prosecutor broad discretionary powers³. The broad discretionary powers play a crucial role in holding individuals accountable for the most severe crimes of international concern. However, the exercise of prosecutorial discretion at the ICC has raised questions about the boundaries within which it operates.

The paper aims to gain a comprehensive understanding of the intricacies of this process and pinpoint the challenges that the ICC encounters. This paper is structured into nine sections. The first section introduces the topic and sets a background. The second section offers a set of concepts, definitions, and their relationships. Section three begins by laying out the paper's theoretical dimensions, providing a structure for understanding and analysing prosecutorial discretion. Agency and institutional theories are the foundation of the subject matter. The fourth section analyses the debate on broad prosecutorial discretion at the Rome Conference, providing readers with the origin of ICC's broad prosecutorial discretion. The following section briefly examines ICC's mandate. The sixth section addresses the legal framework of the ICC Prosecutor. The seventh section discusses the relationship between prosecutorial discretion and the principle of complementarity. The eighth section gives an overview of the impact of prosecutorial discretion on victims' access to justice. The last section concludes the paper and presents recommendations.

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¹ Lovisa Badagard and Mark Klamberg, "The Gatekeeper of the ICC:Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court"(2017) 48 *Georgetown Journal of International Law* 639- accessible at <<https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-3-The-Gatekeeper-of-the-ICC.pdf>> Last accessed 07 January 2024.

² Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity*(Routledge 2015) 36-40.

³ Chazal (n 2).

2. CONCEPTUAL CLARIFICATIONS

2.1 Discretionary Powers

The ICC Prosecutor's broad discretionary powers are conceptualised as crucial in achieving SDG 16. The Rome Statute empowers the Prosecutor to proactively initiate investigations into any situation within the scope of the Statute.⁴ This provision grants the Prosecutor the autonomy to pursue necessary actions independently and effectively uphold justice. When heinous crimes are committed, the Office of the Prosecutor (OTP) becomes the primary authority responsible for investigations and prosecutions, effectively executing the Court's duty to hold perpetrators accountable and prevent impunity.⁵

2.2 Human Rights

The ICC's jurisdiction encompasses gross violations of international human rights and international humanitarian law. Hence, the ICC focuses on crimes that affect human rights, such as crimes against humanity, genocide, war crimes and crimes of aggression.⁶ Although the ICC is not a human rights court, it is a permanent international criminal Court responsible for protecting human rights, deterring future crimes and maintaining international peace and security.⁷ According to the 1993 Vienna World Conference on Human Rights: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."⁸

2.3 Sustainable Development Goal 16

SDG16 is one of the SDGs that underscores the significance of peaceful and inclusive societies in promoting other SDGs' effectiveness. For this paper, it is understood as a comprehensive goal encompassing access to justice, strong institutions, and peaceful societies. Paraphrasing the preamble of the Rome Statute: Committed to these objectives for the betterment of present and future generations, we are steadfast in our resolve to establish an autonomous and

⁴ Rome Statute 1998, Article 15

⁵ Christopher Safferling, *International Criminal Procedure*(Oxford University Press 2012) 149

⁶ Rome Statute 1998, Article 5; See also Rome Statute 1998, Articles 6-8

⁷ Rome Statute 1998, Preamble.

⁸ World Conference on Human Rights, Vienna, 1993 available at <https://www.ohchr.org/en/about-us/history/vienna-declaration>> last accessed 22 August 2024.

enduring International Criminal Court in collaboration with the United Nations system. This Court will hold jurisdiction over the most egregious crimes that impact the international community.⁹ The betterment of present and future generations underscores sustainability

2.4 Accountability

Accountability is construed as a mechanism for achieving SDG16. The concept of accountability is highlighted in the ICC Rome Statute's preamble and the ICC's mandate. Hence, the ICC Prosecutor's powers play a vital role in closing the impunity gap and promoting accountability for atrocity crimes.

2.5 Sustainable Development

Although the concept of sustainable development is nebulous. Nevertheless, sustainable development refers to continuity, a systematic approach to meeting the current needs of the present generation while preserving future generations' capacity to meet their needs.¹⁰ It emphasises the importance of ensuring the survival of civilisations and the planet by creating a more sustainable environment for future generations.¹¹

3. THEORETICAL FRAMEWORK

3.1 The Fairness-Based Theory

The ICC functions within an avidly politicised environment, wherein the decisions made by the Prosecutor may profoundly influence international relations and peacebuilding efforts.¹² The legitimacy of prosecutorial decisions is of utmost importance and is frequently assessed based on the principles of fairness and impartiality.¹³ It could be inferred that the fairness-

⁹ Rome Statute 1998, Preamble

¹⁰ United Nations, "What is Sustainable Development?" <https://www.un.org/sustainabledevelopment/blog/2023/08/what-is-sustainable-development/Last> accessed 30 July 2024.

¹¹ Ibid.

¹² Maria Varaki, "Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court" (2016) 27 *European Journal of International Law* 769-771.

¹³ Maria Varaki, "Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court" (2016) 27 *European Journal of International Law* 769-788; Alison Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" (2003) 97 *American Journal of International Law* 510 - 552.

based theory¹⁴ underscores the intersection between the legitimacy of the ICC's prosecutorial discretion and the principles of fairness and impartiality. Hence, despite the ICC's legitimacy evolving from the Rome Statute and states' consent, implementing the Court's mandate must be guided objectively with no bias. The ICC's use of prosecutorial discretion is frequently influenced by the interests of State parties and the availability of individuals; in contrast, the Court's judicial activism is primarily directed at the charges presented by the accused individuals.¹⁵ Hence, applying the former requires fairness and objectivity to prevent suspicions of bias or political interference.

Aside from the fairness-based theory, the following theories would also enhance the argument of this paper.

3.2 The Agency Theory

Agency theory focuses on the relationship between one party, known as the "principal", and another party, known as "agent," which requires the former delegating responsibilities and duties to the latter.¹⁶ A principal-agent relationship is established when the principal grants the agent the power to act on their behalf.¹⁷ The Principal-Agent Theory is a theoretical framework that examines the connection between two parties: the Principal, who allocates tasks, and the Agent, who carries out those tasks.¹⁸

Hence, flowing from the above analogy, the Principal-Agent theory posits that the International Criminal Prosecutor serves as the agent of the International community, vested with discretionary authority to advance the aims of Sustainable Development Goal 16. The Principal-Agent theory provides a compelling framework for understanding the role of the ICC Prosecutor. By viewing the Prosecutor as a representative of the international community entrusted with discretionary authority, the theory acknowledges the unique position and responsibility of the Prosecutor. This perspective underscores the importance of the Prosecutor's actions being constructive and purposeful, serving the international community's interests and pursuing

¹⁴ Ibid.

¹⁵ Williams Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court" (2008) 6 *Journal of International Criminal Justice* 731-761.

¹⁶ Paula Dalley, "A Theory of Agency Law" (2011) 72(3) *University of Pittsburgh Law Review* 500-502

¹⁷ Ibid.

¹⁸ Ibid.

justice on a global scale. Emphasising the constructive nature of the Prosecutor's actions highlights the Prosecutor's commitment to peace, justice and strong institutions. Through this lens, the Principal-Agent theory offers a rationale for the empowered position of the ICC Prosecutor. It accentuates the significance of their role in promoting accountability and sustainable development.

3.3 Institutional Theory

Institutional theory is a widely accepted framework for elucidating individual and organisational behaviours. It delves into the evolution of institutions and their role in steering transformation at various levels and within diverse contexts.¹⁹ Furthermore, it underscores the dynamic nature of institutions, asserting that they undergo changes in characteristics and influence over time.²⁰ It is inferred that the ICC is considered an institution with a far-reaching impact on the discretionary powers of the Prosecutor. This influence is exerted through its deeply ingrained interests, widely accepted norms, and established practices of the Court.

However, believing that individual actions and decisions can consistently defy institutional pressures and constraints may be unrealistic. While there may be instances where individuals can resist these influences, the reality is that institutions hold significant power and control over their staff. Moreover, external pressures may influence the actions and activities of individuals within an organisation.

4. THE EXTENT OF PROSECUTORIAL DISCRETION: A DEBATE AT THE ROME CONFERENCE

The fragmentation of international law within the global community necessitates the establishment of unification to address the complexities that arise.²¹ In order to achieve this unification, groups often seek to identify and

¹⁹ Dacin, M., Goodstein, J., Tsui, A., Kosnik, R., & Domal, D. (2002), "Institutional Theory And Institutional Change: Introduction To The Special Research Forum" (2002) *Academy of Management Journal*, 45, 45-56.

²⁰ *Ibid*

²¹ Martti Koskenniemi, *Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law* Int'l Law Comm'n, UN Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (Aug.

interact with one another based on shared ideas and interests.²² By doing so, these groups can unite, promote their common interests, and gain collective power. Within this context, strategic alliance remains a viable means of exerting power and influence in the international community. The Rome Conference demonstrated how strategic alliance bolstered the broad discretionary powers of the ICC Prosecutor. The Prosecutorial powers are stipulated in Articles 53 and 54 of the Rome Statute 1998.

