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Positive Complementarity as Justice? The Case for International Criminal Court Proceedings *In Situ*

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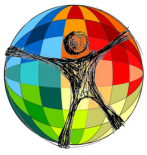

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ABSTRACT

The International Criminal Court (ICC) has the potential to support national accountability mechanisms for serious crimes by holding *in situ* proceedings. However, the legal basis and potential benefits of *in situ* proceedings have remained under-theorized within the scholarly literature on International Criminal Law (ICL). This paper seeks to critically examine the relationship between *in situ* proceedings and the concept of positive complementarity, which refers to the idea that the ICC has a positive obligation to support domestic accountability efforts. The author argues that the ICC ought to take seriously the concept of positive complementarity and can use the opportunity of *in situ* proceedings as a way to do so. This paper proceeds as follows. Part II discusses the concept of positive complementarity, its legal basis, and how it supports the project of international justice. Part III then moves to examine *in situ* proceedings, their legal basis, and how this option for justice supports positive complementarity and consequently, international justice more broadly. In particular, the author argues that *in situ* proceedings can galvanize domestic accountability, support the ICC in fulfilling its mandate, and support restorative justice and reconciliation. Part IV asks why, if *in situ* proceedings could make a significant contribution to positive complementarity and international justice, has the ICC not authorized them to date? To interrogate this question, the author focuses on three rejected in situ requests to demonstrate that the ICC has failed to develop a principled and substantiated approach to evaluating in situ requests, per the relevant Rome Statute provisions as well as the Court's Rules of Procedure and Evidence (RPE). The author concludes by calling on the Court to develop a principled approach to evaluating *in situ* requests to ultimately breathe new life into the concept of complementarity.

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I. Introduction

The question of what role the International Criminal Court (ICC)[1] must play in supporting national accountability mechanisms for serious crimes is one that has been at the core of research on International Criminal Law (ICL). The ability of the ICC to hold proceedings *in situ,*[2] for example, is an interesting feature of the Rome Statute which has the potential to bring justice closer to affected communities and catalyze national accountability efforts. Despite the potential benefits of holding ICC proceedings where alleged crimes were committed, *in situ* proceedings and their legal basis in the Rome Statute have remained undertheorized within the scholarly literature on ICL/the ICC.

My interest in *in situ* proceedings developed as a law student at McGill, when I participated in an internship program focused on international criminal justice. During my summer internship, the ICC had before it a request to hold part of Mahamat Said Abdel Kani's trial in Bangui, Central African Republic (CAR), where the crimes he is charged with were committed. Kani is being tried for four counts of war crimes and three counts of crimes against humanity allegedly committed in the CAR in 2013.[3] My curiosity on Kani's case led me to survey his trial docket and identify the core arguments in favour of and against holding part of the hearings in Bangui. This led me back to January 2022, when one of the Court's Trial Chamber[4] held a status conference and invited parties to submit their views on the possibility of holding the trial at least partly *in situ* and/or the

[1] The views expressed in this paper are my own and do not represent the views of McGill University or Human Rights Watch. In this paper, I use "the ICC" and "the Court" interchangeably.

[2] *In situ* proceedings refers to Court proceedings that take place where the alleged crimes took place (i.e. 'on site').

[3] See *The Prosecutor v Mahamat Said Abdel Kani*, ICC-01/14-01/21, Publicly redacted version of Decision on the confirmation of charges against Mahamat Said Abdel Kani (9 December 2021) (International Criminal Court), online (pdf): *ICC* <icccpi.int/sites/default/files/CourtRecords/CR2021_11432.PDF>.

[4] The Court has several distinct Trial Chambers, however, in this essay I omit the specific Trial Chambers mentioned as it is not relevant to the analysis.

feasibility of a site visit given ongoing insecurity and the threat of violence in the CAR. In the submissions that followed, the Prosecution, Defence, and the Office of the Legal Representative of Victims all agreed (to varying degrees) that at least part of the trial should be held in Bangui in order to bring the judicial process closer to victims.[5] In spite of the parties' views, however, the Trial Chamber rejected the request to hold part of the trial *in situ,* citing safety, efficiency and effectiveness concerns.[6]

This decision left me puzzled and frustrated. Why, if all parties to the case agree that it would be in the interest of justice to hold at least part of the trial in Bangui, did the Trial Chamber reject the request? What good is justice served if it is not visible to affected communities? It is within this timely context, and the aforementioned research gap, that I became interested in better understanding *in situ* proceedings, their legal basis, and what they have to offer the project of international justice.[7]

At the same time as I was grappling with the Kani *in situ* decision, I was also learning about the technicalities of the Rome Statute system. One particular concept that piqued my interest was the concept of 'complementarity,' which came up frequently in my research. As one of the core principles of the Rome Statute, complementarity classically refers to the idea that the ICC may only exercise jurisdiction where national legal systems fail to do so on account of being unwilling or unable to genuinely carry out criminal proceedings against an accused.[8] A former McGill intern even referred to complementarity as "the lynchpin that holds the

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[5] See *The Prosecutor v Mahamat Said Abdel Kani*, ICC-01/14-01/21-389-Red, Decision on the Prosecution's Request for the Trial to be Held Partially in Bangui (5 July 2022) at paras 4–8 (International Criminal Court), online (pdf): *ICC* <icc-cpi.int/court-record/icc-01/14-01/21-389-red> [*Prosecutor v Mahamat Said Abdel Kani*].

[6] See *ibid* at para 8.

[7] I define 'the project of international justice' in this paper as the goal of ensuring impunity for serious crimes, deterrence of future serious crimes, as well as the process of reconciliation and healing that is required for a society to repair itself after violence to prevent future conflict.

[8] Informal expert paper, "The principle of complementarity in practice" (2003) at para 1, online (pdf): *International Criminal Court* <icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF> [Informal expert paper].

International Criminal Court (ICC) and domestic criminal justice systems together."[9]

As I began to research complementarity more, I learned that it was not as simple as a concept as the Rome Statute suggested on a *prima facie* basis. There exists a vast body of literature on complementarity and what it means for the Court. In particular, I came across the idea of 'positive complementarity,' which refers to the idea that the Court has a positive obligation to support domestic accountability efforts. In one text that I came across on positive complementarity, Carsten Stahn appears to take a particular interest in the link between *in situ* proceedings and positive complementarity: "the Court may consider holding on-site proceedings as part of a strategy on 'positive' complementarity." [10] Inspired by Stahn's important but brief observations and my internship experience, this paper seeks to critically examine the relationship between *in situ* proceedings and the concept of positive complementarity.

