THE ICC, THE "INTERESTS OF JUSTICE" AND NATIONAL EFFORTS AT ACCOUNTABILITY FALLING SHORT OF FORMAL JUSTICE: AN EXERCISE IN PROSECUTORIAL DISCRETION

BY CONSTANTINA ANTONOPOULOS

FACULTY OF LAW

MCGILL UNIVERSITY, MONTREAL

DECEMBER 2008

A THESIS SUBMITTED TO MCGILL UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTER OF LAWS (LL.M.)

ABSTRACT

Uganda has reached a peace agreement with the leaders of the LRA, indicted by the ICC, in which they would be tried by national tribunals and serve "alternative sentences". The LRA demands the withdrawal of the ICC warrants as a pre-condition to any settlement. While this peace proposal may not satisfy the admissibility regime of the *Rome Statute,* this thesis argues that in certain circumstances the ICC Prosecutor could defer to accountability mechanisms falling short of formal prosecution and punishment if it is in the "interests of justice" to do so pursuant to Article 53 of the *Rome Statute*. The ICC OTP must however develop a policy on the application of this discretionary criterion which remains undefined, preferably in the form of prosecutorial guidelines. A pluralist interpretation of the "interests of justice" is most consistent with the objectives of the *Rome Statute*, the complementary nature of the ICC and the unique context of each situation of mass atrocity.

ABRÉGÉ

Le règlement de paix entre le gouvernement ougandais et le LRA, prévoit que les chefs de ce dernier, accusés devant la CPI, seraient poursuivis devant des tribunaux nationaux et feraient face à des peines «alternatives ». Les chefs du LRA requièrent que ces mandats soient retirés afin de signer une entente. Bien que la proposition ougandaise ne puisse satisfaire au régime d'admissibilité prévu dans le *Statut de Rome*, cette thèse prétend que dans certaines circonstances, le Procureur de la CPI pourrait arrêter les procédures afin de permettre le déroulement de procédures nationales qui ne constituent pas de la justice formelle, et ce dans les « intérêts de la justice » prévus à l'Article 53. Le Procureur devra développer une politique l'application de ce critère discrétionnaire, plus particulièrement dans l'adoption de lignes directrices. Cette thèse argue qu'afin d'atteindre les objectifs de la CPI, de respecter sa nature complémentaire ainsi que pour reconnaître la nature unique de chaque situation d'atrocités, le Procureur devrait adopter une interprétation pluraliste des « intérêts de la justice ».

ACKNOWLEDGMENTS

First and foremost, I would like to profusely thank my supervisor Professor René Provost for his much needed guidance, insightful comments and encouragement and for making my time at McGill a most rewarding academic experience. A special thanks to Sakina Frattina for her continuous support, for discussing ideas and providing feedback on this thesis and for making me laugh throughout. I would also like to thank Carlos Ivan Fuentes and Sujith Xavier who challenged and encouraged me through my entire experience at McGill University and became treasured friends. I am deeply grateful to my colleagues and supervisors at the Minister of Justice and the PPSC, particularly to Ginette Gobeil and the extradition team, for encouraging me to complete my thesis and for providing me with the opportunity to do so.

I would like to thank my parents Costa and Helen, my brother Dimitri and my sisters Georgia, Ioanna and Angie for their love, support and unwavering faith. Finally, I am blessed to have the wonderful friendship and encouragement of Marina Katerelos, Chrisanthi Argiros, Vicky Brikas, Felix Gutierrez, Silvie Kovacevich, Mona Brière and Joanne Mparoudos for which I am very grateful. This thesis is dedicated to my parents who have given us more than we could have ever asked for.

TABLE OF CONTENTS

INTRODUCTION

The current peace talks between the Government of Uganda and the Lord's Resistance Army (LRA) offer perhaps the best chance to date for ending a conflict that has ravaged Northern Uganda for over twenty years. The talks are hosted by the Government of Southern Sudan in Juba and, with international support, the negotiations have made progress since the signing of a *Cessation of Hostilities Agreement* in August 2006. This has in turn allowed for improved security in Northern Uganda and the gradual return home of some internally dispersed persons (IDPs).[1] What has allowed for such progress in the peace talks after so many years of atrocities is also what supposedly stands in the way of the signing of the peace agreement itself: the arrest warrants issued by the International Criminal Court (ICC) for the leaders of the LRA.

Since 1986 the LRA has been engaged in a campaign against Museveni's government and civilians in Northern Uganda, mostly belonging the Acholi community, and has committed atrocities on a massive scale such as the abduction and enslavement of children, torture, murder and rape of civilians, attacks on IDP camps, and other atrocities amounting to crimes against humanity and war crimes under the *Rome Statute*. Claiming to follow the orders of the Holy Spirit, LRA leader and self-styled prophet Joseph Kony and his group of rebels have operated from Southern Sudan and although claiming to eliminate wrongdoings from the Acholi province in order to overthrow the government,

[1] Michael Otim and Marieke Wierda, "Justice at Juba: International Obligations and Local Demands in Northern Uganda" in Ed. Nicholas Waddell and Phil Clark, Courting Conflict? Justice, Peace and the ICC in Africa (2008) online: Crisis States Research Centre: ‹http://www.crisisstates.com/download/others/ICC%20in%20Africa.pdf› at 21

have no coherent ideology, rational political agenda or political support.[2] It is estimated the LRA's membership consists almost exclusively (some estimates are as high as 85%) of abducted and forcibly conscripted children. It is estimated that the LRA has abducted more than 10,000 children between ages 6-15 since 1986 from homes, schools, communities, and IDP camps. [3] Through severe mistreatment and violence, children are forced under threat of death and torture into slave labor, to serve as "wives" for LRA commanders, or are trained as fighters and forced to commit atrocities against their own families and communities.[4] Abductees are forced to take part in gruesome massacres where civilians are hacked with machetes, babies are flung against trees and those not killed suspected of sympathy for the government are subjected to amputations of hands, lips and ears. The LRA also engages in destruction of villages, homes, shops and storage granaries and attacks on relief convoys.[5] In addition to LRA attacks, Northern Ugandans have also suffered from the government's policy of neglect towards the North and retaliation against the LRA which has also lead to the commission of atrocities at the hands of the Ugandan army (United People's

[2] Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court", (2005) The American Journal of International Law, Vol. 99 No. 2 403 at 407; See also: Manisul Ssenyonjo, "Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court" (2005) Journal of Conflict and Security Law Vol. 10 No. 3 405; Pablo Castillo Díaz, "The ICC in Northern Uganda: Peace First, Justice Later?" (2005) Eyes on the ICC Vol. 2 No. 17 17; H. Abigail Moy, "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity" (2006) 19 Harv. Hum. Rts. J. 267; Makau Mutua, "Beyond Juba: Does Uganda need a National Truth and Reconciliation Process?" (2007) Buffalo Human Rights Law Review Vol. 13 401; Mohammed El-Zeidy, "The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC" (2005) 5 Int'l Crim.L. Rev. 83

[3] Mohammed El-Zeidy, *supra* note 2 at 88

[4] Akhavan, *supra* note 2 at 407-408

[5] *Ibid.* at 408-409

Defense Forces or "UPDF").[6] Up to 2 million people have been crowded in horrible conditions in IDP camps and rates of mortality in Northern Uganda are among the worst in the world.

The Ugandan response to the LRA has been fraught with difficulties, in part because the Sudanese government supported and harbored the LRA. In January 2000, Uganda adopted an *Amnesty Act* providing amnesty and a reintegration package for anyone who had participated in LRA activities against the government since 1986.[7] Although the act was relatively unsuccessful at first, thousands of LRA members had applied by mid-2004 and the Ugandan government attempted to use the amnesty as a negotiating tool in order to come to a ceasefire in 2004. This peace process was however ultimately unsuccessful.[8]

Uganda ratified the *Rome Statute*[9] on June 14, 2002. At this time, Uganda did not intend to use the ICC as a means of arresting the LRA's top leadership but persistent international indifference and increased desperation regarding the unending conflict justified the referral to the nascent ICC.[10] In December 2003, Ugandan President Yoweri Museveni made the first so called self-referral to the ICC under Article 14 of the *Rome Statute* which allows State Parties to refer a situation to the Prosecutor for investigation, for crimes committed in Northern

---

[6] H. Abigail Moy, *supra* note 2 at 268

[7] *Amnesty Act* (2000), online: Southern African Legal Information Institute: ‹http://www.saflii.org/ug/legis/consol_act/aa2000294120/›

[8] H. Abigail Moy, *supra* note 3 at 271; For an overview of the peace processes from 2003 to 2005 see also: Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006) at 78-82

[9] *Rome Statute of the International Criminal Court*, July 12, 1998, 2187 U.N.T.S. 900 [*Rome Statute*]

[10] Akhavan, *supra* note 2 at 410

Uganda to seek the Court's assistance in the apprehension and prosecution of the leadership for the Lord's Resistance Army (LRA).[11] After a year long investigation, the ICC returned indictments against five LRA leaders, including Joseph Kony, on July 8, 2005.[12] The ICC Prosecutor, Luis Moreno-Ocampo, submitted evidence supporting allegations that Joseph Kony issued specific orders in mid-2002 and late 2003 to attack, kill, loot and abduct civilian populations, including those living in IDP camps and that LRA commanders named in the warrants directly participated in the execution of these orders.[13] Although some have welcomed the issuance of these warrants,[14] others have denounced the ICC's intervention as an impediment to the Juba process and as an obstacle for peace.[15] Negotiations in Juba lead to an agreement on Agenda Item 3, signed at Juba on June 29, 2007 on accountability and reconciliation which foresees "formal criminal and civil measures" for "any individual who is

[11] ICC, Press Release, "International Criminal Court, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC" (Jan. 24, 2004) online: ICC ‹http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html›. See generally: El-Zeidy, *supra* note 3.

[12] The indictments remained sealed until October 13, 2005. ICC, "Decision on the Prosecutor's Application for unsealing of the warrants of arrest", ICC-02/04-01/05-52 (Oct. 13, 2005) online: ‹http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-52_English.pdf›. One of the indictees has since been confirmed dead. See: ICC, Press Release, "Statement by the Prosecutor Luis-Moreno Ocampo on the confirmation of the death of Raska Lukwiya" (Oct. 11, 2006) online: ‹http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20061107_en.pdf›.

[13] ICC Press Release, "Statement by the Chief Prosecutor on the Uganda Arrest Warrants" (October 14, 2005), online ICC: ‹http://www.icc-cpi.int/library/organs/otp/Uganda-_LMO_Speech_14102005.pdf›.

[14] United Nations Secretary-General Kofi Annan praised the indictments for sending "a powerful signal around the world that those responsible for such crimes will be held accountable for their actions." See: "*Annan Hails International Criminal Court's Arrest Warrants for Five Ugandan Rebels"* (Oct. 14, 2005) online: UN News Service ‹http://www.un.org/apps/news/printnewsAr.asp?nid=16243›. Organizations like Human Rights Watch [HRW] also supported the issuance of the indictments. See also: HRW, "*ICC Takes Decisive Step for Justice in Uganda"* (Oct. 14, 2005) online: HRW ‹http://www.hrw.org/en/news/2005/10/13/icc-takes-decisive-step-justice-uganda›.

[15] Lucy Hovil & Joanna R. Quinn, "Peace First, Justice Later: Traditional Justice in Northern Uganda" (2005) online: Refugee Law Project ‹http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP17.pdf ›.

alleged to have committed serious crimes or human rights violations in the course of the conflict" in the *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/ Movement* (*2007 Agreement*).[16] For non-state actors (LRA members), the agreement specifies that an "alternative regime of penalties" will be introduced, which shall take into account the gravity of the crimes but also the need for reconciliation. On February 19, 2008 an *Annexure to the Agreement on Accountability and Reconciliation* (*Annexure*) was signed stating that "traditional justice will play a central part of the alternative justice and reconciliation framework referred to in the Agreement."[17] Although there is much speculation as to what sentencing will entail, the *Annexure* remains conspicuously silent. LRA leaders have demanded the withdrawal of the ICC arrest warrants as a precondition to their giving final approval for a peace settlement and President Museveni has indicated the he would be willing to approach the ICC for the withdrawal of the warrants, should the settlement be signed.[18]

The debate over the future of the ICC warrants in Uganda goes beyond this particular situation to underline the still ambiguous nature of the complementary relationship between the ICC and national jurisdictions as well as the question of what constitutes accountability and who ultimately gets to decide what is

---

[16] *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/ Movement* (June 29, 2007) online: Beyond Juba ‹http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconcilition.pdf ›.[*2007 Agreement*]

[17] *Annexure to the Agreement on Accountability and Reconciliation* (February 19, 2008), online: *CICC* ‹http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf ›. [*Annexure]*

[18] Adrian Croft, "Uganda offers "blood settlement" to LRA rebels" (12 March 2008) online: Reuters ‹http://www.reuters.com/article/featuredCrisis/idUSL11891647›.

sufficient. Should Uganda attempt to challenge the admissibility of the case against the LRA in order to implement the *2007 Agreement* and fail, the ICC Prosecutor could exercise his discretion to defer to the proposed accountability mechanism of formal justice paired with traditional sentences if it is deemed in the "interests of justice" to do so pursuant to Article 53 of the *Rome Statute*. This discretionary criterion remains undefined and the debate over its interpretation goes to the heart of prosecutorial discretion at the ICC. The ICC Office of the Prosecutor (OTP) thus faces the significant challenge of defining a clear and fair prosecutorial policy regarding the interpretation of the "interests of justice" in Article 53 that fits within the legal framework of the *Rome Statute*, recognizes the objectives of the ICC to combat impunity and prevent international crimes, is consistent with the complementary nature of the ICC and will further the legitimacy and effectiveness of the ICC.

In the first chapter, this thesis will establish that the ICC OTP could legally exercise its discretion under Article 53 to allow for proceedings falling short of formal justice, such as the Juba proposal, even where the sufficiency of evidence is not an issue. This will be accomplished by first mapping out the purpose of the Court as well as its jurisdiction. Second, an overview of the "duty to prosecute" international crimes will resolve that States are not under an absolute obligation to impose formal justice on all perpetrators. Finally, on closer analysis of the *2007 Agreement* and *Annexure*, it will conclude that Article 53 is the most likely vehicle for deference to alternative justice mechanisms.

Chapter II will argue that Article 53 must be broadly construed in order to recognize the inherently political nature of the role of the International Prosecutor and the situations in which the ICC operates. An overview of the debate over the interpretation of the "interests of justice" will conclude that only significant discretion will allow for the fulfillment of the lofty objectives of the ICC. Finally, an analysis of current prosecutorial policy will show that the ICC OTP has allowed for the possibility of deference to accountability measures falling short of formal prosecution and punishment but has not gone far enough to define which factors would justify such a decision. As such, this chapter will argue for the completion of prosecutorial guidelines that will preserve and further the legitimacy and transparency of the ICC, be it in existing situations before the ICC or the ones to come.

Finally, Chapter III will conclude that a pluralist interpretation of the "interests of justice", that recognizes the benefit of hybrid prosecutorial solutions is most consistent with the complementary nature of the ICC, will realistically allow for the fulfillment of the ICC's objectives and take the reality of the affected areas into account when exercising prosecutorial discretion. The analysis of two particular hybrid prosecutorial solutions, *gacaca* courts in Rwanda and sentencing circles in Canada, will reveal certain factors that the ICC OTP must incorporate into prosecutorial strategy when deciding on possible deference to accountability measures falling short of formal prosecution and punishment.

CHAPTER I: THE *ROME STATUTE* AND NATIONAL ACCOUNTABILITY MEASURES FALLING SHORT OF FORMAL PROSECUTION AND PUNISHMNENT

In 1998, responding to the suggestion that the ICC may eventually interfere with peace-making initiatives such as the South African Truth and Reconciliation Commission, Kofi Annan had declared that it was "inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation, which is seeking the best way to put a traumatic past behind it and build a better future."[19] The question remains however whether, if the ICC had jurisdiction over post-apartheid South Africa, and it was able to make a case against perpetrators of the regime, given its purpose and legal mandate, could it have deferred to a truth and reconciliation commission granting conditional amnesties for the commission of international crimes?

In this first chapter, it will be argued that the *Rome Statute* does provide for deference to national reconciliation efforts that do not amount to formal prosecution and punishment through the exercise of prosecutorial discretion. In order to delineate the legislative context in which the Prosecutor will be called to exercise his or her discretion regarding possible deference to an alternative justice mechanism, this chapter will first map out the purpose and jurisdiction of the Court as well as the complementarity regime, or the "admissibility" requirements that must be met pursuant to Article 17 of the Statute in order for a case to be selected for prosecution at the ICC.

---

[19] Kofi Annan, U.N. Sec'y Gen., Address at the University of the Witwatersrand (Sept. 1, 1998) quoted in Charles Villa-Vicencio, "Neither too much, nor too little justice: Amnesty in the South African context", 49 Media Development 26 online: World Association for Christian Communication ‹http://www.waccglobal.org/lang-en/publications/media-development/67-2002-2/698-Neither-too-much-nor-too-little-justice-Amnesty-in-the-South-African-context.html› at 29.

Second, a brief overview of the "duty to prosecute", will resolve that aside from the crimes of genocide and grave violations of the *Geneva Conventions*, there does not yet exist a duty in international law for States to prosecute in every instance where a crime listed in the *Rome Statute* has been committed. International law is however moving in this direction and although it can be argued that there is a presumption in favor of prosecution regarding international crimes- the crimes constituting the subject-matter of the Court, it cannot be said that prosecution is nor should be a legal absolute in all situations.

Finally, the drafters of the *Rome Statute* explicitly discussed but ultimately chose not to address the issue of alternative justice mechanisms such as truth and reconciliation commissions but allowed for some scope to accommodate and defer to political constraints and alternative justice mechanisms. It will be resolved that it is precisely within the exercise of prosecutorial discretion prescribed by Article 53 that the Prosecutor may, in very exceptional circumstances, legally defer to an alternative justice mechanism because it is in the "interests of justice" to do so, even though a case is within the jurisdiction of the ICC, is of sufficient gravity and demonstrates a reasonable basis to proceed. The legal possibility of deferral however no guidance as to how the ICC OTP could proceed in cases like Northern Uganda. The Prosecutor will have to continue engaging in the exercise of defining what these "interests of justice" can encompass for reasons that will be analyzed more profoundly in Chapter II.

I. LEGISLATIVE FRAMEWORK FOR SELECTING CASES FOR INVESTIGATION AND PROSECUTION

In order to elaborate on prosecutorial policy and to determine an appropriate approach for the ICC with respect to national reconciliation efforts that do not amount to a prosecution *per se*, it is essential to examine the *Rome Statute* in regard to how it sets out the process of selecting cases for investigation and eventual prosecution.

A) The Triggering Procedure

Within the *Rome Statute*, the Triggering Procedure is an autonomous procedure contained in Articles 13, 14, 14, 18 and 53 that refers to the mechanisms that can be used to initiate the Court's exercise of jurisdiction. The *Rome Statute* provides three sources of *notitia criminis*: a referral by the Security Council,[20] by a state party,[21] or by the Prosecutor *proprio motu* after receiving information from any other source.[22] This does not however automatically activate the jurisdiction of the ICC. The Security Council and state parties have granted the ICC a "potential jurisdiction" that is only activated after an elaborate series of tests with two purposes in mind.

The first objective is to establish that there is sufficient evidence that within a particular situation, a crime has been committed within the jurisdiction of the Court to warrant an investigation and a trial and the second objective is to ascertain whether the case both merits the international forum and cannot or will

[20] *Rome Statute*, Article 13(b). Referrals by the Security Council are not subject to review by the Pre-Trial Chamber and are exempt from the Article 18 duty to notify States that would normally exercise jurisdiction.
[21] *Rome Statute*, Articles 13(a) and 14.
[22] *Rome Statute*, Articles 13(c) and 15.

not be dealt with by national authorities who have jurisdiction to do so. As such, the Triggering Procedure can be said to be comprised of two elements: the referral of a situation by the Security Council, a State Party or the Prosecutor to activate the potential jurisdiction of the Court with regard to a specific crisis situation and the opposition of the concerned States to such a referral pursuant to Article 18 of the *Rome Statute*.[23]

The *Statute* provides that the Prosecutor is to take action *proprio motu* 'on the basis of information' of which he or she shall analyze the seriousness by seeking additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources deemed appropriate and, potentially, by receiving written or oral testimony at the seat of the Court. [24] A State party referral is the second trigger mechanism provided for by the *Statute*. A State party may refer 'a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.'[25] Although there was some initial doubt as to the actual use of this mechanism after its adoption into the *Rome Statute*, the Court has received three state referrals in the first years of its operation generating the

[23] Héctor Olásolo, "The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor", (26 March 2004) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/040326_Olasolo.pdf› at 2-3.
[24] *Rome Statute*, Article 15(1) and (2)
[25] *Rome Statute*, Articles 13(a) and 14(a)

investigations of the situations in Uganda,[26] the Democratic Republic of Congo[27] and the Central African Republic.[28] Finally, prosecution may be undertaken at the request of the Security Council acting under *Chapter VII* of the *UN Charter* pursuant to Article 13(b) of the *Rome Statute*. Despite the current US administration's opposition to the ICC, in *Resolution 1593* the Security Council opted to nonetheless "refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."[29] Arrests warrants have been issued against Ali Muhammad Ali Abd-Al-Rahman and Ahmad Muhammad Harun and as of July 14, 2008 the Prosecutor has requested the issuance of an arrest warrant against the president of Sudan Omar Hassan Ahmad Al Bashir in relation to 10 counts of genocide, crimes against humanity and war crimes in Darfur.[30]

B) Considerations of jurisdiction and admissibility

First, in order to trigger the ICC's jurisdiction, the material, personal, territorial and temporal parameters that define the situation of crisis must be included within those parameters of the Court. The jurisdiction of the ICC is limited to cases alleging the commission of crimes against humanity, war crimes, or

[26] ICC, Press Release, "Prosecutor for the International Criminal Court Opens an Investigation into Northern Uganda" (July 29, 2004) online: ICC ‹http://www.icc-cpi.int/press/pressreleases/33.html›.
[27] ICC, Press Release, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo" (April 19, 2004) online: ICC ‹http://www.icc-cpi.int/press/pressreleases/19.html›.
[28] ICC, Press Release, Prosecutor Opens Investigation in the Central African Republic (May 22, 2007) online: ICC ‹http://www.icc-cpi.int/press/pressreleases/248.html›.
[29] SC Res. 1593, op. para. 1 (Mar. 31, 2005). The resolution was adopted by a vote of 11 in favor to 0 against, with abstentions, namely Algeria, Brazil, China and the United States.
[30] ICC OTP, *Summary of Prosecutor's Application under Article 58* (July 14, 2008) online: ICC ‹http://www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf›.

genocide, as defined in the *Rome Statute*,[31] occurring after July 1, 2002, the date of entry into force of the *Statute*.[32] Moreover, unless the Security Council has referred the relevant situation to the Prosecutor, the ICC will not have jurisdiction over the case unless either the state where the crime occurred or the state whose national is accused of committing the crime has ratified the *Rome Statute*.[33]

In addition to these jurisdictional considerations, the Prosecutor will also have to take into account the admissibility criteria, namely the complementarity principle.[34] The admissibility provisions of the *Rome Statute*[35] ensure that the ICC Prosecutor gives deference to national legal systems where a state that normally exercises jurisdiction for the alleged crime is in the process of investigating or prosecuting that crime; or the crime has already been investigated but a decision was made by national authorities not to prosecute.[36] Unlike the primacy provisions governing the work of the *ad hoc* Tribunals,[37] these provisions restrict the Prosecutor's *proprio motu* powers and create a complex

---

[31] *Rome Statute*, Article 5(2)

[32] *Rome Statute*, Article 11. If a state ratifies the *Rome Statute* after July 1, 2000, the ICC will have jurisdiction only over crimes committed after the entry into force of that treaty for that state.

[33] *Rome Statute*, Article 12. A state may also accept the jurisdiction of the Court on an *ad hoc* basis with regard to that particular situation. See Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", (2003) The American Journal of International Law Vol. 97 510 at 516

[34] *Rome Statute*, Paragraph 10 of the Preamble and Articles 1 and 17.

