

The Peace versus Justice Debate at the ICC: The Case of the Ituri Warlords in the Democratic Republic of the Congo

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Introduction

In May and July of 2006, the transitional government of the Democratic Republic of the Congo (DRC) negotiated peace agreements with three warlords - Mathieu Ngudjolo, Peter Karim, and Cobra Matata. They were the leaders of the last remaining armed groups responsible for ethnic violence that had taken 60,000 lives in the Ituri region of northeast Congo since 1999. In exchange for allowing the demobilization and disarmament of their militias, each leader was granted an amnesty and a military commission at the rank of colonel.

These agreements were designed to pacify Ituri in the lead-up to internationally supervised elections, which were the final steps in the peace process that ended the Second Congo War. That war, often referred to as Africa's First World War, had involved over twenty armed factions and the direct military intervention of as many as nine neighboring states, either in support of the fragile government in Kinshasa or of various rebel groups. It was also the deadliest war since World War II. The International Rescue Committee estimates that it took 3.3 million lives from its outbreak in August 1998 until its formal resolution in December 2002.¹ The agreement that ended the war involved a power-sharing arrangement by establishing a transitional government between President Joseph Kabila, the two main armed groups, and the political opposition, in anticipation of national elections. In order to stabilize the post-conflict environment, the peace process sought to buy off political and militia leaders with high-level government or military positions in exchange for allowing a UN peacekeeping force (MONUC) to assist in the demobilization of their militias and their integration into the national army. Since the militias in Ituri were not part of the original agreement, the fighting between them continued, making the region the site of the worst post-conflict violence in the DRC. Extending the same strategy of co-optation used with the main rebel groups to the Ituri warlords was seen as the best way of remedying that situation. Kemal Saiki, a spokesman for MONUC, which had facilitated the amnesty-for-peace deal, defended its role in implementing the agreement: "The most important thing is to bring an end to the bloodshed. Since these deals have been signed, there has not been any large-scale fighting in Ituri."²

This strategy of bargaining with warlords was sharply criticized by international and Congolese human rights organizations for "rewarding war criminals rather than holding them to account." The amnestied leaders were implicated in the recruitment of child soldiers, ethnic massacres, and sexual violence, as well as attacks on UN peacekeepers. Allowing them to go unpunished was not only "a slap in the face to

¹ International Rescue Committee, "Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey Conducted September – November 2002, Reported April 2003," (13 April 2003.)

² Tristan McConnell, "Measures to Keep Peace in Congo Draw Fire" *Christian Science Monitor*, (September 5, 2006), 4.

victims,” but also reinforced the culture of impunity in which the perpetrators of anti-civilian violence know they will never be held accountable for their actions. Anneke Van Woudenberg of Human Rights Watch observed that one of the consequences of these agreements is that the Congolese army “is fast becoming an army of war criminals . . . [which could] kick-start another cycle of violence.”³

The International Criminal Court (ICC) assumed jurisdiction over atrocity crimes committed in the DRC as the result of a referral from the transitional government on April 19, 2004. Its initial investigations have focused on the violence in Ituri. At the time of the negotiations with Ngudjolo, Karim, and Matata, the ICC had issued one arrest warrant for an Ituri-based militia leader, Thomas Lubanga, who was already in custody in 2005 as a result of joint operations between MONUC and the Congolese army and was subsequently surrendered to The Hague on March 17, 2006.

For the purposes of this exercise, we shall assume that ICC Chief Prosecutor Luis Moreno-Ocampo initiated investigations of all three of the Ituri rebel leaders in early 2006 and was planning to issue arrest warrants by the end of the year. How then should he approach Kinshasa’s offer of amnesty in exchange for peace with militia leaders under criminal investigation? Should he act on a duty to prosecute crimes that fall under his jurisdiction regardless of domestic amnesties and peace processes? Should he exercise his discretion not to prosecute, either respecting the amnesty or holding back from prosecution in the interests of peace? Or is there a middle position through which he can balance the imperatives of justice with the requirements of conflict resolution?

Part I of this case study lays out the key provisions of the ICC’s founding Rome Statute. Part II sets up the debate over whether the Prosecutor can defer criminal proceedings to peace processes. Its central focus is on the controversy surrounding Article 53 of the ICC’s founding Rome Statute, which grants the Prosecutor the discretion not to investigate or prosecute if it is not in the “interests of justice.” Should that term be construed broadly enough to include peace processes or would doing so be contrary to the ICC’s mandate to end impunity through prosecution? Part III provides background on the Second Congo War, the peace process that officially ended it and the continued violence in eastern Congo. Part IV provides the context for the decision-making dilemma facing the Prosecutor in the aftermath of the Ituri amnesties and sets up a simulated debate between human rights NGOs who favor prosecution and conflict managers, who want to retain amnesty as an instrument in their peace-making toolbox.

I. The International Criminal Court

The International Criminal Court (ICC) is the first permanent international tribunal tasked with assigning individual criminal responsibility for genocide and other atrocity crimes. Its founding Rome Statute was negotiated in July 1998, and came into force on July 1, 2002, two months after it met the threshold requirement of sixty ratifications. As of September 1, 2011, there are 115 state parties, including the DRC, which deposited its instrument of ratification on April 11, 2002.

The Rome Statute’s preamble lays out the ICC’s mission to ensure the prosecution of “the most serious crimes of concern to the international community.” It affirms the duty of state parties to “exercise criminal jurisdiction over those responsible for international crimes,” either through their national courts or by cooperation with the

³ *Ibid.*

ICC. The goal is to “put an end to impunity for the perpetrators of these crimes,” who in the past believed they could use any means to achieve their goals without legal consequence. As in a domestic criminal law system, ending impunity will both provide justice to victims and deter the recurrence of such crimes. To its strongest proponents in the human rights community, this international justice directive is seen as part of a normative shift in conflict resolution in which those complicit in anti-civilian violence are no longer legitimate partners in peace negotiations and must be held legally accountable.

In order to realize this goal, the anti-impunity advocates lobbied at Rome for an ICC that minimized the influence of politics. While that ideal was not fully realized, their most significant achievement was an Office of the Prosecutor (OTP) with an independent power to investigate situations on its own initiative, rather than passively accepting those referred to it by the Security Council, as the United States had advocated.⁴ The Prosecutor’s independence was reinforced by Article 42(1), which requires it to “act independently . . . [and] not seek or act on instructions from any external source” and Article 42(5), which prevents the Prosecutor from engaging “in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence.” Finally, Article 4(1) gave the court its own “international legal personality,” rather than making it part of the United Nations. In other words, while the ICC has a relationship with the United Nations, it is not a “UN court.” In theory, that means that the ICC is more insulated from the state interests that dominate the UN system, better positioning it to mete out justice without fear or favor, unlike Nuremberg and Tokyo where the victors judged the vanquished, or the UN-created tribunals for the former Yugoslavia and Rwanda, which were created by a major power consensus in the Security Council.

Despite these successes in creating an independent Prosecutor, its effectiveness still depends on states because the Court lacks the supranational capacity to enforce its decisions. That means that the court is dependent on the voluntary cooperation of states for the arrest and surrender of suspects, access to crime scenes and incriminating or exculpatory evidence, and the protection of investigators and witnesses – functions routinely carried out by apolitical law enforcement agencies in a domestic criminal justice system. In theory, Article 86 of the Rome Statute obliges state parties to cooperate with the court, as does Article 25 of the UN Charter for the entire international community when the Security Council refers a case. However, the mechanisms for enforcing those obligations are weak – a referral to the Assembly of States Parties, which lacks coercive authority or sanctions from the Security Council, which depend upon the consensus of the five permanent members (P-5). As a result, while the Prosecutor has the initiative to investigate situations and build cases on his own without political direction, he is entirely dependent on sovereign cooperation for the implementation of the Court’s judgments or to pressure recalcitrant states to comply.⁵

In terms of subject matter jurisdiction, the ICC can currently prosecute three crimes: Genocide (Article 6), Crimes against Humanity (Article 7), and War Crimes (Article 8), though Article 8(1) establishes a presumption in favor of focusing on war

⁴ N. Deitelhoff “The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case,” *International Organization* 33 (2009), 53.

⁵ For a good overview of this dependent, see Allison Marston Danner, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court,” *American Journal of International Law* 97 (July 2003), 525-527.

crimes that are “part of a plan or as part of a large-scale commission of such crimes.” The Rome Statute technically grants the Court jurisdiction over the crime of aggression, but it could only investigate and prosecute that crime if after 2009, two-thirds of the Assembly of States Parties – the political body of states that have ratified the Rome Statute – agrees to a definition of aggression, which is then ratified by seven-eighths of the state parties (Articles 5, 121, 123). A consensus document was negotiated at the ICC Review Conference in Kampala, Uganda, in June 2010, holding out the prospect of prosecutions for the crime of aggression at some point after 2017.⁶

The temporal jurisdiction of the court (Article 11) is prospective, not retrospective. The ICC can only investigate and prosecute crimes alleged to have taken place after the Rome Statute came into force on July 1, 2002. If a state joins the treaty after that date, jurisdiction begins only after that state becomes a party. While this differentiates the ICC from other international courts that investigate crimes committed before their creation, it was a compromise necessitated by the prospect that fewer states would have consented to a tribunal empowered to probe their past behavior.⁷ Nonetheless, this provision is problematic in the case of the DRC since the peace agreement that ended the civil war was signed in December 2002, meaning that the majority of crimes committed during the war are beyond the ICC’s reach.

Under Article 13, there are three triggers through which a case can be brought before the court. First, the Prosecutor can take a case independently or *proprio motu* (Article 13(c)). This was a key goal of the human rights community to hold out the prospect of apolitical justice and ICC Prosecutor Luis Moreno-Ocampo has received thousands of briefs calling on him to initiate investigations, though he has yet to act on any of them. Nonetheless, he has used this authority to open one formal investigation – i.e., the widespread ethnic killings and civilian displacement in Kenya that followed allegations of fraud in the country’s December 2007 presidential elections.⁸

Second, a state party can refer a situation to the Prosecutor’s office (Article 13(a)). This provision has been invoked by Uganda, the DRC, and the Central African Republic, for alleged crimes on their own territory. These “self-referrals” emerged from a policy developed by Moreno-Ocampo to encourage states to accept the court’s jurisdiction voluntarily.⁹ This approach is attractive to the prosecutor because it develops a cooperative relationship with the territorial state, facilitating the collection of evidence, security for investigators and witnesses, and the arrest and surrender of suspects. Some critics, however, fear that this practice will allow governments, who are themselves implicated in human rights abuses, to use the court as an instrument to stigmatize their enemies (rebel groups, the political opposition, leaders of a prior regime) without undertaking improvements in their own accountability practices.¹⁰ While the Prosecutor claims that the ICC’s jurisdiction over all parties will avert this outcome, this issue of

⁶ David Scheffer, “State Parties Approve New Crimes for International Criminal Court,” *ASIL Insights*, (June 22, 2010).

⁷ William A. Schabas, *An Introduction to the International Criminal Court*, 3rd edition (Cambridge University Press, 2007), 65-71.

⁸ Marlise Simons, “International Court Authorizes Inquiry into Kenyans Linked to 2007 Political Clashes,” *New York Times*, April 1, 2010: 1.

⁹ International Criminal Court, Office of the Prosecutor, “Informal Expert Paper: The Principle of Complementarity in Practice” (2003).

¹⁰ William A. Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,” *Journal of International Criminal Justice* 6 (2008), 752-753.

“instrumentalization” has been a source of ongoing controversy, particularly in the DRC and Uganda.¹¹

Finally, the Security Council can authorize an investigation acting under its Chapter VII mandate to maintain international peace and security (Article 13(b)). This empowers the ICC to exercise universal jurisdiction, meaning that it can investigate and prosecute crimes committed by any member of the international community. By contrast, the other triggers require some connection to state consent – either through a state ratifying the Rome Statute, which establishes jurisdiction over crimes committed by its nationals or on its territory (Article 12(2)), or through a voluntary request by a nonparty to accept ad hoc jurisdiction over a particular situation on its territory (Article 12(3)).¹² As a result, Security Council referral is the only trigger that can reach alleged crimes committed by a nonparty state on its own territory without its consent. The Prosecutor has so far received and accepted two Security Council referrals – first, when Resolution 1593 (31 March 2005) authorized an investigation of atrocity crimes in the Darfur region of western Sudan, and second, when Resolution 1970 (26 February 2011) tasked the Court to prosecute war crimes and crimes against humanity committed during the civil war in Libya. Neither Sudan nor Libya were parties to the Rome Statute and both opposed any external scrutiny, judicial or otherwise, of how their security forces dealt with rebels on their own territory.

Under Article 16, the Security Council is also empowered to order a suspension of an investigation or prosecution for renewable twelve-month periods through a resolution passed under Chapter VII of the UN Charter. This provision was opposed by human rights groups, who viewed it as a conduit for politicization. For diplomats, however, it was designed as a political safety valve when prosecution might complicate the Security Council’s mandate to maintain international peace and security. While it has not yet been invoked for that purpose, the African Union (AU) advocated its use in the Darfur case following the confirmation of the arrest warrant against Sudan’s President, Omar Hassan al-Bashir, contending that it jeopardizes the Darfur peace process and the Comprehensive Peace Agreement, which ended a twenty year civil war between Khartoum and rebels in the south.¹³ Ironically, the only uses of Article 16 were 2002 and 2003 resolutions immunizing the armed forces of nonparty states when they participate in UN-authorized operations, passed in response to US threats to veto the reauthorization of UN peacekeeping operations without this protection. This use of Article 16 is often cited by human rights groups as validating their concerns about politicization.¹⁴

The most distinctive feature of the ICC is the principle of complementarity (Article 17). Unlike the International Criminal Tribunals for the former Yugoslavia (ICTY) or Rwanda (ICTR), primary jurisdiction resides with national systems of criminal justice and a case is inadmissible unless they are “unwilling or unable genuinely to carry out the investigation or prosecution” (Article 17(1)(a)). As a result, the ICC is a

¹¹ Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008), 194.

¹² Ivory Coast is the only nonparty state to have made use of this provision and the Prosecutor has sought approval to begin a formal investigation for the violence that followed the disputed 2011 election that reported killed over 3000 people. See Marlise Simons, “Ivory Coast: Hague Inquiry is Sought” *New York Times*, June 24, 2011, p. 6.

