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Legitimate Supra-National Adjudication in the New Era: The Requirement of Comparative Benefit

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Introduction

The new era of international courts and tribunals will be characterized by an array of mechanisms with overlapping jurisdictions to adjudicate.[1] The International Criminal Court (ICC) does not have the capacity to address all the world's accountability demands and is unlikely to develop such capacity. As such, additional accountability mechanisms will continue to be created, ranging from international institutions like the *ad hoc* tribunals for former Yugoslavia and Rwanda, to hybrid and internationalized courts like the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. Regional courts may also start to proliferate. The African Union has already adopted a statute for a proposed African Criminal

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1. *See* Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 Denv. J. Int'l L. & Pol'y 169, 279-80 (2016).

Court,[2] and there are ongoing discussions about establishing a Latin American and Caribbean Criminal Court to address transnational organized crime.[3] The Parliamentary Assembly of the Counsel of Europe, among others, has advocated for the establishment of a European court to try Russians for aggression in Ukraine.[4]

The continued proliferation of supra-national criminal courts in the new era necessitates greater attention to the conditions under which adjudication by such institutions is legitimate. This is distinct from the question of when the institutions themselves are legitimate. The latter has received substantial attention in the scholarship and generated various theories, including theories focused on state consent, and other substantive and procedural requirements.[5] The legitimacy of supra-national *adjudication* has received far less attention. Yet an institution's legitimacy does not ensure the legitimacy of its decisions. Indeed, the legitimacy of important decisions such as whether to adjudicate situations and cases can substantially impact the institution's overall legitimacy.

When commentators address the legitimacy of international adjudication, they usually focus on whether international or national *criminal* adjudication is appropriate, paying less attention to the possibility of non-criminal modalities, whether at

2. *See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, African Union, Twenty-Third Ordinary Session, arts. 3-4 (June 27, 2014).

3. *See* Corte Penal Latinoamericana y del Caribe Contra el Crimen Transnacional Organizado [COPLA], *Estatuto de la Corte Penal Latinoamericana y del Caribe* [*Statute of the Latin American and Caribbean Criminal Court*], at 1 (2018); Robert J. Currie & Jacob Leon, *COPLA: A Transnational Criminal Court for Latin America and the Caribbean*, 88 Nordic J. Int'l L. 587, 589-90 (2019).

4. *PACE Calls for an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression Against Ukraine*, Council of Eur. (Apr. 28, 2022), https://www.coe.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine [https://perma.cc/8KEE-96HR].

5. *See, e.g.*, The Legitimacy of International Criminal Tribunals 3-4 (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017); Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 Leiden J. Int'l L. 491, 492-93 (2012).

the national or supra-national level. This focus on criminal accountability has been termed the "anti-impunity agenda"[6] and has come to dominate global discourse concerning certain kinds of large-scale crimes.[7] Prior to the establishment of the *ad hoc* tribunals and ICC, societies grappling with the aftermath of large-scale crimes had greater freedom to adopt non-criminal modalities such as amnesties, truth commissions, and lustration. Today, criminal justice is widely considered a necessary facet of transitional justice and perhaps even a victims' right.[8]

Scholarship concerning the legitimacy of supra-national criminal adjudication has focused almost exclusively on the ICC's complementarity regime. Under the Rome Statute, the ICC may not adjudicate cases that are being investigated or prosecuted by a state with jurisdiction, unless the state is unwilling or unable genuinely to carry out such investigation or prosecution.[9] A substantial literature exists analyzing how the ICC ought to conduct this complementarity analysis.[10] The ICC's jurisprudence has clarified that when no state with jurisdiction is actively investigating or prosecuting the same person for substantially the

6. *See, e.g.*, Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 L. & Contemp. Probs. 93, 102 (1996); Samuel Moyn, *Anti-Impunity as Deflection of Argument*, *in* Anti-Impunity and the Human Rights Agenda 68, 69-70 (Karen Engle et al. eds., 2016); *see also* Máximo Langer, *Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction*, 13 J. Int'l Crim. Just. 245, 247 (2015).

7. *See, e.g.*, Karen Engle et al., *Introduction* to Anti-Impunity and the Human Rights Agenda 1, 1 (Karen Engle et al. eds., 2016) ("In the twenty-first century, fighting impunity has become both the rallying cry and a metric of progress for human rights. Criminal prosecutions are central to this fight.").

8. Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 Cornell L. Rev. 1069, 1070 (2015) ("Today, to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It also means to be against amnesty laws that might preclude such accountability.").

9. Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

10. *See, e.g.*, The International Criminal Court and Complementarity: From Theory to Practice 1-4 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

same conduct as the ICC, the requirements of complementarity are met and the ICC may exercise its jurisdiction.[11] This broad legal rule regarding the admissibility of cases does not fully address the moral question of when the ICC *ought* to investigate a situation or adjudicate a case.

This essay provides some preliminary thoughts about the conditions required for supra-national adjudication, at the ICC and elsewhere, to be morally legitimate. I use supra-national adjudication to denote adjudication by any institution other than a national court with traditional jurisdiction-conferring ties to the case, such as territoriality and active and passive personality. By this definition, supra-national adjudication encompasses not only the work of the ICC and *ad hoc* international criminal tribunals, but also hybrid institutions such as the SCSL and ECCC. Perhaps counter-intuitively, it also includes adjudication by national courts exercising universal jurisdiction over international crimes with which the state has no connection except, perhaps, the presence of the accused on its territory. Although the adjudicating institution in such cases is national, I nonetheless consider the *case* supra-national because it involves crimes that are widely considered to concern the global community and the communities most directly affected by the crimes are outside the adjudicating state.

This essay adopts a moral legitimacy lens, asking when international criminal law institutions have a moral "right to adjudicate"[12] situations and cases. As such, it is concerned with legal legitimacy only to the extent that legal authority affects moral authority, and it largely sets aside questions of sociological legitimacy, which concern peoples' perceptions of appropriate authority. The essay treats legitimacy as a scalar concept rather than a binary one, at least above a minimal threshold. Decisions below the threshold may be deemed entirely illegitimate, and

11. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 52 (Mar. 31, 2010).

12. This mirrors the "right to rule" that others have examined in the context of institutional legitimacy. *See, e.g.*, Daniel Bodansky, *Legitimacy in International Law and International Relations*, *in* Interdisciplinary Perspectives on International Law and International Relations 321, 324 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

those at the high end of the spectrum may be clearly legitimate, but many decisions are better analyzed in terms of the strength of their legitimacy.