I argue that, given its legal basis in the Rome Statute, the ICC ought to take seriously the concept of 'positive complementarity' and can use the opportunity of *in situ* proceedings as a way to do so. In Part II, I will discuss the concept of positive complementarity, its legal basis, and how it supports the project of international justice. In Part III, I move to examine *in situ* proceedings, their legal basis, and how this option for justice supports positive complementarity and consequently, international justice more broadly. In particular, I argue that *in situ* proceedings can (1) galvanize domestic accountability, (2) support the ICC in fulfilling its mandate, (3) support restorative justice and reconciliation, which the Court ought to be playing a bigger role in, despite not being a core part of its mandate. Part IV asks why, if *in situ* proceedings could make a significant contribution to positive complementarity and international justice,

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[9] Will Colish, "The International Criminal Court in Guinea: A Case Study of Complementarity" (2013) 1:8 McGill International Human Internship Rights Working Paper Series 1 at 24.

[10] Carsten Stahn "Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical,' 'Positive' and 'Negative' Complementarity" in Carsten Stahn & Mohamed M El Zeidy, eds, *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011) 235.

has the ICC not authorized them to date? In this section, I focus on three rejected *in situ* requests to demonstrate that the ICC has failed to develop a principled approach to evaluating *in situ* requests, per the relevant Rome Statute provisions as well as the Court's Rules of Procedure and Evidence (RPE). I call on the Court to develop a principled approach to evaluating *in situ* requests and suggest that in doing so, it has the ability to breathe new life into the concept of complementarity.

II. Positive Complementarity

A. *Background*

Complementarity is one of the core principles underpinning the Rome Statute and ICL. In a classical sense, complementarity refers to the principle that the "ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings."[11] This principle is articulated in both the Preamble and Article 1 of the Rome Statute, which establishes that the ICC "shall be complementary to national criminal jurisdictions."[12] However, despite being one of the core tenants of the international criminal justice system, the Rome Statute does not provide a legal definition of complementarity to be employed by ICC Judges.

In the early to mid 2000s, just as the Court was establishing itself, scholars/practitioners and the Office of the Prosecutor (OTP) began to probe the concept of complementarity and what it meant in praxis, given its under-theorization in the Court's founding statute.

In June 2004, for example, The Amsterdam Center for International Law and the Department of Legal Philosophy at the Law Faculty of the Free University of Amsterdam held an international expert roundtable dedicated to the complementarity

[11] Informal expert paper, *supra* note 8 at para 1.

[12] *Rome Statute*, 17 July 1998, vol 2187, 1-38544 Preamble, art 1 (entered into force 1 July 2002) [*Rome Statute*].

principle.[13] This was followed by a proliferation of academic publications which highlighted the concept of 'positive complementarity,' which refers to the idea that the Court and domestic jurisdictions may complement each other not only in a negative sense (i.e. through the 'residual' jurisdiction of the Court) but also in a positive fashion, particularly through mutual assistance, interaction, and encouraging domestic prosecutions.[14] The policy objective that positive complementarity serves is "to contribute to the effective functioning of national judiciaries."[15]

Notable ICL scholar William Burke-White took this view even further through his theorization of the concept of 'proactive complementarity' which he refers to as the process of "[utilizing] the full range of legal and political levers of influence available to the Court to encourage and at times even assist national governments in prosecuting international crimes themselves."[16] He argues that by following a policy of proactive complementarity, the Court will maximize its impact on international justice, despite its limited resources.[17]

Since the Court's early days, scholarly discussions of (positive) complementarity have persisted, with academics asking whether it is a strength or a weakness,[18] and referring to it as a catalyst for compliance.[19] As of 2020, the idea that positive

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[13] See Jann Kleffner & Gerben Kor, eds, *Complementary views on complementarity: proceedings of the international roundtable on the complementary nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (Amsterdam: TMC Assser, 2006).

[14] See Carsten Stahn, "Complementarity: A Tale of Two Notions" (2007) 19:1 Crim LF 86 at 100; see also William Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49:1 Harv Intl LJ 53 [Burke-White, "Proactive Complementarity"].

[15] William Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice" (2008) 19:1 Crim LF 59 at 61 [Burke-White, "Implementing a Policy"].

[16] Burke-White, "Proactive Complementarity", *supra* note 14 at 56.

[17] See *ibid* at 56.

[18] See generally Linda E Carter, "The Future of the International Criminal Court: Complementarity as a Strength or a Weakness" (2013) 12:3 Wash U Global Stud L Rev 451.

[19] See Christian De Vos, *Complementarity, Catalysts, Compliance: The International Criminal Court in Uganda, Kenya, and the Democratic Republic of*

complementarity creates positive obligations for the ICC to support the fight against impunity in a broad sense, beyond its jurisdiction, was still prevalent in ICL literature.[20]

While academic actors have been influential in the theorization of positive complementarity, the OTP embraced this notion early on as a way of encouraging national accountability efforts for serious crimes.[21] For example, when the Court was created in 2002, the 'start-up team' of the OTP suggested that an expert consultation be convened in order to reflect on the Rome Statute's complementarity regime and its potential impact on legal, policy, and management challenges.[22] The informal expert paper that emerged in 2003 specifically argued that partnership was one of the underlying principles that should guide the complementarity regime's ability to "[serve] as a mechanism to encourage and facilitate the compliance of states with their primary responsibility to investigate and prosecute core crimes."[23] The notion of partnership and encouraging state compliance is more aligned with a view of complementarity as enabling, rather than a strictly residual jurisdictional principle.

Aside from the informal expert report, the Court's first Prosecutor, Luis Moreno-Ocampo, specifically referred to and endorsed positive complementarity in his public statements. For example, in his first statement to the Assembly of States Parties (ASP) following his election, Moreno-Ocampo referred to complementarity as a principle which "compels the prosecutor's office to collaborate with national jurisdictions in order to help

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Congo (Cambridge: Cambridge University Press, 2020); Jann Kleffner, "Complementarity as a catalyst for compliance" in Jann Kleffner & Gerben Kor, eds, *Complementary views on complementarity: proceedings of the international roundtable on the complementary nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (Amsterdam: TMC Assser, 2006); Federica Gioia, "Comments on chapter 3" in Jann Kleffner & Gerben Kor, eds, *Complementary views on complementarity: proceedings of the international roundtable on the complementary nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (Amsterdam: TMC Assser, 2006).