The delegates in the negotiations included individual participants, collective actors, government delegations, Non-Governmental Organisations (NGOs), United Nations diplomats, senior officials, public and private experts, bureau members, and politicians.²³ It is worth mentioning that the Prosecutor's discretionary powers were contentious during the Rome Statute deliberations.²⁴ The Rome Conference highlighted the divergent interests between the United States of America's (USA) pursuit of a "Security Council-controlled Court" and the insistence of certain other nations for a permanent court with universal jurisdiction over war crimes, crimes against humanity, and genocide.²⁵ A plausible justification for the concern by the United States was the potential consequences of having a fully independent ICC Prosecutor. Such a Prosecutor may potentially capitalise on their authority to limit the activities of American military personnel and officials.²⁶ Therefore, the United States aimed to establish a Court with restricted powers.

11, 2006) (Erik Castrén Institute of International Law 2007); Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law? PostmodernAnxieties" (2002)15 *Leiden Journal of International Law* 553.

²² Ibid.

²³ Fanny Benedetti and John Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference, 5 *Global Governance* 16, January- march 1999.

²⁴ Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity* (Routledge 2015) 36-40.

²⁵ Micheal Scharf, "Results of the Rome Conference for an International Criminal Court"(1998)3(10)*American Society of International Law* accessible at <https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court>> last accessed 05 August 2023; Williams Schabas , *An Introduction to the International Criminal Court*(2nd Edition Cambridge University Press 2004)21.

²⁶ Ibid;

Moreover, during the Rome Statute negotiations, there were three main groups. The United Nations Security Council members include China, the United Kingdom, the United States, Russia, and France. Their idea was that the Security Council should closely monitor the ICC. The second group consisted of Mexico, Egypt and India. This group was against the involvement of the Security Council with the Court. In addition, they proposed the inclusion of nuclear weapons in the Rome Statute. The third and most influential was the Like-Minded Group (LMG).²⁷ From initial meetings of the Ad Hoc Committee and the Preparatory Committee, this diverse group consisted of approximately sixty states, including Canada, Australia, Austria, Argentina, European countries, Latin American states and African states. This group proposition was based on jurisdiction over international crimes – crimes against humanity, war crimes, genocide and aggression with a focus on an independent and impartial court jurisdiction over international crimes. They also clamoured for an independent Prosecutor with the authority to initiate proceedings while maintaining a working relationship with the Security Council. Driven by these ideas, the LMG supported the states with less power and agenda to achieve their aims. It also aligned with NGOs; as such, it received support from the NGOs.²⁸ For instance, Amnesty International described the Court as 'a judicial 'body' requiring an independent Prosecutor to ensure whether to investigate or prosecute.'²⁹ The interaction highlights the cooperation between actors and groups to use their ideas to construct the ICC to achieve their interests and identities socially.

Some delegations submitted that the Prosecutor's role under Article 25 was limited.³⁰ Therefore, this restriction, for "political reasons", would curtail the States and Security Council to complain. Drawing from the ' Prosecutor's role in the Statute of the ICTY and ICTR, they proposed a broader prosecutor power to initiate investigations. The ILC's first draft of the Statute, submitted in 1994, granted the prosecutor a restricted power, with

²⁷ Ibid; Philippe Kirsch and John Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process"(1999)93(1)*The American Journal of International Law*,2-12

²⁸ Ibid.

²⁹ Amnesty International, *The International Criminal Court: Making the Right Choices -Part 1* 108-109, January 1997.

³⁰ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras 149-151, paras-149.

the Security Council or State party the power to make referrals.³¹ They canvassed for a Prosecutor empowered with a *proprio motu* to initiate investigations.³² Some delegates criticised granting the Prosecutor the power to commence proceedings *proprio motu* power based on the argument that this would negatively impact the international legal system (it was in its early stage of development).³³They argued that an independent Prosecutor would stretch "the limited resources of the Prosecutor with frivolous complaints"³⁴ The USA vehemently opposed the Prosecutor's independence. It argued for a Court whose powers largely depended on the Security Council referrals.³⁵Although the USA did not contest the likelihood of the Prosecutor's position becoming political, it posited that a Prosecutor with a self-initiating power is likely to overwhelm the Court with complaints, "political decision-making," "risk diversion of resources" and "confusion."³⁶Likewise, some delegates agreed that the vast discretionary powers of the Prosecutor are likely to have adverse effects. They submitted that this would indirectly politicise the Court, with accusations of a politically motivated prosecutor.³⁷ Hence, they suggested that judicial review by the Pre-Trial Chamber (PTC) would check for excesses or abuses of the

³¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras 149-151, Paras-149 Silvia Fernandez de Gurmendi, "The Role of the Prosecutor" in Roy Lee(ed), *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations and Results* (Kluwer Law International 1999).175; Draft Statute for the International Criminal Court, articles 21,23,1994, https://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1994.pdf.

³² *Ibid*, paras, 149.

³³ Report of the International Law Commission on the work of its forty-six session, 2 May -22 July 1994;Official Records of the General Assembly , Forty-ninth session, supplement No.10, Draft Statute of the International Criminal Court p.46.

³⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras149-151, para 151

³⁵ David Scheffer, Ambassador, at Large for War Crimes Issues, Address at American University Washington, D.C ,September 2009, http://www.state.gov/ww/policy_remarks/2000/000914_scheffer_au.html.

³⁶ David Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S Delegation to the U.N Diplomatic Conference on the Establishment of a Permanent International Criminal Court Before the Committee on Foreign Relations of the U.S Senate, July 23, 1998.

³⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, paras149-151.,

'Prosecutor's powers. The Delegates stressed that judicial review would serve as an adequate balance without affecting the Prosecutor's independence.³⁸

On the other hand, an organised group of over sixty states called 'Like-minded' states proposed a more independent Prosecutor.³⁹ The Lawyers Committee for Human Rights asserted that if the Court actively worked towards the proscription and punishment of most serious crimes of concern to the international community, the Prosecutor must be given a degree of independence.⁴⁰ This group of delegates advanced the Prosecutor's autonomy as a basis for efficient prosecution at the ICC. Their recommendation included the Prosecutor's power to trigger investigative or prosecution proceedings on her initiative.⁴¹ For instance, Amnesty International proposed that the Court is "a judicial body, its Prosecutor must have the independence to decide whether to investigate or prosecute."⁴² The preparatory committee also supported the proprio motu power of the Prosecutor during their meeting. Subsequently, a division arose between States on whether to grant the Prosecutor a proprio motu power or not. The proponents posited that a broad prosecutorial power would ensure the Prosecutor fulfils his duties from their perspective; an independent prosecutor would likely promote the administration of justice.⁴³ Therefore, this will necessitate the independence of the Prosecutor to investigate and prosecute.⁴⁴ This dichotomy between the States reflected that prosecutorial independence was at the heart of a competent criminal court. Prosecutorial independence could underscore the legitimacy and competency of the ICC. The supporters of an independent Prosecutor submitted that a criminal court subject to the mandatory powers of the Security Council would undermine the "credibility and moral

³⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Para. 150.

³⁹ Williams Pace and Mark Thieroff, "Participation of Non-Governmental Organisations" Roy Lee(ed), *The International Criminal Court: The Making of the Rome Statute: The Issues, Negotiations, Results* (1999)392-393.

⁴⁰ Lawyers Committee for Human Rights, *The accountability of an Ex-Officio Prosecutor* 6(1998)

⁴¹ *Ibid.*.

⁴² Amnesty International, *The International Criminal Court :Making the Right Choices –Part 1* 108-109, January 1997, [http://web.amnesty.org/library/pdf/IOR400011997ENGLISH/\\$File/Ior4000197.pdf](http://web.amnesty.org/library/pdf/IOR400011997ENGLISH/$File/Ior4000197.pdf). last accessed 29 July 2024.

⁴³ *Ibid.*

⁴⁴ Amnesty International, *The International Criminal Court: Making the Right Choices, Part 1*, June , 1997.

authority of the Court."⁴⁵ By implication, the Court's legitimacy could be subverted by political influence while making the Court a pawn in the hands of external powers.⁴⁶ The opponents cautioned that an independent prosecutor with broad discretionary powers would leave the Prosecutor with unchecked powers, which, in turn, would 'embroil the Court in controversy, political decision-making, and 'confusion'.⁴⁷ Both sides of the delegates were for and against endorsing politically motivated prosecutors.

Consequently, a consensus emerged amidst the division between the delegates. They unanimously consented to provide the Prosecutor with independent power to initiate investigation and prosecution.⁴⁸ However, the Prosecutor's power would be subject to checks by the PTC at an early stage of an investigation.⁴⁹ The compromise reached is embodied in Article 15, particularly Article 15(3) of the Rome Statute. It is provided that the Office of The Prosecutor's investigative efforts and resources should be directed at the perpetrators that bear the most tremendous responsibility for committing the most serious crimes of international concern.⁵⁰ The compromise is reflected in the discretionary powers stipulated in articles 53 and 54 of the Rome Statute. At the same time, these powers are propelled by legislative backing. Thus, history demonstrates that the context that led to the powers is political; the Rome Statute is an outcome of political alliances and formation, likewise the broad prosecutorial discretion. Section 5 will examine the mandate of the ICC and its relationship with SDG16.