I argue that for supra-national adjudication to be strongly morally legitimate it must provide a comparative benefit relative to available alternatives, whether at the international or national level, and whether criminal or non-criminal. Supra-national adjudication should be avoided when a different justice modality would provide greater benefit. Thus, for instance, when the ICC is deciding whether to investigate or prosecute a situation, or a state is deciding whether to exercise universal jurisdiction over international crimes, they should evaluate all available alternative approaches to justice and should proceed with supra-national adjudication only if it would be comparatively beneficial.

My argument for comparative benefit is strongly utilitarian.[13] It not only rejects the retributive claim that punishment is a good in itself,[14] but also posits that the greater the social good it produces, the more morally justified is the punishment. I do not assume, however, that punishment provides any social good. Scholars have made strong arguments that criminal punishment produces net harm to society at both the national[15] and international levels.[16] For present purposes, I set aside that debate

13. Some scholars argue for retributive rationales of international punishment. *See* Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, International Criminal Procedure: Towards a Coherent Body of Law 373, 399-400 (Goran Sluiter & Sergey Vasiliev eds., 2009); *see also* Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. Pa. J. Int'l L. 969, 976 (2014). As I have explained elsewhere, I do not find these arguments convincing. *See generally* Margaret M. deGuzman,*Proportionate Sentencing at the International Criminal Court*, *in* The Law and Practice of the International Criminal Court (Carsten Stahn ed., 2015).

14. *See* Immanuel Kant, The Metaphysics of Morals 141-42 (Mary Gregor trans., Cambridge Univ. Press ed. 1991).

15. *See* Dierdre Golash, The Case Against Punishment: Retribution, Crime Prevention, and the Law 47-48 (2005); Victor Tadros, The Ends of Harm: The Moral Foundations of Criminal Law 2 (2011).

16. *See* Christine Schwöbel, *The Market and Marketing of International Criminal Law*, *in* Critical Approaches to International Criminal Law 264, 278-79 (Christine Schwöbel

and assume that criminal adjudication provides some benefit at least some of the time. However, by emphasizing the importance of comparative benefit analysis, I hope to encourage decision-makers to limit criminal adjudication to situations where no better justice alternative exists. Whereas decision-makers currently assume that a situation that is legally admissible is one in which adjudication is morally legitimate, I argue that such adjudication is illegitimate if a more beneficial form of justice is available—whether criminal or otherwise.

Comparative benefit is not reducible to clear and consistently applicable legal criteria. The potential benefits and harms of different justice modalities are various and incommensurable. Moreover, the benefits and harms of supra-national adjudication accrue to different communities, from the global to the regional, national, and local. Nonetheless, I argue that decision-makers should make their best efforts to weigh the potential benefits of proposed supra-national adjudication as compared to other available justice mechanisms, especially at the national level, before engaging in such adjudication. Although this may seem intuitive, it is not current practice. Rather, pursuant to the "anti-impunity agenda," political and legal actors generally assume that supra-national adjudication is the best response to international crimes, at least in the absence of national *criminal* proceedings.

Comparative benefit analysis would require decision makers to answer three questions in deciding whether to engage in supra-national adjudication of international crimes: (1) what potential benefits does such adjudication offer, and what harms might it inflict; (2) what alternatives avenues to justice exist and what are their potential benefits and harms; and (3) do the net benefits of supra-national adjudication outweigh those of the alternatives? This is a complex analysis. First, the potential benefits of various approaches to justice must be assessed in relation to all potentially affected communities. The benefits of supra-national adjudication generally inure most significantly to the global community, largely in the form of crime prevention through norm expression.[17] Even when "victim-centered" prosecutorial

ed., 2014); Ioannis Kalpouzos, *International Criminal Law and the Violence Against Migrants*, 21 Ger. L.J. 571, 595-96 (2020).

17. *See* Margaret M. deGuzman, Shocking the Conscience of Humanity: Gravity and the Legitimacy of the International Criminal Court 32 (2020).

strategies are adopted, the limited resources available and distance from the events make such adjudication of limited assistance to affected communities. Moreover, supra-national adjudication can negatively affect national communities, such as by diverting resources from other forms of assistance. On the other hand, national trials and alternative justice mechanisms mostly benefit national communities, although they too can have impacts at the global level. If regional justice mechanisms are available, their potential benefits and harms at the regional, national, and international levels must also be assessed.

Identifying the potential benefits and harms of supra-national adjudication to each of these communities is no easy task. Moreover, comparing net benefits to the various relevant communities is both complex and sometimes socially and politically fraught. Nonetheless, this exercise is necessary because supra-national adjudication that produces net harm is not morally legitimate. Indeed, given the uncertainties surrounding the benefits of supra-national adjudication, a strong case can be made that it is not morally legitimate if it produces any significant harm to the communities most affected by the crimes.

This essay makes a preliminary case for a comparative benefit requirement, leaving elaboration of the proposal to future work. It begins by demonstrating that the legal norms governing decisions to engage in supra-national adjudication fail to capture this moral requirement. Next, it sketches the idea of comparative benefit analysis, and finally, it concludes with thoughts about how comparative benefit analysis might be applied to the situations in Ukraine and Colombia to explain why the ICC correctly decided to engage in one situation and not the other.

I. Inadequacy of Existing Norms

The legal norms governing decisions to engage in supra-national adjudication evolved in a climate dominated by the anti-impunity agenda. The seeds of this agenda were sown in the post-World War II era when the rhetoric requiring accountability for "atrocity crimes" started to proliferate. They germinated with the establishment of the *ad hoc* and hybrid tribunals, and the agenda became fully dominant in international legal discourse with the establishment of the ICC. The anti-impunity agenda leaves little room for considering alternatives to criminal punishment.

Although international criminal justice pre-dates the Nuremberg and Tokyo trials,[18] current discourse about legitimate supra-national adjudication largely dates to the establishment of those institutions. The justification proffered for supra-national adjudication of World War II crimes was simple: the crimes were so horrible that the victor nations had the right, if not the obligation, to adjudicate them.[19] The lead prosecutor at Nuremberg, Robert Jackson, emphasized the nobility of the victors' decision to "stay the hand of vengeance,"[20] and engage in trials rather than simply execute the Nazi leaders as Winston Churchill had suggested. Given the one-sided nature of the rationale it has been termed "victor's justice," and is generally rejected in modern international legal discourse.[21] The idea that "atrocity crimes" must be adjudicated, however, continues to thrive.

The question of whether to engage in supra-national adjudication next arose with the establishment of the ICTY and ICTR. These institutions were created under Chapter VII of the United Nations Charter, which gives the Security Council authority to act to preserve and restore international peace and security.[22] As such, the rationale for their creation implicitly focused on the benefits to the international community, although by contributing to peace they were also supposed to benefit the

18. *See* Ziv Bohrer, *International Criminal Law's Millennium of Forgotten History*, 34 L. & Hist. Rev. 393, 393-407 (2016).