¹³ See Dapo Akande, Max du Plessis and Charles C. Jalloh, *An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC*, Pretoria, Institute for Security Studies, (2010), 18-21.

¹⁴ Human Rights Watch, The Meaning of the ‘Interests of Justice’ in Article 53 of the Rome Statute, Policy Paper, (June 2005), 7-9.

subsidiary court that can only take a case when the Prosecutor can persuade the pre-trial chamber that national systems of justice are not doing their jobs. Some proponents of international criminal justice are critical of the complementarity model as nothing more than a “politically expedient concession to the sovereignty of states in order to garner broad support for the Statute.”¹⁵ Defenders of the system counter that the Rome Statute’s admissibility rules create incentives for states to take their duty to prosecute seriously in order to avoid the intervention of the ICC. In addition, the Prosecutor has developed the concept of “positive complementarity” in which the Court combines the threat of asserting jurisdiction with affirmative efforts to encourage national systems of justice to prosecute those core crimes defined by the Rome Statute.¹⁶ That way, the ICC serves as a transmission belt for the injection of anti-impunity norms into the legal systems of those countries with which it is involved. From this perspective, the ICC’s involvement in the DRC should correlate with improvements in human rights and accountability practices.

II. The Duty to Prosecute versus Discretion in the Interests of Peace

A. The Case for Discretion in the Interests of Peace

Does the ICC have a duty to prosecute crimes of sufficient gravity that fall within its jurisdiction regardless of political consequences? This is an important question because states have often chosen to forego legal retribution in transitions from armed conflict or repressive rule, particularly when those accused of war crimes retain significant power and negotiation is the most viable means of political change. In such circumstances, mediators have viewed demands for prosecution as likely to prolong a conflict or dissuade a dictator from relinquishing power. The same is true for peace processes in fragile post-conflict environments when political and legal institutions are weak, relative to the residual power of the perpetrators, and insistence on trials could invite violent backlash against the political transition.¹⁷ This is why formal or de facto amnesties accompanied several UN peace operations in the 1990s, such as those in Mozambique, Haiti, El Salvador and Guatemala.¹⁸ It also explains why the Good Friday Agreement – which formally ended the violence in Northern Ireland – paroled members of Catholic and Protestant paramilitaries who were convicted of killing civilians, some of whose leaders are now serving in the Northern Ireland Assembly.¹⁹

In some circumstances, these amnesties have been accompanied by alternative or non-retributive justice mechanisms, such as truth commissions, reparations or lustration. The best-known example is South Africa’s Truth and Reconciliation Commission (TRC) in which amnesty was conditioned on full confession of political crimes. That way, the

¹⁵ Michael P. Scharf, “The ICC’s Jurisdiction over the Nationals of Non-Party States” in Sarah B. Sewall and Karl Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield, 2000), 216.

¹⁶ See William W. Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice,” *Criminal Law Forum* 19 (2008), 59.

¹⁷ See J. Snyder and L. Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” (2003) 28 *International Security*, at 5-44; and Tonya L. Putnum, “Human Rights and Sustainable Peace,” in Stephen John Stedman, Donald Rothchild, and Elizabeth M. Cousens, eds. *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder: Lynne Rienner, 2002), 237-271.

¹⁸ See Michael P. Scharf, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes,” *Law and Contemporary Problems* 59 (1996), p. 41; and Rachel Kerr and Eirin Mobekk, *Peace & Justice: Seeking Accountability after War*, (Polity Press, 2007), 112-114.

¹⁹ Daniel Philpott, *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice*, (University of Notre Dame Press, 2006), 220.

officials of the apartheid regime were required to acknowledge the past, thereby providing more truth to victims than would likely have been the case with prosecutions and discrediting the old order without the insistence on trials that would have made a negotiated transition impossible.²⁰

Under the Rome Statute, the Prosecutor is not bound by a domestic amnesty. Does that mean there is a duty to prosecute even if the parties believe that non-retributive approaches to conflict resolution are necessary for a peaceful transition? Speaking in South Africa shortly after the negotiation of the Rome Statute, UN Secretary General Kofi Annan's answer was that this duty should not foreclose arrangements like the TRC: "No one should imagine that [the ICC] would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end and the victims have inherited power. It is inconceivable, that in such a case, the Court would seek to substitute its judgment for that of a whole nation, which is seeking the best way to put a traumatic past behind it and build a better future."²¹

From a legal standpoint, the key question is by what authority might the Prosecutor defer to peace processes or non-punitive arrangements like the TRC, particularly given the Rome Statute's mandate to end impunity through prosecution? The only provision that explicitly holds out the prospect of doing so is Article 16, which delegates that authority not to the Prosecutor, but to the Security Council. Moreover, Article 16 only allows the postponement of criminal proceedings, not the acknowledgement of an amnesty, since the decision to forego prosecution would have to be renewed annually.

There are, nonetheless, provisions within the Rome Statute that have been construed as providing the Prosecutor the independent authority to hold back from a criminal investigation. For example, Article 17 stipulates that a case is inadmissible unless a state is "unwilling or unable genuinely to carry out an investigation or prosecution." Since a genuine investigation need not be a criminal one, some commentators have suggested that the Prosecutor could defer to arrangements like the TRC in which amnesty is conditioned on full disclosure of political crimes, as opposed to a blanket amnesty designed to keep the facts hidden.²² At the Rome Conference, South Africa advocated this position and the US circulated a proposal using the TRC as a model for allowing the prosecutor to respect an amnesty if it was democratically ratified, included alternative justice mechanisms, and was necessary for peace and reconciliation.²³

This proposal, however, generated opposition from NGOs and the strongest state supporters of the ICC because of the role amnesties had played in perpetuating the impunity of former military dictators after they left office, particularly in Latin

²⁰ Richard Goldstone, "Past Human Rights Violations: Amnesties and Truth Commissions or Prosecution" *Northern Ireland Legal Quarterly* 51 (2000) 168.

²¹ Cited in Charles Villa-Vicencio, "Truth Commissions" in Charles Villa-Vicencio and Erik Dokstader, eds., *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* (Capetown, South Africa: Institute for Justice and Reconciliation, 2004), 91.

²² Declan Roche, "Truth Commissions Amnesties, and the International Criminal Court," *British Journal of Criminology* 45:4 (2005), 568.

²³ See M. P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court," *Cornell International Law Journal* 32 (1999), 508; Ruth Wedgwood, "The International Criminal Court: An American View" *European Journal of International Law* 10 (1999), 96.

America.²⁴ Agreement on compromise language proved to be impossible and, as a result, amnesty is nowhere mentioned in the Rome Statute. The full text of Article 17 is also more consistent with a duty to prosecute. Article 17(2) defines “unwillingness” as (a) a national process “made for the purpose of shielding the person concerned from criminal responsibility” and (b) an “unjustified delay . . . inconsistent with an intent to bring the person concerned to justice.” Even though the TRC’s amnesty was conditioned on full disclosure and was approved by South Africa’s first democratically elected non-racial parliament, there was no intention to bring to trial those who publicly confessed political crimes. Some commentators still contend this language provides flexibility for deferring to arrangements like the TRC since the intent was not to protect perpetrators, but to maximize truth and promote reconciliation.²⁵ Nonetheless, a strict reading of the text of Article 17 would not recognize crimes amnestied by the TRC as any less admissible than those covered by self-serving amnesties, such as the one that the Pinochet government granted itself prior to the return of constitutional rule in Chile.²⁶

If the Prosecutor is going to contemplate holding back from criminal justice in the interests of peace, that authority is more likely to be found in the rules governing prosecutorial discretion in Article 53. In deciding to initiate an investigation, Article 53(1) requires the Prosecutor to consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under Article 17; and
- (c) Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the *interests of justice* (emphasis added).

Article 53(2) grants the Prosecutor discretion not to move from investigation to trial in a case that satisfies legal, factual and admissibility criteria, but is “not in the *interests of justice*, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime” (emphasis added).

In other words, there is a concept called “the interests of justice” which is not defined in the Rome Statute. It is different from the issues of evidence, jurisdiction, admissibility, the gravity of the alleged crime, and the interests of victims. It is to be weighed and balanced against those factors and, in some circumstances, can overrule them. Can it be construed broadly enough to encompass the interests of peace?

On the surface, the answer would appear to be no since peace and justice are different and amnesties sacrifice legal retribution in order to achieve policy goals. Nonetheless, some international criminal law scholars and practitioners have interpreted

²⁴ Schabas, *Introduction to the International Criminal Court*, 41.

²⁵ See Claus Kress and Leena Glover, “International Criminal Law Restraints in Peace Talks to End Armed Conflict of a Non-International Character,” in Morton Bergsmo and Pablo Kalmanovitz, eds. *Law in Peace Negotiations*, International Peace Research Institute, (Oslo Norway, 2009), 46-47; Freeman, *Necessary Evils*, 82

²⁶ See J. Dugard, “Possible Conflicts of Justice with Truth Commissions,” in A. Cassese, P. Gaeta, and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 699-702.

the provision as a form of “creative ambiguity”²⁷ which could be used to defer to alternative justice mechanisms or peace processes whose destabilization could jeopardize the security of victims or inflict injustices on future victims of political violence.

Richard Goldstone and Nicole Fritz argue that Article 53 allows the Prosecutor to evaluate alternative justice mechanisms – rejecting blanket amnesties, but “allowing for accommodation of amnesties where these are consistent with justice.”²⁸ For amnesties to pass the “interests of justice” test, they recommend internationally prescribed guidelines that require truth commissions fully resourced to conduct thorough investigations, public acknowledgment of official wrongdoing, democratic legitimacy, and provisions for the participation of and reparations to victims.²⁹

Other commentators suggest that Article 53 grants the Prosecutor broad political discretion to account for the potential repercussions for conflict resolution.³⁰ One international criminal law scholar referred to it as a “useful safety valve” that would allow the Prosecutor “to stand down when prosecution becomes an obstacle to peace.”³¹ In fact, a 2003 draft regulation on the “interests of justice” by the OTP suggested that the concept might be used to decline an investigation that exacerbated a conflict or jeopardized a peace process.³² Any finding to that effect is not the Prosecutor’s alone. Under Article 53(3), it would have to be reported to the pre-trial chamber, which would review and possibly reverse it. Nonetheless, it provides a means through which the Prosecutor could theoretically hold back from those prosecutions that might undercut peace efforts.

The ICC confronted precisely this kind of dilemma in early 2005, just as it was about to apply for arrest warrants for Joseph Kony and the leadership of the Lord’s Resistance Army, a rebel group that had abducted more than 20,000 children as sex slaves and soldiers in a campaign of murder, mutilation and sexual violence, directed primarily against the Acholi people in Northern Uganda whom they claim to represent. The case had been referred to the Court by Ugandan President Yoweri Museveni on December 16, 2003, but generated strong criticism from Betty Bigombe, a former Ugandan minister who was attempting to engage the LRA in peace talks. It was also opposed by the leaders of most of the Acholi religious and traditional organizations, as well as one of Uganda’s most prominent human rights organizations – the Refugee Law Project – because of the fear that it would drive the LRA away from the peace talks and foreclose the possibility of a negotiated solution.³³ These organizations prioritized peace

²⁷ See the statement by P. Kirsch in M. P. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court,” *Cornell International Law Journal* 32 (1999), 522.

²⁸ Richard J. Goldstone and Nicole Fritz, “‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers,” *Leiden Journal of International Law* 13 (2000), 656.

²⁹ *Ibid.*, 659-663; Also see Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), 99-102.

³⁰ See M. R. Brubacher, “Prosecutorial Discretion within the International Criminal Court” 2 (2004) *Journal of International Criminal Justice*, 81; L. Côté, “Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law” *Journal of International Criminal Justice* 3 (2005), 177.

³¹ William A. Schabas, “Complementarity in Practice: Some Uncomplimentary Thoughts” *Criminal Law Forum* 19 (2008), 21-22.

³² Cited in Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2010), 83.

³³ See Lucy Hovil and Joanna Quinn, *Peace First, Justice Later* (Kampala: Refugee Law Project, 2005); and Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (New York: Zed Books, 2006), 117-122.

over prosecution because the war has been the principal source of humanitarian problems in the region. At the time of the controversy, 1.7 million people or 90% of the population of the three most war-ravaged districts had been relocated to Internally Displaced Persons (IDP) camps, in which the health and sanitary conditions were appalling, and where they were provided inadequate protection and were often subjected to abuse by the Ugandan army.³⁴ Therefore, they advocated extending a 2000 amnesty law to the LRA leadership in exchange for demobilization and the use of traditional non-punitive reconciliation rituals in which the perpetrators would have to confess their crimes and make amends before being reintegrated into the community.³⁵

Between March and May 2005, Moreno Ocampo met with representatives of local organizations and initiated several missions to Northern Uganda to interview victims and civil society groups. He suggested that the indictments could be delayed to give the peace process a chance, though this would not be the same thing as permanent immunity. In so doing, his office cited Article 53, indicating that it might suspend its investigation “if it is in the interests of justice to proceed with a peace agreement.”³⁶ While the Prosecutor subsequently obtained the arrest warrants in July 2005, and unsealed them in October, his interpretation of Article 53 suggested broad discretion to consider the court’s impact on peace processes should he choose to exercise it.

B. The Case for a Duty to Prosecute

The suggestion that Article 53 could be used to defer to peace processes provoked a sharp challenge from several international lawyers and human rights organizations, most notably Human Rights Watch and Amnesty International, who viewed it as opening the door to treating justice as a bargaining chip to be bartered away. The ICC, they contend, has a duty to prosecute the gravest international crimes, as a result of the Rome Statute, the evolution of international law, and the rights of victims, and acknowledging an amnesty or otherwise condoning a decision to forego trials is an abrogation of its moral and legal obligations. Moreover, if the ICC consistently and impartially acts on this duty uncompromised by politics, it will have superior consequences in securing a durable peace and in promoting human rights in post-conflict societies.

In terms of duties, anti-impunity advocates argue that the mandate of the ICC is justice, not peace. As laid out in its preamble, the object and purpose of the Rome Statute is to end impunity for the worst international crimes by holding perpetrators criminally accountable. Its only reference to peace is that “such grave crimes threaten the peace, security and well-being of the world,” the implication being that peace is the expected result of a consistent policy of prosecution. Moreover, the ICC is a legal, not a political body, and it lacks the mandate and expertise to evaluate the political legitimacy of amnesties or the impact of prosecution on peace. The kinds of consultations necessary to make those determinations would violate the independence of the Prosecutor, who, as stipulated in Article 42(1), shall not “seek or act on instructions for any external

³⁴ A. Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” *Ethics & International Affairs* 21 (June 2007), 179-198.

