THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA: ENSURING THAT THE PURSUIT OF JUSTICE DOES NOT COME AT THE PRICE OF PEACE

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This article discusses the appropriateness of the International Criminal Court (‘ICC’) becoming involved in the continuing hostilities in northern Uganda, especially given the potential impact ICC involvement may have on the prospects of peace. Ongoing conflicts such as the one ravaging northern Uganda raise complex issues that were not envisaged by the creators of the Court. The focus of the article is the potentially competing goals of justice and peace. It argues that further guidance is needed to direct the decision of the Prosecutor to continue investigations and that greater emphasis should be placed on the urgent need for a peaceful resolution to the conflict. In order to ensure that criminal prosecutions do not undermine other initiatives to achieve peace, the article proposes that, where possible, prosecutions should run parallel to steps taken at the political level. Otherwise, not only may the future of the ICC be in jeopardy, but so too may the prospects of peace in northern Uganda.

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I INTRODUCTION

The Preamble to the Rome Statute of the International Criminal Court expresses extreme confidence in the capability of using legal processes to address grave crimes that threaten ‘the peace, security and well-being of the world’. However, less than five years after the Rome Statute first came into force, this faith in the ability of the law to come to grips with complex political and moral issues is coming under heightened scrutiny as the Office of the Prosecutor begins investigations into numerous ongoing conflicts in Africa. There is enormous pressure on the International Criminal Court (‘ICC’) to live up to the high expectations placed on it and at the same time quell its critics. The involvement of the ICC in ongoing conflicts has caused the stakes to rise. The price of failure is high. In the words of the Justice and Peace Commission in Gulu, northern Uganda, ‘[t]o start war crimes investigations for the sake of justice at a time when the war is not yet over, risks having, in the end, neither justice nor peace delivered’.

The focus of this article will be the first referral to the ICC, which was made unexpectedly by Uganda, a State Party to the Rome Statute, in December 2003. Although Uganda’s ratification of the

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2 The Prosecutor has begun investigations into the state referrals of Uganda and the Democratic Republic of the Congo, as well as into the situation in Darfur, Sudan, referred to the Court by the Security Council. The Court has also received a referral from the Central African Republic, but the Prosecutor is yet to begin investigations: Latest Press Releases (2002–2006) International Criminal Court <http://www.icc-cpi.int/press/pressreleases.html> at 26 June 2006.


4 See ICC, ‘President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC’ (Press Release, 29 January 2004) available at <http://www.icc-cpi.int/pressrelease_details&cid-16&el-en.html> at 26 June 2006. While the internal armed conflict between the government of Uganda and the Lord’s Resistance Army has ravaged the north of the country for the past 20 years, the referral is limited to crimes that have occurred since 1 September 2002, when the Statute entered into force for Uganda.
Rome Statute and its subsequent voluntary referral were unexpected, it is believed that, given the situation of civil war ravaging the country, the government of Uganda hoped that joining the ICC would help it prosecute the rebels. Indeed, President Yoweri Museveni specifically referred to the Court ‘the situation concerning the Lord’s Resistance Army’ (‘LRA’) and, since the Prosecutor began investigations into the situation, five arrest warrants for the top tiers of the LRA, including its leader Joseph Kony, have been issued, though not executed. While atrocities have been committed by all sides, including by the Ugandan People’s Defence Forces (‘UPDF’), the worst violence, including murder, abduction, sexual

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5 Although state referrals pursuant to art 14 are one of three mechanisms through which cases may come before the Court (the Security Council may also make referrals under art 13 and the Prosecutor may initiate investigations proprio motu under art 15), it was not anticipated that states would voluntarily surrender their own national criminal jurisdiction. Indeed, the principle of complementarity — pursuant to which the Court can only step in where states are unable or unwilling to prosecute — was based on the presumption that states would jealously guard their sovereignty: see Arsanjani and Reisman, above n 3, 386.


8 The arrest warrants were issued by the Pre-Trial Chamber on 8 July 2005 and on 13 October 2005 the Pre-Trial Chamber unsealed the warrants of arrest. The warrant of arrest for Joseph Kony lists 33 counts including 12 counts of crimes against humanity (art 7) and one count of war crimes (art 8); ICC, ‘Warrant of Arrest Unsealed Against Five LRA Commanders’ (Press Release, 14 October 2005) available at <http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html> at 26 June 2006.

enslavement, mutilation and the forced conscription of Acholi children, has reportedly been committed by the LRA.\textsuperscript{10}

These recent developments raise numerous issues, not least of which is the desirability of the ICC becoming involved in ongoing conflicts, particularly where the referring government is one of the parties. As a result, questions arise about the impartiality of the Prosecutor, the feasibility of enforcement and ultimately the prospects of peace. These issues will be explored by focusing on the prosecutorial discretion to instigate investigations in the ‘interests of justice’ (Part II); the way in which political realities impede investigations and prosecutions (Part III); and the need to ensure that ICC involvement supplements rather than supplants other initiatives to achieve peace (Part IV). Throughout it will be argued that faith should not blindly be placed in the ability of legal processes to deal with the complex political issues of ongoing conflicts, particularly when the risk is that the pursuit of justice may come at the price of peace.