[35] *Rome Statute*, Articles 17(1)(a), (c) and 20(2)

[36] Matthew R. Brubacher, "Prosecutorial Discretion within the International Criminal Court" (2004) Journal of International Criminal Justice 2 71 at 78; See Danner, *supra* note 33 at 517, Morten Bergsmo & Pieter Kruger, "Article 53: Initiation of an Investigation" (2008) in Otto Triffterer, ed., *Commentary of the Rome Statute of the International Criminal Court*. (München, Germany and Oxford, UK: C.H. Beck, Hart and Nomos, 2008) (pp. 1065–1076)

[37] *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991*, UN SCOR, 48th Sess., 3217th mtg., Annex, UN DOC. S/827 (1993), art. 9 [*ICTY Statute*] and *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law*

and potentially politically charged series of procedural hurdles that he must negotiate.[38]

If the Prosecutor decides that there is a reasonable basis to proceed to an investigation, he must therefore notify states who would normally exercise jurisdiction over the crimes concerned.[39] If one of these states informs the Prosecutor that it is investigating or has investigated the perpetrators within its jurisdiction in relation to the information provided in the notification and requests the Prosecutor not to proceed, the Prosecutor "shall defer to the State's investigation" pursuant to Article 18(2) of the *Rome Statute*. The Prosecutor may, however, challenge the state's assertion that the case is inadmissible if the state is unwilling or unable to prosecute the case pursuant to Article 17. The challenge laid before the Prosecutor by Article 17 is therefore significant. The Prosecutor would have to prove either that a state's criminal justice system is incompetent or that it is being manipulated by that state's government. It must also be underlined that the Prosecutor will need state support for a successful prosecution and must therefore be sensitive to state concerns and continue to convey the fundamental ICC principle that states retain the primary responsibility for investigation and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.[40]

Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighboring States, SC Res. 955, UN SCOR, 49th Sess., 3453d mtg., Annex, UN Doc. S/955 (1994), art. 8 [*ICTR Statute*]

[38] Danner, *supra* note 33 at 517

[39] *Rome Statute*, Article 18(1)

[40] Brubacher, *supra* note 36 at 79 ; See also: ICC OTP, *Paper on some policy issues before the Office of the Prosecutor* (September 2003), online: ICC ‹http://www.icc-

Of course, in many cases, particularly where the government is involved in the perpetration of international crimes, state support will be illusory. Such is the case with Sudan. A request for the issuance of an arrest warrant for President Bashir for genocide, crimes against humanity and war crimes as well as the promotion of Ahmad Harun to Minister of State for Humanitarian affairs after being indicted along with Kushayb on 51 counts of crimes against humanity and war crimes allegedly committed while he was Minister of State for the Interior in 2003 and 2004 are indicative of the level of cooperation that can be expected from the government as well as its commitment to bringing perpetrators to justice domestically. In June 2005 the Sudanese government had asserted that in accordance with the complementarity principle it intended to deal with perpetrators of the alleged crimes in Darfur, regardless of rank or affiliation. Various mechanisms had been established by the Sudanese government to supposedly deal with the alleged crimes including the Darfur Special Court (established in June 2005), the two additional Courts (created in November 2005) and the *ad hoc* institutions preceding and supporting the work of these Courts. According to the Sudanese government 160 suspects were identified for investigation and possible prosecution. OTP missions to Khartoum in 2006 and 2007 however revealed that no national proceedings where being held regarding the crimes and individuals investigated by the ICC. Moreover the Special Court President informed the OTP representatives that no cases involving serious violations of international law were going to trial. The six cases tried were in fact

---

cpi.int/library/organs/otp/030905_Policy_Paper.pdf› at 4. [*2003 Paper on some policy issues before the OTP*]

chosen from the case files from the ordinary Courts. In its April 27 decision, Pre-Trial Chamber I concluded the case fell within the ICC's jurisdiction and appeared to be admissible considering the finding that no proceedings were ongoing or had taken place in relation to Harun and Kushayb for the conduct forming the basis of the OTP's application. The position of the government of Sudan has been that it would not surrender nationals to the ICC and that domestic tribunals would try perpetrators.[41] As of yet, Harun not only enjoys complete impunity but as Minister of Humanitarian affairs he is active as chair of the committee on human rights violations and breaches of the transitional constitution in the south and north. Although Kushayb was supposedly under investigation, as of September 30, 2007 he was cleared and returned to active duty.[42]

C) The Reasonable Basis Test

After, or in conjunction with, the jurisdictional and admissibility considerations, the Prosecutor must evaluate the credibility and reasonableness of the evidence submitted to the OTP. Pursuant to Article 53 (1), the Prosecutor must undertake an investigation unless a determination is made that there is "no reasonable basis to proceed under the Statute." In order to make this determination, the Prosecutor shall consider whether "the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the

[41] ICC OTP, *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593* (2005) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/UNSC_2008_En.pdf› at paras. 20-26
[42] *Ibid.*, at paras. 32-40

Court has been or is being committed," [43] and whether "the case is or would be admissible under Article 17." The Prosecutor must also consider whether, "taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." If the Prosecutor is satisfied that the requirements are met, he must then apply in writing to the Pre-Trial Chamber for authorization to commence an investigation.[44] If he is not so satisfied, he must inform those who provided the information of his conclusion and may later reconsider his decision in light of new facts or evidence.[45] The OTP has in fact done just this in response to communications concerning the situations in Venezuela and Iraq. In the first instance, the Prosecutor considered that the lack of precision as well as internal and external inconsistencies in the information provided alleging crimes against humanity had been committed against political opponents of the Venezuelan government made it so the available information did not provide a reasonable basis to believe that the requirement of a widespread or systematic attack against any civilian population had been satisfied.[46] In the case of Iraq, although the Prosecutor found that there was indeed a reasonable basis to believe that willful killing of civilians and inhuman treatment of detainees had been committed by nationals of State parties to the *Rome Statute* (namely British

[43] See also *ICC Rules of Procedure and Evidence*, UN Doc. PCNICC/2000/1/Add.1 (2000), r. 48 [*ICC RPE*]. According to commentators Morten Bergsmo and Pieter Kruger, the "reasonable basis" test in Article 53(1)a) entails that the Prosecutor assesses the information placed before him or her. If it leads to the reasonable belief that a crime within the jurisdiction of the Court has been committed, a reasonable basis for such a belief naturally exists. See Bergsmo and Kruger, *supra* note 36.
[44] *Rome Statute*, Article 15(3); ICC RPE, supra note 43 at r. 50(2)
[45] *Rome Statute*, Article 15(6)
[46] ICC OTP, *Venezuela Response* (9 February 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf›.

soldiers), the total number of victims (less than 20) did not satisfy the general gravity requirement under Article 53(1)(b) when considered against the hundreds of thousands of victims of willful killings and large-scale violence and abduction in the situations under investigation and the displacement of over 5 million people due to the long-running conflicts in Northern Uganda, the DRC and Darfur.[47]

If the Pre-Trial Chamber (PTC) agrees that there is a reasonable basis to proceed with the investigation and the case appears to be within the Court's jurisdiction, it must authorize the commencement of the investigation pursuant to Article 15(4). On the other hand, if the PTC refuses the Prosecutor's request, then the Prosecutor may submit a subsequent request "based on new facts or evidence".[48]

While a referral by the Security Council or a State party entails for the Prosecutor the duty to initiate the investigations, it does not oblige him or her to prosecute. By virtue of Article 53(2), the Prosecutor decides independently whether there is sufficient basis for a prosecution, taking particular account of the legal or factual basis to seek a warrant under article 58, the admissibility under Article 17 and, most importantly, the position that "a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime". Should the Prosecutor decline to prosecute, he

---

[47] ICC OTP, *Iraq Response* (9 February 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf› Iraq is not a signatory of the Rome Convention and as for the alleged crime of aggression by States Parties, seeing as no provision regarding aggression has yet to be adopted by the Assembly of States, the ICC OTP does not yet have jurisdiction over this offence.

[48] *Rome Statute*, Article 15(5)

must inform the Pre-Trial Chamber as well as the referring State or the Security Council, as the case may be and provide reasons for such a refusal.

The test under Article 53(2)(a) is necessarily more vigorous as this test regards full investigation for the purposes of preparing indictments. It does not constitute a mere repetition of the test in paragraph (1), insofar as the Prosecutor must conclude that there are reasonable grounds to believe that a particular suspect has a committed a crime within the Court's jurisdiction. The Prosecutor must therefore have assessed the result of an investigation in detail and ascertain whether the collected evidence satisfied the elements of a crime falling within the jurisdiction of the Court. If this is the case, a 'sufficient legal and factual basis' can be said to exist.[49] If not, the Prosecutor must inform the Pre-Trial Chamber and the referring State or the Security Council. The referring body may ask the Pre-Trial Chamber to review the Prosecutor's decision not to investigate or prosecute a case and the Pre-Trial Chamber may ask the Prosecutor to reconsider this decision.[50] In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is solely based on the interests of justice consideration. In such a case, the decision of the Prosecutor will only be effective if confirmed by the Pre-Trial Chamber.[51]

CONCLUSION

In examining the "triggering procedure" set out in the *Rome Statute* with a view to discuss prosecutorial policy, two observations must be underlined. The first is that the jurisdiction of the ICC is narrow and based on express state acceptance.

[49] Bergsmo & Kruger, *supra* note 36 at 711
[50] *Rome Statute*, Article 53(3)(a)
[51] *Rome Statute*, Article 53(3)(b)

In other words, the ICC has jurisdiction only where the Security Council refers a matter or where the state on whose territory the crime committed occurred or the state of nationality of the accused has accepted the jurisdiction of the ICC, and this within the temporal jurisdiction of the Court.[52] The second point is that "the Court is arbiter of its own jurisdiction."[53] At the ICC, the Prosecutor is under no obligation to initiate proceedings once a situation has been referred to the OTP.[54] Even if the Prosecutor is satisfied that the jurisdictional requirements have been met, and that the case is admissible pursuant to the parameters of the complementarity regime, he can still decide not to pursue an investigation or a prosecution if it is not in the "interests of justice" to do so or if the gravity of the case is insufficient. Seeing however that the drafters of the *Rome Statute* ultimately decided not to define the "interests of justice", the Prosecutor will have to look outside the *Statute* in order to establish his policy and certainly, will first have to look at the existing "duty to prosecute" regarding international crimes, the subject matter of the ICC.

II. THE OBLIGATION TO PROSECUTE

The decision of a prosecutor to proceed with an investigation and even more particularly with a prosecution must not be underestimated in its complexity. This is all the more with international crimes. It can be argued that the Rome Statute creates an obligation for State parties to prosecute international crimes.

[52] *Rome Statute*, Articles 11 to 13
[53] John T. Holmes, "Complementarity: National Courts versus the ICC" in Cassesse, Poala Gaeta & John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford, New York: Oxford University Press, 2002) 667 at 672 [Cassese, Gaeta & Jones, *Rome Statute Commentary* Vol.1]
[54] *Rome Statute*, Article 13

Although it will be argued that this obligation is not absolute, it may be a significant factor for the ICC OTP to consider under Article 53, which the Prosecutor quite correctly qualifies as exceptional.[55] Before elaborating on the exercise of prosecutorial discretion at the ICC, it is important to examine why the *Rome Statute* can be said to create a presumption in favor of prosecution for State parties and some of the reasons why prosecution of international crimes is very rightly a legal and moral obligation. Having done this however, it will also be argued that this obligation to prosecute is not and cannot be deemed to be absolute. Even the *Rome Statute* incorporates some limited scope to avoid criminalization even when the jurisdictional and admissibility criteria have been met and the gravity of the crimes has been established. It will be argued that, for the ICC, this scope exists within the exercise of prosecutorial discretion pursuant to Article 53.

A) Prosecution and the purpose of the ICC

The *Preamble* of the *Rome Statute* puts forth the guiding philosophy that State Parties are determined to put an end to impunity and thus to contribute to the prevention of the most serious crimes of concern to the international community.[56] It also emphasizes that the ICC will be complementary to national criminal jurisdictions and resolves to guarantee lasting respect for the enforcement of international law.[57] Article 1 of the *Rome Statute* provides that the ICC is established as a permanent institution with the power to exercise its jurisdiction over "persons for the most serious crimes of international concern"

[55] ICC OTP, *2003 Paper on some Policy Issues before the OTP*, *supra* note 40 at 3
[56] *Rome Statute, Preamble* paras. 3-5
[57] *Rome Statute, Preamble* paras 10-11

and "shall be complementary to national criminal jurisdictions." The ultimate wish for the ICC is thus to foster accountability, which is the antithesis of impunity. The international community has therefore increasingly moved toward a criminal model that treats the commission of atrocities as unacceptably disruptive behavior for which individual perpetrators must be tried and punished.[58]

Certainly the goal of crime prevention is admirable and ambitious, but it necessarily will have a different meaning internationally than in a domestic context. The goals of domestic justice may be described as more "preservational": sustaining and improving an existing social order.[59] This objective stems from standard utilitarian rationales for punishment, such as incapacitation, denunciation, deterrence and rehabilitation which all aim, in some way, to prevent crime. In regard to international tribunals however, the focus is more "political" in nature. Although it is not yet empirically demonstrable, it is hoped that the erection of a system of international criminal justice (including the national and international prosecutions through the principle of complementarity) will prevent the reoccurrence of war crimes and human rights atrocities.[60] More particularly, however the aim of crime prevention at the international level consists of the aspiration that international criminal tribunals can effect positive political change in the societies most affected by the commission of war crimes.[61]

---

[58] See: Leila Nadya Sadat, "Exile, Amnesty and International Law" (2006) 81 NOTRE DAME L. REV. 955 at 978

[59] Alexander K.A. Greenawalt, "Justice Without Politics? Prosecutorial Discretion and the International Criminal Court" (2007) International Law and Politics Vol. 39 583 at 605

[60] Leila Nadya Sadat, *supra* note 58 at 978

[61] Greenawalt, *supra* note 59 at 601

As noted by Professor Akhavan, gross human rights violations, like the atrocities committed in the former Yugoslavia and Rwanda were not "expressions of spontaneous blood lust or inevitable historical cataclysms". Both conflicts were the result of deliberate efforts to incite ethnic hatred and violence by unscrupulous individual actors who thereby go on to exercise absolute power.[62] Although these leaders can be desperate, unpredictable and even sociopathic, Professor Akhavan argues that punishment can provoke conscious and unconscious responses that can ultimately contribute to preventing elite-induced mass violence. On the one hand, these leaders are not beyond making self-serving choices. As such, the threat of punishment and inevitable downfall and humiliation pursuant to the adoption of a policy that is criminal under international law can be much less attractive than long-term political viability. On the other hand, international legitimacy has become a valuable asset for aspiring statesmen, no matter how small their territory. Thus, "the stigmatization associated with indictment, as much as apprehension and prosecution, may significantly threaten the attainment of sustained political power."[63]

In these appalling situations, prosecution and punishment can therefore directly impact political or military governance through a kind of specific deterrence by removing ruthless political actors from power and stigmatizing those remaining at large, or, in a more general sense, serve as tools of social engineering by catalyzing broader transformations that eliminate the underlying social and

[62] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities" (Jan.,2001) The American Journal of International Law Vol. 95 No. 17 31at 7
[63] *Ibid.* at 12

political causes that have facilitated the commission of the crimes.[64] By slowly and incrementally reversing the process of impunity and by "instilling such unconscious inhibitions in the international community over time, and gradually but definitively transforming the rules for the exercise of power, a new reality of habitual lawfulness may take root and develop."[65]

The case of Uganda is certainly compelling in this respect. The situation in Northern Uganda was described by the UN under-secretary-general for humanitarian affairs, Jan England as "one of the world's most neglected crises".[66] The December 16, 2003 referral by Uganda of the situation in Acholiland to the ICC may have had a significant impact on the peace negotiations to end the series of atrocities perpetuated over 20 years in the region. First, the effective threat of prosecution clearly destabilized the LRA leadership, creating an incentive to reach a settlement. Second, the ICC investigation and increased international pressure to make the referral successful made it significantly more difficult for the LRA to enjoy continued support from its Sudanese ally. Third, the ICC investigation raised awareness and focused the international community's attention, which in turn provided a crucial support for the budding peace process. Finally, and most importantly, the ICC's attempt to hold the LRA leadership criminally liable for the atrocities committed in Northern Uganda has made accountability and the interests of the victims fundamental considerations in the peace process. Both parties have accepted that some form of concrete

[64] Greenawalt, *supra* note 59 at 602
[65] Akhavan, *supra* note 62 at 13
[66] Josefine Volqvarz, "ICC Under Fire over Uganda Probe" (Feb. 23, 2005) online: ‹CNN http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/›

accountability must be incorporated into any peace agreement and that victims should be consulted in the setting up of such accountability mechanisms.[67] This is of course in stark contrast with the peace negotiations in Lomé where amnesty for grave international crimes committed in the armed conflict in Sierra Leone was considered a prerequisite for negotiations.[68] Seeing as such considerations had not seriously been raised in past attempts at peace talks between the LRA and the government and that the closest the Ugandan government came to dismantling the LRA was the *Amnesty Act* of 2000, the impact of the ICC investigation is undeniable.

B) The "duty to prosecute"

As stated in the previous section, the responsibility of the ICC to prosecute perpetrators of crimes within its narrow jurisdiction flows from the mandate encapsulated in the *Rome Statute* and is based on express state acceptance and exercised within the parameters of the complementarity regime. As such, an examination of the international legal obligation to prosecute certain crimes is important not because it would indicate when the ICC would be *obliged* to prosecute but because the question of whether a state is or is not breaching a duty to prosecute would certainly be a factor to consider in the exercise of

[67] Nick Grono & Adam O'brien, "Justice in Conflict? The ICC and Peace Processes" in Nicholas Waddell and Phil Clark, eds. *Courting Conflict? Justice, Peace and the ICC in Africa*, *supra* note 1 at 15-16; Akhavan, *supra* note 2 at 416

[68] Priscilla Hayner, "Negotiating Peace in Sierra Leone: Confronting the Justice Challenge" (December 2007) online: Centre for Humanitarian Dialogue ‹http://www.ictj.org/static/Africa/SierraLeone/HaynerSL1207.eng.pdf› at 13.

discretion to terminate ICC proceedings and any prosecutorial policy must take the duty to prosecute, such as it is, into account.[69]

Although it can be argued that there is sometimes room to defer to alternative means of dealing with the past, most international lawyers would argue that there are exceptionally serious crimes for which criminal prosecution may be required under international law. Criminal prosecution is required for some of the crimes within the ICC's jurisdiction, namely genocide, torture and "grave breaches" of the *1949 Geneva Conventions*. The *Genocide Convention*[70], the "grave breaches" provisions of the *Geneva Conventions* of 1949[71] and the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[72] explicitly require that states criminally prosecute the perpetrators of these offences. Genocide, torture and grave breaches of the Geneva Conventions have furthermore achieved *jus cogens* status as international crimes.[73] As such, all states, even those not party to the treaties, have the

---

[69] Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" (2003) EJIL Vol. 14 No.3 481 at 490

[70] *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted Dec. 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 760 (entered into force Jan. 12, 1951) [*Genocide Convention*] Art. 4

[71] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Aug. 12, 1949*, arts. 49-60, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949,* arts. 146-147, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [*hereinafter Fourth Geneva Convention*]; *Geneva Convention Relative to the Treatment of Prisoners of War Aug. 12, 1949*, arts. 129-130, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces* at Sea Aug. 12, 1949, arts. 50-51, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950).

[72] U.N.G.A. Res. 39/46, opened for signature at New York, Feb. 4, 1985, entered into force June 26, 1987, reprinted in 23 I.L.M. 1027, art. 7.

[73] M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" (Autumn, 1996) Law and Contemporary Problems, Vol. 59 No. 4 9 at 17; Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" (Autumn, 1996) Law and Contemporary Problems, Vol. 59 No. 4 41; Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior

obligation to prosecute or extradite the perpetrators of these crimes; to provide legal assistance; to eliminate statutes of limitations; to eliminate immunities of superiors up to and including heads of states.

With respect to the other crimes listed in the *Rome Statute*, namely crimes against humanity and serious violations of the laws of armed conflict, the situation is less clear. State practice does not seem to fulfill the ideal standard of behavior and has rather been distinctively unsupportive of such a duty by condoning the granting of amnesties.[74] Successor regimes have repeatedly granted amnesty to officials of the previous regime guilty of torture and crimes against humanity rather than prosecute them.[75]

Nevertheless, there is a growing sense of obligation to reject amnesties for international crimes, most convincingly from the adoption of the *Rome Statute* itself.[76] The inclusion of crimes against humanity in the *Rome Statute* alongside genocide and grave breaches of the *Geneva Convention* as "the most serious crimes of concern to the international community as a whole" would indicate that there is an emerging duty to bring to justice those responsible for crimes against humanity are committed, at least on state's own territory or by its own nationals.[77]

Regime" June 1991) The Yale Law Journal Vol. 100 No. 8 2537; Carsten Stahn, "Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court" (2005) Journal of International Criminal Justice 3 695 at 703-704

[74] Robinson, *supra* note 69 at 491; John Dugard, "Possible Conflicts of Jurisdiction with Truth Commissions", in Cassesse, Gaeta & Jones, *Rome Statute Commentary* Vol.1, *supra* note 53 at 698; Scharf, *supra* note 73 at 52-59

[75] Dugard, *supra* note 74 at 698; Scharf, *supra* note 73 at 47; Bassiouni, *supra* note 73 at 15 to 17

[76] For the ratification status of the *Rome Statute*, see: Coalition for the International Criminal Court [CICC], "States Parties to the *Rome Statute* of the ICC According to the UN General Assembly Regional Groups" online: *CICC* ‹http://www.iccnow.org/documents/RatificationsbyUNGroup_18_July_08.pdf›.

[77] Robinson, *supra* note 69 at 493, Dugard, *supra* note 74 at 698; Bassiouni, *supra* note 73 at 17

Aside from the *Rome Statute*, the *Statute of the Special Court of Sierra Leone*[78] explicitly rejects the recognition of amnesties and the Community Reconciliation Process in East Timor[79] has excluded "serious criminal offences," including genocide, crimes against humanity, war crimes, murder, sexual offences and torture.[80] The growing sense of legal obligation to reject amnesties for international crimes can also be gleamed by resolutions such as the Resolution on Impunity adopted by the Commission on Human Rights[81] and declarations such the *Vienna Declaration and Programme of Action*.[82]

Legal scholars have also argued that reasons exist to suggest that under current or emerging customary international law there is a duty to prosecute or to surrender to another national or international entity for prosecution perpetrators of genocide, crimes against humanity and war crimes, at least with respect to crimes committed on the state's territory or by its nationals.[83]

A growing body of jurisprudence is also reflecting the argument that a duty to prosecute can be inferred in certain cases.[84] The Inter-American Court of Human Rights has held in the *Velasquez-Rodriguez* case that the state has a legal duty "to use the means at its disposal to carry out a serious investigation

---

[78] *Statute of the Special Court of Sierra Leone*, Article 10; See also: *1999 Lomé Peace Accord*, Seventh Progress Report of the Secretary-General of the UN Observer Mission in Sierra Leone on 30 June 1999, UN Doc. S/1999/836, para. 7 and *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002

[79] Schedule 1 to Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2000

[80] Section 1.3 of UNTAET/REG/2001/15 of 6 June 2000.

[81] CHR Resolution on Impunity, UN Doc. E/CN.4/RES/2001/70 of 25 April 2001

[82] *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, para. 60; See also: *The Final Declaration and Programme of Action of the 1993 World Conference on Human Rights*, Part II, Para. 60, UN Doc.A/CONF/57/24 (October 1993) 32 ILM 166

[83] Robinson, *supra* note 69 at 491; Michael P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court" Cornell International Law Journal Vol. 32 507 at 519-521

[84] Dugard, *supra* note 74 at 697; Robinson *supra* note 69 at 492.

violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".[85] The Inter-American Commission on Human Rights has held that amnesties granted by Uruguay, Argentina and El Salvador were incompatible with the *American Convention on Human Rights*.[86] The Trial Chamber of the ICTY in *Prosecutor* v. *Furundžija* held that amnesty for torture would be null and void and that perpetrators of torture acting upon or benefitting from those national measures granting amnesty may nevertheless be held criminally responsible for torture, whether in a foreign state, or their own state under a subsequent regime. [87]

In 2004, the Special Court of Sierra Leone (SCSL) declared that the *Lomé Accord*, which granted amnesty to the perpetrators of crimes committed during the conflict in Sierra Leone, could not deprive the SCSL of jurisdiction seeing as the crimes within the Special Court's Statute were crimes subject to universal jurisdiction. [88] Later in 2004, the SCSL faced the question of immunity for a sitting Head of State, Charles Taylor, and opined that because it was an international Court, as opposed to a domestic court, the immunity invoked by Taylor could not apply. The Court therefore held that the principle of sovereignty of states did not apply, given Court's status as an international organ and that, as

[85] *Velasquez-Rodriguez*, 1988 Annual Report Inter-American Court of Human Rights 35 at para. 174

[86] Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) OEA/L/V/11.82.Doc. 25 (1992); Report No. 24/92 (Argentina), Doc. 24 (1992); OEA/L/V/11.85, Doc. 28 (1994) (El Salvador)

[87] Case IT-95-17/1-T (10 December 1998); 39 ILM (1999) 317 at para. 155

[88] *Prosecutor* v. *Kallon & Kamara*, Decision on Challenge to Jurisdiction: *Lomé Accord Amnesty, Case* Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), paras. 87-89 (SCSL App. Ch., Mar. 13, 2004).

a matter of policy, states "have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area."[89]

C) The extent of the obligation to prosecute: need for selective prosecution

An emerging sense of duty to prosecute for international crimes does not however establish an absolute obligation for states to prosecute.[90] Even advocates of the duty to prosecute recognize two limitations. First, the duty does not necessarily require that a transitional government prosecute all offenders; a program of selective prosecution and punishment could have a significant deterrent effect, and thus achieve the aim of the general duty to punish atrocious crimes.[91] Second, the duty may be subject to an exception of "necessity" in situations of a "genuine and serious threat to national life".[92]

In the first case, it seems that there is a consensus among legal scholars that transitional states facing mass atrocities may adopt a policy of targeted, highly selective prosecutions which leave the vast majority of criminals unprosecuted.[93] In advancing the most convincing and comprehensive argument to date on the duty to prosecute international crimes, Professor Diane Orentlicher has found that neither customary nor treaty international law require prosecution of every person who committed human rights crimes for or with the acquiescence of a previous political regime. In the first place, a requirement that a government

[89] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-1, Decision on Immunity from Jurisdiction, (SCSL App. Ch., May 1, 2004)at para. 15
[90] Charles Villa-Vicencio, "Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet" (2000) 49 Emory L. J. 196 at 206
[91] Robinson, *supra* note 69 at 493, Orentlicher, *supra* note 73 at 2601
[92] Orentlicher, *supra* note 73 at 2549
[93] Greenawalt, *supra* note 59 at 620

attempt to prosecute everyone involved in large scale human rights violations would place impossible demands on the judiciary. Second, wide-ranging post-transition trials may provoke political instability if the prosecutions are not confined within principled limits.[94] She concludes that "exemplary prosecution"-targeting those most responsible for designing and implementing system of human rights atrocities or for especially notorious crimes that were emblematic of past violations, would seemingly be sufficient to discharge a government's obligations not to condone or encourage such violations, provided the criteria to select potential defendants did not appear to condone or tolerate past abuses.[95]