19. Prosecutor Robert Jackson famously opened the Nuremberg trial by stating: "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated." Robert H. Jackson, Opening State ment Before the International Military Tribunal (November 21, 1945), *in* 2 Trial of the Major War Criminals Before the International Military Tribunal 98, 98-99 (1947).

20. *Id.* at 99 ("That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.").

21. *See* William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. Marshall L. Rev. 535, 535 (2010).

22. U.N. Charter art. 39.

affected national communities.[23] The principle that governed the exercise of adjudicative authority at those institutions and continues to govern the work of the International Residual Mechanism for Criminal Tribunals, which was formed to continue their work after they closed, is called primacy. Primacy provides those institutions with the first right to adjudicate cases within their jurisdiction, even in the face of competing national claims.[24] The theory behind primacy is that the *ad hoc* tribunals adjudicate serious international crimes—war crimes, crimes against humanity, and genocide—on behalf of the international community, not merely the communities most affected by those crimes; and that the international community's interest in adjudicating such crimes supersedes any competing interests.[25]

23. The Security Council resolutions passed to create the Tribunals evoked these rationales. S.C. Res. 827, at 1 (May 25, 1993); S.C. Res. 955, at 1-2 (Nov. 8, 1994).

24. Primacy is enshrined in the jurisdiction provisions of the statutes of the *ad hoc* tribunals. Statute of the International Tribunal for Former Yugoslavia art. 9, ¶ 2, (May 25, 1993), www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-tribunal-prosecution-persons-responsible [https://perma.cc/L6VZ-8Z5H]; S.C. Res. 955, annex art. 8, ¶ 2 (Nov. 8, 1994) (Statute of the International Tribunal for Rwanda); S.C. Res. 1966, annex art. 5, ¶ 2 (Dec. 22, 2010) (Statute of the International Residual Mechanism for Criminal Tribunals); *see also* S.C. Res. 827 (May 25, 1993) (resolving to authorize the International Criminal Tribunal for the former Yugoslavia).

25. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995) ("[T]he crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature . . . and transcending the interest of any one State . . . . [I]n such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world."); *see also* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 Yale J. Int'l L. 383, 394-95 (1998) ("This extraordinary jurisdictional priority is justified by the compelling international humanitarian interests involved and by the Security Council's determination that the situation in the former Yugoslavia, as well as that in Rwanda, constituted a threat to international peace and security.").

Indeed, some commentators assert that international institutions are better suited to adjudicating international crimes than national courts,[26] although this view is no longer prominent.

An additional reason cited for the primacy of the *ad hoc* tribunals was that the national courts of former Yugoslavia and Rwanda were unable to adjudicate the crimes, at least in accordance with international standards.[27] Later, when national capacity in those states increased, and international interest in funding the institutions decreased, the primacy of the *ad hoc* tribunals was modified. As part of the plan to conclude the work of the tribunals, the Security Council adopted "completion strategies" that limited the cases they could adjudicate to the most serious crimes committed by the most responsible perpetrators.[28] This circumscribed primacy, which retained for the tribunals the most important cases, left intact the idea that the global community's interests in adjudication supersede those of national communities.

Hybrid courts can also be described as operating under a kind of circumscribed primacy. For instance, the Special Court for Sierra Leone had primacy over national courts but only with respect to perpetrators with greatest responsibility for the most serious crimes committed in that country's conflict.[29] The Extraordinary Chambers in the Courts of Cambodia likewise had

26. *See, e.g.*, Stephanos Bibas & William Whitney Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 Duke L.J. 637, 652-53 (2010) ("International tribunals are ideally situated to restore and reconcile because their cases are high profile and their stage is global, rising above national politics and local ethnic tensions."); Antonio Cassese, *The Rationale for International Criminal Justice*, *in* The Oxford Companion to International Criminal Justice 123, 127 (Antonio Cassese ed., 2009) (arguing, *inter alia*, that "international courts . . . may be more impartial than national courts").

27. *See* Mohamed M. El Zeidy, *From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the* Ad Hoc *Tribunals*, 57 Int'l & Comp. L.Q. 403, 406 (2008).

28. S.C. Res. 1534, ¶ 4 (Mar. 26, 2004). This mandate was implemented in Rule 11*bis* of the Tribunals' Rules of Procedure and Evidence.

29. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 137.

jurisdiction only over similar high-level cases.[30] The rationale for the limited jurisdiction of these institutions was not as clearly linked to prioritizing international community goals because the governments of those states agreed to the courts' creation, presumably with national goals in mind, and the institutions were partly staffed by national personnel. Nonetheless, the effect of granting the courts primacy was to provide significant power to international actors to dictate justice outcomes.

A new model of international adjudication emerged with the creation of the ICC. That Court's jurisdiction is based on the principle of complementarity, which is, in some ways, the opposite of primacy. Under complementarity, the ICC may not exercise jurisdiction when a state with jurisdiction is doing so, unless the state is unwilling or unable "genuinely" to investigate or prosecute the case.[31] Complementarity is susceptible to different interpretations, two of which I label the strong and weak versions of the principle. The strong version of the complementarity principle would require the ICC to inquire into the willingness and ability of relevant states to engage in future investigations when it is considering adjudicating a situation. Strong complementarity would also require deference to state actions related to the crimes in question, but not involving the same defendants and conduct. This version would grant states significant leeway to decide when and how to address crimes without risking ICC action.

However, the ICC has not adopted the strong version of complementarity. Instead, the Court has interpreted the statute to permit ICC action whenever no state with jurisdiction is actively investigating or prosecuting the same person for substantially the same conduct as the ICC—what I am calling weak complementarity.[32] This version of complementarity grants significantly less deference to states, which must pursue the same

30. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 2, June 6, 2003, 2329 U.N.T.S. 117.

31. *See* Rome Statute, *supra* note 9, art. 17(1)(a).

32. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 52 (Mar. 31, 2010).

agenda on the same timeline as the ICC to prevent the latter from acting.

The strong version of complementarity suggests that the national community's interests should take precedence over international interests provided the state pursues some form of criminal accountability. The weaker version the Court has adopted is less clear regarding precedence. The international community need not defer to state *intentions* to investigate or prosecute, only to actions, and only when those actions involve pursuing criminal accountability for the same persons and substantially the same conduct. This suggests greater equality between national and international interests. Indeed, this approach to complementarity is compatible with a burden sharing model of adjudication. While strong complementarity suggests the state should adjudicate whenever possible, the weak version leaves room for state and international coordination to determine which jurisdiction is best suited to adjudicate.[33]

Importantly, almost all theories of complementarity presuppose the superiority of criminal adjudication to other justice mechanisms. Some scholars have argued that complementarity should be understood to require the ICC to defer to certain kinds of non-criminal investigations, such as truth commissions. For instance, Martha Minow asserts that complementarity should include deference to national restorative mechanisms that are "genuine and meaningful efforts to pursue individual accountability, justice, and prevention of future harms."[34] Minow would read the term "investigate" in the Rome Statute's requirement that no state with jurisdiction be investigating or prosecuting to include non-criminal

33. I have advocated a burden sharing approach to complementarity for a future African Criminal Court. *See* Margaret M. deGuzman, *Complementarity at the African Court*, *in* The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges 645, 655-66 (Charles Jalloh et al. eds., 2019).

34. Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 Harv. Int'l L.J. 1, 39 (2019); *see also* Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 Emory L.J. 205, 206 (2000).

investigations.[35] Although theoretically appealing, this argument finds little support in the Rome Statute's language and drafting history, both of which focus almost exclusively on criminal accountability. As I argue below, a more plausible reading of the Statute, and its drafting history,[36] is that it allows consideration of restorative justice alternatives under the Prosecutor's discretion to select situations *proprio motu*, and under the "interests of justice" provision for referred situations.

While primacy and complementarity have emerged as theories of supra-national adjudication at international and hybrid institutions, no comparable theory exists to explain when the exercise of universal jurisdiction over international crimes is legitimate. Although falling short of a comprehensive theory, some scholars have advanced ideas about the appropriate exercise of universal jurisdiction. For instance, Devika Hovell argues that the authority to exercise universal jurisdiction is "based in an individual's right of access to justice for victims of serious international crimes."[37] Implicit in her argument is the idea that universal jurisdiction is appropriate when other relevant jurisdictions are inactive. Adeno Addis views universal jurisdiction as "a form of communitarian cosmopolitanism whose major purpose is the shaping and protection of a certain version of an international community."[38] This approach supports supra-national adjudication whenever the international community considers it has a sufficient interest. Máximo Langer identifies a "no safe haven" theory whereby universal jurisdiction is a mechanism for states to avoid becoming safe havens for perpetrators of international crimes.[39] Like complementarity, however, such theories of universal jurisdiction do not explain the legitimacy of supra-national adjudication in the face of alternative justice mechanisms. The "Princeton Principles on Universal

35. Minow, *supra* note 34, at 15-16.

36. William A. Schabas, *Article 53. Initiation of an Investigation/ Ouverture d'Une Enquête*, *in* The International Criminal Court: A Commentary on the Rome Statute 827, 836 (2d ed. 2016).

37. Devika Hovell, *The Authority of Universal Jurisdiction*, 29 Eur. J. Int'l L. 427, 455 (2018).

38. Adeno Addis, *Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction*, 31 Hum. Rts. Q. 129, 161 (2009).

39. Langer, *supra* note 6, at 245.

Jurisdiction," proposed by a group of experts under the auspices of Princeton University's Program on Law and Public Affairs provide some guidance concerning when states should defer to other states with jurisdiction, but do not address international courts or non-criminal mechanisms.[40]

Finally, no theory exists to explain when it is legitimate for the international community, or some subset, such as a regional community, to establish *ad hoc* or permanent supra-national criminal courts. Rather, such discussions tend to be dominated by references to the anti-impunity agenda. When "atrocities" have garnered sufficient attention, there is likely to be a call for international adjudication[41]—and if the ICC does not have jurisdiction, for the establishment of an institution that does. Current conversations concerning supra-national adjudication of Russian crimes in Ukraine are emblematic of this phenomenon.[42]

Norms such as the principles of primacy and complementarity seek to answer the legal question of when supra-national courts are permitted to exercise their authority. In other words, they endeavor to explain when such adjudication is legally legitimate. But these legal norms do not ensure the moral legitimacy of decisions to adjudicate at international courts and tribunals or through universal jurisdiction. Considering the potentially conflicting interests of the national and international communities, morally legitimate adjudication requires determining which of these interests should prevail, at least at a

40. Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction 41 (Stephen Macedo ed., 2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf [https://perma.cc/3A3S-J7BE].

41. *See, e.g.*, Randle C. DeFalco, Invisible Atrocities: The Aesthetic Biases of International Criminal Justice 3 (2022).

42. *See, e.g.*, *PACE Calls for an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression Against Ukraine*, *supra* note 4; *Ukraine Dispatch: Calls Grow for the Creation of a Special Tribunal to Adjudicate Russian War Crimes*, Jurist (Oct. 14, 2022, 12:35 PM), https://www.jurist.org/news/2022/10/ukraine-dispatch-calls-grow-for-the-creation-of-a-special-tribunal-to-adjudicate-russian-war-crimes/ ("[T]he Parliamentary Assembly of the Council of Europe, the European Parliament, the Parliamentary Assembly of NATO, and the Organization for Security and Co-operation in Europe (OSCE) support the creation of a special tribunal.") [https://perma.cc/Q79H-JRUC].

given moment in time. It is not the case that the international community's interests should always prevail when the crimes are particularly heinous, as primacy suggests, or even that they should do so when the suspects are believed to be those most responsible, as circumscribed primacy suggests. Nor is it true that national interests should always prevail except in situations of unwillingness or inability as the strong version of complementarity suggests. It is not even accurate to say that international interests should be given priority when relevant states are inactive as suggested by the weaker version of complementarity. Rather, the moral legitimacy of supra-national adjudication requires a determination that it is likely to produce a comparative benefit considering all relevant interests and alternatives.

An additional reason to reject primacy and complementarity as tests of the moral legitimacy of supra-national adjudication is that they leave little scope for non-criminal responses to harm. Although the anti-impunity agenda often portrays criminal accountability as both a legal and a moral requirement for certain international crimes,[43] it is far from clear that the latter is accurate. Many communities around the world have historically preferred non-criminal responses to these kinds of harms and some continue to use them even in the anti-impunity era.[44] Moreover, even in communities, like those of North America, that have

43. *See, e.g.*, Amnesty International, *Policy Statement on Impunity*, *in* 1 Transitional Justice: How Emerging Democracies Reckon with Former Regimes 219 (Neil Kritz ed., 1995) ("Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice . . . . International standards clearly require states to undertake proper investigations into human rights violations and to ensure that those responsible are brought to justice.").

