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Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court

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Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court

ALEXANDER K.A. GREENAWALT*

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INTRODUCTION

In recent years, the government of Uganda has been engaged in peace talks with the rebel Lord's Resistance Army (LRA) to end the nation's devastating civil war. By most accounts, the talks have represented the best chance yet to realize a conclusive end to the twenty-year conflict, but negotiations have frequently stalled because of the still unresolved question of accountability for serious crimes.¹ In 2005, the International Criminal Court (ICC or Court) issued arrest warrants for a handful of LRA leaders accused of crimes against humanity and other grave offenses.² Although it was Uganda that initially referred the matter to the ICC,³ the government later took the position that it would seek withdrawal of the ICC warrants if the accused agreed to undergo a traditional tribal justice ritual that requires a public confession and an apology without threat of incarceration.⁴ More recent developments in Uganda indicate a plan to supplement traditional justice with more formal court proceedings for those accused of the most serious crimes. However, it

1. *See infra* Part II.

2. *See* Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005), available at <http://www2.icc-cpi.int/iccdocs/doc/doc97185.PDF> [hereinafter Kony Warrant]; Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Vincent Otti (July 8, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc97189.PDF> [hereinafter Otti Warrant]; Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo (July 8, 2005), available at <http://www2.icc-cpi.int/iccdocs/doc/doc97197.PDF> [hereinafter Odhiambo Warrant]; Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Dominic Ongwen (July 8, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc97201.PDF> [hereinafter Ongwen Warrant]; Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Raska Lukwiya (July 8, 2005), available at <http://www2.icc-cpi.int/iccdocs/doc/doc97193.PDF> [hereinafter Lukwiya Warrant].

3. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44 (Jan. 29, 2004), available at <http://www.icc-cpi.int/Menu/Go?id=04d961fa-a963-4b7e-9ce0-e8a0ebf95822&lan=en-GB>.

4. *See* Adrian Croft, *Uganda Offers "Blood Settlement" to LRA Rebels*, REUTERS, Mar. 12, 2008, <http://www.reuters.com/article/featuredCrisis/idUSL11891647>.

remains unclear whether this formality shall be accompanied by more meaningful punishment. How the ICC will respond to a request for deference to local justice also remains unresolved, and the LRA has previously maintained that it will not surrender until the ICC withdraws the warrants. Indeed, the LRA has repeatedly blamed the ICC's failure to do so for the breakdown of negotiations.⁵

In an earlier article dealing with prosecutorial discretion and the ICC, I argued that the particular structure and context of the Court imposes fundamental policy dilemmas on the ICC prosecutor that go to the core of the ICC's goals.⁶ These dilemmas cannot be resolved by reference to existing legal standards or those standards created by the ICC's constitutive treaty, colloquially known as the Rome Statute.⁷ The Ugandan peace process presents the ICC with its first crisis of this kind. On one level, this episode reflects a classic dilemma of transitional justice, raising the oft-debated question of whether, and to what extent, criminal justice may be compromised for the sake of peace. When viewed through the particular framework of the ICC, however, the episode raises a distinct set of difficult institutional problems. Unlike predecessor international criminal tribunals created on an ad hoc basis to address specific historical events,⁸ the ICC is a standing tribunal with broad temporal and geographic jurisdiction,⁹ staffed by prosecutors and judges authorized to pursue many cases without the formal consent of any out-

5. See Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1.

6. Alexander K.A. Greenawalt, *Justice Without Politics: Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583 (2007).

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

8. Tribunals created on an ad hoc basis include the International Military Tribunals in Nuremberg and Tokyo established by the Allied powers to prosecute international crimes committed by the defeated Axis powers during World War II, as well as those created by the UN Security Council to prosecute international crimes committed during the 1990s in the former Yugoslavia and Rwanda. See Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 1, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) (granting jurisdiction over international crimes "committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994"); Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 1, S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (Feb. 22, 1993) (extending jurisdiction to "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"); Charter of the International Military Tribunal for the Far East, art. 1, Jan. 19, 1946, T.I.A.S. No. 1589 (establishing a tribunal "for the just and prompt trial and punishment of the major war criminals in the Far East"); Charter of the International Military Tribunal, art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (establishing a tribunal "for the just and prompt trial and punishment of the major war criminals of the European Axis").

9. The Court's jurisdiction extends to war crimes, crimes against humanity, and genocide committed after the Statute's entry into force in 2002. Rome Statute, *supra* note 7, arts. 5, 11.

side actor.¹⁰ The Court's unusual measure of institutional independence ostensibly was intended to depoliticize the business of international criminal justice by leaving the law to the lawyers. By contrast, past tribunals relied on political bodies, such as the UN Security Council, for their jurisdiction in individual cases.¹¹

As the Uganda crisis reveals, however, this transfer of formal authority has failed to produce meaningful criteria dictating how exactly the ICC should exercise its authority. To put it more specifically, we are often told that the ICC—with its prominent framework of “complementary” jurisdiction—is a last resort, designed to intervene only when national legal systems fail.¹² As indicated by the Ugandan experience, however, the Rome Statute leaves unanswered fundamental questions about how far states recovering from mass violence should be required to go in pursuit of criminal justice.¹³

These observations require a recharacterization of the ICC as it is commonly perceived. While the Court is a criminal tribunal charged with the prosecution of individual suspects, it is also empowered, as a necessary incident of its prosecutorial power, with broad administrative policy discretion to evaluate the adequacy of transitional justice policies undertaken by states in which crimes under the Court's jurisdiction have

10. For crimes committed on a state party's territory or by a state party national, the prosecutor may initiate investigations and seek arrest warrants based either on the referral of a state party or on his own authority. Rome Statute, *supra* note 7, arts. 12–15. Otherwise, the Court requires a referral from the UN Security Council to proceed. *Id.* art. 13(b).

11. Although the United States lobbied to have all ICC cases be contingent upon an initial UN Security Council referral, a group of so-called “like-minded” states prevailed in securing the ICC's existing referral system that grants greater authority to the Court itself. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 15–20 (1st ed. 2001). The “like-minded” states defended this position by emphasizing that the ICC must be driven by legal considerations rather than political influence. *See Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, Report*, ¶ 121, U.N. Doc. A/50/22 (Sept. 6, 1995) [hereinafter *Ad Hoc Comm. on ICC Report*] (reporting worries that mandatory Security Council referral “would reduce the credibility and moral authority of the court; excessively limit its role; . . . [and] introduce an inappropriate political influence over the functioning of the institution”). This position also drew strong support from representatives of nongovernmental organizations who played a critical role in defining and supporting the agenda of the “like-minded” states. *See* William R. Pace & Mark Thieroff, *Participation of Non-Governmental Organizations*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 391, 392–93 (Roy S. Lee ed., 1999) (noting that “[m]any governments, the Secretary-General, other United Nations officials and media experts have commented on the decisive role of NGOs at the Rome Conference”).

12. *See, e.g.*, Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Address at Nuremberg: Building a Future on Peace and Justice (June 24–25, 2007), available at http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf [hereinafter *Moreno-Ocampo Address at Nuremberg*] (explaining that “a system of complementarity was designed whereby the Court intervenes as a last resort, when States are unable or unwilling to act”).

13. *See* Rome Statute, *supra* note 7.

occurred. This administrative quality of the Court's work poses difficult institutional dilemmas that receive no explicit attention in the text of the Rome Statute and seem to play no role in the traditional rationales invoked to justify the Court's creation. Indeed, the problem goes to the very heart of the Court's legitimacy as a supranational institution authorized to override the efforts of states, to whose populations the Court is not democratically accountable. To the extent that many critical decisions are therefore not guided by meaningful legal criteria, has the Rome Statute delegated decisional authority to the wrong actors? Which policies, if any, should the ICC's prosecutors and judges adopt to address these challenges?

In this Article, I take up these questions through a focused analysis of the Uganda prosecutions, considering both the interpretive dilemmas facing the Court and the efforts of Prosecutor Luis Moreno-Ocampo to address them. Part I provides a summary of events leading to the LRA arrest warrants and the recent peace negotiations. Part II turns to the text of the Rome Statute, with a focus on Article 19's framework for complementary jurisdiction¹⁴ and the Article 53 dictate that "interests of justice" may trump the admissibility of investigations and cases that otherwise meet all relevant statutory criteria.¹⁵ Although the ICC is structured to give deference to domestic proceedings, application of these provisions to the Ugandan peace process reveals deep uncertainties regarding the ICC's core relationship to domestic governance. Part III explores how these uncertainties upset standard rationales for the Court's creation and looks to Prosecutor Moreno-Ocampo's response to the Ugandan peace process, focusing both on the failure of existing prosecutorial guidelines to address the situation adequately and on the possibility of relying on various other actors to resolve the Ugandan dilemma. In the Conclusion, I consider different conceptions of the Court that emerge from my discussion. I conclude that the Ugandan peace process reveals the Court to be a promising but unstable institution, one whose legitimacy may ironically depend on help from external stakeholders, including the very political actor—the UN Security Council—whose importance the Rome Statute was designed, in part, to diminish.

I. BACKGROUND: THE ICC ARREST WARRANTS

For the last twenty years, the LRA has been engaged in an armed conflict against the government of Uganda.¹⁶ Led by Joseph Kony, a

14. Rome Statute, *supra* note 7, art. 19.

15. *Id.* art. 53.

16. For a general account of the LRA's rise, see TIM ALLEN, TRIAL JUSTICE: THE

self-professed “spirit medium” who claims he will rule Uganda according to the Ten Commandments, the LRA has been responsible for widespread atrocities. The group has primarily targeted Uganda’s ethnic Acholi who populate the Acholiland region of northern Uganda where the insurgency initially took root and whose interests the LRA claims to protect. Under Kony’s leadership, the LRA has been responsible for the forced abduction, conscription, and abuse of tens of thousands of children, who at times have comprised as much as eighty-five percent of the group’s forces.¹⁷ Reports paint a grim picture of these abductees’ treatment. According to one ICC document, the children are

used as soldiers, porters, labourers and sexual slaves in the case of girls. As part of initiation into the rebel movement, abducted children are forced into committing inhuman acts, including ritual killing and mutilations. The total number of abducted children is reported to be over 20,000. Children are reported frequently beaten and forced to carry heavy loads over long distances, loot and burn houses, beat and kill civilians and fellow abductees, and abduct other children.¹⁸

LRA gunmen have also been responsible for indiscriminate murder, mutilation, torture, and rape of civilians, as well as widespread destruction of property. These atrocities, moreover, have produced a corresponding humanitarian crisis in northern Uganda, where somewhere around one million residents—as much as seventy-five percent of the population in these districts—have been displaced. To avoid abduction, thousands of other children have become “night dwellers,” leaving their villages only at night and “walking large numbers of kilometres to regroup in centres run by non-governmental organisations, on the streets, on shop verandas, on church grounds, and in local factories heading back to their villages at dawn.”¹⁹

Over the last several years, the Ugandan government has pursued multiple strategies to end the war. In addition to military efforts, the government passed legislation in early 2000 offering blanket amnesty to any LRA member who agreed to surrender and renounce involvement with the rebellion.²⁰ A seven-member Amnesty Commission is respon-

INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY (2006).

17. Int’l Criminal Court, Background Information on the Situation in Uganda (Jan. 29, 2004), available at <http://www.pambazuka.org/en/category/rights/19769> [hereinafter Background Information] (note that the ICC removed the original background information document from its website before this Article went to print); cf. ALLEN, *supra* note 16, at 63 (questioning the eighty-five percent statistic, but noting that “[t]he scale of child abduction has been terrible”).

18. Background Information, *supra* note 17.

19. *Id.*

20. Amnesty Act, 2000 ch. 294 § 3 (2000) (Uganda), available at <http://www.ulii.org/>

sible for the administration of the statute.²¹ As of August 2008, at least 12,481 former LRA rebels had reportedly received amnesty under the Act.²² Those receiving amnesty have included both low-level perpetrators and high-level LRA commanders.²³

In June 2002, the Ugandan government ratified the Rome Statute.²⁴ This action allowed the ICC prosecutor, acting either on his own initiative or at the referral of a treaty party, to commence investigations and prosecutions of specified international crimes committed by Ugandan citizens or on Ugandan soil after the treaty's July 1, 2002 effective date.²⁵ With atrocities continuing, Uganda formally referred the LRA's crimes to the ICC in January 2004.²⁶ The ICC prosecutor duly initiated an investigation and, in July 2005, procured arrest warrants for Joseph Kony and four other LRA leaders,²⁷ two of whom, according to reports, have since died.²⁸

The Ugandan investigation was a landmark event in several respects. It represented the first time a state party had referred a situation to the ICC, and the resulting warrants were the first that the ICC issued.²⁹ De-

ug/legis/consol_act/aa2000294120/.

21. *Id.* §§ 6–8.

22. Zahra Abigaba & Grace Matsiko, *Government Pardons 23,000 Rebels*, DAILY MONITOR (Kampala), Aug. 12, 2008, available at http://www.monitor.co.ug/artman/publish/news/Government_pardons_23_000_rebels_69.719.shtml. The article also indicates that the total number of amnesties under the Act is close to 23,000 when all Ugandan rebel groups are counted. *Id.*

23. OFFICE OF THE UN HIGH COMM'R FOR HUMAN RIGHTS, MAKING PEACE OUR OWN: VICTIMS' PERCEPTIONS OF ACCOUNTABILITY, RECONCILIATION AND TRANSITIONAL JUSTICE IN NORTHERN UGANDA 27 (2007) [hereinafter MAKING PEACE OUR OWN].

24. See ICC – Uganda, <http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Uganda.htm> (last visited Sept. 19, 2009).

25. Rome Statute, *supra* note 7, art. 11. Pursuant to Article 126, the Rome Statute entered into force sixty days after the date of deposit of the sixtieth instrument of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations. *Id.* art. 126; see also Leila Nadya Sadat, *The International Criminal Court Treaty Enters Into Force*, ASIL INSIGHTS (April 2002), available at <http://www.asil.org/insigh86.cfm>. As of June 1, 2009, the ICC had 110 members. ICC – The States Parties to the Rome Statute, <http://www2.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm> (last visited Sept. 19, 2009) [hereinafter States Parties to the Rome Statute].

26. Press Release, *supra* note 3.

27. See Kony Warrant, *supra* note 2; Otti Warrant, *supra* note 2; Odhiambo Warrant, *supra* note 2; Ongwen Warrant, *supra* note 2; Lukwiya Warrant, *supra* note 2.

28. The Court has formally withdrawn Raska Lukwiya's warrant on account of his death. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Prosecution's Request that the Warrant of Arrest for Raska Lukwiya Be Withdrawn and Rendered Without Effect Because of His Death (Mar. 22, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc297257.pdf>. The LRA has reportedly executed Vincent Otti upon Kony's order, but the warrant against him remains. See *Uganda's LRA Confirm Otti Death*, BBC NEWS, Jan. 23, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7204278.stm>.

29. See generally Mahnoush Arsanjani & W. Michael Reisman, *Developments at the International Criminal Court: The Law-In-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385 (2005); William Schabas, *First Prosecutions at the International Criminal Court*, 27 HUM.

spite Moreno-Ocampo's receptiveness to the referral, the warrants raised questions about the scope of Article 17 of the Rome Statute, which renders inadmissible cases "being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."³⁰ As Mahn-oush H. Arsanjani and W. Michael Reisman have observed, the drafters of the Rome Statute generally conceived of the Court as a check on recalcitrant states rather than as a mechanism by which states would voluntarily cede jurisdiction over domestic legal matters.³¹

Although the LRA suspects all remain at large, the ICC referral and arrest warrants are credited—along with a reversal of military fortune—in bringing the LRA to the negotiating table.³² In the summer of 2006, a peace agreement seemed within reach as the government of Southern Sudan began brokering talks in Juba, Sudan between the LRA and the Ugandan government. The Juba talks produced a unilateral ceasefire by the LRA, followed by a truce agreement between the parties. After a temporary breakdown caused by the LRA's withdrawal, negotiations resumed in 2007, with regional observers from Kenya, Tanzania, Mozambique, DR Congo, and South Africa participating.³³

While I am hesitant to reduce the negotiating difficulties to a single factor, news reports have consistently portrayed the ICC's involvement as a major stumbling block.³⁴ Not surprisingly, the LRA leadership has insisted on immunity from ICC prosecution.³⁵ The Ugandan government, for its part, has shown a willingness to compromise and consider

RTS. L.J. 25 (2006).