Professor Ruti Teitel argues that "limited criminal sanction" encompassing prosecution processes that do not necessary culminate in full punishment, offers a pragmatic resolution of the core problem of transition which she identifies as being the attribution of individual responsibility for systemic wrongs perpetrated under prior repressive rule. In doing so she underlines this limited criminal process will satisfy the retributive aims of recognition and stigmatization of wrongdoing and serves as a vehicle for political transformation.[96]

A second possible exception to the "duty to prosecute" an international crime is due to "necessity" in situations of "grave and imminent peril".[97] In other words,

---

[94] Orentlicher, *supra* note 73 at 2596

[95] *Ibid*. at 2599-2600

[96] Ruti G. Teitel, Transitional justice (Oxford; New York: Oxford University Press, 2000) at 49-51

[97] The term 'grave and imminent peril' comes from the 'state of necessity' doctrine, set out in art 33 of the International Law Commission, *Draft Articles on State Responsibility: Report of the International Law Commission on the Work of its Thirty-Second Session*, UN GAOR, 35th sess, Supp No 10, UN Doc A/35/10 (1980). The doctrine permits a state to justify the breach of an international legal obligation under certain conditions, including the existence of a grave and imminent peril. It seems unlikely however that a state could legitimately invoke this doctrine when it fails to prosecute a crime which it is compelled to prosecute pursuant to a treaty: see generally Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3

governments would not be required "to press prosecution to the point of provoking their own collapse."[98] In transitional South Africa for instance, it was feared that to have insisted on large-scale prosecutions would have been to perpetuate civil war. It was instead decided that it was more crucial to the nation-building exercise to ensure that perpetrators on all sides of the political divide were included in the nation-building exercise since it would have been impossible to imprison or eliminate all those responsible for past crimes.[99]

Justice Goldstone submits that such an exception is incorporated in the *Rome Statute*. He argues that despite the exacting discipline of international law, the very document codifying international law's insistence that perpetrators of genocide, crimes against humanity and war crimes should be prosecuted and punished; there appears scope to accommodate and defer to political constraints born of necessity. In other words, there is a realization that if the tenets of international law are to be respected and adhered to they must be realizable, not obtained at the cost of a new society's self-destruction. If the demand is therefore too onerous, even in the sphere of domestic law, with its easily identifiable channels of democratic accountability, it will result in non-compliance, and for international law, irrelevance.[100]

Yale Human Rights and Development Law Journal 1; See also: Diba Majzub, "Peace or Justice? Amnesties and the International Criminal Court" (2002) 3 MELB. J. INT'L L. 247

[98] Robinson, *supra* note 69 at 493, Orentlicher, *supra* note 73 at 2548

[99] Villa-Vicencio, *supra* note 90 at 209; See also: Kader Asmal, "Truth, Reconciliation and Justice: The South African Experience in Perspective (Jan. 2000) The Modern Law Review, Vol. 63 No. 1 1 at 11

[100] Richard Goldstone & Nicole Fritz, "'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers" (2000) 13 Leiden Journal of International Law 655 at 663

Darryl Robinson acknowledges the existence of such an exception of "necessity" but argues that it should be very carefully and narrowly construed. In the first place, although it is justified on consequentialist grounds, *all* the consequences, including the long-term global consequences of granting impunity to violators must be weighed.[101] Claims of "necessity" must be the object of serious scrutiny to ensure that accountability is not passed up for reasons of political convenience. As such, this exception should not be invoked because it is politically expedient to do so; governments should expect to assume reasonable risks associated with prosecutions, including a risk of military and popular discontent.[102]

In the second place, a "necessity" exception should not be raised as an excuse to completely abdicate the duty to deal with international crimes. The purpose of this exception is rather to allow the international community to consider good-faith creative alternatives to prosecution, which might include truth commissions granting conditional amnesties.[103] Robinson suggests that in deciding whether a "necessity exception" is appropriate, the alternative treatment of perpetrators or the extent of the departure from full prosecution must be balanced against the severity of the factors justifying deviation in order to come to determine whether the government has effectively done everything possible to impose accountability.[104]

---

[101] Robinson, *supra* note 69 at 496
[102] Orentlicher, *supra* note 73 at 2548-2549
[103] Robinson, *supra* note 69 at 497
[104] *Ibid.*

Conclusion

An overview of the "duty to prosecute" as well as the objectives of the ICC to prevent crimes of concern to the international community and to put an end to impunity establishes that the Prosecutor must exercise his discretion in such a way as to foster and encourage accountability. Although the *Rome Statute* clearly favors criminal prosecution, which is its very *raison d'être*, it does not explicitly oblige the Prosecutor to bring charges every time the jurisdictional and admissibility criteria are met. A policy of exemplary prosecution of those perpetrators most responsible of the gravest crimes would satisfy both the provisions of the *Rome Statute* as well as the international "duty to prosecute". Moreover, although the drafters ultimately chose not to explicitly address the possibility of good-faith alternative means to prosecution in the Statute, it does allow some scope for States to raise the exception of "necessity" in order to establish such means, including truth commissions granting conditional amnesties. The following section will determine that this scope was incorporated in the "interests of justice" considerations contained in Article 53 of the *Rome Statute*.

III. The *Rome Statute* and alternatives to prosecution

The foregoing illustrates that the proposed hybrid accountability mechanisms in the *2007 Agreement and 2008 Annexure* (formal trials paired with alternative sentences) are not directly addressed by the *Rome Statute*. In order to determine the proper legislative vehicle for addressing such proposals, it is

enlightening to consider the debate regarding national reconciliation measures which has been more broadly discussed in the scholarly literature.

The drafters of the *Rome Statute* had discussed the relationship between the ICC and national reconciliation measures such as truth commissions, particularly in the context of Article 17, but chose not to explicitly address it in the *Statute*. In the first place, agreement between those advocating prosecution as the sole appropriate and obligatory response in all situations and those feeling that alternative justice mechanisms were also acceptable was likely an impossible feat. Secondly, even if an agreement had been possible in principle, it would have been unwise to codify a comprehensive test to distinguish between acceptable and unacceptable reconciliation measures and to lock such definitions into the Statute.[105] It would have been equally impossible to incorporate an iron-clad rule mandating prosecution as the only acceptable response in all situations. The *Statute* therefore remains silent on the issue of deference to other justice mechanisms and the result of the debate was essentially "creative ambiguity":[106] a system in which prosecutorial discretion will be exercised in the context of purposefully vague provisions that can oppose the concepts of peace and justice.[107]

After reviewing the accountability proposal put forward by the *2007 Agreement* and *2008 Annexure* and the possible avenues for deference in the *Rome Statute* this section will resolve that it is most probably in the context of prosecutorial

[105] Robinson, *supra* note 69 at 483
[106] Scharf, *supra* note 83 at 522
[107] Thomas Hethe Clark, "*The Prosecutor of the ICC, Amnesties, and the "Interests of Justice": Striking a Delicate Balance"* (2005) 4 Wash. U. Global Stud. L. Rev. 389 (2005) at 390

discretion provided by Article 53 that the ICC could defer to accountability mechanisms falling short of formal prosecution and punishment.

A) The 2007 Agreement and 2008 Annexure

In late June 2006, soon after the issuance of arrest warrants against five leaders of the LRA, Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen citing crimes against humanity and war crimes committed in Uganda since July 2002, the LRA expressed willingness to engage in a new round of peace negotiations with the Ugandan government. Despite a number of past failures, this latest effort at peace talks as appeared more fruitful resulting in the *2007 Agreement* in which the parties compromise to address the commission of "serious crimes, human rights violations and adverse socio-economic and political impacts". On February 19 2008, the same parties signed the *2008 Annexure* which provides measure to implement the *2007 Agreement.* Although parties agree to the investigation and prosecution of those who planned or carried out war crimes and "widespread, systematic, or serious attacks" on civilians during the conflict before a special division of the Ugandan High Court, the *2007 Agreement* provides that a "regime of alternative penalties and sanctions" shall be introduced and "replace existing penalties" with respect to serious crimes committed by "non-state actors".[108] The *2007 Agreement* does not specify what "alternative penalties" consist of nor to what extent they will depart from existing criminal penalties under Ugandan law. Clause 9 of the *Annexure* also provides for the "recognition of traditional and community justice processes in proceedings" without any further specification as to the relationship

[108] *2007 Agreement*, *supra* note 16 clause 6.3.

of such mechanisms to criminal proceedings. The agreement indicates that penalties should address objectives such as the gravity of the crimes, reconciliation, rehabilitation and reparations to the victims, but no details are offered as to the types of penalties that will attain such objectives.

Of course, LRA leader Joseph Kony has not signed the peace agreement negotiated by his representatives after nearly two years of talks as he is seeking guarantees regarding the arrest warrants issued by the ICC. President Museveni has indicated that if they opted for the traditional settlement, he would endeavor to withdraw the complaint from the ICC.[109] The OTP thus far maintains that it is not involved in the peace process and that the arrest warrants issued by the Court against the LRA commanders "remain in effect and have to be executed."[110]

B) Avenues in the *Rome Statute* for deference to the *2007 Agreement*

a) Complementarity

Some authors have argued that Article 17(1)(b) of the *Rome Statute* could allow for the Court to declare a case inadmissible where a non-prosecutorial solution such as a conditional amnesty granted by a national truth commission,[111] the second part of the provision providing that the national decision 'not to prosecute' stems from the 'inability' or 'unwillingness' to prosecute, or to 'bring the person concerned to justice' would negate that interpretation[112] or, at the very least,

[109] Croft, *supra* note 18
[110] ICC OTP, "OTP Statement in relation to events in Uganda" (March 2008) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080303-ENG.pdf›.
[111] See: Anja Seibert-Fohr, "The Relevance of the *Rome Statute* of the International Criminal Court for Amnesties and Truth Commissions" (2003) Max Planck Yearbook of United Nations Law, Volume 7 553 at 575; Stahn, *supra* note 73 at 697
[112] Dugard, *supra* note 74 at 702

allow for a very narrow argument.[113] In order to satisfy the terms of Article 17(1)(b), a State turning to informal justice would have first have had to "investigate" the matter; second, it would have decided not to prosecute; and third, this decision did not result from the unwillingness or inability to prosecute.[114] Even if an alternative justice mechanism could be argued to constitute an 'investigation'[115], the 'decision' to prosecute would have to mean that prosecution is at least a possibility and there must be "an intent to bring the person concerned to justice".[116]

The situation in Uganda and proposed solution of criminal trials paired with "alternative sentence regimes" can be said to be raise more complicated issues of admissibility than would a truth commission for instance. At the outset, it is important to underline that the Ugandan referral to the ICC did not result from an unwillingness to arrest and prosecute perpetrators, but rather from the inability to arrest the LRA leaders due to their location in Southern Sudan, outside Ugandan jurisdiction.[117] Subsequent to the signing of the *Annexure*, the PTC submitted a request to the Ugandan Government on February 29, 2008 seeking further information regarding the implementation of these agreements.[118] In a response dated March 27, 2008, the Solicitor General of Uganda seems to lay the groundwork for an eventual admissibility challenge by noting that Uganda was

[113] Robinson, *supra* note 69 at 498-502
[114] Robinson, *supra* note 69 at 499
[115] The Court would have to adopt an interpretation broader than the typical criminal investigation and coinciding with the objectives of a truth commission.
[116] Robinson, *supra* note 69 at 498-502
[117] Akhavan, *supra* note 2 at 415
[118] ICC Registrar, Report by the Registrar on the Execution of the "Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest" (March 28, 2008) online: ICC ‹http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-286-ENG.pdf›.

unable to bring the LRA leaders to justice because they were "beyond the borders of Uganda." The letter adds: "It is expected that once the agreement is signed and the Lord's Resistance Army submits to Ugandan jurisdiction as required, the perpetrators of atrocities in northern [sic][Uganda], the indictees inclusive, shall be subject to the full force of the law." [119]

Uganda suggests a dual track strategy with regards to accountability. Perpetrators responsible for international crimes committed in the conflict who have not yet received amnesty pursuant to the *Amnesty Act of 2000*, including the ICC indictees, will face formal justice with special procedures and, possibly, alternative sentences. Those who committed lesser offences may face accountability through an alternative justice mechanism based around traditional justice ceremonies. Although the situation of lesser offenders will not create an issue on a potential admissibility challenge, the suggested "regime of alternative penalties and sanctions" for ICC indictees provided for by the 2007 *Agreement* could be seen by the PTC as a way of "shielding the person[s] concerned from criminal responsibility for crimes within the jurisdiction of the Court" contrary to Article 17(2)a) of the *Rome Statute*. As such, this alternative regime of sentences, seemingly a *sine qua non* of any peace deal with a strong incentive for Kony and his followers to submit to Ugandan domestic jurisdiction, could cause the failure of an admissibility challenge by Uganda and potentially prolong the conflict in Acholiland should the perpetrators not be apprehended.

[119] Letter from Jane F. Kiggundu, Acting Solicitor General, to the Registrar of the ICC (27 March 2008) online: ICC ‹http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-286-Anx2-ENG.pdf›.

Although the scope of Article 17 can be said to be too narrow in comparison with Article 53 to allow for deference to an alternative to prosecution, the complementarity regime nonetheless will offer significant guidance as to the interpretation of the "interests of justice" criterion.

b) Deferral of an ICC prosecution by the Security Council

According to some media reports, the LRA has called for a deferral by the Security Council of the ICC case against Kony and the other indictees so as to complete the peace process.[120] Article 16 of the *Rome Statute* provides that:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council , in a resolution adopted under Chapter VII of the United Nations, has the requested the Court to that effect; that request may be renewed by the Council under the same conditions."

Much like the executive branch power in many countries to issue a "stay of proceedings", the Security Council acting under *Chapter VII* of the *UN Charter*, which deals with the maintenance of international peace and security, could request a deferral from the ICC allowing it to coordinate, even in terms of timing, the prosecution of international crimes with the other measures which it undertakes for the fulfillment of its mission or even, in theory, to allow for a peace process to proceed.[121] Article 16 reflects a compromise between those advocated complete Security Council control over the ICC, and those who

[120] Katie Nguyen, "Ugandan rebels urge suspension of arrest warrants" (April 19, 2007) online: Reuters, ‹http://www.reuters.com/article/latestCrisis/idUSL19177992›
[121] Robinson, *supra* note 69 at 502

argued that it would consist of inappropriate political interference.[122] Under Article 39 of the *UN Charter*, the UNSC should first determine the existence of a threat to the peace, breach of the peace or an act of aggression. It is unclear whether this situation need necessarily be directly caused by the investigation or prosecution *per se*, but it seems most likely that the UNSC could refer to a larger or factual or political background related to the proceedings before the ICC and falling into one of the categories described by Article 39.[123] It must be noted that in order for such a deferral to pass, Article 16 requires positive action by the UNSC: a majority of the UNSC members and unanimity of the permanent five members would have to pass a resolution under *Chapter VII* of the *UN Charter* requesting that no investigation or prosecution be commenced for a period of 12 months. [124]

Some have suggested that Article 16 should be used in the Uganda situation in order to allow for the implementation of the peace agreement; even if the Ugandan solution falls short of the complementarity threshold.[125] On the other hand, there seems to be a growing reticence among states to undermine the ICC and even run the risk of contravening the *Rome Statute* if the ICC indictees

---

[122] *Ibid*; See also: Luigi Condorelli and Santiago Villalpando, "Referral and Deferral by the Security Council" in Cassesse, Gaeta & Jones, *Rome Statute Commentary* Vol.1, *supra* note 53at 644-646

[123] Luigi Condorelli and Santiago Villalpando, *supra* note 122 at 647

[124] So far Article 16 has been used on one occasion to grant a form of blanket amnesty to peacekeepers at the initiative of the United States; an action seemingly inconsistent with the purpose of the provision. See SC Res. 1422, 12 July 2002 and SC Res. 1487, 12 July 2003

[125]Greenawalt, *supra* note 59 at 660; International Crisis Group (ICG), "Negotiating Peace and Justice, Considering Accountability and Deterrence in Peace Processes" (Nuremberg, 26 June 2007) online: ICG ‹http://www.crisisgroup.org/home/index.cfm?id=4922&l=2› See also: Nguyen, *supra* note 20; ICG, "Northern Uganda: Seizing Opportunity for Peace" (April 26, 2007) online ICG ‹http://www.crisisgroup.org/home/index.cfm?id=4791&l=1›

ultimately benefited from impunity.[126] Finally, considering the long-standing nonchalance of the international community regarding the situation in Uganda, it is unlikely that the Security Council would choose this particular case to exercise its Article 16 powers as opposed to the more controversial situation in Sudan, which will be discussed in the next chapter.

c) Prosecutorial discretion and the "interests of justice"

Most ICC commentators maintain that prosecutorial discretion is the most plausible avenue in the *Rome Statute* to accommodate the decision to defer to alternative justice mechanisms or even to national prosecutions paired with non-penitentiary sentences, should an admissibility challenge fail before the PTC.[127] Article 53 gives the Prosecutor the power to decide whether or not to initiate an investigation or a prosecution on the grounds that going forward would be contrary to the interests of justice. Under Article 53(1), where an alleged crime falls within the jurisdiction of the Court and the particular situation would otherwise be admissible under the *Statute*, the Prosecutor could nevertheless decline to investigate on the grounds that this investigation "would not serve the interests of justice." Under Article 53(2), the Prosecutor could decline to prosecute if it would be "in the interests of justice" to do so, "taking into account all the circumstances, including the gravity of the crime, the interests of the

[126] International Center for Transitional Justice (ICTJ), "Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice" (May 2007) online: ICTJ ‹http://www.ictj.org/images/content/9/5/956.pdf › at 12.

[127] Dugard, *supra* note 74 at 702; Robinson, *supra* note 69 at 486; Mark Drumbl, *Atrocity, Punishment and International Law*, (Cambridge; New York: Cambridge University Press, 2007), at 142-143; Diba Majzub, "Peace or Justice? Amnesties and the International Criminal Court" (2002) 3 MELB. J. INT'L L. 247

victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."

The OTP also acknowledged this avenue in its "*Policy Paper on the Interests of Justice*" issued in September 2007.[128] In this paper, the OTP reiterates its policy of focusing on "those bearing the greatest degree of responsibility" and its view of that the text and purpose of the *Rome Statute* favors the pursuit of investigations and cases when those investigations and cases are admissible and the relevant standard of proof can be satisfied. In so doing however it lists "other justice mechanisms" and "peace processes" as "potential considerations" under Article 53(1)(c) and 53(2)(c). Although prosecutorial policy will be examined at length in the next chapter, it is worthwhile to note that while maintaining that the exercise of the Prosecutor's discretion under Article 53 is exceptional in its nature and that there is a presumption in favor of investigation or prosecution, the possibility of deference to alternative justice mechanisms exists within the Statute and within prosecutorial policy, albeit in very exceptional circumstances.

Conclusion

An overview of the legislative framework of the *Rome Statute* as well as the "duty to prosecute" international crimes reveals that the ICC OTP could legally defer to national efforts at accountability falling short of formal justice, such as that described in the Juba proposal if it is found to be "in the interests of justice" pursuant to Article 53. In and of itself however, this offers no elucidation as to

[128] ICC OTP, "Policy Paper on the Interests of Justice" (September 2007) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf› [*Policy Paper on the Interests of Justice*]

what circumstances would justify such a deferral since the “interests of justice” remain undefined.

In the next Chapter, a critical review of the Prosecutor’s *Policy Paper on the Interests of Justice* will show that the OTP has responded to the debate regarding the scope of the “interests of justice”, particularly in light of the situation in Uganda, but has not gone far enough to define this discretionary statutory criterion. In a transitional justice setting where the complementarity principle calls for deferral by the OTP to a member State, the current prosecutorial policy while acknowledging the possibility of also deferring to an alternative justice mechanism, offers no elucidation as to the minimum requirements that would satisfy the OTP and eventually, the ICC.

CHAPTER II: EMERGING PROSECUTORIAL STRATEGY REGARDING THE "INTERESTS OF JUSTICE" IN ARTICLE 53

Introduction

It was advanced in the previous chapter that the Uganda referral and subsequent ICC investigation likely pushed Kony and his acolytes to the negotiating table. As a consequence however, the ICC has become an unofficial yet most important player in the peace talks despite not being able or willing to sit at the negotiation table. The ICC was lauded as the embodiment of the culmination of international justice into a tribunal that was completely impartial, independent and free from political influence that would be complementary to national efforts at international criminal justice. In Rome, prosecutorial independence was considered a great achievement to that end. Ten years after its creation however, the Ugandan situation illustrates that the consensus in Rome may have raised more issues than it solved.

Although the Prosecutor is certainly not a political figure *per se*, it will be argued in the first part of this chapter that his decisions will have profound political effects and, specifically in application of his discretionary powers under Article 53 of the *Rome Statute*, he will be called to make decisions involving political considerations. Even after the adoption of the *Rome Statute* however, there is no consensus on the extent of political considerations or if they should even influence prosecutorial decision-making at all. Even advocates of the ICC have not reached an agreement on the balance between legalism and political realism in the exercise of prosecutorial discretion. This chapter will therefore delve into

this debate as it concerns the interpretation of the "interests of justice" in Article 53 in order to properly frame the ICC OTP's published policy on the issue.

A critical review of the *Prosecutor's Policy Paper on the Interests of Justice* will show that the OTP has responded to the debate regarding the scope of the "interests of justice", particularly in light of the situation in Uganda, such as it was before September 2007, but has not gone far enough to define this discretionary statutory criterion. In a transitional justice setting where the complementarity principle calls for deferral by the OTP to a member State, the current prosecutorial policy while acknowledging the possibility of also deferring to an alternative justice mechanism, offers no elucidation as to the minimum requirements that would satisfy the OTP and eventually, the ICC. More specifically, it does not address the unexpected hybrid proposal that emerged in the Juba talks: criminal prosecutions paired with alternative sentences and that will likely emerge in future peace negotiations elsewhere.

It will finally be argued that the Prosecutor must address the complementary nature of the ICC as it influences the discretionary concept of the "interests of justice". In other words, the OTP will have to develop a policy on hybrid prosecutorial solutions such as that proposed by the Ugandan peace talks and likely to be proposed in other situations falling within ICC jurisdiction and incorporate this policy into prosecutorial guidelines that will allow ensure the legitimacy and transparency of the exercise of prosecutorial discretion at the ICC.

I. THE ICC PROSECUTOR AND POLITICS

The ultimate aspiration for the ICC was that it would consist of a "new international criminal justice," a neutral culmination of a series of partial attempts at international prosecution that would be immune to political influence. The structure of prosecutorial authority in selecting cases for investigation and prosecution as summarized in Chapter I resulted from a concern in Rome that international prosecutions be guided by pure legal standards and free from "political considerations." However, inasmuch as the Prosecutor's general mandate can be seen as a duty to examine conflicts of a political or ethnic nature in regions where there is great mistrust between different population groups who are often themselves involved in the crimes perpetrated against civilians, in selecting cases, perpetrators and charges for prosecution, as well as in deciding when to proceed, prosecutors cannot ignore the political dimension of their decisions, which lie at the heart of international relations and, very often, conflict resolution.[129] Thus, despite the legislative source of prosecutorial powers, prosecutors hold the most "political" office in international justice.

A) Prosecutorial independence and discretion in the *Rome Statute* and in practice

The Prosecutor's position in the structure of the ICC is the critical juncture where law and politics converge: unlike domestic prosecutors, the ICC Prosecutor is intended to function as a counterweight to state power. The ICC Prosecutor's

[129] Luc Côté, "International Criminal Justice: Tightening the Rules of the Game" (March 2006) International Review of the Red Cross Vol. 8 No. 861 133 at 135-137; See also: Greenawalt, *supra* note 59 at 613; Frédéric Mégret, "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project" (2002) Finnish Yearbook of International Law Vol. 12 195 at 210-223

ability to make individualized considerations based on law and justice, rather than the self-interest or sheer power of any particular state, transforms the Court from a political body operating in a legal context to a legal institution with strong political undertones.[130] Thus, the independence of the Prosecutor of the International Criminal Court, who can initiate investigations without a formal state complaint or Security Council referral, is rightly considered a celebrated achievement. Subjecting the Court to political control, be it by member States or the Security Council, would have rendered it incapable of fulfilling its objectives of putting an end to impunity and enforcing human rights.

Prosecutorial independence refers to the institutional division of power from other bodies within the tribunal and independence from the executive which, in the international system, can be considered to be the function of States and, in some instances, the UN Security Council.[131] It is based on the interest of impartial justice on which the credibility and legitimacy of the criminal justice process depends. The principle of independence is expressed in declaratory and functional terms in Article 42 (1):

The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

Prosecutorial discretion is the principal manifestation of the statutory principle of prosecutorial independence and is tied up with the concepts of fairness, incorruptibility, freedom from outside influences; decision-making based on

[130] Danner, *supra* note 33 at 515-518
[131] Brubacher, *supra* note 36 at 84

evidence objectively assessed, and, necessarily, sound principles of public interest.[132]

At the core of any notion of prosecutorial discretion lies the power to decide whether or not to investigate and prosecute.[133] This power and the corollary power to decline to proceed, is a necessary and fundamental concept in the administration of criminal justice and is rooted in the practical need for a selective, rather than automatic approach to the institution of criminal proceedings, so as to avoid overburdening and potentially paralyzing the justice system. As "gatekeeper" of the ICC, the Prosecutor is ultimately entrusted with the responsibility of deciding whether or not the ICC gets and stays involved in Uganda, the DRC or Darfur.[134]

Aside from the legislative obligations canvassed in Chapter I of this thesis, the Prosecutor must also address some practical factors complicating the exercise of his discretion in devising an effective and fair prosecutorial strategy. First the OTP must address the issue of the limited resources of the ICC in the face of unquantifiable demands for international justice. Second, the nature of the volatile situations over which the ICC has jurisdiction, often involving ongoing violent conflicts, raises significant issues of timing for the Prosecutor, particularly in the case of issuing arrest warrants. Each of these issues will be examined herein.