44. *See* Sarah M.H. Nouwen & Wouter G. Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. Int'l Crim. Just. 157, 164-73 (2015) (presenting five noncriminal alternative conceptions of justice based on research in Uganda and Sudan, including "restoration of relationships," "ending ongoing violations," "redistribution," ideas of accountability distinct from imprisonment, and "justice as equality"); John O. Omale, *Justice in History: An Examination of 'African Restorative Traditions' and the Emerging 'Restorative Justice' Paradigm*, 2 Afr. J. Criminology & Just. Stud. 33, 38-52 (2006) (citing sources discussing the historical roots of restorative justice in many cultures).

historically favored criminal accountability for serious harms, a countertrend is developing, especially in response to growing awareness of the role of racism in the administration of criminal law.[45]

II. Comparative Benefit

Comparative benefit analysis would help to ensure that supra-national adjudication occurs only in situations where it is likely to be useful. It would involve a wholistic evaluation of the potential net benefits of supra-national adjudication compared to other options for pursuing justice for harms committed by individuals or groups. Such adjudication may provide benefits to different communities, including the global community and affected regional, national, and local communities. Alternative justice mechanisms may include national prosecutions in the courts of most affected states, or alternatives to criminal adjudication such as truth commissions, lustration, and traditional justice mechanisms. The analysis should therefore encompass a wide range of factors and involve an overall qualitative assessment rather than a rigid or quantitative approach.

The first question a comparative benefit analysis should address is what potential benefits, net of potential harms, supra-national adjudication may provide. Such benefits must be analyzed in relation to each potentially affected community. Additionally, the likelihood of the benefits accruing should be considered. When evaluating potential benefits of supra-national adjudication to the global community, the focus should be on crime prevention. Supra-national adjudication can help to prevent crimes in various ways, including by deterring and incapacitating specific individuals and by deterring potential perpetrators more generally.[46] Most importantly, criminal

45. *See, e.g.*, Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. Pol'y Prac. 77, 78 (2015).

46. Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 Int'l Org. 443, 446 (2016); Geoff Dancy, *Searching for Deterrence at the International Criminal Court*, 17 Int'l Crim. L. Rev. 625, 654-55 (2017); Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 Int'l Interactions 616, 618 (2016).

prosecution at the global level such as at the ICC, can help to prevent crimes by expressing important global norms.[47] International prosecution, particularly at a global institution like the ICC, sends a strong message of condemnation of the acts prosecuted.[48] This is particularly potent for under-enforced norms such as those related to sexual and gender-based violence, the use of child soldiers, and crimes affecting culture and the environment.[49] Additional potential benefits—all related to crime prevention—include fostering international peace, creating an historical record, and reducing the scope for denial of the crimes.[50] The probability that such benefits will accrue depends on a variety of factors, including the calculations by potential perpetrators of the likelihood of interception. One especially important factor related to norm expression is the sociological legitimacy of the supra-national institution. An institution that is widely viewed as legitimate will more effectively disseminate norms through its statements and actions.

Supra-national prosecutions also have the potential to benefit the communities most affected by the crimes, both directly and indirectly. Direct benefits include those mentioned above, as well as providing victims with a sense of recognition and, perhaps, closure.[51] If the court provides for reparations or restitution upon conviction that may also directly benefit victims. Indirect benefits can include the promotion of local prosecutions, such as through the operation of the ICC's complementarity principle. For hybrid

47. *See* Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 Mich. J. Int'l L. 265, 312-19 (2012); Carsten Stahn, Justice as Message: Expressivist Foundations of International Criminal Justice 15 (2020).

48. deGuzman, *supra* note 47, at 314-15.

49. *See* Margaret M. deGuzman, *An Expressive Rationale for the Thematic Prosecution of Sex Crimes*, *in* Thematic Prosecution of International Sex Crimes 11, 37-44 (Morten Bergsmo ed., 2d ed. 2018).

50. Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 Chi.-Kent L. Rev. 329, 331 (2007).

51. *See* Victims Rts.' Working Grp., The Impact of the Rome Statute System on Victims and Affected Communities 17-19 (2010), https://redress.org/wp-content/uploads/2018/01/Apr-10-The-Impact-of-the-Rome-Statute-System-on-Victims.pdf [https://perma.cc/54C7-YEA2].

courts, national communities may benefit from an infusion of resources and expertise related to the prosecution of international crimes.

However, supra-national prosecution also has the potential to harm local communities suffering, or recovering from, armed conflict and other harms. Most notably, some commentators believe that criminal prosecutions can inhibit peace.[52] A substantial literature exists on the so-called peace versus justice debate, with commentators disagreeing about the extent of this tension and, indeed, whether it exists at all.[53] Nonetheless, there is at least some evidence that armed groups sometimes resist efforts to end conflicts that seem likely to lead to the criminal prosecution of their members.[54] Whether this is a "harm" to the

52. *See, e.g.*, Martha Minow, *Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations*, 7 J. Hum. Rts. 174, 181 (2008) ("[I]t may be worth entertaining postponement of prosecution, if not its suspension altogether, in order to facilitate peace negotiations . . . ."); Nouwen & Werner, *supra* note 44, at 169; James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. Peace Rsch. 271, 277 (2005) ("A second perspective regarding the work of the ICTY is that its actions have a negative impact on societal peace in Bosnia. If Bosnia's Serbs, Croats, and Bosniaks perceive the ICTY to be biased, or even a threat to their people's interests, the prominent actions of the tribunal may give rise to defensive or even offensive measures by these groups that lead to violence.").

53. *Compare* Minow, *supra* note 52, *with* David Tolbert, *International Criminal Law: Past and Future*, 30 U. Pa. J. Int'l L. 1281, 1292 (2009) ("In many ways [the peace versus justice] debate is based on a faulty premise: continued failure to address past crimes does not lead to peace but rather to more conflict."); *see also* Janine Natalya Clark, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, 9 J. Int'l Crim. Just. 521, 545 (2011) (quoting Chandra Lekha Sriram, *Introduction: Transitional Justice and Peacebuilding*, *in* Peace Versus Justice? The Dilemma of Transitional Justice in Africa 1, 1 (Chandra Lekha Sriram & Suren Pillay eds., 2009)) ("Rather than engaging in narrow peace versus justice debates, a 'dichotomous dilemma [that] is often overstated,' the way forward is to explore whether and how the ICC can contribute to peace as part of a comprehensive and holistic justice strategy.").

54. *See, e.g.*, Alyssa K. Prorok, *The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination*, 71 Int'l Org. 213, 220 (2017) ("The ICC case remained a stumbling block throughout negotiations between the

local community depends on whether meaningful tension between peace and justice exists or, instead, lasting peace requires (criminal) justice. Given the unresolved nature of this debate, the potential harm to peace efforts should be considered in conducting any comparative benefit analysis. Other potential harms to affected communities include exacerbating tensions among groups, diverting resources from more pressing social needs such as food and education, and creating an inaccurate historical narrative or distorting international understandings of a conflict or social situation.[55]

Comparative benefit analysis should consider the range of potential alternatives to supra-national adjudication, with one exception: doing nothing to address crimes is no longer a valid option. For most of history inaction was the norm. As recently as the 1970s, Spain adopted a national *pacto del olvido* (pact of forgetting) in response to the crimes of the Franco era. However, modern commitments to victims' rights preclude this approach today, including in Spain.[56]

Often the most viable alternative to supra-national adjudication is adjudication at the national level. National prosecutions can provide local communities with many of the

Ugandan government and the Lord's Resistance Army (LRA), with Kony repeatedly insisting that ICC charges be dropped as a precondition for settlement.").

