

**Un-triggering the Jurisdiction of the International Criminal Court: The Ugandan Referral of the Situation concerning the Lord's Resistance Army in Northern Uganda to the International Criminal Court**

**A Dissertation Submitted to the Faculty of Law of the University of Pretoria,  
In Partial Fulfilment of the Requirements for the Degree of Masters of Law LLM (Human Rights and Democratisation in Africa)**

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**Declaration**

I, Clare Lagua Ukuni, declare that the work presented in this dissertation is original and has never been presented to any other University or Institution. Where other people's works have been used, these have been duly acknowledged. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

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Date.....

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Signature .....

Date.....

**Dedication**

To Alber, Maggie and Flora who sowed the seeds of my education. You have been my light even in the darkest moments of life. It is unfortunate that you have not lived to see the fruits of your seeds but I know you are smiling down on me wherever you are.

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Most importantly, I thank my husband Pascal, for enduring for a whole painful year. Your support meant more than you would ever know.

## **List of Abbreviations**

AU	African Union
CBOs	Community Based Organisations
DRC	Democratic Republic of Congo
GOSS	Government of Southern Sudan
ICC	International Criminal Court
ICESCR	International Covenant on Economic Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IDPs	Internally Displaced Peoples'
ILC	International Law Commission
JLOS	Justice Law and Order Sector Forum
LRA/M	Lord's Resistance Army/Movement
NGO	Non Governmental Organisation
NRA/M	National Resistance Army/Movement
SCSL	Special Court for Sierra Leone
SPLA/M	Sudan Peoples' Liberation Army/Movement
OAU	Organisation of African Unity
OTP	Office of the Prosecutor
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPDF	Uganda People's Defence Forces

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## Chapter One

### Introduction

#### 1.1 Background to the study

The international community has said 'never again' to heinous atrocities committed during wars for several decades but even after the Nuremberg trials, there was continued commission of atrocities against civilians in conflict zones. The need to bring to justice those alleged to have committed such heinous crimes subsequently led to the creation of ad hoc tribunals like the International Criminal Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the hybrid courts like the Special Court for Sierra Leone (SCSL). These were created for the prosecution of those suspected to have committed crimes of international concern like war crimes, genocide and crimes against humanity. The international community faced with unprecedented events that shock the conscience of the whole world, was faced with the challenge of creating avenues for addressing prosecution of those alleged to have committed international crimes.

The twentieth century, it has been argued, is generally acknowledged as one of the bloodiest centuries in the history of mankind. Destructive ideologies that emerged were responsible for the two World Wars and other conflicts the century experienced. These wars in turn were used as justification for flagrant abuses of human rights. Africa was not spared these wars and their destructive aftermath.<sup>1</sup> In taking up the challenges, a notable achievement was the establishment of a permanent International Criminal Court (ICC)<sup>2</sup>.

With the establishment of the Rome Statute, a system of global international criminal justice was created. Established pursuant to the Rome Statute, the ICC is a permanent institution with the power to exercise jurisdiction over persons for the most serious crimes of international concern, and is complementary to national criminal jurisdiction.<sup>3</sup> The crimes under the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and the crime of aggression.<sup>4</sup> The main objects and goals of the ICC are to put an end to the culture of impunity for serious human rights violations through criminal prosecution of the most serious crimes of international concern<sup>5</sup> and the provision of a broad based accountability mechanism for international crimes.

Over the past twenty years, a silent war has been raging in the northern part of Uganda. The conflict between the government of Uganda and the Lord's Resistance Army (LRA) begun shortly after the

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<sup>1</sup> DDN Nsereko 'Triggering the jurisdiction of the International Criminal Court' (2004) 4 *African Human Rights Law Journal* 256.

<sup>2</sup> Rome Statute of the International Criminal Court adopted on 17 July 1998 and entered into force on 1 July 2002.

<sup>3</sup> Art 1 Rome Statute.

<sup>4</sup> Art 5 (2) Rome Statute.

<sup>5</sup> The preamble to the Rome Statute recognises grave crimes that threaten the peace, security and wellbeing of the world and affirms that the most serious crimes of concern to the international community must not go unpunished to end to impunity.



Ugandan rebel National Resistance Army (NRA) led by current President Yoweri Museveni seized power in 1986. Defeated soldiers of the deposed government fled to their birthplaces in northern Uganda and in many cases continued to fight the new government. The Acholi leader Alice Lakwena created the Holy Spirit Movement that fought the NRA. She combined Acholi and Christian doctrine to inspire her followers.<sup>6</sup> Joseph Kony's LRA followed quickly on the heels of the Holy Spirit Movement, incorporating its followers as well as remnants of the defeated soldiers of the former regime.

Thousands of people have been maimed or lost in the gruesome war and in some cases almost entire population of villages has been uprooted and displaced. Most have become refugees while others have found security in Internally Displaced Peoples' Camps (IDPs), where a whole generation that could have been productive to the development of the country is being lost. The LRA rebels are notorious for their brutality against civilians, abduction of children and turning the girls into sex slaves and forcefully recruiting boys into the army.<sup>7</sup> The response of the government was by military intervention by the Uganda Peoples' Defence Forces (UPDF). In the process of military engagement with the LRA, UPDF are reportedly said to have committed atrocities against the civilian population.<sup>8</sup>

Criticism of the government for its failure to end the war through military operations, by donors, civil society organisations and Non Governmental Organisations (NGOs) working in the war torn northern region<sup>9</sup> compelled the government to refer the situation in northern Uganda to the ICC.<sup>10</sup> However, the indictments that were subsequently issued against the top five leaders of the LRA has created more controversies along the lines of justice and peace. The main argument of those opposed to the ICC indictments is that the threat of arrest and eventual prosecution of the LRA leaders constitutes a threat to the on-going peace talks brokered by the government of Southern Sudan (GOSS) and should therefore be withdrawn in the interest of peace.<sup>11</sup> Those in favour of the ICC indictment view criminal prosecution of the LRA leadership as essential to end the culture of impunity.<sup>12</sup>

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<sup>6</sup> For an account on the background to the war in northern Uganda, see Human Rights Watch reports, <<http://www.hrw.org>>, E De Temmerman *Aboke girls, children abducted in northern Uganda*

<sup>7</sup> See Abducted and Abused Renewed Conflict in northern Uganda <<http://www.hrw.org>> accessed on 27 March 2008.

<sup>8</sup> Abducted and abused (n 7 above) 41-47.

<sup>9</sup> The Refugee Law Project's paper position on the announcement on the formal investigations of the LRA by the Prosecutor of the ICC and the implications on the search for peaceful solutions to the war in northern Uganda See <<http://www.refugeelawproject.org/resource/paper/archive/2004/RLP.ICC.investig.pdf>> accessed on 30 August 2008 3-4.

<sup>10</sup> ICC Press Release, President of Uganda refers Situation concerning the LRA to the ICC, 29 January 2004, <[www.icc-cpi.int/pressrelease\\_details&id=16.html](http://www.icc-cpi.int/pressrelease_details&id=16.html)> accessed on 8 October 2008.

<sup>11</sup> n 9 above 6-7

<sup>12</sup> Human Rights Watch, When Peace Talks Undermine Justice Published in International Herald Tribune 4 July 2008 <<http://hrw.org/english/docs/2008/07/04/global19268.htm>> accessed on 9 August 2008.

The LRA on their part have demanded for the withdrawal of the indictments as a precondition for them to sign the final peace agreement.<sup>13</sup> In a turn of events, the government has intimated that it will withdraw the case of the LRA from the jurisdiction of the ICC and prosecute persons suspected of offences against civilians in the domestic courts. The government, through the Justice Law and Order Sector (JLOS) of the Ministry of Justice is in the process of developing mechanisms for the implementation of the Juba peace talks. It is too early to determine if and how this system will work bearing in mind that the Agreement on Accountability and Reconciliation has provisions for using traditional methods of conflict resolution and reconciliation notably among which is the *mato oput*.<sup>14</sup>

The critical issues facing Uganda right now is how to bring to justice those alleged to have committed crimes against civilians without necessarily compromising the prospect of peace in the northern region. There are concerns that the attempts by Uganda to withdraw the case of the LRA from the jurisdiction of the ICC will set a bad precedent and is against the spirit and object of the ICC and the fight against impunity. The attempts at withdrawing the indictments from the jurisdiction of the ICC has also left people questioning the rationale behind the referral<sup>15</sup> and whether such attempts will not tantamount to scorning and defrauding international criminal law in the guise of peace and state sovereignty.

The ICC operates as a system of international justice which buttresses the national justice systems of state parties<sup>16</sup> and envisages a two-track system. The first track constitutes cases referred to the Court by the Security Council<sup>17</sup> while the second track consists of cases referred to the Court by States Parties or the ICC Prosecutor. An example of the use of the second track was the referral by the Democratic Republic of Congo (DRC) of the situation of crimes committed within its territory to the ICC.<sup>18</sup> Uganda also relied on this provision to refer the case of the LRA to the ICC in December 2003.<sup>19</sup> The ICC is intended only to complement national courts when the state concerned is unwilling or genuinely unable to carry out investigations or prosecutions. This is expressed in the Statute as an overall general limitation on the Court's jurisdiction.<sup>20</sup> As a consequence of this requirement, the ICC

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<sup>13</sup> R Muhumuza, 'Kony Rebels Refuse to Sign Peace Deal', *Daily Monitor*, 10 October 2006.

<sup>14</sup> *Mato Oput* literally means drinking of the bitter root from a common cup. It refers to traditional rituals performed by the Acholi to reconcile parties formerly in conflict, after full accountability. See Liu Institute for Global Issues, 'Restoring Relationships in Acholi land: Traditional Approaches to Justice and Reconciliation', September 2005, at <[www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20Acoli-2005.pdf](http://www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20Acoli-2005.pdf)> n 9 above 4.

<sup>15</sup> J Dugard *International Law: A South African Perspective* 193.

<sup>16</sup> Article 13 (b) Rome Statute: The Security Council passed resolution 1593 Of 31 March 2005 to refer the situation in Darfur although Sudan is not a state party to the Rome Statute.

<sup>17</sup> On 19 April 2004 the president of the DRC referred the situation in the Ituri region in the Eastern part of the country to the jurisdiction of the ICC and on 21 July 2004 the prosecutor opened a case against the perpetrators including militia leader Thomas Lubanga who was formally charged in 2006 for war crimes.

<sup>18</sup> On 16 December the president of Uganda referred the situation in the northern Uganda to the jurisdiction of the ICC ,the prosecutor opened investigation in to the matter on 28 July 2004 and in 2005 issued indictments and arrest warrants for the top five commanders of the LRA who are still at large.

<sup>19</sup> On 16 December the president of Uganda referred the situation in the northern Uganda to the jurisdiction of the ICC ,the prosecutor opened investigation in to the matter on 28 July 2004 and in 2005 issued indictments and arrest warrants for the top five commanders of the LRA who are still at large.

<sup>20</sup> W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 64-65

can only investigate or prosecute where national governments fail to act or where they undertake investigations or prosecutions that are not genuine.<sup>21</sup> If the national courts concerned were functioning properly, the ICC would not exercise its jurisdiction.

The Ugandan referral, the first ever by a state party to the ICC, has not generally been well received by the leadership of some communities in northern Uganda. Many traditional, civic and religious leaders as well as civil society groups in northern Uganda have opposed the ICC investigation on the grounds that it undermines the peace process and will lead to increased violence against civilians. They have instead advocated amnesty for all members of the LRA, including the top leaders who would be the individuals the ICC would most likely investigate and prosecute.<sup>22</sup>

## **1.2 Research questions**

Against the above background, this study seeks to answer the following questions:

- i). Can a State withdraw a referral from the ICC upon which an indictment has been made?
- ii). Under what circumstances can a referral be withdrawn from the ICC?
- iii). Can a referral be withdrawn if a referring State develops domestic mechanisms for trying the cases referred?

## **1.3 Objectives**

This research has a triple objective:

1. To examine whether a state can withdraw a case upon which an indictment has been made by the ICC.
2. To determine and elucidate on the circumstances under which a referral can be withdrawn from ICC jurisdiction.
3. To clarify whether a referral can be withdrawn if the referring state develops mechanisms for domestic trial of relevant ICC crimes.

## **1.4 Justification**

Available literature on the jurisdiction of the ICC has not precluded the Ugandan referral from critical analysis as the referral presents a novel subject matter which has featured dividing controversy. This study seeks to contribute to the issue by determining the merits and demerits of the arguments made so far for the purpose of charting the way forward.