³⁵ Marc Lacey, “Victims of Uganda Atrocities Choose a Path of Forgiveness,” *New York Times*, April 18, 2005: A1.

³⁶ See comments by Y. Sorokobi in “Uganda: ICC Could Suspend Northern Investigations—Spokesman,” *IRIN News*, 18 April 2005; OTP never formally invoked “the interests of justice” as a basis for a deferral, but suggested it could do so in a number of interviews. See Allen, *Trial Justice*, 93-94; International Crisis Group, *Shock Therapy for Northern Uganda’s Peace Process*, Africa Briefing No. 23, 11 April, 2005: 5-6.

source.”³⁷ Hence, the Rome Statute (Article 16) delegates any decision to defer prosecution to peace exclusively to the Security Council – a political body whose mandate, unlike that of the ICC, is to maintain international peace and security.³⁸ Absent Security Council intervention, Human Rights Watch concludes, “the prosecutor may not fail to initiate an investigation or decide not to proceed with the investigation because of national efforts such as truth commissions, national amnesties, or the implementation of traditional reconciliation methods, or because of concerns regarding an ongoing peace process.”³⁹

In addition, most of the crimes covered by the Rome Statute, such as torture, genocide, and war crimes, involve a duty to prosecute as a result of treaty or custom that predates the Rome Statute. These legal developments have delegitimized amnesties for the most serious violations of international law.⁴⁰ A key watershed event marking this change was the statement by the UN Special Representative to the 1999 Lomé Accords withholding recognition of the blanket amnesty conferred on all the parties during the civil war in Sierra Leone if they involved international crimes for which there was universal jurisdiction to prosecute.⁴¹ Thereafter, the UN reversed its traditional practice and established an official policy of not facilitating peace agreements unless amnesty provisions exclude international crimes – a position the European Union (EU) has endorsed as well.⁴² Given these normative and legal changes, Human Rights Watch concludes that the TRC is “a model from another era” whose application today would be “seen as a step backwards by victims whose expectations for justice have changed as a result of the rise of international criminal law.”⁴³ To acknowledge the legitimacy of such arrangements, therefore, would be to act against the normative developments that made the ICC possible.

Finally, deferring prosecution to peace is an abrogation of the Court’s duty to victims, which is covered by international human rights law. Article 2(3) of the International Covenant on Civil and Political Rights asserts that victims of human rights abuses have a right to a remedy whether or not the perpetrator is acting in an official capacity. While this right to redress may sometimes involve civil penalties, nothing less than prosecution is mandated for the most serious abuses. Extending amnesties for such crimes would sacrifice what should be a victim’s non-negotiable right to redress to the political agenda of the state.⁴⁴

Proponents of a duty to prosecute also provide a results-based argument for rejecting non-retributive alternatives. First, a strategy of prosecution uncompromised by politics is necessary to deter large-scale human rights abuses. It will contribute to *specific deterrence* in the countries in which it is applied – both with respect to continued

³⁷ Amnesty International, Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice, drafted by Martin Macpherson, Senior Director of the International Law and Organizations Program, 17 June 2005, 4.

³⁸ Amnesty, 1.

³⁹ Human Rights Watch, *The Meaning of the ‘Interests of Justice’*, 2.

⁴⁰ Diane F. Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency” *International Journal of Transitional Justice* 1 (2007), 18.

⁴¹ Human Rights Watch, *The Meaning of the ‘Interests of Justice’*, 12.

⁴² Laura Davis and Priscilla Hayner, “Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC” International Center for Transitional Justice, New York, March 2009.

⁴³ Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (July 2009), 7-8.

⁴⁴ Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 3rd edition (New York: New Press, 2006), 294.

atrocities during an ongoing war and preventing their recurrence in a post-conflict environment. It also maximizes *general deterrence* to future perpetrators through the “gradual emergence of inhibitions against massive crimes, hitherto tolerated or condoned by the international community.”⁴⁵ By contrast, deferring prosecution to peace negotiations weakens deterrence. In an ongoing war, it “undermine[s] any short-term deterrent value the court might have through investigating current crimes.”⁴⁶ In a post-conflict environment, it sends the message that perpetrators can return to violence without legal consequence, thereby setting the stage for renewed atrocities. Human Rights Watch notes that the amnesties that accompanied the 1999 Lomé Agreement in Sierra Leone and 2005 Comprehensive Peace Agreement in Sudan encouraged the resumption of war crimes – in the former case, through the Revolutionary United Front returning to violence and taking UN peacekeepers hostage; in the latter case, by signaling to Sudan’s ruling National Congress Party that it could do in Darfur what it had done in the south for two decades without legal repercussions.⁴⁷ This also weakens general deterrence by sending the message that those who contemplate criminal violence can always leverage their power to gain immunity no matter the crime.

Second, a principled insistence on prosecution, far from being an obstacle to peace, is actually indispensable to its consolidation. It allows victims to individualize guilt in criminal leaders rather than collectivize it in entire communities, thereby breaking the “us versus them” cycle that perpetuates inter-communal violence and prevents reconciliation.⁴⁸ It also stigmatizes and thereby incapacitates the most dangerous criminal actors who would otherwise play a disruptive role in post-conflict politics – e.g., Radovan Karadžić in post-Dayton Bosnia or Charles Taylor after the democratic transition in Liberia.⁴⁹ Finally, it has a positive demonstration effect on the domestic rule of law whereas allowing perpetrators to re-enter politics or share power erodes public confidence and contributes to corruption, lawlessness, and the continuation of abuses.⁵⁰

In making this argument, proponents of a duty to prosecute assert that many of the dire predictions as to the negative impact of criminal justice on peace processes have not been borne out. For example, the indictments of Bosnian Serb leaders Radovan Karadžić and Ratko Mladić just prior to the peace negotiations at Dayton or of Slobodan Milošević during the Kosovo War did not derail settlements of those conflicts despite the warnings of diplomats. And contrary to the fears of mediators and civil society groups, the LRA accepted a cease-fire in northern Uganda and returned to the negotiating table after the unsealing of the arrest warrants by the ICC.⁵¹ Nor did the arrest of former Chilean dictator Augusto Pinochet in the United Kingdom and the sixteen-month controversy over his extradition to Spain trigger a backlash against democratization in Chile, as some had predicted. In fact, the aftermath of the Pinochet arrest saw “an opening of the domestic courts in Chile to victims who had previously been denied access to effective

⁴⁵ Payam Akhavan, “Beyond Impunity: Can the International Criminal Court Prevent Mass Atrocities” *American Journal of International Law* 95 (2001): 9.

⁴⁶ Human Rights Watch, *The Meaning of the ‘Interests of Justice,’* 15.

⁴⁷ Human Rights Watch, *Selling Justice Short*, 57-61, 68-74.

⁴⁸ Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,” *European Journal of International Law* 14 (2003), 489.

⁴⁹ Samantha Power, “Stopping Genocide and Learning ‘Justice’: Learning by Doing,” *Social Research* 69 (Winter 2002), 1101.

⁵⁰ Human Rights Watch, *Selling Justice Short*, 7, 35.

⁵¹ Human Rights Watch, *Selling Justice Short*, 3-4, 18-19.

remedies,” thereby demonstrating the galvanizing impact of international justice on the rule of law at home.⁵²

III. The Congolese Civil War

The Democratic Republic of the Congo (DRC) is the site of what the United Nations has referred to as “the world’s worst ongoing humanitarian crisis.”⁵³ That crisis is the direct result of the Second Congo War, also referred to as Africa’s First World War because it involved not only a civil war between Kinshasa and Congolese rebels, but also most of its neighbors, no less than six of whom intervened directly on Congolese soil. The war took more than 3 million lives from its outbreak in August 1998 until its formal resolution in December 2002, making it the deadliest conflict since the Second World War. Even after the peace agreement, the violence has continued contributing to another 2 million deaths, both directly and as the result of war-related starvation and disease.⁵⁴

Two events set the stage for the conflict. The first was the Rwandan genocide. When the Tutsi-led Rwandan Patriotic Front (RPF) defeated the genocidal Hutu regime in July 1994, more than one million Hutu refugees fled across the border to eastern Zaire (now the DRC) into camps run by the United Nations and international humanitarian organizations. Among those who fled were members of the former Armed Forces of Rwanda (FAR) and Interahamwe militias who were complicit in the genocide and who used the camps as a base from which they rearmed to launch cross-border attacks into Rwanda, with the long-term goal of retaking the country.⁵⁵ The Hutus also became the dominant force in certain parts of eastern Congo and their militias initiated a policy of ethnic cleansing against Congolese Tutsis, often with the cooperation of local politicians and the Zairian government, who viewed the Tutsi minority as a potential fifth column.⁵⁶

The second event was the overthrow of the 30-year Zairian dictatorship of Joseph Mobutu. Mobutu’s sympathy for the former regime in Rwanda and his protective role vis-à-vis its “government-in-exile” led the Rwandan army to invade and occupy those areas of northeast Congo where the Hutu militias were active.⁵⁷ This, in turn, initiated the First Congo War when, in September 1996, Rwanda, joined by Uganda, and later by Angola, invaded Zaire with the goal of regime change. In order to legitimize their involvement, they collaborated with a coalition of four Congolese rebel groups in exile, the *Alliance des Forces Démocratiques pour la Libération du Congo* (AFDL). On May 17, 1997, Mobutu fled the country and, shortly thereafter, the rebels took Kinshasa. With the assistance of Kigali and Kampala, one of the leaders of the rebel coalition, Laurent Kabila, declared himself president and changed the name of the country from Zaire to the Democratic Republic of the Congo (DRC).⁵⁸

⁵² Human Rights Watch, *Selling Justice Short*, 108; For an academic version of this argument, see Madeleine Davis, “Externalised Justice and Democratisation: Lessons from the Pinochet Case,” *Political Studies* 54:6 (2006), 249-251.

⁵³ See the statement from Under-Secretary General for Humanitarian Affairs, Jan Egeland, in “UN Calls Eastern Congo Worst Humanitarian Crisis,” *Voice of America*, 16 March 2005.

⁵⁴ Lydia Polgreen, “Congo’s Death Rate Unchanged Since War Ended,” *New York Times*, January 23, 2008: A8.

⁵⁵ Gérard Prunier, *Africa’s World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press, 2009), 24-29.

⁵⁶ Thomas Turner, *The Congo Wars: Conflict, Myth and Reality* (London: Zed Books, 2007) 4, 124-125.

⁵⁷ Herbert F. Weiss, “The Democratic Republic of the Congo: A Story of Lost Opportunities to Prevent or Reduce Deadly Conflicts” in Richard H. Cooper and Juliette Voinov Kohler, eds., *Responsibility to Protect: The Global Moral Compact for the 21st Century* (New York: Palgrave Macmillan, 2009) 117.

⁵⁸ Turner, *The Congo Wars*, 4-5.

During the First Congo War, the most serious allegations of criminal violence were directed against the Rwandan armed forces and their AFDL allies for systematic and widespread attacks against Hutu civilians that went well beyond what was necessary to neutralize militias associated with the old regime. Evidence of atrocity crimes was recently corroborated in a 2010 UN Mapping report, which characterized the “relentless pursuit and mass killing of Hutu refugees” as war crimes and crimes against humanity that might rise to the level of genocide.⁵⁹ In fact, when reports of atrocities first emerged in 1997, the UN Human Rights Commission authorized a panel of experts to investigate the allegations. While President Kabila obstructed the investigators’ access to mass graves and witnesses, the commission nonetheless reported that Rwandan army attacks on Hutu civilians were “an abhorrent crime against humanity.” The Security Council subsequently condemned the massacres and called on the Rwandan and Congolese government to investigate and punish those responsible, but took no further action – in effect, leaving accountability to governments complicit in those crimes.⁶⁰

The Second Congo War was triggered by the breakdown of relations between Kabila and his former patrons. In July 1998, Kabila purged all Rwandan officials from Kinshasa and ordered the Rwandan army to leave the country.⁶¹ In early August, Rwanda intervened in support of a mutiny in the Congolese army and, joined again by Uganda, initiated military operations in the northeast and in the west of the country with the aim of taking Kinshasa and overthrowing Kabila. In so doing, they aligned themselves with a group of Congolese politicians in eastern Congo who formed *Rassemblement Congolais pour la Démocratie* (RCD) as an alternative to Kabila.⁶² The ostensible purpose of the Rwandan and Ugandan intervention was to prevent the region from being used by insurgents for cross-border attacks (and in the former case, to protect the Congolese Tutsi). Nonetheless, what emerged was an outright military occupation of much of eastern Congo sustained by plundering the region’s resources.⁶³

In order to save his regime, Kabila appealed to the Southern African Development Community (SADC) and obtained the military assistance of Angola, Namibia, and Zimbabwe. Their counteroffensive prevented the Ugandan and Rwandan supported rebels from taking Kinshasa.⁶⁴ What emerged, however, was a military stalemate in which the country was effectively partitioned into three zones. Rwanda and its RCD allies occupied most of eastern Congo. Uganda, after falling out with Rwanda, sponsored its own proxy militia, the *Mouvement pour la Libération du Congo* (MLC), and occupied much of northern Congo. Kabila and his African partners controlled the rest of the country.⁶⁵ Each of the protagonists used ethnic militias as proxies, almost all of whom engaged in direct attacks on civilian communities associated with the combatants they were fighting.

⁵⁹ UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Democratic Republic of the Congo between 1993 and 2003*, August 2010, 9-14.

⁶⁰ See Filip Reyntjens, *The Great African War: Congo and Regional Politics, 1996-2006*, (Cambridge University Press, 2009), 88-92; and Jason K. Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (New York: Public Affairs, 2011), 135-141.

⁶¹ Prunier, *Africa’s First World War*, 178.

⁶² Weiss, “The Democratic Republic of the Congo,” 118-120.

⁶³ René Lemarchand, *The Dynamics of Violence in Central Africa* (University of Pennsylvania Press, 2007), 233-234, 241-245.

⁶⁴ Prunier, *Africa’s World War*, 181-186.