55. *See, e.g.*, Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 Hum. Rts. Q. 624, 648 (2009) ("As an immediate reaction to the [Bashir] arrest warrant, the Sudanese government expelled more than a dozen humanitarian aid organizations, leaving more than one million people without access to food, water, and healthcare services."); Edgar R. Aguilera, *Truth and Victims' Rights: Towards a Legal Epistemology of International Criminal Justice*, 6 Mexican L. Rev. 119, 160 (2013) ("[T]he truth-thwarting patterns outlined in this essay indicate that [the] right [of victims to a truthful understanding of events underling atrocity crimes] is plausibly being systematically violated as the International Community has implemented legal procedures, mechanisms, and practices that are much less reliable as truth-promoting or epistemic engines than what they purport to be.").

56. *See* Law on the Victims of Crime (B.O.E. 2015, 4) (Spain); Francis D. Boateng, *Victims' Rights Legislation: A Comparative Assessment and Implementation Issues*, *in* Routledge Handbook on Victims' Issues in Criminal Justice 46, 55 (Cliff Roberson ed., 2017).

same benefits as supra-national adjudication in terms of prevention but can also more directly promote the interests of victims and other affected communities. Their greater visibility at the national level enhances their ability to impact national discourse. They are also likely to cover a broader range of perpetrators and levels of culpability, providing a fuller and more accurate historical narrative. On the other hand, national prosecutions can sometimes harm local communities, particularly when national courts are corrupt or lack adequate competency or resources to abide by community standards. Even if community standards are met, national prosecutions that fail to meet international standards and expectations can harm local communities by undermining their global standing.

The third option, non-criminal or restorative justice mechanisms, is controversial considering the current strong emphasis on combatting impunity. Nonetheless, such mechanisms may have significant benefits, especially for local populations. The most common such mechanism are truth commissions, which became popular in the 1980s in Latin America. South Africa famously employed a Truth and Reconciliation Commission as the centerpiece of its efforts to address the legacy of apartheid. Truth commissions have been employed in many other countries, either instead of criminal prosecutions or alongside them.[57] Whether the pursuit of truth in the absence of accountability provides a net "benefit" is another controversial issue. It is widely agreed, however, that such commissions can benefit victims, who seek to have their suffering seen, and can contribute to the creation of an historical record.[58]

57. *Id.* at 611-35 (describing and comparing the use of Truth Commissions in fifteen countries, including Uganda, Bolivia, Argentina, Uruguay, Zimbabwe, The Philippines, Chile, Chad, South Africa, Germany, El Salvador, Rwanda, and Ethiopia).

58. *See, e.g.*, Minow, *supra* note 34, at 13 ("If standing alone, a truth commission could offer a focal point for national memory and accountability; if proceeding alongside prosecutions, it could generate factual predicates for investigations and judicial accountability. In either case, truth commissions could generate knowledge and help build public acknowledgment around a narrative of events and responsibility for the events."); Jonathan Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 Int'l Crim. L. Rev. 263, 288 (2011).

Other restorative justice mechanisms that have been employed after large-scale harms include traditional approaches to justice such as the *Gacaca* in Rwanda and the *Matu Oput* in Uganda.[59] In such cases, the traditions, which were developed to address smaller-scale local harms, have been modified to address mass crimes.[60] Despite the controversy that surrounds the use of such mechanisms,[61] it demonstrates the continued interest in non-criminal approaches to justice for massive harms. The benefits that may accrue from these justice mechanisms include addressing victims' needs in a culturally appropriate way, promoting inter-group harmony, and conserving resources.[62]

Finally, as with supra-national adjudication, an effort to compare potential benefits accruing from non-criminal approaches must take account of their probability. Again, an important factor to consider in this regard is the sociological legitimacy of the institutions involved. Given the disparate

59. *See* Barbara Oomen, *From Gacaca to Mato Oput: Pragmatism and Principles in Employing Traditional Dispute Resolution Mechanisms*, *in* Facing the Past: Amending Historical Injustices Through Instruments of Transitional Justice 167, 167 (Peter Malcontent ed., 2017) ("The Rwandan gacaca, in many ways, serve as an example of a somewhat exotic but increasingly essential element of the 'transitional justice toolbox' as employed all over the world. Next to tribunals, truth commissions and a host of mechanisms for reparations, traditional dispute resolution mechanisms have been reinvigorated or even reinvented for the purpose of dispensing post-conflict justice in former colonies with a tradition of legal pluralism like East Timor, Sierra Leone, Rwanda and Burundi.").

60. *See* Lars Waldorf, *Local Transitional Justice: Customary Law, Healing Rituals, and Everyday Justice*, *in* An Introduction to Transitional Justice 169, 179 (Olivera Simić ed., 1st ed. 2016).

61. *See id.*

62. *See* Tola Odubajo, *Africa's Transitional Justice System in a Changing Global Order: The "Allure" of Rwanda's Gacaca Transitional Justice System*, *in* The Palgrave Handbook of Africa and the Changing Global Order 825, 825-37 (Samuel Ojo Oloruntoba & Toyin Falola eds., 2022) (arguing that African indigenous approaches to transitional justice have the capacity to bring lasting harmony to the affected societies); Tim Murithi, *African Indigenous and Endogenous Approaches to Peace and Conflict Resolution*, *in* Peace and Conflict in Africa 16, 28 (David J. Francis ed., 2009) (arguing that indigenous approaches to transitional justice are more cost effective than alternatives).

benefits and harms that could potentially accrue to different communities from various kinds of justice mechanisms, comparisons are challenging. Such analysis is not susceptible to the application of legal criteria, but instead should be part of discretionary decision-making about when to establish supra-national courts and when those institutions should exercise their jurisdictions. For the ICC, the authority to engage in comparative benefit analysis can be found in both the prosecutor's discretion to determine when to pursue situations *proprio motu*, and in the "interests of justice" provision for referred situations.[63] Although the ICC is not mandated to defer to non-criminal investigations in determining whether a situation or case is admissible as Minow argues,[64] it can do so as an exercise of discretion. Likewise, the ICC Prosecutor can use discretion to defer to national or even regional justice efforts that do not address the same persons and conduct as the ICC and thus would not render a case inadmissible under the weak version of complementarity the Court has adopted.[65]

The ICC Appeals Chambers has held that the Prosecutor has discretion to decide when to seek Pre-Trial Chamber authorization to open an investigation *proprio motu*.[66] Comparative benefit should be part of that discretionary decision-making. For situations referred to the Court by a State party or the Security Council, the Prosecutor is obligated to open an investigation if the situation is admissible unless "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[67] The Pre-Trial Chamber may review the prosecutor's decision not to proceed based on the interests of justice, including on its own initiative, in which case the decision will stand only if confirmed

63. *See* Rome Statute, *supra* note 9, art. 53.