5. THE ICC AND ITS MANDATE

⁴⁵ United Nations General Assembly Official Records, Report of the Adhoc Committee on the Establishment of an International Criminal Court, para.121, United Nations Document Doc A/50/22, Fiftieth Session, 6 September 1995.

⁴⁶ Ibid.

⁴⁷ Statement of David Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S Delegation at the U.N Diplomatic Conference on the Establishment of a Permanent International Criminal Court, The Committee on Foreign Relations of the U.S Senate, 23 July 1998.

⁴⁸ Zoe Pearson, "Non-Governmental Organisations and the International Criminal Court: Changing Landscapes of International Law" (2006) 39(2) *Cornel International Law Journal* 243-284.; See also Chazal (n 2).

⁴⁹ Ibid

⁵⁰ ICC, Office of the Prosecutor, Paper on some Policy issues before the Office of the Prosecutor, September 2003.

The preamble of the Rome Statute connotes that prosecuting individuals responsible for gross violations of human rights and international humanitarian law is the mandate of the ICC. It stipulates:

Recognising that such grave crimes threaten the peace, security and well-being of the world.⁵¹

Determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.⁵²

Resolved to guarantee lasting respect for and the enforcement of international justice.⁵³

The provided excerpts serve as a powerful reminder of the crucial mission of the ICC. Article 1 of the Rome Statute reaffirms the ICC's role as a permanent body with the authority to prosecute individuals responsible for the gravest international crimes. This institution is designed to complement national courts and play a pivotal role in upholding the mandate, bridging the gap between the ICC and the realisation of SDG16. These passages underscore the vital importance of peace, justice, and accountability on a global scale, acknowledging the serious threat posed by "grave crimes." The ICC is unwavering in its commitment to ensure continued respect for the enforcement of international justice,⁵⁴ a fundamental pillar in achieving SDG 16. The clear use of "lasting respect" signifies the vital need for continuity and sustainability in enforcing international justice. It's crucial to underscore that "continuity" is imperative for securing lasting peace and justice within the international community.

Having examined the mandate of the ICC, section 6 will analyse the legal framework of the ICC Prosecutor to comprehend how the agreement reached during the Rome Negotiations influences their legal responsibilities.

6. LEGAL FRAMEWORK OF PROSECUTORIAL DISCRETION AT THE ICC

The Prosecutor's powers to commence legal proceedings are stipulated in articles 17, 53(2) (a) (b)(c), 54, and 58. Article 53(1) (a)(b)(c) outlines the specific requirements that must be met for the Prosecutor to proceed with an

⁵¹ Rome Statute 1998, Preamble 3.

⁵² Rome Statute 1998, Preamble 4.

⁵³ Rome Statute 1998, Preamble 11.

⁵⁴ Rome Statute 1998, Preamble 11.

investigation. Article 15(1) & (2) confers upon the Prosecutor the authority to initiate an investigation entirely on their motion, upon receiving information from any source, without requiring a referral from any State or the Security Council. More importantly, the OTP can autonomously determine the approach to conducting investigations and how to present evidence throughout the trial.⁵⁵

The Prosecutor will initiate an investigation once he has assessed the available information.⁵⁶ When the Prosecutor initiates an investigation, it is his obligation "to establish the truth" and to "investigate incriminating and exculpatory circumstances equally."⁵⁷ Accomplishing these requirements imposes a credible condition that obligates the Prosecutor to refrain from politicising investigations and prosecutions. According to the Statute, the Prosecutor is empowered to initiate investigations only if they have determined that there are sufficient justifiable reasons to proceed. The Prosecutor will evaluate three criteria to determine whether to commence an investigation. The grounds for initiating an investigation are as follows: (a) "The available information to the Prosecutor indicates that a crime falling under the jurisdiction of the Court has been or is being committed." (b) The case meets the requirements for admissibility as stated in Article 17(c) Despite the crime's seriousness and the victims' interests, there are significant reasons to believe that conducting an investigation would not serve the interests of justice.⁵⁸

However, suppose the Prosecutor concludes that there is no reasonable basis to proceed, which is established based on subparagraph (c). In that case, the Prosecutor is obliged to inform the Pre-Trial Chamber.⁵⁹ This provision seems to scrutinise the Prosecutor's powers in this respect. Arguably, the content of this section stipulates a threshold for judicial scrutiny or review of the Prosecutor's authority. Article 531 enables the PTC to re-evaluate the OTP's decision where 'an investigation would not serve the "interests of justice."⁶⁰ Article 15(3) of the Statute grants victims the right to be heard by a

⁵⁵ Rome Statute 1998, Article 54; Article 13(c); Article 15(3); ICC Rules, Rule 48; Rule 63(5); International Criminal Court, Office of the Prosecutor, accessible at <[https:// www.icc-cpi.int/about/otp](https://www.icc-cpi.int/about/otp)> last accessed on 11 January 2024.

⁵⁶ Rome Statute 1998, Article 53(1).

⁵⁷ Rome Statute 1998, Article 54(1)(a).

⁵⁸ Rome Statute, Article 53 (1) (c).

⁵⁹ Rome Statute, Article 53(3) (a).

⁶⁰ Rome Statute, Article 53(3) (b).

PTC when the Prosecutor has determined a reasonable basis for conducting an investigation.

The capacity of the Prosecutor to interpret and apply "the interests of justice" is susceptible to review and ruling by the Pre-trial Chamber. A corollary of these standards is the requirement to adhere to checks and balances for assessing the Prosecutor to forestall oversights from the latter. This facilitates victims' furnishing the PTC with necessary information concerning crimes committed—the judicial scrutiny by the PTC proceeds regardless of whether the OTP decides to initiate prosecution. Accordingly, with the requisite information, the PTC can proficiently assess the Prosecutor's decision not to continue an investigation. This judicial review does not constitute an appeal against the Prosecutor's decision; instead, it examines the factors and process that went into making that decision.

Interestingly, in some domestic jurisdictions, such as the United Kingdom, the Chamber's authority to review the Prosecutor's decision to either press charges or to end them is well-founded.⁶¹ Often, a review may be required when there is a reason to believe that the Prosecutor erroneously interpreted the stipulations of the Statute while making the decision.⁶² Therefore, it can be deduced that the PTC's authority to regulate the Prosecutor's decision-making authority appears to harmonise the Prosecutor's powers with the principle of legality; the Prosecutor's powers arise from legality, and both co-exist. Thus, the rationale for PTC's authorisation could be legality and checks. Mireille Delmas-Marty argues that Article 53 balances strict adherence to the law and the Prosecutor's discretion.⁶³ The Prosecutor's decision to refrain from conducting an investigation may be justified on the basis that there are significant grounds to believe that such an investigation would not be in the best interests of justice, irrespective of the gravity of the crime or the concerns of the victims, as stated in Article 53. With the provision that prosecutorial powers are not absolute. The PTC's judicial

⁶¹ See *R(Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] 1AC 800 ; *Matalulu v Director of Public Prosecution[s2003]* 4 LRC 712,736 .

⁶² GCHQ case, *Council of Civil Service Unions v Minister for the Civil Service*[1984] UKHL, Statement of Lord Diplock, in the House of Lords.

⁶³ Mireille Delmas-Marty, "Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC"(2006) 4 *Journal of International Criminal Justice* 10.

confirmation of the selection of situations for investigation aimed to ensure fairness and impartiality in the process.⁶⁴

In 2011, Schabas presented an alternative perspective in his book, comparing the Prosecutor's role to that of an investigating magistrate or judge 'd'instruction in civil law countries.⁶⁵ He suggests that this duty is different from what is relevant in a primarily adversarial context with a prosecuting attorney of the common law.⁶⁶ Schabas emphasises that the Prosecutor's role at this stage must be unbiased and objective, devoid of political factors. Schabas underscores the significance of an unbiased and unprejudiced Prosecutor in common law proceedings, recognising that politics influence the selection of situations and cases.⁶⁷ Therefore, the 'PTC's checks and balances are not sufficient. By implication, it can be assumed that the ICC Prosecutor is not accountable to the PTC. He is empowered to select instances from situations depending on his judgment. Consequently, from the 'Prosecutor's selection emerges the classification of victims that could potentially be qualified to access justice with the opportunity to make their interests known to the Court. The consideration of the possibility that the selection of cases by the ICC Prosecutor may not adequately represent all potential victims raises concerns about the fairness and effectiveness of the ICC's proceedings.

From this section, it is noted that the ICC Prosecutor plays a critical role in determining the selected cases and situations as well as victims' access to justice. The selection of cases and decisions not to explore specific situations can lead to some potential victims going unnoticed. The Prosecutor has a crucial role in victims' access to justice at the ICC. This section has established the legal basis of the ICC Prosecutor's powers. Now that the legal framework is set, the following sections will examine the role of the Prosecutor in SDG 16.