30. Rome Statute, *supra* note 7, art. 17(1)(a).

31. Arsanjani & Reisman, *supra* note 29, at 387. A state that proactively refers a case to the ICC would hardly seem "unwilling" to prosecute, and the Rome Statute's provision for "inability" seems to contemplate more than Uganda's lack of success thus far in apprehending the suspects. Article 17(3) of the Rome Statute provides that "[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." Rome Statute, *supra* note 7, art. 17(3); *see also* JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 213 (2008) ("If one considers this practice of auto-referrals, one cannot fail to notice its tension with the formal framework of complementarity in general and the procedural setting of complementarity in particular.").

32. *See, e.g.*, INT'L CRISIS GROUP, AFRICA REPORT NO. 124, NORTHERN UGANDA: SEIZING THE OPPORTUNITY FOR PEACE ii (2007), *available at* http://www.crisisgroup.org/library/documents/africa/central_africa/124_northern_uganda_seizing_the_opportunity_for_peace.pdf.

33. *See* INT'L CRISIS GROUP, AFRICA BRIEFING NO. 46, NORTHERN UGANDA PEACE PROCESS: THE NEED TO MAINTAIN MOMENTUM 2 (2007), *available at* http://www.crisisgroup.org/library/documents/africa/central_africa/b46_north_uganda_peace_process_need_to_maintain_momentum.pdf.

34. *See, e.g.*, Gettleman, *supra* note 5, at A1.

35. *Id.*

various alternatives to ICC prosecutions, or indeed to conventional criminal justice. Much discussion has focused on Ugandan proposals to confront LRA abuses through the deployment of traditional informal dispute resolution methods historically relied upon by Uganda's various peoples to mete out justice at the local village level.³⁶ Indeed, traditional justice measures already have provided a method of integrating returning LRA members into their communities. These efforts have received the encouragement of Uganda's Amnesty Commission, acting under its statutory duty "to consider and promote appropriate reconciliation mechanisms in the affected areas."³⁷ Although traditional justice appears to enjoy some formal role within the Ugandan legal system as a general method of resolving cases referred by local courts,³⁸ the transplantation of justice to the village setting is marked both by the informality of the procedure employed and by a focus on monetary compensation and reconciliation rather than more severe criminal sanctions. According to one study of traditional justice in Acholi culture, the "most important" aspects of traditional justice are "the establishment of truth, the voluntary nature of the process (particularly on the behalf of the offender), the payment of compensation to restore what was lost, and finally the restoration of social relations and unity of the family and clans."³⁹ Given the

36. See *id.*; Emmy Allio, Felix Osike & John Odyek, *Kony Must Confess*, THE NEW VISION (Kampala), Feb. 21, 2007, available at <http://www.newvision.co.ug/D/8/13/550389>; Croft, *supra* note 4 (quoting Ugandan President Yoweri Museveni as saying that "what we have said in the agreement is that instead of using this formal Western type of justice we are going to use the traditional justice, a traditional blood settlement mechanism"); *Indictments Not on Talks Agenda, Says Rugunda*, NEW VISION (Kampala), Apr. 20, 2007, available at <http://www.newvision.co.ug/D/8/13/560996/Rugunda> (quoting Uganda internal affairs minister Ruhakana Rugunda as stating that "[o]ur position on the court indictments is that, the government will engage the ICC after a final peace agreement (is reached) and after the LRA have undergone the traditional justice system of mato-oput"); see also SCOTT WORDEN, U.S. INST. OF PEACE, THE JUSTICE DILEMMA IN UGANDA (2008), available at <http://library.usip.org/articles/1011526.977/1.PDF>.

37. Amnesty Act, 2000 ch. 294 § 8 (2000) (Uganda), available at http://www.ulii.org/ug/legis/consol_act/aa2000294120/; see also Barney Afako, *Reconciliation and Justice: Mato Oput and the Amnesty Act*, ACCORD, 2002, at 64, 67, available at <http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php> (noting that the Amnesty Commission has been supportive of initiatives to employ traditional Acholi rituals as a means of promoting reconciliation).

38. According to one study, traditional local courts often will refer ordinary cases—both civil and criminal—within their jurisdiction to traditional leaders and elders, including matters involving "petty theft, instances of *kiir* (breaking cultural norms), incest, domestic violence, land disputes, and, in some cases—murder—if it is believed that it can be resolved locally." ERIN BAINES, JUSTICE & RECONCILIATION PROJECT, THE COOLING OF HEARTS: COMMUNITY TRUTH-TELLING IN ACHOLI-LAND 11 (2007), available at <http://www.justiceandreconciliation.com/#/publications/4516360892>.

39. LIU INST. FOR GLOBAL ISSUES ET AL., ROCO WAT I ACOLI: RESTORING RELATIONSHIPS IN ACHOLI-LAND: TRADITIONAL APPROACHES TO JUSTICE AND REINTEGRATION 14 (2005), available at http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf.

concentration of both victims and perpetrators among the Acholi population, much attention has focused on a particular ritual known as *mato oput*⁴⁰ (literally, “drinking of the bitter root”), which the Acholi have traditionally used to address both intentional and accidental killings,⁴¹ and which exemplifies the aforementioned values. Although the particular elements of the *mato oput* may differ from case to case, the defining feature of this tradition is that it restores social harmony after a homicide through confessions, negotiated compensation, and, ultimately, reconciliation between the offender and the victim’s kin.⁴² The process culminates in a ritual whose individualized elements—typically including the beating of a stick, ritual slaughter, and the eating and drinking of various substances (including the “bitter root” for which the ceremony is named)—all play a symbolic role in furthering the goals of truth-seeking and reconciliation. Alongside the Amnesty Act, these and other cleansing rituals have played an important role to date in the reintegration of former LRA members into their communities.⁴³

Consistent with these practices of traditional justice, Ugandan authorities have repeatedly suggested that a comprehensive peace agreement would permit the specific LRA leaders sought by the ICC to undergo alternative justice procedures of some form or another without need for incarceration.⁴⁴ In early 2007, for example, the government’s lead negotiator maintained that the LRA leaders would be required to confess to their crimes, apologize, and become subject to certain sanctions, such as payment of reparations and restrictions on their freedom of movement.⁴⁵ Many accounts indicate that this solution enjoyed broad support among Ugandans, and especially the Acholi. Indeed, the Ugandan government largely justified its position by claiming that this is the course that the Acholi desire.⁴⁶ While visiting northern Uganda in September 2006, UN Under-Secretary-General for Humanitarian Affairs Jan Egeland reported that “the predominant feeling among all the stakeholders in the peace process is that the ICC warrant of arrest should be dropped against the LRA leaders so that a peaceful conclusion to the talks can be reached.”⁴⁷ He elaborated that “[t]here is no doubt that 98 percent of the IDPs [internally displaced persons] believe that peace is the priority and

40. BAINES, *supra* note 38, at 9.

41. LIU INST. FOR GLOBAL ISSUES ET AL., *supra* note 39, at 54, 57.

42. *Id.* at 54–66.

43. *See id.*; *see also* Afako, *supra* note 37, at 67.

44. *See supra* note 36 and accompanying text.

45. Allio et al., *supra* note 36.

46. *Id.*

47. Grace Matsiko, Frank Nyakairu & Paul Harera, *Kony Charges a Stumbling Block, Says UN Chief*, DAILY MONITOR (Kampala), Sept. 13, 2006.

punishment for crimes committed is not.”⁴⁸ Even Human Rights Watch, a leading advocate for conventional criminal trials of those most responsible for LRA atrocities, has acknowledged that only a “distinct vocal minority” of Ugandan displaced persons shares its views.⁴⁹ Other reports have painted a more complex picture, emphasizing a diversity of viewpoints and reasoning among victims while nevertheless confirming pervasive victim sentiment opposing the ICC warrants.⁵⁰

What, then, has divided the parties? The issue appears to be largely one of timing and assurances. The Ugandan authorities publicly pledged that they would go to the ICC to seek withdrawal of charges, but only after the LRA leaders surrendered and underwent the *mato oput* ceremony.⁵¹ The LRA, by contrast, repeatedly demanded the withdrawal of the charges as a pre-condition to a final agreement. Of course, such a withdrawal was not something the Ugandan government could accomplish without the cooperation of the ICC. As the *New York Times* noted in reference to the stalled negotiations in 2006, it was “an impasse that possibly only the international court [could] break.”⁵²

Since that time, the process has followed a familiar pattern. Months of negotiations have yielded apparent breakthroughs, only to have hopes dashed by Kony’s last-minute refusals to emerge and sign agreements. Each round also has revealed repeated attempts to devise acceptable alternatives to ICC jurisdiction. After returning to the negotiating table, the Ugandan government and the LRA signed a June 2007 Agreement on Accountability and Reconciliation (Agreement) dealing specifically with the question of accountability for serious crimes.⁵³ Although the

48. *There is hope for peace in the north – Egeland*, AFROL NEWS/IRIN, Nov. 15, 2006, <http://www.afrol.com/articles/22662>.

49. HUMAN RIGHTS WATCH, BENCHMARKS FOR ASSESSING POSSIBLE NATIONAL ALTERNATIVES TO INTERNATIONAL CRIMINAL COURT CASES AGAINST LRA LEADERS (2007), reprinted in BENCHMARKS FOR JUSTICE FOR SERIOUS CRIMES IN NORTHERN UGANDA 1, 4 (2008), available at http://www.hrw.org/legacy/pub/2008/ij/uganda_memos_cover.pdf.

50. One 2007 study of Ugandan victim sentiment found that “[s]entiments of anger and vengefulness and a desire for prosecution abound in many communities, though there are still some perceived pragmatic advantages to amnesty, particularly to facilitate the return home of low-level LRA perpetrators (including former abductees), whom many respondents consider ‘children of the community.’” MAKING PEACE OUR OWN, *supra* note 23, at ii. The same report confirms the existence of an “overwhelming desire for reconciliation,” albeit with views differing on how best to accomplish reconciliation. *Id.*

51. Allio at al., *supra* note 36.

52. Gettleman, *supra* note 5, at A8.

53. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement (Nov. 18, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc589232.pdf> [hereinafter Agreement on Accountability and Reconciliation]; see also UGANDA: LRA Talks Reach Agreement on Accountability, IRIN, June 30, 2007, <http://irinnews.org/Report.aspx?ReportId=73010>.

document's preamble highlights a specific commitment to "the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity," the Agreement raises more questions than it answers about the handling of LRA crimes.⁵⁴ Emphasizing throughout the dual goals of "accountability" and "reconciliation," the Agreement endorses a combination of methods to achieve them. On the one hand, the Agreement specifies that "[t]raditional justice mechanisms [including *mato oput* as well as others] . . . shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation."⁵⁵ On the other hand, it also provides that "[f]ormal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict,"⁵⁶ and that those "alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes" are subject to the jurisdiction of "formal courts provided for under the Constitution."⁵⁷

While these provisions would seem to abandon the idea of using *mato oput* or some other form of traditional justice to try Kony and other suspects targeted by the ICC, the Agreement on Accountability and Reconciliation does not equate the use of formal courts with the imposition of typical criminal penalties. Instead it provides that "[l]egislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict."⁵⁸ The Agreement offers no detail on what the content of these alternative penalties shall provide except that they shall, "as relevant, reflect the gravity of the crimes or violations; promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual's admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims."⁵⁹ Since the time of the Agreement, Ugandan President Yoweri Museveni has continued to endorse the idea of traditional justice or amnesty for Kony, thereby raising further questions as to whether the Agreement is intended as a departure from these measures.⁶⁰

54. Agreement on Accountability and Reconciliation, *supra* note 53, pmb1.

55. *Id.* cl. 3.1.

56. *Id.* cl. 4.1. This provision suggests a further distinction between LRA and government suspects by providing that "state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement." *Id.*

57. *Id.* cl. 6.1.

58. *Id.* cl. 6.3.

59. *Id.* cl. 6.4.

60. See, e.g., *Ugandan Rebel Leader Still Eligible for Amnesty: Museveni*, AGENCE FR-PRESSE, Mar. 9, 2009, available at 3/9/09 AGFRP 18:10:00 (Westlaw).

In February 2008, the parties executed a further annex to the June 29th agreement specifying, among other provisions, that trials of individuals accused of serious crimes shall be handled by a newly created special division of the High Court of Uganda.⁶¹ The annex also reaffirms the commitment to traditional justice, including *mato oput*, and provides for the establishment of a government body charged with truth-seeking and preservation of historical memory, among other tasks.⁶² Days later, the parties announced a “permanent cease-fire” agreement, hailed by one media source as “a major step toward a final peace settlement to their two-decade war.”⁶³ In April, however, Kony once again refused to appear for a scheduled signing ceremony and reverted to his previous refusal to sign a final peace agreement until the ICC had quashed the outstanding warrants.⁶⁴ Another scheduled signing came and went that November.⁶⁵ In the meantime, news reports reflected increasing LRA abductions of young children.⁶⁶

With the prospects of a negotiated peace appearing increasingly remote, Uganda reverted to military efforts in late 2008, launching a joint operation with DR Congo and Sudan aimed at encircling and defeating the LRA in the area of the Congo-Uganda border.⁶⁷ Although the operation benefited from U.S. military assistance, initial reports indicated a botched operation that backfired after Kony and the bulk of his forces escaped intact and promptly proceeded to take their revenge on Congolese villagers.⁶⁸ By early February the rampage had reportedly claimed the lives of almost one thousand civilians, with others abducted or left mutilated.⁶⁹

Notwithstanding these initial setbacks, the renewed military pressure appeared for a time to be taking its toll on the LRA. First, reports emerged that two of the three living suspects accused by the ICC—LRA

61. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Annexure to the Agreement on Accountability and Reconciliation, cl. 7 (June 29, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc589233.pdf> [hereinafter Annexure to the Agreement].

62. *Id.* cls. 3, 19–21.

63. *Uganda and Rebels Sign Cease-Fire*, N.Y. TIMES, Feb. 24, 2008, at A4.

64. Jeffrey Gettelman & Alexis Okeowo, *Warlord's Absence Derails Another Peace Effort in Uganda*, N.Y. TIMES, Apr. 12, 2008, at A9.

65. Jeffrey Gettelman & Eric Schmitt, *U.S. Aided a Failed Plan to Rout Ugandan Rebels*, N.Y. TIMES, Feb. 6, 2009, at A1.

66. See Press Release, Human Rights Watch, *Uganda: LRA Atrocities Demand Action* (May 19, 2008), available at <http://www.hrw.org/en/news/2008/05/19/uganda-lra-regional-atrocities-demand-action>.

67. Gettelman & Schmitt, *supra* note 65, at A1, A7.

68. *Id.*

69. *Id.* at A1; see also HUMAN RIGHTS WATCH, *THE CHRISTMAS MASSACRES: LRA ATTACKS ON CIVILIANS IN NORTHERN CONGO* (2009), available at http://www.hrw.org/sites/default/files/reports/drc0209webwcover_1.pdf.

commanders Dominic Ongwen and Okot Odhiambo—had defected from the rebels and were willing to surrender in exchange for amnesty and assurances that they would not be sent to the ICC.⁷⁰ Both men are charged with directing LRA atrocities, and the Odhiambo warrant singles him out for particular brutality, noting that he “is described by former LRA commanders and members as a ‘ruthless killer’, ‘the one who killed the most’, and ‘a ‘bitter’ man who will kill anyone.’”⁷¹ Next, reports emerged that Kony was surrounded in a swamp in DR Congo with a reduced force of only 250 fighters and little hope of escape.⁷² In March, however, Uganda withdrew its troops from DR Congo, raising fears that the operation had failed and that Kony might return to Uganda to commit additional crimes.⁷³

As this Article goes to press, the final contours of peace and justice in Uganda remain unclear. The possibility of the LRA’s military defeat might render irrelevant any offers made in earlier negotiations, but proposals to employ alternative justice mechanisms have in fact continued. At a February 2009 press conference, Museveni reportedly promised amnesty to Ongwen and Odhiambo and emphasized that Kony would also have received amnesty had he signed the Juba peace agreements the previous April.⁷⁴ Museveni has also recently reemphasized that “Kony still has a chance to take advantage of the amnesty if he stops fighting.”⁷⁵ At the same time, Uganda has yet to clarify the nature of the court system promised under the 2008 annex. Thus, not only do the major LRA suspects remain at large, but it remains unclear what, if any, punitive measures will be applied in the event the suspects are apprehended.⁷⁶ Given the LRA’s past behavior, it is reasonable to suppose that Kony will not surrender absent a commitment on Uganda’s part to minimal, even token, punishment.⁷⁷ Moreover, the ICC arrest warrants

70. Bill Oketch et al., *Kampala Faces Odhiambo Dilemma*, ICC AFR. UPDATE (Inst. for War & Peace Reporting), Jan. 29, 2009, <http://www.iwpr.net/EN-acr-f-349637>.