II THE DECISION TO COMMENCE INVESTIGATIONS

Despite recognising the need to address threats to the peace, the Preamble to the \textit{Rome Statute} states that crimes ‘must not go unpunished’ and ‘effective prosecution must be ensured’.\textsuperscript{11} The belief is that war criminals must be put on trial to ‘put an end to impunity’ and to ‘contribute to the prevention of such crimes’.\textsuperscript{12} Although various rationales are proffered in support of international criminal justice,\textsuperscript{13} it is retribution and deterrence that are most often emphasised.\textsuperscript{14} For proponents of the ICC, prosecution is regarded as being of the ‘highest importance’.\textsuperscript{15}

\textsuperscript{10} Moreno-Ocampo, above n 7, 2–3.
\textsuperscript{11} \textit{Rome Statute}, above n 1, Preamble.
\textsuperscript{13} See, eg, the list compiled in Mark Lattimer and Philippe Sands, ‘Introduction’ in Mark Lattimer and Philippe Sands (eds), \textit{Justice for Crimes against Humanity} (2003) 1, 18–22.
\textsuperscript{14} This is evidenced in the Preamble to the \textit{Rome Statute}, above n 1. See also ibid 22.
When a conflict is ongoing, however, the immediate concern will be to bring an end to the bloodshed. Although the pursuit of justice can potentially contribute to long-lasting peace through the imposition of the rule of law, if approached prematurely and with rigidity, it may have the opposite effect. Indeed, punishment has the potential to reinforce hostility and to impede efforts to encourage rival parties to agree. For those most at risk in the conflict, it is more than likely that it will be peace and not justice that is of greatest concern.

The *Rome Statute*, however, is silent on these issues. Art 53 provides the only indication, by directing the Prosecutor to consider the ‘interests of justice’ when deciding to begin investigations. Yet, there is no further guidance as to what the ‘interests of justice’ involve and how it interacts with other considerations such as peace.

### A Article 53 and the ‘Interests of Justice’

In deciding whether to initiate an investigation and whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, the Prosecutor must consider, pursuant to art 53(1)(c), whether, ‘[t]aking into account the gravity of the crime and the interests of victims, there are

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18 As the Refugee Project points out, ‘[t]he victims know what they want: first, an end to the war; second, to return to their ancestral homes and start a new life; and third, reconstruction of social services like schools and dispensaries. Once they are safe at home, and their children can go to school without fear of abduction, only then can they be asked about those who visited horror on them’: Refugee Law Project, above n 9, 9.

19 *Rome Statute*, above n 1, art 53(1)(c).


21 *Rome Statute*, ibid, art 53(1)(a). Pursuant to art 5 the Court has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression, though aggression is yet to be defined.
nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'. Similar criteria guide the decision of the Prosecutor on whether it is in the interests of justice to proceed to prosecution under art 53(2)(c).

There is little indication, however, of what the ‘interests of justice’ entails or how it interacts with what may be the more immediate concern of bringing an end to an ongoing conflict. The word ‘justice’ is very indeterminate, and its use in the Rome Statute leads one to question whose definition of justice should prevail. It is subjective, culturally specific and the meaning accorded to it is likely to depend on the circumstances.

While the dominant conception of justice usually equates to retribution, at least in Western institutions, it appears that that the use of the word ‘justice’ in art 53 is not necessarily confined to

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23 See, eg, Eric Stover and Harvey Weinstein, ‘Introduction: Conflict, Justice and Reclamation’ in Eric Stover and Harvey Weinstein (eds), My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity (2004) 1, 4, where Stover and Weinstein recount the variety of things ‘justice’ represents for the victims of the Rwandan tragedy, varying from returning to earning a living to seeking revenge. As Weinstein and Stover explain, ‘[j]ustice, like beauty, is in the eye of the beholder and can be interpreted in a variety of ways’: at 4.