⁶⁴ Luis Moreno Ocampo, "The International Criminal Court in Motion" in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (MartinusNijhoff 2009)13.

⁶⁵ Williams Schabas, *An Introduction to international Criminal Court*.(6th Edition, Cambridge University Press 2020)249-300.

⁶⁶ Ibid.

⁶⁷ Ibid.

6.1 Gravity of the Crime

An analysis of the legal framework for prosecutor powers would not be complete without delving into the gravity of crime as a factor. Sufficient gravity is a threshold for the initiation of investigation and prosecution.⁶⁸ As noted in Section 5, the ICC Prosecutor is involved in promoting peaceful and inclusive societies. The goal of SDG 16 is to promote peaceful and inclusive societies, which conforms with the ICC's mandate to investigate and prosecute crimes that threaten international peace and security. Hence, these crimes that threaten international peace and security are severe in nature; they can also be referred to as gross crimes "that deeply shock the conscience of humanity."⁶⁹The severity of these crimes has been described as "sufficient gravity" in Article 17(1) (d) of the Rome Statute. After considering the severity of crimes, the ICC Prosecutor would have to determine if the affected national jurisdiction has commenced investigations or prosecution into the concerned crimes.

Based on states' sovereignty, one may argue that the ICC's jurisdiction is restricted to states that have consented to its power. While the ICC's jurisdiction may not be triggered for a consenting state, it could undermine its legitimacy and limit its effectiveness. For instance, given that the USA is not a State Party to the Rome Statute, its authority over the USA is restricted to specific circumstances. The George W. Bush administration displayed discontent towards the ICC by not signing the Rome Statute and enacting the American Service Members Protection Act.⁷⁰ The "Hague Invasion Act" is a statute granting the president the authority to free individuals from the ICC who are allied countries.

Additionally, it forbids the USA from providing any assistance or backing to the ICC.⁷¹ The Bush administration also sought to establish Bilateral Immunity Agreements (BIAs), also known as Article 98 Agreements,

⁶⁸ Rome Statute 1998, Article 17(1) d.

⁶⁹ United Nations International Law Commission, Draft Articles on the Prevention and Punishment of Crimes against Humanity, 2019, Adopted by the International Law Commission at its 71st Session and submitted to the General Assembly, Session (A/74/10)

⁷⁰ Helen Clapp and Kathryn Sikkink, From "Invade the Hague" to "Support the ICC": America's shifting stance on the International Criminal Court, April 17 2022 available at < <https://scholar.harvard.edu/ksikkink/blog/invade-hague-support-icc-america-s-shifting-stance-international-criminal-court>> last accessed 25 July 2024

⁷¹ Ibid.

wherein both nations mutually agreed to refrain from extraditing present or former government officials, military personnel, or residents of the other party to the ICC.⁷² Arguably, these BIAs preclude the ICC from assuming jurisdiction over Americans in foreign countries, provided such countries do not surrender them. One implication of ICC's limited jurisdiction due to states sovereignty is that it undermines its ability to effectively hold individuals accountable for gross violations of human rights and international humanitarian law. On the other hand, it is argued that the USA's refusal to consent to the Rome Statute and the enactment of the American Service Members Protection Act may demonstrate a lack of trust in the ICC's jurisdiction and legitimacy. This lack of trust in ICC's jurisdiction and legitimacy could be a consequence of the USA's exceptionalism. USA's exceptionalism may be defined as the notion that the United States of America is a unique and morally superior nation due to its historical, philosophical, or religious factors, with a special responsibility in international affairs.⁷³ In the past, the White House made a bold attempt to amend Article 98 of the Rome Statute, aiming to shield American citizens, military personnel, and peacekeepers from the legal reach of the Court.⁷⁴ Demonstrating a solid stance, the United States issued a warning to withdraw military assistance from nations that declined to endorse the revised Article 98.⁷⁵ This action reveals a concerning lack of accountability and creates a protective shield for state-sponsored offences.⁷⁶ This theory makes the USA a distinctive state from its fellow developed, industrialised, developing and underdeveloped states. In addition, USA's exceptionalism questions the principle of equality of states as entrenched in Article 2(1) of the United Nations Charter. It invariably restricts the scope of ICC's capacity to preserve SDG16.

Be that as it may, the concept of "gravity" holds significant relevance when considering the legality of the ICC.⁷⁷ The Rome Statute's rules are intricately

⁷² Ibid.

⁷³ Adam Volle, "American Exceptionalism" Encyclopedia Britannica, 6 February 2023, <https://www.britannica.com/topic/American-exceptionalism>. Accessed 23 August 2024.

⁷⁴ Michael Welch, *Crimes of Power & States of Impunity: The U.S. Response to Terror* (Rutgers University Press 2009)162.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Margaret M. deGuzman, "Legitimacy, Gravity, and Global Community" in Margaret M.deGuzman (ed) *Shocking the Conscience of Humanity: Gravity and*

intertwined with the idea of gravity, which plays a crucial role in defining the Court's jurisdiction. The force of gravity is a criterion for the Court's jurisdiction, and the Prosecutor must consider this criterion while choosing situations and cases.⁷⁸ Moreover, the relative gravity of a situation plays a crucial role in the Prosecutor's discretionary power, influencing how the Court's legitimacy is perceived.⁷⁹ Article 53(1) c and (2)(c) of the Rome Statute grants the Prosecutor discretionary or relative gravity to choose situations and cases, while Articles 54(1)(b), 17(1)(b) and 53(2) provides for legal gravity threshold.⁸⁰ It is inferred that the Prosecutor possesses significant latitude in using legal criteria, such as determining "sufficient gravity". A cursory look at the provisions mentioned above illustrates that there is a marked difference between Articles 54(1)(b), 17(1)(b) and 53(2), the legal interpretation of gravity and the Prosecutor discretion on Articles 53(1) c and (2)(c), non-legal considerations. Both categories of provisions extend the Prosecutor's powers to implement SDG16. It is noteworthy that due to the large scale of violence and the considerable number of alleged perpetrators involved in armed conflict, it is usually not feasible to try all perpetrators. One implication of this complexity is that selectivity is inevitable for investigation and prosecution,⁸¹ reinforcing the argument on the marked difference between prosecutorial discretion in applying legal thresholds, including "sufficient gravity" as opposed to prosecutorial discretion, including extra-legal considerations such as the interests of justice. It appears the former is inexhaustible, while the latter limits the Prosecutor's powers.

According to the preamble of the Rome Statute and the principle of complementarity, the concept of gravity not only triggers the jurisdiction of the ICC but also functions as a threshold for the jurisdiction of the ICC, guaranteeing that only the most severe crimes are subject to prosecution. This strategy is regarded as essential in upholding the moral and sociological

Legitimacy of International Criminal (1st Edition, Oxford University Press 2020) 10-22.

⁷⁸ Rome Statute 1998, Article 17(1) d.

⁷⁹ Ignaz Stegmüller, "Interpretative Gravity under the Rome Statute" in Carstan Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2014) 609-641; Farid Rashid, "The hidden discretionary capacity of the ICC Prosecutor: revisiting the analysis of legal and relative gravity" (2020) 24 *The International Journal of Human Rights* 773 – 795.

⁸⁰ *Ibid.*

⁸¹ Farid Rashid, *The hidden discretionary capacity of the ICC Prosecutor: revisiting the analysis of legal and relative gravity* (2020) 24 *The International Journal of Human Rights* 773 - 795

legitimacy of the Court and ensuring its international credibility.⁸² Based on the gravity of the situation, the Prosecutor's discretionary decision-making is said to improve the Court's legitimacy.⁸³ Guzman proposes the inclusion of relative gravity in selecting cases by evaluating different points of view on the significance of gravity.⁸⁴

Ford's study found that gravity's impact on the ICC significantly affects its proceedings and legitimacy.⁸⁵ A survey conducted on the severity of the victim's injury and the nature of the crime (mass atrocities) revealed that these factors are essential in determining the severity of the crimes. However, characteristics such as the number of secondary victims or the time frame of the crimes were not found to be strong predictors.⁸⁶ Therefore, Ford recommends ICC's definition of gravity be adjusted to align with people's expectations.⁸⁷

In summary, arguably, selectivity is indispensable for investigations and prosecutions, given the limited resources and time constraints. Therefore, to accelerate adequate trials and achieve justice, the ICC Prosecutor will inadvertently prioritise some cases while relegating other situations in compliance with the legal interpretative threshold of "sufficient gravity" and the extra-legal considerations. This explains the limitations of international criminal trials in addressing atrocities.