---

[132] Hassan B. Jallow, "Prosecutorial Discretion and International Criminal Justice" (2005) Journal of International Criminal Justice 3 145 at 146 and 154; See also: Côté, *supra* note 129 at 136;
[133] See: Bergsmo and Pieter Kruger, *supra* note 36.
[134] Héctor Olásolo, "The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?" (2003) International Criminal Law Review 3 8 at 89

a) The need for prosecutorial selectivity

Considerations of efficiency at the ICC mandate significant prosecutorial discretion. Louise Arbour has stated that the "main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting targets for prosecution."[135] In a domestic context, there is an assumption that all crimes that go beyond the trivial or *de minimis* range are to be prosecuted.[136] But, as argued by Arbour, before an international tribunal, particularly one based on complementarity, "the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones."[137]

According to a 2006 Report, the OTP received 1918 communications from individuals or groups in at least 107 different countries alleging crimes in 153 countries in all regions of the world. Of these only 20% were found to be within the jurisdiction of the court and 10 situations were subjected to further analysis including the investigations opened in the DRC, Uganda and Darfur, two were dismissed (Venezuela and Iraq) and five analyses are on-going including the situation in the CAR and in Côte d'Ivoire which, through a declaration lodged with

[135] Morten Bergsmo, The Jurisdictional Regime of the International Criminal Court (Part II, Articles 11-19) (1998) 6 Eur J. Crime, Crim. L. & Crim. Just 29 at 39
[136] William Schabas, *An introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007) at 159
[137] *Ibid.* at 160

the Court, accepted the Court's jurisdiction for crimes committed in its territory since September 19, 2002.[138] The OTP has since specified that also under analysis are the situations in Colombia, Afghanistan, Chad, Kenya and Georgia.[139] Obligating the Prosecutor to launch investigations and prosecutions into all such cases would be a practical impossibility.

Even within a particular situation, it would be logistically impossible to prosecute every perpetrator of crimes falling within the jurisdiction of the ICC. In Uganda alone for instance it is estimated the LRA had abducted up to 26,615 children and UNICEF estimates that almost 12,000 abductions had taken place between the entry into force of the *Rome Statute* on July 1, 2002 and August 2004.[140]

In the international context, where a few prosecutors appear before a few judges to try cases of mass atrocities committed by thousands of perpetrators, murderers and rapists will go unpunished. History is ripe with such examples. Article 14(b) of the *Charter of the International Military Tribunal of Nuremberg* provided that the Chief Prosecutors acting in committee had the responsibility "to settle the final designation of major war criminals to be tried by the Tribunal". Ultimately only 24 defendants were ever indicted,[141] revealing a very selective charging strategy on the part of the Chief Prosecutors.[142] The ICTY has tried

---

[138] ICC OTP, "Report on the activities performed during the first three years (June 2003-June 2006)" (September 12, 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf› at 9-10.

[139] ICC OTP, "ICC Prosecutor confirms situation in Georgia under analysis" (20 August 2008) online: ICC ‹http://www.icc-cpi.int/pressrelease_details&id=413.html›.

[140] Akhavan, *supra* note 2 at 402

[141] Of the 24 initially indicted, one committed suicide, one was found unfit to stand trial,12 were sentenced to death, 3 received life sentences, 4 received other prison terms and 3 were acquitted but subsequently tried and found guilty by German courts.

[142] Morten Bergsmo, Catherine Cissé & Christopher Staker, "The Prosecutors of the International Tribunals: The Cases of Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC

116 suspects after 14 years of operation and a billion dollars in expense following the ethnic cleansing occurring after the breakup of Yugoslavia yielding hundreds of thousands of victims of systematic atrocities at the hands of thousands of perpetrators. In 13 years of operation, the ICTR has tried just 36 génocidaires despite having held over 100,000 suspects at one time or another.[143]

b) The exercise of prosecutorial discretion and timing

Prosecutorial impartiality must also be understood very differently at the international level because of the politically fraught context in which the ICC is operating. The ICC has currently issued arrest warrants in three situations where a conflict is ongoing and the threat of contributing to political instability is great. In contrast to the *ex post facto* nature of the IMTs and the ICTR, the *ex ante* nature of the ICC allows the Court to issue arrest warrants while a conflict is ongoing and therefore to have an effect on peace efforts.

Two particular concerns can be raised relating to the effect of prosecutorial policy in this context. The first concern relates to the possibility that pre-transitional indictments can exacerbate and prolong the conflict by precluding peaceful political settlements that include non-prosecutorial solutions. The second concern relates to the possibility that pre-transitional indictments can actually positively contribute to the peace process. Both arguments have been raised in the Ugandan context. On the one hand it is argued that the ICC indictments

---

Compared", in *The Prosecutor of an International Criminal Court* (Freiburg im Breisgau : Edition Iuscrim, 2000) at 134

[143] The Security Council adopted Resolution 1503 of August 27, 2003 establishing a completion strategy for both Tribunals and requiring the Prosecutor to conclude all investigations into possible new indictments by the end of 2004, all trials by 2008, and all appeals by 2010. It requested the transfer of all but the highest level remaining suspects to national jurisdictions. See: S.C.Res. 1503 U.N. Doc. S/RES/1503 (Aug. 28, 2003)

against Kony and his acolytes stand in the way of peace settlement. On the other hand, it is advanced that the issuance of the indictments pushed Kony to the negotiating table in the first place.[144]

The issue of timing is also prominent, albeit differently, in the Sudanese situation. On July 14, 2008 Prosecutor Luis Moreno-Ocampo announced that he was seeking an arrest warrant for genocide and war crimes against the Sudanese president, Omar Hassan Al-Bashir, regarding the situation in Darfur.[145] Not only was this move historic in that it is the first time the ICC sought an arrest warrant against a serving head of state, thus breaking new ground in the realm of diminishing national sovereignty, but it was unusual because it was announced before the PTC even had a chance to render a decision. The Prosecutor's decision to proceed in this manner was not met with unanimous approval. Some have accused the Prosecutor of making a political statement calling for the removal of Al-Bashir and of interfering in attempts to negotiate a peaceful political settlement with the Sudanese government in Darfur.[146] The Sudanese government has explicitly stated to the UN that peace in Darfur and the execution of the ICC indictments are mutually exclusive and has called for the U.N. Security Council to invoke Article 16 of the *Rome Statute* in order to freeze the ICC proceedings for at least 12 months. The Sudanese government is supported by

[144] ICTJ, *supra* note 126 at 6; On the issue of timing see also: Mahnoush H. Arsanji & W. Michael Reisman, "The Law-in-Action of the International Criminal Court" (2005) 99 Am. J. Int'l L. 385

[145] ICC OTP**,** Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080714-ENG.pdf›.

[146] Paul Reynolds, "Bashir Move bold but problematic" (July 14, 2008) online: BBC News ‹http://news.bbc.co.uk/2/hi/africa/7500437.stm›; David Pallister, "Human Rights: Growing Clamour to Remove the Hague Prosecutor who wants Sudanese President Arrest" (August 18, 2008) online: Guardian UK ‹http://www.guardian.co.uk/world/2008/aug/18/humanrights.sudan›.

the African Union, the Arab League, the Islamic Conference Organization and the Non-Aligned Movement. Even French President, Nicolas Sarkozy, has suggested that an Article 16 deferral would be possible if the Sudanese government met stringent prior conditions such as ending all violence in Darfur.[147] On the other hand, Richard Goldstone who, as chief Prosecutor of the ICTY had argued that the Dayton Agreement was possible because of the indictment of Bosnian Serb leader Radovan Karadžić and General Ratko Mladić,[148] defends Moreno-Ocampo's decision in underlining the indictment may delegitimize the Sudanese government in the eyes of the Sudanese people and also perhaps push the UN Security Council to put real pressure on the government.[149] In 1999, ICTY Prosecutor Louise Arbour had admitted to rushing the indictment of Serb President Slobodan Milošević so as to preclude an amnesty deal in the peace talks.[150] In a press release accompanying the indictment she said she was "mindful of the impact that this indictment may have on the peace process" and that "the product of our work will make a major contribution to peace, not only in Kosovo, but in the whole region in which we have jurisdiction" and "no credible, lasting peace can built upon impunity and injustice."[151]

---

[147] Simon Tisdall, "What price of action over Darfur?" (September 28, 2008) online: Guardian UK ‹http://www.guardian.co.uk/commentisfree/2008/sep/29/sudan.warcrimes›.
[148] Greenawalt, *supra* note 59 at 643
[149] Richard Goldstone, "Catching a war Criminal in the Act" (July 15, 2008) online: New York Times ‹http://www.nytimes.com/2008/07/15/opinion/15goldstone.html?_r=1›.
[150] Marlise Simons, "Proud but Concerned: Tribunal Prosecutor Leaves" (September 15, 1999), online: New York Times ‹http://query.nytimes.com/gst/fullpage.html?res=9C04E1DB163CF936A2575AC0A96F958260›. See also: Greenawalt, *supra* note 59 at 645-646; Danner, *supra* note 33 at 544-545
[151] See: ICTY, Press Release, "Statement by Justice Louise Arbour", (May 27, 1999), online: ICTY ‹http:www.un.org/icty/pressreal/p404-e.htm›; See also: Greenawalt, *supra* note 59 at 646

Although it is difficult to determine whether the timing of international indictments effectively help or exacerbate peace negotiations, it is clear that the actions of international prosecutors, including those Moreno-Ocampo, have significant political consequences, whether these are intended or not.

c) Prosecutorial discretion and the principle of complementarity

The principle of complementarity is incorporated into the *Rome Statute* in order to set out the admissibility criteria for cases at the ICC. Unlike the *ad hoc* tribunals which have exercised unfettered primacy over proceedings in domestic courts, the ICC is designed to address only those crimes that a state has proven "unwilling or unable" to investigate or prosecute. Article 53 read with Article 17 of the *Rome Statute* seem to set forth the following set of obligations and rights in regards to admissibility: (1) States have an overarching duty to pursue justice, which in some instances may trump the imperatives of prosecution, (2) the ICC can evaluate whether a state's actions are consistent with this duty, and (3) a state may effectively bar an ICC prosecution of a particular perpetrator by conducting a genuine investigation and/ or prosecution of him or her.[152]

The *Rome Statute* does not incorporate institutional guarantees of independence like domestic systems, nor did it retain the principle of primacy characterizing the *ad hoc* tribunals. The complementary nature of the ICC mandates that the ICC Prosecutor provide a greater degree of deference to national laws and jurisdictional claims.[153] Alexander Greenawalt points that, particularly in a situation where the State isn't "unable" to prosecute, the ICC's implication in a

[152] Greenawalt, *supra* note 59 at 631
[153] *Rome Statute*, Article 19(2); Brubacher, *supra* note 36 at 84

given situation could send a signal that the state isn't doing what it should. This implies that, in the first place, a state's entire prosecutorial strategy is a matter of international concern in that as long as a perpetrator against who evidence to support a conviction under the *Rome Statute* exists, the possibility of an ICC prosecution remains. In the second place, the Prosecutor's authority is unrestrained since it could always indict some unprosecuted subjects in order to signal that the state in question has not done enough to address international crimes.[154]

Considerations of complementarity pose no real conundrums for the exercise of prosecutorial discretion where, in cases like Sudan, a state attempts to secure its own impunity. The ICC could proceed here as would an *ad hoc* tribunal. In the absence of state cooperation, international pressure or military intervention to secure the arrests of alleged perpetrators however, the ICC's implication would also likely remain symbolic.

The case of Uganda, a state desiring to be a good citizen in the international community and, at the same time, to broker a peace agreement ending 20 years of continuous atrocities, raises more challenging questions for the ICC Prosecutor. In this situation, good faith efforts at a transitional justice solution-criminal prosecution paired with a regime of alternative sentences may fall short of what is acceptable for the OTP.

Since the *Rome Statute* offers no specific guidance on how states recovering from mass atrocities may legitimately try to balance the interests of justice

[154] Greenawalt, *supra* note 59 at 630; See also: Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford: Oxford UP, 2003) at 84

against considerations of future reconciliation- which may not justify full prosecution, it therefore falls into the hands of the ICC Prosecutor to make principled distinctions between which methods of balancing are acceptable and which are not. The Ugandan example underlines the absence of stark distinctions in the balancing of prosecution with the broader context-specific goals of reconciliation and political transition. In exercising his duty under Article 53, it may fall to the ICC Prosecutor to ultimately decide whether, in a continuum of transitional justice options, none of which emerges as an *a priori* best choice, a state has made the proper choice. In allowing for the Prosecutor to thus indirectly assess whether a state's transitional justice efforts in a broad sense are adequate, the *Rome Statute* ultimately provided for the kind of complex political calculations that the ICC was ostensibly designed to avoid.[155]

Conclusion

As argued by Frédéric Mégret, the Rome conference endowed the Prosecutor with a discretion amounting to much more than the exigencies of complementarity: "In the absence of stabilized political expectations about what might be best done in the extreme circumstances of war and peace, the reasons for preferring one of the available options- very much in good faith- will as a matter of necessity be of an essentially political or moral nature."[156] In order to preserve the independence and legitimacy acquired in Rome after much debate, the ICC Prosecutor is in the process of defining its prosecutorial policy. After 10

[155] Greenawalt, *supra* note 59 at 633; See also: Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (2005), Northwestern University Law Review Vol.99 No. 2 539 at 605

[156] Mégret, *supra* note 139 at 218-219

years of operation however this is proving to be a most difficult task as it raises questions that should probably have been answered in Rome. Even among supporters of the ICC, no consensus exists as to the extent of prosecutorial discretion, particularly regarding the interpretation of the "interests of justice". The debate over the *interpretation* of this discretionary criterion illustrates the two poles between which the ICC OTP must elaborate its prosecutorial policy and provide transparent and consistent criteria for the exercise of its discretion.

II. Diverging views of the prosecutorial discretion and the "interests of justice"

The phrasing of Article 53 marks the entry of the concept of the "interests of justice", very well known in domestic jurisdictions, into positive international criminal law. Unlike domestic criminal law however, in the context of international law, which is be inextricably tied to international relations, conflicts and wars and the ultimate goal of ending impunity, there seems to be no consensus as to what the duty to consider the "interests of justice" confers on the Prosecutor. On the one hand, the legalist interpretation would oblige the Prosecutor to consider only those interests tied to effective prosecution, while on the other hand, a broader interpretation would have the ICC Prosecutor take such things as the effect on a peace process and alternative justice mechanisms into consideration. Each position will be examined in the following section.

A) The Prosecutor as an apolitical actor: a narrow interpretation

The legalist interpretation is summed up by Héctor Olásolo who argues that the *Preamble of the Rome Statute* reflects the real intent of the drafters which is to eradicate the culture of impunity by essentially favoring prosecution and thus

adopted a quasi-jurisdictional model for the investigative and prosecutorial functions. In other words they intended that the Prosecutor be governed by the principle of legality exclusively. He maintains that "through the back-door" of Article 53, among others, the drafters undid this core policy choice by granting the Prosecutor "unlimited political discretion whether to exterminate the virus of impunity, once it has been detected in a given situation of crisis". In delegating this power to the Prosecutor, and somewhat to the PTC, they created a risk that the Prosecutor's functions become political and become an instrument for implementing policies of states parties.[157] His suggestion is nothing less than the deletion of Articles 53(1)(c), 53(2)(c) and (3)(b), or, as a second-best solution, the addition of an RPE Rule 104*bis* to the effect that "for the purposes of 53(1)(c) and (2)(c), an investigation is not in the interests of justice unless directed against the highest leaders that masterminded the crimes within the jurisdiction of the Court allegedly committed."[158]

Human rights groups invited, on November 30, 2004, by the OTP to submit proposals on the "interests of justice" adopted this legalist approach to a certain extent. In June 2005, Human Rights Watch (HRW) published a policy paper that argued that only a narrow interpretation of Article 53 would be consistent with the objectives of the *Rome Statute*.[159] According to this position, the Prosecutor could only consider the "gravity of crime" and the "interests of the victims" under

[157] Olásolo, supra note 134, at 149; See also Stahn, *supra* note 73 at 717-718
[158] Olásolo, *supra* note 134 at 147; See also: Christopher Keith Hall, "Suggestions concerning International Criminal Court, Prosecutorial Policy and Strategy and External Relations (28 March 2003) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/hall.pdf›.
[159] HRW, "The Meaning of the "Interests of Justice" in Article 53 of the *Rome Statute*" (June 2005) online: *CICC* ‹http://www.icc-cpi.int/library/organs/otp/hall.pdf› [HRW Policy Paper]

Article 53(1)(c) and the additional criteria of "the age of infirmity of the alleged perpetrator" and "his or her role in the alleged crime" under Article 53(2)(c). Moreover, HRW insists that in considering the interests of the victims, only those relating to achieving justice are relevant for the purposes of Article 53.[160] As such, the Prosecutor could not decide to forego an investigation or prosecution on the basis of national efforts such as truth commissions, national amnesties, or traditional reconciliation methods, or on the basis of concerns resulting from an ongoing peace process since this would be, according to HRW, against the objectives of the Court announced in the *Preamble*. HRW also argued that, based on Article 16, the drafters of the *Rome Statute* implicitly intend that the United Nations Security Council retain the decisive role in deciding to halt an investigation or prosecution on political grounds.[161] HRW would limit any prosecutorial discretion to the timing of launching an investigation or prosecution although even then, the Prosecutor would not be able to announce that action is being delayed because of a national peace process and delays could not be indefinite or triggered by simple representations that such a process is coming.[162] Amnesty International (AI) had put forward a similar interpretation of Article 53 on June 17, 2005.[163] According to AI, the only vehicles in the *Rome Statute* providing for the possibility of stalling investigations and/or prosecutions are contained in Articles 16, 18 and 19: the UNSC's power to halt proceedings on

[160] *Ibid*. at 19
[161] *Ibid*. at 8-9
[162] *Ibid*. at 22-23
[163] Amnesty International (AI), "Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice" (June 17, 2005) online: AI ‹http://www.amnesty.org/en/library/asset/IOR40/023/2005/en/dom-IOR400232005en.pdf›.

political grounds and admissibility challenges based on the ICC's complementarity regime. AI maintained that Article 53 does not provide for the possibility for suspending an investigation or prosecution for deferral to a national peace process, traditional reconciliation mechanism, truth commissions or any other reason save for the age and/or infirmity of the alleged perpetrator, both exceptions restrictively defined.[164] In making this argument, AI relies heavily on national prosecution guidelines where the "public interest test" is generally limited to narrow considerations bearing on the individual offence or offender, the impact of prosecution on the mental and physical health of the victim and delay. Guidelines indicate that although the interests must be taken into consideration, national prosecutors generally act in the interests of the public, and not on behalf of individual victims. The interests of the public thus include considerations such as national security, public confidence in the criminal justice system and alternatives to prosecution (where the offence is not of a serious nature).[165]

Both HRW and AI are concerned with maximizing the legitimacy of the ICC Prosecutor and thereby of the ICC. Their proposed very narrow interpretations of Article 53 seem however to fail on both legal and practical grounds. Both groups erroneously interpret Article 16 as giving the UNSC a duty to intervene. Rather, the UNSC seems to have merely a *right* to intervene to forestall action by the Prosecutor.[166] The HRW and AI reading of Article 16 is also inconsistent with the

---

[164] *Ibid*. at 8-9
[165] *Ibid*. at 13
[166] *Rome Statute*, art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council , in a resolution adopted under Chapter VII of the United Nations, has the requested the Court to that effect; that request may be renewed by the Council under the same conditions.")

fact that the neither the UN nor the UNSC are parties to the *Rome Statute* and that Article 39 of the *UN Charter*[167] rather seems to confer on the UNSC, not an absolute duty to guarantee peace and security in every instance, but the prerogative (as opposed to other UN organs) of determining when there is a threat to the peace, and what would be the appropriate action.[168]

The purely retributive interpretation of "justice" put forth by both human rights groups also fails to properly define the context in which the ICC Prosecutor will called to exercise his discretion under Article 53. Unlike domestic jurisdictions, in the commission of international crimes, perpetrators will often command state or military power and resources and could not only hinder justice but also prolong conflict and suffering by refusing otherwise acceptable political arrangements involving a peaceful transition to a more just society in exchange for non-prosecutorial alternatives. The South African example illustrates the very real possibility that political settlements not relying solely on criminal prosecution may, after all, command greater respect than policies imposed independently by an international prosecutor. Carlos Nino has argued:

"Though it is true that many people approach the issue of human rights violations with a strong retributive impulse, almost all who think momentarily about the issue are not prepared to defend a policy of punishing those abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or worse abuses."[169]

---

[167] *U.N. Charter,* art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make the determination, or decide what measure should be taken […] to maintain or restore international peace and security")

[168] Henry Lovat, "Delineating the Interests of Justice", Denv. J. Int'l L. & Pol'y Vol. 35 275 at 282-283

[169] Carlos S. Nino, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina" (June 1991) The Yale Law Journal Vol.100 2619 at 2620

Finally, it must be underlined that even in some domestic systems, where political considerations in the exercise of prosecutorial discretion are greatly reduced, prosecutors can defer to alternative justice mechanisms in certain circumstances. In Canada for instance, the *Federal Prosecution Service Deskbook* provides that if the prosecutor is satisfied that there is sufficient evidence to justify the institution or continuation of a prosecution, he or she must then consider whether "in light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued." Factors to be considered in evaluating "public interest" include "the availability and appropriateness of alternatives to prosecution".[170] Article 717 of the *Criminal Code* provides that where it is not inconsistent with the protection of society, prosecutorial discretion can be exercised to deal with the individual by "alternative measures". Although they are not available for every perpetrator, it is an acknowledgment that in some cases, particularly with young offenders and those with no criminal record having committed minor offences, the public interest would be better served by a resolution outside of the traditional courtroom.[171] Thus, even in domestic contexts, the interests of justice are sometimes best served by avoiding formal prosecution and punishment.

B) A broader interpretation of the "interests of justice"

Although one can easily argue that the *Rome Statute* leaves no room for illegitimate political considerations such as the relationship of an offending state with a member of the U.N. Security Council, the same cannot be said of other

[170] Public Prosecution Service of Canada (PPSC), *The Federal Prosecution Service Deskbook*, online: ‹http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html› at Ch. 15 [*FPS* Deskbook]
[171] *Ibid.* at Ch. 14

extra-legal considerations such as the historical or political context of a particular crisis in an overriding effort to advance the ICC's declared objectives.[172] International criminal justice is not exercised in a vacuum, nor is it exercised in the controlled environments of domestic jurisdictions. It is, after all, but one aspect of the pursuit of "peace, security and well-being" for the world which is the very *raison d'être* of international relations.[173]

Matthew R. Brubacher argues that considerations of international peace and security were included in the *Rome Statute* in recognition that while prosecutorial decisions are to be made objectively, without political interference, the decisions will nonetheless have significant political repercussions. Since the ICC is more likely to have jurisdiction over crimes occurring during ongoing armed conflicts rather than in the wake of conflict, these effects are all the more probable. As such, should the OTP decide to intervene in ongoing disputes or even post-conflict reconciliation processes, the Prosecutor must consider the potential impact of an investigation or prosecution on the political process.[174] According to his interpretation, beyond the considerations identified in Article 53(2)c), the term "in the interests of justice" also requires the Prosecutor to take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction. This consideration will be similar to that made by the Security Council in determining whether a situation is a threat to

[172] Greenawalt, *supra* note 59 at 613
[173] Côté, *supra* note 129 at 134
[174] Brubacher, *supra* note 36 at 80

international peace and security but does not obfuscate the role of the UNSC, who retains the ultimate discretion over this issue pursuant to Article 16. [175]

Conclusion

As stated by Justice Goldstone: "Meaningful assessments of justice extend beyond simplistic tallies of prosecution and punishment and encompass an appraisal of those conditions which shore up the standards of justice."[176] The debate among ICC supporters over the proper interpretation of the "interests of justice" frames the challenge of the ICC OTP to elaborate a prosecutorial strategy that falls at the appropriate place in the continuum between legalism and considerations of *realpolitik*. The proposed policy of the ICC OTP on the "interests of justice" acknowledges certain extra-judicial considerations but, as it will be argued in the next chapter will necessarily have to be elaborated further to address such hybrid proposals as that coming out of the Ugandan peace talks.

III. THE ICC OTP AND ARTICLE 53

The *ICC Rules of Procedure and Evidence* provide that the Prosecutor shall enact regulations to "govern the operation of the office".[177] In this vein, the OTP has proceeded to develop a prosecutorial strategy that is incrementally being elaborated in public documents available on the ICC's website. The OTP posted *Draft Regulations of the Office of the Prosecutor* (*Draft Regulations*), dated June 3, 2003[178] which, much like domestic prosecutorial guidelines, provide an outline of the modes of operation and applicable standards to the work of the

[175] Brubacher, *supra* note 36 at 81
[176] Goldstone and Fritz, *supra* note 100 at 660
[177] ICC RPE, *supra* note 43 at r. 9
[178] ICC OTP, *Draft Regulations of the Office of the Prosecutor (annotated)* (3 June 2003), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/030603_draft_Regulations.pdf› [*Draft Regulations*]

Prosecutor. In these *Draft Regulations*, under the heading "The management of preliminary examination, article 53(1) evaluation and start of investigation" a comment contained in a footnote (n. 79) indicates that the experts consulted are not in a position to make a recommendation on whether the Regulations should further contain a definition of what might constitute "interests of justice". This same footnote suggests that should a definition be adopted, this could compromise the following factors: "(a) the start of an investigation would exacerbate or otherwise destabilize a conflict situation; (b) the start of an investigation would seriously endanger the successful completion of an investigation or peace process; or (c) the start of an investigation would bring the law into disrepute." It then proceeds to list the reasons for the inclusion of such criteria as being: (1) the need for transparency so that Prosecutor can stave off criticism when making such a decision; (2) the need to inform the Security Council of the factors that it should also take into account when deciding whether to refer a case to the ICC; and (3) the legal obligation pursuant to Rule 104(4) and (4) that the Prosecutor provide reasons for not starting an investigation based only on interests of justice assessments.[179] No regulations were proposed under the heading "Prosecution" and therefore nothing regarding Article 53(2). No regulations were proposed under the heading "Complementarity practice" either.