⁶⁵ Turner, *The Congo Wars*, 6.

In 1999, the UN Special Rapporteur for the Congo, Roberto Garretón, reported that all sides disregarded international humanitarian law, particularly through the incitement of ethnic hatred, which created a climate that encouraged anti-civilian violence, such as massacres, forced deportations, large-scale sexual violence, torture, and the impressment of child soldiers. He recommended that efforts at mediation should be accompanied by extending the mandate of the International Criminal Tribunal for Rwanda (ICTR) to the DRC since “all acts of brutality . . . must be tried by an international court, regardless of who committed them.”⁶⁶

The first step in the process of ending the war was the Lusaka Peace Agreement, signed by Kinshasa and the other state belligerents in July 1999 and later joined by the main rebel groups in August. It called for a cease-fire, to be followed by the removal of all foreign troops from the DRC and the disarmament of the militias. In order to foster internal reconciliation, it launched the Inter-Congolese Dialogue to start negotiations between the government, the rebels, the unarmed opposition and Congolese civil society. It also envisioned a Chapter VII UN peacekeeping mission that could enforce compliance with the agreement.⁶⁷

While Lusaka created a framework for ending the war, the cease-fire broke down almost immediately, in large measure because most of the parties believed they had more to gain through the continuation of the conflict. For example, the Kabila government feared that full implementation of Lusaka might threaten its hold on power while the rebels were reluctant to surrender gains made in the war or access to lucrative resources under their control. The latter was also the reason why three of the governments that signed Lusaka – Rwanda, Uganda and Zimbabwe – maintained a direct military presence in the DRC.⁶⁸ Moreover, the Security Council authorized a relatively modest UN peacekeeping force (MONUC), which would monitor rather than enforce implementation.⁶⁹ Given the realities on the ground, however, there was probably little that even a well-resourced UN force could have done.

A major turning point in the conflict was the assassination of Laurent Kabila in January 2001 and his replacement by his son Joseph. The younger Kabila was more amenable to working with the UN to help end the conflict and in pursuing negotiations with the rebels. As a result, the Inter-Congolese Dialogue began in earnest in Sun City, South Africa in February 2002. This was followed by peace agreements with Rwanda and Uganda who, under strong donor pressure, agreed withdraw their troops from Congolese soil. The peace process culminated in the Global All-Inclusive Accord in Pretoria on December 17, 2002, which formally ended the war and established the framework for the transition.⁷⁰

The peace agreement involved a power-sharing arrangement with a transitional government comprised of President Kabila and four vice presidents representing the two major rebel forces, the unarmed opposition, and Congolese civil society. This, in turn, led

⁶⁶ United Nations, Economic and Social Council, *Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission resolution 1998/61*, (8 February 1999), 14-17, 29.

⁶⁷ Weiss, “The Democratic Republic of the Congo,” 121.

⁶⁸ Philip Roessler and John Prendergast, “Democratic Republic of the Congo” in William J. Durch, ed., *Twenty-First Century Peace Operations* (Washington, D.C.: United States Institute of Peace, 2006), 254-255.

⁶⁹ Roessler and Prendergast, “Democratic Republic of the Congo,” 251.

⁷⁰ Roessler and Prendergast, “Democratic Republic of the Congo,” 267.

to the drafting of a constitution in March 2005, its ratification by referendum in December, and presidential and national assembly elections scheduled for July 2006. In order to create a more stable environment for the transition, the peace process sought to disarm the militias by co-opting their leaders with government or military positions. In return, MONUC would be allowed to subject the militias to a strategy of disarmament, demobilization, and reintegration (DDR) known as *brassage*, which involved dismantling their command and control structures, assimilating ex-combatants into the Congolese army (*Forces Armées de la République Démocratique du Congo* or FARDC), and dispersing those forces to different parts of the country.⁷¹

The underlying logic of the peace process was to prioritize political accommodation over legal accountability. In theory, the parties committed themselves to criminal justice, calling for an ad hoc tribunal, as well as a truth commission.⁷² The DRC was also a party to the Rome Statute and its amnesty law conformed to international standards by excluding genocide, crimes against humanity, and war crimes.⁷³ In practice, however, none of these commitments was taken seriously. The transitional government never formally requested an ad hoc tribunal from the Security Council, which did not take up the matter on its own, and the truth commission never materialized.⁷⁴ Many of those implicated in some of the worst crimes were not only granted amnesties, but also given high-level appointments to the cabinet or the armed forces. Finally, the DDR program did not contain a process for vetting those responsible for serious human rights abuses, unlike comparable programs elsewhere.⁷⁵ As one human rights worker put it, “impunity greased the gears of the transition.”⁷⁶

Justice was downplayed in the peace process because of the nature of the transition. The war had ended in a negotiated settlement rather than in the victory of one side over the other, and there was neither the domestic capacity nor the international presence to apprehend alleged perpetrators, many of whom still retained control over their armed forces. In comparable situations, the traditional approach to conflict resolution has been some sort of power sharing with inclusion of powerful actors into the process regardless of their complicity in serious human rights abuses – in other words, subordinating justice to stability.⁷⁷ This tradeoff between peace and justice was made more acute by the fact that virtually all the political and militia leaders who became part of the transitional government were complicit in war crimes, either directly or through the proxies they armed and supported. As the historian, Gérard Prunier, noted: “the whole exercise, necessary as it was to stop major organized violence, reeked of reward for crime and pork-barrel politics.”⁷⁸

⁷¹ Center on International Cooperation, *Annual Review of Global Peace Operations, 2008* (Boulder, Colo.: Lynne Rienner, 2008), 44.

⁷² Davis and Hayner, “Difficult Peace, Limited Justice,” 20.

⁷³ Davis and Hayner, “Difficult Peace, Limited Justice,” 15.

⁷⁴ Davis and Hayner, “Difficult Peace, Limited Justice,” 20.

⁷⁵ Turner, *The Congo Wars*, 130.

⁷⁶ Stearns, “Congo’s Peace,” 205.

⁷⁷ See the statement of Belgian Minister of Foreign Affairs, Louis Michel in “L’Afrique est une Tache sur la Conscience Occidentale,” *Jeune Afrique L’intelligent*, 29 Octobre 2003, translated in Pascale Kambale and Anna Rotman, “The International Criminal Court and the Congo: Examining the Possibilities,” *Crimes of War*, (October 2004), note 13.

⁷⁸ Cited in Mats Berdal, *Building Peace After War* (London: International Institute for Strategic Studies, 2009), p. 35.

While the peace process reduced the level of violence in most of the country, it failed to end the war in eastern Congo. In the Kivus, for example, a general from the Goma faction of RCD, Laurent Nkunda, declined an appointment in Kinshasa and refused to disarm, claiming the need to protect the Tutsi minority in northeast Congo from genocide at the hands of the Hutu-led *Forces Démocratiques de Libération du Rwanda* (FDLR). The end result was a violent proxy war. Nkunda received aid from Kigali not only to counter the threat from the Hutu militias, but also to preserve its economic interests in the region. In response, Kinshasa supported local Mai-Mai militias, as well as the FDLR, in fighting against Nkunda.⁷⁹ On both sides, this resulted in attacks on civilian populations seen as sympathetic to their opponents, perpetuating the kind of ethnic violence that had characterized most of the Second Congo War.

The site of the worst post-conflict violence, however, was in the Ituri district of Orientale Province in northeastern Congo where land disputes between Hema pastoralists and Lendu farmers were exacerbated by foreign intervention and became a proxy war involving Kigali, Kampala and former rebels who became part of the transitional government, over control of the region's resources.⁸⁰ Civilians were often the direct targets of this war with massacres, ethnic cleansing, and widespread sexual violence, much of which was carried out by child soldiers.⁸¹ The United Nations estimated that from the outbreak of the war in 1999 through the peace agreement, more than 50,000 civilians had been killed and more than 500,000 had been internally displaced.⁸² However, neither the peace agreement nor the withdrawal of foreign forces brought any respite to the region, as armed groups proliferated in the ensuing anarchy. In fact, when Uganda removed its last troops from the region in the spring of 2003, ethnic violence escalated with Hema militias attacking and ethnically cleansing the regional capital of Bunia, followed by Lendu reprisal killings against Hema communities.⁸³

Neither MONUC nor the fledgling Congolese army were able to stem the violence or protect the civilian population.⁸⁴ In fact, during the initial violence, the *Economist* referred to MONUC as the "world's least effective peacekeeping force" since it was an under-resourced and poorly-trained operation that could not carry out its mandate to protect civilians during the attack on Bunia. In addition, MONUC's reputation was further tarnished by allegations of rape against UN peacekeepers and of the sexual abuse of Congolese war orphans by a civilian administrator.⁸⁵

In response to these scandals, UN Secretary General Kofi Annan appealed to the international community to deploy a multinational force to stabilize the situation until the UN could reinforce MONUC under a Chapter VII mandate. On May 30, 2003, UN Security Council Resolution 1484 provided the authorization for a French-led EU force,

⁷⁹ Lemarchand, *The Dynamics of Violence*, 17-19.

⁸⁰ Francis Mwepu, "Ituri: Congo's Own Rwanda" *Institute of War & Peace Reporting*, 27 July 2006; For more background see Koen Vlassenroot and Timothy Raemaekers, "The Politics of Rebellion and Intervention in Ituri: A New Political Complex?" *African Affairs* 103 (2004), 385-412.

⁸¹ Roessler and Prendergast, "Democratic Republic of Congo," 231.

⁸² United Nations Security Council, *Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, UN Doc. S/2003/566, May 27, 2003, paragraphs 9, 10.

⁸³ Roessler and Prendergast, "Democratic Republic of the Congo," 283.

⁸⁴ See Denis M. Tull, "Peacekeeping in the Democratic Republic of Congo: Waging Peace and Fighting War," *International Peacekeeping* 16 (2009), 217.

⁸⁵ "Is This the World's Least Effective Peacekeeping Force?" *Economist*, December 4, 2004, p. 45.

Operation Artemis, to protect civilians by taking enforcement actions against the warlords. Through its ability and willingness to use force, the multinational force was able to disarm the militias that had been fighting over Bunia and stabilize the surrounding area, even though it lacked the authority to address violence outside the city.⁸⁶ In September 2003, security responsibility was handed back to a better-resourced MONUC, which was reinforced to 10,800 troops in September 2003, and to 16,700 in October 2004. MONUC's "Ituri Brigade" initiated more forceful tactics against the militias in December 2004, and changed the balance of forces on the ground. This convinced several warlords to lay down their arms, which enabled MONUC to demobilize over 16,000 fighters.⁸⁷ Despite the improvement in the security situation, however, a number of armed groups remained active in 2006 as the transitional government was moving toward elections for the Presidency and National Assembly.

IV. The International Criminal Court in the DRC

On July 16, 2003, ICC Prosecutor, Luis Moreno-Ocampo, indicated that after reviewing almost 500 complaints involving more than 60 countries, he planned to open the Court's first case in the Ituri region of the DRC, which he referred to as the "most urgent situation" under the court's jurisdiction. Although the Court's temporal jurisdiction began on July 1, 2002 – well after most of the atrocities had taken place – the Prosecutor noted that 5000 civilians had been killed since then, in what "could constitute genocide, crimes against humanity or war crimes."⁸⁸ In September, he sought authorization from the Pre-Trial Chamber to begin an investigation on his own authority, but stated that he preferred to work cooperatively with the Congolese government and encouraged it, as a party to the Rome Statute, to refer the situation on its own.⁸⁹ On April 19, 2004, President Kabila requested ICC scrutiny over criminal violence not only in Ituri, but the entire DRC, and the Prosecutor began his investigation on June 23, 2004.

The Prosecutor started in Ituri because it was the site of the worst atrocities that fell within the ICC's jurisdiction. This decision was also politically prudent for two reasons. First, it did not threaten the peace agreement since the militias were not part of the power-sharing accord in Kinshasa.⁹⁰ Second, the prospects for success in Ituri were enhanced by the presence of MONUC, which was given an enforcement mandate to assist the FARDC in protecting civilians and disarming the militias. Since MONUC was authorized to take action against those that the ICC was likely to investigate, the court had a potential enforcement arm in the region that did not exist elsewhere in the DRC.⁹¹

The advantages of MONUC's presence were clearly evident in the ICC's first case against Thomas Lubanga. Lubanga was the leader of the Union of Congolese Patriots (UPC), a Hema-dominated rebel group that had served as a proxy initially for

⁸⁶ International Crisis Group, *Maintaining Momentum in the Congo: The Ituri Problem*, Africa Report No. 84, 26 August 2004, p. 3; Prendergast and Roessler, "Democratic Republic of the Congo," 284-286.

⁸⁷ International Crisis Group, *Congo: Consolidating the Peace*, Africa Report No. 128, 5 July 2007: 14.

⁸⁸ "International Criminal Court Targets Ituri," *IRIN News*, July 17, 2003.

⁸⁹ Benjamin Schiff, *Building the International Criminal Court* (Cambridge, U.K.: Cambridge University Press 2008), 212.

⁹⁰ Phil Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of the Congo and Uganda," in Nicholas Waddell and Phil Clark eds. *Courting Conflict: Justice, Peace, and the ICC in Africa* (London: Royal African Society, 2008), 40.

⁹¹ International Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri*, Africa Report No. 140, May 13, 2008: 31.

Uganda and later for Rwanda, and was implicated in the escalation of ethnic violence after the peace agreement. On February 10, 2006, the pre-trial chamber granted the Prosecutor's application for an arrest warrant for Lubanga on the charge of recruiting child soldiers under the age of 15 into combat. The warrant was unsealed on March 14 and Lubanga was transferred to The Hague three days later.⁹² The extradition process was expeditious because Lubanga had already been persuaded to lay down his arms due to MONUC's more robust mandate, and was later arrested in March 2005 after the murder of nine Bangladeshi peacekeepers one month earlier.⁹³ While the Lubanga indictment was the only ICC case prior to the 2006 elections, the same factors facilitated the execution of the ICC's second arrest warrant against Germain Katanga, a senior commander of the Lendu Front for Patriotic Resistance of Ituri (FRPI), for his complicity in the massacre of 200 Hema civilians in the town of Bogoro in February 2003. Katanga had laid down his arms in exchange for a military appointment in December 2004 and was later arrested with Lubanga in March 2005. As a result, he was already in custody at the time of the ICC's extradition request on October 17, 2007.⁹⁴

Despite the ICC's "no impunity" mandate, the transitional government decided to negotiate peace agreements with three active militia leaders in the run-up to the July 2006 elections: Peter Karim of the Lendu National and Integrationist Front (FNI), Mathieu Ngudjolo a former FNI commander who co-founded the Congolese Revolutionary Movement (MRC) in order to continue the fight against MONUC and the FARDC, and Cobra Matata of the FRPI. Each was offered a general amnesty and appointed to the FARDC at the rank of colonel.