6.2 Relevant Case Laws from the ICC on the Exercise of Prosecutorial Discretion

According to Kim, SDGs are firmly rooted in international law and are in line with commitments expressed in various international legal instruments.⁸⁸ It is crucial to recognise the inherent connection between international law and these paramount global priorities. This linkage underscores the vital role that international legal frameworks play in advancing the SDGs and promoting sustainable development worldwide.⁸⁹ Despite its fragmented

⁸² Margaret M. deGuzman, "Gravity and Legitimacy of the International Criminal Court" (2008)32(5) *Fordham International Law Journal* 1400-1418.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Stuart Ford, "The Maning of Gravity at the International Criminal Court: A Survey of the Attitudes about the Seriousness of Mass Atrocities"*4 U.C. Davis Journal International Law . & Policy* ' 209 (2018)211-220.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Rakhyun Kim, "The Nexus between International Law and the Sustainable Development Goals" (2016) *Review of European, Comparative and International Environmental Law*, 15-25.

⁸⁹ *Ibid.*

nature, international law establishes a normative framework for the SDGs.⁹⁰ The role of the ICC Prosecutor in promoting SDG16 is supported by Article 17(1)(d) of the Rome Statute.

Article 17(1)(d) of the Rome Statute stipulates that the ICC can declare a case inadmissible if it lacks sufficient gravity to warrant further actions for investigations into a situation under Article 53(1) and 15(3)-(4). In this stance, gravity is a prerequisite for the admissibility of a case at the ICC. A classic example is illustrated in the Iraq/UK Situation. In 2014, the ICC initiated a preliminary examination to investigate allegations of war crimes committed by British forces in Iraq.⁹¹ ECCHR and Public Interest Lawyers presented compelling evidence demonstrating the severe widespread abuse of detainees by UK armed forces. In 2017, the Office of the Prosecutor (OTP) confirmed that there were reasonable grounds to believe that UK forces in Iraq had perpetrated war crimes, such as wilful killings, torture, inhumane/cruel treatment, acts that violate human dignity, rape, and other forms of sexual abuse. Nevertheless, the initial investigation was terminated in 2006 due to insufficient gravity, per article 17(1)(d) of the Statute. In 2019, a subsequent submission highlighted the UK's failure to institute legal action against incidences of domestic torture.⁹² The ICC prosecutor had concluded a preliminary investigation into allegations of international crimes perpetrated by UK soldiers in Iraq. The Final Report confirms that the UK's internal investigations were deemed genuine.⁹³ However, the ICC has jurisdiction over the alleged crimes, considered sufficiently grave to justify an investigation. The Prosecutor determined that the existing investigations in the UK were genuine, as there was insufficient evidence to imply otherwise. Consequently, a full investigation was unnecessary, given the UK's investigation into the situation. This underscores the function of ICC's complementarity; even if the ICC decides to initiate an investigation or prosecution, such an attempt may be restrained, provided that the affected domestic jurisdiction is able and willing to prosecute and open a genuine investigation. The ICC's complementarity principle is valid in this situation

⁹⁰ Ibid.

⁹¹ European Center for Constitutional and Human Rights "War Crimes by UK forces in Iraq: ICC ends Preliminary Investigation" <https://www.ecchr.eu/en/case/war-crimes-by-uk-forces-in-iraq> last accessed 23 July 2024.

⁹² Ibid.

⁹³ Patrick Butchard, "UK War Crimes in Iraq: The ICC Prosecutor's Report" 2021 available at <https://commonslibrary.parliament.uk/uk-war-crimes-in-iraq-the-icc-prosecutors-report/> last accessed 26 July 2024.

as it highlights the significance of domestic jurisdictions in prosecuting and investigating alleged crimes. The ICC Prosecutor allowing the UK to investigate alludes to its collaboration with national authorities, which could strengthen partnerships with the latter to build capacity and promote a culture of accountability, as indicated by SDG16.

On the other hand, the ICC's initial hesitation to pursue the investigation may indicate bias, implying that the outcome would have been different if the state in question had been a third-world country. However, it is crucial to emphasise that the ICC's primary mandate is to ensure justice and accountability for grave international crimes. While geopolitical considerations may impact the ICC's decision-making process, it is noteworthy that the Court's independence and impartiality are fundamental principles that guide its actions. Therefore, any initial reluctance to commence an investigation should be thoroughly examined to ensure compliance with fairness and impartiality. By examining the evidence and potential external factors influencing alleged crimes and by considering whether specific individuals or groups directly orchestrated actions, the ICC contributes to the pursuit of justice, accountability, and strong institutions as outlined in SDG16.⁹⁴ These efforts are vital for creating a more just and peaceful society, which aligns with the overarching goal of SDG16.

In the investigation of alleged crimes against humanity during the post-election violence in Kenya, there was apparent judicial oversight of the Prosecutor's use of their initiative powers.⁹⁵ The confirmation of charges hearing, spanned from 21 September to 5 October 2011. The judges confirmed the charges on 23 January 2012, but the Prosecutor withdrew them on 11 March 2013; ultimately, the charges were withdrawn due to a lack of

⁹⁴ See *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* Public redacted version of the "Corrected Version of the 'Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf'" With a Public Redacted Annex Containing the Full List of Charges Confirmed against the Accused Pre-Trial Chamber 1, ICC-01/12-01/18-767-Corr-Red-tENG 8 May 2020, pp 44-69.

⁹⁵ *Situation in the Republic of Kenya, Decision Assigning the Situation in the Republic of Kenya to the Pre-Trial Chamber II*, 6 November 2009, No ICC-01/09-1; *Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, Pre-Trial Chamber II*. ICC-01/09, 26 November 2009.

compelling evidence.⁹⁶ The legal proceedings against Mr. Kenyatta were terminated on 13 March, 2015.⁹⁷ While the outcome presents an opportunity to strengthen the case with additional supporting evidence, the Prosecutor could not submit sufficient evidence. Consequently, the case was closed. Kenyatta's British lawyer, Steven Kay, stated that the Court and its Prosecutors "owed Kenyatta an apology for bringing proceedings based on false witnesses and impugning his integrity."⁹⁸ The then ICC prosecutor, Fatou Bensouda, withdrew allegations against President Uhuru Kenyatta, citing harassment and intimidation of potential witnesses by the Kenyan government. Bensouda stated that based on the evidence available, she had no choice but to withdraw the charges. However, she left open the possibility of bringing a new case if additional evidence emerges.⁹⁹ In her words: "This is a painful moment for the men, women and children who have suffered tremendously from the horrors of the post-election violence, and who have waited, patiently, for almost seven years to see justice done."¹⁰⁰

The decision to drop charges against President Kenyatta raises questions about the strength of the evidence supporting the allegations of crimes against humanity. While the then Prosecutor, Bensouda, cited harassment and intimidation of witnesses by the Kenya Government, Kenyatta's lawyer alleged the use of false witnesses by the ICC. Both propositions centered on evidence-gathering, obtaining credible witnesses, and lack of cooperation between the ICC and Kenya government. Withdrawing charges due to insufficient evidence undermines the credibility of the entire case, which could mean an absence of thorough investigation rather than a need for additional evidence. The Kenyan situation reiterates that international cooperation, as stipulated by the Preamble of the Rome Statute is indispensable for carrying out the Court's mandate. This situation may sabotage access to justice.

⁹⁶ Kenyatta Case, *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11 available at <https://www.icc-cpi.int/kenya/kenyatta> last accessed 3 August 2024.

⁹⁷ Ibid.

⁹⁸ Owens Bowcourt, *The Guardian* "ICC Drops Murder and Rape Charges against Uhuru Kenyatta (2014) available at <https://www.theguardian.com/world/2014/dec/05/charges-humanity-charges-kenya-president-dropped-uhuru-kenyatta> last accessed 20 August 2024.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

In addition, Clark underscores the concept of "distance", which encompasses physical, philosophical, and personal aspects.¹⁰¹ He emphasised how the ICC, headquartered in The Hague, maintains a physical, philosophical, and personal separation from the affected communities, significantly impacting these communities.¹⁰² This analysis brings to light the complexities of this distance and its profound impact on the relationship between the ICC and Africa.¹⁰³ Clark alludes to how distance has made the Court vulnerable to manipulation by states, leading to reduced incentives for peace negotiations and increased militarisation in certain areas.¹⁰⁴ The concept of "distance" and its impact on the relationship between the ICC and Africa is closely related to SDG 16, which aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels. By examining how the ICC's physical, philosophical, and personal separation from affected communities impacts them, we can better understand the challenges and opportunities for achieving the targets of SDG16, such as promoting the rule of law, reducing violence, and ensuring equal access to justice. This connection highlights the importance of addressing issues of distance and impact on communities in the context of SDG16 and peacebuilding efforts.

7. RELATIONSHIP BETWEEN PROSECUTORIAL DISCRETION AND THE PRINCIPLE OF COMPLEMENTARITY

One of the key aspects to consider when examining prosecutorial discretion at the ICC is the principle of complementarity. Notably, the ICC is not a court of first instance; hence, it does not have precedence over domestic jurisdictions.¹⁰⁵ Article 17 of the Rome Statute provides that the ICC should only intervene when national legal systems are unable or unwilling to genuinely prosecute individuals responsible for the most serious crimes of international concern. Hence, this principle of complementarity regulates the relationship between the ICC and national courts in applying international criminal law by highlighting state sovereignty. It is enforced through Articles

¹⁰¹ Phil Clark, *Distant Justice: The Impact of International Criminal Court on African Politics* (Cambridge University Press 2018) 5.