[20] See Christian De Vos, *ibid* at 27.

[21] See *ibid* at 28.

[22] See Informal expert paper, *supra* note 8 at 2.

[23] *Ibid* at 3.

them improve their efficiency."[24] He continued by emphasizing that this can be done through cooperation, specifically by "providing the state's personnel with training and technical support."[25]

OTP's support of positive complementarity as a policy objective has continued since Moreno-Ocampo's term and continues to be re-iterated in the present day. Like Moreno-Ocampo, the Court's current Prosecutor, Karim Khan, has frequently endorsed positive complementarity publicly. For example, in his first address to the UN Security Council as Prosecutor of the Court, Khan outlined that during his term, he would "give renewed purpose to the principle of complementarity, working with states, for states to step up."[26] This has been followed by a number of statements where Prosecutor Khan has discussed the cooperative role that complementarity requires, going as far as specifically referring to positive complementarity in his remarks. For example, Prosecutor Khan has recently referred to complementarity as "the obligation to work better,"[27] as the principle that "underlies the importance of further deepening the cooperation [...],"[28] and as a process of "[jointly creating] an environment of constructive dialogue and cooperation, enabling national authorities to take on greater responsibility with respect to Rome Statue crimes."[29] In addition to

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[24] Luis Moreno-Ocampo, "Election of the Prosecutor, Statement by Mr. Moreno Ocampo" (2 May 2003), online: *I*CC <icc-cpi.int/news/icc-election-prosecutor-statement-mr-moreno-ocampo>.

[25] *Ibid*.

[26] Karim Khan, "Statement of ICC Prosecutor, Karim A.A. Khan QC, to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)" (24 November 2021) at para 9, online: *I*CC <icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-united-nations-security-council-situation-libya>.

[27] *Ibid*.

[28] Karim Khan "Statement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya" (7 September 2022), online: *I*CC <icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint-0>.

[29] Karim Khan, "Statement by ICC Prosecutor Karim A.A. Khan KC regarding the opening of the trial related to events of 28 September 2009 in Guinea, signature of Agreement with Transitional Government on complementarity and closure of the Preliminary Examination" (29 September 2022), online: *I*CC <icc-

Prosecutor Khan's remarks, the OTP reiterated in its 2016–2018 Strategic Plan that while it will not act as a development agency, it can contribute to positive complementarity through the sharing of its expertise in ICL, for example.[30]

B. Positive Complementarity's Legal Basis

In his foundational work on positive complementarity, Burke-White outlines that in order to have legal weight, the ICC's endorsement of positive complementarity needs to either have a basis in the Rome Statute or the inherent powers of the Prosecutor/OTP.[31] He suggests that there exists a legal basis in the Rome Statute on the basis of three of its separate elements: (1) the absence of a prohibition of a policy of positive complementarity, (2) express Statutory provisions that serve as the basis of positive complementarity, and (3) the inherent powers of the OTP to adopt and implement a policy of positive complementarity.[32]

First, the admissibility limitations that exist in Article 17, the Rome Statute's general provision on complementarity, do not bar the Court's Prosecutor from encouraging national judiciaries to prosecute serious crimes.[33] Although this is not an endorsement of positive complementarity, it is significant insofar as it does not hinder positive complementarity's ability to be adopted and implemented by the OTP and the Court more broadly.

Second, there exist several provisions in the Rome Statute that give explicit authority to the Court to adopt positive complementarity as a policy goal. In particular, Burke-White argues that there are several provisions that encourage communication and dialogue between the Court and national

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cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-regarding-opening-trial-related-events-28-september>.

[30] See Office of the Prosecutor, "Strategic Plan 2016 – 2018" (2015) at 57, online (pdf): *ICC* <icc-cpi.int/sites/default/files/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf>.

[31] See Burke-White, "Implementing a Policy", *supra* note 15 at 63.

[32] See *ibid* at 63–64.

[33] See *ibid* at 65.

governments on issues of complementarity.[34] This includes statutory provisions which enable both the Prosecutor and States to collaborate. For example, Articles 54 sets out Prosecutor's powers with respect to investigations and empowers them to "seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate" and to "enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person."[35]

Conversely, the Rome Statute also creates a range of obligations for States that Burke-White argues may provide a legal foundation for positive complementarity. Many examples can be found in Part 9 of the Rome Statute, which focuses on *International Cooperation and Judicial Assistance*. Some examples include States' duties to cooperate with the Court's investigations,[36] and their duties to have appropriate procedures under its national law to facilitate this cooperation.[37] Overall, by drawing on various articles of the Rome Statute, Burke-White suggests that is, at the very least, a statutory framework in place that could enable a policy of positive complementarity to be employed by the OTP and the Court more broadly.

Finally, Burke-White suggests that the Prosecutor may have implied powers to endorse positive complementarity. In particular, he argues that the Rome Statute's creation of an independent OTP recognizes that it may have to take actions consistent with the Statute, but not expressly stated in it, in order to fulfill its duties.[38] His second argument is that the object and purpose of the Rome Statute suggest an inherent authority of the Prosecutor that goes beyond enumerated power in order to fulfill the Rome Statute's mandate: to end impunity.[39] Together, these two elements "[provide] the Prosecutor with a strong–if indirect–legal basis for

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[34] See *ibid* at 67.

[35] *Rome Statute*, *supra* note 12, arts 54(3)(d),(e); see also Burke-White, "Implementing a Policy", *supra* note 15 at 68.

[36] See *Rome Statute*, *ibid*, art 86.

[37] See *ibid*, art 88.

[38] See Burke-White, "Implementing a Policy", *supra* note 15 at 68–69.

[39] See *ibid* at 69.

adopting a strategy of positive complementarity."[40] Based on Prosecutor Khan's current statements endorsing positive complementarity that were discussed in the preceding section, this aspect of Burke-White's analysis is particularly relevant.

Given the legal basis for the Court to support positive complementarity, there are many ways that the Court could do so in praxis. One suggestion, made by Linda Carter, is the idea to create an Institute or Centre that would be a separate entity from the Court.[41] This Institute would be responsible for leading national capacity building efforts and supporting positive complementarity, without the threat of being criticized for not being impartial.[42] As the next section suggests, the prospect of holding *in situ* proceedings is another underexplored and relevant option to consider, which is particularly timely given the Court's missed opportunity in *The Prosecutor v. Mahamat Said Abdel Kani*.