Nonetheless, each had commanded militias that had been implicated in criminal violence that fell within the definition of crimes laid out in the Rome Statute, such as the recruitment of child soldiers, ethnic violence including murder, rape and mutilation, and attacks on international peacekeepers. The most serious allegation against Mathieu Ngudjolo was that when he was a high-ranking commander with the FNI, he collaborated with Germain Katanga's FRPI in massacre in Bogoro.⁹⁵ Peter Karim's FNI was responsible for a violent ethnic cleansing campaign that involved the burning of 70 Hema villages in 2005 and early 2006 in order to remake the ethnic composition of the region under his control.⁹⁶ He was also implicated in the kidnapping of seven Nepalese peacekeepers in May 2006, one of whom was killed.⁹⁷ Cobra Matata was a senior commander of the FRPI during the massacre of 1200 Hema in Nyakunde on September 5, 2002, as a reprisal for Lubanga's UPC campaign of ethnic cleansing against the Lendu in Bunia.⁹⁸

The question that confronts the Prosecutor's office is how to exercise its discretion after the negotiation of the peace agreements. For the purposes of this exercise, it will be assumed that the OTP has been investigating each of these warlords with the

⁹² William A. Schabas, *An Introduction to the International Criminal Court*, 3rd edition, (Cambridge, U.K.: Cambridge University Press, 2007), 43.

⁹³ International Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri*, 31.

⁹⁴ *Institute of War & Peace Reporting*, October 18, 2007.

⁹⁵ International Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri*, 21.

⁹⁶ Johan Pottier, "Displacement and Ethnic Reintegration in Ituri, Democratic Republic of the Congo: Challenges Ahead," *Journal of Modern African Studies* 46:3 (2008), 439.

⁹⁷ International Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri*, 33.

⁹⁸ See International Crisis Group, *Maintaining Momentum in the Congo: The Ituri Problem*, 2; and International Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri*, 22.

intention of asking the court to issue arrest warrants by the end of the year. The Prosecutor is not bound by national amnesties for crimes defined by the Rome Statute, which could be defined as an “unwillingness to prosecute” under the terms of Article 17, making the crimes covered by them admissible before the court. Moreover, the Security Council has not invoked Article 16 to prevent him from initiating a case against the amnestied warlords. Should the Prosecutor then go forward with the cases on the basis of legal criteria regardless of the status of political negotiations and agreements? Should he invoke Article 53 and hold back from criminal proceedings as long they might complicate the peace process? Or are there middle positions that the prosecutor might consider in navigating between the goals of justice and peace?

PART B: INSTRUCTOR'S GUIDE

Introduction

This case study is designed for classes in human rights, conflict resolution, international law or international organization. Its central purpose is to introduce students to the “peace versus justice” debate – namely, whether demanding prosecution in the aftermath of large-scale violence works at cross-purposes with negotiations to end hostilities or is essential for the consolidation of peace and the promotion of human rights in post-conflict societies. Implicit in this debate are broader theoretical questions as to the influence of international laws and institutions on world politics. Do international justice institutions, such as the ICC, promote legal norms that shape and constrain state behavior in the direction of international justice? Or, given their reliance on voluntary sovereign cooperation for their effectiveness, are they ultimately constrained by political calculations of states? And should the ICC Prosecutor adapt his decision-making to the international community’s approach to addressing conflicts or should he seek to insulate his office from the intrusion of politics?

Most of the ICC’s initial investigations have triggered a “peace versus justice” controversy because they have taken place in the context of ongoing violence. From a conflict management perspective, the ICC’s “no impunity” mandate complicates efforts to mediate negotiated settlements, whose logic is “to end the violence as quickly and with as few casualties as possible, with “justice” if possible, without it if necessary.”⁹⁹ The reason why justice needs to be downplayed in some peace processes is because many of those leaders most responsible for criminal violence also have the power both to continue to fight or to stop the war. As a result, the pragmatics of peace-making involve engaging as many of these powerful actors as possible regardless of past behavior. Such strategies are most likely to succeed when all the parties find themselves in a “mutually hurting stalemate,” in which they recognize that they cannot win the war and that its continuation will make them increasingly worse off.¹⁰⁰ In such circumstances, the task of mediators is to persuade the leaders of warring factions that it is in their interest to end their armed struggle and address their grievances through political mobilization rather than violence. Finalizing such an understanding usually means reassuring these leaders through an amnesty or enticing them through power-sharing. Insisting on prosecution, by contrast, would undermine this strategy since “some of the parties may fear the consequences of postwar judgments more than those of continued fighting.”¹⁰¹ As a result, one scholar warns, “the price of maintaining the moral and rhetorical high ground will be paid in additional lives lost from the continuation of the conflict.”¹⁰²

The same logic often holds in fragile post-conflict environments in which political and legal structures necessary to enforce the law have not yet been consolidated and

⁹⁹ See Roy Licklider, “Ethical Advice: Conflict Management vs. Human Rights in Ending Civil Wars,” *Journal of Human Rights* 7 (2008), 377.

¹⁰⁰ I.W. Zartman, *Ripe for Resolution: Conflict and Intervention in Africa*, 1989, 268.

¹⁰¹ I. William Zartman, “Negotiating Forward- and Backward-Looking Outcomes,” in I. William Zartman and Victor Kremenyuk, eds., *Peace versus Justice: Negotiating Forward- and Backward Looking Outcomes* (Rowman & Littlefield, 2005), 6.

¹⁰² Tonya Putnam, “Human Rights and Sustainable Peace” in Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, Colorado: Lynne Rienner, 2002), 240-241.

perpetrators retain significant power.¹⁰³ In these situations, demanding prosecution could trigger a violent backlash against the new political order. And the UN peacekeeping forces deployed to such situations are poorly suited to contain that backlash since they normally operate under a Chapter Six mandate as a neutral third force to separate combatants, monitor elections and supervise disarmament, and otherwise build confidence on the part of the parties to disengage. As a result, the priority should be given to sustaining peace and stability – which are prerequisites for developing the institutions necessary to protect human rights. This, in turn, requires, not a duty to prosecute, but “a series of balancing acts between . . . sensitivity to the fragility of postconflict political settings [and] . . . the impetus to react forcefully against all human rights violations.”¹⁰⁴

The strongest proponents of international criminal justice challenge this model on both duty and results-based grounds.¹⁰⁵ First, they view amnesties for serious human rights abuses as derogations from legal duties under international law and moral duties to victims, and contend that such practices have been rendered obsolete by developments in international criminal law and international human rights law.¹⁰⁶ Second, they challenge the policy argument for amnesty by contending that a peace built on impunity is unlikely to last. That is because allowing human rights abusers or war criminals to enter politics – or even worse, to share power – sets the stage for corruption, repression, and violence – by demonstrating that resort to criminal violence has no legal consequence, thereby perpetuating a culture of impunity. Prosecution, by contrast, can consolidate peace, democracy and human rights by (a) deterring the recourse to violence, (b) serving as a substitute for vengeance on the part of victims, (c) incapacitating criminal actors whose continued participation in post-conflict politics could undermine the transition, and (d) setting an example regarding the rule of law.¹⁰⁷ From this perspective, peace and justice are mutually reinforcing rather than in opposition to each other.

Both of these positions are premised on differing views as to the impact of international laws and institutions on international politics. The strongest proponents of international criminal justice claim that law can transform politics. This view is informed – explicitly or implicitly – by a constructivist view of international law in which international institutions, such as the ICC, and civil society groups, such as the anti-impunity movement, can act as transnational moral entrepreneurs promoting an evolutionary change in standards of appropriate behavior.¹⁰⁸ Some scholars within this tradition contend that the past two decades have witnessed the emergence of a “justice cascade” that has delegitimized amnesty for international crimes and promoted prosecution as the only legitimate response.¹⁰⁹

¹⁰³ See Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors: Principle and Pragmatism in Strategies of International Justice’ *International Security* (2003), 5-44.

¹⁰⁴ Putnam, “Human Rights and Sustainable Peace,” pp. 259-260; Also see Leslie Vinjamuri, “Deterrence, Democracy and the Pursuit of International Justice,” *Ethics & International Affairs* (Summer 2010), 193.

¹⁰⁵ For a critical summary of these arguments, see Leslie Vinjamuri, “Deterrence, Democracy, and the Pursuit of International Justice,” *Ethics & International Affairs* 24:2 (Summer 2010), 191-211.

¹⁰⁶ Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 3rd ed. (New York: The New Press, 2006), 324-331.

¹⁰⁷ Human Rights Watch, *Selling Justice Short*

¹⁰⁸ See Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52 (1998), 887-917.

¹⁰⁹ Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” *Chicago Journal of International Law* 2:1 (2001), pp. 1-33; On the impact of these norms on UN

Given these changes, a principled approach to prosecution, rather than accommodating law to politics, will lend greater authority to anti-impunity norms. It will stigmatize and reduce the influence of those branded as war criminals and galvanize international opposition to their crimes. For example, some anti-impunity advocates have pointed to the impact of the indictments of Ratko Mladić and Radovan Karadžić in limiting their influence in post-Dayton Bosnia, and the arrest warrants against Serb President Slobodan Milošević and Liberian President Charles Taylor for their subsequent removal from power.¹¹⁰ Elizabeth Rubin, who wrote about the Darfur case for the *New York Times Sunday Magazine* shortly after the Security Council referral, asserted that if the prosecutor “issues arrest warrants for President Bashir and Vice President Ali Osman Taha . . . their careers will effectively end.”¹¹¹ Many NGOs have consequently claimed that after the ICC’s confirmation of the arrest warrant for Bashir, it is only a matter of time before he ends up in the dock, thereby ending Khartoum’s impunity to sanction anti-civilian violence. Hence, they argue for allowing justice to run its course without political interference. By contrast, if the Prosecutor defers his mandate to political negotiations, this would weaken the moral authority of the ICC as a promoter of criminal justice norms. As the director of one NGO put it: “He is a prosecutor, not a diplomat, and the credibility of the ICC depends on that distinction being maintained.”¹¹²

Those who call for a more pragmatic application of international criminal law are skeptical of the claims that normative changes have altered the basic dynamic of conflict resolution. This position is taken up not only by realists, who are skeptical of the power of international law, also by more pragmatic liberals who contend that the promotion of human rights needs to take into account political realities. As a result, one prominent human rights scholar characterizes the anti-impunity movement’s insistence on prosecution as “judicial romanticism” that overestimates what courts can accomplish in the absence of a commitment to coerce or defeat those implicated in criminal violence. Instead, he recommends flexibility: “in the wake of atrocities there is no single response that is always appropriate everywhere, but rather a menu of choice in which the proper selection depend upon context.”¹¹³

The Role Playing Simulation

This case study can be used to illustrate these debates through involving students in a role-playing simulation. One option would be to assign students or teams of students the responsibility for one of the major players involved in this decision scenario. These could include:

1. NGOs – Students could represent both international NGOs, such as Human Rights Watch and Amnesty International, or Congolese NGOs, such as Friends of Law, who are the strongest advocates of prosecution. The simulation could also include some NGOs involved in humanitarian relief,

and EU mediation strategies, see Laura Davis and Priscilla Hayner, “Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC” *International Center for Transitional Justice*, (New York, March 2009),

¹¹⁰ Enough, *Selling Justice Short*

¹¹¹ Elizabeth Rubin, “If Not Peace, Then Justice,” *New York Times Magazine*, April 2, 2006.

¹¹² Mark Lattimer, “For all Bashir’s bravado, he is marked as damaged goods: The Sudanese president will soon find his security council allies can’t shield him from the impact of being cast as global pariah” *Guardian* July 16, 2008, 28.

¹¹³ David P. Forsythe, *Human Rights in International Relations*, 2nd edition, Cambridge University Press, 2006, 90.

such as Oxfam or Médecins Sans Frontières, whose impartial mandate to gain access to populations at risk may be complicated by international criminal justice, as happened when the Sudanese government expelled thirteen international humanitarian organizations after the ICC judges confirmed the arrest warrant for President Omar Hassan al-Bashir.¹¹⁴

2. The Transitional Government in Kinshasa – Students could focus on the government and explore its interest in the peace-for-amnesty deal. For a course which delves more deeply to internal Congolese politics, students might want to examine how different factions within the coalition had different views of the ICC given their relative vulnerability to international prosecution – e.g., President Kabila versus the former leaders of two rebel groups – Azarias Ruberwa and Jean-Pierre Bemba – who were serving as vice presidents, both of whom had ties to the militias in Ituri.¹¹⁵ Bemba, who was Kabila’s opponent in the 2006 presidential runoff, was later arrested in Belgium and extradited to the ICC for crimes committed in the neighboring Central African Republic.¹¹⁶ This can be used to raise broader questions after the simulation, some of which are explored in Part C. For example, to what extent do governments invite the ICC in as a way of marginalizing their political opponents and what can the OTP do to safeguard against this kind of “instrumentalization”?¹¹⁷ Students can also draw analogies to the Kenyan case in which politicians in the power-sharing accord have different views of international prosecution depending on their vulnerability to international prosecution.¹¹⁸
3. MONUC or the UN Department of Peacekeeping Operations – students might want to explore why those officials involved in peacekeeping operations would be supportive of the kind of deal negotiated with the Ituri warlords. They might think of the potential tension between this and the formal position the UN has adopted since 1999 that it will not recognize amnesties for international crimes. Students might also examine the logic of the Brahimi Report – which envisioned circumstances in which the UN might adopt strategies of peace-enforcement¹¹⁹ – and the implications of its more robust

¹¹⁴ For more on the tensions between prosecution and humanitarian relief, see David Lanz, ‘Conflict Management and Opportunity Cost: The International Response to the Darfur Crisis’, Fundación para las Relaciones Internacionales y el Diálogo Exterior, September 2008, 7, and Elizabeth Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Washington, D.C.: Brookings Institution Press, 2011), pp. For a more critical view of the ICC from a humanitarian perspective, see Fabrice Weissman, ‘Humanitarian Aid and the International Criminal Court (2)’, Social Science Research Council Blog, *African Arguments*, 21 July 2009. <http://africanarguments.org/2009/07/21/humanitarian-aid-and-the-international-criminal-court-grounds-for-divorce-2/>.