¹⁰² *Ibid.*

¹⁰³ *Ibid* (22-23).

¹⁰⁴ *Ibid* (n 303).

¹⁰⁵ Rome Statute 1998, Article 17 & 53.

17 and 53 of the Rome Statute, allowing ICC jurisdiction in cases where a state cannot investigate to protect the alleged perpetrator. The principle of complementarity mandates that the ICC assess the capacity of national jurisdictions to handle cases,¹⁰⁶ striking a balance between individual state jurisdiction and international responsibility.¹⁰⁷ It limits the ICC's authority and fosters collaboration between the Court and national authorities,¹⁰⁸ strengthening international pursuits to address and prevent impunity. The complementarity principle emphasises the role of the ICC Prosecutor in promoting SDG16 either through cooperation with domestic jurisdiction in investigations and prosecutions or by granting national authorities the autonomy to initiate investigations within their jurisdictions. According to Article 17, the primary rule is that domestic jurisdiction precedes the ICC on allegations of severe human rights violations and international humanitarian law.

However, there were situations where the ICC refused to comply with the principle of complementarity, which is vividly illustrated in the Simone Gbagbo case.¹⁰⁹ For context, Simone Gbagbo received a 20-year prison term in Côte d'Ivoire for the offences of inciting unrest, orchestrating armed groups, and destabilising national security.¹¹⁰ However, the ICC considered her case admissible due to the lack of similarities between the domestic charges and counts of crimes against humanity.¹¹¹ ICC's attempt at prosecuting Simone Gbagbo after her conviction at the domestic court questions the efficiency of Article 17 of the Rome Statute 1998. Is the

¹⁰⁶ Office of the Prosecutor, ICC, Informal Expert Paper "The principle of complementarity in practice" (2003) available at <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> last accessed 31 July 2024.

¹⁰⁷ Markus Benzing "The complementarity regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against Impunity" (2003) 7 *Max Planck Yearbook of United Law* 600

¹⁰⁸ Michael Newton "The complementarity conundrum: Are we watching evolution or evisceration?" (2010) 8 *Santa Clara Journal of International Law* 119.

¹⁰⁹ Prosecutor v Simone Gbagbo, Decision on further submissions on issues related to the admissibility of the case against Simone Gbagbo, Pre-Trial Chamber, ICC-02/11-01/12-44, 28 August 2014.

¹¹⁰ The Guardian, Simone Gbagbo goes on trial accused of crimes against humanity (2016), available at <https://www.theguardian.com/world/2016/may/31/simone-gbagbo-trial-crimes-against-humanity-ivory-coast><https://www.amnesty.org/en/latest/press-release/2016/05/cote-divoire-trial-of-simone-gbagbo-opens/> last accessed 31 July 2024.

¹¹¹ Ibid 70.

complementarity principle a double-edged sword? Heller criticised the Simone Gbagbo case ruling, arguing that it contradicts complementarity principles.¹¹² He contends that Article 17, which requires the same person's requirement, is too restrictive and contradicts the aims of complementarity. He concluded that if a state sincerely tries prosecuting a suspect at the domestic jurisdiction, their case becomes inadmissible at the ICC.¹¹³ In addition, it could also be argued that given the difference in the elements of crimes prosecuted in Cote de Voire (domestic jurisdiction) and the crimes against humanity at the ICC, the ICC trial does not directly imply double jeopardy.

Furthermore, compliance with the principle of complementarity is demonstrated in the Kenya case. In 2010, the ICC began legal proceedings in Kenya to address alleged crimes against humanity committed during the post-election violence in 2007/2008. The Kenyan government collaborated with the ICC through the International Crimes Act and other judicial systems.¹¹⁴ However, the ICC took control due to the Parliament's inability to establish a Special Tribunal. Despite efforts, local courts failed to adequately examine responsible individuals, leading to the ICC assuming jurisdiction; however, the ICC withdrew and dismissed the allegations in 2015 and 2016 on the grounds of insufficient evidence, which ended the quest for justice for both victims and perpetrators.¹¹⁵ The ICC was satisfied that Kenya had no genuine investigation, which could mean that the former was safeguarding against exceeding its powers and also precluding the replication of criminal proceedings.

The principle of complementarity, as outlined in the Rome Statute, is crucial for ensuring that national jurisdictions take the primary responsibility for investigating and prosecuting international crimes, which is fundamental to achieving SDG16's objectives. The effectiveness and fairness of the ICC's application of the complementarity principle have significant implications for

¹¹² Jon Keller, "Radical Complementarity" (2016)14(3) *Journal of International Criminal Justice* 638-641.

¹¹³ *Ibid*

¹¹⁴ International Criminal Court, Situation in the Republic of Kenya, available at <https://www.icc-cpi.int/kenya> last accessed 31 July 2024.

¹¹⁵ Muema Wambua, "The Complementarity Principle could increase the ICC's Global Legitimacy" (2021) Available at <https://blogs.lse.ac.uk/africaatlse/2021/08/11/complementarity-principle-increase-international-criminal-court-icc-bias-glo> last accessed 31 July 2024; *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11

the goal of achieving access to justice and building strong, accountable institutions globally. It also reveals that domestic jurisdictions are essential for achieving SDG16. National authorities could assume jurisdiction to work towards SDG16 or cooperate with the ICC.

Furthermore, political considerations and reciprocity substantially impact the establishment and operation of the ICC and its operations within the international community.¹¹⁶ Political considerations may shape and determine the level of support or resistance towards the ICC's jurisdiction and operations. The framework and systems of international responsibility underscore the longstanding significance of reciprocity in international law and the inherent constraints that arise from international law's axial design when determining precise penalties for violations of community duties.¹¹⁷ Hence, reciprocity as a basis for international relations may be a double-edged sword and deployed as a carrot-and-stick approach by states to limit prosecutorial powers. Even if the Prosecutor attempts to initiate an investigation or open a situation, non-cooperation from states might hinder the progress of such an investigation. A typical example was the reluctance of South Africa to arrest Omar al-Bashir, the Former President of Sudan, when the ICC indicted him for allegations of genocide, crimes against humanity, and war crimes.¹¹⁸

Another classic example of reciprocity is demonstrated in the Arrest Warrant issued by the ICC Prosecutor against Russian President Vladimir Vladimirovich Putin and Ms Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation, for the alleged commission of "the war crimes of unlawful deportation of the population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the

¹¹⁶ Frederic Megret, 'The Politics of International Criminal Justice' (2002) *European Journal of International Criminal Justice*, 1261-1284; Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press 2008) 3, 4; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 1999) 454; Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity* (First published 2016, 1st Edition, Routledge 2016) 38.

¹¹⁷ Arianna Whelan, *Reciprocity in International Law* (Cambridge University Press 2023) 44-45.

¹¹⁸ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber, ICC-02/05-01/09; The first Arrest Warrant for Omar Hassan Ahmad was issued on 4 March 2009, the second on 12 July 2010.

Russian Federation".¹¹⁹ One of the implications of the arrest warrant is for some states to cut international relations with Russia and to effect the arrest of the Russian President and Ms Lvova-Belova if they visit their countries. The warrant can only be effected by other states provided there is reciprocity, mutual respect and cooperation. In the absence of these factors, the arrest warrant is not but a paper tiger.

Therefore, the principle of complementarity espouses that the ICC cooperates with national jurisdiction to achieve SDG 16. Non-cooperation by some states is a clog in the wheels of the ICC in achieving the targets of SDG 16. Modalities of cooperation such as mutual legal assistance, extradition and transfer of prisoners address human rights concerns.¹²⁰ Having discussed the connection between the principle of complementarity and the function of the ICC Prosecutor, the following part will analyse the impact of prosecutorial discretion on victims.

8. IMPACT OF PROSECUTORIAL DISCRETION ON VICTIMS

This section examines the impact of the Prosecutor's decisions on the rights and interests of victims at the ICC. This will facilitate our understanding of how the OTP functions and how it contributes to the accessibility of justice for victims at the ICC. This section illuminates SDG16 because access to justice aims to protect human rights, a key aspect of SDG 16 and promotes the rule of law in accordance with Target 16.3. For every human rights violation, there are corresponding victims.

Schwobel-Patel posits that the increased focus on victims in international criminal law has led to the construction of "an ideal victim" that is characterised by weakness, vulnerability, dependency, grotesqueness, feminisation, infantilisation, and racialisation shaped by the effect of the "attention economy" and the disparity in the attention given to extreme and

¹¹⁹ International Criminal Court, Situation in Ukraine, ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, 17 March 2023.