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<sup>21</sup> Art 17 Rome Statute.

<sup>22</sup> Human Rights Watch Uprooted and Forgotten Impunity and Human Rights Abuses in Northern Uganda September 2005 vol 17 No 12(A) + at <[www.hrw.org](http://www.hrw.org)> ( accessed on 19 March 2008)

## 1.5 Literature Review

Since the resumption of peace talks in 2006 an agreement on accountability and reconciliation was reached and signed between the LRA and the Ugandan government on 29 July 2007. Under this agreement, the LRA leaders accused of crimes against humanity and war crimes would be tried by a national court. The agreement has provoked a mixture of reactions. In a 20 February 2008 press release, Amnesty International expressed disappointment and disapproval at the Ugandan government for negotiating away ICC arrest warrants for the LRA. That as a party to the Rome Statute, Uganda is under the duty to cooperate fully with the ICC in its investigations and prosecutions.<sup>23</sup> The fear expressed above is with regards to the motive behind domestic trials and whether the trials will be fair, credible and not a sham.

Discussing this as a gap to be filled, Zachary Lomo argues that the principles of international law allow a state to be released from its international obligations if grave circumstances occur making it impossible for it to implement the obligations it assumed under a particular treaty. He argues that the principles of state sovereignty and self determination make it clear that the ICC is not superior to national legislation. That as a sovereign state, Uganda can decide when and how to resolve the situation in northern Uganda by peaceful means.<sup>24</sup> This position does not however discuss whether justice can be sacrificed for peace.

On the issue of sovereignty, Nsereko argues that the obligation of state parties to the Rome Statute should not depend on whether they are in favour of action in a particular case. States must co-operate fully, and at all times, when their co-operation is reasonably and legitimately sought by the prosecutor. Establishing the ICC by way of a treaty has the same effect: it imposes restrictions on state sovereignty like any other treaty.<sup>25</sup>

Dolan argues that the continued ICC indictments against the wishes of the people of Uganda are tantamount to imposition of justice in the 21<sup>st</sup> century just like the imposition of aid of which Uganda has been on the receiving side. The argument here is that the sequencing of the approach to peace and justice in ongoing conflicts like the Ugandan case should be negotiated carefully and the beneficiaries should be involved in it.<sup>26</sup>

The proactive complementarity advocated for by William Burk would motivate and assist national courts to prosecute international crimes in their jurisdictions. Through this, states assume the

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<sup>23</sup> <<http://www.amnesty>> accessed on 19 March 2008

<sup>24</sup> Z A Lomo, Why the ICC must withdraw indictments against top LRA leaders: A Legal Perspective see <<http://www.refugeelawproject.org>> accessed on 9 August 2008.

<sup>25</sup> Nsereko (n 1 above) 265.

<sup>26</sup> C Dolan, Imposed justice and the need for sustainable peace in Uganda. Presentations to the beyond Juba project/ AMANI Forum Training in Transitional Justice for Parliamentarians 18 July 2008.

responsibility of fulfilling their obligation by providing accountability and hence ending impunity.<sup>27</sup> The proactive complementarity advocated by the Burke raises the confidence of national jurisdictions and assures them that the ICC doesn't take precedence over national jurisdictions nor undermines state sovereignty. However, concerns in relation to the quality of such trials and the respect for due process of the law and minimum standards at the international level cannot go unnoticed. Additionally, the rationale behind the prosecutions by national courts also leaves behind unresolved issue, if the situation in Sudan is to go by.<sup>28</sup> The national trials may be politically motivated and aimed as legal shields for those indicted by the ICC.

Sririam argues that there is a wide spread intuition that justice and peace are inextricably linked together. Where there is justice, there can be peace, and peace justice, but the observance of one may not necessarily result in the absence of another. Citizens of countries emerging from civil war may learn that peace and justice cannot be achieved simultaneously in such situations.<sup>29</sup> Her book is focused mainly on Latin American countries emerging out of war. This research seeks to examine the peculiar circumstances surrounding the debate on peace and justice in Northern Uganda.

For different reasons, both combatants in Uganda's war are unenthusiastic about the ICC. The president announced that if the LRA rebels lay down their arms he will protect them from prosecution; Joseph Kony has stated that he will not leave the bush until the indictments are withdrawn. These announcements have had the effect of making the ICC charges increasingly appear like a barrier to peace.<sup>30</sup>

The emerging views from the above literature seem to indicate that both sides are interested in peace and justice, but their points of departure are on when, where and how justice and peace should be addressed. What is clear from the above is that peace and justice should be addressed carefully, with a broader perspective and justice should not be downgraded in preference for peace as peace based on impunity may not be durable. This study seeks to contribute to the issue by determining the merits and demerits of the arguments made so far on the issue for the purpose of charting the way forward.

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<sup>27</sup> Burke-White (n 19 above) 54.

<sup>28</sup> After the March 2005 UN Security Council referral of the situation in Sudan to the ICC, immediately following the Prosecutor's June 6 2005 announcement that he would begin investigations, the Sudanese government objected to ICC prosecutions of Sudanese nationals and announced that it would establish special domestic tribunals to prosecute approximately 160 individuals suspected of international crimes in Darfur. On 14 June 2005, the Sudanese government established the Darfur Special Court, and in November the same year, it created two additional courts: a Judicial Investigations Committee and a Special Prosecutions Committee. See Sudan: National Courts to Try Suspects of War Crimes, IRINnews.org June 15 2005, <http://www.irinnews.org/report.asp>

<sup>29</sup> C L Sririam *Confronting Past Human Rights Violations. Justice v Peace in Times of Transition* 1.

<sup>30</sup> < <http://www.alertnet.org/thenewa/newsdesk/L13873168.htm> > accessed on 19 March 2008.

## **1.6 Research Methodology and Limitations**

The primary sources of this study are textbooks, articles from journals and official documents of national and international bodies. The situation being discussed is based on the observation of events unfolding in the case study country and as such, the study will invariably be affected by those events. The study is limited in scope to the triggering and untriggering mechanisms of the ICC in relation to the case of Uganda and its impact on International criminal law.

## **1.7 Overview of chapters**

The study is divided into five chapters. Chapter one provides the background to the study. At the heart of chapter two is the triggering and untriggering mechanisms of the ICC and explores whether the state can withdraw a case that is before the ICC and the circumstances under which it can. Chapter three is concerned with the exploration of the peace v justice debate in the ICC mechanisms and as it obtains to the peculiarities in Uganda. Chapter four is dedicated to discussing the Ugandan referral to illustrate the practical difficulties faced by states in attempts to withdraw hastily referred situations to the ICC and the inherent challenges faced by the ICC in dealing with peace and justice simultaneously. Chapter five is a summary of the discussion and gives recommendations in support of continuing with prosecutions even when attempts are being made at peace talks.

## Chapter Two

### Jurisdiction of the ICC justice mechanism

#### 2.1 Introduction

Events occurring in the twentieth century, notably the First and Second World Wars challenged and threatened the very existence of humanity and shaped the development of international criminal law. Commentators have acknowledged the developments in international criminal law especially with regard to the setting up of ad hoc international tribunals like the Nuremberg and Tokyo and that for the former Yugoslavia and Rwanda, and hybrid courts like in Sierra Leone, East Timor and Cambodia.<sup>31</sup> These ad hoc International tribunals were able to prosecute individuals for committing international crimes hence bringing individuals into the realm of international law which traditionally is the domain of states.

The establishment of these international tribunals and ad hoc courts however didn't escape criticism from scholars, creating divides of those in favour and those opposed to their establishment. While some argued that these ad hoc tribunals reflected selective justice, others responded that without an international criminal court endowed with universal jurisdiction, these ad hoc tribunals were necessary.<sup>32</sup> Whatever the criticisms towards these tribunals, they did break the monopoly over criminal jurisdiction concerning international crimes which had been until that moment firmly held by States.<sup>33</sup> For the first time, non-national and quasi-international institutions were set up to prosecute new crimes with international dimensions that gradually became customary international law and developed new legal standards in international criminal law.<sup>34</sup> Hence, the foundation for a permanent international Criminal Court in the prosecution of international crimes was laid.

This chapter attempts to discuss the rationale behind the creation of the ICC. Thereafter, an examination of the triggering and untriggering mechanisms of the ICC will be explored. The chapter will conclude by establishing whether a state can withdraw a case that is before the ICC and if so, the circumstances under which the withdrawal can take place.

#### 2.2 The Permanent International Criminal Court and the fight against immunity

On April 11, 2002, the Rome Statute of the International Criminal Court received its sixtieth ratification, hence entering into force on 1 July 2002, establishing the first global permanent

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<sup>31</sup> E Skinnider, Experiences and lessons from hybrid tribunals: Sierra Leone, East Timor and the Cambodia, A paper presented for the symposium on the International Criminal Court 3-4 February 2007 Beijing, China International Centre for Criminal Law Reform and Criminal Justice Policy 5-6.

<sup>32</sup> A Cassese, 'From Nuremberg to Rome: International Military Tribunal to the International Criminal Court' in A Cassese et al *The Rome Statute of the International Criminal Court: A Commentary* (2002)1 Oxford University Press 10.

<sup>33</sup> Cassese (n 32 above) 8.

<sup>34</sup> Skinnider (n 31 above) 6.

international Court with jurisdiction to prosecute individuals for the most serious crimes of concern to the international community.<sup>35</sup> The mandate of the ICC at least in theory includes retribution, deterrence, and restorative justice, especially reconciliation.<sup>36</sup> The UN, many human rights organizations, and states have expressed support for the new Court and its goals of combating impunity hence promoting respect for the rule of law.<sup>37</sup> The advent of the ICC brought with it highly extra ordinary expectations of the international community that it would put end to impunity and provide broad based accountability for international crimes<sup>38</sup> .These high expectations however, appear to ignore the reality that the success of the ICC will largely depend on the cooperation of states, sometimes the very states that are alleged to have committed crimes in issue.

Another challenge is whether the expectations are realistic bearing in mind that the ICC has the unique position of being only complementary to domestic systems. There are both supporters and those opposed to the establishment of the ICC. The ICC's detractors, it has been argued, have sought to undermine support for the new institution by creating the perception of a powerful and invasive institution that threatens national sovereignty.<sup>39</sup> It is important to bear in mind that some of these fears may be speculative as state parties surrender part of their jurisdiction willingly.

Traditionally the adjudication of international crimes has been the prerogative of national courts,<sup>40</sup> but with the emergence of the ICC and tribunals, the prosecution of certain crimes can now take place before international tribunals. The establishment of these tribunals has posed the tricky problem of how to co-ordinate their activities with those of national courts. The role of domestic courts in the prosecution of international crimes has created controversial debates with some arguing in favour of domestic courts<sup>41</sup> and others in favour of international prosecutions.<sup>42</sup> Scholars in the latter category argue that domestic courts or other procedures cannot be trusted with some international crimes.<sup>43</sup> As opposed to the ICTY and ICTR that have primary jurisdiction over the national jurisdictions, the ICC Statute's principle of complementarity, gives priority to national courts. Complementarity is the result of a delicate balance between State sovereignty and the need for the ICC to step in as an agent of the international community where the effective prevention of the core crimes is not guaranteed, and provides for the primacy of prosecution by the national jurisdictions. The introduction of the principle

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<sup>35</sup> Preamble 4 Rome Statute.

<sup>36</sup> LM Keller Achieving Peace with Justice: 'The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International Law* 209 at 260.

<sup>37</sup> J Elsea, International Criminal Court: Overview and Selected Legal Issues, Report for Congress, Received through the CRS web 5 June 2002.

<sup>38</sup> Burke-White (n 20 above).

<sup>39</sup> LA Casey 'Assessment of the United States Position: The case Against the International Criminal Court' (2002) 25 *Ford International Law Journal* 840.

<sup>40</sup> See *Re Piracy Jure Gentium* [1934] AC 586, specifically Lord Sankey LC at 589: 'With regard to crimes as defined by international law, the law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of criminals are left to the municipal courts of each country.'

<sup>41</sup> JE Alvarez, Crimes of States/Crimes of Hate: Lessons from Rwanda (1999) 24 *Yale International Law* 365

<sup>42</sup> LS Bickley, US Resistance to the International Criminal Court Is the Sword Mightier than the Law? 14 *Emory International Law Reviews* 213,272-75.