24 Unlike the adversarial nature of existing national and international concepts of criminal justice, in traditional Acholi communities, for example, justice is seen as restorative and rehabilitative rather than as retributive. The Refugee Law Project provides the example of a murderer bearing responsibility for the victim’s family: Refugee Law Project, above n 6, 8.


considerations of retributive criminal justice. This is because in art 53(1)(c) traditional criminal justice considerations are juxtaposed against the broader notion of ‘interests of justice’ and art 53(2)(c) specifically directs the Prosecutor to ‘the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime’. The list does not exclusively set out the relevant circumstances and, arguably, in ongoing conflicts one of the ‘circumstances’ (and perhaps the most important) that should be taken into account, which would also be in ‘the interests of victims’, is the fact that peace is yet to be attained.

B Curbing Prosecutorial Discretion

There is little doubt that assessing whether or not it is in the interests of justice to proceed involves a high degree of discretionary judgement. At the Rome Conference many states, particularly the United States (‘US’), feared that an ‘unfettered Prosecutor would politicise the judicial and prosecutorial process’. In drafting art 53, Arsanjani and Reisman claim that ‘the drafters were aware of the magnitude of the challenge these particular problems could present and apparently, their implications for the very judicial character of the Court’. Consequently, review mechanisms were put in place, which proponents have argued subject the Prosecutor’s decision to commence investigations and prosecutions to ‘substantial checks

28 Robinson, above n 15, 488.
32 Arsanjani and Reisman, above n 3, 386.
and balances’. When the Prosecutor reaches a decision not to proceed on the ground of the interests of justice, the Pre-Trial Chamber must be informed of the decision. The Pre-Trial Chamber may decide to review the decision on its own initiative, in which case the decision of the Prosecutor will only be effective if confirmed by that Chamber. While such mechanisms for review are to be welcomed, it appears surprising that similar procedures for review are not in place when a positive determination is made, particularly given the fact that the commencement of prosecutions can impede initiatives for peace. While this issue may only arise in ongoing conflicts, in which the involvement of the ICC was not originally anticipated, this is an oversight that still appears to have gone unnoticed.

If Pre-Trial Chamber review was indeed intended to address the fact that the Prosecutor may be drawn ‘under the guise of the “interests of justice,” into political decisions, which may prove problematic for the image of a criminal court’ as Arsanjani and Reisman claim, this oversight should be addressed, especially given its potential effect on the judicial nature of the Court. In deciding that it is in the interests of justice to proceed, the Prosecutor is similarly making a political decision. Thus, the need for a fallback mechanism of review is arguably just as great. This is especially an issue in Uganda where it has been argued that the commencement of prosecutions, with the issuing of the five indictments, has effectively ended peace negotiations with the LRA. Checks and balances should be in place no matter what the decision reached.

Another potential loophole is that art 53 sets out the considerations intended to guide the Prosecutor ‘[i]n deciding whether to initiate an investigation’, which leaves open the question of investigations that are not formally considered. Arrest

32 Rome Statute, above n 1, art 53(1)(c) or 53(2)(c).
33 Ibid art 53(1), 53(2).
34 Ibid art 53(3)(b). The state making the referral or the Security Council may also request a review pursuant to art 53(3)(a).
35 Arsanjani and Reisman, above n 3, 386.
37 Rome Statute, above n 1, art 53(1).
warrants have reportedly been limited to the leaders of the LRA because they are ‘the most responsible’. The question is, however, whether this effectively involves a decision that members of the UPDF are not as responsible, and that it is not, or at least not as yet, ‘in the interests of justice’ to initiate investigations and prosecutions against the UPDF. Although it may be impossible to review every single decision made and to completely guard against the political nature of prosecutorial discretion, this issue also raises the important question of the impartiality of the Prosecutor, which in turn implicates the perceived legitimacy of the Court.

C Impartiality

Indeed, the legitimacy of the Court will undoubtedly depend on the ability of the Prosecutor to maintain an appearance of impartiality, which is likely to be a key problem with respect to ICC involvement in Uganda. As Danner points out, ‘[i]f the Prosecutor becomes identified with any political agenda other than seeking justice, the role of the Court in providing an impartial, independent forum for individuals accused of the most serious crimes will be severely compromised’. The problem that has already arisen is that only LRA rebels have been targeted, making the Court open to claims that its purpose is to selectively rid Uganda of the rebels rather than to impartially prosecute the crimes committed. This problem should not be taken lightly. To quote Koskenniemi, war crimes trials have the tendency to ‘oscillate between the wish to