¹²⁰ Gerhard Kemp, "Horizontal and Vertical" in Takeh Sendze, Adesola Adeboyejo Howard Morrisson and Sophia Ugwu(eds), *Contemporary International Criminal Law Issues: Contributions in Pursuit of Accountability in Africa and the World*(TMC Asser Press 2023)186-192.

spectacular vs moderate material content.¹²¹ It is argued that the prioritisation of victims in international criminal law has resulted in significant improvements in acknowledging and protecting their rights, developing legal structures for reparations, psychological assistance, and inclusion in criminal proceedings for marginalised groups. The "attention economy," described by Schwobel-Patel, has inadvertently led victims to seek justice. In addition, the impact of prosecutorial discretion at the ICC can also be analysed through "Marketing Global Justice," which provides a comprehensive critique of the global justice sector and exposes its contradictions and interests.¹²² It emphasises the importance of agency, redistribution, and international solidarity in resisting dominant narratives.¹²³ It goes beyond blaming the for-profit market for appropriating social justice causes and highlights how the global justice movement is involved in and benefiting from the market economy and global inequalities.¹²⁴ With Schwobel-Patel's analysis, the proliferation of international criminal law leads to the commodification of victims, the faces of global injustice, while also accentuating the natural beneficiaries—the elites. Arguably, the marketing justice analogy may explain forces beyond the broad prosecutorial discretion, such as the availability of individuals for prosecution, power dynamics/power imbalance, state cooperation, inadequate resources, and, most importantly, varied political contexts. For instance the PTC differentiated between victims of a specific case and victims of a broader situation when determining which category of victims should participate at this stage.¹²⁵ During the situation phase, it was determined that the victims were not obligated to establish a causal connection between the crime and the injury they suffered.¹²⁶ Additionally, they do not need to know the perpetrator's identity. The threshold is relatively low because identifying the suspect or accused culprit at the investigation stage is often vague.

As mentioned earlier, the ICC's primary goal is to prosecute individuals responsible for international crimes, ensuring justice is served. However, this

¹²¹ Christine Schwobel-Patel, *The Ideal Victim of International Criminal Law*, (2018)29(3) *European Journal of International Law* 704-717.

¹²² Christine Schwobel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021)60-95.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Situation in the Democratic Republic of Congo, Decision on the Applications for the Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6*, 17 January 2006, ICC-01/04-101. Paras. 77-87.

¹²⁶ *Ibid.* para. 65.

prompts the question of the place of victims' interests during prosecution. According to Article 53(2), the Prosecutor must consider the victims' interests as a criterion when deciding not to prosecute in the pursuit of justice. For emphasis, Article 53(2) empowers the Prosecutor to conclude that:

There is not a sufficient basis for a prosecution" if, among other things, a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.¹²⁷

The prosecution considers the "interests of victims" alongside other factors for justice decisions, although its meaning may be ambiguous as it is not expressly stated in Article 53. A cursory look at article 68(3) and the preamble of the Rome Statute indicates that victims' interests are crucial in determining justice in criminal proceedings. Involving victims in justice ensures their voices are heard, and needs are addressed, promoting a fair legal system. Recognising victims' interests helps create a more persuasive argument for a justice system that values and respects everyone involved. Meaningful participation in criminal proceedings reveals the truth and secures reparations without disrupting the balance of arms.¹²⁸

It is worth mentioning that the interests of victims should be considered separately from those of the Prosecutor. Arguably, there is an overlap because both parties want justice but have distinct interests. The Prosecutor's role encompasses various responsibilities, from conducting thorough investigations to collecting compelling evidence.¹²⁹ They aim to establish the truth and fulfil their duties with utmost objectivity.¹³⁰ They are committed to ensuring that the truth prevails from the initial stages of the investigation through the trial. In the Lubanga case,¹³¹ The Appeal Chamber(AC) dissected

¹²⁷ Rome Statute 1998, Article 53(2).

¹²⁸ David Donat-Catin, "Article 68" , In Otto Triffterer(ed), Commentary on the Rome Statute of the International Criminal Court,Observers' Notes, Article by Article (Second Edition , 2008)1279,1290 and 1291.

¹²⁹ Rome Statute 1998, Articles 53 & 54.

¹³⁰ Rome Statute 1998, Article 69; Prosecutor v.Lubanga, Appeal Chambers, ICC-01/04-01/06-568, 13 October 2006, para.52.

¹³¹ Prosecutor v Lubanga, Decision of the Appeal Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the Directions and Decision of the Appeals Chamber of 2 February 2007,ICC-01/04-01/06-925 13-06-2007 CB PT OA8,para.45.

the relationship between the interests of the victims and the Prosecutor. The AC ruled that victims cannot participate in the appeal process unless they demonstrate that their personal interests are affected. The AC also distinguished between the personal interests of victims and the general interests of the Prosecutor.¹³² The AC held that the requirement to show personal interests is determined on a case-by-case basis. It further stated that victims cannot claim personal interests in matters that fall within the Prosecutor's role.¹³³ Arguably, there is an overlap between the personal interests of victims and the interests of the Prosecutor, particularly in securing the perpetrator's conviction. Victims are interested in seeing the perpetrator punished or convicted, which can be seen as justice for their harm. In many cases, the interests of the Prosecutor and the victims align. Overall, the analysis suggests that while some of the Prosecutor's and victims' interests overlap, there are also distinct differences. Nevertheless, as clarified in the institutional theory, the Prosecutor is a representative of the international community, whose function is to investigate and prosecute egregious crimes in order to promote justice.

Aptel identifies five determinative factors that limit the scope of international criminal prosecutions. The first factor is the determination of specific entities within the applicable jurisdictional scope, which restricts investigation by focusing on a particular entity.¹³⁴ The second component is the individual targets to be investigated and prosecuted, as the ICC's mandate is to try the most responsible perpetrators in hostilities/armed conflict. This reduces the number of suspects/culpable persons for trial, potentially limiting the number of potentially affected victims. The third component is the selection of specific factual allegations to be listed in the charges, limiting the number of situations or cases to be tried to a few "illustrative events."¹³⁵ This can be due to challenges inherent in evidence gathering, such as the limitations of these illustrative events. The fourth criterion is the decision to restrict the legal characterisation of the offence, which may result in narrow charges, disregarding other alleged crimes. Human rights organisations, NGOs, and victims' associations have questioned the Prosecutor's motives for not considering other serious crimes committed in Ituri, which falls within the

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Cecile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap (2012) 10(5) *Journal of International Criminal Justice* 1357-1375.

¹³⁵ Ibid.

jurisdiction of the Court. The fifth component is selections made by the Prosecutor, which affects the scope of accountability due to their discretionary choice of witnesses and victim-witnesses.¹³⁶ These decisions can lead to restrictive access to justice for victims due to the wide discretionary powers of the Prosecutor. However, the ICC cannot try all perpetrators because it will slow down the efficiency of the Court.

In addition, Aptel argues that the broad prosecutorial discretion may hinder victims' right to remedy, as many victims of serious human rights violations are denied access to a judicial remedy.¹³⁷ She suggests that the ICC should broaden the range of charges it considers.¹³⁸ The charging document, usually within the ICC prosecutor's prerogative, determines the perpetrators and scope of the allegations, which may inadvertently dictate the category of victims and accountability. A well-crafted charge with unambiguous legal characterisation of facts will sufficiently cover the allegations in the affected jurisdiction. Schabas reaches a similar conclusion, highlighting that some victims fall into an impunity gap due to the Prosecutor's selection of situations and cases based on subjective criteria.¹³⁹ Guzman focuses on the reluctance of the former ICC prosecutor to prosecute sexual violence, attributing it to gender bias assumptions.¹⁴⁰ SaCuoto and Clearly criticises the insensitivity of the former Prosecutor towards victims of sexual violence and the challenges they face.¹⁴¹ However, it is pertinent to note that there are

¹³⁶ Ibid.

¹³⁷ Cecile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap (2012) 10(5) *Journal of International Criminal Justice*, 1357-1375.

¹³⁸ Ibid.

¹³⁹ Williams Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6(4) *Journal of International Criminal Justice*, 731-761.

¹⁴⁰ Margaret de Guzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in Bergsmo and Morten, *Thematic Prosecution of International Sex Crime*, <https://www.fichl.org/fileadmin/fichl/documents/FICHL_13_Web.pdf > 11-44.

¹⁴¹ Susan SaCuoto and Katherine Clearly, 'The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court', (2009) 17(20) *American University Journal of Gender, Social Policy & the Law*, 337-362; Sizan Pritchett, 'Entrenched Hegemony, Efficient Procedure, or Selective Justice? An Inquiry into Charges from Gender-Based Violence at the International Criminal Court' (2008) 17 *Transnational Law & Contemporary Problems*, 265-305; K'Shaani Smith, 'Prosecutor v. Lubanga: How the International Criminal

situations where the prosecutor has formed an intricate and contentious relationship with the victims. While the prosecutor advocates for the community's broader interests, the victims represent their specific interests. These interests may coincide; nevertheless, this is only sometimes true. Victims in each of these situations are autonomous entities. Kofi Anan emphasised that the overriding interests must be that of the victims,' and the international community as a whole'¹⁴² Due to the lack of homogeneity among victims, there is potential for divergent and conflicting perspectives and interests.