71. Odhiambo Warrant, *supra* note 2, ¶ 9.

72. Barbara Among, *Kony, 250 Rebels Trapped in Swamp*, THE NEW VISION (Kampala), Feb. 15, 2009, available at <http://www.newvision.co.ug/D/8/12/671597>.

73. Samuel Richard Egadu, *Congo Withdrawal Sparks Panic*, ICC AFR. UPDATE (Inst. for War & Peace Reporting), Mar. 17, 2009, <http://www.iwpr.net/?p=acr&s=f&o=351062>.

74. *Odhiambo Won't Face World Court*, THE NEW VISION (Kampala), Feb. 10, 2009, available at <http://www.newvision.co.ug/D/8/12/671013>.

75. *Ugandan Rebel Leader Still Eligible for Amnesty*, *supra* note 60.

76. See Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision on the Admissibility of the Case Under Article 19(1) of the Statute, ¶ 44 (Mar. 10, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc641259.pdf>.

77. Milton Olupot, *LRA, Gov't Agree on Disarmament*, THE NEW VISION (Kampala), Feb. 25, 2008, available at <http://www.newvision.co.ug/D/8/12/613519> (“Prominent Acholi have welcomed the progress in the peace talks but expressed doubt whether Kony would submit himself to a special division of the Ugandan High Court, as agreed last week.”).

remain in effect with no word as to whether, and under what conditions, the ICC will defer to domestic justice initiatives.

II. UGANDA AND THE ROME STATUTE

As a legal matter, the LRA's concerns about the enforceability of a final peace deal that sidelines the ICC are well-founded. Although it was Uganda itself that referred the LRA's abuses to the Court, the Rome Statute lacks any provision contemplating the withdrawal of referrals submitted by States Parties.⁷⁸ And because Uganda is a party to the Rome Statute, the ICC prosecutor did not even require Uganda's authorization to bring charges against the LRA suspects.⁷⁹ The matter, then, is not really in Uganda's hands at all, as the arrest warrants for Kony and his underlings cannot be withdrawn unless the ICC itself agrees to do so.

Moreover, influential voices within the international human rights community have urged the ICC to reject domestic justice alternatives, at least to the extent that they do not offer serious punishments for serious international crimes.⁸⁰ These voices include former prosecutors of the ICC's predecessor international criminal tribunals.⁸¹ For instance, Richard Goldstone, former chief prosecutor for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, objected that the ICC is not "a convenient hot water tap that can be turned on or off" and has condemned Ugandan President Museveni for "acting in contravention of international law. . . . His government signed the . . . Rome Statute, and offers of amnesty violate the letter of the law."⁸²

78. See Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 222 (2008); Adel Maged, *Withdrawal of Referrals—A Serious Challenge to the Function of the ICC*, 6 INT'L CRIM. L. REV. 419, 420 (2006).

79. Rome Statute, *supra* note 7, arts. 12–13, 15.

80. See, e.g., Amnesty Int'l, *Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to End Impunity*, AI Index AFR 59/001/2008, at 4–5, (Mar. 1, 2008), available at [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/LRON-7CTEZN-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/LRON-7CTEZN-full_report.pdf/$File/full_report.pdf); HUMAN RIGHTS WATCH, *supra* note 49, at 5–7; Press Release, Human Rights Watch, Uganda: No Amnesty for Atrocities (July 28, 2006), available at <http://www.hrw.org/en/news/2006/07/28/uganda-no-amnesty-atrocities>.

81. See, e.g., Katy Glassborrow, *Peace Versus Justice in Uganda*, ICC AFR. UPDATE (Inst. for War & Peace Reporting), Sept. 27, 2006, available at <http://iwpr.net/?p=acr&s=f&o=324160>; Joe De Capua, *VOA News: LRA Leaders Must be Brought to Justice, Says a Former Chief Prosecutor* (Voice of America radio broadcast Apr. 23, 2007), available at <http://www.voanews.com/english/archive/2007-04/2007-04-23-voa12.cfm?moddate=2007-04-23>.

82. Glassborrow, *supra* note 81.

What, if anything, does the Rome Statute itself say about these matters? Does it provide any guidance as to what impact a final Ugandan peace deal might have on the outstanding warrants? Contrary to Goldstone's confident invocation of the "letter of the law," the ICC's constitutive treaty is surprisingly silent on this matter, raising difficult questions about how exactly the ICC's work should relate to national efforts. Substantial debate has focused on two provisions of the Rome Statute to which I turn here, both of which are central to the ICC's eventual response to a Ugandan peace proposal: Article 17, with its framework for mandatory deference to state investigations and prosecutions, and Article 53, which allows that the prosecutor may otherwise decline to investigate or prosecute based on the "interests of justice."

I am, of course, not the first to identify the ambiguities raised by these articles. In highlighting these provisions, however, my aim is not merely to expose interpretational complexities, but instead to call attention to the ways in which the application of these provisions to situations like that in Uganda complicates the very rationales traditionally invoked to justify the ICC's existence.

A. *Article 17: Complementarity*

It is often said that the ICC is a court of last resort, designed to intervene only when other avenues of justice have failed.⁸³ The Rome Statute's preamble emphasizes this design when it proclaims that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."⁸⁴ Article 17 of the Statute gives effect to this aspiration by providing that cases of genocide, crimes against humanity, and war crimes otherwise within the Court's jurisdiction may be inadmissible if subject to national investigation or prosecution.

The question of how ICC trials intersect with state proceedings is plainly an important one. From one vantage point, complementarity defines the scope of the Court's own work. Yet perhaps even more important is the perspective of the state seeking deference from the ICC. Although the Rome Statute itself does not speak in these terms, it is natural to conceive of complementarity as defining a state's obligations. At his swearing-in ceremony, current ICC Prosecutor Moreno-Ocampo emphasized that "[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure [of] its efficiency. On the contrary, the absence of trials before this Court, as a conse-

83. See, e.g., Moreno-Ocampo Address at Nuremberg, *supra* note 12 ("[T]he Court intervenes as a last resort, when States are unable or unwilling to act . . .").

84. Rome Statute, *supra* note 7, pmbl.

quence of the regular functioning of national institutions, would be a major success.”⁸⁵ The reverse implication, of course, is that the prosecution of a matter by the ICC signals that something has gone wrong at the national level or that efforts by domestic authorities have proven inadequate. In other words, the ICC’s structure ensures that in many cases the state itself is on trial in some substantial sense. For a state that now, like Uganda, seeks to avoid the intervention of the ICC, it is critically important to know which responses to past crimes will command the deference of the ICC.

1. *Text*

The requirements of Article 17 are superficially straightforward and provide separately for national proceedings at the investigation, prosecution, and post-judgment phases. First, a case “being investigated or prosecuted by a State which has jurisdiction over it” is inadmissible “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”⁸⁶ Similarly, if a state has investigated a case and “has decided not to prosecute the person concerned,”⁸⁷ the result must stand “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”⁸⁸ Finally, where a “person concerned has already been tried for conduct which is the subject of [a] complaint,” the case is inadmissible unless the proceedings in the other court “[w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court” or “[o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”⁸⁹

There is also an important procedural dimension to these provisions. In the event that the Court pursues an investigation or case, both the accused and any state with jurisdiction are entitled to contest jurisdiction and admissibility before a Pre-Trial Chamber, in which case complementarity becomes a judicially-applied principle.⁹⁰ The presiding Pre-Trial Chamber may also raise the question of admissibility on its own

85. Luis Moreno-Ocampo, Prosecutor of the Int’l Criminal Court, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003), available at <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>.

86. Rome Statute, *supra* note 7, art. 17(1)(a).

87. *Id.* art. 17(1)(b).

88. *Id.*

89. *Id.* arts. 17(1)(c), 20(3).

90. *Id.* arts. 18–19.

motion, as it has done recently with respect to the Uganda warrants.⁹¹ But the Rome Statute does not provide for judicial review of the prosecutor's initial decision to defer to state investigations or prosecutions unless a state party or the Security Council referred the situation to the Court, and the party who made the referral seeks further review.⁹² Thus, in at least some instances complementarity appears to become a matter of pure prosecutorial discretion. Less clear is the situation, potentially at issue in Uganda, in which the prosecutor seeks to withdraw existing charges based on a state's compliance with Article 17. The statute allows that "[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information,"⁹³ but elsewhere it provides that arrest warrants, once issued, "shall remain in effect until otherwise ordered by the Court."⁹⁴ Moreover, the statute requires judicial permission for the prosecutor to amend the charges at the pre-trial stage,⁹⁵ or withdraw the charges after trial has begun.⁹⁶ The deference, if any, owed to prosecutorial discretion in these circumstances is not specified.

2. *Problems*

The text of Article 17 has given rise to various interpretive questions that have commanded substantial scholarly attention, including book-length treatments.⁹⁷ Rather than attempt a comprehensive account of every thorny question that might arise, I will focus here on two slippery slopes that complicate the application of the complementarity standard to a situation like the one in Uganda. The first has to do with basic defi-

91. *Id.* art. 19(1); *see infra* Part III.B.3.

92. Rome Statute, *supra* note 7, art. 53(3)(a).

93. Rome Statute, *supra* note 7, art. 53(4).

94. *Id.* art. 58(4).

95. *Id.* art. 61(9).

96. *Id.* art. 61(10). The difference in phrasing between these two provisions is of further interest because it raises the question of what, if any, judicial oversight constrains the prosecutor's ability to withdraw rather than amend previously confirmed charges before the trial has begun.

97. *See, e.g.*, COMPLEMENTARY VIEWS ON COMPLEMENTARITY (Jann K. Kleffner & Gerben Kor eds., 2006); JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS (2008); JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY (2008); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008); Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255 (2006); Claus Kress, *'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy*, 2 J. INT'L CRIM. JUST. 944 (2004); William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5 (2008); Carsten Stahn, *Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695 (2005).

nitions, such as what constitutes a trial or an investigation. The second concerns tensions between the collective and individual nature of the determination. In both cases, the difficulty is essentially the same: application of the complementarity principle inevitably enmeshes the Court into contested questions about the purposes of international criminal justice for which there is no easy answer and which may, in fact, be unsolvable.

a. “Genuine” Investigations and Prosecutions

Much of what makes Uganda such a difficult test case for the application of Article 17 is the range of procedural models potentially available to address LRA atrocities. At one end of the spectrum is the Amnesty Act, which shields perpetrators from punishment so long as they renounce the LRA.⁹⁸ At the other end is the ICC itself, which makes available an actual court to try Kony and his fellow accused and also provides a procedural model rooted in conventional forms of criminal justice for domestic courts to emulate. In between these poles, and harder to categorize, is the model of Ugandan traditional justice exemplified by the *mato oput* ceremony.⁹⁹ By one measure, *mato oput* could be said to possess the bare trappings of a criminal trial. The envisioned ceremony includes an individualized admission of guilt followed by sanctions. But the token nature of the sanction, the lack of procedural rigor, and the emphasis on forgiveness and reconciliation reveal something very different from the kind of criminal justice typically associated with serious violent crimes, even under Uganda’s own justice system.¹⁰⁰ Finally, there is Uganda’s offer to employ “[f]ormal criminal and civil justice measures” through a special division of the formal court system.¹⁰¹ Here we have the specter of a proceeding whose external formalities may be those of a conventional trial but is subject to “a [yet-to-be-determined] regime of alternative penalties and sanctions,”¹⁰² whose goals explicitly should include “reconciliation between individuals and within communities.”¹⁰³

98. Amnesty Act, 2000 ch. 294 § 3 (2000) (Uganda), available at http://www.ulii.org/ug/legis/consol_act/aa2000294120/.

99. See LIU INST. FOR GLOBAL ISSUES ET AL., *supra* note 39, at 4, 14; Afako, *supra* note 37 and accompanying text.

100. See Human Rights Watch, Uganda: The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes (July 2007), <http://hrw.org/legacy/backgrounders/ij/uganda0707/>.

101. Agreement on Accountability and Reconciliation, *supra* note 53, cl. 4.1.

102. *Id.* cl. 6.3.

103. *Id.* cl. 6.4. Additionally, clause 4.1 suggests a further distinction between LRA and government suspects. *Id.* cl. 4.1 (“[S]tate actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement.”).

Applying Article 17 to these procedures presents obvious definitional problems. The statute does not explain what exactly it means for a state to “prosecute” a case. It also contemplates deference where a “case is being [or has been] investigated *or* prosecuted.”¹⁰⁴ Therefore, as some commentators have observed, Article 17 does not necessarily even require a prosecution at all. This phrasing has given rise to speculation that an institution, such as a truth commission, that investigates atrocities for purposes of truth-telling rather than punishment might count as an “investigation” for purposes of the Rome Statute.¹⁰⁵

Whatever one’s position on this matter, one point beyond dispute is that the requirement of investigation or prosecution is not a purely formal or mechanical demand. The Statute requires that these be genuinely carried out,¹⁰⁶ and it refuses deference to procedures that “were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”¹⁰⁷ In providing for this qualification, the drafters were most directly concerned with the prospect of states using sham proceedings—which might outwardly look much like genuine ones—to evade justice.¹⁰⁸ The situation in Uganda is obviously more complicated, however, because the argument for alternative justice mechanisms is rooted not in sympathy for the LRA or a desire to deny the culpability of Kony and others, but instead in a desire to promote peace and reconciliation alongside accountability. Determining whether nonconventional proceedings motivated by these goals are “genuine” prosecutions or investigations necessarily invites inquiry into contested questions regarding the purpose of both the criminal law and the ICC itself.

To perceive the difficulty here, it helps to begin with a restrictive interpretation of Article 17. With regard to the definition of what it means to genuinely prosecute, one might interpret the Statute to require proceedings that, subject to basic requirements of due process and humane

104. Rome Statute, *supra* note 7, art. 17(1)(a) (emphasis added).

105. See, e.g., William W. Burke-White, *The International Criminal Court and the Future of Legal Accountability*, 10 ILSA J. INT’L & COMP. L. 195, 198 (2003); Keller, *supra* note 78, at 237–39, 256–57; Stahn, *supra* note 97, at 708–09.

106. Rome Statute, *supra* note 7, art. 17(1)(a).

107. *Id.* art. 20(3)(b).

108. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee During March–Apr. & Aug. 1996)*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 154, U.N. Doc. A/51/22 (Sept. 13, 1996); see also *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 45, U.N. Doc. A/50/22 (Sept. 6, 1995); cf. KLEFFNER, *supra* note 31, at 115–16 (arguing that while the inclusion of “genuinely” in the Rome Statute was due more to concerns about sham or feigned proceedings than to requirements of good faith, a question is raised as to “whether the term ‘genuinely’ adds anything of substance to the way in which investigations and prosecutions have to be carried out . . .”).

punishment,¹⁰⁹ aim to ensure that the guilty receive sentences commensurate with their culpability irrespective of other extrinsic factors.¹¹⁰ A genuine investigation, according to this desert-based framework, would similarly focus on ensuring that the guilty receive their just deserts: a state might decline to pursue a prosecution if a thorough good faith investigation failed to turn up sufficient evidence to establish guilt, but the state would not be allowed to abandon an investigation or prosecution for reasons wholly unrelated to individual culpability, such as when the accused happens to be a member of the military or a government official. Similar principles would apply at the trial and sentencing stages, and not only to the prosecutors' conduct, but also to the judges and the adequacy of the rules and procedures governing the trial.