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40 Moreno-Ocampo, above n 7, 3.
42 Though this has been justified by the Chief Prosecutor as follows: ‘Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA’: Moreno-Ocampo, above n 7, 2–3.
43 Selectivity has always been an issue throughout the history of war crimes trials, which have also been prone to the criticism of ‘victor’s justice’. The ICC has already been criticised for selectivity because all of the situations before the Court involve African failing states. This was adamantly brought to light by Sudan before the Security Council: Security Council, Minutes, 5158th mtg (31 March 2005) UN Doc S/PV.5158, 12, quoted in Matthew Happold, ‘Darfur, the Security Council and the International Criminal Court’ (2006) 55 International and Comparative Law Quarterly 226, 231. See also McGoldrick, above n 22, 461, on the dangers of moral imperialism and inconsistent application to the First and Third worlds. In Uganda, it could also be argued that as of yet the ICC is acting selectively on behalf of the government or the would-be ‘victors’. 
punish those individually responsible for large humanitarian disasters and the danger of becoming a show trial.\(^\text{44}\) If it appears that criminals have not been impartially selected but are rather targeted for being on the wrong side or for holding dissenting views, a trial will not be a vindication of the rule of law but will be for ‘show’. In addition, this situation will be potentially complicated as the president of Uganda has purportedly, though quite ambiguously, left open the possibility that the government will try their own forces themselves.\(^\text{45}\) If only criminals on the side of the party opposing the government are handed over to the Court, while the government prosecutes its own forces, the credibility of the government and the perceived impartiality of the Court will be compromised. Though, on the other hand, if prosecutions are initiated by the ICC against members of the government’s forces, and as a result the government decides to withdraw its referral, complications would also abound.\(^\text{46}\)

The Prosecutor’s task is rendered difficult not only by the fact that the referring government is one of the parties to the conflict, but also, as succinctly stated by Danner, because the Prosecutor ‘sits at a critical juncture in the structure of the Court, where the pressures of law and politics converge’.\(^\text{47}\) Although the theory is that the ICC Prosecutor decides on prosecutions in an impartial way based on the seriousness of the crimes,\(^\text{48}\) the circumstances, particularly in complex ongoing political turmoil, further complicate this scenario. There is no denying that the moves that can feasibly be made by the Prosecutor depend upon ‘the manifold realities of international politics, not the least of which will be the practical and financial


\(^{45}\) Museveni is quoted as having said, ‘I am ready to be investigated for war crimes ... and if any of our people were involved in any crimes, we will give him up to be tried by the ICC ... And in any case, if such cases are brought to our attention, we will try them ourselves’: see Luis Moreno-Ocampo (Speech delivered at the 27th Meeting of the Committee of Legal Advisers on Public International Law, Strasbourg, 18–19 March 2004).

\(^{46}\) For a discussion on the practical and legal implications of the withdrawal of a voluntary referral, see Arsanjani and Reisman, above n 3, 397.

\(^{47}\) Danner, above n 41, 510.

limits those realities may place upon investigation and prosecution’. 49

III REALITIES IMPEDING INVESTIGATIONS AND PROSECUTIONS

Many issues arise as a result of the initiation of investigations in a war zone such as northern Uganda. Even humanitarian workers are experiencing difficulty gaining access and must negotiate with rebels, while the government has often been forced to resort to ‘local defense’ units. 50 The volatility of this situation in turn provides extreme challenges to the investigators, who, given the lack of alternatives, must rely on the government of Uganda to provide them with security.

This situation renders numerous matters, such as the collection of evidence and the interrogation of witnesses, extremely complex. For example, it may be difficult, if not impossible, to ensure that innocent civilians are not subject to retaliation. 51 Even though protection measures have reportedly been put in place by the Victims and Witnesses Unit, 52 it is impossible to prevent all retaliatory attacks, especially those that are not directed at individual witnesses but are of a more general kind. In addition, the rebels themselves may be critical to access for information, particularly in preparing for trial, though are unlikely to cooperate without the guarantee of amnesty.

Despite these difficulties, the Office of the Prosecutor appears to have overcome many of the initial hurdles, as it was able to satisfy the Pre-Trial Chamber that it had built up a sufficient case to issue the five arrests, and further, that sufficient protections had been put in place to warrant the unsealing of the arrests. 53 However, subsequent investigations are likely to prove just as difficult, if not more difficult, particularly if public perceptions of the Court continue to fall as the conflict continues and the arrests remain unexecuted. There have especially been concerns that the issuing of the arrest warrants resulted in the intensification of the conflict, as there is now a major disincentive for the leaders to engage in

49 Arsanjani and Reisman, above n 3, 385.
50 Ibid 393.
51 Ibid 400.
52 Moreno-Ocampo, above n 7, 7.
53 See, ICC, above n 8.
dialogue. Consequently, the longer the arrests remain unexecuted and the longer the conflict continues, the more likely it is that support will dwindle, even from those who originally welcomed ICC intervention.