<sup>43</sup> A Cassese (n 32 above)



of complementarity was aimed at bridging the gap between national and international preference.<sup>44</sup> Complementarity respects national jurisdictions and should not therefore be seen as imposing over them.

The aim of ending impunity is to hold transgressors accountable for their crimes through a transparent and fair justice system. Even if the ICC represents a vital win for the international community in its fight against impunity, international prosecutions are only one of many accountability mechanisms and cannot be the first resort.<sup>45</sup> It must be used to support national prosecution efforts.<sup>46</sup> The ICC does not diminish in any way the need to strengthen domestic mechanisms of accountability.<sup>47</sup> National prosecutions are essential to ending impunity and thus vital to any response. They represent the key method of promoting respect for the rule of law and strengthening national institutions. The recognition by states to conduct prosecutions as a means of ending impunity is supported by calls from the UN that Justice should never be sacrificed by granting amnesty in ending conflicts, but rather, justice and peace should be considered as complementary demands and that the international community should consider ways of dovetailing one with the other.<sup>48</sup> ICC mechanisms like independence of the Office of the Prosecutor (OTP), the principle of complementarity, the rule on admissibility illustrate that the Rome Statute favours the adoption of comprehensive strategies to combat impunity.

The procedural provisions of the ICC create an optimal balance between many priorities. It recognises the need for an independent, representative international Court, which can function efficiently and effectively to bring to justice those responsible for the most serious crimes recognised by the international community<sup>49</sup> and the right of States to take primary responsibility for prosecuting such crimes if they are genuinely willing and able to.<sup>50</sup> The need to redress and compensate victims of such crimes<sup>51</sup> and protection of the rights of accused persons.<sup>52</sup> Lastly the role of the UN Security Council in maintaining international peace and security in accordance with Chapter VII of the UN Charter.<sup>53</sup> These considerations are all reflected in the functions and powers of the ICC, and its relationship with other entities, as set out under the Statute.

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<sup>44</sup> D Akande, 'The Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 1 618; M Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', *Max Planck UNYB* 7 (2003), 591 (592).

<sup>45</sup> B Concannon Junior, 'Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti' (2000) 32 *Columbia Human Rights Law Review* 201.

<sup>46</sup> J E Stromseth, 'Introduction: Goals and Challenges in the Pursuit of Accountability' in JE Stromseth (ed) *Accountability for Atrocities: National and International Responses* (2003) 3.

<sup>47</sup> As above 5.

<sup>48</sup> See the report of the statement of the United Nations Under Secretary General for Legal Affairs, Nicolas Michel (UN Security Council Press Release, June 22, 2006 on 5474th meeting).

<sup>49</sup> Rome Statute Preamble 4.

<sup>50</sup> Art 17 Rome Statute.

<sup>51</sup> Art 79 Rome Statute.

<sup>52</sup> Art 67 Rome Statute.

<sup>53</sup> Art 13 (b) & 16 Rome Statute.

Thus, the OTP in a policy paper noted that the pursuit of criminal justice provides one part of the necessary response to serious crimes of international concern which, by itself, may prove to be insufficient as the OTP focuses on conducting investigations and prosecutions. As such, it is necessary to accept the complementary role that can be played by domestic prosecutions like, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.<sup>54</sup>

The mandate of the OTP is to conduct investigations and prosecutions of crimes that fall within the jurisdiction of the Court.<sup>55</sup> By fulfilling its mandate, the OTP contributes to the overall objective of the Court to end impunity for the perpetrators of the most serious crimes of concern to the international community as a whole. The current case load of the ICC consists of state referrals with the exception of Darfur, indicating states' willingness to co-operate with the ICC in the fight against impunity.

The major challenge faced by the ICC in its mandate so far can be illustrated by the Ugandan referral and the Situation in Darfur that demonstrate the tension between peace and justice. The rebels can inflict further atrocities on civilian populations and thereby have an upper hand in demanding concessions in a peace deal. This is best demonstrated by the LRA's demand for immunity from prosecution thereby negatively impacting on states co-operation.<sup>56</sup> States usually compare peace and justice as variables and often compromise justice for peace. The request by the Peace and Security Council of the African Union (AU) to the UN Security Council to defer the application made by the Prosecutor of the ICC for arrest warrant for the president of Sudan illustrates the tension between peace and justice. The reasoning is that in the prevailing circumstances in the Darfur, a prosecution will jeopardise the ongoing peace efforts and may not be in the interest of the victims.<sup>57</sup> It is contended that although justice for victims requires more than criminal prosecutions peace without justice is not durable. A diverse response, suited to the needs of the individual country, is most likely to approach the requirements of justice.

### **2.3 Triggering and untriggering mechanisms of the ICC**

The Rome Statute defines and limits the jurisdiction of the ICC to the most serious International crimes.<sup>58</sup> There are three clear ways of setting the jurisdiction of the ICC mechanism in motion; these can be by the state, UN Security Council and by the Prosecutor. The question of who should have the

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<sup>54</sup> Policy issues on the interests of justice September 2007 at [http://www.icccpi.int/library/organs/otp/ICC-OTP-Interests\\_Of\\_Justice.pdf](http://www.icccpi.int/library/organs/otp/ICC-OTP-Interests_Of_Justice.pdf) >7-8 accessed on 25 September 2008.

<sup>55</sup> Art 42(1) Rome Statute.

<sup>56</sup> Keller (n 36 above) 213.

<sup>57</sup> Communiqué of the 142nd meeting of the Peace and Security Council of the African Union 21 July 2008 Addis Ababa, Ethiopia.

<sup>58</sup> n 3 above

authority to set in motion the jurisdiction of the Court was one of the most contentious issues before the Preparatory Commission and the Rome Diplomatic Conference and the above three<sup>59</sup> survived the scrutiny hence their inclusion in the final Statute.<sup>60</sup> The need to balance between the two extremes on how to bring perpetrators of atrocities to justice while protecting innocent persons from frivolous prosecution and unjust punishment dominated the debate. There however seems to be no clear means of halting the motion of the ICC process apart from Security Council deferrals. In the following discourse, I will try to explore the explicit and unclear mechanism for engaging and disengaging the jurisdiction of the ICC respectively.

### **2.3.1 State referral**

The process of a state lodging a complaint is known as state referral. The Prosecutor may start an investigation upon referral of situations<sup>61</sup> in which there is a reasonable basis to believe that crimes have been or are being committed. A state referral is provided for under article 13 (a) of the Rome Statute. The Prosecutor evaluates the material submitted to him/her before making the decision on whether to proceed. The referring state is required as far as possible to specify the relevant circumstances and provide available supporting documentation to the Prosecutor concerning the situation referred to enable him/her conduct investigations.<sup>62</sup>

If the Prosecutor determines there is sufficient cause to commence an investigation, he/she will notify all states parties and any other state that would normally be able to assert jurisdiction over the crime.<sup>63</sup> The Rome Statute gives room for a state that can claim jurisdiction to notify the Prosecutor within one month of its intent to investigate an alleged crime. Where such notification occurs, the Prosecutor should defer to that state, but may make an application to the Trial Chamber to commence an investigation in the event that the state's investigation is not genuine.<sup>64</sup> The decision as to whether a state is unwilling or unable genuinely to carry out its investigation is determined by the Pre-Trial Chamber. The state may challenge the determination to the Appeals Chamber, and if that challenge is unsuccessful, may later bring a challenge on the admissibility of the case under article 19, providing there are additional facts or a significant change of circumstances.<sup>65</sup>

However not all situations brought to the prosecutor's attention will be selected for formal investigation. The OTP must analyze the set of events in question to determine whether they meet the legal requirements under article 53 of the Rome Statute to proceed. The principle of complementarity

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<sup>59</sup> Art 13 Rome Statute

<sup>60</sup> Elsea (n 37 above) 22.

<sup>61</sup> Nsereko writes that a situation is a set of circumstances or episodes, such as a war or other untoward episodes, in which one or more of the crimes within the Court's jurisdiction have been committed.

<sup>62</sup> Art 14 (2) Rome Statute.

<sup>63</sup> Art 18 (1) Rome Statute.

<sup>64</sup> Art 18(2) Rome Statute.

<sup>65</sup> Art 18(7) Rome Statute.

besides recognising state sovereignty in the conduct of criminal proceedings, also limits the power that states can exercise over certain persons.<sup>66</sup> State referred situations are also subject to deferral by the Security Council if the continuation of the investigations or prosecution is a threat to international peace and security.

The issue of who should have the authority to set in motion the jurisdiction of the Court was one of the most contentious before the Preparatory Commission and the Rome Diplomatic Conference. According to the International Law Commission (ILC) draft, only state parties to the Statute could lodge complaints with the prosecutor, alleging that crimes within the ICC's jurisdiction appear to have been committed.<sup>67</sup> The legality of self referrals in general have been questioned; whilst the form of the referral itself led to suspicions that governments will use the ICC as a weapon in conflicts with the enemy by bringing politically trumped charges.<sup>68</sup> This fear however has been addressed by the principle of complementarity and the provision on independence of the OTP.

### 2.3.2 Referral by UN Security Council

In addition to State Party referrals, another way by which the jurisdiction of the ICC can be initiated is when a matter is referred by the UN Security Council acting to address a threat to international peace and security.<sup>69</sup> The authority of the Security Council to do so extend to and binds none states parties.<sup>70</sup>

Once the OTP receives a referral by the UN Security Council, it determines whether or not an investigation is warranted using the same procedure as in the case of any other type of referral. Under a Security Council referral unlike the other types of referrals, the consent of neither the state of nationality of the accused nor the state on whose territory the crime was committed is necessary for the ICC to assert its jurisdiction.<sup>71</sup> It has, however, been argued that it appears that those states retain the right to contest the jurisdiction of the ICC based on complementarity.<sup>72</sup>

The special relationship between the ICC and the UN Security Council<sup>73</sup> has prompted some commentators to argue that one of the reasons for initiating the ICC was to give the Security Council a permanent forum for war crimes trials, without necessitating the intense effort required to set up an *ad hoc* tribunal.<sup>74</sup> The Security Council mode of engaging the ICC can contribute to fighting impunity

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<sup>66</sup> Article 17 (2) Rome Statute.

<sup>67</sup> Nsereko (n1 above) 256.

<sup>68</sup> M Happold 'The International Criminal Court and the Lord's Resistance Army', *Melbourne Journal of International Law*

<sup>69</sup> Art 13(b) Rome Statute.

<sup>70</sup> The UN Security Council used this provision to refer the situation in Darfur, Sudan to the ICC. See United Nations Security Council, Resolution 1593(2005), S/RES/1593(2005), < <http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement> > accessed 10 June 2008.

<sup>71</sup> Art 18 (1) Rome Statute

<sup>72</sup> Elsea (n 37 above) 25.

<sup>73</sup> Art 2 Rome Statute.

<sup>74</sup> Elsea (n 37 above) 24.

and restoring peace. However, during the negotiations the relationship of the Court with the Security Council as a political actor and the fear that this would undermine the independence of the Court was a contentious issue.

### **2.3.3 Initiation of proceedings by the Prosecutor**

In addition to State Party and Security Council referrals, the Prosecutor may also receive information on crimes within the jurisdiction of the Court provided by other sources, such as individuals or NGOs and may initiate investigations *proprio mato*.<sup>75</sup> If the Prosecutor, after conducting preliminary examination of the information then decides that there is a reasonable basis to proceed with an investigation, he/she will request the Pre-Trial Chamber to authorise an investigation.

It is upon the basis of this triggering mechanism that the Prosecutor on 14 July 2008 issued indictments for the President of Sudan in relation to the situation in Darfur. For this purpose, the Prosecutor may request information from states, NGO or any other reliable source as deemed appropriate, and must protect the confidentiality of all such information in accordance with the Rome Statute.<sup>76</sup> If the Prosecutor concludes that there is a reasonable basis for an investigation in a given situation, he/she must first submit a request to the Pre-Trial Chamber for authorization to proceed.<sup>77</sup> The Chamber, in turn, must determine both that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court. Once the investigation is authorised, the Prosecutor must notify relevant parties as in the case of a referral by a state party in accordance with Statute.