On June 17-18, 2003, the OTP conducted public hearings on issues relating to the Office of the Prosecutor and it was recommended that criteria be developed according to which decisions to take no further action are taken "in the interests

[179] *Ibid.* at 47

of justice" pursuant to Article 53(1)(c).[180] Again, there is no mention of Article 53(2)c).

In September 2003, the ICC OTP issued a "Paper on some policy issues before the Office of the Prosecutor" (*2003 Policy Paper*)[181] in which the OTP elaborates on its general strategy, prioritizes the tasks to be performed and determines an institutional framework for the proper functioning of the Office. The Paper states that "[t]he Office of the Prosecutor considers that Regulations are essential to ensure its independence and accountability" and envisions adopting final Regulations during the first trimester of 2004. The *2003 Policy Paper* announces the OTP's two-tiered approach to combat impunity: prosecution of the leaders who bear the most responsibility for crimes and encouragement of national prosecutions for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means. The Paper acknowledges that this policy, justified by the limited resources of the ICC, may leave an "impunity gap". In order to combat this, the OTP proposes to sometimes widen the net, so to speak, to include lower-level perpetrators when it is warranted by the investigation.

---

[180] ICC OTP, "Summary of Recommendations Received during the first Public Hearing of the Office of the Prosecutor, convened from 17-18 June 2003, at the Hague : Comments and Conclusions of the Office of the Prosecutor" online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf› at 6 [*ICC OTP Summary of Comments and Conclusions*]

[181] ICC OTP, Paper on some policy issues before the Office of the Prosecutor (September 2003), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf› [2003 Policy Paper]

A) ICC OTP and Complementarity

Although the 2003 Policy Paper does not explicitly delve into considerations of the "interests of justice", the most significant contribution to the debate regarding alternatives to prosecution, is the Paper's examination of the complementarity nature of the ICC. The OTP underlines that the complementary nature of the ICC means that it that is not intended to replace national courts, but to operate when "national structures and courts" are unwilling or unable to conduct investigations and prosecutions and states that in cases of concurrent jurisdiction between national systems and the ICC, the former have priority.[182] In encouraging States to "take ownership of the Court", the OTP issues a general rule that "the policy of the Office in the initial phase of its operations will be to take action only where there is a clear case of failure to take national action."[183] Here the Paper is clearly referring to national investigations and prosecutions but it specifies that for those offenders that are not those leaders that bear the most responsibility, "alternative means for resolving the situation may be necessary, whether by international assistance in strengthening or rebuilding the national justice systems concerned, or by some other means."[184] Moreover, the OTP commits to considering the need to respect the diversity of legal systems, traditions and cultures in assessing national efforts at investigation and prosecution and commits to detailed, exhaustive guidelines for the operation of the principle of complementarity.[185]

---

[182] *Ibid*. at 4
[183] *Ibid*. at 5
[184] *Ibid*. at 3
[185] *Ibid*. at 5

On September 14, 2006 the ICC OTP issued a "Report on Prosecutorial Strategy" (*2006 Prosecutorial Strategy*)[186] which formulated five strategic objectives for the following three years. The fifth objective, the most significant for the purpose of the present study, consisted of the intention to establish forms of cooperation with states and organizations to maximize the OTP's contribution to the fight against impunity and the prevention of crimes. In elaborating on this objective, the OTP reiterated its commitment to fostering international cooperation to prevent and resolve conflicts causing massive crimes and addressing the resulting impunity. For the first time in its public documents, the OTP specifically lists "traditional mechanisms or other tools" along with the promotion of national proceedings as methods of international cooperation. The OTP intends to consider the potential deterrent impact of its activities, starting as early as the analysis phase and commits to aligning its own strategies with "broader efforts aimed at stabilizing situations of violence and crime." In order to do so, the OTP indicates that this will require frequent consultation with an expanding set of interlocutors, in the area of rule of law, conflict resolution, peace and security, as well as humanitarian action. [187]

In "Annex to the Three Year Report and the Report on Prosecutorial Strategy"[188] the OTP underlines that despite the general opinion that justice and peace efforts aren't incompatible, the Prosecutor's specific mandate international justice

[186] ICC OTP, *Report on Prosecutorial Strategy (14 September 2006)*, online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf› [*ICC 2006 Prosecutorial Strategy*]
[187] *Ibid*. at 9
[188] ICC OTP, *Annex to the Three Year Report on the Prosecutorial Strategy*, online: ICC ‹ http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-Annex_En.pdf› [*ICC OTP 2006 Annex*]

should be clearly distinguished from those bearing the responsibility for establishing peace.[189]

B) Policy paper on the "Interests of Justice"

In September 2007, the OTP published its *Policy Paper on the Interests of Justice*[190] in order to specifically address "the exceptional circumstances in which a situation or case, which would otherwise qualify for selection by the OTP is not pursued and that decision not to prosecute is based solely on a determination by the OTP that the investigation or case would not serve the 'interests of justice,'" as that term is used in Article 53 of the *Rome Statute*. The Paper does not aim to elaborate on the specific factors to be considered and opts instead to offer "only limited clarification in the abstract". Nonetheless, certain significant conclusions can be drawn regarding prosecutorial policy on the issue and they will be examined herein.

a) A presumption in favor of prosecution

The policy adopted by the ICC OTP on Article 53 is more or less consistent with previous expressions of policy and while underlining the "exceptionality" of resorting to the "interests of justice", the OTP did not opt for an exceedingly narrow interpretation thereof. As such, the OTP emphasizes three overriding principles guiding prosecutorial discretion: (1) The Prosecutor considers that there is a presumption in favor of investigation or prosecution whenever the criteria established in Article 53(1)(a) and (b) and 53(2)(a) and (b) have been met. (2) The criteria for the exercise of prosecutorial discretion under Article 53

[189] *Ibid*. at 2
[190] ICC OTP, *Policy Paper on the Interests of Justice*, *supra* note 128

will remain the objects and purpose of the *Rome Statute*- namely the prevention of serious crimes of concern to the international community through ending impunity. (3) There is a difference between the "interests of justice" and the "interests of peace" and the latter does not fall within the mandate of the OTP.

Firstly, in virtue of Article 31 of the *Vienna Convention on the Law of Treaties*, the OTP interprets the concept of "interests of justice" by the ordinary meaning of the words in the light their context and the objects and purpose of the *Statute*. Citing paragraph 6 of the *Preamble* to the effect that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and the UN Commission on Human Rights adoption of the *Updated set and principles for the protection and promotion of human rights* as support, the OTP underlines a consistent trend in the last decade or so towards imposing a duty on States to prosecute international crimes. The OTP relies on the rest of the *Preamble*, specifically the concern to "guarantee lasting respect for and the enforcement of national justice" to conclude that the new legal framework under the *Rome Statute* dictates a presumption in favor of the pursuit of justice and that "any political or security initiative must be compatible".[191]

b) The interest of the victims extend beyond the interests of justice

Regarding the explicit factors to be considered under Article 53 including the gravity of the crime and the interests of the victims, the OTP's position diverges from that of HRW or AI in recognizing that any understanding of the interests of the victims cannot be limited to seeing justice done, but must include other essential interests such as their protection. Article 68(1) of the *Rome Statute*,

[191] *Ibid.* at 4

creates an obligation on the entire Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses and Article 54(1)(b) requires that the Prosecutor respect the interests and personal circumstances of victims and witnesses in carrying out effective investigations. Although the OTP suggests open dialogue with the victims themselves, it goes further by explicitly envisaging discussion with "local leaders (religious, political, tribal), other states, local and international intergovernmental and nongovernmental organizations" and encouraging victims, their representatives and other intermediaries to be proactive in expressing their views to the OTP. This attitude diverges with the practice of most Common Law jurisdictions where the victims play a much less significant role in the decision to proceed with criminal prosecutions as the *Rome Statute* gives victims a clear position as key stakeholders in the justice process.[192]

The OTP has in fact been proactive in attempting to ascertain the interests of the victims in Uganda, or at the very least, in creating a rapprochement with the ICC and has certainly engaged in much of it in Uganda. According to the ICC OTP, 25 missions to Uganda have been organized for the purpose of listening to the concerns of victims and representatives of local communities.[193] The *ICC OTP 2006 Report* mentions that in March and April 2005, the ICC OTP invited Acholi local government leaders, members of Ugandan Parliament, and religious

[192] See: Mariana Goetz, "The International Criminal Court and its Relevance to Affected Communities", in ed. Nicholas Waddell and Phil Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*, *supra* note 1.

[193] ICC OTP, *Policy Paper on the Interests of Justice*, *supra* note 128 at 8; See also: ICTJ, *supra* note 126 at 7-8; ICTJ, "Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda" (July 2005) online: ICTJ ‹www.ictj.org/images/content/1/2/127.pdf›.

leaders to the Hague to meet the Prosecutor and to build consensus around the issues of traditional justice mechanisms and the OTP's pursuit of those most responsible.[194]

c) Article 53 and justice mechanisms and peace processes

i. "Other justice mechanisms"

In adding a category of "other potential considerations" under Article 53, the OTP rejected the narrow interpretation favored by the NGOs and left an, albeit limited, opening to consider alternative vehicles to criminal justice and the effects of peace processes. In attempting to canvas other potential considerations for the evaluation of the "interests of justice", the OTP essentially integrated the principle of complementarity by reiterating the "need to integrate different approaches", namely domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms.

Interestingly, the OTP references the development of theory and practice in designing comprehensive strategies to combat impunity but does not go much further. The OTP acknowledges that although its focus is the execution of investigations and prosecution, the pursuit of criminal justice is only one part of an appropriate response to serious international crimes. There is no further elaboration as to what would constitute an "appropriate" response, nor does the OTP explain how such an evaluation would be made.

[194]ICC OTP, "Report on the activities performed in the first three years" (June 2003-June 2006) (12 September 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf› at 17 [ICC OTP 2006 Report]

ii. "Peace Processes"

In deciding on a position regarding peace processes, the ICC OTP settled on an interpretation of the "interests of justice" that is neither as broad as that recommended by Brubacher, nor as narrow as that by HRW and AI:

> "The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security."[195]

The OTP explicitly recognizes that although the *Rome Statute* recognizes a role for the UN Security Council under Article 16, this provision does not remove the Prosecutor's obligation to consider issues of "crime prevention and security" under the "interests of justice" under Article 53 as well as the protection of the victims and the witnesses under Article 68. In insisting in the same paragraph however that "the broader matter of international peace and security" is not the responsibility of the Prosecutor, the OTP muddles, intentionally one must assume, the extent to which it is willing to elaborate its own position. In concluding this *Policy Paper*, the OTP recognizes the need of many parties, "including victims, organizations working with victims and others affected by conflict, States and those trying to end conflicts" to ascertain the OTP's interpretation of the "interests of justice under Article 53, but insists that the best guidance on the Office's approach to these issues can be gathered by the way it has dealt with real situations all the while acknowledging that no decisions to defer prosecution have yet to be made under Article 53.[196]

---

[195] ICC OTP, *Policy Paper on the Interests of Justice, supra* note 128 at 8
[196] *Ibid.* at 9

Ultimately, the ICC OTP maintains its stance that resorting to a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort but this position raises more questions than it answers.

C) The need to complete the prosecutorial guidelines

In drafting its *Policy Paper on the Interests of Justice*, the OTP acknowledges the interest provoked by Article 53 but does not commit to the completion of the 2003 *Draft Regulations* in any particular manner. The ICC OTP and the Court need to function in a manner that is, and is perceived as, fair and effective in light of its ultimate purpose to put an end to impunity, the complementary nature of the Court and the finite resources available to it in contrast with the incredible demand for international justice. Elaborate prosecutorial guidelines will promote the legitimacy and credibility of the OTP and the ICC, which will in turn serve to reassure states, victims and will inform parties to peace process what will and will not be tolerated by international criminal justice.

a) Substantive issues remaining unanswered by the ICC OTP *Policy Paper*

It is not argued herein that the OTP could foresee every possible scenario in the elaboration of prosecutorial policy. The Juba peace talks for instance resulted in a proposal that was not altogether anticipated. In an international justice context where amnesties are perhaps no longer considered acceptable trade-offs for peace, the Ugandan proposal of prosecution paired with an alternative sentencing regime may come up in future peace talks.

In elaborating prosecutorial policy the OTP has yet not offered any elucidation on the relationship between the principle of complementarity and the evaluation of

the "interests of justice". The admissibility regime of the *Rome Statute* provides a set of rules regarding the relationship of the ICC and national efforts at investigation and prosecution but is silent regarding transitional justice efforts falling somewhat short of formal prosecution and punishment. Should the PTC decide that Article 17 leaves no room for such proceedings, it is the OTP who will have to further develop its position on the relationship between national sovereignty, "other justice mechanisms" and the complementary nature of ICC.

The OTP has not addressed the issue of sentencing directly in any of its policy documents, including the 2003 *Draft Regulations*. The sentencing regime in the *Rome Statute* (Articles 76 to 80) provides for the imposition of a term of imprisonment up to 30 years or life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the accused as well as penalties of fines and forfeiture.[197] Article 80 provides that nothing in Part 7 of the *Rome Statute* regarding penalties affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part. Although originally a concession to retentionist states in Rome who threatened to withdraw support from the *Statute* as a whole,[198] Article 80 will likely open new debates regarding the possibility of traditional sentences for national prosecution of international crimes.

Moreover, neither does the OTP specify whether the considerations mentioned would be different depending on whether the evaluation was being done in the situation phase pursuant to para. 53(1)(c) or in the case phase pursuant to

[197] Chapter 7 of the RPE provides for some aggravating and mitigating circumstances.
[198] Schabas, *supra* note 136 at 316

53(2)(c). The issuance of arrest warrants in the Ugandan situation is considered both a catalyst and an obstacle for peace negotiations. What effect, if any, does the issuance of arrest warrants have on the Prosecutor's analysis of the discretionary criterion under Article 53? Certainly, one cannot deny that the appearance of justice being rendered would be affected by the withdrawal of said warrants whose issuance attests to the existence of evidence going to the commission of serious international crimes.

The Paper is also silent regarding the potential differences in the exercise of prosecutorial discretion depending on the source of *notitia criminis*. Does a self-referral imply different considerations under Article 53 than would a referral by the UN Security Council? In the case of Uganda, for instance, a self-referral to ICC made at a time where the state was admittedly "unable" but not "unwilling" to try perpetrators because they were outside state jurisdiction, would a newfound ability to bring said individuals to justice, albeit with an alternative sentencing regime that remains to be elaborated, be a legitimate factor to consider in evaluating the "interests of justice" of proceeding with a prosecution?

b) Benefit of ex ante guidelines

After only 10 years of operation the ICC OTP clearly has not been in a position to elaborate an overly detailed prosecutorial policy. The project of completing a set of prosecutorial regulations, such as the *Draft Regulations* of 2003, is still an important one and the OTP should see to it that it is done in the not so distant future. Prosecutorial guidelines can help to define discretionary criteria so as to ensure not only the consistency but the appearance of consistency in

prosecutorial decision-making. This is common practice in many national legal systems. As canvassed above, the Public Prosecution Service of Canada has, for instance, promulgated prosecutorial guidelines elaborating on the application of the discretionary criteria of "public interest" in the decision to prosecute a particular crime.[199]

Allison Marston Danner recommends the ICC OTP develop clear and public guidelines that, like the *FPS Deskbook*, include commentaries that will further elucidate prosecutorial policy. She argues that although it is in fact impossible to foresee every possible scenario, the OTP should not issue regulations that are so vague, they are ultimately meaningless. Nor, should it endeavor to elaborate such rigid criteria that dictate how the Prosecutor should act in every situation so that prosecutorial discretion is all but wiped out. A balance must be struck to ensure that future learning and jurisprudential developments are taken into account and incorporated into the exercise of prosecutorial discretion.[200]

In the first place, by articulating guidelines publicly, the OTP assures states parties, victims, accused and the international community that decisions are made in a rational and consistent way. It is fundamentally an issue of fairness to inform parties of the standards they will be asked to meet so as to guarantee that the principle of legal certainty is respected.[201]

---

[199] *FPS Deskbook*, *supra* note 170.

[200] Danner, *supra* note 33 at 550; See also: Avril McDonald & Roelof Haveman, "Prosecutorial Discretion- Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC" (15 April 2003) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/mcdonald_haveman.pdf› at 5 and 9

[201] Geert-Jan G. J.Knoops, *Theory and practice of international and internationalized criminal proceedings* (The Hague: Kluwer Law International, 2005) at 116; See also: Mireille Delmas-Marty, "La CPI et les interactions entre droit international pénal et droit pénal interne à la phase

Second, without directly participating in any sort of peace negotiations, articulated prosecutorial policy can be informative to parties to a peace process in a situation in which the ICC regarding justice proposals. This is potentially the case for Colombia, where a controversial *Colombian Peace and Justice Law* (*JPL*) provides for reduced sentences for ex-paramilitaries (the AUC) in exchange of a full (complete and genuine) disclosure of crimes. According to the International Crisis Group, the Uribe administration, acutely aware of the possibility of ICC prosecution, has attempted to draft the JPL in such a way that it would preclude such a scenario on the basis of admissibility.[202]

Alexander Greenawalt argues that *ex ante* guidelines will not address the underlying problem of legitimacy because of the nature of the problems before the international prosecutor are not of the sort that can be subjected to rule-based decision-making and the lack of a proper political framework to justify prosecutorial control over these issues.[203] Certainly, it is unrealistic to think that prosecutorial guidelines could ever address every potential dilemma faced by the ICC OTP in the years to come. The completion of the *Draft Regulations* would nonetheless ensure more legitimacy for the OTP but also effective cooperation with various governments.

---

d'ouverture du procès pénal" (March 11, 2005) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP_GL_2005March11› at 7

[202] International Crisis Group, "Colombia: Towards Peace and Justice?" (March 14, 2006) online: ICG ‹http://www.crisisgroup.org/library/documents/latin_america/16_colombia_towards_peace_and_justice.pdf› at 2

[203] Greenawalt, *supra* note 59 at 652-658

Conclusion

To the extent that extra-legal considerations such as the exacerbation of a particular conflict or the safety of individuals cannot be ignored in the exercise of prosecutorial discretion, it has been argued that the *Rome Statute* created a more complex reallocation of authority which confers on the ICC Prosecutor significant legal authority coupled with political functions.[204] The OTP should acknowledge this reality in prosecutorial guidelines that aim to demarcate its perception of the effects of the political reality in which it operates in a balanced and flexible fashion so as to ensure the transparency, legitimacy and credibility of its office and that of the ICC. Such guidelines should elaborate on the effect of the complementary nature of the ICC was well as its limited resources on the consideration of the "interests of justice" regarding alternatives to prosecution and punishment in the strictest sense.

The next chapter will argue that a pluralist view of the "interests of justice" is most consistent with the lofty objectives of the ICC as well as the complementary nature of the Court. By examining hybrid prosecutorial solutions like *gacaca* courts in Rwanda, or even sentencing circles in Canada, some general principles can be drawn to guide the Prosecutor in his evaluation of the "interests of justice".

[204] Greenawalt, *supra* note 59 at 613

CHAPTER III: A PLURALIST INTERPRETATION OF THE INTERESTS OF JUSTICE IS COMPATIBLE WITH COMPLEMENTARITY

Introduction

The debate over the future of the ICC warrants issued in the Ugandan situation arguably goes beyond this particular situation. The ICC's thus far exclusive involvement in four African situations highlights the ultimate challenge for the success of the ICC: to translate global legal obligations into functional justice at the local level. In light of Africa's anti-colonial struggles and the persistent discourse around sovereignty and self-determination, it is not surprising that the creation and first decade of operation of the ICC have raised controversial questions regarding the relationships between local, national and international approaches to justice.[205]

The foregoing summary of the debate over the meaning to be given to the discretionary criterion of the "interests of justice" illustrates the difficult undertaking of the ICC OTP to achieve transparency, legitimacy and credibility in the execution of its mandate in the face of very particular challenges including the protection and involvement of witnesses, victims and affected communities, the investigation and enforcement of Court orders while relying on national actors and most significantly, the political will and practical reach of states in situations before the ICC. Thus, the interpretation to be given to the "interests of justice" under Article 53 will necessarily be tied to prosecutorial policy regarding the

[205] Graeme Simpson, "One among Many: The ICC as a Tool of Justice during Transition", in ed. Nicholas Waddell and Phil Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*, *supra* note 1 at 73

complementary nature of the ICC. It will be argued that a pluralist interpretation of this discretionary factor is not only consistent with the principle of complementarity but also with the recognition that every situation of mass atrocity is unique and therefore requires a contextualized justice response.

Second, this chapter will delve into two particular examples of hybrid prosecutorial solutions: the *gacaca* courts in Rwanda and sentencing circles in Canada, which, like the proposal put forward in the Juba peace talks blend retributive and restorative justice vehicles to address very particular problems in each situation.

Finally this analysis will conclude with an examination of the Juba peace proposal and attempt to determine, from a legal pluralist perspective, which factors will consistently sway the evaluation of the "interests of justice" in Article 53 of the *Rome Statute*, despite the complementary nature of the ICC.

I. A pluralist interpretation of the "interests of justice"

A) Article 53 and legal pluralism

In attempting to determine the relationship between the complementary nature of the ICC and the "interests of justice", the OTP may look to incorporate solutions deriving from legal pluralism: the presence in one social field of more than one legal order applicable to the same situation. Legal pluralism recognizes that explicitly announced legal rules are not the only vehicles of normativity since they complement a variety of indigenous and customary rules, practices and implicit expectations for interaction.[206] In the realm of international public law, Professor

[206] Martha-Marie Kleinhaus and Roderick A. MacDonald, "What is *Critical* Legal Pluralism?" (1997) 12 Can. J. L. & Soc. 25 at 32

Delmas-Marty argues that pluralism rests on two main principles: the sovereignty or autonomy of nations as well as their equality, as proclaimed by the *UN Charter*. These principles can often conflict with attempts at universal law or even what she terms "la force des choses": political and socio-economic constraints that create both inequalities and interdependence.[207] Seeing as the ICC has jurisdiction over nationals of states with very different legal and moral cultures, it must consider how much room there is for diverse state approaches to the repression of international crimes. The legal fact that State parties have consented to be bound by the ICC does not homogenize the extensive diversity among legal systems and conceptions of justice. As such, in acknowledging in its Policy Paper that the "interests of justice" may include such considerations as alternative justice mechanisms or peace processes, the ICC OTP will be called to evaluate such efforts and make certain legal, and, as explained in the previous chapter, political determinations. In doing so, two significant problems will have to be addressed. First, the ICC OTP will have to be and appear impartial despite the fact that the constituent states have conflicting moral and legal values. Second, the ICC OTP will have to preserve a sense of democratic legitimacy in the ICC even though it is far removed from the people it affects.[208]

[207] Mireille Delmas-Marty, *Le relatif et l'universel : Les forces imaginantes du droit* (Paris: Seuil, 2004) at 230-231

[208] Eric Blumenson, "The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court" (2006) Columbia Journal of Transnational Law Vol. 44 801at 854

a) A pluralist framework for the determination of the "interests of justice"

As a solution, Eric Blumenson has proposed a move away from narrow, centralized directives for the ICC and towards a pluralistic framework which leaves significant scope for individual states to choose their own methods of accountability. He argues that such a prosecutorial policy would serve to preserve the impartiality and democratic legitimacy of the Court. First, it would allow for the Prosecutor to contextualize his decision regarding the appropriateness of prosecution in light of the reality and history of the affected areas. Second, if the affected populations feel marginalized and far removed from the ICC, they may see the ICC as illegitimately imposed, or its verdicts as biased and unjust or their own system as weak and useless. Third, a pluralist approach would acknowledge the complexity of transitional justice settings where there is perhaps no one best solution, but rather a range of reasonable ways a country could use to confront its past and move forward.[209] By acknowledging that multiple communities (international, national, local) may legitimately wish to assert their norms over a given act or actor, by seeking ways to reconcile competing norms, and by deferring to alternative approaches if possible, a pluralist approach may in fact further legitimize the ICC in both the affected communities and around the world. Even if such deferrals to alternative justice mechanisms are impossible, by adopting a framework that manages hybridity,

[209] *Ibid.* at 856

the OTP can at least offer a legitimate explanation as to why the "interests of justice" do not justify a deferral in a particular situation.[210]

Mireille Delmas-Marty proposes a similar solution in examining the relationship between the ICC and national jurisdictions. She comes to the conclusion that international criminal justice must be conceived of, not as a closed system, but as a 'multipolar space' (*espace multipolaire*) that is open to interaction between different international sources (general international law and international human rights law) and domestic sources. She argues that Article 53 operates as a sort of compromise between strict legalism and absolute prosecutorial discretion and thus expresses a certain hybridization of domestic legal systems. For this reason, she argues that Article 53 should not be interpreted by referencing one national system in particular.[211]

It will thus argued below that the ICC OTP must elaborate a policy that, although consistent with the *Rome Statute*, acknowledges the multiplicity of legal orders applicable to a particular situation and the affected people therein. The solution proposed by Professor-Delmas Marty, examined herein, offers an insightful means to navigate between state sovereignty and the global objectives of the ICC.

b) Prosecutorial strategy for a pluralist interpretation of Article 53

A pluralist interpretation of Article 53 does not equate to subjecting the exercise of prosecutorial discretion only on the particulars of each situation. As

[210] Paul Schiff Berman, "Global Legal Pluralism" (2007) Southern California Law Review Vol. 80: 1155 at 1164

[211] Delmas-Marty, *supra* note 201

elaborated in the previous chapter, in order to guarantee the independence and impartiality of the exercise of prosecutorial discretion, it must be objective and foreseeable and expressed in a set of prosecutorial guidelines in a coherent manner. Professor Delmas-Marty argues that this coherence must come not of a strict legalism or absolute discretion, but a sort of 'relaxed legality' (*légalité assouplie*).[212]

The criteria that will be retained by this 'relaxed legality' will have to be incorporated in an ordered and specific structure that will serve as a common grammar to the exercise of discretion. Delmas-Marty suggests that instead of listing the numerous possible factors that could affect prosecutorial decision-making, this common grammar should arrange these factors at the intersection of two axes. The first axis represents legitimacy/effectiveness and the second universality/relativism.[213]

In recognition of the complexity of the exercise of interpreting the "interests of justice" through a pluralistic lens, Professor Delmas-Marty suggests a two-step process. In the first place, a decision to prosecute should be made according to the first axis of legitimacy/effectiveness. A case must satisfy the legislative parameters set out by the *Rome Statute* as well as considerations of feasibility on the ground. Second, a decision to prosecute made according to the second axis of universality/relativism would allow for an, albeit limited, consideration of national differentiation as long as national rights remain compatible with international law. Should contradictions arise, such as the perpetration of grave

[212] *Ibid.* at 7
[213] *Ibid.* at 8

crimes but possibly ineffective prosecution or inconsistent national attitudes to prosecution, Delmas-Marty argues universality must be favored over cultural relativism in order to ensure the proper functioning of the new international criminal justice.

i. Legitimacy/ effectiveness

The legitimacy/effectiveness axis is derived from the comparison of various legal systems and allows for legitimacy- comprised of factors such as the gravity of the offence, the circumstances of the accused and the interests of the victims, to be combined with effectiveness- the feasibility of an investigation and prosecution and the credibility of the Court. Considerations of legitimacy constitute the legislative framework of the *Rome Statute* regarding the launching of investigations and prosecutions.[214]

This first axis has already been incorporated into prosecutorial strategy. Alongside the parameters of the *Rome Statute*, the ICC OTP has recognized that issues of effectiveness are of fundamental importance in the work of an international prosecutor. No investigation can be undertaken without careful regard to all circumstances prevailing in the affected country or region, including the nature and stage of the conflict and any intervention by the international community. Moreover, the Prosecutor must consider whether the necessary means of investigation are available and whether the witnesses can be properly protected. Because of the absence of an international police force, the

[214] See Chapter I

Prosecutor will also have to consider whether international co-operation will be available for such things as evidence gathering or the arrest of the suspects.[215] Unlike the second axis of universality/relativism, these factors would not need to balanced out since both legal and practical considerations of feasibility are necessary for a case to be brought before the ICC.

ii. Universality/ relativism

The second axis represents universality/relativism and, according to Professor Delmas-Marty, is also derived from the comparison of different legal systems. It combines the universalism of international criminal justice, which bases the gravity of international crimes on their attack on universal values, with the relativism of national concepts, which encourages the Prosecutor to consider some factors differently, such as the interest of the victims, the impact of prosecution in a given situation or the role of alternative justice mechanisms.[216] A pluralist perspective would thus tie with in the broader interpretation of the "interests of justice" that the ICC OTP seems to be open to as elaborated in the analysis of current prosecutorial policy in Chapter II of this thesis.

c) Limits of a pluralist interpretation

The adoption of a pluralist interpretation of the "interests of justice" by the ICC does not amount to the acceptance of cultural relativism. Despite the range of possible appropriate responses to the commission of mass atrocities, some choices cannot be justified in the "interests of justice".[217] Deferring for instance to unconditional amnesties for a high-level genocide offender would clearly be

[215] ICC OTP, *2003 Policy Paper*, *supra* note 181 at 2
[216] Delmas-Marty, supra note 201 at 7
[217] Blumenson, *supra* note 208 at 857

incompatible with the *Rome Statute* which creates a duty for States parties to ensure accountability.