Apart from the impact of ICC involvement on peace negotiations, the issue that has received the most attention is enforcement. Many are particularly sceptical as to how the ICC will execute the five arrest warrants when the government of Uganda has proved itself unable to do so for more than 20 years. Having no police force of its own, the ICC must rely on international cooperation in order to effect the arrests. Given the ongoing nature of the conflict, this is likely to require security forces, which increases the control of states. The situation is rendered even more difficult by the fact that the LRA is reportedly moving between three countries — Uganda, the Congo and Sudan, all of which have internal conflicts. Although the Sudanese government has been pressured into cooperating and into cutting off support for the LRA, the governments of Uganda, Sudan and the Congo are far from reaching a trilateral agreement for a true regional response.

While it may be more desirable for the prosecutorial team to rely on United Nations (‘UN’) peacekeeping forces for enhanced security in undertaking investigations and efficiency in carrying out arrests, the use of UN forces also presents various problems. Not only could the neutrality of the forces be compromised if they were perceived as part of the operation that was building a case against a party to the conflict, but so too could the relative independence of

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54 Indeed, in its referral to the ICC the government of Uganda withdrew its offer of amnesty to the leaders of the LRA: see Akhavan, above n 6, 409–10. On the effect the arrests had on the conflict, see, eg, Apuuli, above n 38, 180; Refugee Law Project, above n 6, 1.
57 Indeed, situations in each of these countries are before the ICC: see above n 2.
59 Arsanjani and Reisman, above n 3, 399.
the ICC. The *Rome Statute* was intended to strike a balance between allowing input from the Security Council and allowing the Court to operate independently, but if the Prosecutor is forced to rely on UN forces this balance may be tipped. The Court may find itself continually looking towards the Security Council and whether it is prepared to act.

The paradox of this situation has not escaped the Chief Prosecutor, Moreno-Ocampo, however, who has aptly explained that ‘the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community’. The question is, however, whether the complications that arise in ongoing conflicts can be overcome and whether the Court can find a way to supplement rather than supplant other initiatives at the national and international level.

IV  LOOKING TO THE ALTERNATIVES

In order to ensure that ICC involvement does not do more harm than good in northern Uganda, the importance of other initiatives aimed at establishing the peace should not be forgotten. There is only so much that ICC involvement can hope to achieve. This is made clear by Arsanji and Reisman, who question

what contribution to the settlement of the dispute accrues from transferring the problem, at this juncture, to the International Criminal Court, a body that was neither intended nor equipped to resolve, through judicial means, a longstanding political problem of a government.

Such a line of questioning is unavoidable, especially because the government of Uganda has been unable to solve the problem for more than 20 years.

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60 Simpson, above n 31, 52.
61 Arsanjani and Reisman, above n 3, 399.
63 Arsanjani and Reisman, above n 3, 393.
A Domestic Initiatives

In this vein Arsanji and Reisman assert that Uganda’s referral to the ICC amounts to ‘washing its own hands of an insoluble internal problem’. They argue that referring the situation to the Court serves to deflect internal and international criticism of the government’s unresolved political problems. Moreover, it is ‘a move that could encourage [other] governments to externalize to the Court the domestic political problems they are unable or unwilling — because they do not wish to invest the necessary resources — to manage or resolve’. Akhavan, however, stresses that ‘Uganda was not relinquishing a responsibility that it could discharge on its own’: there had been failed attempts at amnesty and the fact that Sudan was harbouring the rebels made military initiatives fruitless. In addition, ‘[i]nternational trials were … viewed as a depoliticized venue for justice that would be perceived as impartial if and when the LRA’s top leaders were captured’.

Despite this disagreement about the government’s underlying motives, it is essential that it does not now use ICC involvement as an excuse for inaction. There is still an urgent need for political initiatives to bring a halt to the senseless bloodshed and to help rebuild the communities that have been torn apart.

Although ICC involvement cannot on its own resolve the complex political issues ravaging Uganda’s north, Uganda’s decision to invoke ICC jurisdiction has already had some beneficial impact. It has succeeded in bringing a long forgotten conflict onto the world stage and has encouraged Sudan to stop harbouring the LRA. This culminated in a March 2004 protocol allowing the UPDF to attack LRA camps in southern Sudan: ibid 404.

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64 Arsanjani and Reisman, above n 3, 394.
65 Ibid 395.
66 Ibid. See also above n 20.
67 Akhavan, above n 6, 404.
68 Ibid 410.
69 This culminated in a March 2004 protocol allowing the UPDF to attack LRA camps in southern Sudan: ibid 404.
support, there is no denying that there is, at the very least, benefit to be had in the denunciatory function of law. Indeed, indicting the LRA leaders has already provided a means for publicly recognising and denouncing the atrocities that have occurred. Indictments on their own, however, will not stop the commission of further atrocities. Rather, military intervention or the commencement of serious negotiations may be required. Given that steps taken by the government of Uganda have so far proved ineffective, the need for further involvement by the international community should not be overlooked.