The opposition to the powers of the prosecutor relates to the impact on state sovereignty. The argument is that criminal investigations tend to be intrusive into the internal affairs of a state and that for the prosecutor to commence investigations in the territory of a state *proprio motu*, without a request and against the wishes of that state, would amount to a diminution of that state's sovereignty.<sup>78</sup> The argument is based on the premise that where a state perceives its sovereignty is under threat it would most likely not co-operate with the prosecutor or with the Court, and any proceedings commenced without the political goodwill of states, would be doomed to failure

The foregoing discussion illustrates that the reservations expressed during the deliberations of the Rome Statute were taken care of by the Statute itself. For example, a state referral helps build confidence and enhance the cooperation of states with the ICC. While the rigorous process that the Prosecutor goes through before the initiation of an investigation ensures that he/she is answerable to some authority and hence would not abuse his/her power.

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<sup>75</sup> Art 15(1) Rome Statute.

<sup>76</sup> Art 15(2) Rome Statute.

<sup>77</sup> Art 15 (3) Rome Statute.

<sup>78</sup> Nsereko (n 1 above)

## 2.4 Untriggering Mechanisms

While triggering mechanisms are provided for in the Rome Statute, the untriggering mechanisms are not so clear. The fact that there is likely to be a need to put an end to an ongoing conflict makes it necessary to disengage the jurisdiction of the ICC. The current case load of the ICC in Uganda, DRC and Sudan indicate that it deals in situations of ongoing conflict. This gives the ICC the difficult role of seeking to prevent ongoing crimes on the one hand, while simultaneously pursuing those who may be committing them.<sup>79</sup> While there is no express provision for un-triggering the jurisdiction of the ICC, at least three means to do so can be identified and in the following section, I will attempt to bring them out.

### 2.4.1 Deferral of investigation or prosecution by the Security Council

The explicit provision on deferral of a case before the ICC is that authorised by the UN Security Council. The Security Council may issue a stay preventing the Prosecutor from proceeding in cases submitted by states parties or initiated by the Prosecutor. Article 16 of the Rome Statute permits the Security Council through a resolution adopted under Chapter VII of the UN Charter to request the Court for a temporary suspension of investigation or prosecution for a 12-month period. The reason for this provision is that there may be situations where investigations by the ICC at a certain moment could be detrimental to efforts by the Security Council to establish peace. Once the situation has changed, the investigations of the Prosecutor could continue.

Some commentators argue that the relationship between the ICC and the Security Council is tantamount to interference by a political organ in the independence and impartiality of the Court. The contention is that Security Council postponement could open the door to dangerous interference by the Security Council in the work of the ICC. As an independent institution, the ICC should not have its judicial operations subjected to political interference.<sup>80</sup> The contrary view is that Security Council deferment should not be misinterpreted to mean the possibility of a deferral as leading to undue political influence, but as a concession to the fact that sometimes, first a political solution has to be sought to bring a conflict to an end before justice can be done.<sup>81</sup> This concern may be genuine but we should not lose the focus as to the different approaches required in attaining justice while maintaining peace at the same time and the need for a case by case approach depending on the prevailing circumstances. The more realistic approach for understanding the procedure would be to bear in mind

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<sup>79</sup> Pursuing Justice in ongoing Conflict: A discussion of current practice prosecutions program at ICTJ May 2007

<sup>80</sup> Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation Human Rights Watch's Fourth Memorandum on Justice Issues and the Juba Talks February 2008 <<http://hrw.org/backgrounder/ij/uganda0208/>> accessed on 23 March 2008

<sup>81</sup> The independence of the ICC and safeguards against political influence speech outline his excellence judge Sang-Hyun Song a paper prepared for the symposium on the International Criminal Court February 3 – 4, 2007; Beijing, China International Centre for Criminal Law Reform and Criminal Justice Policy See <<http://www.ictj>> accessed on 17 August 2008

the rationale behind the inclusion of article 16 in the Rome Statute. In light of such an understanding the relevance of the provision in finding a balance between peace and justice in the context of on-going conflicts should be assessed.

The relationship between the ICC and the UN Security Council should be viewed as complementary since they are both concerned with peace, security and wellbeing of the world. As the International Court of Justice has held in *Nicaragua v United States*<sup>82</sup> the Council and the Court have complementary functions – political and judicial. They may both simultaneously exercise political and judicial functions with respect to the same situation. Even if the Security Council decides to postpone an investigation or prosecution, if the deferral was done to shield the alleged perpetrators, the Prosecutor can reopen the case after the expiry of twelve months hence the possibility of political interference is avoided.

#### **2.4.2 Challenging the jurisdiction of the Court on the admissibility of a case**

Where the OTP refuses to cease jurisdiction of the ICC in the interest of justice, such case can become inadmissible. The admissibility challenge is not an untriggering mechanism per se, but it can be used as a means to untrigger. Article 19 lays down an elaborate procedure on when, by whom and how a challenge on admissibility should be addressed. The article suggests that the ICC on its own motion may determine the admissibility of a case. The admissibility of a case can be challenged by any person or state only once prior to or at the commencement of the trial except with leave of Court.<sup>83</sup> A party that is unsatisfied with the ruling of the Pre-Trial Chamber can lodge an appeal with the Appeals Chamber.<sup>84</sup> A probable interpretation of article 19 is that admissibility challenges can be made by a state on the basis that circumstances have changed, for example where a peace process results in a change of the situation whereby a state finds itself in the position to be able genuinely to investigate or prosecute, and embarks on that course to address justice issues without compromising peace.

The Preamble of the Rome Statute recognises that the Court itself is but a last resort for bringing justice to the victims of genocide, war crimes, and crimes against humanity.<sup>85</sup> Emphasising the primary responsibility of States to investigate and prosecute international crimes, the Statute provides that a case is inadmissible before the Court where the case is 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.<sup>86</sup> The Prosecutor is obliged to consider this requirement of the Statute when deciding whether or not to start an investigation.

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<sup>82</sup> See for example, Military and Paramilitary activities in and against Nicaragua (Merits), *Nicaragua v United States*, (1986) ICJ Reports 1 Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising out of the Aerial Incident at Lockerbie (Provisional Measures), *Libya v. U.K.*, (1992) ICJ Reports 3.

<sup>83</sup> Art 19(4) Rome Statute.

<sup>84</sup> Art 19(6) Rome Statute.

<sup>85</sup> Preamble 10 & art I Rome Statute

<sup>86</sup> Art 17 Rome Statute

It is arguable that under article 19 of the Rome Statute, the ICC could decide whether a national trial is an acceptable alternative to ICC prosecution. The determination can only be made after the parties, either the state or the accused have made an admissibility challenge to that effect. It is then left to the ICC to decide whether the case is admissible or not, based on the evidence adduced by the parties. If the judges find that a case is no longer admissible, but a national trial does not ultimately meet necessary requirements, the statute suggests that the case could be returned to the ICC<sup>87</sup>.

Related to the principle of admissibility is the principle of *ne bis in idem* which precludes persons from being tried or punished twice for the same crime.<sup>88</sup> This principle is in effect a bar to the jurisdiction of the ICC. Article 20 of the Rome Statute provides that no person shall be tried by the Court with respect to crimes to which the person has been convicted or acquitted by the Court. An aggrieved party can hence challenge the jurisdiction of the ICC on the ground that he/she has already been convicted or acquitted of the crimes for which he/she is being tried. The exception to the *ne bis in idem* rule is if the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility for the crimes within the jurisdiction of the Court or if the proceedings were not conducted independently or impartially with the norms of due process recognised by international law.

### **2.4.3 The Prosecutor's discretion to initiate or discontinue an investigation or prosecution**

The Rome Statute confers upon the Prosecutor the discretion to choose whether to initiate, or discontinue an investigation or prosecution under article 53 if after an evaluation of the available information continuation with such an investigation or prosecution it can reasonably be inferred that it will not be in the interest of justice. The decision of the Prosecutor to discontinue will be confirmed by the Pre-Trial Chamber, and the Prosecutor has the authority to reconsider this decision if new facts or information emerge.<sup>89</sup> It is important to bear in mind that this provision is discretionary and the Prosecutor is likely to favour investigations and prosecution in light of the purpose and object of the ICC Statute-prosecution of serious international crimes and ending impunity.<sup>90</sup> In the use of his discretion, the prosecutor is guided by many variables like the gravity of the offence, the interest of victims and particular circumstances of each case.<sup>91</sup> Another important element of this provision is that regardless of whether the matter is admissible under article 17, if taking into account the gravity of the

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<sup>87</sup> Art 19(10) & (11) Rome Statute.

<sup>88</sup> MC Bassiouni, *The Legislative History of the International Criminal Court* 160 (2005)

<sup>89</sup> Art 53 3(b) & 4 Rome Statute.

<sup>90</sup> Policy paper (n 54 above).

<sup>91</sup> Art 53 (2) (c) Rome Statute.



crime and interests of justice the Prosecutor believes that an investigation would not serve the interest of justice, he/she will not proceed.<sup>92</sup>

## **2.5 Necessity for untriggering the jurisdiction of the ICC**

The ICC was created on the premise that justice is an essential component of stable peace. The ICC's institutional mandate is to prosecute or to facilitate prosecution at the national level. Yet the ICC statute is ambiguous on whether it can defer to non prosecutorial alternatives in extreme circumstances.<sup>93</sup> The Preamble to the Statute recognizes that the crimes under the Court's jurisdiction threaten the peace, security and well-being of the world. The UN Secretary General has stated that Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.<sup>94</sup>

The mechanisms by which the ICC could defer depend on the situation but the most obvious is a Security Council request for suspension of prosecutions if continued prosecution is a threat to international peace and security as provided for under article 16. Because of its peace and security mandate, the Security Council might put a prosecution on hold to allow for the implementation of a peace deal, but it should be extremely conscious that indiscriminate exercise of this power in purported pursuit of peace will weaken the ICC, and undermine efforts to strengthen deterrence and institutionalise human rights norms.<sup>95</sup> The other mechanisms discussed above are not necessarily deferral mechanisms but they can technically be used to disengage the jurisdiction of the ICC. In interpreting these provisions, the ICC should not only consider statutory interpretation but also assess the alternatives being suggested. First, it should evaluate whether the alternatives are necessary and legitimate and if so, whether the alternative advances the goals of international criminal justice. In this way, the ICC might ensure that there is at least some measure of accountability for international criminals, without blocking peace initiatives vital to ending mass killings and other atrocities.<sup>96</sup>

## **2.6 Conclusion**

This chapter has explored the mandate of the ICC in fighting impunity, the progress made so far and the challenges it faces in this regard. The ICC in recognition that criminal prosecutions cannot work in isolation of other imperatives engages the principle of complementarity, the admissibility challenge and the discretionary power of the Prosecutor to balance between peace and justice. As Bassiouni

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<sup>92</sup> Art 53(1) (c) Rome Statute.

<sup>93</sup> Keller (n 36 above) 279.

<sup>94</sup> See Report of the Secretary general on the Rule of Law and Transitional Justice, 23rd August, 2004, S/2004/616.

<sup>95</sup> N Gronon, Remarks at the International Conference on Building a Future on Peace and Justice, Negotiating Peace and Justice: Considering Accountability and Deterrence in Peace Processes, (June 26, 2007), <<http://www.crisisgroup.org/home/index.cfm?id=4922>> accessed on 10 October 2008

<sup>96</sup> Keller (n 36 above) 279.

argues, long-term peace requires the attainment of justice.<sup>97</sup> A future society will be better able to prevent and punish human rights abuses if it is governed by the rule of law. A government policy that sacrifices accountability at the expense of peace is one that takes an unduly narrow and short-term perspective of the meaning of the term.<sup>98</sup> It is contented that although justice for victims requires more than criminal prosecutions peace without justice is not durable. A diverse response, suited to the needs of the individual country, is most likely to approach the requirements of justice. Even amidst the challenges it is hoped that ICC will explore opportunities for solutions for better functioning and combating impunity.

This discourse has also explored the mechanisms for engaging and disengaging the jurisdiction of the ICC. The discussion found that although the mechanisms for setting the jurisdiction of the ICC in motion are specifically provided for in the Statute, those for discontinuing are not so clear except for Security Council deferral. Apart from Security Council deferral, the state or any other interested party may utilize the complementarity principle, the admissibility challenge and the discretion of the Prosecutor to attempt to dislodge the ICC jurisdiction. A state that is desirous of withdrawing a case from the ICC jurisdiction must make a challenge in open Court whereupon the judges will decide whether a trial at domestic jurisdiction is an acceptable alternative to the ICC. The decision to withdraw cannot be taken unilaterally by the state. If the Court has decided that a case is inadmissible before the ICC, any national trial alternative would not only need to meet the requirements of genuine willingness and ability to try the case, but the state should live up to these requirements in practice. The next chapter will focus on the interplay between peace and justice in an ongoing conflict and how the ICC approaches these two variables

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<sup>97</sup> MC Bassiouni 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9, 13.