¹¹⁵ On the potential impact of the Ituri investigation on rivalries within the Congolese government, see William Burke-White, ‘Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo’, (2005) 18 *Leiden Journal of International Law*, 565.

¹¹⁶ Marlise Simons, ‘Congolese Faces Charges of Atrocities,’ July 5, 2008, A6.

¹¹⁷ See Schiff on the issue of the “instrumentalization” of the Court in Uganda and the DRC.

¹¹⁸ See Congressional Research Service, *International Criminal Court Cases in Africa: Status and Policy Issues*, March 7, 2011, 8.

¹¹⁹ See Christine Gray, ‘Peacekeeping and Enforcement Action in Africa: The Role of Europe and the Obligations of Multilateralism’ *Review of International Studies* (2005), 207-223.

mandate for cooperation with the ICC. On the one hand, MONUC's enforcement mandate facilitated the arrest of its first suspect, Thomas Lubanga. Does that imply that an international criminal justice mandate requires peacekeeping operations that, like MONUC, move beyond an impartial confidence-building role – as is the case for UNMIS and UNAMID in Sudan, which have not facilitated any arrests – to an enforcement-oriented mandate? And even with such a mandate, does the risk of casualties to MONUC personnel, and to civilians from a military confrontation with the militias, create an incentive to support the peace-for-amnesty deal rather than international criminal justice?

4. Students could focus on the donor states, particular members and the European Union and the EU itself, which were heavily involved in the transitional process in the DRC. On the one hand, the European Union is strongly committed to the ICC. On other hand, it had invested over \$500 million in the DRC's transitional process whose success its diplomats have hinged on the elections and on President Kabila. As a result, they may be wary of criminal justice strategies that risk destabilizing that process.¹²⁰
5. The role-play could be extended to Rwanda and Uganda since the militias were supported by foreign patrons in Kigali and Kampala.¹²¹ How might these countries respond if the ICC extended its criminal investigations to neighboring states? Students might want to look at how Rwanda's termination of cooperation with the International Criminal Tribunal for Rwanda (ICTR) forced the hand of its chief prosecutor, Carla Del Ponte, when she took steps toward indicting commanders from the victorious Rwandan Patriotic Front (RPF) for revenge killings against Hutu civilians during the insurgency that overthrew the regime responsible for the genocide.¹²² Would the ICC's experience be any different? This might also present an opportunity to bring the United States into the picture since it has a strong patron-client relationship with both the Kagame regime in Rwanda and the Museveni regime in Uganda.

As for the Office of the Prosecutor (OTP), its role could be adapted to the simulation in a number of ways. First, the OTP could adopt the strict legalist position that excludes peace processes from its decision-making, effectively trying to compel political actors to conform to the legal parameters set by the Court. This would provide an interesting test case as to how powerful anti-impunity norms are in constraining states and intergovernmental organizations. It would enable the class to evaluate the consequences of treating the law as a binding obligation on the peace-making process. Second, members of the OTP could be divided into one group that is more sympathetic to

¹²⁰ A good source on the European Union's approach to genocide and the ICC is Karen E. Smith's, *Genocide and the Europeans* (Cambridge University Press, 2010).

¹²¹ See Phil Clark, 'Law, Politics, and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in Nicholas Waddell and Phil Clark, *Courting Conflict*, 41.

¹²² See Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press, 2008), 207-233.

the broad construction of Article 53 while others argue that the consideration of peace processes is outside the ICC's mandate.¹²³ The task of the simulation could be for the various NGOs, international institutions and state actors to persuade the ICC team what strategy it should adopt towards the amnesty-for-peace deal.

Another variant of this role play would be to divide the students into three teams representing the Office of the Prosecutor, human rights NGOs lobbying for prosecution, and peace processors recommending some deference to political strategies of conflict management. In this scenario, OTP convenes a meeting with actors on both sides of the debate to obtain legal and political guidance on how to proceed. That means that the second and third teams play the role of advocates attempting to persuade the Prosecutor's office how it should exercise its discretion. Alternatively, students could draft expert papers to be presented to the OTP, extrapolating from the works of international relations and international law scholars to present recommendations.¹²⁴ Following the debate, the OTP analysts leave the room to deliberate as to how they should construe Article 53 and apply it to the situation in Ituri. After they return, the positions can be examined vis-à-vis some of the issues raised in Part C of the case study.

In many ways, this is an unrealistic scenario, placing prosecutors in the position of judges deliberating over competing academic or advocacy positions – though there was an internal debate over this issue within the OTP in 2006. Nonetheless, this is a pedagogical simulation rather than one designed to train students as international lawyers and its purpose is to sensitize students to the relationship between politics and law and the practical dilemmas that international prosecutors are likely to face in insulating the latter from the former.

Critically Assessing Both Sides of the Debate

The “amnesty versus prosecution” debate is about how to prioritize two different phases of conflict resolution – i.e., the immediate goal of expediting negotiations between power-brokers to end hostilities as opposed the longer-term goal of sustaining peace through strengthening the rule of law. Proponents of the former fear that insistence on prosecution will make negotiated solutions more difficult. Proponents of the latter warn that a rush to complete negotiations without insisting on accountability will pave the way for abuses and future violence. What follows is a brief case for both sides of the Ituri debate followed by the kinds of counterarguments that would be deployed against them.

The Case for Deferring to Peace Processes. The central rationale for the peace-for-amnesty deal is that it is the most expeditious means of ending the violence in Ituri. The amnestied warlords were not going to allow the demobilization of their militias if subjected to prosecution, so the only alternative was to reassure them with amnesties and

¹²³ For different perspectives from two former OTP officials see, Matthew Brubacher, “Prosecutorial Discretion at the International Criminal Court” *Journal of International Criminal Justice* 2:1 (2004) and Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court,” *European Journal of International Law* 14 (2003).

¹²⁴ Many of the articles cited elsewhere in the case study and the first section of the instructor's copy could serve this purpose. On the debate between pragmatists and constructivists, contrast Snyder and Vinjamuri, “Trials and Errors” with Lutz and Sikkink, “The Justice Cascade.” For debates among international lawyers, see Rod Rastan, “Comment on Victor's Justice and the Visibility of Ex Ante Standards,” and William A. Schabas, “Victor's Justice: Selecting Situations at the International Criminal Court,” both in *John Marshall Law Review* 43 (2010).

entice them with military commissions. MONUC facilitated this agreement even though the UN is opposed in principle to amnesties for international crimes and Security Council resolutions have called for “bring[ing] to justice perpetrators of grave violations of human rights or international humanitarian law.”¹²⁵ MONUC’s position can be understood as consistent with other parts of its peacekeeping mandate. It was operating with the consent of the transitional government in Kinshasa, which initiated these deals. It was also tasked to provide security for holding elections in the entire territory of the DRC, including those regions still at war.¹²⁶ And the amnesty-for-peace deals enabled MONUC to disarm the militias and stabilize Ituri without further casualties, either to its personnel or to civilians. As a MONUC spokesperson explained it: “It is a big step toward the pacification of Ituri.”¹²⁷ Indeed, the International Crisis Group reported that there was a considerable improvement in the region’s security situation after the negotiations were completed.¹²⁸

The principal moral objection to this approach to peace-making is its impact on the rights of victims. As one local human rights activist put it: “The Congolese people’s blood should not be considered a stepping stone to achieve power.”¹²⁹ Adam Hochschild puts a human face on this advocacy through the story of a survivor of an attack on a man’s family by one of the amnestied warlords for an article in *The Atlantic*:

The man is a former schoolteacher and civil servant. I will call him Jacques Ngabu; because of threats he has received since telling his story, he does not want his real name used. Ngabu is a Lendu but was married to a Hema woman. In 2006 he, his wife, and their three children were traveling to Bunia when they were stopped at a roadblock by militiamen under a notorious Lendu warlord, Peter Karim. “They asked me why I had married a dirty Hema woman. They said they would exterminate us.” Karim then ordered his soldiers to rape Ngabu’s wife and two daughters, ages 10 and 13. Ngabu heard his daughters’ screams, then saw them with blood running down their legs. He himself was whipped—165 times, with a soldier stamping on his head each time, counting the strokes. In front of him, his wife and children were all killed, by machete blows to the back of the neck. . . . Soon after this experience, the government struck a peace deal with Karim’s militia, and Karim was made a colonel in the Congolese army. Today, “whenever I see him on television, I tremble again. Why is he a colonel?” Ngabu asks the roomful of people, in anguish. “Why the impunity? Why is he not at The Hague?”

From this perspective, a peace this is built on providing immunity to and sharing power with criminals responsible for these kinds of heinous crimes is a peace built on injustice and one to which the ICC should show no deference.

A counterargument to this is that some compromises with justice are necessary for a negotiated transition and South Africa’s TRC granted amnesties for comparably

¹²⁵ UN Security Council Resolution 1649, 21 December 2005, 3.

¹²⁶ UN Security Council Resolution 1493, July 28, 2003.

¹²⁷ “Kinshasa accepts militia leader’s plea to join army,” *IRINNews*, 14 July 2006.

¹²⁸ International Crisis Group, *Congo: Consolidating the Peace*, Africa Report No. 128, 5 July 2007, 14.

¹²⁹ Eugène Bakama Bope, “The Need for Peace and Justice,” *Institute for War & Peace Reporting*, January 8, 2008. <http://iwpr.net/report-news/comment-need-peace-and-justice>

heinous acts. There are, however, some important differences between the amnesties in South Africa and the DRC. While some proponents of international criminal justice recommend deference to alternative justice mechanisms like the TRC that provide victim participation and condition amnesty on truth-telling, there was no such process in the DRC. Neither Karim nor any of the other rebel leaders were required to acknowledge past crimes in exchange for being allowed to enter the political system. In fact, the cynicism surrounding the process was captured in an interview with one of the warlords by a reporter for the *Christian Science Monitor*: “Surrounded by baby-faced fighters, [Mathieu] Ngudjolo denies any atrocities. ‘We don’t have infant soldiers.’”¹³⁰

Critics of amnesty and power-sharing don’t only base their arguments on the duty to victims, but also for their consequences since they don’t deliver on their goal of ending violence. One line of argument against this approach to peace-making is that it creates a “moral hazard” in which efforts to end anti-social behavior through compensation produce an incentive for others to reproduce that behavior in order to reap comparable rewards. As Anneke van Woudenberg of Human Rights Watch put it, the deal made with Karim, Ngudjolo and Matata: “sends a signal that if you want to become a colonel, you should pick up your gun and kill people.”¹³¹ In fact, Human Rights Watch reported that the three warlords took up arms after similar deals had been negotiated with militia leaders in Ituri in 2005.¹³² As a result, the ICC should aggressively challenge the acceptability of such arrangements in order to end the impunity that feeds cycles of violence.

Another negative consequence of the lack of accountability in peace-making is entrenching a culture of impunity and all of the social ills associated with it. In this sense, the deal with the Ituri warlords is viewed as emblematic of the entire Congolese peace process. First, as Jason Stearns notes, the power-sharing agreement “stacked the new government with the very people who plunged the country into internecine conflict” which has resulted “in a government replete with criminals who have little deterrent to keep them from resorting to violence again.”¹³³ Among the results of this are massive corruption and political repression against those groups that challenge the existing power structure.¹³⁴ Second, impunity weakens deterrence. On the one hand, the arrest of Lubanga for conscripting children as soldiers sent the message that this practice was unacceptable, which influenced other militias to remove children from their ranks to avoid the same fate.¹³⁵ On the other hand, immunizing and rewarding warlords for comparably heinous acts sends the opposite message. This, in turn, perpetuates impunity and contributes to high levels of violence, even in areas ostensibly at peace, including the world’s worst epidemic of rape.¹³⁶ And, according to MONUC, 40% of the most serious human rights abuses in eastern Congo is attributed to the FARDC, itself composed of

¹³⁰ Tristan McConnell, “Measures to Keep Peace in Congo Draw Fire” *Christian Science Monitor*, September 5, 2006, 4.

¹³¹ Anjan Sudaram, “Militia Groups in Eastern Congo to Lay Down Arms,” Associated Press, July 27, 2006.

¹³² Selling Justice Short, 44.

¹³³ Stearns, *Dancing in the Glory of Monsters*, 318, 334.

¹³⁴ See Human Rights Watch, *‘We Will Crush You’: Restrictions on Political Space in the Democratic Republic of the Congo*, November 25, 2008.

¹³⁵ Davis and Hayner, “Difficult Peace, Limited Justice,” 31; For more evidence on the deterrent effect of the ICC, see Jake Goodman, “The Grease in the Gears: Impunity in the Democratic Republic of Congo and the Opportunity for Peace,” *Loyola Los Angeles International and Comparative Law Review* 32 (2010), 232-234.

¹³⁶ See Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone*, July 16, 2009.

soldiers from former rebels who were implicated in violence against civilians.¹³⁷ Finally, the peace process failed to address ethnic conflict in regions like Ituri where “each new bout of violence . . . manipulates the past into a story of victims, ignoring the wounds of other communities.”¹³⁸ That cycle of violence is only likely to be broken by prosecuting the leaders of all of the ethnic militias for the crimes they set in motion.

A final cost the OTP might incur from deferring to the amnesty-for-peace processes is the normative authority of the Court, which depends upon its legal integrity in operating above politics. Human Rights Watch warns that factoring peace processes into prosecutorial discretion would involve the Prosecutor in making political judgments, thereby subjecting him to manipulation by governments and rebel movements who might launch peace processes or threaten to undermine them in order to evade prosecution. It would also subject the Court to charges of selective justice since some perpetrators would be able to evade accountability through their ability to block progress in conflict resolution.¹³⁹ Given that the ICC lacks enforcement capacities comparable to those in domestic criminal justice systems, its influence depends upon its moral authority as an enforcer of anti-impunity norms – something likely to be tarnished if prosecution is adapted to the vagaries of political negotiations. Or as one legal analyst at the OTP has put it, the argument that the law needs to bend to political negotiations ignores “the capacity of the legal process to influence state behaviour.”¹⁴⁰

The Case for Prosecution. International and Congolese human rights organizations view the deal with the Ituri warlords as a microcosm of problems with the Congolese peace process, which has focused on power-sharing rather than accountability. As one NGO study explained:¹⁴¹

Analysis of peace agreements in the DRC between 1999 and 2008 shows . . . [t]hat each stage, impunity has been entrenched. The result is ongoing conflict between armed groups and continuing abuse of the population. This suggests that addressing justice options during peace agreements is necessary for durable peace.