B International Initiatives

Many have voiced fear that the international community will seek comfort in ICC involvement in ongoing conflicts so as to absolve other states from considering more complicated options such as humanitarian intervention. In particular, the Security Council referral of the situation in the Sudan has been seen by some to be a substitute for effective action. These fears echo criticisms of the International Criminal Tribunal for Rwanda (‘ICTR’), which, it has been argued, serves to deflect responsibility and to alleviate the consciences of the states that were unwilling to stop the genocide. However, the difference between the ICTR and the ICC is that the former was created after the event, whereas the latter ‘is the archetypal ex ante tribunal’. The ICC was established and became

70 This may indeed be because so much is expected of the law. Although Lattimer and Sands have reduced the justifications of international criminal law into eight main categories, each of these is complex and gives rise to numerous issues: see Lattimer and Sands, above n 13, 18–22. Even some of the most basic justifications such as deterrence have come under intense criticism for lack of empirical support. In the words of Richard Goldstone, ‘[t]he hope of never again has become the reality of again and again’, quoted in Simon Chesterman, ‘Never Again … and Again: Law, Order and the Gender of War Crimes in Bosnia and Beyond’ (1997) 22 Yale Journal of International Law 299, 316.

71 See, eg, Koskenniemi, above n 44, 4, on the practice of reading indictments in public court at the International Criminal Tribunal for the Former Yugoslavia and the beneficial effect this can have on the healing process.

72 Arsanjani and Reisman, above n 3, 394.

73 See, eg, Smith, above n 25; Cassese, above n 56, 10; McGoldrick, above n 25, 471.


76 Arsanjani and Reisman, above n 3, 385.
involved in Uganda in the midst of the conflict. Its mandate was evoked before and not after the resolution of the international security problem.\(^7^7\) Thus, there is and should be even greater scope to consider how the efforts of the ICC can supplement rather than supplant other initiatives to restore the peace and alleviate the hardships.

As the former President of the International Criminal Tribunal for Yugoslavia, Antonio Cassesse, has argued,

> the trend towards the institutionalization of international criminal law must not detract from the underlying political realities. Judicial reckoning, while necessary in order to uphold and enforce the international rule of law, should run parallel to steps taken on the political level. The prosecution and punishment of war criminals by an international criminal tribunal ... cannot be a substitute for robust action by the United Nations where required to restore international peace and security.\(^7^8\)

Just as in Rwanda where the most influential states were too slow to act, Uganda does not present a political issue of sufficient concern to the national interests of the major powers to entice them into immediate action.\(^7^9\) However, there should be no excuse for stopping at ICC involvement. Rather, where possible, criminal prosecutions should run parallel to steps taken on the political level, both nationally and internationally.

### C. Peace Negotiations Involving Amnesties

In some cases prosecutions may impede political initiatives such as peace settlements. For societies ravaged by war, or in a state of transition, compromise is likely to be essential and the granting of amnesties may, in some situations, be indispensable if peace is to be achieved.

However, the desirability of granting amnesties is heavily contested. There are some who believe that amnesties should never be granted, as they run contrary to the aims of international criminal

\(^7^7\) Arsanjani and Reisman, above n 3.
\(^7^8\) Cassese, above n 56, 10.
\(^7^9\) See Akhavan, above n 6, 404.
law, particularly the goal of ending impunity. Others are against an iron rule that prosecution is the only acceptable response, but believe working an explicit amnesty exception into the Rome Statute would have been untenable. As Robinson relates, at the Rome Conference, agreement on these issues was unlikely, so the drafters of the Rome Statute chose not to delve into the question of amnesties.

Nevertheless, the wording of the Rome Statute appears to leave open some scope for amnesties (and other alternative mechanisms) to be considered by the Office of the Prosecutor, particularly in deciding whether investigating and prosecuting would be in the ‘interests of justice’ under arts 53(1)(c) and 53(2)(c). However, art 53 is directed solely to the initiation of investigations and prosecutions. It does not stipulate what considerations should be involved in deciding whether to cease the activities of the Court because alternative arrangements have been reached. Art 53(4) simply sets out that ‘[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information’.