In a pluralist interpretation of Article 53, some moral judgments would still have to be made despite the diversity of cultures in which the ICC operates. In the first place, any interpretation relating to the role of the ICC would have to be consistent with its object and purpose to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished". Moreover, Article 53 requires the prosecutor to proceed with an investigation or prosecution unless certain factors militate otherwise. As noted by the ICC OTP, any deference to an alternative to prosecution would have to be exceptional in order for it to comply with the *Rome Statute*. In the second place, the achievement of the creation of the ICC and the drafting of the *Rome Statute* illustrate the willingness of the international community to submit to a particular set of rules that reflecting a consensus in the approach to mass human rights violations.

The "interests of justice" in Article 53 of the *Rome Statute* require the ICC OTP to respond to the narrow but still fundamental question of how much leeway it can and will afford states that choose to confront their past and hold perpetrators accountable by means of non-penal methods or by means of restorative sentencing practices. The ICC OTP Prosecutor would have to determine where reasonable diversity ends and legal and moral imperatives begin. It was in this spirit that the former Vice Chairperson of the South African TRC, Alex Boraine had urged the ICC to make every effort "to assist countries to find their own

solutions provided that there is no blatant disregard of fundamental human rights."[218]

B) A pluralistic interpretation of the "interests of justice" is consistent with the rationale of complementarity

A pluralist interpretation of the "interests of justice" justified in light of the objectives and complementary nature of the ICC, particularly by expressly considering factors relating to the universal and local reasons favoring prosecution at the ICC. An overview of the rationale behind the adoption of the complementary nature of the ICC will illustrate that the consensus in Rome regarding ICC jurisdiction is essentially a compromise between state sovereignty and the universal interest in addressing massive human rights violations in light of the limited resources of an international court.

a) The objectives of the ICC and the principle of complementarity

The *Preamble* of the *Rome Statute* affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".[219] In declaring the need to put an end to impunity and contribute to the prevention of such crimes, it recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[220] The *Rome Statute* thus provides for a system within which both the domestic and international levels of

[218] Blumenson, *supra* note 208 at 857
[219] *Rome Statute*, *Preamble*, para. 4
[220] *Rome Statute*, *Preamble*, paras. 5-6

governance have interrelated duties to provide accountability for international crimes.[221]

The complementarity regime is designed to ensure a decentralized system that is responsive to national norms and interests by limiting ICC intervention in cases where the state is "unable" or "unwilling" to prosecute.[222] It is therefore meant to serve as a mechanism to encourage and facilitate the compliance of states with their primary responsibility to investigate and prosecute international crimes. Where States fail to execute proceedings, the Prosecutor should then proceed with a case before the ICC that will offer independent and impartial justice, demonstrate the determination of the international community to repress international crimes, and demonstrate the real prospect of ICC action, thereby encouraging future national prosecutions.[223]

b) The rationale for complementarity

After having determined that, as a matter of principle, national jurisdictions should have primacy over cases of international crimes, the drafters in Rome were faced with the question of when the ICC could or should assume jurisdiction. The solutions developed in the *Rome Statute* were both complex and politically sensitive, reflecting States' concerns over issues of national sovereignty and the potentially intrusive powers of an international court.[224] The underlying rationale for the consensus in Rome is essentially a balancing of

[221] William Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice" (Winter 2008) Harvard International Law Journal, Volume 49, Number 1 53 at 56-57
[222] Blumenson, *supra* note 208 at 856
[223] ICC OTP, *Informal Expert Paper: The principle of complementarity in practice* (2003), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/complementarity.pdf› at 3
[224] Holmes, in Cassese, Gaeta & Jones, *Rome Statute Commentary* Vol.1,*supra* note 53, at 668

national sovereignty with the universal demand for accountability in consideration of the limited resources of an international tribunal. Each of these considerations is examined herein.

i. Protection of state sovereignty

The most significant issue in deciding on the jurisdiction of an international criminal tribunal was the protection of the sovereignty of State parties and third states. Since the exercise of criminal jurisdiction is central to the aspect of sovereignty itself,[225] the issue of state sovereignty pervaded the Rome negotiations.[226] Creating an international tribunal to deal with human rights violations on an international scale would necessarily limit national sovereignty to a certain degree. The ICC's assertion of jurisdiction over individuals in member states and the independence of the ICC Prosecutor did not sit well with many powerful nations, most significant of which was the United States, who refused to sacrifice national sovereignty and ultimately did not ratify the *Rome Statute*.

Another concern relating to sovereignty was former ICTY Prosecutor Louise Arbour's warning that the complementarity regime would work in favor of rich, developed countries and would overshadow the needs of developing countries. In other words, there was a concern that developed countries would impose their

[225] Jeremy Rabkin, "No substitute for sovereignty: Why international criminal justice has a bleak future and deserves it" in Edel Hughes, William A. Schabas and Ramesh Thakur eds., *Atrocities and international accountability: beyond transitional justice* (New York : United Nations University Press: 2007) at 100-104

[226] Markus Benzing, "The Complementary Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003) Max Planck Yearbook of United Nations Law, Volume 7 591 at 595

concept of morality and justice on developing countries, thus allowing for the possibility of sliding into moral and cultural imperialism.[227]

The underlying compromise of the complementarity regime was thus to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases.[228] The *Rome Statute* therefore maintained the "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[229]

ii. The universal project to put an end to impunity

A second concern, rivaling the importance of state sovereignty, is the interest of the international community in the effective prosecution of international crimes.[230] The Rome conference resulted from an aspiration for an international court that would deter future crimes, address serious war crimes, establish precedent, instill fairness in the judicial process, consistently apply international law, and decrease the likelihood that politics would influence the prosecution of international crimes.[231] The defining purpose of the ICC, as set out in the Preamble of the *Rome Statute*, affirms that "the most serious crimes" are of "concern to the international community and must not go unpunished."

According to the ICC OTP: "[t]he principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal

---

[227] Schabas, *supra* note 136 at 184-185; See also, Anna Coyer, "The Hybrid Model of International Dispute Resolution: Why Sudan's Case Should be heard in the Hague and at Home" (2005), Eyes on the ICC Vol. 2 33 at 42

[228] Holmes, in Cassese, Gaeta & Jones, *Rome Statute Commentary* Vol.1,*supra* note 53 at 675

[229] *Rome Statute*, *Preamble*, para. 6

[230] *Rome Statute*, Preamble, paras. 4 and 5; See also, Benzing, *supra* note 226 at 597

[231] Coyer, *supra* note 227 at 40

jurisdiction."[232] The complementarity principle can therefore be said to strike a balance between the endeavor to put an end to impunity and state sovereignty.[233]

iii. The limited resources of the ICC

Another significant basis for complementarity was the practical reality of the limited resources of the ICC and considerations of efficiency and effectiveness. This rationale acknowledges the insufficiency of both the legal mandate and the resources available to the ICC to fulfill the world's high expectations. Thus, the principle of complementarity recognizes the comparative advantages of national proceedings: the readier availability of evidence, the lower costs of investigation and of transporting witness to the trial and, of course, the greater legitimacy and impact in the eyes of the affected societies, inasmuch as local judiciaries are functioning and independent. National proceedings can thus more efficiently prosecute crimes falling under the *Rome Statute* while promoting reconciliation and restoring social balance in a transitional situation.[234]

C) The uniqueness of situations of mass atrocities and the appropriateness of hybrid responses

In creating a process of analysis for the Prosecutor's evaluation of the "interests of justice" under Article 53, Professor Delmas-Marty's proposal for the consideration of factors along an axis of universality/relativism acknowledges the

---

[232] ICC OTP, *2003 Policy Paper*, *supra* note 181 at 4

[233] Philippe Kirsch, "La Cour pénale internationale face à la souveraineté des États", in Antonio Cassese, Mireille Delmas-Marty eds., *Crimes internationaux et juridictions internationales*]. (Paris: Presses universitaires de France, 2002) at 32

[234] Broomhall, supra note 154 at 84; Benjamin Perrin, "Making Sense of Complementarity: The Relationship Between the International Criminal Court and National Jurisdictions" (2006) 18 Sri Lanka J. Int'l L. 301 at 314; Benzing, *supra* note 226 at 600; ICC OTP, "The principle of complementarity in practice" (2003), *supra* note 223 at 3

reality that every situation of mass violence is unique and offers the possibility of hybrid justice solutions tailored to the needs of a particular situation.

a) The uniqueness of mass atrocity

This uniqueness is related to the difference in the experience of the survivors, the level of mobilization of the aggressors, the public or secretive nature of the aggression, and the historical context from which the violence emerged. In other words, the violence in Uganda is very different from the violence that swept through Rwanda, East Timor, South Africa or Nazi Germany. As such, an argument can be made that the appropriate methods of accountability and even reconciliation may vary in each individual case. As noted in the previous chapter, there may be a range of adequate policy responses to mass atrocity, including prosecutorial and traditional accountability mechanisms. This range of responses can also vary depending on the timing of the transitional efforts. The security and stability of the affected communities, their demographic composition, and the dynamic of group relationships as well as the political reality of the situation all influence the method of choice to address the commission of atrocities.[235]

It must also be underlined that victim communities do not necessarily articulate homogenous needs and can be themselves fractured and fragmented, much like the societies from which they come. Victims' needs and expectations also change over time depending on the state of the peace process and the prospects

[235] Mark Drumbl, "Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide" (2002) Contemporary Justice Reviews Vol. 5(1) 5 at 6-7

for justice at any particular time.[236] The varying array of such factors can favor international trials, national trials, redistributive reparations, public inquiries, mediation, restorative justice vehicles such as truth commissions or traditional rituals, or, more reasonably, a combination of all of the above. A contextual response to mass violence will thus increase the potential for rebuilding or redefining peace, establishing the rule of law and ensuring a longer-term security of the affected communities.

b) Hybrid justice responses to mass atrocity

The suggestion of a pluralist policy regarding Article 53 coincides with a growing amount of literature arguing for legal pluralism or hybrid structures in which two or more legal structures address the same series of events in a transitional justice setting.[237] By adopting hybrid approaches, the hope is that the response to the commission of massive human rights violations will be holistic in having multiple political, social and legal institutions operating more effectively towards the rebuilding of society, rather than a single legal institution. The growing movement to adopt hybrid responses in transitional justice situations coincides with the greater legitimacy afforded to localized methods of accountability which are also seeing more regular use. In transitional justice situations, such as Sierra Leone, East Timor and Burundi, hybrid solutions seem to involve some type of criminal tribunal and a locally-directed truth commission.

[236] Simpson, *supra* note 205 at 76

[237] Phil Clark, "Hybridity, Holism and "Traditional" Justice: The Case of the *Gacaca* Courts in Post-Genocide Rwanda", (2007) George Washington International Law Review Vol. 39 No. 4; See also: Drumbl, *supra* note 235 at 5-22

In Rwanda, the response to the genocide has included an international criminal tribunal, national tribunals and a modified form of traditional dispute resolution tailored to address the particular nature of the genocide and the post-genocide reality. Particularly in Africa, it has become popular to revert to forms of local or traditional dispute resolution in response to serious atrocities.[238]

Conclusion

In 2004, UN Secretary General Kofi Annan had stated that, in the context of transitional societies, "due regard must be given to indigenous and informal traditions for administering justice or settling disputes to help them continue their often vital role and to do so in conformity with both international standards and local tradition."[239] The Ugandan proposal of national prosecutions paired with alternative traditional sentences is therefore part of a potentially larger movement of contextualized criminal justice that can certainly not be summarily dismissed, even in the context of universal efforts at accountability.

A pluralist interpretation of the "interests of justice" would contextualize the Prosecutor's decisions in the complex reality in which the ICC is meant to operate while maintaining the universal imperatives listed in the *Preamble* of the *Rome Statute*. Allowing for pluralist or hybrid solutions to criminal justice may more realistically allow for the fulfillment of the universal ideals of accountability and prevention of crime. The *gacaca* courts in Rwanda and the use of sentencing circles for aboriginal offenders in Canada will highlight how these

[238] Clark, *supra* note 237 at 1-2
[239] United Nations, "Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" UN Doc. S/2004/616, 23 August 2004 at 12

objectives fare in hybrid criminal solutions blending retributive criminal models with community, restorative justice vehicles.

II. HYBRID MODELS OF CRIMINAL JUSTICE

The call for a pluralist response to transitional justice and post-conflict reconstruction is certainly not a new one. The judicial handling of the Rwandan genocide is a most compelling example. Even domestic criminal jurisdictions like Canada have been pairing criminal prosecutions with alternative sanctions, such as sentencing circles, in order to address the over-representation of certain aboriginal groups in the prison population. The following section will study two examples of a contextualized approach to justice. In some instances a community or traditional response to criminality may actually further accountability and the prevention of crime. An examination of the Rwandan response to the genocide and Canada's attempts to contextualize justice among aboriginal peoples will reveal some significant insights into the Ugandan peace proposal which will be addressed at the end of this chapter.

A) A hybrid model: *Gacaca* Courts

Rwanda is a poignant example of the uniqueness of the commission of mass atrocity. In 1994, over 800,000 Rwandans were massacred in a three-month killing spree that was a "carefully planned and orchestrated slaughter, coordinated at the highest level of the state".[240] The Rwandan genocide was organized by the Rwandan government, supported by local authorities, and publicly undertaken by hundred of thousands of ordinary men and women. Also,

[240] Maya Goldstein Bolocan, "Rwandan Gacaca: An Experiment in Transitional Justice" (2004) Journal of Dispute Resolution Vol. 2 355 at 368

the killings were not depersonalized through physical distance or the use of technology. Victims were butchered with machetes, sticks, tools and large clubs studded with nails. Despite the absence of technology, the dead in Rwanda accumulated at three times the rate of Jewish dead during the Holocaust.[241]

a) Post-genocide Rwanda

Almost 120,000 genocide suspects, mostly Hutu, were arrested following the genocide and transported to jails around the country, originally built to hold only 45,000 inmates. In the aftermath of genocide, Rwanda was a country destroyed with no functioning institutions or infrastructure where both victim and aggressor must live unavoidably side-by-side in the same nation sate and in close economic interdependence, sharing the same language, religion and lifestyle. The transitional government was faced with a nightmare scenario of dealing with the masses of alleged perpetrators in an attempt to break the vicious cycle of impunity that had allowed for the genocide to occur in the first place.[242]

The judicialization of the reaction to the genocide in Rwanda proceeded through three types of institutions. The first was the ICTR, established under *Chapter VII* of the *UN Charter* in 1994 and sited in Arusha, Tanzania. Although Rwanda had initially requested the creation of an international tribunal, it cast its UNSC vote against the ICTE objecting, *inter alia* to its seat outside Rwanda, its limited temporal jurisdiction, the absence of Rwandans on its staff, and its inability to issue a death sentence. The Rwandan government nonetheless, though

[241] Drumbl, *supra* note 235 at 8-9
[242] Bolocan, *supra* note 239 at 369

certainly not routinely, cooperates with the ICTR.[243] The second means of dealing with the genocide were domestic courts, mostly in Rwanda, but also in a handful of foreign jurisdictions including Belgium and Canada. Finally, the third vehicle for transitional justice is the modified form of g*acaca,* meaning "justice in the grass" in Kinyarwanda: a traditional dispute resolution adapted for genocide-related crimes.[244]

b) *Gacaca* courts

Gacaca courts are village-based, quasi-judicial forums designed to complement and remedy the failure of the national and international justice system by achieving several ambitious goals. The *gacaca* system aimed to reduce the delays in the overburdened justice system, to uncover truths of the genocide and to achieve some sort of reconciliation by involving a large part of the population.[245] By blending retributive and restorative approaches as well as traditional with modern legal aspects in an innovative way, *gacaca* courts represent a unique opportunity to seek justice in an open, accessible and participatory fashion.[246] General assemblies (composed of all adult residents in the respective communities) elect nine adults of "integrity" to serve as "judges" (although legal qualifications are discouraged) in the *gacaca* courts and exercise the role of the prosecutor by identifying the crime, the victims, the alleged perpetrators and the evidence.[247] Of course, *gacaca* courts have been the subject of significant criticism relating to the perceived absence of traditional fair

[243] Drumbl, *supra* note 127 at 72
[244] *Ibid.* at 71
[245] Bolocan, *supra* note 238 at 377
[246] *Ibid.* at 356
[247] *Ibid.* at 379

trial rights and legal representation and concerns about the impartiality of the judges and the one-sided narrative of events.[248] Nonetheless, two features of the *gacaca* courts are significant for the purposes of this thesis: the hierarchy of offenders and the retributive character of the sentences.

i. Hierarchy of offences

By passing the *Organic Law* of August 1996 and later the *Gacaca Law* of 2001, with the latter modified in June 2001 and June 2004, the government created three categories of genocide offenders. Category 1 includes planners, leaders, notorious murderers, torturers (even when not resulting in death), rapists and sexual torturers, and those who committed dehumanizing acts against a dead body (in all cases, actual perpetrators and accomplices are implicated). Category 2 includes murderers, those who committed attacks with the intention to kill but did not succeed and those who committed other offences against the person but without the intention to kill. Finally, Category 3 includes those perpetrators who committed property offences (an offender in this category cannot be prosecuted if there is an agreement between the offender and the victim to settle the property harms caused).[249]

Gacaca courts have jurisdiction only over Categories 2 and 3. Category 1 offenders are excluded from the local *gacaca* panels and referred to the national court system and ICTR. Although there are no explicit guidelines regarding the distribution of suspects between the ICTR and the national courts, unofficially, the ICTR will hear the cases of the suspects considered to be among the most

[248] Gerald Gahima, "Alternatives to Prosecution: The Case of Rwanda" in Edel Hughes, William A. Schabas and Ramesh Thakur. Eds., *supra* note 224,at 166-177
[249] Drumbl, *supra* note 243, 86-87

important planners and perpetrators of the genocide.[250] The *Gacaca Law* divides the hearing of the remaining offenders according to category, between the approximately 9000 jurisdictions at two administrative levels who carry out a different task in the *gacaca* process. The first level, the *cellule*, is charged with the investigation of crimes committed within the cellule and with the production of four lists: of all those who lived in the cellule before October 1, 1990, of all those who were killed in the cellule during the specified period, of the damage to individuals or property inflicted during this time and of suspects and their category of crimes. The cellule hears only cases of suspects in Category 3. The second level, the *secteur*, hears cases of Category 2 and functions as the jurisdiction for the appeal of cases related to Categories 2 and 3 and the point from which Category 1 cases are forwarded to the Public Prosecutor's office at the national level.[251]

ii. A community justice vehicle with retributive objectives

Despite the communitarian and traditional origins of the *gacaca* courts, it must be emphasized that along with restorative justice efforts in truth-telling and reparations, gacaca courts also pursue retributive and deterrent justice after the genocide. The *Gacaca Law* of 2004 emphasizes that the deterrent nature of punishment by affirming that *gacaca* is established to "eradicate forever the culture of impunity" by "adopting provisions enabling rapid prosecutions and trials of perpetrators and accomplices of genocide."[252] The government maintains that, in light of the retributive aims at fulfilling a moral obligation to try suspects

[250] Clark, *supra* note 237 at 25
[251] *Ibid.*
[252] *Ibid.* at 62

and punish the guilty, rapid trials are necessary to process the huge backlog of untried genocide cases. The population also expressed the need for retributive justice. In the months following the genocide, the government rejected the suggestion of amnesty for dealing with the innumerable killings on the grounds that it would inflame many of the survivors' perceived desire for vengeance.[253]

What is particularly interesting about *gacaca* courts is the detailed punishment schematic provided for by the 2004 legislation. This legislation, that meshes punishment with a confession and plea bargain regime, focuses on confessions, pleading guilty, public apologies to surviving genocide victims and Rwandan society, and repentance. There is also a requirement to provide information regarding the whereabouts of victims' remains. These restorative measures create sentencing credits tied to the timing of the accused's confession: namely, whether the confession is approved before the accused's name appears on a list drawn up by the *gacaca* courts in their investigative functions, or after. An incomplete or insincere confession can be rejected.[254]

The 2004 legislation thus provides for serious prison-sentences and even the death penalty. Category 1 offenders who refuse to confess, or whose confessions have been rejected, face either the death penalty or life imprisonment. If they confess as provided by law, they incur a prison sentence ranging from twenty-five to thirty years.[255] Category 2 offenders who kill or who

[253] *Ibid.* at 15
[254] Drumbl, *supra* note 243,at 87
[255] *Ibid.* at 87; Although Category 1 cases will not be heard by *gacaca* courts, determination of Category 1 offenders can be made in the information-gathering pretrial stages of *gacaca* and these offenders, although tried by national courts, will apparently be entitled to the sentencing regime of the *gacaca* legislation.

commit serious attacks with the intent to kill, and who either refuse to confess or whose confessions incur a sentencing ranging from twenty-five to thirty years. Those who confess after their names have appeared on the list compiled by the relevant cellule-level *gacaca* court incur a sentence from twelve to fifteen years, but may only serve half their time in custody as the other half is converted to *travaux d'intérêt general* (community service). Those who confess before the list is drawn up incur a prison sentence ranging from five to seven years, half served in prison, half in community service, in consideration of the resources saved and forthcoming truthfulness. Category two defendants who committed offences against the person without the intention to kill incur a prison term within the following ranges: five to seven years if there is no confession or the confession is rejected; three to five years if the confession is made after the list is drawn up; and one to three years if the confession is made before the list is drawn up. In all cases half the sentence is community service. Category 3 offenders are only sentenced to civil reparations for damages made.[256]

Conclusion

The *gacaca* system thus allows for the integration of victims, perpetrators and the affected communities, into the process of truth, reconciliation and group accountability as opposed to the official legal systems which seek solely to hold perpetrators accountable without a significant role to be played by either victims or the community. By holding *gacaca* hearings alongside national and international efforts at justice, justice is thus expedited in that lower level offenders are tried at a much faster pace instead of languishing in Rwandan

[256] *Ibid.* at 87-88

prisons for over a decade. It must however be emphasized that despite the restorative functions of the *gacaca* courts, higher level offenders are excluded and perpetrators can still face considerable prison time. As such, the *gacaca* courts, like Canadian sentencing circles examined in the next section, retain much of the retributive character of official trials.