III. *In Situ* Proceedings

A. *Legal Basis and Origins*

In situ proceedings refer to the ICC's ability to hold parts or all of a trial in the place where the alleged crimes were committed. Although this might not always be the literal site of the crime, or even the same city, the ethos of *in situ* proceedings is to try and get as close as possible to affected communities to ensure that justice being delivered, regardless of the outcome of any particular trial, is visible to the public.

Like positive complementarity, the concept of *in situ* proceedings is not explicitly mentioned in the Rome Statute, nor in the Court's Rules of Procedure and Evidence (RPE). However, there exists a solid legal basis for the Court's ability to hear cases outside of the seat of the Court, which is in The Hague. This legal

[40] *Ibid*.

[41] See Carter, *supra* note 18 at 469–70.

[42] See *ibid*.

basis rests in Articles 3, 4, and 62 of the Rome Statute, as well as within the Rule 100 of the Court's RPE.

Article 3(3) of the Rome Statute outlines that the Court may sit outside of The Hague "whenever it considers it desirable, as provided in this Statute."[43] Article 4(2) provides further support for the ICC hearing proceedings *in situ* and states that "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State."[44] Article 62 allows an exception to the general rule that the place of the trial shall be The Hague: "Unless otherwise decided, the place of the trial shall be the seat of the Court."[45] The final, and crucial, provision that supports *in situ* proceedings is Rule 100 RPE which states:

> In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.[46]

The Court's RPE further outline the procedural requirements necessary in order for an *in situ* request to be approved by the Court. Rule 100(2) RPE states that that any recommendation by the Trial Chamber to change the place of where the Court sits "shall be addressed to the Presidency."[47] This means that in order for the ICC to hold a trial or part of a trial *in situ*, it would have to first be recommended by a Trial Chamber (preferably unanimously but at the least by a majority of Judges) and then, approved by the Presidency. The rationale for this is the fact that Trial Chambers do not have the capacity to make an institutional commitment on behalf of the whole Court, nor do they have the authority that the Presidency has to consult with the prospective

[43] *Rome Statute*, *supra* note 12, art 3(3).

[44] *Ibid*, art 4(2).

[45] *Ibid*, art 62.

[46] International Criminal Court, *Rules of Procedure and Evidence Rule,* ICC-ASP/1/3 and Corr.1 at 100.

[47] *Ibid* at Rule 100(2).

host state.[48] Stuart Ford suggests that the correct textual reading of Rule 100 RPE is that it is the Presidency that should decide all requests.[49] However, the actual practice at the ICC appears to be two pronged: the request will first be considered by a Trial Chamber and if recommended, it will then be finally decided on by the Presidency. In practice, most requests to consider *in situ* proceedings have not made it to the Presidency as they have not been recommended by a Trial Chamber.

Despite the strong legal basis to support *in situ* proceedings, the Court has never held a trial or any part of a trial outside of the seat of the court in The Hague. However, the issue of whether or not to do so has been a core issue at the Court since its inception. This is evidenced by the fact that in the first trial before the Court, the case of *The Prosecutor v. Thomas Lubanga Dyilo,* the Trial Chamber announced that the possibility of *in situ* proceedings in the Democratic Republic of Congo (DRC) was being investigated by a Legal Advisor to the Chamber.[50] Many commentators were torn on whether Lubanga should have faced trial in DRC: some argued that holding the hearings where the crimes occurred would be more relevant for the Congolese people, while others thought that bringing Lubanga to the DRC from The Hague would increase tensions and conflict in an already fragile environment.[51] While the trial was ultimately held in The Hague, where Lubanga was found guilty of war crimes and sentenced to 14 years imprisonment, these initial reflections on *in situ* hearings

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[48] See Stuart Ford, "The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers" (2010) 43:3 J Marshall L Rev 715 at 743.

[49] See *ibid*.

[50] See *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-T-50-ENG, Trial Chamber I Transcript (4 September 2022) at page 4 (International Criminal Court), online (pdf): *ICC* <icc-cpi.int/sites/default/files/Transcripts/CR2007_03863.PDF>.

[51] See Sonia Nezamzadeh, "Should Lubanga Face Trial in DRC?" (16 October 2007), online: *Institute for War & Peace Reporting* <iwpr.net/global-voices/should-lubanga-face-trial-drc>; Associated Press, "International Criminal Court" (4 September 2007) online: *Global Policy Forum* <archive.globalpolicy.org/intljustice/icc/investigations/drc/2007/0904hearings.htm>; International Bar Association, "IB Monitoring Report International Criminal Court November 2007 An International Bar Association Human Rights Institute Report" (last visited 15 December 2022) at 43–44, online (pdf): *IBA* <ibanet.org/document?id=November-2007-Monitoring-Report-ICC>.

have been reiterated since 2007 within a variety of cases and with regard to different country contexts.

Another example of this was in 2009, when the issue of whether to move part of Jean-Pierre Bemba Gombo's case *in situ* to Bangui, CAR came before one of the Court's Trial Chambers. The Prosecution argued that moving parts of the trial to Bangui would "provide maximum access to the trial process for the public and the victims and would therefore be in the interests of justice."[52] While the legal representatives of the victims agreed with the Prosecutor's suggestion, the Trial took place in The Hague, with no publicly available information on how that decision was made.

The final example comes from 2011, when ICL scholars/practitioners called for Muammar Qaddafi's trial to be held *in situ* in Tripoli.[53] Two notable ICL commentators, David Kaye and Mark Kersten both published opinion pieces highlighting the fact that holding the ICC trial in Libya would allow victims to see justice being done and strengthen the country's rule of law more generally.[54] The case has stalled owing to Muammar Qaddafi's death, an outstanding arrest warrant against his son (who is a co-defendant), and the inadmissibility of charges against the final co-defendant. Consequently, it is unlikely that trial will be held at all in the foreseeable future, let alone *in situ*.

The three examples provided here are not exhaustive but have been selected to highlight the origins of the Court's (and commentators') discussions on *in situ* proceedings and what they have to offer international justice. In what follows, I make the case that *in situ* proceedings may be invaluable in implementing a policy of positive complementarity, which the OTP continues to unequivocally endorse.