The Chief Prosecutor, Moreno-Ocampo, has reportedly stated that if a solution to end the violence in Uganda were found, and continuing the investigation did not serve the interests of justice,

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80 See especially, Bassiouni, above n 16. There may also be an obligation under international law to prosecute as advocated by Orentlitcher, for example, but the nature and extent of this obligation is unresolved: see Diane Orentlitcher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1990) 100 Yale Law Journal 2537; Diba Majzub, ‘Peace or Justice?: Amnesties and the International Criminal Court’ (2002) 3 Melbourne Journal of International Law 247, 252–62.
81 Robinson, above n 15, 483.
82 Ibid.
83 Art 17(1)(b) presents another alternative provided that it can be argued that the truth commission or other body ‘investigated’ the matter and ‘decided’ not to prosecute: ibid 499. Art 16 also stipulates the procedures that must be followed in the event that the Security Council requires the Court to suspend investigations and prosecutions which interfere with efforts to maintain or restore international peace and security, pursuant to Chapter VII of the Charter of the United Nations: ibid 502. See also Stahn, above n 27, 697–9, for a discussion of arts 16, 17–19, 53, in the context of amnesties.
then the ICC would cease investigations. While it is appropriate that the Prosecutor direct his or her mind to this issue in the spirit of art 53, it would be more desirable for a stipulated procedure to be in place. If, despite the existence of a potential solution, the Prosecutor decides to continue investigations and prosecutions in ‘the interests of justice’, or the inverse, this decision should be open to review by the Pre-Trial Chamber in the same manner as stipulated in art 53(3)(b).

There have also been suggestions of hybrid approaches. For example, it may be appropriate to prosecute only the most responsible, while having alternative mechanisms in place for lower-level offenders. In some cases, of which Uganda is undoubtedly an example, it is simply not possible or even desirable to prosecute all offenders. Moreover, as the vast majority of LRA members are, or were, child soldiers who were abducted and forced into conscription, the desirability of prosecuting them should be questioned. Amnesties have been seen by their families as a means of encouraging them home, and it is believed that amnesties are compatible with the Acholi community’s existing traditional system of justice and dispute resolution.

One possibility is for lesser offenders to be dealt with through truth commissions granting conditional amnesties, while the persons most responsible, such as the leaders who incited others to violence, are held criminally accountable.

The benefit of supplementing prosecutions with truth commissions or other traditional mechanisms is that they are more likely to accord with traditional values regarding justice and conflict resolution. Truth commissions can also achieve some of the goals of international

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85 See, eg, Robinson, above n 15, 493; Stahn, above n 27, 707–9.
86 Robinson, ibid, 493–4.
87 See Akhavan, above n 6, 407, on the history of abductions.
88 Refugee Law Project, above n 6, 7.
89 Modelled, for example, on the South African Truth and Reconciliation Commission. See Majzub, above n 80, 261–2, for a brief discussion of the main attributes of the South African model.
90 See Robinson, above n 15, 493–4.
91 Refugee Law Project, above n 6, 7.
criminal justice that have the potential to sit uneasily with prosecutions such as reconciliation and education. They can also provide a forum that can be used to seek out the ‘truth’, rather than the ‘legal truth’, and to make recommendations for the future. In addition, by supplementing legal proceedings, these processes can relieve the law from burdens that it is not designed to bear, which, as Curran has pointed out in a not so different context, would ‘risk deforming law and legal principle’.

Even though such hybrid approaches are likely to be effective when the greatest concern is rebuilding society after the conflict is over, they may not be workable in attempting to bring an end to a conflict. This is because it is the very leaders bearing the greatest responsibility who are most likely to be pushing for amnesty in peace negotiations. Although amnesty laws have had an uneasy history in Uganda — as the adoption of the Amnesty Act in 2000 did not succeed in bringing the leaders of the LRA to give up their arms — many believe that amnesties are still likely to be a vital tool for

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92 See, eg, Zolo, above n 17, 734, on how the adversarial process can reinforce feelings of hostility.


94 See, eg, Tzvetan Todrov, ‘The Limitations of Justice’ (2004) 2 Journal of International Criminal Justice 711, 712, on the difference between factual or ‘legal truth’ and other forms of ‘truth’ that one arrives at through interpretation. See also Stover and Weinstein, above n 23, 4, where they stress that for the victims of mass atrocities, truth often lies not in the facts themselves but in their moral interpretation.

95 For further discussion of truth commissions, see especially Robert Rotherberg and Dennis Thompson (eds), Truth v Justice: The Morality of Truth Commissions (2000). While truth commissions, such as the South African Truth and Reconciliation Commission, have been criticised for failing to hold criminals accountable to the extent of a criminal trial, the benefits, particularly the way in which they can help bring about a peaceful transition, may still be found to outweigh the costs: cf Kingsley Chiedu Moghalu, ‘Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions’ in Ramesh Thakur and Peter Malcontent (eds), From Sovereign Impunity to International Accountability (2004) 197, 200.

96 Curran, above n 93, 309. In her analysis of the French war crimes trials of Barbie and Touvier, Curran argues that the legal proceedings were weighed down by historical, political and educational objectives. See also Arendt’s criticism of the Eichmann trial in Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1964).