Only a strategy of prosecution independent of the political deals negotiated between the government and militias will end impunity and fulfill the ICC’s duty to victims and its mandate to demonstrate that ethnic massacres, sexual violence, and conscripting child soldiers are crimes, not legitimate acts of war. If anything, human rights NGOs contend that limiting the OTP’s focus to the Ituri warlords ignores the fact that the Ituri conflict was a proxy war involving Uganda, Rwanda, and former Congolese rebel leaders who are part of the political structure in the DRC. As a result, they argue that arrest warrants for the three Ituri warlords should be followed by criminal investigations of high-level officials in Kigali and Kampala, as well as influential politicians in Kinshasa.¹⁴²

¹³⁷ Taylor Toeka, “Officers Admit Ignorance of the Rules of War,” *Institute for War & Peace Reporting*, April 10, 2008.

¹³⁸ Stearns, *Dancing in the Glory of Monsters*, 107.

¹³⁹ Human Rights Watch, 14.

¹⁴⁰ Rastan, 601-602.

¹⁴¹ Davis, 17.

¹⁴² Mattioli and Van Woudenberg, pp. 55-56.

Conflict managers acknowledge the costs of power-sharing and amnesty for good governance, but as one facilitator of the Congolese peace process put it: “Did it compromise the future? Yes. But it was the only way out of a difficult situation.”¹⁴³ The reason it was “the only way out” of the Second Congo War was because all the parties were implicated in grave human rights abuses and insistence on prosecution would have made a negotiated settlement impossible. Similarly, applying a “no impunity” mandate to Ituri would complicate the effort to stabilize the region in anticipation of national elections, which were viewed as the best hope for consolidating the peace process. It could also re-victimize war-torn communities or create new victims given the character of the violence of these armed groups. Moreover, if the government extends an amnesty and the ICC overrides it, this is likely to decrease the credibility of amnesties as instruments to end violence in other parts of eastern Congo still at war.

The Prosecutor may also risk his relationships with governments and international institutions involved in conflict resolution if he moves precipitously without consulting them. The reason why this risk is significant lies in the structural weakness of the ICC relative to a domestic criminal court in enforcing its decisions. The ICC lacks its own police force and depends on the voluntary cooperation of states for virtually everything it needs to do. Allison Marston Danner argues that this makes the Court “pragmatically accountable” to those actors on whom it depends, whose interests will inevitably be factored into prosecutorial discretion.¹⁴⁴ For example, if Kinshasa and MONUC are committed to the amnesty-for-peace deal as the best means of pacifying Ituri while minimizing violence, would the issuance of an arrest warrant regardless of the preferences of these actors jeopardize relationships without which the Court would not be able to operate in the DRC? And what of relations with European governments, who are the strongest supporters and largest financial backers of the Court, but who also invested over \$500 million in the peace process and the elections, which in their view, hinged on President Kabila? From this perspective, the Court’s legitimacy comes from acting within (or not veering too far from) the consensus of political actors whereas proponents of a duty to prosecute contend that legitimacy flows from operating above politics.

The conflict management perspective would acknowledge the need to focus on the longer-term goal of building the rule of law, but this will not rely primarily on the ICC, which at best, could only prosecute a handful of warlords. Rather, it will depend on internationally assisted capacity-building programs. This includes Security Sector Reform, involving a system of vetting, training and disciplining new recruits into the military and paying them a professional wage so they will be less likely to act as predators vis-à-vis the civilian population.¹⁴⁵ It also involves building a legal infrastructure through strengthening the courts, the police, and prisons. For example, the European Commission has supported the Restoration of the Justice System in Eastern Congo (REJUSCO) – that builds on a relatively pilot project that created a military court in Bunia, Ituri’s provincial capital, and had successfully prosecuted some Congolese

¹⁴³ Interview with Philip Winter in Stearns, *Dancing in the Glory of Monsters*, 318.

¹⁴⁴ Danner, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court,” 525-527.

¹⁴⁵ Eirin Mobekk, ‘Security Sector Reform and the UN Mission in the Democratic Republic of Congo: Protecting Civilians in the East’, (2009) 16 *International Peacekeeping* 273.

army officers for abuses of civilians.¹⁴⁶ Similarly, the Open Society Institute and the UN peacekeeping force (renamed MONUSCO in 2010) have supported mobile courts to bring judges to prosecute sexual violence in remote areas of eastern Congo.¹⁴⁷ From a conflict management perspective, a prerequisite for the strengthening of these “rule of law” initiatives is a stable environment. While ICC prosecutions may complement these initiatives, they need to be crafted carefully to avoid actions likely to trigger a return to violence. Therefore, the Prosecutor should consult with international and local actors involved in capacity-building to craft a legal strategy that does not destabilize the situation in ways that undermine their efforts.

Conflict managers would also be skeptical of extending criminal justice to powerful actors in Uganda and Rwanda regardless of their predatory behavior in Ituri. Instead, they would focus more on changing regime behavior – as when donor pressure persuaded Presidents Kagame and Museveni that it was in their interest to withdraw their forces from the DRC as part of the Congolese peace process. Criminalization, by contrast, implies regime change given the complicity of senior political and military officials in the intervention, making compliance less likely. Moreover, if the Prosecutor targets high-level officials in Kinshasa, Kampala, and Kigali, these governments are likely to end whatever cooperation the Court has cultivated with them. This was the experience with Carla Del Ponte when, as chief prosecutor for the ICTR, she tried to initiate cases against the victorious Rwandan Patriotic Army for revenge killings of Hutu civilians during the insurgency that overthrew the regime responsible for the genocide. Rwanda’s response was to end cooperation with the ICTR, which eventually forced Del Ponte’s hand since the tribunal was completely dependent on Rwanda for access to the witnesses and evidence necessary for prosecution.¹⁴⁸ Proponents of prosecution might counter that the mobilization of civil society and the publicity surrounding high-profile arrest warrants would put pressure on Western donors to question the relationships they have developed with these rights-abusive regimes – in other words, the Prosecutor has considerably more normative power than he has so far been willing to use. Skeptics would counter that this is unlikely given the strong patron-client relationship these regimes have with Western donors and the fact that both Rwanda and Uganda have pursued economic policies that comport with the Western development model.

¹⁴⁶ International Crisis Group, *Congo: Four Priorities for Sustaining Peace in Ituri*, Africa Report No. 140, 13 May 2008, 21.

¹⁴⁷ See David A. Kaye, *Justice Beyond the Hague: Supporting the Prosecution of International Crimes in National Courts*, Council Special Report No. 61, June 2011, 10.

¹⁴⁸ Kingsley Moghalu, *Rwanda’s Genocide: The Politics of Global Justice*, Palgrave Macmillan, New York 2005, 125-151.

A Middle Position?

While human rights NGOs emphatically deny that there is any conflict between peace and justice, the Human Rights Watch study on Article 53 attempts to carve out a narrow exception for those cases in which that conflict is unavoidable. Part V of its analysis of the Article 53 controversy argues that the Prosecutor has limited discretion with respect to the timing of a potentially destabilizing prosecution since “nothing in the Rome Statute states . . . that the prosecutor must ensure that a warrant is issued within a prescribed time after having commenced an investigation.”¹⁴⁹ Therefore, the Prosecutor could delay issuing or unsealing arrest warrants during particularly sensitive phases of a political negotiation or when it poses a serious risk of increased violence.

Nonetheless, the report expresses serious concerns about the potential for this approach to undermine the anti-impunity agenda and offers three caveats regarding its use. First, it argues that the prosecutor “should not acknowledge publicly that he is delaying an investigation because of a national peace process.” That is because doing so would compromise the independence of the prosecutor and create an incentive for states and rebels to “manipulate the OTP every time they believe issuance of an arrest warrant is near.” Second, it warns that any postponement “should not be indefinite in a way that makes the investigation meaningless or results in de facto impunity.” Finally, it recommends discreetly delaying prosecution only for significant developments in the peace process, not simply “the intent to initiate a peace process” or for “peace negotiations that appear to be stalled.”¹⁵⁰

This section of the Human Rights Watch report can be passed out at the end of the simulation to discuss whether it provides a principled alternative to a rigid duty to prosecute in circumstances in which there is a clear conflict between criminal justice and peace negotiations. This can be done by applying this recommendation to the amnesty-for-peace deal with the Ituri warlords. What the model suggests is a decision hold off from the issuance of formal arrest warrants and requests for the surrender of the suspects until after the elections, to reduce the likelihood that they would be marred by violence. The Prosecutor might also wait until the DDR process has progressed to point at which the surrender of the amnestied warlords is less likely to lead to a violent backlash. This might not only minimize the risks of instability, but also increase the likelihood that the Court will obtain custody of the suspects.

There are, however, a number of critical questions that can be raised about the Human Rights Watch proposal and how it would be implemented in the Congolese context. First, it recommends that if the Prosecutor delays prosecution because of its impact on peace and stability, he should not explicitly acknowledge that he is doing so. One cost of this approach is transparency. If the Prosecutor made use of the broad construction of Article 53, it would require a submission to the pre-trial chamber in open court, providing both public knowledge and a degree of accountability since the judges could turn down the Prosecutor’s request. Students might want to discuss why a human rights NGO, such as Human Rights Watch, would prefer a less transparent process – i.e.,

¹⁴⁹ Human Rights Watch, 21-22.

¹⁵⁰ Ibid, 22.

that it would subject the Court to political manipulation, to charges of selective justice, and otherwise tarnish its reputation and credibility as an enforcer of new legal norms.

Second, while the proposal warns that the discretion to delay prosecution should have a time limit, it does not spell out how the Prosecutor determines when that limit has been reached. How would the OTP conclude that moving forward with prosecution no longer poses an unacceptable risk to peace and security? With respect to the Ituri warlords, does this mean consultations with Congolese politicians and foreign diplomats involved in the electoral process, or with MONUC, which is tasked with maintaining stability in Ituri? Would such consultations violate the requirement of prosecutorial independence in Article 42(1) of the Rome Statute, which Amnesty International views as prohibiting consultations with political actors?¹⁵¹

Finally, even if the prosecutor is able to issue the arrest warrants and have them executed on the ground without violent backlash, what are the implications of this “success” for peace processes in other regions of eastern Congo still at war. During the negotiations in Ituri, the Congolese government has attempted to end insurgent violence in North Kivu, both through military campaigns and negotiated solutions, particularly with Laurent Nkunda’s CNDP. Would a decision to override domestic amnesties for the Ituri warlords undermine the credibility of using this device to persuade active militias to disarm? Should this be a consideration for the Prosecutor or is it outside his mandate? Part C will expand on the situation in North Kivu and address the question of whether the ICC’s capacity to overrule national amnesties forecloses negotiated settlements and biases the conflict management policy toward military solutions.

¹⁵¹ See Part A, pp. 18-19, note 37.

PART C: EPILOGUE

The aftermath of the amnesty-for-peace deals in Ituri saw three developments relevant to the “peace versus justice” debate that it generated. First, in September 2007, the OTP issued new guidelines that denied that the “interests of justice” test in Article 53 of the Rome Statute could be applied to peace processes. Second, on February 6, 2008, the ICC unsealed an arrest warrant for one of the three amnestied warlords – Mathieu Ngudjolo – who was promptly arrested and surrendered to The Hague. As of 2011, however, neither the ICC nor the Congolese justice system has moved against the two other militia leaders. Finally, armed conflict escalated in North Kivu, the most violent region in eastern Congo since the pacification of Ituri. The Congolese government has alternatively sought to address this violence through military and diplomatic means. This raises the question as to what impact the ICC’s arrest warrant for Ngudjolo and its decision to focus its next set of prosecutions in North Kivu will likely have on the prospects for conflict resolution and whether that is an issue the Prosecutor should factor into his decision-making.

The OTP’s Interpretation of the “Interests of Justice” Test

In September 2007, the OTP released a position paper on its interpretation of the “interests of justice” in Article 53’s rules regarding prosecutorial discretion. Whereas a 2004 position paper had construed this provision as providing latitude to consider the impact of trials “on the stability and security of the country concerned,”¹⁵² the new guidelines adopted the NGO position that such concerns are outside the ICC’s mandate.¹⁵³

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

The section concludes by noting “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”¹⁵⁴

In presenting this policy, Moreno-Ocampo has repeatedly stated that his office is not a party to any political negotiations, and his judicial independence requires him to follow the facts and the law regardless of their status. This also rules out consultations with political actors. When asked by former ICJ judge, Stephen Schwebel, whether “it would be appropriate for the Prosecutor, before reaching a position to prosecute, to consult with governments and UN officials about the possible diplomatic impact of

¹⁵² Cited in Marie Delmas-Marty, “Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC,” *Journal of International Criminal Justice*, 2005, 8.

¹⁵³ ICC-OTP, *Policy Paper on the Interests of Justice*, September 2007, 8.

¹⁵⁴ *Ibid.*, 9.

bringing a prosecution,” Moreno-Ocampo responded by recalling a conversation with his international relations advisor prior to initiating his investigation in the DRC:¹⁵⁵

She said. . . you [have] to do consultations with different diplomats and different leaders, . . . and then you start with their support. I said . . . what happens if they don’t support that? If they say no? Oh, if they say no, you cannot do it. So I said . . . we are prosecutor[s], we cannot give the decision to others. . . . So from those days we started this method of informing . . . hoping that [states] will follow . . . But basically, yes, I cannot consult, because then I [become] a politician.

The 2007 policy paper did state the OTP “will seek to work constructively with and respect the mandates of those engaged in . . . humanitarian, security, political, development and justice [solutions].”¹⁵⁶ This means that the OTP could inform these actors of a prosecutorial decision in advance to enable them to prepare for any potential fallout, but it could not adjust its legal mandate to accommodate their concerns.