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[52] *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-*555*, Prosecution's Submission to Conduct Part of the Trial In Situ (12 October 2009) at 3 (International Criminal Court), online (pdf): *ICC* <icc-cpi.int/sites/default/files/CourtRecords/CR2009_07290.PDF>.

[53] See David Kaye, "What to do with Qaddafi?", *New York Times* (31 August 2011), online: <nytimes.com/2011/09/01/opinion/what-to-do-with-qaddafi.html?_r=1>; Mark Kersten, "Having Cake and Eating it Too: An ICC Trial in Libya?" (26 August 2011), online: *Justice in Conflict* <justiceinconflict.org/2011/08/26/having-cake-and-eating-it-too-an-icc-trial-in-libya/>.

[54] See Kaye, *ibid*; Kersten, *ibid*.

B. How do In Situ Proceedings Support Positive Complementarity?

The prospect of *in situ* proceedings supports the concept of positive complementarity in a variety of ways. In this section, I will provide three examples to demonstrate how *in situ* proceedings can (1) galvanize domestic accountability in order to promote national criminal prosecutions, (2) support the ICC in fulfilling its mandate, and (3) promote restorative justice and reconciliation, which is formally outside of the mandate of the court but should be taken more seriously as part of the court's responsibilities and capabilities.

i) Galvanizes Domestic Accountability

The fact that *in situ* proceedings have the potential to galvanize domestic accountability mechanisms is the most significant reason why the Court ought to take requests seriously. If successful, this would mean that less cases would appear before the Court because they would (1) not occur due to the deterrent effect of seeing justice locally or (2) cases would be prosecuted domestically, and impunity avoided. Consequently, the Court would have fulfilled its mandate to end impunity for serious crimes and thus contribute to the prevention of such crimes.

One way that *in situ* proceedings could galvanize domestic accountability would be since they may create "an opportunity for national staff to develop skills and expertise in the practice of international criminal justice." [55] For example, if a shadowing/mentorship program was designed around an *in situ* proceeding, this could enable both local legal and administrative professionals to see first-hand how international criminal trials proceed and are managed. This approach may be particularly useful in contexts where civil society actors have already been conducting capacity building, such as the CAR, where the Wayamo Foundation held capacity building workshops for

[55] Kirsten Ainley & Mark Kersten, "Dakar Guidelines on the Establishment of Hybrid Courts" (2019) at 80, online (pdf): *Hybrid Justice* <hybridjustice.files.wordpress.com/2019/08/dakar-guidelines_digital-version.pdf> (while the guidelines refer to hybrid courts the same principle can be applied to *in situ*).

members of the Special Criminal Court in 2016–2017.[56] Had an *in situ* proceeding been approved in the CAR which overlapped with the Wayamo project, there could have been potential to provide CAR officials with a live case study which may have supported their ability to conduct future domestic proceedings in similar cases.[57]

Additionally, holding proceedings *in situ* may create a greater sense of local ownership by allowing affected communities to witness the justice process first-hand and be a part of it.[58] It seeks to demonstrate that justice is not something that is done "over there" in The Hague, but something that is part of the social fabric that makes up the State where *in situ* proceedings are being held. This greater sense of ownership could be useful insofar as strengthening the rule of law, which is crucial to ensuring that domestic judicial systems "are capable of delivering reasonably fair justice and that enjoy public confidence."[59] Doing so would also be a significant contribution to galvanizing domestic accountability.

ii) Supports the ICC in Fulfilling its Mandate

Notwithstanding the catalytic potential of *in situ* proceedings to galvanize domestic accountability efforts, their potential on the ICC itself also supports the view that they ought to be taken seriously.

First, the Court may be able to increase its credibility and public perception by engaging directly with affected communities. By demonstrating local engagement and interest, the ICC may counter the risk of being perceived as "a remote and incomprehensible 'foreign' institution with little relevance to

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[56] See *ibid* at 81.

[57] See Jeremy Sarkin, "Enhancing the Legitimacy, Status, and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies" (2011) 6:1 Interdisc J Hum Rts L 83 at 92.

[58] See Janine Clark, "Peace, Justice and the International Criminal Court: Limitations and Possibilities" (2011) 9:1 J Intl Crim Justice 521 at 534; Beth VanSchaack, "The Building Blocks of Hybrid Justice" (2016) 44:2 Denv J Intl L & Pol'y 169 (while Van Schaack is discussing hybrid courts, this principle also applies to in situ proceedings).

[59] Jane Stromseth, "Justice in the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?" (2009) 1:1 Hague J Rule L 87 at 89.

people's everyday lives," which Clark notes was a commonly held view of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Bosnia and Herzegovina.[60]

Second, in holding proceedings *in situ*, the Court may be able to address the 'gap' between affected communities' expectations and what the Court can actually achieve. In inviting local populations to attend the trial proceedings, the Court may be able to vernacularize its role and reiterate that it is process rather than outcome oriented. Demonstrating the rigour of the process may also provide affected communities gain a sense of confidence in the system and may increase their willingness to cooperate in future proceedings or investigations.

Lastly, it is important to emphasize the role that *in situ* proceedings can play in the Court's knowledge of affected communities. This point is crucial in order to not perpetuate the erroneous assumption that it is in only States that can "learn" from the ICC and not vice versa. Having the Court travel to affected communities may allow Judges and Court staff to gain a more nuanced understanding of the lived experience of victims. In doing so, it would problematize the notion of the "abstract victims," which Nouwen and Kendall refer to as "one of the most common discursive practices for dealing with the complexities of the individual victim."[61] Through seeing multiple victims within their local realities, the Court may also be enabled to question the image of the "ideal victim" which is identified in ICL as being weak and vulnerable, dependent and grotesque.[62] This is relevant as a more nuanced understanding of affected communities, their local contexts, and their needs could be particularly relevant when the Court decides on matters of individual and collective reparations.

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[60] Clark, *supra* note 58 at 534.

[61] Sara Kendall & Sarah Nouwen, "Representational Practices at the International
Criminal Court: The Gap between Juridified and Abstract Victimhood" (2013) 76:3&4 Law & Contemp Probs 235 at 259.