97 For a discussion of criticisms of the Amnesty Act, see Akhavan, above n 6, 410.
conflict resolution. Moreover, the fact that amnesties failed in the past does not necessarily mean that they will fail in the future. As pointed out by the Refugee Law Project, ‘peace within the constraints of a set timeframe is a flawed approach’. If in the future it appears that there is no other viable alternative, in the interests of peace there should be at least the option of granting amnesty, even to the most criminally responsible.

The granting of such amnesties, however, should be a last option — the exception and not the rule. As Robinson argues, any such exception should occur only in situations of ‘drastic necessity’ and would have to be very stringently justified. Consideration should be given to the quality of the measures taken as an alternative to prosecution and the severity of the factors necessitating a deviation. Though, in the end, deciding whether amnesties are necessary and should be deferred to by the Prosecutor involves careful political judgement, reinforcing the fact that law and politics cannot be entirely divorced in the realm of international criminal justice. All the circumstances should be taken into account. For example, care should be taken to ensure that amnesties will not

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98 Refugee Law Project, above n 6, 7.
100 Examples of this include where prosecutions would amount to ‘political suicide’ for a fragile democracy or would trigger further conflict and violence: see Robinson, above n 15, 495.
101 Cf Bassiouni, above n 80, 27: ‘That is the essence of the mediator’s dilemma — how to bring about peace without sacrificing justice … To avoid this dilemma in the future, the peace negotiators acting in good faith in the pursuit of peace must be immune from the pressures of having to barter away justice for political settlements … Impunity must … be removed from the “tool box” of political negotiators’ (citations omitted).

However, Bassiouni does not resolve the dilemma. He simply avoids it by removing amnesties from the ‘tool box’ and in doing so he does not discuss the implications this could have on the length of a conflict, or even the fact that as a result peace negotiations could be rendered impossible.
102 Robinson, above n 15, 495. See also Michael Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 Cornell International Law Journal 507, 512. For example, amnesties are unlikely to be justified when they are granted by members of a regime to themselves while they are in power: see Majzub, above n 80, 259.
103 Ibid 497.
104 See Curran, above n 93, 309–10, on the interrelated nature of law and politics which is rendered more visible in international criminal law. See also Simpson, above n 31, 48–52.
result in reinforcing a continuing culture of impunity,\textsuperscript{105} but instead will bring an immediate cease to the hostilities.

It should also be kept in mind that the nature of any settlement must be context specific, taking into account the complex history and political dilemmas from which any settlement is to emerge. Both the government involved and the international community should keep an open mind to alternatives to prosecution that will ensure that there is no further unnecessary bloodshed. While traditional mechanisms and truth commissions granting conditional amnesties may be the most desirable alternatives, the possibility of using wider ranging amnesties should not be foreclosed given the lives that can be saved if the hostilities are brought to an immediate halt. It is especially important to ensure that ICC involvement is not the cause of undue rigidity, as this may come at a high price for all those at risk in the conflict.

V Conclusion

Though many have questioned the desirability of the ICC intervention in ongoing conflicts, as long as the Prosecutor proceeds in an impartial and cautious manner, the involvement of the Court has the potential to have a beneficial impact. The issuing of the five arrest warrants against the LRA has already served to denounce the atrocities that are occurring and has provided a means to encourage others to act. However, to ensure that ICC involvement does not do more harm than good, adequate safeguards should be put in place guaranteeing that proper consideration is given to the desirability of commencing and continuing investigations and prosecutions. As outlined above, this could be achieved by extending the situations where the ‘interests of justice’, broadly construed, have to be considered by the Prosecutor and the decision subject to review. If the ICC is to be seen as a legalistic institution rather than a political one, it is important that substantial checks and balances be put in place to guide and review the exercise of prosecutorial discretion. Moreover, in this heavily politicised area, the greater the checks and balances in place, the lesser the risk that the Court will proceed down a path that is perilous for the innocent civilians whose lives are at risk.

\textsuperscript{105} Which occurred in Sierra Leone and resulted in the amnesties later being reversed: see Robinson, above n 15, 496.
It is vital that all those involved do not get caught up in the legal enterprise and lose sight of the realities of war and the other alternatives that are available. Given the limitations of what the law can achieve, especially due to practical and political constraints and the unpredictable nature of ongoing conflicts, the way in which other processes can supplement legal trials should be explored. Putting too much blind faith in the institution of legal proceedings, which may never eventuate given the difficulty of carrying out arrests, will potentially come at a high price. Not only might efforts for peace in Uganda be thwarted, but also confidence in the ICC’s ability to ensure ‘the peace, security and well-being of the world’ may be undermined.\(^{106}\) These are trying times for the Court. It must do all that it can to ensure that the pursuit of justice does not come at the price of peace.

\(^{106}\) Rome Statute, above n 1, Preamble.