B) Sentencing Circles in the Canadian Justice System

Hybrid justice solutions are not reserved for the international forum, or limited to developing countries. In order to address high rates of Aboriginal incarceration and recidivism, the Canadian government has turned to alternative justice mechanisms, specifically relating to the sentencing hearing. It has thus attempted to blend criminal trials with a community based sentencing process in order to contextualize its approach to justice in aboriginal communities.

a) Sentencing circles: a matter of judicial discretion

For starters, Canada adopted a sentencing principle in the *Criminal Code* requiring the judge to consider all available sanctions other than imprisonment with particular attention paid to the circumstances of aboriginal offenders.[257] Then, a sentencing judge has discretion to refer an offender to a sentencing circle: a community directed process, conducted in partnership with the criminal justice system where community members including the victim and family members, community elders and workers contribute to a sentence recommendation.[258]

---

[257] *Canadian Criminal Code*, R.S.C. Ch. C-46, Article 718.2

[258] *R* v. *Moses* (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.); See also a recommendation to incorporate sentencing circles in American sentencing proceedings that delves into the Canadian policy: Megan Lynn Johnson, "Coming full circle : the use of sentencing circles as a federal

The judge has broad discretion as to referring an offender to a sentencing circle in the first place but certain criteria must be satisfied such as the agreement of the offender entering a guilty plea, the offender's strong connections to the community, the willingness of community elders to participate, the willingness of the victim to participate, the resolution of all factual issues at trial and the consideration of the public's confidence in the proper administration of justice.[259] Although, no specific offences are the subject of a possible referral to a sentencing circle, it seems that such a referral should not be made where a penitentiary sentence (two years of imprisonment or more) is required[260] unless, in very exceptional circumstances, the offender demonstrates remorse, sincerity and acceptance of responsibility.[261] Ultimately, the judge has discretion to follow the recommendation or not.

b) A contextualized response to criminality

Sentencing circles represent an acknowledgment of the multiple legal and moral orders in aboriginal society which has historically dealt with justice matters apart from the official justice system.[262] Proponents of sentencing circles argue that such justice vehicles will have an effect on the volume of crime and the incidence of recidivism by bringing greater understanding of crime and social problems and the creation of a more profound accountability to the community, particularly the aboriginal community of the offender. By having the offender identify with the

---

statutory sentencing reform for native American offenders", Thomas Jefferson Law Review, Vol. 26: 265 2007, at 276

[259] *R v. Joseyounen*, [1995] 6 W.W.R. 438 (Sask. Prov.C); *R. v. Taylor* (1997), 122 C.C.C. (3d) 376 (Sask. C.A.)

[260] *R v. Kahnapace*, 2001 SKCA 205; *R v. Morin* (1995), 101 C.C.C. (3d) 124 (Sask. C.A.)

[261] *R. v. Taylor*, *supra* note 259 at para. 50

[262] Donald Clairmont, "Alternative Justice Issues for Aboriginal Justice" (1996), 36 J. Legal Pluralism & Unofficial L. 127 at 126

aboriginal alternative to the official justice system, rehabilitation and reconciliation will be effected.[263] This contextualization of the justice response is hoped to benefit Canadian society as a whole and especially the particularly disadvantaged segments within it.

Although some have argued that sentencing circles could lead to inequitable treatment of offenders depending on what sentencing objectives are pursued in each case[264] (for instance rehabilitation for one offender and deterrence for another), others argue that background knowledge of a particular group and its relationship with the legal system can assist in determining what perspectives should count and which proposals would be effective, thus limiting possibilities of relativism.[265] The *Canadian Criminal Code* explicitly recognizes the social marginalization of aboriginal groups in Canada and thus seeks to remedy the situation by encouraging alternatives to imprisonment. The imposition of standards to promote uniformity and parity of reasoning could actually obscure the facts of a case and undermine the application of fair procedure. After all, the overrepresentation of aboriginal people in the Canadian prison population supposedly resulted from treating "like offenders alike".

Although there is insufficient evidence to establish whether sentencing circles have effectively improved the aboriginal experience with the legal system, what seems to underlie such alternative justice efforts is the desire to allow a perspective of social experience to emerge for a community. It was hoped that

[263] *Ibid*..at 127
[264] Julian V. Roberts and Carol Laprairie, "Sentencing Circles: Some Unanswered Questions", (1997) 39 CLQ 69
[265] Maureen Linker, "Sentencing Circles and the Dilemma of Difference" (1999) 42 CLQ 116 at 5

community members could develop a vocabulary for their own experiences in crime and come to recognize the reality and the responsibility that other community members share.[266]

Conclusion

Although an effort at a pluralistic approach to domestic criminal justice, sentencing circles resemble *gacaca* courts as hybrid criminal solutions attempting to blend restorative and rehabilitative objectives in order to allow for community members and offenders to come to terms with a particular type of criminality in a particular context. In each case, the involvement of the community allows the perspective of justice of the victims, the offender (through plea bargaining) and the community to emerge in order to define not only the common past but the common future.

Both examples however differ significantly with the Juba peace proposal. There are important retributive aspects to both *gacaca* courts and sentencing circles. In the first place, neither hybrid solution is available to the worst offenders. Category 1 offenders under the *gacaca* laws and offenders facing penitentiary sentences in Canada are explicitly excluded. Second, *gacaca* courts result in prison terms that may be reduced by an elaborate plea-bargaining scheme and sentencing circle recommendations may be refused by the sentencing judge if disproportionate to the severity of the crime. Despite the shortcomings of the ICTR for instance, it cannot be denied that the conviction of the Rwandan Prime Minister Jean Kambanda, the first time a head of government acknowledged his guilt for genocide before a tribunal, was critical to victims and for affirming

[266] *Ibid.* at 6

universal accountability for international crimes.[267] Aside from interpreting the definition of genocide, bringing high-level offenders to trial and securing convictions was the most significant success of the ICTR. As such, these examples illustrate Professor Delmas-Marty's proposal that universal imperatives trump relativist concerns where the most serious offenders are concerned, even when adopting a pluralist perspective to the pursuit of investigations and prosecutions. Thus, although it would be possible to incorporate such traditional justice mechanisms into a national strategy for accountability, neither process could justify a deferral "in the interests of justice" for ICC indictees considered "those most responsible" for the commission of massive atrocities.

III. Article 53 and the Uganda Peace Proposal

As of this writing, the leader of the LRA and ICC indictee, Joseph Kony has not signed either the *2007 Agreement* or the Annexure that recalls "the requirements of the *Rome Statute* of the [ICC] and in particular the principle of complementarity".[268] The *2007 Agreement* also provides that the Ugandan government agree to "[a]ddress conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA."[269] As such, the entire debate over the future of the LRA indictments remains theoretical. In another sense however, this debate exemplifies not only the importance of defining the "interests of justice" under Article 53, but also, in a much larger sense, the relationship

[267] *Prosecutor* v. *Kambanda,* Case No. ICTR 97-23-S (Sept. 4, 1998)
[268] *2007 Agreement*, supra note 16, *Preamble*; *Annexure*, supra note 17, *Preamble*. Joseph Kony failed to show up for the signing of the peace agreement again on November 29, 2008. See: "Uganda rebel fails to sign deal" (November 29, 2008) online: ICC ‹http://news.bbc.co.uk/2/hi/africa/7756520.stm›.
[269] *2007 Agreement*, *supra* note 16 at Clause 14.6

between international criminal and domestic accountability mechanisms or at least what competing principles will take precedence in order for the ICC to retain its relevance and legitimacy.

A) The indeterminacy of the "interests of justice" as definition

Professor Delmas-Marty proposes a model recognizing the multiplicity of legal orders applicable to a particular situation. This translates, as examined above, into a pluralist interpretation of the "interests of justice" in Article 53. This exercise is certainly a difficult one, particularly with Uganda: a country torn by over two decades of bloody conflict where the safety of the Northern population is still at risk. Even among supporters of the ICC, there is no consensus as to whether the "interests of justice" should lean towards the interests of peace and therefore the security interests of the victims, the interests of establishing a retributive and deterrent precedent in international criminal law or even the interests of the affected community, in accordance with the spirit of complementarity, to determine its own approach to accountability. Even prosecutorial policy examined at length in the previous chapter affirms the mandatory character of the obligation to see the proceedings through but remains somewhat equivocal as to what the "interests of justice" will actually justify.

In her work "*Les forces imaginantes du droit: Le relatif et l'universel,*" Professor Delmas-Marty paradoxically proposes a method of "indeterminacy" (*indétermination*) for the determination of a global legal order. This does not signify the adoption of inconsistent or ambiguous criteria but rather greater

transparency and rigor in decision-making. Indeterminacy must not be confused with arbitrariness.[270] Rigor in decision-making thus requires that factors affecting variations in decision-making be spelled out; be it principles of international law like the legitimacy of the objective sought or the nature of the specific principle applied and comparative factors such the presence or absence of common denominators between national systems.[271] It is submitted herein that, in recognition of the inescapable political character of some of the tasks of the Prosecutor, including the determination of the contents of the "interests of justice" and the application of this discretionary criterion in a particular situation, this method of 'indeterminacy' may be helpful for the ICC OTP. A pluralist interpretation of the "interests of justice" would thus allow the Prosecutor to openly balance considerations of universality and relativism by underlining the most significant factors that will influence his decision here and elsewhere.

B) Factors guiding a pluralist approach to the "interests of justice"

In determining whether the *2007 Agreement* and Annexure could justify a deferral in the interests of justice pursuant to Article 53, certain factors drawn from a comparative exercise between national and international responses to serious crimes will certainly be inescapable. These would be situated along the universality/relativism axis suggested by Professor Delmas-Marty and include the importance of the universal objective of putting an end to impunity and maintaining the legitimacy and effectiveness of the ICC, the nature of the accountability sanction proposed and the nature of the crimes and the level of the

[270] Delmas-Marty, *supra* note 207 at 16
[271] *Ibid.* at 17

perpetrators indicted by the ICC. Each of these factors, although interrelated, will be examined herein.

a) Universal objectives of accountability and the effectiveness of the ICC

The entry into force of the *Rome Statute* in July 2002 perhaps marked a turning point in the development of an international legal order since in sanctioning behavior affecting humanity as a whole, the international community created a common identity and eventually, indirectly, a common history. What international prosecutions aim to do, is to transform judgment on crime into a commitment for prevention. These are after all the stated objectives of the ICC. A conviction at the ICC can therefore be retributive but also contribute to the ending of a violent cycle and the instauration of a new order that has yet to be determined.[272] Of course, international justice is by no means perfect and can underline enormous failure in other respects. The ICTR for instance is the subject of justified criticism for being an international effort at covering up a flagrant failure to intervene before or during the commission of the genocide.

i. The gravity of the offences

The extent of the atrocities committed in Uganda, even when considering only those committed since the entry into force of the *Rome Statute*, is such that it justifies an international denunciation of the extreme and senseless violence in Northern Uganda but also the creation of the universal memory of the experience of the victims of that particular conflict. The operation of an external jurisdiction could be an indispensable means of changing domestic power realities and

[272] *Ibid.* at 192-195

challenging a consistent culture of impunity.[273] Moreover, it seems as if the ICC intervention has finally prompted some international scrutiny of the region and increased security for the affected population. Victims of the conflict in Uganda require not only a functioning state to make the best of their lives, but also conventional forms of legal protection from those who might oppress them. Peace in Uganda will therefore depend on sufficient political will, relative stability and the proper acknowledgment of the extensive crimes committed in the region.

ii. The timing of a possible deferral

As with the laying of charges, the timing the withdrawal of arrest warrants or the deference to national accountability mechanisms is of the utmost importance in this particular situation. A concession to Joseph Kony and his co-indictees to withdraw the ICC warrants under threat of continued violence would grossly undermine the legitimacy and effectiveness of the Court which has really only begun to operate. It was arguably the issuance of the arrest warrants that prompted the leaders of the LRA to submit to the most fruitful peace negotiations to date. There is nothing to suggest that in the absence of international intervention to secure the arrest of the Kony and his co-accused, any promises made at these talks would be honored. As pointed out by Professor Akhavan, the idea that dialogue with fanatical murderous leaders would somehow lead to peaceful settlement is unrealistic, often encouraged by the international community that is eager to insulate itself from genuine engagement to put an end

[273] Akhavan, *supra* note 2, at 415

to the atrocities.[274] Prosecutor Luis Moreno-Ocampo has indicated that he would not give in to what amounts to LRA blackmail and extortion.[275]

iii. Uganda's duty to prosecute

Finally, it must be noted that Uganda is a party to the *Rome Statute* and referred the situation of Northern Uganda to the ICC. Uganda thus accepted an obligation to further the objectives of the ICC and co-operate with the investigation and prosecution of the indicted perpetrators.[276] Article 26 of the *Vienna Convention on the Law of Treaties*[277] and the General Assembly's *Draft Declaration on the Rights and Duties of States*[278] require that states perform their obligations to the best of their abilities. Uganda could be in a position of breaching its duty of good faith by attempting to subvert the object and purpose of the *Rome Statute* and its accountability requirements. As such, when considered with Uganda's duty to prosecute international crimes, the ICC OTP could consider that this, in and of itself, is inconsistent with the "interests of justice".

In this sense, despite the inherent considerations of complementarity in the "interests of justice", the universal objectives of fostering international accountability and preventing the commission of such crimes both in Uganda and

---

[274] *Ibid.* at 419

[275] ICC OTP, "Address by Mr. Luis Moreno-Ocampo, Nuremberg, 24/25 June 2007, Building a Future on Peace and Justice", online ICC: ‹http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf›

[276] *Rome Statute*, Article 59(1) "A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9."

[277] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Vienna Convention on the Law of Treaties*, 1115 U.N.T.S. 331, Article 26

[278] *Draft Declaration on the Rights and Duties of States,* G.A. Res. 375 (IV), annex, art. 13, U.N. GAOR 4th Sess. (Dec. 6, 1949)

internationally should trump the proposed national response to the crimes of the LRA.

b) The parameters of a national response

It is a welcome development in transitional justice that "accountability" be an item included in the agenda of the peace negotiations in Juba. Although the traditionally penal character of domestic proceedings will be a more relevant consideration under the admissibility regime, considerations of the "interests of justice" will likely have to include an evaluation of the proposal of the national response to the crimes committed, even if such a response is an alternative to traditional prosecution or a hybrid solution pairing prosecution with other mechanisms. In other words, before the ICC OTP can exercise its discretion under Article 53 to defer to national efforts at accountability, such efforts will have to be clearly articulated.

i. Ugandan traditional justice rituals and ICC indictees

Before the issuance of the arrest warrants, the Acholi Religious Leaders Peace Initiative (ARPLI) had maintained that it was important to have "peace first and […] justice later on"[279] and several groups now advocate the withdrawal of the ICC warrants in favor of traditional rituals for conflict resolution. The LRA high command has understandably expressed favor towards local rituals as opposed to criminal prosecutions and such suggestions have even been incorporated into the *2007 Agreement* as well as the *Annexure* which prescribe prosecutions through a Special Division of the Ugandan High Court and "complementary

[279] Will Ross, "Ugandans Ask ICC to Spare Rebels" (March 16, 2005) online: BBC ‹http://news.bbc.co.uk/2/hi/africa/4352901.stm›

alternative justice mechanisms" which shall include "traditional justice processes, alternative sentences, reparations and any other formal institutions or mechanisms."[280] Traditional justice mechanisms may include *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Aliuc* and *Tonu ci Koka* defined as traditional mechanisms practiced by the different affected communities.[281]

The March 2007 Letter from the Ugandan Solicitor General to the ICC Registrar[282] suggests that these traditional justice mechanisms would only apply to lower level offenders and would not constitute a part of the formal justice mechanisms applicable to ICC indictees. This is however not explicitly stated in the *2007 Agreement* or the Annexure. The relationship between the Ugandan Special Division of the High Court, traditional and other mechanisms remains unspecified. The Agreement states that the legislation establishing the special division may provide for the "recognition of traditional and community justice processes in proceedings" but does not outline how they might be reformed or codified. It is unclear whether such mechanisms would supplement or replace prosecutions in regularly constituted courts.[283]

---

[280] *2007 Agreement*, supra note 16 at Clauses 5.2 and 5.3 of

[281] *2007 Agreement*, supra note 16 at Clause 3.1

[282] Letter from Jane F. Kiggundu, Acting Solicitor General, to the Registrar of the ICC (27 March 2008), *supra* note 119

[283] See also: AI, "Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to End Impunity" (March 2008), online: *CICC* ‹http://www.iccnow.org/documents/afr590012008eng.pdf›; HRW, "Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation" (February 2008), online: *CICC* ‹http://www.iccnow.org/documents/Analysis_of_the_Annex_to_the_June_29_Agreement_on_Accountability_and_Reconciliation_02_21_08.pdf›; ICG, "Northern Uganda Peace Process: The Need to Maintain Momentum" (September 14, 2007) online: ‹http://www.crisisgroup.org/home/index.cfm?id=5078&l=1›

ii. Proposed traditional rituals and accountability: an insufficient link

Traditional rituals called *mato oput* (or drinking the bitter root) were used by Acholi people to reintegrate members who had performed violent acts. Instead of seeking punitive justice, the objective was compensation and reintegration into the community.[284] Various groups, championing this use of traditional justice and criticizing ICC intervention and Western imposition that ignores the realities and attitudes on the ground, claim to speak for the victims and exert pressure on the ICC to defer to their version of "justice".

Ceremonies of *mato oput* are actually very similar to other African rituals providing for conflict resolution and compensation following a killing. These involved the killer and the family of the victim drinking a concoction of the blood of sacrificed sheep and a bitter root to underline the resolution of their dispute after a compensation agreement has been reached. Since a murder within a moral community occurred only rarely, *mato oput* was not a common occurrence.[285] The passing of the *Amnesty Act* in January 2000 provided a legal context for the ceremonies and the ICC referral prompted many to argue that Acholi traditional justice was more acceptable than the imposition of criminal prosecutions in a far-removed country. By mid-2005, *mato oput* ceremonies were thus being regularly performed funded by Aid agencies, Christian groups and peace activists, notably the Belgian government, and attended by aid workers, activists and journalists. Of course, the Acholi are not the only people

[284] See: Tim Allen, "Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda, in Courting Conflict? in Ed. Nicholas Waddell and Phil Clark, Courting Conflict? Justice, Peace and the ICC in Africa (2008), *supra* note 1

[285] For a study of the institutionalization of *mato oput* see Allen, *supra* note 8 at 132-138

affected by the LRA. Madi, Langi and Iteso people have also suffered at the hands of the LRA and the inclusion of additional traditional rituals in the *2007 Agreement* reflects the broadening of the proposed mechanisms. This does not however resolve the potential problems of selecting some local practices and transforming them into something new in order to address the commission of human rights violations on a huge scale.[286]

The Rwandan *gacaca* courts, examined above, do show that creating hybrid mechanisms combining traditional rituals with formal judicial features in order to create a formal pseudo-traditional system is possible. However this was not undertaken in the *2007 Agreement or the Annexure*. Neither document codifies the rituals or offers concrete external support for doing so, nor do they designate authority figures to perform them and verify their correct application. It must also be noted that Uganda is much more ethnically diverse than Rwanda and while *gacaca* has traditionally been practiced throughout Rwanda, Uganda also lacks any strong historical precedent in terms of an integrated traditional justice system, either within or between different ethnic groups.[287] Northern Uganda customs vary from place to place and from one social group to another. As such, if the creation of a pseudo-traditional accountability mechanism is envisaged, relevant rituals from most affected ethnic groups will have to be broadly and appropriately incorporated. The Ugandan government could theoretically combine rituals with formal justice features as suggested by the *2007 Agreement*

[286] Allen, *supra* note 284, at 49
[287] *Ibid.* at 51

and Annexure but there would have to be explicit constraints, regulations and careful monitoring.[288]

Finally, some have argued that even if traditional mechanisms were somehow reformed and formalized sufficiently to justify the ICC's deference to domestic proceedings, the reliance on codified rituals would essentially throw the horrors of Northern Uganda back onto the affected population. Using "traditional justice" risks the implication that the government and the rest of the country are dissociated from the conflict in Acholiland and that Northern Ugandans are not yet ready for modern justice vehicles.[289]

As it stands, the absence of a particular structure of the proposed hybrid Ugandan solution could not justify any type of informed deferral under Article 53. Unlike the *gacaca* legislation, the *2007 Agreement* and Annexure offer no elucidation as to the existence of a hierarchy of offences and elaboration as to which justice vehicles would deal with which crimes. There is also no indication of the existence of a sentencing regime or even what types of sentences will be envisaged.

c) Dealing with those most responsible

The Northern Ugandan conflict has lasted over 21 years and involved thousands of victims and perpetrators. In this particular conflict it is believed that a great number of perpetrators were actually victims themselves, abducted at a young age and forcibly conscripted into the LRA through torture and deprivation. It is estimated that up to 85% of the LRA's membership were abducted village

[288] *Ibid.* at 51
[289] *Ibid.* at 52

children.[290] This statistic had prompted many to fear that the ICC would have punished abducted children.[291]

It is necessary to draw a distinction between those persons most responsible for international crimes and lesser offenders. There is certainly practical, legal and moral justification for dealing with lesser offenders through alternative justice mechanism, including traditional rituals, whereas the persons most responsible (planners, leaders and those committing the most notorious crimes) should still be held criminally accountable on an international stage. In Rwanda, Category 1 offenders were not tried before *gacaca* Courts, but before the ICTR and national courts. Even those most serious offenders in Category 2 were only tried before the *secteur gacaca* tribunals, not at the cellule level, and face considerable terms of imprisonment if no confession is made, or the confession is not accepted.

The ICC OTP made this distinction when it issued warrants against the five individuals it considered most responsible. Between July 2002 and July 2004, in which the ICC investigation was conducted, thousands of killings and abductions were committed often passing the hundreds in a single month. Joseph Kony is charged with 12 counts of crimes against humanity and 21 counts of war crimes including rape, murder, sexual enslavement and forced enlisting of children. The other indictees include Kony's second in command Vincent Otti who has personally led attacks against civilians and is charged with 11 counts of crimes against humanity and 21 counts for war crimes; Raska Lukwiya, Army Commander of the LRA and responsible for some of the worst attacks committed

[290] Akhavan, *supra* note 2, at 407
[291] Volqvartz, *supra* note 66.

during the investigated period; Okot Odhiambo who commanded four of the most violent brigades of the LRA and Dominic Ongwen, an LRA Brigade commander who was killed in combat following an attack on an IDP camp.[292]

It is difficult to see how the hybrid solutions proposed in the Juba talks could sufficiently address the gravity of the offences committed or could adequately underline the blameworthiness of the offenders. Even in the case of domestic offenders in Canada, sentencing circles are not available for those offenders that would otherwise merit a penitentiary sentence of 2 years or more. Finally, it is unrealistic to believe that considering the LRA's cult-like character and Kony's self-depiction as a prophetic figure, he would submit to any kind of restorative, rehabilitative traditional mechanism in order to eventually settle into a peaceful life.[293] Kony has refused bigger concessions for years, including total amnesty. The disastrous example of Foday Sankoh's amnesty under the Lomé peace accord is a powerful example of how impunity, or insufficient accountability, reinforces the belief that violence pays.[294]

Conclusion

A pluralist interpretation of the "interests of justice" as elaborated by Professor Delmas-Marty would not only make the objectives of the ICC more attainable but is also consistent with the complementary nature of the ICC. It would also strike a fairer balance between state sovereignty and the universal objectives of accountability. More specifically, an open approach toward hybrid justice

[292] ICC OTP, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (October 14, 2005) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf›.
[293] Akhavan, supra note 2 at 419
[294] *Ibid.* at 420

solutions that mix traditional prosecutorial mechanism and alternative sentences can increasingly contextualize justice solutions to the unique reality existing in each situation of mass atrocity. The *gacaca* courts in Rwanda are an example of such a solution that, although far from perfect, involves the community as whole in the rendering of accountability, reconciliation and the reconstruction of society by processing the thousands of Hutu detainees with whom Rwandans will have to share a nation and a life. Sentencing circles in Canada also illustrate the potential for blending restorative or rehabilitative justice vehicles in order to reduce crime and recidivism among aboriginal offenders who are overrepresented in Canadian prisons.

A pluralist interpretation of the "interests of justice" does not however allow for any type of national solution. Certain proposals will remain legally and morally insufficient to address the gravity of the offences and the blameworthiness of the offenders. The *2007 Agreement* and *Annexure* do not create an alternative justice vehicle that could sufficiently hold Kony and his 3 co-accused accountable for the crimes they committed and ordered committed in Northern Uganda. Thus, universal principles of accountability and Uganda's own commitment to the fulfillment of the objectives of the ICC outweigh any considerations of complementarity in the evaluation of the "interests of justice" pursuant to Article 53 of the *Rome Statute* for the ICC indictees. Such alternative justice mechanisms may still, with the appropriate implementation, be an adequate response for lesser offenders but not the leaders and organizers of the campaign of violence and terror in Northern Uganda.

CONCLUSION

The historical significance of the creation of the ICC cannot be overstated. Not only does the ICC symbolize the universal will to put an end to impunity for international crimes, but it has already shown that it will greatly influence the political landscape of settling armed conflicts. By issuing arrest warrants against the LRA leaders, the ICC catalyzed the failed peace negotiations that could put an end to a forgotten 20 year conflict in Northern Uganda. As a permanent tribunal with near global jurisdiction, the ICC will have an unprecedented impact on peace and accountability settlements around the world. While acknowledging that the ICC is a legal institution with a specific mandate to try those most responsible of the gravest international crimes, this thesis calls for the ICC OTP to also offer some guidance to transitional states as to what accountability mechanisms can and will be deemed acceptable by the ICC and in what circumstances.