<sup>98</sup> As above.

## Chapter 3

### Peace and Justice within the framework of the ICC

#### 3.1 Introduction

The UN Charter, Universal Declaration on Human Rights(UDHR) and international humanitarian law contain standards that all provide for peace, justice, respect for human rights and development.<sup>99</sup> This emanates from the recognition by the international community that peace, justice and human rights are interlinked and mutually reinforcing and that they need to be addressed in accordance with those statutory provisions.<sup>100</sup> As events in Sierra Leone, Burundi, DRC and Uganda have shown, alleged international criminals find themselves at the negotiation tables where circumstances are tilted in their favour to barter away justice in exchange for peace instead of being prosecuted.<sup>101</sup>

Keller argues that the advancement of peace and justice is a long-term endeavour, requiring a comprehensive and inclusive approach that is sensitive to political, cultural and gender aspects. Although the immediate need for peace often tend to outweigh calls for justice, the ICC can further both goals in certain circumstances.<sup>102</sup> The view is that, in order to achieve long-lasting peace and reconciliation in conflict zones, it is imperative to uphold the principles of accountability and bring to justice the perpetrators of gross human rights violations. The interlinked issues of combating impunity and promoting peace, reconciliation and healing should be addressed in a mutually reinforcing manner.<sup>103</sup> This chapter engages the peace and justice discourse. The linkage between the two in the arena of ongoing conflicts and at the international level and the experience of the ICC so far with regard to initiating and disengaging the ICC jurisdiction will be discussed.

#### 3.2 Understanding peace and justice in the context of ongoing conflicts

Under the Nuremberg Declaration on Peace and justice, peace is understood as sustainable peace. Sustainable peace goes beyond the signing of an agreement. That sustainable peace requires a long-term approach that addresses the structural causes of conflict, and promotes sustainable development, rule of law and governance, and respect for human rights, making the recurrence of violent conflict less likely.<sup>104</sup> The imperative to stop conflict is usually strong but it is equally important that negotiations should build the foundation for peace and justice.

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<sup>99</sup> Office of the High Commissioner for Human Rights Human Rights Resolution 2005/81 on Impunity.

<sup>100</sup> Nuremberg Declaration on Peace and Justice June 2008 at accessed on 17 September 2008.

<sup>101</sup> A Armstrong &G Ntegeye 'The devil is in the details: The challenges of transitional justice in recent 17 African peace agreements' (2006) *African Human Rights Law Journal* 1.

<sup>102</sup> Keller (n 36 above) 211.

<sup>103</sup> As above.

<sup>104</sup> Article 1 Nuremberg Declaration on Peace and Justice.

According to Lederach, justice involves the pursuit of restoration, rectifying wrongs, creating right relationships based on equity and fairness.<sup>105</sup> Justice in the Declaration means accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs. Justice combines elements of criminal justice, truth seeking, reparations and institutional reform as well as the fair distribution of, and access to public goods, and equity within society at large. Justice may be delivered by local, national and international actors depending on the particular circumstances of each case.<sup>106</sup> The following sections will examine the relationship between peace and justice as portrayed in the ICC Statute.

To end an ongoing armed conflict, painful choices must be made in a context of fear and uncertainty.<sup>107</sup> On the face value, there appears to be tension between peace and justice, but some commentators regard this as a false dichotomy maintaining that there is a way to achieve both peace and some form of justice for victims.<sup>108</sup> Gronon does not agree with the view that there is no tension between peace and justice. He observes that at times the price of a peace deal may be a degree of impunity for those most responsible for such abuses. He cautions against making general statements of principle to the effect that no trade-off is required because peace and justice are inextricably linked. To him, peace and justice are complementary in that justice can deter abuses and can help make peace sustainable by addressing grievances non-violently. That peace and justice are good things and as such, don't always go together, and that to present them as invariably mutually reinforcing is misleading and unhelpful when the difficult reality of peacemaking often proves otherwise.<sup>109</sup>

However, even commentators who recognize that peace and justice can coexist<sup>110</sup> contest the proper form of, and balance between the means to achieve peace and justice. This can be attributed to the peculiar circumstances of each conflict that call for a case by case approach. The peace versus justice debate is demonstrated by the competing imperatives of retributive and restorative justice. Pure retributive justice would require the prosecution of all those culpable for international crimes while restorative justice would focus on victims' needs, root causes of the conflict, and the reintegration of the rebels into society but neither approach will suffice alone.<sup>111</sup>

There is a general concern that the timing of indictments in ongoing conflicts may affect the outcome of negotiations either positively or negatively. The debate on timing is whether indictments issued

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<sup>105</sup> JP Lederach *Preparing for Peace: Conflict Transformation across Cultures* 20

<sup>106</sup> Article 2 Nuremberg Declaration.

<sup>107</sup> E Blumenson, 'The Challenge of a Global Standard of Justice: Peace Pluralism, and Punishment at the International Criminal Court' (2006) *Columbia Journal of International Law* 801 at 829.

<sup>108</sup> Keller (n 36 above).

<sup>109</sup> N Gronon & A O'Brien Justice in Conflict? The ICC and peace process in The Royal African Society's 'Courting Conflict? Justice, peace and the ICC in Africa' Nicholas Waddell & Phil Clarks (eds) March 2008 at <<http://www.crisisgroup.org/home/index.cfm?d=533&l=1>> accessed on 2 October 2008.

<sup>110</sup> Blumenson, (n 107 above) 871

<sup>111</sup> Keller (n 36 above) 212.

during conflict hinder justice and prolong conflict and suffering or they possibly have positive effects. The answers to the above are varied. Gronon notes that the potential clash between peace and justice objectives can sometimes be circumvented by pursuing a sequential approach – for example, by getting a peace agreement now, then dealing with justice many years later as was done in Latin America.<sup>112</sup> Conversely, it has been argued that history offers little empirical evidence to answer these questions, and existing cases caution against easy generalisations as each conflict situation is unique and requires adoption of a case by case approach.<sup>113</sup>

### **3.3 The link between peace and justice as manifested in the ICC**

According to Christian Much, justice and peace are not contradictory forces, rather, properly pursued, they promote and sustain one another. He maintains that the question can never be whether to pursue justice and accountability, but rather when and how.<sup>114</sup> When it comes to ending violent conflicts, peace and justice do sometimes appear to be competing with each other – at least in the short term. It usually starts in the peace negotiations where leaders of a party to the conflict may only approve a peace agreement if they are guaranteed impunity; this demand may in turn trigger debates within society about the conflicting imperatives of either peace or justice as manifested in northern Uganda, Darfur, Afghanistan and Colombia.<sup>115</sup>

The ICC has not been spared this tension between peace and justice. Being a permanent international criminal institution, the ICC will usually be active during ongoing conflict. This gives it the difficult role of seeking to prevent ongoing crimes on the one hand, while important diplomatic measures like peace negotiations are underway.<sup>116</sup> In each case, the ICC has been confronted by the challenges inherent in pursuing peace and justice simultaneously.<sup>117</sup> The Ugandan referral presents the tension between peace and justice when efforts to prosecute perpetrators of mass atrocities coincide with a peace process. The ICC Statute is more explicit than the statutes of the ICTY or ICTR in recognizing the tensions between peace and justice and has in place mechanisms to address them.<sup>118</sup>

The Preamble to the ICC Statute recognises that states parties have an obligation to exercise criminal jurisdiction over those responsible for international crimes. Considering the complementarity principle, states are obliged to prosecute and bring to justice those alleged to have committed international crimes and in cases where they are unwilling or unable to genuinely prosecute, then it is

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<sup>112</sup> Gronon & O'Brien (n 109 above).

<sup>113</sup> n 79 above.

<sup>114</sup> C Much Building a future on peace and justice a congress in Nuremberg.

<sup>115</sup> As above.

<sup>116</sup> n 12 above.

<sup>117</sup> Gronon & O'Brien (n 109 above)

<sup>118</sup> The Security Council deferral, under article 16, the challenge on admissibility in articles 17 and 19 and the provisions on article 53 are aimed at restraining a possible clash between peace and justice.

incumbent upon them to cooperate with the ICC<sup>119</sup> thus leaving states with no option for foregoing justice options in conflict resolution.

State co-operation is essential for the ICC to exercise its mandate bearing in mind that it has no police force of its own. It has been argued that the cooperation of states with the ICC presents operational paradox for the ICC.<sup>120</sup> On the one hand, the ICC is expected to intervene in countries that are either unable or unwilling to investigate and prosecute those responsible for the worst crimes, and on the other hand, it has to rely on the support of those very states to carry out its mandate. On other occasions, a close relationship with a State Party may give rise to perceptions of bias in an ongoing conflict, especially where government has referred cases. For instance, in Uganda, the Prosecutor is dependent on the Ugandan army to provide security for his investigations. The fact that there are currently no arrest warrants from ICC for members of the UPDF has given further rise to a perception of bias.<sup>121</sup>

The ICC Statute places upon states the obligation to co-operate fully with the ICC in its investigation and prosecution of crimes.<sup>122</sup> This may involve cooperation with regard to arrest and surrender of indicted persons. For example commentators have argued that the referral of the LRA to the ICC was to exert pressure on countries neighbouring Uganda to support the government in the search for the top leadership of the LRA.<sup>123</sup> The Ugandan referral further left people wondering whether third states could take steps to support peace processes that involve persons who are the subject of arrest warrants before the ICC like the LRA.<sup>124</sup> It seems settled that the participation of third countries in the Juba peace process is not a contravention of part nine of the Rome Statute as the ICC use parallel track system.

The ICC has already been confronted with several peace processes of varying promise. For example, in reaction to the application made by the Prosecutor of the ICC for a warrant of arrest against the president of Sudan,<sup>125</sup> the AU requested for deferral of the process initiated by the Prosecutor<sup>126</sup> on grounds that prosecution will jeopardise the ongoing peace efforts and may not be in the interest of the victims.<sup>127</sup> The contrary view is that without the prosecution of the president, there will be no peace in Darfur. There is a general perception that a deferral of the prosecution would send a bad message to

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<sup>119</sup> Art 17 Rome Statute.

<sup>120</sup> n 79 above 9.

<sup>121</sup> n 9 above 1.

<sup>122</sup> Art 86 Rome Statute.

<sup>123</sup> Gronon & O'Brien (n 109 above), n 9 above.

<sup>124</sup> n 79 above 9.

<sup>125</sup> On 14 July 2008, the ICC prosecutor applied for arrest warrant against the president of Sudan

<sup>126</sup> Art 16 Rome Statute.

<sup>127</sup> n 57 above.

the president and his government that they had won.<sup>128</sup> In Uganda also, the Betty Bigombe initiative in 2004 and the Juba peace talks of 2006 have raised controversy over the place of justice in ongoing conflicts. Foremost among the obstacles to the Juba agreement is the conflict between the ICC prosecutions and the desire of the LRA's leaders for full or substantial impunity. The LRA have declared unwillingness to agree on a peace deal unless the ICC indictments are dropped.<sup>129</sup> To prove their point, the LRA top leadership refrained from attending the peace talks citing the ICC indictment as an obstacle.<sup>130</sup> It is important to note that peace deals that sacrifice justice usually fail to provide durable peace. Although one should be mindful of making sweeping conclusions, the ICC prosecution has, to an extent contributed in bringing Kony to the negotiating table where he can explore options to ending the war through peace agreement. To bow to the demands of the LRA would be against the spirit and purpose of the ICC Statute and tantamount to defrauding the international community in the fight against impunity.

On its part, the ICC strongly believes that peace and justice can be achieved concurrently.<sup>131</sup> Throughout its interaction with the peace processes in Northern Uganda, the ICC Prosecutor has maintained that there is possibility for the peace process and the arrest warrants proceeding simultaneously, on parallel tracks. That the arrest warrants should be viewed not as a standalone option, but as part of a comprehensive solution to conflict. In essence, the parallel tracks approach implies that international actors involved in peace negotiations should do as they see fit to promote a peaceful solution, without being hindered or inhibited by the actions of the Prosecutor. Simultaneously, the OTP should promote the enforcement of the arrest warrants without necessarily deferring to the peace process.<sup>132</sup>

There is divided opinion on the issuance of arrest warrants in ongoing conflicts. The proponents of prosecutions argue that arrest warrants are essential and complement peace and justice and that ICC involvement actually encouraged the peace negotiations in Uganda by putting pressure on the LRA and its supporters in Sudan.<sup>133</sup> The contrary view is that arrest warrants compromise peace.<sup>134</sup> That

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<sup>128</sup> Press conference on developments relating to International Criminal Court investigation in Darfur, role of Security Council United Nations Department of Public Information 19 September 2008 at <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7JMT7RE?OpenDocument>> accessed on 17 September 2008

<sup>129</sup> Gronon(n 109 above)

<sup>130</sup> International Bar Association, *ICC Monitoring and Outreach Programme*, Second Outreach Report, May 2007, 16.<[www.ibanet.org/images/downloads/ICC/ICC%20Outreach%20report\\_%20May%202007.pdf](http://www.ibanet.org/images/downloads/ICC/ICC%20Outreach%20report_%20May%202007.pdf)> accessed on 17 September 2008

<sup>131</sup> n 54 above.