Of course, even within these relatively restrictive parameters, there is still potential for much complexity in the application of Article 17 requirements to a particular prosecution or investigation. In the first place, there is no definitive answer as to what the deserved punishment is for a particular offense. The trying court, however, can mitigate this problem by taking guidance from the general sentencing practices of international criminal tribunals or other courts within the state asserting jurisdiction.¹¹¹ There will also be questions regarding the degree of deference owed by the ICC to the domestic justice system's judgments about what a desert-based standard requires, from the initial questions of whether to prosecute and which crimes to charge, to the determination of the appropriate sentence. It may well be that a generous margin of latitude is required.¹¹² But even accounting for these caveats, it would not be hard to reject justice schemes that provide mass murderers with formal amnesty or limit their punishment to monetary compensation. Therefore, even affording Uganda's justice system a wide margin of latitude, the ICC would have little difficulty rejecting Uganda's efforts as inconsistent with a desert-based reading of the Rome Statute.

109. Article 17(2) of the Rome Statute specifies that the ICC's determination of a state's "unwillingness" to prosecute shall take into account "the principles of due process recognized by international law." Rome Statute, *supra* note 7, art. 17(2).

110. This, roughly, appears to be the approach endorsed by Human Rights Watch, which has argued that "[p]enalties that reflect the gravity of the crimes" must serve as a benchmark for assessing the sufficiency of any Ugandan alternative to ICC jurisdiction. HUMAN RIGHTS WATCH, *supra* note 49, at 9–10.

111. For a general discussion of the problems of desert-based sentencing, see Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145 (2008).

112. See Burke-White, *supra* note 97, at 75 (drawing from analogous areas of international human rights jurisprudence to argue that the ICC should afford a "margin of appreciation" to domestic determinations).

The more difficult question, however, is whether Article 17 should in fact be read to force states into the strict proportionality box that I have imagined. Indeed, the model I have just outlined does not even comport with the standard practices of criminal justice systems that routinely employ devices such as prosecutorial discretion and plea bargaining to abandon cases or reduce sentences based on systemic considerations unrelated to the desert of the individual accused.¹¹³ The considerations are even more complex in the context of international criminal law, where prosecutions frequently focus on places like Uganda where mass atrocities have fundamentally disrupted the social order and given rise to unique dilemmas. As I have observed elsewhere, the standard rationales invoked to establish the ICC and its predecessor international criminal tribunals have focused not simply on the goal of giving particular defendants their deserved punishments, but also on the broader aspiration that international trials will facilitate society-wide transformation by breaking cycles of violence, delegitimizing criminal regimes, and fostering peaceful societies rooted in the rule of law.¹¹⁴

113. Such practices have traditionally been more accepted in states that follow a common law model, but a longstanding debate has also existed about similar practices in civil law countries, and legislative developments in some jurisdictions have blurred the lines. *See, e.g.*, Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 610–26 (1990); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993). For a discussion of plea bargaining in the international context, see Julian A. Cook, III, *Plea Bargaining at The Hague*, 30 YALE J. INT'L L. 473 (2005).

114. Greenawalt, *supra* note 6, at 601–05; *see also, e.g.*, RUTI G. TEITEL, TRANSITIONAL JUSTICE 28 (2000) ("Why punish? The leading argument for punishment in periods of political flux is consequentialist and forward-looking: it is contended that, in societies with evil legacies moving out of repressive rule, successor trials play a significant foundational role in laying the basis of a new liberal order."); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001) (investigating "the impact of international criminal justice on postconflict peace building"); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2031–32 & n.3 (1998) ("[A] distillation of the goals most frequently articulated by the diplomats who established these tribunals and the relevant epistemic community of international lawyers" include goals to "channel victims' thirst for revenge toward peaceful dispute settlement; . . . tell the truth of what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence; and, perhaps most important, restore the lost civility of torn societies to achieve national reconciliation."); Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 51, 53–54 (Sarah B. Sewall & Carl Kaysen eds., 2000) ("The denial of atrocity is closely linked to the committing of atrocity. . . . After a war, distorted memories can lay the groundwork for a fresh outbreak of violence.").

In theory, these special background justifications for international criminal tribunals might not say much about the mechanics of prosecution at either the international or domestic level. Historically, one of the roles of international criminal tribunals has been—in Justice Robert H. Jackson’s famous words at Nuremberg—to “stay the hand of vengeance” by affording the worst war criminals a fair criminal trial that embodies the ideals of liberal society.¹¹⁵ But for purposes of applying Article 17 to situation like Uganda, much of the difficulty rests on the fact that advocates of alternative justice mechanisms invoke these very same forward-looking, transformational goals in justifying *limits* on states’ obligations to pursue conventional criminal justice.

These aspirations most famously took center stage when South Africa dismantled its apartheid regime and created a Truth and Reconciliation Commission (TRC) to grant individualized amnesties in exchange for full, public confessions of political crimes.¹¹⁶ In its final report, the TRC presented various rationales for why its method better realized values such as justice, peace, and accountability than could have been achieved by insisting on conventional criminal prosecutions.¹¹⁷ It argued that South Africa could not have made a peaceful transition to a more just society without offering amnesties to the outgoing regime; that insistence on individual prosecution would inevitably have run up against the realities of resource constraints, lost or inaccessible evidence, and uncooperative witnesses;¹¹⁸ and that the TRC facilitated a qualitatively distinct form of restorative justice based on reconciliation and forgiveness that is independently desirable and not possible through regular trials.¹¹⁹ Thus, despite some possible sacrifice in justice, the argument is that the TRC process as a whole facilitated a greater amount of aggregate justice or equivalent moral goods than would otherwise have been possible.

The same set of considerations applies even in situations where states do choose some form of prosecution rather than amnesty. Indeed, there exists not a binary choice between prosecution and non-prosecution, but rather a continuum of strategies, including selective prosecutions and alternative justice mechanisms that offer reduced sanctions and may not

115. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1945).

116. For a detailed account of the TRC’s creation and operation, see ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION* (2000).

117. See 1 THE TRUTH & RECONCILIATION COMM’N, THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (1998), available at <http://www.doj.gov.za/trc/report/finalreport/TRC%20VOLUME%201.pdf>.

118. *Id.* at 5–6.

119. *Id.* at 5, 9.

look like conventional criminal trials. In Rwanda, for example, the government has pursued the death penalty against many perpetrators of the 1994 genocide, but faced with the sheer enormity of participation in that crime, also has sent the vast majority of suspects (numbering in the tens of thousands) to informal village proceedings known as *gacaca* trials at which perpetrators are offered greatly reduced sentences in exchange for their confessions.¹²⁰ Even some leaders of the genocide are guaranteed as little as three and a half years prison time coupled with community service in exchange for their confessions.¹²¹ In most cases, moreover, the prison time has already been served in pre-trial detention. Although the Rwandan government has justified this approach partly based on resource constraints, it has also appealed to the value of reconciliation, hardly an irrelevant concept in a state where the genocide's primary victims, the Tutsi, remain a minority.¹²²

The dilemma, therefore, is that alternative justice schemes like the South African TRC and Rwandan *gacaca* trials fall somewhere on a continuum of justice. They do not offer full trials or full punishment in the conventional sense. But neither do they present the case of a state endorsing or turning its back on past crimes. To the extent that such schemes might be consistent with the Rome Statute, it is difficult to draw the line between sufficient and insufficient proceedings for the purposes of Article 17. Once the broader goals of reconciliation and political transition enter into the equation, any number of compromises to a fully desert-based scheme might be justified. Does a state comply with the Rome Statute's genuine prosecution requirement when it binds itself under a legislative bargaining scheme to impose sentences that are, for instance, only ten percent of what is considered deserved according to some benchmark such as the state's normal criminal justice practices? How about punishments that are even more lenient, entailing only

120. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, RWANDA (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41621.htm>; U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, RWANDA (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27744.htm>.

121. Organic Law Setting Up "Gacaca Jurisdictions" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1990 and December 31, 1994, No. 40/2000 of Jan. 26, 2001, in OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA, Mar. 15, 2001, arts. 69–70 (as modified by Organic Law No. 33/2001 of June 22, 2001, OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA, July 15, 2001), available at <http://www.inkiko-gacaca.gov.rw/En/EnLaw.htm>.

122. With respect to the background and current practices of *gacaca* trials, see generally HUMAN RIGHTS WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA (2008), available at <http://www.hrw.org/sites/default/files/reports/rwanda0708webwcover.pdf> and BERT INGELAERE, INST. OF DEV. POLICY & MGMT., "DOES THE TRUTH PASS ACROSS THE FIRE WITHOUT BURNING?" TRANSITIONAL JUSTICE AND ITS DISCONTENT IN RWANDA'S GACACA COURTS (2007), available at <http://www.ua.ac.be/objjs/00167435.pdf>.

community service, payment of compensation, or perhaps some form of public shaming? All of these questions are vital to the ICC's assessment of Uganda's domestic justice initiatives, whether they take the form of traditional village justice or rely on formal courts to mete out reduced or minimal sanctions for the guilty.

b. Individual Justice Versus Collective Justice

These observations point to the second slippery slope: the relationship between individual and collective justice under the Rome Statute. The text of Article 17 focuses on the individual accused. It asks whether a state has investigated "the case" at hand and whether it has prosecuted "the person" at issue.¹²³ Yet, one of the strongest justifications for non-traditional justice schemes is that they may actually provide more justice for societies recovering from mass atrocities than an atomistic focus that may more severely punish a select group of individuals while leaving the broader mass of wrongdoers at large. Had the South African regime insisted on full trials for every perpetrator, it might have failed to achieve the necessary political transition, or it might have found the effort so frustrating and costly that it could only pursue a few cases.¹²⁴ Rwanda's over-burdened justice system had held tens of thousands of genocide suspects in pre-trial detention for a decade before the *gacaca* trials began.¹²⁵ Had the government insisted on comprehensive criminal trials as the exclusive mechanism for confronting these crimes, it simply could not have processed a great number of these cases without stretching the process out for decades longer.¹²⁶ Because they cast a broader net, nonconventional responses may collectively better serve the goals of punishment even where they fail to ensure full accountability for individual offenders. To what extent does the Rome Statute authorize this more encompassing analysis?

Opinions on these questions have varied. In a 1998 speech in South Africa, then-UN Secretary-General Kofi Annan adopted a position highly favorable to a TRC-style process, condemning as a "travesty" the argument that "an exemplary process of national reconciliation might be torpedoed, since the Statute empowers the Court to intervene in cases where a State is 'unwilling or unable' to exercise its national jurisdiction."¹²⁷ He continued:

123. Rome Statute, *supra* note 7, art. 17.

124. See Greenawalt, *supra* note 6, at 614–16.

125. See *id.* at 624.

126. *Id.*

127. Press Release, The Secretary-General, Secretary General Urges 'Like-Minded' States to Ratify Statute of International Criminal Court, U.N. Doc. SG/SM/6686 (Sept. 1, 1998).

The purpose of that clause in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power.¹²⁸

A group of experts who convened to advise the ICC Office of the Prosecutor (OTP) on complementarity took a less confident view. Opining that alternatives to prosecution "should not be summarily dismissed," they simultaneously expressed skepticism that the highest-level perpetrators should benefit from such processes, and they further identified a set of criteria for assessing situations on a case-by-case basis.¹²⁹ The group further advised that "it would be preferable for the OTP to avoid promulgating too precise a position on the issue, until some experience is acquired in actual situations," but simultaneously cautioned that "a proactive stance will however be necessary if, for example, the OTP is consulted by a state party developing an alternative justice mechanism."¹³⁰

B. Article 53: Interests of Justice

Complementarity is not the only basis upon which the Rome Statute might favor deference to unconventional domestic processes. Article 53 further invokes the "interests of justice" as a separate and independent basis to block the ICC's investigation or prosecution of a case. It provides that the prosecutor may decline to investigate an otherwise admissible case when, "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."¹³¹ Similarly, the prosecutor may determine after investigation 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 victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."¹³²

128. *Id.*

129. INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE, NO. ICC-01/04-01/07, ¶¶ 72–73 (2003), available at <http://www2.icc-cpi.int/iccdocs/doc/doc656350.pdf>.

130. *Id.* ¶ 74.

131. Rome Statute, *supra* note 7, art. 53(1)(c).

132. *Id.* art. 53(2)(c).

Although the language of Article 53 is even more open-ended than the complementarity provisions of Article 17, the Rome Statute subjects its invocation to greater judicial review. In the event that the prosecutor elects not to proceed with a case solely due to the “interests of justice,” the decision must be reported to the Pre-Trial Chamber for review.¹³³ By contrast (and again unlike complementarity), there is no judicial check on this ground when the prosecutor *does* decide to proceed with a case. Therefore, complementarity provides the more secure method of avoiding judicial oversight when the prosecutor decides not to pursue a case and of securing judicial oversight when the prosecutor does decide to move forward.

To appreciate the significance of this provision, one must remember that it only has effect when the prosecutor determines the case is otherwise admissible: there must first be a suspect accused of genocide, crimes against humanity, or war crimes plus a state that has failed “genuinely to investigate or prosecute” the offense.¹³⁴ Pursuant to an additional statutory requirement, the crime must also be “of sufficient gravity to justify further action by the Court.”¹³⁵ Yet even when all these factors are present, the prosecutor may still decline to move forward on the ground that the interests of justice so dictate. As the ICC prosecutor has acknowledged, the “interests of justice” recognized by Article 51 are necessarily “broader than criminal justice in a narrow sense.”¹³⁶

Although the Rome Statute itself leaves wide open what circumstances might trigger the interests of justice, it was reportedly a debate over South Africa’s TRC that directly inspired the drafters to include this language.¹³⁷ Despite “widespread sympathy” for South Africa’s experience, delegates to the treaty’s drafting conference also raised concerns about other “disgraceful” amnesties like the one that the late Chilean President Augusto Pinochet had accorded himself.¹³⁸ Unable to agree on a specific legal test, the delegates settled on language that opened the door to such processes but provided no guidance as to the circumstances under which alternatives to prosecution might be accepted. In the words of the conference chair and current ICC president Philippe Kirsch, the “interests of justice” language reflects a decision to

133. *Id.* art. 53(1)–(3).

134. *Id.* art. 17(1)(a).

135. *Id.* art. 17(1)(d).

136. INT’L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY PAPER ON THE INTERESTS OF JUSTICE 8 (2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> [hereinafter INTERESTS OF JUSTICE].

137. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 185–86 (3d ed. 2007).

138. *Id.* at 185.

settle for “creative ambiguity,”¹³⁹ leaving the elaboration of more concrete standards regarding when to permit alternatives to prosecution to case-by-case evolution.

III. LEGITIMACY AND PROSECUTORIAL POLICY

The mere fact that the Rome Statute raises interpretive difficulties is hardly surprising. However, the problems posed by the Uganda peace process point to a deeper instability in the very structure of the International Criminal Court. The ICC, after all, is an institution structured on a relationship between national justice and international authority. Yet it is this very relationship that the Rome Statute leaves fundamentally undefined, ultimately calling into question the very justifications invoked to create the ICC in the first place. Advocates for the Court decried the political dependence of ad hoc predecessor tribunals whose limited mandates reflected the discrete priorities of particular political forces like the victors of World War II or the states comprising the UN Security Council.¹⁴⁰ By creating a permanent tribunal whose prosecutor possesses substantial independent authority to pursue cases free from any political trigger, the drafters of the Rome Statute sought to depoliticize international justice and move “a further step down the road from partiality to impartiality.”¹⁴¹ In other words, the ICC was founded partly on the idea that international criminal justice was a legal matter whose implementation must be trusted to competent legal professionals applying neutral legal rules, rather than to political actors. This conception of the ICC has also permeated the public rhetoric of the Court’s current officials. In a recent speech marking the Court’s ten-year anniversary, Moreno-Ocampo emphasized that “as the Prosecutor, my duty is to apply the law without political considerations. I cannot adjust to political con-

139. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 521–22 (1999); see also Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court*, 14 EUR. J. INT’L L. 481, 483 (2003) (“The drafters of the Rome Statute wisely chose not to delve into these difficult questions [of national amnesties]. . . . The drafters turned to the faithful and familiar friend of diplomats, ambiguity, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations.”).