64. *See supra* notes 34-35 and accompanying text.

65. *See supra* note 32 and accompanying text.

66. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 30 (Mar. 5, 2020).

67. Rome Statute, *supra* note 9, art. 53, ¶ 1.

by the Chamber.[68] For referred situations the judges thus play an important role in determining the interests of justice. The judges may not, however, declare a situation to be outside the interests of justice in the absence of such a finding by the prosecutor.[69] As such, the prosecutor enjoys considerable discretion in determining which investigations are in the interests of justice, and somewhat less in deciding which are not.

Thus far, the ICC's prosecutors have made little use of the interests of justice provision. The first prosecutor issued a policy statement declaring that the interests of justice do not include consideration of the interests of peace.[70] No prosecutor has cited the interests of justice in declining to pursue a situation. In the Afghanistan situation, the prosecutor applied for Pre-Trial Chamber authorization to investigate, but the Pre-Trial Chamber held the investigation was not in the interests of justice.[71] It cited several factors, including likely difficulties in obtaining evidence.[72] The Appeals Chamber reversed the decision, holding that the Pre-Trial Chamber has no authority to consider the interests of justice in determining whether to grant authorization to open an investigation.[73] Although the Pre-Trial Chamber acted beyond the confines of the Rome Statute in declining to authorize the investigation based on the interests of justice, its impulse to consider a range of factors, including the likely effectiveness of prosecutions, is to be lauded. The prosecution should likewise broaden its understanding and employment of the interests of justice provision to include comparative benefit.

To ensure their decisions maximal legitimacy over time, decision-makers should articulate their views about the likely

68. *Id.* art. 53, ¶ 2.

69. *Islamic Republic of Afghanistan*, Case No. ICC-02/17 OA4, ¶¶ 37, 46.

70. Int'l Crim. Ct. Off. of the Prosecutor, Policy Paper on the Interests of Justice 1 (2007), www.icc-cpi.int/sites/default/files/ICCOTPInterestsOfJustice.pdf [https://perma.cc/6CZT-7MLG].

71. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 87 (Apr. 12, 2019).

72. *Id.* ¶ 89-95.

73. *Islamic Republic of Afghanistan*, Case No. ICC-02/17 OA4, ¶ 37.

benefits of their choices to relevant audiences, fostering dialogue with those communities that can inform future decisions. For instance, in establishing an *ad hoc* tribunal, political actors can express the view, as they did in establishing the ICTY, that the institution will contribute to regional peace and security.[74] Such predictions can later be assessed, as scholars have in the former Yugoslavia,[75] and the assessments used in future decision-making. Articulated decisions *not* to proceed on comparative benefit grounds are likely to generate significant dialogue that can inform institutional and political actors about the preferences of various stakeholders. For this dialogic process to be productive, it will be crucial to engage with as broad and diverse a set of stakeholders as possible, consciously seeking to counteract decision-maker biases.[76]

Conclusion: Comparative Benefit of ICC Action in Colombia and Ukraine Situations

To demonstrate the value of comparative benefit analysis, consider the ICC's decision-making with respect to the situations in Colombia and Ukraine. In 2004, the ICC opened a preliminary examination into war crimes and crimes against humanity committed during Colombia's decades-long civil war.[77] In 2021, almost two decades later, the ICC closed the preliminary examination, finding the situation inadmissible on the basis of complementarity.[78] Throughout the preliminary examination, the

74. *See* S.C. Res. 1166, ¶ 1 (May 13, 1998).

75. *See, e.g.*, Frédéric Mégret, *The Legacy of the ICTY as Seen Through Some of its Actors and Observers*, 3 Goettingen J. Int'l L. 1011, 1050 (2011); The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments (Milena Sterio & Michael Scharf eds., 2019).

76. For a discussion of this process see deGuzman, *supra* note 17, at 25-33.

77. *Colombia—Preliminary Examination*, Int'l Crim. Ct., www.icc-cpi.int/colombia [https://perma.cc/MC23-QKCA].

78. Press Release, Int'l Crim. Ct., ICC Prosecutor, Mr Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice (Oct. 28, 2021) ("Following a thorough

ICC was in dialogue with the Colombian authorities, generally encouraging *more* criminal accountability.[79] Ultimately, Colombia adopted a peace agreement that provides for a complex mix of criminal accountability and restorative justice.[80] It created a "*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*," ("Truth, Coexistence, and Non-Repetition Commission.") as well as a "*Jurisdicción Especial para la Paz*" (Special Jurisdiction for Peace) (*JEP*).[81] The *JEP* has a judicial panel for amnesty, which provides amnesty for certain "political" crimes, and non-carceral punishment for some defendants who acknowledge their crimes and engage in restorative activities.[82] The ICC's recognition that this agreement meets the requirements of complementarity represents a step in the direction of accepting the legitimacy of restorative justice measures in some situations. Comparative benefit analysis, however, could have led to the same decision without the ICC Prosecutor having to find the situation inadmissible and might thus have led to an earlier resolution.

The adoption of the peace agreement in 2016 made clear the Colombian government's commitment to national justice measures for the crimes that took place during the country's civil war. Although the population was, and remains, divided about

assessment, the Prosecutor is satisfied that complementarity is working today in Colombia." The Office of the Prosecutor entered into an agreement with the Colombian government that provides the ICC a role in monitoring the progress of national accountability proceedings.).

79. René Urueña, *Prosecutorial Politics: The ICC'S Influence in Colombian Peace Processes, 2003-2017*, 111 Am. J. Int'l L. 104, 107 (2017) ("Moreno-Ocampo acknowledged that his strategy in Colombia was to spur domestic institutions to act in compliance with international norms, including through domestic prosecution of war criminals.").

80. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom.-FARC-EP (Nov. 24, 2016), www.peaceagreements.org/viewmasterdocument/1845 [https://perma.cc/3EEL-MFQW].

81. *Id.* at 139, 69-70.