Chapter I of this thesis set the legislative framework in which the ICC OTP must exercise its discretion and concluded that deference to a hybrid accountability mechanism of formal prosecution with alternative sentences, such as that proposed in the *2007 Agreement* and *2008 Annexure*, would be possible through the exercise of prosecutorial discretion provided by Article 53 of the *Rome Statute*. Should the Prosecutor find that it would be in the "interests of justice" to do so, he could put an end to the ICC proceedings in the case of Northern Uganda in order to allow for the *2007 Agreement* to be implemented.

The absence of a definition of the "interests of justice" in the *Rome Statute* has underlined the difficult debate as to the scope of prosecutorial discretion of the ICC Prosecutor. Chapter II sought to establish that the subject matter of the ICC as well as the impact of the decisions of the ICC OTP render the Prosecutor the most "political" office in the structure of the ICC. As such, prosecutorial policy cannot embrace a purely legalistic interpretation of the "interests of justice" which would render the term meaningless. A critical examination of the ICC OTP's current policy on Article 53 reveals that a narrow interpretation of the discretionary criterion has been rejected. However prosecutorial policy on this issue is still incomplete. It is argued that the ICC OTP should complete the *2003 Draft Guidelines* in order to preserve the legitimacy and transparency of the ICC so as to fairly express prosecutorial policy on what accountability mechanisms would justify a deferral in the "interests of justice".

In order to develop prosecutorial policy that respects the objectives of the *Rome Statute*, the complementary nature of the ICC, the particular context of each situation and that recognizes the limited resources of the Court, Chapter III recommends that the ICC OTP adopt a pluralist approach to defining the "interests of justice". Such an interpretation would allow the ICC OTP to be impartial despite the fact that the constituent states have conflicting moral and legal values and to preserve a sense of legitimacy even though it is far removed from the people it affects. In order to do so, an overview of hybrid prosecutorial solutions in Rwanda and even Canada reveal a number of factors that would have to be taken into consideration while still maintaining fluidity in the evaluation

of the discretionary criterion. When applied to the situation in Uganda, these factors, including the blameworthiness of the ICC indictees, the timing of a proposed withdrawal of the ICC warrants and more particularly the vagueness of the proposed accountability mechanisms, would not warrant a deferral.

Nevertheless, hybrid prosecutorial solutions in response to international crimes merit further study. The complementary nature of the ICC recognizes that national endeavors at accountability, if genuine, feasible and fair, more effectively serve the objectives of the ICC than do international prosecutions. In some instances, alternative justice mechanisms can be an appropriate response, particularly where the number of potential accused could paralyze a formal justice system. And although this thesis argues that deferral by the ICC is possible, in order to preserve the legitimacy of national endeavors at accountability, the ICC regime would need to be further developed.

The *Rome Statute* provides for a system within which both the domestic and international levels of governance have interrelated duties to provide accountability for international crimes.[295] In October 2008, Prosecutor Moreno-Ocampo indicated that in order to achieve its objectives of putting an end to impunity for the most serious crimes of international concern and to contribute to the prevention of such crimes, the *Rome Statute* integrates sovereign states and an international criminal court into one global criminal justice system. He added that this interaction is based on two main principles: complementarity and

[295] Burke-White, *supra* note 221 at 56-57

cooperation.[296] This rhetoric has however not yet been transformed into a formal policy that structures the ICC's interactions with national governments.[297] The Northern Uganda situation provides a golden opportunity to do just this.

[296] ICC OTP, "The Tenth Anniversary of the ICC and Challenges for the Future" (8 October 2008) online: ICC ‹http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20081007LuisMorenoOcampo.pdf›

[297] Burke-White, *supra* note 221 at. 6

BIBLIOGRAPHY

LEGISLATION

Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/ Movement (June 29, 2007) online: Beyond Juba ‹http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconcilition.pdf ›.[*2007 Agreement*]

Annexure to the Agreement on Accountability and Reconciliation (February 19, 2008), online: *CICC* ‹http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf›. [*Annexure]*

Amnesty Act (2000), online: Southern African Legal Information Institute: ‹http://www.saflii.org/ug/legis/consol_act/aa2000294120/›

Canadian Criminal Code, R.S.C. Ch. C-46

Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 760 (entered into force Jan. 12, 1951) [*Genocide Convention*]

Draft Declaration on the Rights and Duties of States, G.A. Res. 375 (IV), annex, art. 13, U.N. GAOR 4th Sess. (Dec. 6, 1949)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Aug. 12, 1949, arts. 49-60, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, arts. 146-147, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [*hereinafter Fourth Geneva Convention*]

Geneva Convention Relative to the Treatment of Prisoners of War Aug. 12, 1949, arts. 129-130, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950)

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea Aug. 12, 1949, arts. 50-51, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950).

ICC Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000), r. 48 [*ICC RPE*]

International Law Commission, *Draft Articles on State Responsibility: Report of the International Law Commission on the Work of its Thirty-Second Session*, UN GAOR, 35th sess, Supp No 10, UN Doc A/35/10 (1980)

1999 Lomé Peace Accord, Seventh Progress Report of the Secretary-General of the UN Observer Mission in Sierra Leone on 30 June 1999, UN Doc. S/1999/836

S.C.Res. 1503 U.N. Doc. S/RES/1503 (Aug. 28, 2003)

Rome Statute of the International Criminal Court, July 12, 1998, 2187 U.N.T.S. 900

Schedule 1 to Regulation 2001/10 on the *Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, UNTAET/REG/2001/10, 13 July 2000

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991, UN SCOR, 48th Sess., 3217th mtg., Annex, UN DOC. S/827 (1993) [*ICTY Statute*]

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighboring States, SC Res. 955, UN SCOR, 49th Sess., 3453d mtg., Annex, UN Doc. S/955 (1994) [*ICTR Statute*]

Vienna Convention on the Law of Treaties, 1115 U.N.T.S. 331

Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, para. 60; See also: *The Final Declaration and Programme of Action of the 1993 World Conference on Human Rights*, Part II, Para. 60, UN Doc.A/CONF/57/24 (October 1993) 32 ILM 166

JURISPRUDENCE

Prosecutor v. *Kallon & Kamara*, Decision on Challenge to Jurisdiction: *Lomé Accord Amnesty, Case* Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), paras. 87-89 (SCSL App. Ch., Mar. 13, 2004)

Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-1, Decision on Immunity from Jurisdiction, (SCSL App. Ch., May 1, 2004)

Prosecutor v. *Kambanda,* Case No. ICTR 97-23-S (Sept. 4, 1998)

R v. Joseyounen, [1995] 6 W.W.R. 438 (Sask. Prov.C)

R v. Kahnapace, [2001] SKCA 205

R v. Morin (1995), 101 C.C.C. (3d) 124 (Sask. C.A.)

R v. *Moses* (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.)

R. v. Taylor (1997), 122 C.C.C. (3d) 376 (Sask. C.A.)

Velasquez-Rodriguez, 1988 Annual Report Inter-American Court of Human Rights 35

SECONDARY MATERIAL: MONOGRAPHS

Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006)

Broomhall, Bruce. *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford UP, 2003)

Cassesse, Antonio, Gaeta, Poala & Jones, John R.W.D., eds. *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford, New York: Oxford University Press, 2002) 667

Cassese, Antonio & Delmas-Marty, Mireille, eds. *Crimes internationaux et juridictions internationales*]. (Paris: Presses universitaires de France, 2002)
Delmas-Marty, Mireille. *Le relatif et l'universel : Les forces imaginantes du droit* (Paris: Seuil, 2004)
Drumbl, Mark. *Atrocity, Punishment and International Law*, (Cambridge; New York: Cambridge University Press, 2007)
Hughes, Edel, Schabas. William A. & Thakur, Ramesh eds., *Atrocities and international accountability: beyond transitional justice* (New York: United Nations University Press: 2007)
J.Knoops, Geert-Jan G. *Theory and practice of international and internationalized criminal proceedings* (The Hague: Kluwer Law International, 2005)
Kleffner Jann. K. & Kor Gerben, eds. *Complementary Views on Complementarity* (The Hague:TMC Asser Press, 2006)
Moghalu, Kingsley Chiedu. *Rwanda's Genocide: The Politics of Global Justice* (New York: Palgrave Macmillan, 2005)
Schabas, William. *An introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007)
Roach, Steven C. *Politicizing the International Criminal Court : the convergence of politics, ethics, and law* (Lanham : Rowman & Littlefield Publishers, 2006)
Teitel, Ruti G. Transitional justice (Oxford; New York: Oxford University Press, 2000)
Triffterer, Otto, ed. *Commentary of the Rome Statute of the International Criminal Court*. (München, Germany and Oxford, UK: C.H. Beck, Hart and Nomos, 2008)
Von Hebel, Herman A.M., Lammers, Johan G. & Schukking, Jolien, eds. *Reflections on the International Criminal Court* (The Hague: T.M.C. Asser Press, 1999)

SECONDARY MATERIAL: ARTICLES

Akhavan, Payam. "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court", (2005) The American Journal of International Law, Vol. 99 No. 2 403
Akhavan, Payam. "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities" (Jan.,2001) The American Journal of International Law Vol. 95 No. 17 31
Arsanji, Mahnoush H. & Reisman, W. Michael. "The Law-in-Action of the International Criminal Court" (2005) 99 Am. J. Int'l L. 385
Asmal, Kader. "Truth, Reconciliation and Justice: The South African Experience in Perspective (Jan. 2000) The Modern Law Review, Vol. 63 No. 1 1
Berman, Paul Schiff. "Global Legal Pluralism" (2007) Southern California Law Review Vol. 80: 1155
Bassiouni, M. Cherif. "Searching for Peace and Achieving Justice: The Need for Accountability" (Autumn, 1996) Law and Contemporary Problems, Vol. 59 No. 4 9

Bergsmo, Morten. The Jurisdictional Regime of the International Criminal Court (Part II, Articles 11-19) (1998) 6 Eur J. Crime, Crim. L. & Crim. Just 29

Bergsmo, Morten, Cissé, Catherine & Staker, Christopher. "The Prosecutors of the International Tribunals: The Cases of Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared", in *The Prosecutor of an International Criminal Court* (Freiburg im Breisgau : Edition Iuscrim, 2000)

Blumenson, Eric. "The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court" (2006) Columbia Journal of Transnational Law Vol 44 801

Benzing, Markus. "The Complementary Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003) Max Planck Yearbook of United Nations Law, Volume 7 591

Bolocan, Maya Goldstein. "Rwandan Gacaca: An Experiment in Transitional Justice" (2004) Journal of Dispute Resolution Vol. 2 355

Brubacher, Matthew R. "Prosecutorial Discretion within the International Criminal Court" (2004) Journal of International Criminal Justice 2 71

Burke-White, William. "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice" (Winter 2008) Harvard International Law Journal, Volume 49, Number 1 53

Boed, Roman. 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 *Yale Human Rights and Development Law Journal* 1

Castillo Díaz, Pablo. "The ICC in Northern Uganda: Peace First, Justice Later?" (2005) Eyes on the ICC Vol. 2 17

Clairmont, Donald. "Alternative Justice Issues for Aboriginal Justice" (1996) 36 J. Legal Pluralism & Unofficial L. 127

Clark, Thomas Hethe. "*The Prosecutor of the ICC, Amnesties, and the "Interests of Justice": Striking a Delicate Balance"* (2005) 4 Wash. U. Global Stud. L. Rev. 389 (2005)

Clark, Phil. "Hybridity, Holism and "Traditional" Justice: The Case of the *Gacaca* Courts in Post-Genocide Rwanda" (2007) George Washington International Law Review Vol. 39 No. 4

Côté, Luc. "International Criminal Justice: Tightening the Rules of the Game" (March 2006) International Review of the Red Cross Vol. 8 No. 861 133

Coyer, Anna. "The Hybrid Model of International Dispute Resolution: Why Sudan's Case Should be heard in the Hague and at Home" (2005), Eyes on the ICC Vol. 2 33

Delmas-Marty, Mireille. "La CPI et les interactions entre droit international pénal et droit pénal interne à la phase d'ouverture du procès pénal" (March 11, 2005) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP_GL_2005March11›

Drumbl, Mark A. "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (2005), Northwestern University Law Review Vol.99 No. 2 539

Drumbl, Mark A. “Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide” (2002) Contemporary Justice Reviews Vol. 5(1) 5

El-Zeidy, Mohammed. “The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC” (2005) 5 Int’l Crim.L. Rev. 83

Goldstone, Richard & Fritz, Nicole. “’In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers” (2000) 13 Leiden Journal of International Law 655

Greenawalt, Alexander K.A. “Justice Without Politics? Prosecutorial Discretion and the International Criminal Court” (2007) International Law and Politics Vol. 39 583

Grono, Nick & O’brien, Adam. “Justice in Conflict? The ICC and Peace Processes” Ed. Nicholas Waddell and Phil Clark, Courting Conflict? Justice, Peace and the ICC in Africa (2008) online: Crisis States Research Centre: ‹http://www.crisisstates.com/download/others/ICC%20in%20Africa.pdf›

Hall, Christopher Keith. “Suggestions concerning International Criminal Court, Prosecutorial Policy and Strategy and External Relations (28 March 2003) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/hall.pdf›.

Hayner, Priscilla. “Negotiating Peace in Sierra Leone: Confronting the Justice Challenge” (December 2007) online: Centre for Humanitarian Dialogue ‹http://www.ictj.org/static/Africa/SierraLeone/HaynerSL1207.eng.pdf›

Hovil, Lucy & Quinn. Joanna R. “Peace First, Justice Later: Traditional Justice in Northern Uganda” (2005) online: Refugee Law Project ‹http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP17.pdf ›

Jallow, Hassan B. “Prosecutorial Discretion and International Criminal Justice” (2005) Journal of International Criminal Justice 3 145

Kleinhaus, Martha-Marie & MacDonald, Roderick A. “What is *Critical* Legal Pluralism?” (1997) 12 Can. J. L. & Soc. 25

Linker, Maureen, “Sentencing Circles and the Dilemma of Difference” (1999) 42 CLQ 116

Lovat, Henry. “Delineating the Interests of Justice”, Denv. J. Int’l L. & Pol’y Vol. 35 275

McDonald, Avril & Haveman, Roelof. “Prosecutorial Discretion- Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC” (15 April 2003) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/mcdonald_haveman.pdf›

Majzub, Diba. “Peace or Justice? Amnesties and the International Criminal Court” (2002) 3 MELB. J. INT’L L. 247

Marston Danner, Allison. “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court”, (2003) The American Journal of International Law Vol. 97 510

Mégret, Frédéric. “Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project” (2002) Finnish Yearbook of International Law Vol. 12 195

Mutua, Makau. “Beyond Juba: Does Uganda need a National Truth and Reconciliation Process?” (2007) Buffalo Human Rights Law Review Vol. 13 401

Moy, Abigail H. “The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity” (2006) 19 Harv. Hum. Rts. J. 267

Nino, Carlos S. “The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina” (June 1991) The Yale Law Journal Vol.100 2619

Olásolo, Héctor. “The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor”, (26 March 2004) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/040326_Olasolo.pdf›

Olásolo, Héctor. “The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?” (2003) International Criminal Law Review 3 8

Otim, Michael & Marieke, Wierda. “Justice at Juba: International Obligations and Local Demands in Northern Uganda” in Ed. Nicholas Waddell and Phil Clark, Courting Conflict? Justice, Peace and the ICC in Africa (2008) online: Crisis States Research Centre: ‹http://www.crisisstates.com/download/others/ICC%20in%20Africa.pdf›

Orentlicher, Diane F. “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” June 1991) Yale Law Journal Vol. 100 No. 8 2537

Perrin, Benjamin. “Making Sense of Complementarity: The Relationship Between the International Criminal Court and National Jurisdictions” (2006) 18 Sri Lanka J. Int’l L. 301

Robinson, Darryl. ”Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003) EJIL Vol. 14 No.3 481

Sadat, Leila Nadya. “Exile, Amnesty and International Law” (2006) 81 NOTRE DAME L. REV. 955

Scharf, Michael P. “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes” (Autumn, 1996) Law and Contemporary Problems, Vol. 59 No. 4 41

Scharf, Michael P. “The Amnesty Exception to the Jurisdiction of the International Criminal Court” Cornell International Law Journal Vol. 32 507

Seibert-Fohr, Anja. “The Relevance of the *Rome Statute* of the International Criminal Court for Amnesties and Truth Commissions” (2003) Max Planck Yearbook of United Nations Law, Volume 7 553

Ssenyonjo, Manisul. “Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court” (2005) Journal of Conflict and Security Law Vol. 10 No. 3 405

Stahn, Carsten. “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court” (2005) Journal of International Criminal Justice 3 695

Villa-Vicencio, Charles. “Neither too much, nor too little justice: Amnesty in the South African context”, 49 Media Development 26 online: World Association for Christian Communication ‹http://www.waccglobal.org/lang-en/publications/media-development/67-2002-2/698-Neither-too-much-nor-too-little-justice-Amnesty-in-the-South-African-context.html›

Villa-Vicencio, Charles. “Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet” (2000) 49 Emory L. J. 196

ELECTRONIC SOURCES

Amnesty International (AI). “Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice” (June 17, 2005) online: AI ‹http://www.amnesty.org/en/library/asset/IOR40/023/2005/en/dom-IOR400232005en.pdf›.

AI. “Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to End Impunity” (March 2008), online: *CICC* ‹http://www.iccnow.org/documents/afr590012008eng.pdf›

“*Annan Hails International Criminal Court’s Arrest Warrants for Five Ugandan Rebels”* (Oct. 14, 2005) online: UN News Service ‹http://www.un.org/apps/news/printnewsAr.asp?nid=16243›

Coalition for the International Criminal Court [CICC]. “States Parties to the *Rome Statute* of the ICC According to the UN General Assembly Regional Groups” online: *CICC* ‹http://www.iccnow.org/documents/RatificationsbyUNGroup_18_July_08.pdf

Croft, Adrian. “Uganda offers “blood settlement” to LRA rebels” (12 March 2008) online: Reuters ‹http://www.reuters.com/article/featuredCrisis/idUSL11891647›.

Goldstone, Richard. “Catching a war Criminal in the Act” (July 15, 2008) online: New York Times ‹http://www.nytimes.com/2008/07/15/opinion/15goldstone.html?_r=1›.

HRW. “*ICC Takes Decisive Step for Justice in Uganda”* (Oct. 14, 2005) online: HRW ‹http://www.hrw.org/en/news/2005/10/13/icc-takes-decisive-step-justice-uganda›

HRW. “The Meaning of the “Interests of Justice” in Article 53 of the *Rome Statute*” (June 2005) online: *CICC* ‹http://www.icc-cpi.int/library/organs/otp/hall.pdf› at 1 [HRW Policy Paper]

HRW. “Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation” (February 2008), online: *CICC* ‹http://www.iccnow.org/documents/Analysis_of_the_Annex_to_the_June_29_Agreement_on_Accountability_and_Reconciliation_02_21_08.pdf›

ICC OTP. *Summary of Prosecutor's Application under Article 58* (July 14, 2008) online: ICC ‹http://www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf›.
ICC OTP. *Paper on some policy issues before the Office of the Prosecutor* (September 2003), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf› [*2003 Paper on some policy issues before the OTP*]
ICC OTP. *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593* (2005) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/UNSC_2008_En.pdf›
ICC OTP. *Venezuela Response* (9 February 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf›
ICC OTP. *Iraq Response* (9 February 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf›
ICC OTP. "OTP Statement in relation to events in Uganda" (March 2008) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080303-ENG.pdf›.
ICC OTP. "Policy Paper on the Interests of Justice" (September 2007) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf› [*Policy Paper on the Interests of Justice*]
ICC OTP. "Report on the activities performed during the first three years (June 2003-June 2006)" (September 12, 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf›
ICC OTP. "ICC Prosecutor confirms situation in Georgia under analysis" (20 August 2008) online: ICC ‹http://www.icc-cpi.int/pressrelease_details&id=413.html›
ICC OTP. Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080714-ENG.pdf›.
ICC OTP. "Draft Regulations of the Office of the Prosecutor" (annotated) (3 June 2003), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/030603_draft_Regulations.pdf› [*Draft Regulations*]
ICC OTP. "Summary of Recommendations Received during the first Public Hearing of the Office of the Prosecutor, convened from 17-18 June 2003, at the Hague : Comments and Conclusions of the Office of the Prosecutor" online: ICC ‹http://www.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf› at 6 [*ICC OTP Summary of Comments and Conclusions*]
ICC OTP. "Paper on some policy issues before the Office of the Prosecutor" (September 2003), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf› [2003 Policy Paper]
ICC OTP. "Report on Prosecutorial Strategy" (14 September 2006), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf› [*ICC 2006 Prosecutorial Strategy*]

ICC OTP. “Annex to the Three Year Report on the Prosecutorial Strategy”, online: ICC ‹ http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-Annex_En.pdf› [*ICC OTP 2006 Annex*]
ICC OTP. “Report on the activities performed in the first three years” (June 2003-June 2006) (12 September 2006) online: ICC ‹http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf› at 17 [ICC OTP 2006 Report]
ICC OTP. “Informal Expert Paper: The principle of complementarity in practice” (2003), online: ICC ‹http://www.icc-cpi.int/library/organs/otp/complementarity.pdf›
ICC OTP. “Address by Mr. Luis Moreno-Ocampo, Nuremberg, 24/25 June 2007, Building a Future on Peace and Justice”, online ICC: ‹http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf
ICC. Press Release, “International Criminal Court, President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC” (Jan. 24, 2004) online: ICC ‹http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html›
ICC. “Decision on the Prosecutor’s Application for unsealing of the warrants of arrest”, ICC-02/04-01/05-52 (Oct. 13, 2005) online: ‹http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-52_English.pdf›
ICC. Press Release, “Prosecutor for the International Criminal Court Opens an Investigation into Northern Uganda” (July 29, 2004) online: ICC ‹http://www.icc-cpi.int/press/pressreleases/33.html›.
ICC. Press Release, “Statement by the Prosecutor Luis-Moreno Ocampo on the confirmation of the death of Raska Lukwiya” (Oct. 11, 2006) online: ‹http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20061107_en.pdf›
ICC. Press Release, “Statement by the Chief Prosecutor on the Uganda Arrest Warrants” (October 14, 2005), online ICC: ‹http://www.icc-cpi.int/library/organs/otp/Uganda-_LMO_Speech_14102005.pdf›.
ICC. Press Release, “Prosecutor for the International Criminal Court Opens an Investigation into Northern Uganda” (July 29, 2004) online: ICC ‹http://www.icc-cpi.int/press/pressreleases/33.html›.
ICC. Press Release, “Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo” (April 19, 2004) online: ICC ‹http://www.icc-cpi.int/press/pressreleases/19.html›
ICC. Press Release, “Prosecutor Opens Investigation in the Central African Republic” (May 22, 2007) online: ICC ‹http://www.icc-cpi.int/press/pressreleases/248.html›
ICC Registrar. Report by the Registrar on the Execution of the "Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest" (March 28, 2008) online: ICC ‹http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-286-ENG.pdf›.
International Crisis Group (ICG). ”Negotiating Peace and Justice, Considering Accountability and Deterrence in Peace Processes” (Nuremberg, 26 June 2007) online: ICG ‹http://www.crisisgroup.org/home/index.cfm?id=4922&l=2›

ICG. “Northern Uganda: Seizing Opportunity for Peace” (April 26, 2007) online ICG ‹http://www.crisisgroup.org/home/index.cfm?id=4791&l=1›

ICG. “Colombia: Towards Peace and Justice?” (March 14, 2006) online: ICG ‹http://www.crisisgroup.org/library/documents/latin_america/16_colombia_towards_peace_and_justice.pdf›

ICG. “Northern Uganda Peace Process: The Need to Maintain Momentum” (September 14, 2007) online: ‹http://www.crisisgroup.org/home/index.cfm?id=5078&l=1›

ICTJ. “Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda” (July 2005) online: ICTJ ‹www.ictj.org/images/content/1/2/127.pdf›

ICTY. Press Release, “Statement by Justice Louise Arbour”, (May 27, 1999), online: ICTY ‹http:www.un.org/icty/pressreal/p404-e.htm›

International Center for Transitional Justice (ICTJ). “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice” (May 2007) online: ICTJ ‹http://www.ictj.org/images/content/9/5/956.pdf ›

Letter from Jane F. Kiggundu. Acting Solicitor General, to the Registrar of the ICC (27 March 2008) online: ICC ‹http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-286-Anx2-ENG.pdf›.

Nguyen, Katie. “Ugandan rebels urge suspension of arrest warrants” (April 19, 2007) online: Reuters, ‹http://www.reuters.com/article/latestCrisis/idUSL19177992›

Reynolds, Paul. “Bashir Move bold but problematic” (July 14, 2008) online: BBC News ‹http://news.bbc.co.uk/2/hi/africa/7500437.stm›

Ross, Will. “Ugandans Ask ICC to Spare Rebels” (March 16, 2005) online: BBC ‹http://news.bbc.co.uk/2/hi/africa/4352901.stm›

Pallister, David. “Human Rights: Growing Clamour to Remove the Hague Prosecutor who wants Sudanese President Arrest” (August 18, 2008) online: Guardian UK ‹http://www.guardian.co.uk/world/2008/aug/18/humanrights.sudan›.

Public Prosecution Service of Canada (PPSC). *The Federal Prosecution Service Deskbook*, online: ‹http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html› at Ch. 15 [*FPS* Deskbook]

Simons, Marlise. “Proud but Concerned: Tribunal Prosecutor Leaves” (September 15, 1999), online: New York Times ‹http://query.nytimes.com/gst/fullpage.html?res=9C04E1DB163CF936A2575AC0A96F958260›.

Tisdall, Simon. “What price of action over Darfur?” (September 28, 2008) online: Guardian UK ‹http://www.guardian.co.uk/commentisfree/2008/sep/29/sudan.warcrimes›.

“Uganda rebel fails to sign deal” (November 29, 2008) online: ICC ‹http://news.bbc.co.uk/2/hi/africa/7756520.stm›.

Volqvarz, Josefine. “ICC Under Fire over Uganda Probe” (Feb. 23, 2005) online: ‹CNN http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/›