140. See, e.g., *supra* note 11 and accompanying text. For a comparison of these ad hoc predecessor tribunals with the ICC in terms of jurisdiction, see *supra* notes 8–10 and accompanying text.

141. Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 51, 51–52 (Sarah B. Sewall & Carl Kaysen eds., 2000) (tracing the history from the “victor’s justice” of Nuremberg and Tokyo, to the superior but mandate-limited ad hoc tribunals, to the ICC).

siderations.”¹⁴² The Court’s President Kirsch has similarly urged that “[o]nce a process as [sic] been triggered, then the court has to function as a court, not as a political body”¹⁴³

This argument makes sense to the extent that broad international agreement exists regarding both the obligations of states in response to international crimes and the appropriate conditions for international intervention. But since those questions remain fundamentally unresolved, the authority of the ICC’s prosecutors and judges in many ways becomes more like that of an administrative agency given a broad statutory mandate to pursue independent regulation and policymaking. The ICC thereby becomes, in a sense, a regulatory agency whose responsibilities include the assessment of transitional justice policies undertaken by states where crimes within the Court’s jurisdiction have occurred.

Although reframing the ICC’s authority in this way might clarify matters, it also raises difficult questions about the Court’s underlying legitimacy. Standard justifications for administrative delegations have focused on the special expertise of administrators and the existence of democratic legitimacy through various forms of oversight by both elected officials and the public itself. The ICC, by contrast, does not fit easily within either framework. Are the judges and prosecutors of the ICC the appropriate actors to make broad-based policy judgments about what form of transitional justice is best for Uganda? If so, the reasons are not obvious, and there is no evidence that the drafters of the Rome Statute conceived of the ICC in this way. An inquiry into democratic legitimacy does not fare much better.¹⁴⁴ The 110 states that have ratified the Rome Statute vote collectively on a one-state-one-vote basis for appointment and removal of the ICC’s prosecutor and judges.¹⁴⁵ The ICC’s officials operate, in other words, on an international level that is far removed from the democratic politics of any particular state, much

142. Luis Moreno-Ocampo, Prosecutor, Int’l Criminal Court, Address at the London School of Economics: The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law (Oct. 8, 2008) [hereinafter Moreno-Ocampo Address at LSE] (transcript available at <http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20081007LuisMorenoOcampo.pdf>).

143. *War-Crimes Court Won’t Bend to Political Pressure: Canadian Head*, OTTAWA CITIZEN, Aug. 11, 2008. In the same interview, Kirsch provided further reassurance that he is “sure the court has acted only judicially and not politically at all.” *Id.*

144. In this sense, the ICC suffers from the same “democratic deficit” that plagues many international organizations. For a summary of literature confronting this problem, see Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 597–98 (1999).

145. Rome Statute, *supra* note 7, arts. 36, 42. For a list of the 110 States Parties, see States Parties to the Rome Statute, *supra* note 25. A simple majority is required both to select and dismiss the prosecutor, whereas a two-thirds super majority is needed to remove a judge. Rome Statute, *supra* note 7, art. 46.

less the politics of the states most directly affected by the Court's particular investigations. Once the Court moves from the realm of substantive criminal law to the open-ended policy dilemmas of transitional justice, what legitimacy does the ICC have to tell the people of Uganda what compromises may or may not be appropriate?

Despite the centrality of these questions to the ICC's mission, they received relatively little attention in the political debates over the Court's creation. The United States, of course, has famously mounted great opposition to the Court's creation, but its public criticisms have predominantly focused on the possibility that a zealous prosecutor might use the tribunal for politically motivated prosecutions of U.S. soldiers.¹⁴⁶ The dilemmas of transitional justice complicate the Court's work regardless of how well-intentioned or "neutral" its officials may be. Additionally, the problem is one that reaches well beyond great powers, like the United States, to troubled places, like Uganda, which have far less influence over world affairs.

The ICC, of course, is not an institution frozen in place by its founding document. Ultimately, it is the Court itself (and, more indirectly, the international community at large) that must give meaning to the Rome Statute and supply the ICC with its "law-in-action." How has the Court fared thus far in defining its mandate and safeguarding its legitimacy? The Ugandan peace negotiations provide a lens through which to examine the ICC's first attempts to come to grips with this question. With no suspects arrested, it has been Moreno-Ocampo who has taken the lead role thus far, and, accordingly, I focus in this Part on his efforts to define the Court's role with respect to alternative justice in Uganda. Looking at the public pronouncements of Moreno-Ocampo's OTP, the ICC's response to the Ugandan situation reveals two interrelated phenomena: (1) the limitations of *ex ante* guidelines, favored by some commentators as the preferred method of enhancing institutional legitimacy; and (2) a tendency to look to external actors for the legitimacy that prosecutorial discretion alone may not be able to provide. I consider each in turn.

146. *See, e.g.*, LEE A. CASEY ET AL., THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: CONCERNS AND POSSIBLE COURSES OF ACTION (2002), available at http://www.fed-soc.org/doclib/20070325_ICC.pdf; John R. Bolton, Under Sec'y of State for Arms Control and Int'l Sec., The United States and the International Criminal Court, Remarks to the American Enterprise Institute 28, 31 (Nov. 3, 2003) (transcript available at <http://www.disam.dsca.mil/pubs/v.26-2/Bolton.pdf>); Marc Grossman, Under Sec'y of State for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002) (transcript available at http://www.amicc.org/docs/Grossman_5_6_02.pdf).

A. *The Limits of Guidelines*

Some commentators have viewed internal guidelines as a method by which the Court's prosecutor can enhance his own legitimacy by functionally creating the law omitted by the Rome Statute.¹⁴⁷ Pre-set guidelines promote certainty and predictability among states subject to ICC investigations and allow the ICC prosecutor to act according to neutral criteria rather than improper motives. Whether or not Moreno-Ocampo elects to defer to alternative justice in Uganda, he can protect both his perceived legitimacy and that of the Court by ensuring that his decisions flow from neutral guidelines established ahead of time without regard to the particular context.¹⁴⁸ Although advocates of this approach have generally focused on prosecutorial discretion, a similar framework applies to the Court's judges, who may use case-by-case adjudications to translate the open-ended provisions of the Rome Statute into more concrete rules and standards that, though technically applied only to the adjudicated case, may cabin judicial discretion in future cases. In either event, this approach foresees that the ICC itself will fill the gaps in its mandate.

1. *The Theoretical Challenge of Guidelines*

Although it is hard to deny the theoretical attraction of guidelines, there are reasons for skepticism about their ultimate value in negotiating situations like the one currently facing Uganda. The mere existence of guidelines provides little comfort if their substantive content does not serve the goals of the Court or benefit its primary stakeholders, particularly the people of the societies most affected by the ICC's work. Further, the dilemmas of transitional justice faced by states like Uganda may simply be too contingent upon case-by-case assessments to lend themselves to resolution via standards that are definite enough to serve the legitimizing function desired by their advocates.

147. See AVRIL McDONALD & ROELOF HAVEMAN, PROSECUTORIAL DISCRETION—SOME THOUGHTS ON 'OBJECTIFYING' THE EXERCISE OF PROSECUTORIAL DISCRETION BY THE PROSECUTOR OF THE ICC 2 (2003), available at http://www.wold.icc-cpi.int/library/organs/otp/mcdonald_haveman.pdf; Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 535–40 (2003).

148. See Danner, *supra* note 147, at 534–48. Héctor Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?* 3 INT'L CRIM. L. REV. 87, 143–48 (2003) (arguing that legislators of the Rome Statute should explicitly implement policies to limit the current unlimited political discretion of the prosecutor to bring cases before the ICC). For general discussions of possible frameworks the ICC might develop to determine when to prosecute and when to defer to national amnesties, see Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293 (2005), and Robinson, *supra* note 139.

An illustrative example of this tension can be observed in the recent work of two scholars who have proposed standards for the ICC to apply to alternative justice proposals like those at work in Uganda. In a recent article focused on the Uganda arrest warrants, Linda Keller argues that the ICC should apply a two-part test to evaluate the adequacy of proposed alternatives to ICC jurisdiction.¹⁴⁹ First, alternative justice proposals should pass a threshold test of necessity and legitimacy, which Keller believes is met in the Ugandan case because alternative justice is necessary to a peaceful resolution of the conflict with the LRA and enjoys strong support in northern Uganda among the Acholi people whom the LRA has primarily victimized.¹⁵⁰ Second, alternative justice proposals should advance international criminal justice at least to the same extent that ICC jurisdiction would, as measured by the goals of retribution, deterrence, expressivism, and restorative justice.¹⁵¹ Mark Drumbl has similarly proposed a policy of “qualified deference” to domestic procedures subject to six interpretative guidelines that he believes should direct the analysis.¹⁵² According to this model, alternative justice procedures must be evaluated for (1) good faith; (2) democratic legitimacy; (3) the characteristics of the violence the procedures seek to address, as well as the current political climate; (4) the avoidance of gratuitous or iterated punishment; (5) the effect of the procedures on the universal substance (by which Drumbl means that the procedures should condemn rather than trivialize great evils); and (6) the preclusion of the infliction of great evils on others.¹⁵³

My purpose here is not to attempt a detailed substantive evaluation of either proposal, but I will mention that there is much in both frameworks that I find attractive. Consistent with my own observations,¹⁵⁴ Keller and Drumbl both operate from the perspective that, in many situations, there is more in common between the advocates of alternative justice and those of conventional criminal trials than might at first appear. Their respective approaches also recognize that the prosecution of mass atrocities often faces limits and compromises no matter what form justice takes. Nonetheless, legal frameworks for transitional justice, even appealing ones, do not necessarily reveal the correct institution or

149. Keller, *supra* note 78, at 261.

150. *Id.* at 263.

151. *Id.* at 265.

152. MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 187–91 (2007).

153. *Id.* at 189–91.

154. Compare *supra* text accompanying note 114 (advocating criminal proceedings and the rule of law as the appropriate mechanism to restore peace within society after massive violence) with *supra* text accompanying notes 116–19 (advocating alternative justice mechanisms, such as the South African TRC, as the best means by which to achieve peace, justice, and accountability).

institutional actor to *apply* the framework. Put another way, it is hard to see how the adoption of either Keller's or Drumbl's approach by the ICC's prosecutor or judges would do much to solve the legitimacy crisis that the challenges of transitional justice pose to the ICC's ostensible mission as a legal institution.

Consider, for example, Keller's threshold requirement of necessity. She argues that Uganda passes this test because it cannot defeat the LRA militarily, and therefore, it cannot negotiate peace while insisting on full-blown prosecutions.¹⁵⁵ That might have seemed true at the time of her writing, but with the recent encircling of Kony and his remaining forces in DR Congo,¹⁵⁶ the situation on the ground began to look very different. The tide now appears to have shifted again with Uganda's withdrawal from DR Congo, and may well shift again before my own words appear in print, but the fast-changing nature of these events itself reveals the difficulty of adopting a test whose application requires litigators to assess a state's ability or willingness to achieve a future military victory. At the same time, the defeat of the LRA will in no case be cost-free. Uganda's previous failures to conclude a peace agreement have already claimed a terrible price in human life and suffering, both prior to and as a result of the recent fighting.¹⁵⁷ As this fact reveals, "necessity" is not an autonomous, free-standing concept. Logically speaking, alternative justice can only be "necessary" to achieve some defined goal. How many lives must be saved in order for Ugandan traditional justice to become an acceptable alternative to ICC prosecution? Is this a question the ICC will ever be able to answer adequately?

Similar difficulties confront Keller's remaining criteria. Few would oppose an alternative justice mechanism that meets or exceeds the ICC's ability to achieve international criminal justice; the difficulty, however, lies in knowing when exactly this is the case, especially when multiple theories of criminal justice are thrown into the mix. Some commentators, like Drumbl and Keller, may emphasize the benefits of truth-seeking, condemnation, reconciliation, and restorative justice as justifying alternatives to conventional prosecutions.¹⁵⁸ Others, such as Human Rights Watch and Amnesty International, have argued that foregoing the possibility of more serious punishment for the worst offenders amounts to impunity and will be highly detrimental to the goals of justice and lasting peace.¹⁵⁹ Some of these divisions among commentators

155. Keller, *supra* note 78, at 262–63.

156. See *supra* text accompanying notes 67 & 72.

157. See *supra* text accompanying notes 66 & 69.

158. DRUMBL, *supra* note 152; Keller, *supra* note 78.

159. See HUMAN RIGHTS WATCH, *supra* note 49, at 3–4; Amnesty Int'l, *supra* note 80, at 4–5.

may turn on empirical questions that effectively collapse into a wide-ranging necessity analysis that attempts to balance the costs and benefits of various scenarios. Drumbl's framework, for example, would have the ICC consider a range of complicated factors including "the effects of retrospective accountability on prospective stability," whether "the society [is] transitioning toward democracy or drifting toward a new totalitarianism," and, in the event the society lacks capacity to conduct regular trials, "whether the international community could help build capacity to effective levels."¹⁶⁰ Even assuming these specific questions have answers, the ultimate determination regarding the acceptance of alternative justice mechanisms or conventional criminal proceedings may well hinge on the comparison of incommensurables. There is, of course, no ready way to quantify the amount of "criminal justice" achieved under any particular scenario, and minds will differ about the various goals at issue.

In raising these concerns, my aim is not to erect a firm division between the realms of law and politics, or to suggest that prosecuting or judging does not inevitably involve a policy component. But the fact remains that it was the allegedly "legal" nature of international justice that most powerfully justified the creation of an international criminal court subject to the degree of prosecutorial and judicial independence enjoyed by the ICC under the Rome Statute.¹⁶¹ To the extent the prosecutor is concerned with demonstrating that his actions conform to a view that his "duty is to apply the law without political considerations,"¹⁶² it is hard to see how adopting either Keller or Drumbl's open-ended criteria would actually serve this purpose. Instead, these approaches seem to invite wide-ranging policy analysis that travels far beyond the borders of conventional legal training and that would invite precisely the sort of suspicion that Moreno-Ocampo has sought to avoid.

2. *Guidelines at the ICC*

It is with this caution in mind that I now turn to the guidelines that the ICC prosecutor has actually endorsed. To date, Moreno-Ocampo's OTP has issued several documents exploring the mandate and weighing in on the critical provisions in the Rome Statute. Most relevant to my purposes are two documents: a September 2003 policy paper (2003 Policy Paper) on prosecutorial strategy,¹⁶³ and a 2007 paper dealing specif-

160. DRUMBL, *supra* note 152, at 190.

161. *See supra* text accompanying notes 140–42.

162. *See* Moreno-Ocampo Address at LSE, *supra* note 142.

163. INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES

ically with the Article 53 “Interests of Justice” standard.¹⁶⁴ I consider each in turn.

a. The 2003 Policy Paper

The 2003 Policy Paper defines “a general strategy for the Office of the Prosecutor, highlight[ing] the priority tasks to be performed and determin[ing] an institutional framework capable of ensuring the proper exercise of its functions.”¹⁶⁵ It is here that the OTP commits itself to the principle that “as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”¹⁶⁶

The idea that an international war crimes tribunal primarily should target top-level officials may seem uncontroversial, perhaps even obvious. Pervading the 2003 Policy Paper is an appreciation of the fundamental imbalance underlying the Court’s work: it is an institution with highly limited capacity, designed to prosecute crimes that are typically committed as mass atrocities.¹⁶⁷ Although one may debate whether high-level officials are always those who bear greatest responsibility, a policy of focusing on such persons seems like a sensible way of negotiating the Court’s limitations. This is also the general course that predecessor tribunals have settled upon, either adopting this position from the start (as with Nuremberg and the International Criminal Tribunal for Rwanda), or settling upon it after high-level suspects became available for trial (as with the International Criminal Tribunal for the former Yugoslavia).¹⁶⁸

But does this policy choice tell us something more about the ICC? Resource constraints may urge the prosecutor to give priority to the highest-level suspects, but they do not prevent the prosecutor from taking a position on how states should handle wrongdoers that the ICC itself cannot process. Moreno-Ocampo might, for example, seek arrest warrants against one or two former LRA members who have already surrendered and received amnesty under Uganda’s Amnesty Act. Al-

BEFORE THE OFFICE OF THE PROSECUTOR (2003), available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf [hereinafter OTP 2003 POLICY PAPER].