[62] See Christine Schwöbel-Patel, "The 'Ideal' Victim of International Criminal Law" (2018) 29:3 Eur J Intl L 703 at 703.

iii) Promotes Restorative Justice and Reconciliation

The final contribution of *in situ* proceedings to positive complementarity is its potential to promote restorative justice, reconciliation, and deter future crimes.

A major shortcoming of ICL, or criminal law more broadly, is its inability to address the social 'ruptures' that are created during and after conflict. In response, some scholars, such as Jeremy Sarkin, argue that the ICC ought to play a much greater deterrent role by integrating restorative justice or transitional justice approaches into its work.[63] This is echoed by Pentelovitch who emphasized in 2008 that "there [was] a growing consensus that international criminal tribunals should contribute to national reconciliation by conducting activities such as outreach to affected populations."[64]

In situ proceedings where victims are invited to participate have the potential to address restorative justice through creating *transitional justice atmospheres*.[65] Bens argues that these atmospheres aim to "influence people's sense of justice in relation to the past violence and their demands for a just future" by creating an "affective arrangement."[66] An *in situ* trial may constitute an affective arrangement, particularly when victims are permitted to testify about what occurred, in the place where it occurred. This may have a positive cathartic effect, notwithstanding the outcome of the trial.[67] It could also catalyze a national process of healing and reconciliation in order to repair the social fabric that was torn during conflict. Being able to have this effect would take a concerted effort on the part of the Court to ensure that infrastructure selected for the proceedings has a large enough public space to enable the creation of a *transitional justice atmosphere*. This may have a lasting effect on justice in the

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[63] See generally Sarkin, *supra* note 57.

[64] Norman Henry Pentelovitch, "Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals" (2008) 39:3 Geo J Intl L 445 at 449.

[65] See Jonas Bens "Transitional justice atmospheres" in Katrin Seidel & Hatem Elliesie, eds, *Normative Spaces and Legal Dynamics in Africa* (London: Routledge, 2020) 41 at 42.

[66] *Ibid*.

[67] See Sarkin, *supra* note 57 at 93.

concerned state and has the potential to contribute to the Court's larger role in deterring the commission of future crimes.

IV. Kani, Ntaganda, and Ongwen: An Analysis of *In Situ* Rejections

The preceding analysis has demonstrated the contributions that *in situ* proceedings can make to advancing positive complementarity, as well as the project of international justice more broadly. Why then, given its potential, have requests to hear proceedings *in situ* been rejected by the Court's Trial Chambers or the Presidency in every case where it has been considered? In this section, I will highlight the core obstacle that the Trial Chambers or the Presidency has faced when *in situ* proceedings have been considered and rejected. Based on three notable cases where *in situ* proceedings were discussed at length, I argue that the ICC has failed to develop a principled basis upon which to assess and evaluate whether holding *in situ* proceedings would serve the interests of justice, per Rule 100 RPE. The three cases that will be analyzed are: *The Prosecutor v. Mahamat Said Abdel Kani, The Prosecutor v. Bosco Ntaganda*, and *The Prosecutor v. Dominic Ongwen*.[68]

A. *The Prosecutor v. Mahamat Said Abdel Kani*

The case of Said Kani was the original source of inspiration for this academic inquiry into *in situ* proceedings and their relationship to the principle of positive complementarity. Kani's trial opened in September 2022 in The Hague, despite the Prosecutor's request for the Trial Chamber to open the trial *in situ* in Bangui, CAR. To recall from the beginning of this paper, Kani is facing 7 counts of crimes against humanity and war crimes for crimes he committed in 2013 as an alleged member of the Seleka coalition, a rebel group operating in CAR.

[68] As aforementioned, these are not the only cases where *in situ* proceedings have been considered by a Trial Chamber. However, they are the most significant cases where the docket has been made public.

The request in this case was different from all other *in situ* requests that have come before the Court's Trial Chambers insofar as the Prosecutor suggested a hybrid format, relying on audio-video technology to do so. In particular, the Prosecutor submitted two options that they argued would fulfill Kani's right to be present at his trial. Per the first option, the trial opening would be conducted in Bangui, while the Kani would remain in The Hague with one of his counsel and participate via video link. The second option was for the Trial Chamber, Kani, and one of his counsels to remain in The Hague, while parties and participants (namely, witnesses) would make their statements and answer questions from Bangui via video link. Under both proposals one of Kani's defence counsel would be present in Bangui and another with him in The Hague.[69] All of the proposed *in situ* proceedings envisioned Kani remaining in The Hague due to the Prosecutor's overwhelming concern that he would be enabled to flee if he was permitted to travel to CAR. While the Defence did not support the Prosecution's submissions as they raised concerns about Kani's procedural right to be physically present at his trial, they supported the idea of holding the trial opening *in situ* if and only if Kani could be in Bangui.[70]

The Trial Chamber ultimately rejected the request in July 2022. In its analysis, the Trial Chamber begins by expressing that it shares the view that holding the opening of the trial *in situ* could further the "objective of bringing the judicial process closer to victims, the affected communities and those impacted in the situation country as a whole."[71] The Chamber refers to Article 3(3) of the Rome Statute and Rule 100 RPE as the statutory basis for the Court to conduct proceedings *in situ*. The Chamber, however, fails to probe what "the interests of justice" means, per Rule 100, and instead claim that "the interests of justice" can be determined by looking at "safety, efficiency and effectiveness."[72] It does so without providing a justification as to why these three factors ought to be considered in the analysis. Nor does it ground this adopted analytic approach in previous Trial Chamber decisions.

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[69] See *Prosecutor v Mahamat Said Abdel Kani*, *supra* note 5 at para 5.

[70] See *ibid* at para 6.

[71] *Ibid* at para10.

[72] *Ibid* at para 11.

The approach appears out of hot air and enables the Chamber to quickly dispose of the request and decide against *in situ*.

In terms of safety, the Chamber argues that it is not possible to have Kani travel to Bangui for fear he will flee, nor is it possible to ensure that testifying victims will be protected in the course of proceedings. [73] Turning to efficiency, the Chamber makes speculative claims that "holding hearings in Bangui ***would likely*** require an enormous logistical and resource commitment in terms of mobilising the necessary personnel, transporting the necessary equipment and securing lodging and work facilities for all" (emphasis added).[74] They do not provide any figures to support this claim, nor do they ask the Registry to conduct an assessment into logistics, as they have done in other situations. Finally, in terms of effectiveness, the Chamber suggests that the objective of bringing the Court closer to the victims and the affected communities may not be fulfilled since, given the given the safety and logistical concerns highlighted, "it may be difficult for a significant number of victims and the general public to be present at the trial."[75] Although victims' safety concerns are based on evidence submitted, the Chamber does not explain why logistical concerns, which they did not elaborate on, would impact the ability of victims to be present at trial.