One potential consequence of the selection is that it restricts the number of affected victims. Many of the victims who have suffered harm by lower-ranking officers and foot soldiers are likely to be denied justice. The ICC Prosecutor determined that Lubanga was the primary individual accountable for the crimes committed in the Democratic Republic of Congo (DRC). Consequently, he was arrested, prosecuted, and arraigned primarily for this purpose. Nevertheless, evidence indicates the involvement of additional masterminds.¹⁴³ Kambale deduces that there were influential instigators who were not formally charged.¹⁴⁴ The individuals responsible for instigating the events were identified but were not officially charged with crimes. Furthermore, he argued that the gravest offences in Ituri were perpetrated by the RCD-ML (Rassemblement Congolais pour la Démocratie—Mouvement de Libération), in which Lubanga held a mere ministerial position.

Thomas Lubanga, a suspect in the DRC, was awaiting trial in a national court on allegations of genocide, war crimes, and crimes against humanity in DRC's military criminal code.¹⁴⁵ The President of the DRC referred the matter to the Prosecutor, who subsequently requested that the latter

Court Failed the Women and Girls of the Congo, (2011) 54 *Howard Law Journal* ,467-500.

¹⁴² Kofi Anan, Secretary-General, Press Release, UN Diplomatic Conference to Establish International Criminal Court Begins Five-Week Session in Rome, L/2870 15 June 1998.

¹⁴³ Pascal Kambale, 'The ICC and Lubanga :Missed Opportunities ' SSRIC Forums:African Futures, 16 March 2012, available at <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/> last accessed 16 March 2024.

¹⁴⁴ *Ibid.*

¹⁴⁵ International Center for Transitional Justice, Situation Brief: The Trial of Thomas Lubanga, accessible at <https://www.ictj.org/sites/default/files/ICTJ-DRC-Lubanga-Trial-2009-English.pdf> last accessed 12 January 2024.

investigate and prosecute crimes within its jurisdiction that have occurred since July 2002.¹⁴⁶ The Prosecutor expressed his dedication to monitoring the situation in the DRC and conducting further investigations in the Ituri region of the country. The Prosecutor informed the Assembly of States Parties in September 2003 that he was prepared to request permission from the PTC to initiate an investigation into his motion. Lubanga was apprehended and deported to The Hague, where he was accused of recruiting juvenile soldiers and utilising them to engage in hostilities. Schabas criticised the Prosecutor's sole charge, contending that the DRC's justice system performed more effectively than the Court.¹⁴⁷ In his words: "the justice system of the DRC was doing a better job than the Court itself because it was addressing crimes of greater gravity".¹⁴⁸ Consequently, the singular charge may have impeded the right to remedy and reduced the number of victims of crimes.

It could be that the Prosecutor wished to begin investigations into a crime for which the suspect had not been charged to avoid interrupting local investigations or trials. The prosecutor's vow to conduct more investigations is reaffirmed in the statement: "[T]he investigation is ongoing, and we will continue to investigate more crimes committed by Thomas Lubanga Dyilo and us..."¹⁴⁹ The announcement came after he indicated the alleged crime against Lubanga: the recruiting and conscription of children under the age of 15 to participate in hostilities actively.¹⁵⁰ The expression appears to convey the impression that the Prosecutor will continue examining additional offences Thomas Lubanga committed. This statement was thought to imply additional investigation into other alleged crimes the suspect, Lubanga, committed. Given the lack of fresh or supplementary charges against the suspect/accused, it is unclear whether the Prosecutor performed additional investigations.

¹⁴⁶ ICC-Prosecutor receives referral of the situation in the Democratic Republic of Congo: Democratic Republic of Congo. Press Release, ICC-OTP-20040419-50, 19 April 2004.

¹⁴⁷ Williams Schabas, "Prosecutorial discretion v. judicial activism at the International Criminal Court (2008) 6*Journal of International Criminal Justice*, 731-743.

¹⁴⁸ Ibid.

¹⁴⁹ ICC, Statement by Luis Moreno-Ocampo: Press Conference in relation with the surrender to the Court of Mr Thomas Lubanga Dyilo, The Hague, 18 March 2006, p.3

¹⁵⁰ ICC, Statement by Luis Moreno-Ocampo, Press Conference in relation with the surrender of the Court of Mr Thomas Lubanga Dyilo, The Hague, 18 March 2008, p.2.

The foregoing illustrates that broad prosecutorial discretion may lead to an impunity gap, denying justice to victims. Consequently, victims' access to justice becomes restricted. In addition, victims' interests are considered, but not always prioritised, in prosecutorial discretion. Since it has been revealed that prosecutorial discretion is utilised to select situations, cases, prioritise crimes, and consider broader contexts, ICC's limited capacity to prosecute all offenders hinders its efficiency. Therefore, the above analysis highlights the need for a balanced approach, ensuring that prosecutorial discretion serves the interests of justice, victims and the international community, aligning with SDG16.

9. CONCLUSION

This paper has shown that the Rome negotiations resulted in broad prosecutorial discretion, subject to the PTC.¹⁵¹ This authority extends from investigations to prosecution. The ICC investigates and prosecutes grave crimes closely related to SDG16 in various ways. These crimes include war crimes, crimes against humanity, genocide, and aggression, which pose significant threats to global peace and security, fundamental aspects of SDG16. These criminal activities frequently involve serious violations of human rights, thus undermining the fundamental principles of equality, fairness, and the rule of law advocated by SDG16. Vulnerable communities, including women and children, who are specific targets of SDG16, suffer particularly devastating impacts from the crimes under the jurisdiction of the ICC.¹⁵² Furthermore, these criminal acts have the potential to impede sustainable development through the destruction of infrastructure, disruption of economic activity, and the enduring infliction of social instability in post-conflict societies. Therefore, holding perpetrators accountable for these gross crimes is instrumental in achieving the objectives outlined in SDG16, particularly in terms of access to justice, the effectiveness of institutions, and the promotion of the rule of law. Additionally, the prosecution of serious violations of human rights and international humanitarian law has the potential to deter future acts of violence,¹⁵³ promote peace and security, and provide support for sustainable development. Moreover it appears the ICC utilises prosecutorial discretion to select cases, prioritise crimes, and consider broader political considerations which influence its operations and justice administration. Clark's analysis highlights the need for ICC to address the

¹⁵¹ Chazal (n 2).

¹⁵² ICC Rome Statute 1998, Article 5.

¹⁵³ ICC Rome Statute 1998, Preamble.

complexities of distance and engage meaningfully with affected communities.¹⁵⁴ Distance is considered a challenge which could slow down the effectiveness of the ICC Prosecutor in implementing SDG16.

9.1 Recommendations

One of the principles of the United Nations Charter is the principle of State sovereignty, which works hand-in-hand with the doctrine of complementarity to give states the primacy over prosecution of serious violations of human rights and international humanitarian law.¹⁵⁵ If a state fails to prosecute crimes of international concern, the ICC can assume jurisdiction; however, the involvement of the affected domestic jurisdiction does not end at that stage. State cooperation is required to enforce arrest warrants, gather evidence, conduct investigations, and prosecute.

Furthermore, political consideration is almost vital in promoting dialogue and cooperation with states. This ICC is justified in considering political and social contexts when determining whether to initiate an investigation or prosecution based on the concept of "interests of justice."¹⁵⁶ Additionally, it is suggested that applying soft power theory can effectively address objections to considering politics in the exercise of prosecutorial discretion.¹⁵⁷ Given that the sovereignty of states empowers them to either give consent or withhold consent for international relations, the ICC Prosecutor can employ soft power with the state to ensure cooperation and dialogue.

Moreover, positive complementarity could also enhance the achievement of SDG16. The coordinated use of actors within domestic and regional contexts would ensure varied mechanisms in filling impunity gaps, and strengthening accountability¹⁵⁸ while also promoting the targets of SDG 16.

Prosecutorial decisions can impact victims, leading to an impunity gap. Victims should not be relegated during pre-trial and investigation stages, as

¹⁵⁴ Clark (n 114).

¹⁵⁵ Rome Statute 1998, Article 17.

¹⁵⁶ Cale Davis, "Political Considerations in Prosecutorial Discretion at the International Criminal Court." 15 (2015) 15 *International Criminal Law Review* 170-173.

¹⁵⁷ *Ibid.*

¹⁵⁸ Karolina Aksamitowska, Iuliia Anosova and Vasilka Sancin, "Positive Complementarity in Action: International Criminal Justice and the Ongoing Armed Conflict in Ukraine" (2024) *International Criminal Law Review* 22

they may be affected by prosecutorial discretion. As noted from Schwobel-Patel's analysis, the marketing of justice by global actors reflects a misrepresentation of global justice, thereby shifting the construct from the face of global justice, victims, to political actors/beneficiaries.¹⁵⁹ Enhancing victims' position during investigations and prosecution would optimise their participation rather than tokenism or symbolic representation.

¹⁵⁹ Christine Schwobel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021) 24-33.