<sup>132</sup> n 79 above 6

<sup>133</sup> T Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*.

<sup>134</sup> For example, J. Volqvartz, 'ICC Under Fire Over Uganda Probe', CNN.com, 23 February 2005; K Southwick, 'When Peace and Justice Clash', International Herald Tribune, 14 October 2005; 'Not a Crime to Talk: Give Peace a Chance in Northern Uganda', joint statement by Refugee Law Centre and Human Rights Focus (HURIFO) on the Juba Peace Talks, July 2006; H. Cobban, "Uganda: When International Justice and Internal Peace are at Odds", Christian Science Monitor, 24 August 2006; Z Lomo, 'Why the International

even if the ICC brought the LRA to the table, however, its decision to issue arrest warrants risked stopping the peace talks.<sup>135</sup> This raises the issue whether peace and justice can proceed on parallel tracks. Those inclined to peace first justice later advocate for positive peace and consider international justice as narrow and erroneous<sup>136</sup> because it focuses on prosecutions, which is only one part of the bigger bundle of requirements for positive peace.

Sequencing is often referred to as part of the solution to resolving tensions between peace and justice. The proposition is that sequencing should be done correctly so that justice does not undermine peace and that prosecutions should only commence after the end of the conflict. The peace first justice later position is to an extent misleading in that it contradicts the fact that sequencing is often made impossible by demands from perpetrators during peace talks for assurances that they will not be tried, for instance through an amnesty.<sup>137</sup> This is exemplified by the Lome Peace Accord in Sierra Leone, the Argentine and Chile examples and of recent, the demands of the LRA in the Juba Peace talks for the withdrawal of the ICC indictments as a precondition for them to sign the final peace agreement. According to the Rome Statute, once the ICC has issued arrest warrants, the only possibilities for discontinuation of the proceedings are those found in Articles 16,17,19,20 and 53 of the Rome Statute so the peace first justice last phenomenon may not be applicable were these conditions are not met.

It is argued that for positive peace to prevail all the parties involved must be consulted and their input to the peace process respected.<sup>138</sup> The Rome Statute considers victims as part of the judicial process for example Victims' interests are considered when deciding to discontinue a proceeding in the interests of justice pursuant to Article 53 of the Statute. This article gives the Prosecutor discretionary power to discontinue investigations where, taking into account the gravity of the crime and the interests of victims, there are reasons to believe that an investigation may not serve the interests of justice. It is also apparent that the provision on victims' trust fund under article 79 of the Rome Statute is meant to cater for the needs of victims. This is the broad approach the Statute envisages in its efforts to combat impunity while maintaining peace.

### **3.4 Preserving justice in an ongoing conflict**

Dealing with widespread human rights violations raises large practical difficulties and as such, a holistic approach is required as one element is usually insufficient. This is the basis upon which transitional justice was established and advocates for a broad based approach that complement each other to address widespread violations of human rights. These approaches may include but not limited

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Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective', Kampala: Refugee Law Project, August 2006.

<sup>135</sup> n 9 above.

<sup>136</sup> Dolan (n 26 above).

<sup>137</sup> n 79 above 6.

<sup>138</sup> Keller (n 36 above)



to criminal prosecutions, truth commissions, and, more recently, adoption of traditional mechanisms.<sup>139</sup>

Depending on the circumstances obtaining in a particular state, the above mentioned approaches may be applied. For instance, arguments for amnesty assert that Article 6(5) of Additional Protocol II of 1977<sup>140</sup> permits states to grant amnesties to persons who have participated in armed conflict, or those deprived of their liberty for reasons related to armed conflict.<sup>141</sup> This provision has been understood to apply to the ordinary crimes of all rank and field participants, but not to authors of political and military leaders who bear the greatest responsibility for international crimes.<sup>142</sup> That criminal prosecutions prolong conflicts and that more flexible restorative measures might be more appropriate in situations involving mass atrocities with thousands of perpetrators.<sup>143</sup> To this end, amnesties and truth commissions whose primary purpose is addressing and resolving armed conflicts rather than shielding a perpetrator from criminal responsibility, can qualify as valid attempts at investigating crimes.<sup>144</sup> Accordingly, it has been suggested that amnesties may be appropriate where the only alternative to an amnesty is a continuance of violence and further human rights violations.<sup>145</sup> The argument is that states can grant amnesties or pardons, even for heinous crimes, in the interest of saving lives, and to induce rebels to surrender in reliance upon them.<sup>146</sup> The justification usually given for the grant of amnesties is ending an armed conflict and restoring peace.

Available literature suggests that blanket amnesties are prohibited under international law and that amnesties should not be granted to shield authors of serious human rights violations and charges involving crimes against humanity.<sup>147</sup> The UN strictly follows the principle that there cannot be impunity for these serious crimes and therefore does not recognize any such amnesty, even if formally agreed to by the parties to a peace agreement. This applies to all peace agreements whether they are negotiated or facilitated by the United Nations or otherwise conducted under its auspices.<sup>148</sup>

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<sup>139</sup> International Centre for Transitional Justice <<http://www.ictj.org>> accessed 15 September 2008.

<sup>140</sup> Geneva Convention

<sup>141</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS p. 609, entered into force 7 December 1978.

<sup>142</sup> See SCSL, Separate Opinion of Justice Robertson, *Prosecutor v Allieu Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lome' Accord, Decision of the Appeals Chamber, SCSL-04-14-T-128-7347, paras. 32-33.

<sup>143</sup> H Moy 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity', 19 *Harvard Human Rights Journal* (2006) 267 at 272.

<sup>144</sup> N Roht-Ariaza *Amnesty and the International Criminal Court*, in D Shelton, ed., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, NY, Transnational Publishers 2000) 79.

<sup>145</sup> S Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone', 5 *Human Rights Law Review*. (2005) 271 at 295.

<sup>146</sup> n 5 above para 23.

<sup>147</sup> *Prosecutor v. Kallon* Case No. SCSL-2003-07-PT, 16 June 2003; *Prosecutor v. Kamara* Case No. SCSL-2003-10-PT, 16 June 2003.

<sup>148</sup> M Ssenyonjo 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty' (2007) *Netherlands International Law Review* 69.

The Rome Statute is silent regarding amnesty or other alternative justice mechanisms such as truth commissions.<sup>149</sup> There is significant dispute over the interpretation of relevant provisions of the statute, and the ICC has yet to render any decisions on this issue. According to John Dugard, the international community's establishment of the ICC proves that it has decided that justice, in the form of prosecution, must take priority over peace and national reconciliation.<sup>150</sup> As the ICC is premised on an aversion to impunity and accountability for the commission of international crimes, it is contended that its integrity is best preserved by this position.<sup>151</sup> As a general principle, the ICC should not defer to a domestic non-prosecutorial alternatives simply because they may further peace, however desirable their outcome may be. Nevertheless, in the event alternative justice mechanisms are preferred, they must equally advance the goals of the international criminal justice system and, particularly, those of the ICC.<sup>152</sup> The ICC should not defer solely on the ground that deferral would further peace. Although this is a crucial consideration, the ICC was created with a core prosecutorial mandate aimed at ending impunity.<sup>153</sup>

Some states have explored truth commissions instead of prosecution. A truth commission is typically an official investigation established for a limited period of time that looks into a past pattern of abuses.<sup>154</sup> Priscilla Hayner identifies five aims, of truth commission: to clarify and acknowledge past abuses; respond to victims' needs; further justice and accountability, short of prosecution; investigate institutional responsibility and recommend reforms; and promote peace and reconciliation.<sup>155</sup> A truth commission's success depends on its mandate, resources, and personnel.

In situations when prosecutions are costly, alternative justice mechanisms are preferred either as a complement to justice or as a second-best substitute. Some advocates of South Africa's Truth and Reconciliation Commission (TRC), for instance, took this second-best approach in arguing that ideally, apartheid officials would be prosecuted, but that given the need for healing and stability, an amnesty that was conditional on a restorative public telling of truth could be allowed.<sup>156</sup> Even then, blanket amnesties generally are incompatible with restorative punishment. When political realities force it, amnesties may be necessary, but they are always less than just. Generally, a presumption for accountability ought to apply. A peace agreement may demand foregoing prosecution at the moment, but it need not prevent it from ever occurring. Interestingly in the northern Uganda case, many ordinary Ugandan civilians want to focus on restoring their lives and homes, planning for a more

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<sup>149</sup> J Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in A Casesse et al; (eds) *The Rome statute of the International Criminal Court: Commentary* (2002) 1.

<sup>150</sup> As above 701

<sup>151</sup> As above 703

<sup>152</sup> Bassiouni (n 88 above) 871.

<sup>153</sup> Blumenson (n 107 above) 819

<sup>154</sup> PB Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* 14 (2002).

<sup>155</sup> As above 24.

<sup>156</sup> P Digeser, *Political Forgiveness Amnesty's Justice* (2001).

hopeful future rather than undergoing expensive, intricate justice tribunals.<sup>157</sup> But it is also important that the peace that is being advocated for should be a positive one so that the population does not get uprooted and hence the need for the prosecution of those who bear the greatest responsibility for the crimes committed.

### **3.5 Conclusion**

This chapter has tried to discuss the apparent tension between peace and justice in light of the ICC and the need to adopt a diverse approach in order to accommodate both. As Armstrong and Ntegeye pointed out, the fact that the ends of achieving durable peace may be mutually supportive does not mean that the means to achieve these ends are mutually supportive. The means to achieve one end may undermine other equally legitimate ends.<sup>158</sup> This therefore calls for care in sequencing of the approaches to be adopted and cautions against generalisation as conflicts are different and hence cases should be treated depending on the peculiarities that they present. At this point it is difficult to confidently state that the ICC indictment will end the conflict in northern Uganda but what is clear is that it is embracing the challenges and using the opportunity to continue making tremendous contribution to the ongoing peace process. The challenge is now left to other actors to make contributions in balancing the delicate tension between peace and justice. ICC involvement should not be looked at in the negative sense but should be seen as complementary to other mechanisms aimed at attaining both sustainable peace and justice. The next chapter will consider the interplay of peace and justice as it obtains to the Ugandan referral.

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<sup>157</sup> Phuong Pham et al When the War ends: A population based survey on attitudes about peace and justice and social reconstruction in northern Uganda, December 2007 ICTJ, Human Rights Centre

<sup>158</sup> Armstrong & Ntegeye (n 101 above) 18.

## Chapter 4

### The challenges facing the Ugandan referral to the ICC

#### 4.1 Introduction

The challenge confronting Uganda is how to deal with the atrocities committed against the people of northern Uganda during the twenty year conflict. The scale of the conflict and the extent to which it affected and distorted the lives of people from northern and eastern parts of the country, whether as victims or as perpetrators have presented Uganda with obstacles of a virtually unprecedented magnitude and is the subject of debate not only in Uganda but at the international level and varied spectra of the academia, political wings, and ordinary people.

The potential for indictments emerging from international courts, or hybrid courts has considerably changed the dynamics around peacemaking in some contexts.<sup>159</sup> Uganda is no exception to this and its challenge is compounded by the ICC indictments for the top LRA leadership. The dilemma of how to balance between the two delicate phenomena: peace and justice without compromising elements of the other are the major issues of contention in the Ugandan situation. In this chapter, an attempt is made at discussing the Ugandan referral, whether Uganda complied with the Rome Statute in referring the matter. The interplay of peace and justice and whether the Ugandan situation satisfies the consideration for domestic prosecutions or alternative justice mechanisms and whether the Ugandan judiciary meets the minimum international standards to conduct domestic trials will be discussed.