It is not my intention to suggest that there were not (and are not still) pressing and substantial concerns that should have hindered the Chamber from hearing the opening of the trial in the CAR. However, the unprincipled and unsubstantiated legal reasoning employed by the Chamber ought to be challenged. The entire decision is marred with speculative claims and ultimately does not contribute to a principled understanding of Rule 100 RPE. Given what is at stake when deciding *in situ* proceedings, namely supporting positive complementarity and international justice more broadly, there remains a crucial need for the Chamber to consider such requests on a principled basis.

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[73] See *ibid* at paras 12–15.

[74] *Ibid* at para 16.

[75] *Ibid* at para 17.

Many of the issues in the Kani decision are not new and have plagued *in situ* decisions for years. The next case, *The Prosecutor v. Bosco Ntaganda,* provides an example from 2016.

B. The Prosecutor v. Bosco Ntaganda

Bosco Ntaganda, a former Congolese rebel commander, appeared before the ICC from 2015 to 2018, where he faced 18 counts of war crimes and crimes against humanity which were allegedly committed during an internal armed conflict in the Ituri region of eastern DRC between 2002 and 2003. In July 2019, he was unanimously convicted of all 18 counts by Trial Chamber VI. While the entire trial was ultimately held in The Hague, the Trial Chamber and Presidency both considered the prospect of the trial's opening statements being held in Bunia, DRC.

In October 2014, the Trial Chamber instructed the Registry to prepare a report on the feasibility and security implications of holding part of the trial 'in the [Democratic Republic of Congo ('DRC') itself or some nearby location.'[76] The Registry of the ICC prepared two reports on the feasibility of holding part of the trial in Bunia or close to the affected region. In the first report, the Registry assessed the security situation in the proposed trial locations (DRC and Arusha, Tanzania), budgetary impacts, and technical issues. While the Registry noted issues regarding security and detention, they suggested that Bunia may be a feasible location, and suitable for bringing the trial closer to the victims.[77] In their second report, which focused exclusively on Bunia as a venue, they outlined the relevant parameters and requirements of the hearings, cooperation matters, security risk assessment, proposed potential sites for the hearing to be convened, details of logistical concerns, proposed hearing set up, a communication

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[76] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-T-15-ENG, Trial Chamber VI Transcript (17 October 2014) at 19, lines 4–12 (International Criminal Court), online (pdf): *ICC*: <icc-cpi.int/sites/default/files/Transcripts/CR2014_08867.PDF>.

[77] See *The Prosecutor v Bosco Ntaganda,* ICC-01/04-02/06-526, Recommendation to the Presidency on holding part of the trial in the State concerned (19 March 2015) at para 10 (International Criminal Court), online (pdf): *ICC* <icc-cpi.int/court-record/icc-01/04-02/06-526>.

strategy, and a cost overview.[78] The Registry concluded in its second report that it would be feasible to hold the opening statements in Bunia, subject to outstanding issues being resolved.[79]

In spite of the Prosecution and Defence both having reservations about holding part of the hearing *in situ*, the Trial Chamber recommended in March 2015 that the Presidency authorize the opening statement to be held in Bunia.[80] The Trial Chamber had the following to say when it announced that it would request a Rule 100 proceeding to present the *in situ* request to the Presidency:

> The Chamber wishes to emphasize at the outset that it is with the intention of bringing the judicial work of the Court closer to the most affected communities that it is making this recommendation to the Presidency.[81]

While the significance of the Trial Chamber recommending the opening statements be held in Bunia cannot be understated, it is important to note that even their recommendation lacked a principled legal basis. They claimed that their recommendation is in the "interest of justice" since it would "serve to meaningfully bring the proceedings closer to those most affected," without defining what this means.[82] While I am sympathetic to this view, it is inadequate for the Chamber to have made a determination without probing what is meant by "the interests of justice" and what factors ought to be considered in the analysis.

Notwithstanding the Trial Chamber's support, the Presidency ultimately decided against holding the opening statements in Bunia and instead decided that the trial would be heard at the seat of the Court in The Hague. At first glance, their decision appears to be one that is more grounded in Rule 100 RPE and how it ought to be interpreted. They suggest that in deciding whether it would be in "the interest of justice" to move the place of the proceedings, the Presidency should give careful consideration to: (1) the recommendation of the Trial Chamber,

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[78] See *ibid* at para 11.

[79] See *ibid*.

[80] See *ibid* at para 21.

[81] *Ibid*.

[82] *Ibid* at para 23.

(2) the arguments of the parties for and against the request, and (3) the correspondence between the Court and any state of international organization in relation to moving the proceeding away from The Hague.[83] They continue by outlining that the Presidency shall consider the following factors in deciding on the request:

a) security issues;

b) the costs of holding proceedings outside The Hague;

c) the potential impact upon victims and witnesses;

d) the length and purpose of the proceedings to be held away from the seat of
the Court;

e) the potential impact on the perception of the Court; and

f) the potential impact on other proceedings before the Court.[84]

This is the closest that either the Presidency or the Trial Chambers have gotten to developing a principled basis to inform decisions on *in situ* requests under Rule 100 RPE. However, a closer look at the citations in this decision raises doubt as to where they drew these seemingly "authoritative" factors from.

The Presidency draws the aforementioned factors from *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, a 2013 case where the parties requested that the trial be held *in situ* in Kenya, or alternatively Arusha, Tanzania. [85] The paragraphs that are cited as authorities are ones where the Presidency is merely *reviewing the Trial Chamber's decision* and

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[83] See *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-645-Red, Public redacted version of Decision on the recommendation to the Presidency on holding part of the trial in the State concerned (15 June 2015) at para 17 (International Criminal Court), online (pdf): *ICC* <icc-cpi.int/court-record/icc-01/04-02/06-645-red>.

[84] See *ibid* at para 18.