164. INTERESTS OF JUSTICE, *supra* note 136.

165. OTP 2003 POLICY PAPER, *supra* note 163, at 1.

166. *Id.* at 7 (emphasis removed).

167. *See, e.g.*, OTP 2003 POLICY PAPER, *supra* note 163, at 3 (“The Court is an institution with limited resources. . . . [But] the aspiration must be that the Court [through its statements, policies and operations] may itself assist in preventing the commission of atrocities.”); *see also* Greenawalt, *supra* note 6, at 610–12.

168. Greenawalt, *supra* note 6, at 627–28 & n.144.

though the ICC surely could not process every individual who meets this description, the targeting of even one such person would send a powerful message that Uganda's amnesty process is inconsistent with its obligations under the ICC.

In so doing, Moreno-Ocampo would be practicing a form of what William Burke-White has termed "proactive complementarity."¹⁶⁹ In other words, the ICC prosecutor would be using the complementarity mechanism to give states guidance as to how they should handle the domestic prosecution of international crimes, including crimes that the ICC would lack the resources to prosecute on its own.¹⁷⁰ Indeed, the fact is that some version of proactive complementarity is already embedded in the structure of the Rome Statute itself, whether or not the prosecutor consciously adopts it as a policy.

To illustrate this point, consider the following hypothetical scenario. The Ugandan authorities apprehend the three living LRA suspects who are the targets of outstanding ICC warrants. Rather than deliver the suspects to the ICC, the Ugandan authorities try them in domestic courts, resulting in guilty verdicts and life sentences. Acknowledging the proceedings to be genuine, the ICC drops its warrants. At the same time, Uganda goes ahead with *mato oput* for all remaining LRA perpetrators, including ones who have committed crimes within the ICC's jurisdiction of similar gravity to those committed by the convicted three. Should the ICC prosecutor pursue additional cases? If so, what attitude, if any, should the ICC take towards the remaining tens of thousands of perpetrators? At what point, if any, should the ICC respect Uganda's discretion to prosecute some suspects and not others? In this example, neither resource constraints nor a focus on the highest-level suspects shield the ICC from the dilemmas of transitional justice.

Moreno-Ocampo's public pronouncements confirm his willingness to accept domestic prosecutorial efforts that are far from comprehensive. The 2003 Policy Paper itself is somewhat ambiguous on this point, but it suggests a hands-off approach where lower-level suspects are concerned. It acknowledges that the strategy of targeting only the highest leaders will leave an "impunity gap" within which "alternative means for resolving the situation may be necessary, whether by encouraging and facilitating national prosecutions by strengthening or rebuilding national justice systems, by providing international assistance to those systems or by some other means."¹⁷¹ It concludes simply that "[u]rgent and

169. See Burke-White, *supra* note 97, at 53.

170. *Id.*

171. OTP 2003 POLICY PAPER, *supra* note 163, at 7.

high-level discussion is needed on methods to deal with the problem generally.”¹⁷²

In subsequent statements, Prosecutor Moreno-Ocampo has gone further, explicitly suggesting that alternative justice can complement the ICC’s efforts. In particular, a September 2007 paper focusing on Article 53’s “interests of justice” standard promotes “the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.”¹⁷³ The paper also notes “the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap,” and maintains that “[t]he Office will seek to work with those engaged in the variety of justice mechanisms in any given situation, ensuring that all efforts are as complementary as possible in developing a comprehensive approach.”¹⁷⁴ Speaking directly to the Ugandan scenario, Moreno-Ocampo similarly expressed that “[t]his case in Uganda is to show how traditional mechanisms to reconcile people can work together with investigation and prosecution.”¹⁷⁵ He even went so far as to suggest that Uganda need not prosecute anyone except those sought by the ICC: “Basically we are doing a case on four people, all the others could be handled using different mechanisms.”¹⁷⁶

As these comments reflect, the focus on high-level offenders is not simply a matter of the ICC’s limited resources, but instead demonstrates a substantive judgment about how much the ICC should demand of states confronting mass atrocities within their borders. Moreno-Ocampo, it seems, has embraced the view of M. Cherif Bassiouni, Diane Orentlicher, and others that states recovering from mass atrocities must, at a minimum, pursue “exemplary trial,” isolating the highest-level perpetrators of the worst crimes for conventional prosecutions while leaving the remaining perpetrators unprosecuted or perhaps employing alternative justice mechanisms of one sort or another.¹⁷⁷ As a

172. *Id.*

173. INTERESTS OF JUSTICE, *supra* note 136, at 8.

174. *Id.*

175. Felix Osike, *Uganda: ICC Prosecutor Louis Ocampo in His Office at the Hague*, NEW VISION (Kampala), July 13, 2007, available at <http://allafrica.com/stories/200707160105.html>.

176. *Id.*

177. M. Cherif Bassiouni et al., *Proposed Guiding Principles for Combating Impunity*, in POST-CONFLICT JUSTICE 255, 261 (M. Cherif Bassiouni ed., 2002) (“Prosecution of all the perpetrators of widespread international criminal acts is sometimes impractical if not impossible. Selective prosecution and use of ‘exemplary trials’ is accepted in principle in virtually all legal systems and is therefore consistent with general principles of law.”); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2598–99 (1991); Robinson, *supra* note 139, at 493–95 (proposing that in transitional situations following mass violence, it may be appropriate to target for prosecution only those most responsible).

means of coming to grips with the ICC's legitimacy deficit, this approach has obvious attraction. The policy is relatively objective and constraining, making it attractive to those who stress the importance of neutral *ex ante* guidelines. By focusing only on the small group of perpetrators whose prosecution is presumably most desirable at both the domestic and international levels, the policy also extends broad deference to societies to decide for themselves how best to manage the remaining perpetrators and negotiate the dilemmas of political transition.

At the same time, there is something about this myopic focus on a handful of perpetrators that seems unprincipled, even arbitrary. Can it really be that the Rome Statute requires Uganda to put an entire peace process on hold to force the prosecution of just four—and now possibly three—perpetrators, while at the same time expressing juridical indifference as to countless other perpetrators who have also committed serious atrocities? This indifference would seem to concede so much to the proponents of alternative justice that it undermines the insistence on prosecuting the few. In the end, this approach may be more about shielding the prosecutor from controversial decisions than about providing a principled framework for transitional justice, and as the Uganda situation shows, the policy does not always succeed in avoiding political controversy in any event.

b. The September 2007 “Interests of Justice” Paper

A key problem in Uganda, of course, is that the tentative peace agreement raises the possibility of alternative justice or reduced sanctions for *all* LRA suspects, including the handful of prosecutions that the ICC is pursuing. The issue is not merely that there are so many perpetrators to prosecute through conventional means, but that, on a more fundamental level, it has not seemed possible—at least until recently—to begin to address the past and secure justice without first concluding a peace deal with the very persons targeted by the ICC. In this respect, Uganda's situation may be more like South Africa's than Rwanda's, with the highest-level offenders able to stand in the way of the initial transition that must precede the formal judicial process.¹⁷⁸

The OTP's 2007 paper on the Article 53 “interests of justice” exemption to prosecution shows Moreno-Ocampo struggling with this issue, which is left unresolved by a focus on exemplary prosecution.¹⁷⁹ Here, the prosecutor acknowledges that the Rome Statute contemplates deferral of prosecution based on justice interests other than those of tradi-

178. For a comparison between the situations in South Africa and Rwanda, see *supra* text accompanying notes 116–22.

179. See INTERESTS OF JUSTICE, *supra* note 136, at 1.

tional criminal justice. At the same time, he emphasizes that there must be a “presumption in favour of investigation or prosecution” with respect to otherwise admissible cases, that “the criteria for [Article 53’s] exercise will naturally be guided by the objects and purposes of the Statute—namely the prevention of serious crimes of concern to the international community through ending impunity,” and that “there is a difference between the concepts of the interests of justice and the interests of peace.”¹⁸⁰ Although the paper proceeds to identify specific factors relevant to the analysis—including the gravity of the crime, the interests of the victim, and the circumstances of the accused—it provides no concrete guidance as to what circumstances, if any, would justify deferral to a state in Uganda’s position. Indeed, the paper concludes that “[t]he best guidance on the Office’s approach to these issues can be gathered from the way it has dealt with real situations. The Office will not speculate on abstract scenarios.”¹⁸¹

Clearly, the OTP has sound reasons to be suspicious of governmental avoidance of any meaningful punishment of wrongdoers. If the ICC were to defer to amnesties or nonpunitive mechanisms whenever a state so requested, the very mission of the Court as a supranational institution designed to hold states in check would disappear. And the very nature of the logic underlying efforts like South Africa’s TRC reveals that the justifications for deferring prosecution rest on a wide-ranging balance of interests that is by nature a case-by-case affair. The prosecutor who commits to clear *ex ante* criteria therefore risks being overtaken by political developments that make alternative justice less desirable. At worst, prospective guidelines can provide a road map for states seeking to avoid accountability. In other words, the best guidance is to avoid meaningful guidelines, and instead leave the question as open-ended as it is under the Rome Statute. That solution, however, does nothing to address the legitimacy crisis that situations like Uganda present to the Court.

B. Outsourcing Discretion

With prospective guidelines providing only limited assistance, we return to the original problem. How can the ICC respond adequately to the situation in Uganda without jeopardizing its legitimacy as a legal institution? To date, Moreno-Ocampo has been steadfast in maintaining the Uganda arrest warrants, although his statements on the matter reflect the difficulties of having the Prosecutor’s Office make these determinations

180. *Id.*

181. *Id.* at 9.

on a case-by-case basis. I focus here on an episode in late 2006 in which the presiding Pre-Trial Chamber, clearly disturbed by reports that the Ugandan peace process would circumvent the Court, asked the prosecution to provide an update on the situation. The resulting document, submitted in October 2006, treads carefully, arguing for the maintenance of the warrants without foreclosing the possibility of a future change in direction.¹⁸² The reasoning of the brief, moreover, suggests at least four different approaches, all of which involve taking guidance to some extent from external actors. In other words, the intuition may be that the Court is not self-legitimizing, and that its response to transitional justice dilemmas requires the support of external stakeholders.

1. Pragmatic Accountability to NGOs and UN Officials

The October 2006 document shows the OTP turning to public statements of UN officials and nongovernmental organizations (NGOs) to support the assertion that lifting the warrants would be imprudent. Thus, after recognizing the increasingly weakened status of the LRA, the document cites to a statement by Jan Egeland, then-UN Under-Secretary-General for Humanitarian Affairs, and also to a report by the International Crisis Group in order to conclude that “the role of the existence of the warrants in creating pressure upon the LRA leadership has also publicly been acknowledged.”¹⁸³ In other words, the proposition is that the warrants should be maintained because they have applied some of the pressure that brought the LRA to the peace table. In another section, the document quotes Human Rights Watch’s view that “amnesty or similar measures cannot be on the table when it comes to war crimes or crimes against humanity,” and it quotes Egeland again for his insistence that there “could be no impunity for mass murder and crimes against humanity.”¹⁸⁴

On the surface, the OTP makes a good case for maintaining the indictments. To the extent the warrants have facilitated negotiations, it would make little sense to remove the pressure from the LRA before a final deal is reached. Of course, this logic is in tension with the OTP’s argument that amnesty or similar measures should be off the table. To the extent the warrants have incentivized the LRA to negotiate, that must be because the LRA expects the negotiations will lead precisely to

182. See *Prosecutor v. Kony*, Case No. ICC-02/04-01/05, Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda (Oct. 6, 2006), available at <http://www2.icc-cpi.int/icedocs/doc/doc272178.PDF> [hereinafter Oct. 2006 Submission of Information].

183. *Id.* ¶ 25.

184. *Id.* ¶ 34.

that sort of alternative to international prosecution. Indeed, that is precisely the argument that the International Crisis Group has advanced, maintaining that the arrest warrants must be maintained for purposes of pressuring the LRA to the negotiating table, even though, in their view, it might be best to forego the warrants eventually as part of a peaceful settlement.¹⁸⁵

But putting aside the coherence of the policy as a substantive matter, the larger question is whether the opinions of NGOs and other international officials are satisfactory sources of decisionmaking authority. The OTP has emphasized that “the broader matter of international peace and security is not the responsibility of the Prosecutor,”¹⁸⁶ but to the extent its response to situations like those in Uganda necessarily hinges on broader policy judgments, there is an obvious appeal to relying on those who may have greater expertise in the area. And, expertise aside, it may also be the case that both the moral authority of the ICC and the efficacy of its day-to-day operations depend to no small degree on the support of these other entities. As Allison Danner has observed, the relationship between the ICC prosecutor and the network of NGOs and individual states supporting the Court may therefore be one of “pragmatic accountability” notwithstanding the lack of any formal accountability in the Rome Statute itself.¹⁸⁷

The drawback of this approach is equally apparent, however, for reasons that Danner also notes. As she succinctly puts it: “If the Prosecutor is accountable in part to NGOs, to whom are NGOs accountable?”¹⁸⁸ Indeed, the proposition is that, by limiting the states’ authority to decide questions of transitional justice, the Rome Statute has simply transferred that authority to an informal network of actors outside the affected society. This is hardly a result that would seem to enhance the credibility of the Court’s work.

2. *Listening to the Victims*

A second strategy at work in the OTP’s October 2006 submission is assessing the desires of Uganda’s victims. As a result of various provisions in the Rome Statute and the ICC’s Rules of Procedure and Evidence, victims enjoy the opportunity to participate in proceedings before the Court.¹⁸⁹ Even more to the point, Article 53 of the Statute identifies

185. See INT’L CRISIS GROUP, *supra* note 32, at 15.

186. INTERESTS OF JUSTICE, *supra* note 136, at 9.

187. Danner, *supra* note 147, at 534. Danner particularly focuses on pragmatic accountability of the ICC to NGOs and states, but her analysis would seem to apply equally to other stakeholders, such as officials of international organizations with related mandates.

188. *Id.* at 533.

189. See, e.g., Rome Statute, *supra* note 7, arts. 19(3), 68; Int’l Criminal Court, Rules of Pro-

the “interests of victims” as one of the factors that the prosecutor should take into account when deciding whether a particular investigation or prosecution is in “the interests of justice.”¹⁹⁰ One might expect that this factor would typically favor prosecution,¹⁹¹ but as the Uganda peace process reveals, the opposite can also be the case. For example, advocates of alternative justice have relied heavily on the putative interests and desires of Uganda’s victims.¹⁹² The prosecutor might therefore appear to be uniquely qualified to take guidance from Uganda’s victims in formulating his policies.

The desirability of victim participation is a hotly debated topic among criminal law scholars,¹⁹³ and the specific question of victim participation in ICC proceedings has already consumed a substantial amount of litigation, with many questions still unresolved.¹⁹⁴ For purposes of my observations here, I do not attempt to enter the broader philosophical debate over the desirability of victim participation. I instead

cedure and Evidence, Rules 89–93, ICC-ASP/1/3 (2002), available at http://www2.icc-cpi.int/NR/ronlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf. See generally HÉCTOR OLÁSULO, THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT 107–19 (2005).

190. Rome Statute, *supra* note 7, art. 53.

191. For example, in 2006, the UN General Assembly passed a resolution identifying positive duties to punish and to assist international prosecutions of gross violations of international human rights law and humanitarian law. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, at 5, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (“In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.”).