82. *Id.* at 161-62, 182-85.

the best path forward,[83] a legal framework was put in place requiring measures to ascertain truth, hold perpetrators accountable, and provide reparations and restorative measures.[84] Moreover, the Colombian government strongly prefers to pursue justice at the national level, in accordance with national goals and values.[85] Under these circumstances, the benefits of national proceedings may well outweigh those of supra-national adjudication at the ICC. Indeed, supra-national adjudication that is incompatible with Colombian goals, for instance because it over-emphasizes retribution at the expense of restoration, could harm national communities.

Additionally, the global community did not have strong independent interests in supra-national adjudication. National accountability mechanisms appear likely to produce the necessary deterrence, and there is no great need for global norm expression because many of the crimes in the conflict have already been internationally condemned over the past decades. Additionally, national proceedings are focused on some of the most important under-prosecuted crimes such as those particularly affecting women, children, and the natural environment.[86] Although the ICC Prosecutor reached the right result, waiting until a determination of inadmissibility could be reached may have needlessly prolonged the process. As soon as the Colombian government made a strong legal and political commitment to enforcing a justice process, a comparative benefit analysis could have supported the conclusion that ICC action was not appropriate.

In contrast to the Colombia situation, the Ukraine situation presents an easy case for ICC, and other supra-national,[87] action

83. *Colombia Referendum: Voters Reject Farc Peace Deal*, BBC (Oct. 3, 2016), www.bbc.com/news/world-latin-america-37537252 [https://perma.cc/MA82-94LP].

84. *See* Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, *supra* note 80.

85. *See* Annika Björkdahl & Louise Warvsten, *Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC*, 15 Int'l. J. Transitional Just. 636, 646-54 (2021).

86. Alexandra Huneeus & Pablo Rueda Sáiz, *Territory as a Victim of Armed Conflict*, 15 Int'l J. Transitional Just. 210, 210 (2021).

87. Several states are pursuing universal jurisdiction cases. *See Universal Criminal Jurisdiction in Ukraine*, Inst. for War & Peace Reporting (Sept. 20, 2022), https://iwpr.net/global-

under a comparative benefit analysis. First, the global interest in supra-national accountability is exceptionally strong. Russia's invasion of Ukraine represents a serious threat to the entire global order, in addition to infringing Ukraine's sovereignty and inflicting tremendous suffering on its people.[88] Global inaction in the face of such aggression could encourage future aggressors, further destabilizing world order. Additionally, there is no tension between global and local goals in this situation. Ukraine has expressed eagerness for supra-national action by the ICC and by national courts exercising universal jurisdiction.[89] Although Ukrainian prosecutors and courts have made impressive progress in investigating crimes being committed during the war,[90] they face serious challenges considering the context of armed conflict in which they must operate and the overwhelming number of crimes being committed.[91] Moreover, they lack jurisdiction over

voices/universal-criminal-jurisdiction-ukraine [https://perma.cc/VC57-LZ5H].

88. *Russia/Ukraine: Invasion of Ukraine is an Act of Aggression and Human Rights Catastrophe*, Amnesty Int'l (Mar. 1, 2022), www.amnesty.org/en/latest/news/2022/03/russia-ukraine-invasion-of-ukraine-is-an-act-of-aggression-and-human-rights-catastrophe/ [https://perma.cc/MB3P-VQZS].

89. Julia Crawford & Thierry Cruvellier, *Ukraine Responds to Warfare with "Lawfare"*, Justiceinfo.net (Mar. 25, 2022), www.justiceinfo.net/en/89266-ukraine-responds-to-warfare-with-lawfare.html [https://perma.cc/FMJ6-8D2U].

90. Egle Murauskaite, *War Crimes in Ukraine: In Search of a Response*, Foreign Pol'y Rsch. Inst. (Aug. 18, 2022), www.fpri.org/article/2022/08/war-crimes-in-ukraine/ [https://perma.cc/N8X4-JLWW] ("By early July 2022, there were reports of 200-300 war crimes being committed every day, with 21,000 investigations launched, 600 suspects identified, and 80 prosecutions initiated."); Paul LeBlanc, *Ukraine's Prosecutor General Says Office is Investigating 5,800 Cases of Russian War Crimes*, CNN, www.cnn.com/2022/04/11/politics/iryna-venediktova-ukraine-russia-war-crimes-cntv (Apr. 11, 2022, 9:06 PM) [https://perma.cc/PKG3-VVFW].

91. *USAID/Ukraine Rapid Response to Russia's Invasion of Ukraine*, USAID (Nov. 3, 2022), https://www.usaid.gov/ukraine/fact-sheets/jan-13-2023-usaidukraine-rapid-response-fact-sheetjanuary-13-2023 ("[Coalitions] have documented more than 20,000 instances of alleged war crimes and human rights abuses."); Cindy Tran, *Ukraine Holding War Criminals to Account Despite Judicial System Woes: Chief Justice*, Nat'l Post (Oct. 31, 2022,

certain crimes, including official acts of aggression, due to international law immunities and gaps in legislation.[92] Burden sharing between national and supra-national courts is appropriate in these circumstances, especially because the goals of both communities are aligned: specific and general deterrence, as well as global norm expression, are important to global and national communities alike. Indeed, the ICC's issuance of an arrest warrant for President Putin for illegal deportation of Ukrainian children to Russia represents an excellent use of the Court's resources for expressive purposes.

In summary, comparative benefit analysis is an important component of ensuring the moral legitimacy of supra-national adjudication. The anti-impunity agenda of recent decades has encouraged decision-makers to view such accountability efforts as morally appropriate whenever so-called "atrocity crimes" have been committed. Yet the potentially divergent goals and values of affected communities belie such claims. In some situations, global institutions should defer to national efforts, whether they involve criminal punishment or other forms of accountability such as restorative justice measures. Such deference should not be limited to situations that are inadmissible before global institutions but should occur whenever the benefits those institutions are likely to provide are outweighed by the likely benefits of other justice efforts.

7:15 PM), https://nationalpost.com/pmn/news-pmn/canada-news-pmn/ukraines-chief-justice-in-ottawa-to-talk-about-strain-of-war-on-judicial-systems [https://perma.cc/29C8-R6U8].

92. Oona Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part 1)*, Just Sec. (Sept. 20, 2022), www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/ ("[E]ven though Ukrainian law (and other States' domestic law) permits prosecution for the crime of aggression in a domestic court, cases against those most responsible for the war would be difficult, if not impossible, to pursue successfully without violating key international legal rules on immunity.") [https://perma.cc/X386-PLM5]; Masha Gessen, *The Prosecution of War Crimes in Ukraine*, The New Yorker (Aug. 1, 2022), www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine ("Last year, Ukraine's parliament voted to amend the criminal code to better define war crimes and to outline punishments for them, but the law has yet to take effect.") [https://perma.cc/P3EY-BMWB].