#### 4.2 Background to the referral

Twenty-one years of war, destruction, and the displacement of over 1.5 million people have turned northern Ugandan into a humanitarian disaster.<sup>160</sup> One of the war's principal perpetrators has been the LRA that allegedly abducted tens of thousands of civilians.<sup>161</sup> In December 2003, President Museveni referred the situation in northern Uganda to the ICC.<sup>162</sup> Two years later the ICC unsealed arrest warrants against the LRA leader Joseph Kony and four of his top commanders for crimes against humanity and war crimes in October 2005.<sup>163</sup> In 2006, peace talks between the Government of Uganda and the LRA commenced in Juba, under the mediation of the President of South Sudan, Riek Machar.

A significant question is whether Uganda complied with the triggering mechanisms of the ICC when referring the situation in the north to the ICC. The Rome Statute provides that a state party can refer a

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<sup>159</sup> See P Hayner, Building a Future on Peace and Justice Nuremberg 25-27 June 2007. The Challenge of Justice in Negotiating Peace: Lessons from Sierra Leone Expert Paper Workshop paper 6- Negotiating Justice

<sup>160</sup> The UN chief referred the situation in northern Uganda a humanitarian crisis

<sup>161</sup> Phuong Pham et al (n 157 above).

<sup>162</sup> ICC Press Release, President of Uganda refers Situation concerning the LRA to the ICC, 29 January 2004, <[www.icc-cpi.int/pressrelease\\_details&id=16.html](http://www.icc-cpi.int/pressrelease_details&id=16.html)> accessed on 8 October 2008.

<sup>163</sup> Warrant of Arrest Unsealed against LRA Commanders: ICC press release, 14 October 14 2005, The Hague. The five leaders are Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen. However, Lukwiya was killed in August 2006 in a gun battle with the Ugandan army.

situation in which crimes over which the ICC has jurisdiction appear to have been committed to the ICC Prosecutor.<sup>164</sup> The complementarity principle as discussed in previous chapters obliges a state to only refer a situation to the ICC when that state is unwilling or genuinely unable to carry out the investigations or prosecution.<sup>165</sup> In determining inability in a particular case, the Court considers whether due to total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence for the conduct of its proceedings.<sup>166</sup>

Did Uganda have the capacity to try the LRA in domestic courts at the time of the referral? It is not in dispute that at the time of the self-referral, Uganda had an effective and functioning national judicial system. Ssenyonjo argues that under the complementarity principle, a state whose judicial system has not suffered a total or substantial collapse shouldn't voluntarily confer jurisdiction to the ICC.<sup>167</sup> This, he contends would safeguard against the possible use of the ICC as a political tool or as a less politically and financially costly alternative.<sup>168</sup> A functioning judicial system should not be limited to the court structures but whether those structures can administer justice as required under international standards. It is noted here that the prosecutorial and investigative capacities of Uganda was and still remain a challenge.<sup>169</sup> Uganda at the time of the referral had not yet domesticated the Rome Statute thus; procedurally it would have been impossible for it to prefer charges against the LRA. Then the fact that the LRA were and still are at large in neighbouring countries notably the Sudan and now DRC posed a challenge to Uganda on accessing and arresting them.

These challenges demonstrate that although Uganda had a functioning judiciary at the time of referral, it nonetheless was genuinely unable to carry out investigations and prosecutions of the LRA at home. Evidently, if Uganda had the capacity to try and chose instead to refer the matter to the ICC, this would have resulted into an illegality and the Prosecutor would have discovered that the referral offends the principle of complementarity and consequently rejected the matter altogether. Uganda may have acted hastily in referring the situation to the ICC but it was not done illegally. The logical conclusion is that Uganda abided by the Rome Statute.

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<sup>164</sup> Arts 13(a), 14 Rome Statute.

<sup>165</sup> Art 17(1) (a) Rome Statute.

<sup>166</sup> Art 17(3) Rome Statute.

<sup>167</sup> Ssenyonjo (n 148 above)58.

<sup>168</sup> H Moy, 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity', 19 *Harvard Human Rights Journal* (2006) 267 at 273; A Slaughter and W Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)', 47 (2006) *Harvard International Law Journal* 327 at 347.

<sup>169</sup> Third National Justice Law and Order Sector Forum: Them: Developing and managing an effective transitional justice system for Uganda 31July -1 August 2008 on file with writer.

### 4.3 The interaction between peace and justice

This section engages the debate on the impact of the referral on the question of peace and justice in Uganda. It is admitted that the Ugandan referral has confronted the ICC by the challenges inherent in pursuing peace and justice simultaneously.<sup>170</sup> As events unfolding in the Juba peace talks suggest, when efforts to prosecute perpetrators of mass atrocities coincide with a peace process it generates tension and ushers a delicate balance between peace and justice. In considering the impact of the referral on peace and justice, the guiding principle should be whether the referral has helped in the peace process, the search for justice and the fight against impunity.

It is not uncommon for justice to be postponed or even dismissed at the negotiating table by those who have committed violations. Where some semblance of justice is implemented, it is usually within a post-conflict context or part of a transition, as was the case in Argentina.<sup>171</sup> Gronon suggests that at times a trade-off is necessary especially when the price of a peace deal may be a degree of impunity for those responsible for such abuses, like the top five leadership of the LRA indicted by the ICC.<sup>172</sup> Gronon observes that the potential clash between peace and justice objectives can sometimes be circumvented by pursuing a sequential approach – for example, by getting a peace agreement now, then dealing with justice many years later as it happened in Latin America.<sup>173</sup> When the ICC issued indictments for the LRA there was concern that this would impact negatively on the peace process in northern Uganda. Many organizations in this region originally urged the ICC to adopt a wait- and -see policy, or advocate an approach of peace first, justice later.<sup>174</sup> In a joint press release, the Refugee Law Project and Human Rights Focus stated that given the international community's overriding commitment to contributing to peace, the logic of prosecution is untenable. It unreasonably devalues an opportunity that seeks to end a destabilising humanitarian crisis.<sup>175</sup> Gronon uses the Sun City and related agreements that formally ended the DRC conflict in 2003; and Sudan's 2005 Comprehensive Peace Agreement (CPA) as well as the Darfur Peace Agreement in 2006 to show that at times accountability for past atrocities could be postponed for the sake of peace.<sup>176</sup>

The above examples cited by Gronon can be distinguished from the northern Uganda situation. It is not disputed that a trade-off could at times be necessary especially when the sequencing ensures justice to victims. Trade-off, however, is applicable where both parties are willing to end the conflict but this does not seem to be the case with the LRA. After failed peace talk attempts, the government

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<sup>170</sup> See, Gronon & O'Brien (n 109 above), C Much (n 114 above).

<sup>171</sup> n 79 above.

<sup>172</sup> Gronon & O'Brien (n 109 above).

<sup>173</sup> As above.

<sup>174</sup> L Hovil & J Quinn, 'Peace First, Justice Later: Traditional Justice in Northern Uganda'. Refugee Law Project, Working Paper No. 17, July 2005.

<sup>175</sup> Not a Crime to Talk: Give Peace a Chance in Northern Uganda. Refugee Law Project and Human Rights Focus, Press statement. Kampala, July 24, 2006.

<sup>176</sup> Gronon & O'Brien (n 109 above).

decided to grant the LRA full amnesty<sup>177</sup> which obviously was not taken seriously by the top leadership of the rebels. Several attempts at peace talks initiated by the government with the backing of religious organisations in northern Uganda<sup>178</sup> also proved futile. Then when government referred the matter to the ICC, the LRA positively responded by accepting to participate in the Juba peace talks. The peace agreement in the DRC has not been successful in restoring peace neither has the situation in Darfur even after the signing of the peace agreement. The CPA between the government of Sudan and the Sudan Peoples' Liberation Army/Movement (SPLA/M) succeed because there was determination on both sides. However, the same cannot be said of the LRA since the resumption of peace talks. The LRA are presently destabilising and terrorising civilians in the DRC and parts of Southern Sudan even when there is supposed to be a cessation of hostilities.<sup>179</sup>

At this juncture, it would be germane to consider whether a State Party to the ICC Statute can in its quest for peace grant total amnesty to individuals indicted by the ICC. As Ssenyonjo observes, it is not clear whether the grant of amnesty is a legal bar to the exercise of ICC jurisdiction.<sup>180</sup> The LRA demand for withdrawal of ICC indictments as a precondition for them to sign the peace agreement illustrates the tension between peace and justice. Since the rebels still have an upper hand in restoring and maintaining peace in northern Uganda they demand for impunity, or threaten continued insecurity and instability.

While the government has sometimes referred to an amnesty, it is clear that a blanket amnesty would indicate an unwillingness to investigate or prosecute. In this respect, the ICC is not bound by the Ugandan Amnesty Act of 2000 that preceded its investigation. Traditional justice mechanisms have been mentioned by the LRA and other actors as one possibility for a domestic justice approach, but many believe that traditional justice measures alone will not satisfy the test of complementarity due to the references to investigation or prosecution. Recent proposals suggest the establishment of a national mechanism that is more likely to meet such a threshold.<sup>181</sup>

Accountability and reconciliation forms Agenda item 3 in the Juba peace talks and an agreement has been signed on it.<sup>182</sup> The agreement provides that both formal and informal justice mechanisms will be adopted and that the formal judicial systems as provided in the constitution of Uganda will be used to prosecute individuals who bear responsibility for the most serious crimes especially those amounting

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<sup>177</sup> Under the 2000 Amnesty Act.

<sup>178</sup> Northern Uganda Religious Peace Initiative.

<sup>179</sup> UN News Centre: Attacks by the LRA on DRC <<http://www.un.org/apps/news/story.asp?NewsID=28395>>, accessed on 15 October 2008.

<sup>180</sup> Ssenyonjo (n 148 above) 55.

<sup>181</sup> n 79 above 10.

<sup>182</sup> Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (Annex to June 29 Agreement), Juba, Sudan, June 29, 2007,

to international crimes.<sup>183</sup> With regard to the ICC indictment, the agreement states that the government will undertake the obligation to address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA.<sup>184</sup> It is not clear how the government intends to address the ICC arrest warrants as no formal request has been made to the ICC regarding withdrawal of the indictments

The annex to the agreement on accountability and reconciliation between Uganda and the LRA provides that the government will set up a special division of the High Court to try individuals who are alleged to have committed serious crimes during the conflict.<sup>185</sup> Alongside the special war crimes division of the High Court, the agreement also gives a prominent place to traditional justice. It provides that the government shall, in consultation with relevant interlocutors, examine the practice of traditional justice mechanisms in affected areas, with a view to identifying the most appropriate roles for such mechanisms.<sup>186</sup> In addition, the agreement sets up a truth commission body, and mandates some form of reparations for victims of the conflict.<sup>187</sup> The annexure however is unclear on the place of the ICC. The preamble contains a reference to the requirements of the principle of complementarity of the Rome Statute. This could imply that Uganda intends to argue that an international prosecution is no longer necessary or appropriate.

Traditional justice and particularly the ceremony of the *mato oput* has been put forward assertively by local leaders as an alternative to the ICC. Zachary Lomo has suggested that the people of northern Uganda have the right to self determination, and this implies the primary prerogative of determining how to end the conflict in northern Uganda.<sup>188</sup> However, research indicates that victims usually have diverse views on forms of justice. A survey carried out on the analysis of attitudes and perceptions about peace and justice in northern Uganda from both Acholi and non Acholi tribes revealed that the majority of those who believe that justice may endanger peace still supported pursuing justice in future, after peace is established.<sup>189</sup> In northern Uganda, when victims were asked what they would like to see happen to those LRA leaders who are responsible for violations, many opted for punishment including trial, imprisonment or death as opposed to a smaller number that opted for forgiveness.<sup>190</sup> Other victims have expressed a desire for peace at any cost, but with future prosecution once the conflict is over.<sup>191</sup> According to the International Crisis Group, even within the Acholi culture, traditional reconciliation ceremonies receive moderate support in part because they are

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<sup>183</sup> Section 6.1 Agreement on Accountability and Reconciliation.

<sup>184</sup> Section 14.6 Agreement on Accountability and Reconciliation.

<sup>185</sup> Annex to the 29 June Agreement paras 7, 10-14.

<sup>186</sup> Annex to June 29 Agreement, paras. 19-22.

<sup>187</sup> Annex to June 29 Agreement, para 4(j).

<sup>188</sup> Lomo (n 24 above).