192. See *supra* text accompanying notes 46–50.

193. See, e.g., George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 51 (1999) (supporting victim participation in criminal proceedings); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 65–89 (1999) (opposing victim participation in criminal proceedings except for the purposes of providing evidence); Leo Zaibert, *The Ideal Victim*, 28 PACE L. REV. 885, 885 (2008).

194. See, e.g., WAR CRIMES RESEARCH OFFICE, VICTIM PARTICIPATION AT THE CASE STAGE OF PROCEEDINGS (2009), available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonVictimParticipationattheCaseStageofProceedingsFebruary2009.pdf>; WAR CRIMES RESEARCH OFFICE, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT (2007), available at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf; Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456 (Roy S. Lee ed., 2001); Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315 (Dominic McGoldrick et al. eds., 2004).

accept at face value the proposition that the ICC's duty to take victims' interests into account appropriately requires some weight to be given to victims' desires. Nonetheless, the OTP's analysis reveals the problems inherent in identifying and taking victims' desires into account.

The problem is roughly two-fold. The first is the difficulty of properly identifying the desires of large groups of victims; the mass nature of atrocities in Uganda ensures that the victims with an interest in the case are not isolated individuals, but rather entire populations. Among other complications, the number of victims is much larger than could possibly participate individually in the ICC's formal trial or pre-trial procedures. Moreover, large groups are sure to reflect a diversity of viewpoints, both among individuals and among different populations within the group. In Uganda, the greatest support for amnesty and alternative justice reportedly comes from Kony's own Acholi people, whereas other populations of Ugandan victims—and even distinct segments of the Acholi people—are more likely to demand Kony's prosecution.¹⁹⁵ Additionally, some victims are not even Ugandan, as evidenced by the LRA's recent atrocities in DR Congo.¹⁹⁶ By contrast, alternative justice is something of an all-or-nothing proposition. To provide an effective inducement, the contemplated scheme requires the ICC to lift the warrants completely, and not simply to eliminate charges with respect to specific victims who have provided their consent.¹⁹⁷ Honoring victims' interests therefore requires a single set of views encompassing the interests of all victims. This, in turn, requires taking account of a broad range of viewpoints and devising a method of weighing those viewpoints in pursuit of a single answer. The Rome Statute provides no guidance as to how this should be done, and there is indeed no easy answer.

The OTP has, in fact, undertaken substantial outreach efforts to Uganda's victims, having “conducted more than 25 missions to Uganda for the purpose of listening to the concerns of victims and representatives of local communities.”¹⁹⁸ Judging from the October 2006 submission, however, this research has, predictably, failed to produce a definitive answer. The document notes that there have been “strong calls for the execution of the warrants to be subjugated to the end of obtaining

195. ALLEN, *supra* note 16, at 176; PHUONG PHAM ET AL., HUMAN RIGHTS CTR. (BERKELEY) & INT'L CTR. FOR TRANSITIONAL JUSTICE, FORGOTTEN VOICES: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA 26, 28 & TBL.4 (2005), available at <http://www.ictj.org/images/content/1/2/127.pdf>; Keller, *supra* note 78, at 225–26.

196. Gettleman & Schmitt, *supra* note 65, at A1.

197. The question of deceased victims and who may speak on their behalf raises, of course, an additional set of problems.

198. INTERESTS OF JUSTICE, *supra* note 136, at 6.

peace,” but also contests the universality of this sentiment by maintaining that “[r]adio call-in shows in northern Uganda continue to draw a diversity of opinions from residents and victims there, including a strong view that impunity should not be a price paid for justice.”¹⁹⁹ Others who have surveyed sentiments among victim populations have similarly reported a diversity of viewpoints.²⁰⁰ The concern is that it may be impossible to gauge the victims’ interests in any definitive way and that, at worst, appeals to victim sentiment may simply provide a convenient means to confirm pre-existing suppositions.

The second problem concerns the potential contingency of victims’ desires on varying assumptions regarding official policies. Although there may be broad support among Uganda’s victims for employing *mato oput* in lieu of traditional prosecutions, that sentiment may itself be a product of various assumptions, including the fear that peace will otherwise be impossible to achieve or the belief that the Ugandan government is unwilling to commit the resources necessary to defeat the LRA. If so, then the interests of the victims may at some level become dependent upon the very policy preferences of the LRA and the Ugandan government that are under evaluation by the ICC. There are related questions about the degree to which victim preferences are informed. Do the supporters of alternative justice mechanisms have a clear understanding of the relevant alternatives, or do many victims, crowded in refugee camps in remote areas of the country, base their opinions on a fundamental misunderstanding of the various options, including, perhaps, the nature of the ICC itself?

One example of this phenomenon might explain the results of a 2007 survey conducted in the eight Ugandan counties most affected by the conflict. Although a majority of respondents favored either ICC trials or Ugandan trials as the “most appropriate” mechanism to deal with the LRA, eighty percent of respondents stated that they preferred peace with amnesty to peace with trials.²⁰¹ As the researchers noted, one possible explanation for this discrepancy is a lack of faith on the respondents’ part that peace with trials is achievable.²⁰² If so, one might expect future answers to a similar survey to change in the event that the Ugandan government did in fact succeed in ending the conflict without amnesty.

199. Oct. 2006 Submission of Information, *supra* note 182, ¶ 33.

200. *See, e.g.*, MAKING PEACE OUR OWN, *supra* note 23.

201. INT’L CTR. FOR TRANSITIONAL JUSTICE, ET AL., RESEARCH NOTE ON ATTITUDES ABOUT PEACE AND JUSTICE IN UGANDA 5 (2007), available at <http://www.ictj.org/images/content/7/3/737.pdf>.

202. *See id.* at 5–6.

Taken together, these problems raise a fundamental question about the legal status of victim preferences. As Leo Zaibert has posed the question: Should we be concerned with the opinions of actual flesh-and-blood victims, or is it better instead to posit ideal victims making rational choices based upon complete information?²⁰³ In either event, the task of assessing and giving weight to victim preferences in the context of mass atrocities is not straightforward. The prosecutor's hesitancy to posit a single, definitive victim preference reflects these complexities.

3. *Judicializing Discretion*

In addition to the aforementioned strategies, the OTP's October 2006 submission also looks to procedural formality as a means of avoiding definitive commitments on the dilemmas of the Ugandan peace process. Notwithstanding repeated public statements by Ugandan officials evidencing an intent to seek the eventual withdrawal of the warrants in favor of *mato oput*, the document emphasizes that as a formal matter, "[n]o State or any other entity . . . has sought withdrawal of the warrants, nor has any State or any other entity requested any amnesty from this Court."²⁰⁴ In a more recent interview, Moreno-Ocampo has elaborated that:

To withdraw the warrants there has to be a legal challenge by Uganda or the LRA If someone believes that the traditional system is enough to ensure justice and accountability, they can challenge the admissibility of the case. It is the defendant and the state party who have the responsibility for this and the judges will make the final decision.²⁰⁵

He further stated: "I cannot be a political actor in the talks. I am only a judicial actor at the ICC. I have to do my judicial work."²⁰⁶

The solution, on this account, is a judicial one. With warrants already issued, the prosecutorial role fades into the background, and it is then up to the judges to assess whether the case can go forward. If this is indeed the prosecutor's position, the implications for prosecutorial authority are dramatic. The prospective nature of the Rome Statute's jurisdiction ensures that warrants are most likely to be issued when mass atrocities are in process and prospects for criminal accountability are still dim. The most difficult questions of complementarity and interests of justice arise later when peace is at hand and the dilemmas of transitional justice rise

203. See Zaibert, *supra* note 193, at 888.

204. Oct. 2006 Submission of Information, *supra* note 182, ¶ 27.

205. Felix Osike, *Kony Must Face Trial—ICC*, THE NEW VISION (Kampala), July 12, 2007, available at <http://www.newvision.co.ug/D/8/13/575670/>.

206. *Id.*

to the fore. It is precisely at that point that prosecutorial policy has the potential to play a more meaningful role.

It is true, as I have outlined above, that the Rome Statute contemplates the litigation of questions pertaining to the admissibility of investigations or prosecutions, and judicial approval is required for the withdrawal of existing warrants.²⁰⁷ At the same time, however, the Rome Statute gives a prominent role to prosecutorial discretion. Article 53 not only requires the prosecutor to satisfy himself of a case's admissibility before commencing an investigation or prosecution. It also allows that "[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information."²⁰⁸ While the precise interplay between these various provisions is left unclear, one plausible reading is that the Pre-Trial Chamber should cancel warrants under Article 58 when so requested by the prosecutor under Article 53. At a minimum, the Statute plainly encourages the prosecutor to take positions on admissibility issues even after a case has gone forward.

In the event, however, that the prosecutor does leave it completely to the Court's judges to determine the validity of traditional justice in Uganda, it is hard to see what exactly the advantage would be. To the extent that the dilemmas of transitional justice expose gray areas in the Rome Statute that resist reduction to legal norms, the ICC's judges have no greater claim to legitimacy than does Prosecutor Moreno-Ocampo. If anything, the prosecutor's investigative experience on the ground in Uganda, including repeated outreach efforts to Uganda's government and its victims,²⁰⁹ would seem to put Moreno-Ocampo at a comparative advantage in terms of his ability to balance the equities at stake.

Recently, the Pre-Trial Chamber overseeing the Uganda cases attempted to force the issue of Ugandan alternative justice by initiating on its own motion a proceeding to test the admissibility of the arrest warrants.²¹⁰ The proceeding proved largely inconsequential, however, after the Government of Uganda submitted a letter conceding the continued admissibility of the case due to the lack of an executed peace agreement, but remaining noncommittal as to how the accused would be handled in the event that the peace process were to succeed.²¹¹ The Pre-

207. See Rome Statute, *supra* note 7, arts. 18–19, 61; see also *supra* Part II.A.

208. Rome Statute, *supra* note 7, art. 53.

209. See *supra* text accompanying note 198.

210. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision Initiating Proceedings Under Article 19, Requesting Observations and Appointing Counsel for the Defence (Oct. 21, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc578326.pdf>.

211. See Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision on the Admissibility of the Case Under Article 19(1) of the Statute, ¶ 9 (Mar. 10, 2009), available at <http://www.icc->

Trial Chamber accordingly maintained the admissibility of the case while acknowledging that the issue might well be relitigated later.²¹²

4. *The UN Security Council*

Finally, the October 2006 submission by the OTP to the ICC Trial Chamber hints at a fourth possible approach, namely deference to the UN Security Council's views. The Security Council plays only a modest role in the prosecutor's submission, no doubt in part because it has refrained from taking a strong position on Ugandan justice. Nevertheless, the submission recounts that "the UN Security Council twice has issued resolutions referring to the LRA."²¹³ Security Council Resolution 1653 urges all States concerned to take action to bring to justice perpetrators of grave violations of human rights and international humanitarian law,²¹⁴ while Resolution 1663 "strongly condemn[ed] the activities of . . . the Lord's Resistance Army."²¹⁵ These resolutions do not take any specific position on the Ugandan peace process, much less offer advice on the acceptability of *mato oput* as a means of addressing past criminality. Yet, the prosecutor's reliance on the Security Council's resolutions, however modest in nature, raises the question of the Council's role in guiding the ICC's work.

The idea of appealing to the Security Council's views is somewhat ironic given the history of the ICC. Acting pursuant to its UN Charter mandate to safeguard international peace and security, the Security Council established the ICC's most immediate predecessors, the international criminal tribunals for the former Yugoslavia and Rwanda. When the International Law Commission released a draft statute for the ICC in 1994, it similarly foresaw that ICC investigations and prosecutions would largely depend on referrals from the Security Council.²¹⁶ The Rome Statute's expanded referral system reflects a direct rejection of that approach and a determination among many of the negotiating states to weaken the Council's role by ensuring that prosecutions would not hinge on that body's preclearance. The ostensible reason reflects the

api.int/iccdocs/doc/doc641259.pdf.

212. *Id.* ¶ 52.

213. Oct. 2006 Submission of Information, *supra* note 182, ¶ 16.

214. S.C. Res. 1653, ¶ 6, U.N. Doc. S/RES/1653 (Jan. 27, 2006).

215. S.C. Res. 1663, ¶ 7, U.N. Doc. S/RES/1663 (Mar. 24, 2006).

216. See Int'l Law Comm'n, Working Group on a Draft Statute for an Int'l Criminal Court, *Report of the Working Group: Draft Statute for an International Criminal Court*, art. 23, U.N. Doc. A/CN.4/L.491/Rev.2 (Part B) (July 14, 1994). The draft also provided for state party referrals, but only in the case of crimes committed on the territory of the referring state or when a suspect is in the physical custody of the referring state. See *id.* art. 21. The draft allowed one exception to this rule: in cases of genocide, any party to the Genocide Convention could lodge a complaint, which could form the basis of a genocide investigation. *Id.* art. 25(1).

same concern that I have considered throughout this Article: the so-called “like minded” states that drove much of the agenda advanced a model of the Court driven by legal rather than political considerations and argued that mandatory Security Council referral “would reduce the credibility and moral authority of the court; excessively limit its role; . . . [and] introduce an inappropriate political influence over the functioning of the institution.”²¹⁷ This agenda also likely reflected some resentment over the Security Council’s membership and voting rules, which grant a veto over Chapter VII decisions to permanent members China, France, Russia, the United Kingdom, and the United States.²¹⁸

Formally speaking, the Rome Statute reduces the Security Council’s role in the ICC to two specific functions. First, as it has already done with respect to the situation in Darfur, the Council may refer a situation to the Court, whether or not the situation involves citizens or territory of a state party.²¹⁹ Second, Article 16 of the Rome Statute provides that “[n]o 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 Charter of the United Nations, has requested the Court to that effect.”²²⁰ The Statute further provides that such a “request may be renewed by the Council under the same conditions.”²²¹

For my purposes, however, the issue is not so much the Security Council’s formal authority as the Council’s ability to supply a degree of legitimacy that the ICC may lack when acting on its own. As the OTP has itself expressed, “the broader matter of international peace and secu-

217. *Ad Hoc Comm. on ICC Report*, *supra* note 11, ¶ 121; *see also* SCHABAS, *supra* note 11, at 15–20.

218. *See* U.N. Charter art. 23, at para. 1 (designating China, France, the Soviet Union, the United Kingdom, and the United States as permanent Security Council members; Russia has since been recognized as legal successor to the Soviet Union’s membership); Ruth Wedgwood, Comment, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF., Nov.–Dec. 1998, at 20, 21 (arguing that developing countries’ “new jealousy of the Security Council’s exclusive authority over international security matters” and “[t]he recent, failed attempt of middle-rank powers to expand the Council . . . made it impossible for the United States to preserve an American veto over prosecution decisions by using the requirement of Council approval”).

219. *See* Rome Statute, *supra* note 7, art. 13; U.N. SCOR, 60th Sess., 5158th mtg. at 3, U.N. Doc. S/PV.5158 (Mar. 31, 2005); S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

220. Rome Statute, *supra* note 7, art. 16. Arguably, this last provision is superfluous because it locates the source of the Security Council’s authority in Chapter VII of the UN Charter, a provision from an entirely separate treaty. *See* U.N. Charter art. 23, at para. 1. To the extent that the Security Council’s Chapter VII authority over international peace and security gives it authority to defer ICC investigations and prosecution, perhaps this authority exists independent of the Rome Statute and unrestricted by the twelve-month limit. Thus far, the Security Council has twice invoked Article 16.

221. Rome Statute, *supra* note 7, art. 16.

rity is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”²²² International peace and security are the mandates of the Security Council under the UN Charter.²²³ For all its flaws, the Council remains, within the largely anarchic international order, the international body that has greatest claim to making the kind of complex political judgments that the Rome Statute seems to require.