[85] See *Le Procureur c William Samoei Ruto et Joshua Arap Sang*, ICC-01/09-01/11-875-Anx.PDF, Notification of the Decision of the Plenary of Judges on the "Joint Defence Application for a Change of Place where the Court Shall Sit for Trial (26 August 2013) at para 1 (International Criminal Court), online (pdf): *ICC* <https://www.icc-cpi.int/fr/court-record/icc-01/09-01/11-875>.

what factors they considered in making their recommendation to the Presidency.[86] In other words, the Presidency takes what was a factual recounting of the finding of the Trial Chamber in *Ruto and Sang* and transforms this into what they claim is the authoritative test for determining *in situ* requests under Rule 100 RPE. If the Presidency wanted to introduce the *Ruto and Sang* factors as the key ones to be considered when deciding on *in situ* proceedings under Rule 100 RPE, they could have done so. However, treating them as authoritative, without justification as to why this is the case and with little more than a "see also" citation to justify doing so, is not satisfying and does not sufficiently contribute developing a principled basis upon which to decide *in situ* requests.

C. *The Prosecutor v. Dominic Ongwen*

Finally, of the three cases highlighted in this paper, the decision to reject holding the opening statements *in situ* in *The Prosecutor v. Dominic Ongwen* is the most perplexing and unsatisfying.

Dominic Ongwen, Brigadier General of the Lord's Resistance Army (LRA) in Uganda, was charged by the ICC of 70 counts of crimes against humanity and war crimes committed between July 2002 and December 2005 in northern Uganda. In February 2021, he was found guilty of 61 of these counts and he was sentenced to 25 years imprisonment as a joint sentence for all of the guilty counts.

While all of Ongwen's trial was ultimately held in The Hague, the Prosecution, Defence, and both teams of legal representatives of the participating victims had invited the Chamber to consider holding the trial's openings statements in Gulu, Uganda.[87] In July 2016, in response to this invitation, the Trial Chamber rejected the request in a short, five-page decision.

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[86] See *ibid* at paras 11–12.

[87] See *The Prosecutor v Dominic Ongwen,* ICC-02/04-01/15-499, Decision Concerning the Requests to Recommend Holding Proceedings In Situ and to Conduct a Judicial Site Visit in Northern Uganda (18 July 2016) at para 2 (International Criminal Court), online (pdf): *ICC* <icc-cpi.int/sites/default/files/CourtRecords/CR2016_05118.PDF>.

In its decision, the Trial Chamber does not even mention "the interests of justice" per Rule 100 RPE. The Chamber engages in no weighing of factors and does not consider the positive impact that holding the opening statements in Gulu would have on victims and the perceptions of the Court in Uganda. Instead, the Chamber mentions that security concerns and logistical difficulties "militate against making a recommendation to the Presidency to hold the opening of the trial *in situ*."[88] The evidence to support these findings is questionable, if not non-existent.

First, on the question of security concerns, the Trial Chamber relies on a vague concern that was expressed by some victims to the Office of Public Counsel for Victims:

> The only concern expressed so far by the victims is the presence of the Accused on Ugandan soil. In particular, the victims indicated that his presence *in situ* is not desirable for security reasons. Indeed, they fear possible episodes of violence in the event the Accused returns to Uganda.[89]

This brief paragraph is the only evidence considered by the Chamber in supporting its rejection.

On the issue of logistics, the Trial Chamber provides no specific examples of what logistical difficulties exist or could exist to support a finding that it would not be in the interests of justice per Rule 100 RPE to move the seat of the Court for the opening statements.

The lack of rigorous analysis in this decision is confusing given that the request was decided on a year and a half after the Trial Chamber's recommendation in Ntaganda. Although not perfect, the Trial Chamber in that case at least considered factors in their analysis, which the Presidency then considered in their final decision.

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[88] *Ibid* at para 3.

[89] *The Prosecutor v Dominic Ongwen,* ICC-02/04-01/15-437, Common Legal Representative's submissions pursuant to the "Order Scheduling First Status Conference and Other Matters (18 May 2016) at para 33 (International Criminal Court), online (pdf): *ICC* <icc-cpi.int/sites/default/files/CourtRecords/CR2016_03502.PDF>.

D. Why Do These Cases Matter?

The aforementioned cases are useful in illustrating the lack of a principled basis upon which the Trial Chambers and the Presidency have considered *in situ* requests. Both organs of the Court have failed to develop a principled basis through which to consider *in situ* requests by declining to comment on the meaning of "the interests of justice" per Rule 100 RPE. While I am not suggesting that a strict test be created, the Chamber ought to take these requests seriously and respond to them with reference to a sound legal framework, adequate justification, and evidence to support their claims. Given the overwhelmingly positive contributions that *in situ* proceedings could make to positive complementarity and the project of international justice more broadly, this should be the minimal standard that the Court is required to meet.

V. Conclusion

In this paper, I have argued that the ICC ought to take seriously the concept of positive complementarity, given its potential to support the project of international justice. One particularly relevant way to do this would be through authorizing *in situ* proceedings, preferably in the State where the alleged crimes occurred. At the very least, *in situ* requests should be assessed on a principled, rather than *ad hoc*, basis.

Through an analysis of *The Prosecutor v. Mahamat Said Abdel Kani, The Prosecutor v. Bosco Ntaganda*, and *The Prosecutor v. Dominic Ongwen,* I have demonstrated how the Trial Chambers' and Presidency's approach to evaluating *in situ* requests per Rule 100 RPE has remained inadequate and undertheorized. Rectifying this shortcoming is crucial to take *in situ* proceedings seriously and their ability to further the policy of positive complementarity and the project of international justice more broadly.

While in the three cases examined the requests were only to partially hear the trial proceedings *in situ,* it should be evident at this point that a genuine commitment to positive complementarity would require much more. It would require a serious financial and

logistical commitment on the part of the Court to develop an institutional approach to *in situ* proceedings. What would be required is more than ICC personnel 'flying in and flying out' of an affected community within a matter of days to hear the opening of a trial. This 'spaceship' phenomenon must be avoided at all costs.[90]

Given that Kani's trial is ongoing as of December 2022, it is possible that in the coming months and years, the Trial Chamber may once against receive a request to move part of the proceedings *in situ*. If faced with this request, and in light of this paper, the relevant Trial Chamber and the Presidency should consider this as an opportunity to develop a principled basis to Rule 100 RPE. Until then, the Court will be its biggest obstacle in promoting positive complementarity and in turn, its own mandate: to end impunity for serious crimes and deter future offences.

[90] See Kendall & Nouwen, *supra* note 61 at 88.

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