<sup>189</sup> Phuong Pham et al., *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* 34 (International Center for Transitional Justice & Human Rights Center July 2005) at <<http://www.ictj.org/images/content/1/2/127.pdf>> accessed on 8 October 2008.

<sup>190</sup> ICTJ and HRC Berkeley, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, Table 4.

<sup>191</sup> Phuong Pham et al (n 190 above).



insufficient to the scale and nature of the conflict.<sup>192</sup> The survey revealed a disparity between Acholi and other northern Ugandans regarding prosecution with the latter in favour of accountability.<sup>193</sup> When asked about accountability, the most common response (66%) was punishment, i.e., trial and imprisonment/execution.<sup>194</sup> Again, the non-Acholi districts supported prosecution and punishment more strongly than the Acholi districts, which were more likely to support reconciliation and reintegration.<sup>195</sup>

The government is currently engaged in developing policy issues that will address peace and justice as it waits the signing of the final peace agreement. There is recognition of the crucial role of the traditional justice mechanisms in an effective transitional justice system as it promotes truth telling, reconciliation and reintegration. Traditional justice mechanisms are not uniform thus as a fusion of the traditional justice mechanism with the formal criminal system for war crimes are being sought, to make the cultural processes relevant within the current legal framework,<sup>196</sup> this disparity should be addressed.

There is uncertainty on whether *mato oput*, an Acholi traditional reconciliation mechanism will deliver justice to the LRA victims in other parts of Uganda whose justice systems are different from that of the Acholi. The attempt by the government to integrate other traditional mechanisms of reconciliation and accountability from other affected communities would address this problem if it is feasible. However, given the fact that the crimes committed in northern Uganda were against the international community as a whole, it is unclear if the traditional mechanisms meet the minimum international requirements for accountability in accordance with Uganda's international treaty obligations.<sup>197</sup> Issues concerning individual accountability by a competent, independent and impartial tribunal with due process would also need to be addressed. Senyonjo opines that *mato oput* is not part of a system aimed at bringing the persons concerned to justice, but a form of blanket amnesty reflecting a traditional attempt to shield perpetrators from justice. He maintains that *mato oput* in its current form would not necessarily be enough to satisfy international law, which does not allow impunity for the most serious crimes.<sup>198</sup>

There is an apparent lack of agreement on whether traditional methods are feasible given the circumstances.<sup>199</sup> Keller observes that the obstacle to adapting *mato oput* for the current situation is the

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<sup>192</sup> International Crisis Group, *Peace in Northern Uganda?* 12-13 (Africa Briefing No. 41, Sept. 13, 2006), at <[http://www.crisisgroup.org/library/documents/africa/central\\_africa/b041\\_peace\\_in\\_northern\\_uganda.pdf](http://www.crisisgroup.org/library/documents/africa/central_africa/b041_peace_in_northern_uganda.pdf)>6 accessed 8 October 2008,

<sup>193</sup> Pham et al (n 190 above) 26.

<sup>194</sup> As above

<sup>195</sup> As above

<sup>196</sup> n 169 above.

<sup>197</sup> Ssenyonjo (n 148 above) 65.

<sup>198</sup> As above.

<sup>199</sup> Keller (n 36 above) 229.

unprecedented complexity of perpetrators and victims needing reconciliation.<sup>200</sup> In light of the difficulties of adapting *mato oput* to mass atrocities, it might best serve as a complement to prosecution. Thus, *mato oput* could take place after or alongside prosecution although the problem with this approach is that the LRA is scared of the potential for prosecution.<sup>201</sup>

While LRA leaders have sought to portray the ICC as an obstacle to achieving peace, nonetheless, by and large the ICC is widely credited with helping to move the parties to the negotiating table and with contributing to a focus on accountability at the peace talks.<sup>202</sup> Although it may not be a conclusive assertion, the ICC involvement rattled and forced the rebels to the negotiating table, made it more difficult for them to enjoy support from its foreign ally, and raised awareness of the international community thus the support the Juba peace talks have received.<sup>203</sup>

#### **4.4 Can Uganda withdraw matter from the ICC?**

In considering whether it is desirable to withdraw a referral from the jurisdiction of the ICC, it is imperative to scrutinise if the circumstances that warranted the referral as given by that state have changed. The withdrawal should not be done to shield perpetrators of crimes but should be in the interest of peace and most importantly the interest of victims. The impact of the withdrawal on justice and the fight against impunity should also be considered.

Untriggering the jurisdiction of the ICC as discussed in chapter two apply here. In enforcing its peace and security mandate, the Security Council might put a prosecution on hold to allow for the implementation of a peace deal, but it should be conscious that indiscriminate exercise of this power in purported pursuit of peace will emasculate the ICC, and undermine efforts to strengthen deterrence and institutionalise human rights norms.<sup>204</sup> Once the situation has changed, the investigations of the Prosecutor could continue. The LRA during peace talks have demanded for a deferral under Article 16 and permanent withdrawal of ICC warrants, in exchange for peace deal.<sup>205</sup> A deferral would set a dangerous precedent; as it would encourage impunity.<sup>206</sup> It might also undermine the ICC by encouraging states parties to go to the Security Council for deferrals rather than carry out their obligations to arrest and surrender individuals to the ICC. The UN Security Council has not requested for a deferral of Ugandan situation so Uganda cannot rely on it

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<sup>200</sup> As above 232

<sup>201</sup> As above 237.

<sup>202</sup> n 80 above.

<sup>203</sup> Gronon& O'Brien (n 109 above).

<sup>204</sup> Gronon(n 95 above).

<sup>205</sup> Keller (n 36 above).

<sup>206</sup> Amnesty International, Letter to Security Council ,April 1 ,2008 ,at <<http://appablog.wordpress.com/2008/04/04/uganda-amnesty-international-letter-to-unscc-re-icc-andjoseph-kony/>> accessed 8 October 2008.

Uganda could lay an admissibility challenge basing on article 19 Rome Statute on the ground that circumstances have changed, for example if the peace process results in a change of the situation whereby Uganda will be in a position to genuinely investigate or prosecute, and embarks on that course to address justice issues without compromising peace. The Prosecutor could also use his discretion under article 53 of the Rome Statute to discontinue investigations if the interest of justice, interest of victims so demand. On a referral of a case to the ICC by a state, that state does not have the power to unilaterally take back the referral. Uganda could therefore challenge the admissibility of the cases, but it would still remain up to the ICC to decide whether the war crimes processes underway in the country meet the threshold of a genuine effort, as specified in the statute.

In the event that national jurisdictions are permitted to try ICC crimes, they should maintain credible, independent, and impartial prosecutions; adhere to international fair trial standards; and render penalties that reflect the gravity of the crimes, with imprisonment as the principal penalty. The internationally recognised fair trial procedures as provided for in the International Covenant on Civil and Political Rights (ICCPR),<sup>207</sup> those in the ICC Statute and the Updated UN Principles on Protection and Promotion of Human Rights through Combating of Impunity will have to be strictly observed both in substance and in practice. Substantially, it is imperative for states to incorporate the provisions of the Rome Statute into their national criminal legislation to implement it. Uganda is in the process of incorporating the Rome Statute, it is important that the jurisdiction of war crimes court; the types of crimes; admissibility of evidence; the definition of victims given that some perpetrators are victims themselves; need to be considered. All the above will have to be addressed to meet the internationally accepted standards in order for the system to be perceived as an effective local remedy.

Penalties and sentences should reflect the gravity of the crime and meet international standards. The ICC crimes carry with them imprisonment for specified number of years the maximum of 30 years and life imprisonment when justified.<sup>208</sup> Uganda currently maintains the death penalty for capital offences in its statute books.<sup>209</sup> Under international standards, Uganda will have to reconcile the legislation on the death penalty. If the Court decides that a case is inadmissible before the ICC, any national trial alternative would need to meet the requirements of genuine willingness and ability to try the case.

#### **4.5 Conclusion**

There is general consensus on the need for both criminal prosecutions and complementary alternative justice systems for an effective transitional justice system. In preparation for the implementation of the Juba agreement, Uganda plans to fuse the traditional justice system at the exit point of the formal

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<sup>207</sup> International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976

<sup>208</sup> Art 77 Rome Statute.

<sup>209</sup> Article 22 (1) of the 1995 Constitution of Uganda as amended provides for the death penalty.

justice process particularly for those with command responsibility.<sup>210</sup> The approach adopted by Uganda in quest to conduct domestic prosecutions should adhere to international standards and be victim centred. If Uganda is desirous of withdrawing a case from the ICC jurisdiction it must make a challenge in open Court whereupon the judges will decide whether a trial at domestic jurisdiction is an acceptable alternative to the ICC. Uganda cannot take a decision to unilaterally withdraw the case from the ICC.

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<sup>210</sup> n 169 above.

## Chapter five

### 4.1 Conclusion and Recommendation

Human rights violations in parts of Africa have left several victims of genocide, war crimes and crimes against humanity without effective remedy as the perpetrators have escaped justice thereby entrenching a culture of impunity. The establishment of the ICC was an acknowledgment by the international community that impunity can no longer be tolerated. The Rome Statute with its complementarity principle gives priority to states to prosecute alleged perpetrators of international crimes and only comes to play when states are unwilling or genuinely unable to prosecute.

The current cases before the ICC illustrate that the complementarity principle has intensified rather than prevent tension between the Court and national jurisdictions. Although 27 African states have ratified the Rome Statute, many have not incorporated the Statute into national legislation to give it effect at the national level. As the discussion in this study illustrates, the ICC Statute provides the mechanisms for setting the jurisdiction of the Court in motion however it is unclear on whether a state that referred a matter before it can decide to withdraw the matter. The only withdrawal provision is where the UN Security Council requests a deference to protect and maintain international peace and security. The case relating to the president of Sudan illustrates the conflict between peace and justice: a central theme in our discussion.

Although commentators generally agree that peace and justice are important, they are divided on the approach to be adopted when reconciling the tension between the two especially in the context of ongoing conflict. While there are views suggesting for a 'peace first justice later' approach, others believe that the parallel track system of the ICC can handle justice and peace simultaneously. There however, is consensus among commentators that prosecution alone will not suffice in fighting impunity and restoring peace and a multi dimensional approach is required. There is also agreement that because conflicts are unique, generalisation of what was successful in one conflict zone should not be applied without modifications to the circumstances of another conflict. Prosecution by the ICC should not be viewed in isolation but in context as its success depends on several factors. The above discussion demonstrates the difficulties that the prevailing regime of the Rome Statute poses for recalling cases that have been submitted to the ICC by states. This in turn calls for caution by states in referring cases to the ICC, in order to avoid situations where such referrals potentially jeopardize the search for peace on war torn states.

## **Recommendations**

A multi-dimensional approach to prosecution of individuals suspected to have committed international crimes in domestic legal systems should be encouraged. Where the ICC has been seized with jurisdiction, there need not be contradictions as the ICC is only complementary to national jurisdictions. In recommending a continuation with the ICC prosecutions where a state willingly referred the matter or even in Security Council referrals, this study strengthens previous acknowledgements of the significance and determination by the international community to end impunity.<sup>211</sup> The ICC must find a balance between peace and justice while recognising the complementary roles the two play in sustainable peace. The issue of state sovereignty and the mandate of the ICC are crucial areas. The ICC should take a nuanced approach to balance peace and justice, as a slight tilt against either will lead to detrimental effects. This is also vital for the ICC to earn the trust and cooperation of states.

The referrals by Uganda, DRC and the Security Council referral of the situation in Darfur have confronted the ICC with challenges inherent in pursuing peace and justice simultaneously.<sup>212</sup> This is worsened if attempts at prosecutions of suspects coincide with a peace process as in the case of Uganda. It is important to note that peace deals that sacrifice justice usually fail to provide durable peace. To bow to the demands of the LRA would be against the spirit and purpose of the ICC Statute and jeopardize the fight against impunity. However, at times pragmatism requires that legality be abandoned to move society forward and that the better choice would be to ensure that the international community intervenes before violations of rights result in full blown conflicts

The immediate impetus is the need to build capacity of national jurisdictions to enable them prosecute individuals suspected of international crimes. This begins with the incorporation of the Rome Statute into national legislation. State parties require enlightenment on the conditions under which they can decide to refer a situation to the ICC so that referrals are not made in haste. The circumstance under which withdrawal from the ICC is permitted also needs to be elucidated so as to avoid misconceived unilateral withdrawal matters from the ICC jurisdiction by states.

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<sup>211</sup> Preamble 5 and art 1 Rome Statute.

<sup>212</sup> n 170 above.

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