One can take either an optimistic or pessimistic view of the Council’s ability to act in this context. Although the Council remains hobbled by its need to draw the concurrence of all five of its permanent members, an optimist will take comfort in the fact that this same institutional feature helps ensure that when the Council does act, its views will reflect a broad international consensus, helping perhaps to guarantee both the wisdom and legitimacy of its decision. A pessimist will be less sure of the Council’s wisdom, seeing in its workings the cynicism of a system of power politics that has little to do with the justice interests at the heart of the ICC’s mandate. Even from this perspective, however, the Council’s intervention has potential to shore up the ICC’s legitimacy. The question here is less “Why the Security Council?” than “Who else?” The Uganda peace process finds the ICC in a situation—likely to be repeated many times in the Court’s future—in which its own authority seems inadequate to resolve the controversy. The impulse, as evidenced so clearly in the October 2006 submission, is to seek legitimacy from external actors. The comparative advantage of the Security Council is that it possesses definitive authority under both the UN Charter and the Rome Statute to pronounce upon the problem. While the result may simply be to displace discretion from one international organization to another, the politicized nature of the decision seems better suited to an institution like the Security Council whose own legitimacy does not hinge on the expectation that its decisions will conform to a legalistic, judicial model.

The legitimizing potential of a Security Council resolution is, of course, a two-way street, with the potential to provide guidance both in cases where ICC prosecution is deemed desirable and where it is not. For example, in the event that the Council were to issue a resolution strongly urging the execution of the outstanding warrants, the result could simplify the ICC’s task enormously, by effectively removing the question of alternative justice from the table (at least with regard to the specific individual accused), and bolstering the OTP’s insistence on international trials. One can see this dynamic at work in the Court’s Sudan investigations, which produced an arrest warrant for Sudan’s sitting

222. INTERESTS OF JUSTICE, *supra* note 136, at 9.

223. See U.N. Charter ch. VII.

head of state, Omar Hassan Ahmad Al-Bashir,²²⁴ alongside two previously issued warrants.²²⁵ As with Uganda, the Sudan warrants have proven controversial on account of their potential to disrupt peace efforts, with many African governments voicing particular opposition to the ICC's involvement.²²⁶ But the Council's referral of the situation to the ICC provides a political cover that effectively removes these considerations from the table as far as the ICC itself is concerned. Whatever the political consequences of ICC action may be, the organ of the United Nations formally entrusted with matters of peace and security has deemed Darfur worthy of the ICC's attention. Indeed, one might even go so far as to agree with George Fletcher and Jens David Ohlin that Security Council referrals effectively transform the ICC into a different court.²²⁷ In such cases, it will still be incumbent upon the Court's prosecutor and judges to conduct a complementarity analysis, but it should be one "with greater weight given to the legal determinations made by the Council under its law-making authority, and supplanting the regular procedures of the ICC as a traditional criminal court operating under rules of admissibility."²²⁸ Although Fletcher and Ohlin apply this argument only to formal Security Council referrals under Article 13(b), the basic logic pertains to all ICC cases, whatever the initial source of referral, regarding which the Security Council has taken a definitive stand.

Conversely, if the Council were to endorse a comprehensive peace deal that trades ICC justice for local solutions, the ICC would be saved the potentially delegitimizing consequences of reaching such a decision itself. Although many would no doubt disagree with the result, the suspension of the prosecution would not carry the same potential costs for the ICC's own future legitimacy if such deference is forced by the Secu-

224. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

225. See Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>; Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Muhammad Ali Kushayb (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279858.PDF>.

226. See, e.g., Colum Lynch, *Court Charges Fail to Sideline Sudan*, WASH. POST, Feb. 9, 2009, at A13; Marlise Simons & Neil MacFarquhar, *Warrant Issued for Sudanese Leader over Darfur War Crimes*, N.Y. TIMES, Mar. 5, 2009, at A6. In February, for example, the General Assembly of the African Union, a regional organization consisting of fifty-three African states (comprising all African states except Morocco), issued a resolution requesting that the UN Security Council invoke Rome Statute Article 16 to defer the Darfur investigations and prosecutions. See Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Dec. 221, ¶ 3, Assembly of the African Union, 12th Sess., Assembly Doc. Assembly/AU/Dec.221(XII), (Feb. 1–3, 2009); see also Member States of the African Union, <http://www.africa-union.org/root/au/memberstates/map.htm>.

227. George P. Fletcher & Jens David Ohlin, *The ICC – Two Courts in One?*, 4 J. INT'L CRIM. JUST. 428 (2006).

228. *Id.* at 431–32.

curity Council than might result from the Court reaching that same decision on its own.

To be clear, even subscribing to this less optimistic perspective does not require reopening the old debate over whether Security Council authorization should be a precondition to ICC intervention in any specific matter. The Rome Statute has resolved that debate in favor of prosecutorial authority, and that fact has already fundamentally defined the dynamic of the ICC. The Court, after all, has moved independently (albeit at the original request of Uganda itself) to prosecute LRA crimes, and that initiative appears to have played a role in driving the LRA to the negotiating table and has likely also influenced the parties to take accountability seriously, even if that accountability comes in the form of an alternative justice proposal.²²⁹ Any intervention by the Security Council at this point will take place in the context of a reality that has already been defined in large part by the ICC, which has likely at least created inertia in favor of maintaining the existing warrants.

Of course, there is no guarantee that the Security Council will express a firm opinion of any kind, and the ICC itself cannot force it to. But these observations about the Security Council may nevertheless have some consequences for internal ICC policy. For example, the prosecutor might be candid about the difficulties his statutory authority creates and affirmatively seek the Council's assistance on matters such as whether to defer to local Ugandan justice. Among other consequences, this attitude might facilitate more active participation by Security Council members—the United Kingdom and France in particular—who are also parties to the ICC and will likely wish to avoid the appearance of obstructing the Court's work. As regards the Court's judges, these observations counsel in favor of a jurisprudence flexible enough to take account of the Council's views favoring or opposing alternative justice, even where the Council's actions take forms other than the one-year deferral under Article 16 of the Rome Statute. For example, the fact that the Council has referred the Darfur situation to the Court could be viewed as a strong indication of the Security Council's preference for international trials over domestic solutions. Sudanese proposals to the contrary would therefore be presumptively suspect.

How have the Uganda arrest warrants fared under this model? In contrast to Sudan, the Council's actions have been tentative and noncommittal about the ICC's role in a final peace agreement. In both 2006 and 2007, the Council issued presidential statements regarding Uganda that emphasized broadly that "those responsible for serious violations of human rights and international humanitarian law must be brought to jus-

229. See *supra* text accompanying notes 32, 183–84.

“ . . . ” and “that the peace process [must] be concluded expeditiously.”²³⁰ Although these sentiments extended some support for the ICC’s current course, they gave little direction to the Ugandan government as it attempted to navigate the complexities and compromises of peace with the LRA. During the spring of 2008, reports emerged that the Council was considering an anticipated request from Uganda to defer the ICC’s Uganda cases for twelve months while Uganda established its own accountability mechanisms following the conclusion of a peace deal with the LRA.²³¹ The following month, however, the UN Ambassador for the United Kingdom, a veto-wielding permanent member of the Security Council and an ICC state party, publicly opposed any such deferral and argued that it was the ICC’s responsibility to determine the adequacy of Uganda’s trial arrangements.²³² More recently, in December 2008, the Council issued a fresh presidential statement condemning recent LRA attacks, but remained more ambiguous than ever on the question of legal accountability.²³³ The statement expressly recalls the ICC warrants, but stops short of calling for their execution or even demanding a particular form of justice, instead merely emphasizing the “vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace,” and stating that “ending impunity is essential for a society recovering from conflict to come to terms with past abuses committed against civilians and to prevent their recurrence.”²³⁴ At the same time, the statement also declares the Council’s “welcome for the Final Peace Agreement (FPA), negotiated between the Government of Uganda and the LRA, and reached through the Juba Peace Process” and that it “commends the Government of Uganda for its continued commitment to the FPA and its investment in the peace process.”²³⁵ Of course, as the Council well

230. The President of the Security Council, *Statement by the President of the Security Council*, at para. 3, *delivered to the General Assembly*, U.N. Doc. S/PRST/2007/6 (Mar. 22, 2007); *see also* The President of the Security Council, *Statement by the President of the Security Council, delivered to the General Assembly*, U.N. Doc S/PRST/2006/45 (Nov. 16, 2006).

231. *See, e.g.*, SECURITY COUNCIL REPORT, UPDATE REPORT NO. 1: UGANDA/LRA, 1 (2008), *available at* <http://www.securitycouncilreport.org/atf/cf/{65BF9F9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/Update%20Report%2011%20April%202008%20Uganda%20LRA.pdf>.

232. *See* Matthew Russell Lee, *UK Schizophrenic on Human Rights, But Says No Impunity for LRA’s Kony*, INNER CITY PRESS, May 2, 2008, <http://www.innercitypress.com/uk1sc050208.html>. The rigidity of this position must be taken with a grain of salt, however, in light of subsequent reports that UK Prime Minister Gordon Brown and French President Nicolas Sarkozy were open to employing Article 16 to facilitate a UN peacekeeping mission in Sudan. *See* Chris Stephen, *Justice the Price Paid for Peace?*, THE SCOTSMAN, Sept. 28, 2008, *available at* <http://thescotsman.scotsman.com/world?articleid=4525758>.

233. The President of the Security Council, *Statement by the President of the Security Council, delivered to the General Assembly*, U.N. Doc S/PRST/2008/48 (Dec. 22, 2008).

234. *Id.* at para. 6.

235. *Id.* at para. 3.

knows, the peace agreement it praised is one that would circumvent the ICC warrants. Although the statement suggests substantial flexibility on the Council's part, more specific guidance will have to wait until a later time once the peace process runs its course.

Thus far then, the Uganda prosecutions remain in the default scenario in which the Security Council is largely silent and fails to provide specific guidance either in favor of or against ICC prosecution. Here, the prosecutor's existing endorsement of exemplary prosecution will mitigate tensions with states that are willing at least to prosecute the highest-level offenders. But where, as in Uganda, that policy fails to eliminate disputes over the ICC's authority, the temptation will likely be to rely on the pragmatic accountability of NGOs, international officials, and perhaps the views of states whose cooperation is especially important to the Court. In the end, the most likely impulse will be to continue insisting on ICC prosecutions, not necessarily because that will yield the most desirable outcome, but because of the institutional difficulty of the analysis required to reach a contrary result. Prosecutor Moreno-Ocampo's OTP is therefore right to say that the Rome Statute creates a presumption in favor of prosecution; further, he has appropriately refused to offer the withdrawal of warrants in favor of domestic Ugandan justice.²³⁶ But that presumption derives in no small part from the impossibility of the decisions that the Rome Statute asks the Court's prosecutor and judges to make. Hanging over the ICC's actions, in other words, is a perennial question mark, one that the ICC itself is not institutionally capable of removing.

CONCLUSION: WHAT KIND OF INTERNATIONAL CRIMINAL COURT?

Where does this analysis leave the ICC and the Ugandan peace process? The Court is caught in a difficult position. It is asked to navigate the open spaces of the Rome Statute and the attendant challenges to its own legitimacy in contexts that seem to call for as much, if not more, open-ended political assessment and balancing than for legal expertise. The ICC, it seems, is supposed to provide a check on the independent discretion of sovereign states, but the nature of that check and the line between state discretion and international obligation remains hopelessly murky.

In the end, the debate over prosecutorial policy in Uganda is fundamentally a debate about the nature of the ICC and about how its mission should be characterized and its goals realized. Emerging from this discussion are at least four different models for how the Court might be

236. See *supra* text accompanying note 180; INTERESTS OF JUSTICE, *supra* note 136, at 1.

characterized. I briefly consider each below, and then offer some concluding thoughts.

First is the concept of the ICC as a constrained and ministerial body, charged with the neutral application of well-settled and agreed upon principles of international law deemed too serious to be entrusted to political actors. This vision has dominated much of the public discourse on the Court's work. However, for reasons I have explained, it is actually little more than a foundation myth.²³⁷ There are simply too many unanswered questions fundamental to the ICC's work that are not easily reduced to legal rules to support such a narrowly defined role.

Second is the model of the ICC as a modern administrative agency whose constitutive treaty delegates broad policymaking discretion to the Court to determine the forms of transitional justice best suited to individual societies. The ICC, of course, prosecutes individual cases, and it does so pursuant to relatively detailed dictates of substantive international criminal law. But the most important decision—whether to trigger and maintain a prosecution in light of competing state efforts—is more a policy question than anything else. This account is fairly satisfying as a descriptive matter, but it also raises difficult questions about the Court's legitimacy and its role. Few sympathizers of the Court would openly embrace this model, and the prosecutor's own decision to focus narrowly on a handful of high-level suspects reflects deep reluctance to enter into this territory.

A third, more cynical model—one that I have not focused on explicitly in this paper but which perennially lingers beneath the surface—is that of an inwardly focused court whose primary concern is not the well-being of societies recovering from mass atrocities, but instead the maintenance of a docket that will maximize the Court's own visibility and prestige. The Court, after all, is staffed with a group of judges, prosecutors, investigators, and other professionals, all of whom presumably are attracted by the opportunity to work for a body that actually tries cases. With no Ugandan suspects in custody and only one trial (relating to DR Congo) underway, there is doubtless some degree of pressure to move forward with the Ugandan prosecutions as a means of justifying the Court's own existence. One might identify at least some of this impulse in Richard Goldstone's comment that “[i]t would be fatally damaging to the credibility of the international court if [Ugandan President] Museveni was allowed to get away with granting amnesty. I just don't accept that Museveni has any right to use the International Criminal Court like this.”²³⁸ Although this impulse is understandable, it is at

237. See *supra* text accompanying notes 137–39.

238. Chris McGreal, *African Search for Peace Throws Court into Crisis*, THE GUARDIAN,

worst unprincipled, and at best inordinately focused on institutional prestige to the exclusion of other values. It is also an impulse publicly repudiated by Moreno-Ocampo when he proclaimed that “the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.”²³⁹

Fourth, and finally, is the model of the ICC as an incomplete and unstable institution, one that has great promise but that must rely on other actors to imbue it with the efficacy and legitimacy that it does not inherently possess. At a certain level, this point is uncontroversial. The ICC has no power to apprehend suspects, and its ability to conduct effective investigations similarly relies on the cooperation of states and other actors. But the dilemmas of transitional justice suggest that the Court may need to look outside itself even when deciding such deceptively basic issues as whether to bring or maintain charges against a particular suspect.

As I have detailed above, the Rome Statute’s provision for Security Council deferrals does, in fact, specifically contemplate a scenario in which the priorities of a political body may trump the Court’s work.²⁴⁰ The lesson of Uganda is not only that Security Council guidance is possible, but also that it may be desirable in a great number of cases, both as a means of affirming particular local solutions and as a means of giving the ICC positive affirmation when national alternatives are inadequate. This is a somewhat ironic conclusion given the drafters’ determination to weaken the Security Council’s role by ensuring that prosecutions would not hinge on that body’s preclearance. Yet it does not reduce the ICC to the diminished role that the United States originally had foreseen for it. As with Uganda, the critical moment may not come when the Court first begins to investigate and pursue charges. Instead, it may come later, after which the ICC’s work may already have helped to stigmatize the wrongdoers, draw international attention to a difficult situation, and catalyze increased political pressure that is conducive to negotiation.

Again, the greatest value is not the pure formality of a Security Council mandate, but rather the hope that such action will reflect the commitment of the international community to seek and support a just and lasting resolution to the Ugandan nightmare. From that perspective, the international community’s response heretofore has left much to be desired. Speaking in 2003, UN Under-Secretary-General for Humanitarian Affairs Egeland lamented that “[t]he conflict in northern Uganda is

Jan. 9, 2007, at 14, available at <http://www.guardian.co.uk/world/2007/jan/09/uganda.topstories3>.

239. OTP 2003 POLICY PAPER, *supra* note 163, at 4.

240. See *supra* text accompanying notes 213–18.

the biggest forgotten, neglected humanitarian emergency in the world today We the United Nations have also done too little. The donors have done too little. The government has done too little, we have all done too little.”²⁴¹ While the hope is that the ICC’s participation can help catalyze international commitment to do more, the corresponding fear is that the Court will demand too much of Uganda—and other transitional states—when such commitment does not materialize.

241. *War in Northern Uganda World's Worst Forgotten Crisis: UN*, AGENCE FR.-PRESSE, Nov. 11, 2003, available at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/elf176894430fdeec1256ddb0056ea4c>.