Conversely, the policy paper argues that it is peace processes that should adapt to prosecution when it asserts that any “political and security initiative” must conform to “the new legal framework and that framework necessarily impacts on conflict management efforts.”¹⁵⁷ Paul Seils elaborated on this position in a speech given in Nuremberg in July 2007 when he was a senior analyst at the OTP:

The arguments that are presented against the pursuit of justice may often present very stark moral and political dilemmas and no doubt this will continue for a long time to come: the first impact of the Rome Statute however is to change the parameters, and to a largest extent the usefulness, of such discussions. This is for the simple reason that it states what the law is now. The time for rhetorical discussions and genuine philosophical debate may not be over, but it will often be beside the point if not conducted with a clear understanding of the implications of the new legal realities. The Rome Statute provides the legal framework in which discussion about the pursuit of peace must be circumscribed. If the pursuit of peace cannot come to an accommodation with the obligations to which states have voluntarily bound themselves, States simply cannot endorse such agreements.¹⁵⁸

Seils goes on to argue that the new legal reality requires a “change in mindset” away from traditional peace-making models: “the Rome Statute does not make peace deals impossible. It makes impunity for war crimes, crimes against humanity and genocide an unacceptable condition for peace.”¹⁵⁹ This means that amnesties are no longer on the table for international crimes, and if offered, the ICC is not bound by them and states are obliged to arrest and surrender those indicted by the Court regardless of the political deals that they struck or concerns about the consequences of their abrogation. As Moreno-

¹⁵⁵ Council on Foreign Relations, “Pursuing International Justice: A Conversation with Luis Moreno-Ocampo,” February 5, 2010.

¹⁵⁶ ICC-OTP, *Policy Paper on the Interests of Justice*, 8.

¹⁵⁷ ICC-OTP, *Policy Paper on the Interests of Justice*, 4.

¹⁵⁸ Paul Seils, “The Impact of the ICC on Peace Negotiations,” expert paper, conference on “Building a Future of Peace and Justice,” Nuremberg, Germany, July 25-27, 2007, 1.

¹⁵⁹ *Ibid.*, 2.

Ocampo explained: “[N]egotiators have told me, we took away tools from their toolkit, such as amnesty, immunity. But such tools just did not work. And we offered new ones. They can and must use them . . . but it requires adjusting negotiation to the law.”¹⁶⁰

Discussion Questions

This change in the OTP’s official approach to the “peace versus justice” debate raises a number of academic and policy questions. First, to what extent does it highlight the role of civil society groups as norm entrepreneurs in influencing the Court’s construction of its mandate independently of states?¹⁶¹ As noted in Part A, officials at the OTP had initially suggested that the “interests of justice” test could be used to hold back from prosecution after some promising developments in mediation efforts designed to end the longstanding war between the Ugandan government and the LRA.¹⁶² In response, Human Rights Watch and Amnesty International drafted reports stating that such an approach was contrary to the ICC’s mandate to end impunity through prosecution. Shortly thereafter, the OTP adopted an approach that was considerably closer to the position of the NGOs than it was to the preferences of diplomats – and this interpretation seems to have been put into practice in both northern Uganda and Sudan.¹⁶³ To what extent does this support a constructivist view of global norms contributing to an outcome in which the ICC is more responsive to NGO than to state preferences?

Second, reading the OTP document in its entirety raises some questions as to how absolute this separation of peace from justice is, particularly in fragile post-conflict situations that contain within them a serious risk of a return to violence. While the NGO studies restrictively equate the interests of victims with prosecution,¹⁶⁴ the OTP policy paper suggests that they could encompass other interests, such as their security and protection. Addressing these other interests involves an “ongoing risk assessment” and a dialogue with victims and their representatives.¹⁶⁵ This suggests that the Prosecutor may refrain from actions likely to destabilize conflict situations that exacerbate violence in victimized communities.

Yet how is exercising prosecutorial discretion to support this broader view of interests of victims different from doing so in the interests of peace? Matthew Brubacher, a Ugandan analyst at the OTP at the time of the breakdown Juba peace talks between Kampala and the LRA in 2008, attempted to spell out the difference in an interview with the *Globe and Mail*.¹⁶⁶

The fact is that the court is not a political institution; we can take matters of security into consideration in terms of victims and witnesses, but our overall decision making is determined by the crimes and the responsibilities of the

¹⁶⁰ Luis Moreno-Ocampo, “The International Criminal Court: Seeking Global Justice” *Case Western Reserve Journal of International Law* 40 (2008), 221.

¹⁶¹ See Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52 (1998), 887-917; and Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” *Chicago Journal of International Law* 2:1 (2001), 1-33.

¹⁶² See Part A, 16-17.

¹⁶³ This evolution is documented in Victor Peskin, “Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan,” *Human Rights Quarterly* 31:3 (August 2009), 655-669.

¹⁶⁴ See Human Rights Watch, *The Meaning of the ‘Interests of Justice’*, 19-20.

¹⁶⁵ OTP, *Policy Paper on the Interests of Justice*, 6-7

¹⁶⁶ Stephanie Nolen, “Africa’s Unjust Deserts” *Globe and Mail*, June 14, 2008, F1.

perpetrators. . . If the court becomes embroiled in political matters – such as its impact on a peace process – then we lose our independence.

Is this a persuasive distinction between the interests of victims in their security and the interests of peace? Could Brubacher’s position be extrapolated from the northern Ugandan case to the amnesty-for-peace deal with the Ituri warlords?

Third, how would the Prosecutor make his “ongoing risk assessment” to determine whether there was a threat to the security of victimized communities – whether in northern Uganda or in eastern Congo? Would that require a process of consultation with local and international actors involved in conflict resolution and peace-building? Would those consultations violate the concept of prosecutorial independence expressed by Moreno-Ocampo in his response to Judge Schwebel’s question? Or does his answer equate consultation with taking instructions and is it possible to maintain a dialogue with those involved in peace processes and decide independently whether or not to adjust – as opposed to having your decision-making being driven by the preferences of others?

An affirmative answer to the last question was made by Paul Seils in a 2005 paper he co-authored for the International Center for Transitional Justice that seems to contradict the position he took as an OTP official at Nuremberg two years later:

While it is true that there exists in certain quarters the view that justice must be done whatever the price, it is not a view that the ICC was designed to support. The concept of the interests of justice would appear to include the notion that trials that directly contribute to an increase in or prolongation of political instability can be deferred until such time as the risk has significantly receded. If it is highly probable that the investigation and prosecution of individuals creates a substantial risk of provoking the same kinds of widespread and dreadful acts that may be the subject of investigations, the ICC naturally would be hesitant to proceed. This is so for both practical and ethical reasons. Without any enforcement mechanisms, investigations rely on the cooperation of the state where they occur. The security of staff and witnesses is unlikely to be provided for in circumstances of such real or threatened instability. It also ought to be obvious that the objectives of the Court in terms set out earlier are unlikely to be met if the immediate consequence of prosecution is significant upheaval.¹⁶⁷

The paper goes on to argue that the OTP should evaluate the “threat of instability or prolonging of the conflict through detailed discussion with well-placed sources on the ground who have experience in the relevant security, military and political aspects.”¹⁶⁸

Is this view inconsistent with the interpretations of the “interests of justice” test in the 2007 policy paper and the speech Seils gave at Nuremberg or can they be reconciled? How would you assess its ethics in requiring the Prosecutor to weigh and balance multiple factors, including non-judicial ones that proponents of a duty to prosecute view as outside his mandate? Is it a more realistic view of how the OTP is

¹⁶⁷ Paul Seils and Marieke Wierda, *The International Criminal Court and Conflict Mediation*, International Center on Transitional Justice, June 2005, 12.

¹⁶⁸ *Ibid*, 13.

likely to act in fragile post-conflict environments, particularly if the Court is going to cultivate the cooperation of political actors on whom it is likely to depend for its effectiveness? If so, does this challenge constructivist arguments with respect to the influence of anti-impunity norms and civil society groups? And if this is actually the operational policy of the Prosecutor's office, should it be frankly acknowledged or does the Court have an institutional interest in not doing so?

The Arrest of Mathieu Ngudjolo

On February 6, 2008, the ICC issued an arrest warrant for one of the three amnestied warlords, Mathieu Ngudjolo, for a massacre of 200 people in the Hema village of Bogoro in February 2003. Ngudjolo was promptly arrested and surrendered to The Hague. The arrest warrant was unsealed three months after Ngudjolo and the two other Ituri militia leaders had arrived in Kinshasa for training and integration into the FARDC. The ICC did not issue arrest warrants for the other two warlords, nor did the Congolese courts initiate proceedings against them as of 2011.

Human Rights Watch welcomed the arrest of Ngudjolo, but called on the Congolese authorities to follow the ICC's lead and try the other two warlords "in fair and effective trials." It also called on the OTP to move further up the chain of command by building cases against political and military officials in Rwanda and Uganda who financed and supported these militias, as well as former Congolese rebels leaders who had used them as proxies, and are now influential politicians in the government in Kinshasa.¹⁶⁹

Issue #1 – The Impact of the Ngudjolo Arrest on Peace in Ituri

The Ngudjolo case provides an illustration of how the timing of the OTP's actions can be managed to mitigate the risk of violence.¹⁷⁰ The arrest warrant was initially issued in July 2007, but not unsealed until February 2008 – three months after the militia leaders arrived in Kinshasa for military training. This minimized the likelihood that the warrants would interfere with the DDR process or convince the militia leaders to back out of their agreement and resume their insurgencies. It also increased the prospects for securing Ngudjolo's arrest, so there was a correlation between the Court's law enforcement mandate and the goal of minimizing the risk of recidivist violence in Ituri.

The decision nonetheless raises a number of questions about the relationship between law and politics in terms of whether the Prosecutor should or actually does consider politics in his discretion. First, did the OTP consult with MONUC and other actors involved in the peace process prior to going forward the Ngudjolo arrest? Or were communications limited to simply giving advanced warning to allow them to prepare from any potential fallout from the arrest? Which approach did the Prosecutor most likely take? And is the risk that Ngudjolo's arrest might provoke a violent backlash something that should be part of the Prosecutor's decision-making or is it outside his mandate to remain above politics?

¹⁶⁹ "ICC/DRC: New War Crimes Suspects Arrested," Human Rights Watch, February 7, 2008.

¹⁷⁰ Human Rights Watch, *The Meaning of the 'Interests of Justice'*, 21-22.

Second, the decision not to issue arrest warrants for Karim and Matata raises comparable questions about the risk of violence since they were likely to view decision to arrest and extradite Ngudjolo as a “bait and switch” tactic that could also be deployed against them. Indeed, both former warlords disappeared for a few days after the unsealing of the arrest warrant, but eventually returned to their positions. The reason they did not restart their rebellions, according to one study, was that “[o]nce physically removed from their support base and cut off from their networks, the targeted militia leaders have seemingly not been able to retain the intense support that might lead to a backlash of violence upon their arrest.”¹⁷¹ Yet, given the potential risks of indicting only one of the three militia leaders, did the OTP have an ethical responsibility to consult with peace facilitators in order to determine this prior to making its decision? Did it likely do so, and if it did, would that have been consistent with the position on prosecutorial discretion and peace processes in the 2007 policy paper?

Issue #2 – The Impact of the ICC on DRC’s Duty to Prosecute in Ituri

The decision to indict only one of the three warlords raises a third question related to the complementarity provisions of the Rome Statute, which assume that states have a duty to prosecute international crimes and the ICC steps in only when national courts are unwilling or unable to do so. Under the theory of “positive complementarity” developed by the Prosecutor, part of the Rome Statute’s mandate is not just to take cases where states fail to act, but also to encourage states to assume those duties for cases not brought before the ICC.¹⁷² Karim and Matata were accused of crimes similar in nature and severity to those of Ngudjolo. As a result, both international and Congolese human rights groups have called on the DRC authorities to prosecute them.¹⁷³ As of 2011, they have not done so. In fact, there have been few high-level militia leaders put on trial in the DRC and many of those who have been detained, have remained under house arrest for long periods of time without formal charges.¹⁷⁴ Since the ICC is supposed to encourage national legal systems to uphold their duty to investigate and prosecute those responsible for international crimes, does the absence of DRC prosecutions mean that it is failing in that goal? Should it then build its own cases against Karim, Matata and other militia leaders who have not been prosecuted? Are there other means through which the Court and its supporters in the international community could address this “impunity gap”?

Issue #3 – The Absence of High-Level Prosecutions for the Proxy War in Ituri

Finally, why has the OTP not yet moved beyond militia leaders in Ituri to their patrons in Kampala, Kigali, and Kinshasa? After all, Moreno-Ocampo has defined his mandate as prosecuting those most responsible for criminal violence. By that standard, he should focus on senior officials in Rwanda and Uganda who supported the militias during the Second Congo War to control the region’s resources. In fact, a few months

¹⁷¹ Davis and Hayner, “Difficult Peace, Limited Justice,” , “Difficult Peace, Limited Justice,” 32.

¹⁷² See Carsten Stahn, “Complementarity: A Tale of Two Notions” *Criminal Law Forum* 19: (2008), 87-113.

¹⁷³ Institute of War & Peace Reporting, February 11, 2008.

¹⁷⁴ For an overview, see Avocats Sans Frontières, “Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo,” 2009.

http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf

before the issuance of the arrest warrant for the first Ituri warlord, Thomas Lubanga, the ICJ ruled that Uganda, which had been Lubanga's patron, had illegally occupied Ituri, during which it was responsible for serious violations of international humanitarian law.¹⁷⁵ While a comparable ICJ case against Rwanda was dismissed for lack of jurisdiction, a 2010 UN Mapping Study documented large-scale violence its army inflicted on civilians on DRC territory going back to the First Congo War in 1996.¹⁷⁶ In addition, rival Hema and Lendu militias were supported by Congolese rebel groups, some of whose leaders are now influential politicians in Kinshasa, such as Mbusa Nyamwisi, who was Kabila's Minister of Foreign Affairs when Ngudjolo was arrested.¹⁷⁷

Many NGOs and international criminal law scholars have been critical of the Prosecutor's focus on rebels rather than government officials in those situations in which states have invited ICC investigations on their territory. They attribute this to a pragmatic calculation designed to secure the cooperation of the governments with whom he has partnered.¹⁷⁸ For example, were the Prosecutor to investigate high-level Ugandan involvement in violence and plunder in Ituri, he could risk losing the cooperation of the Museveni government for his cases against the leaders of the Lord's Resistance Army. Or, as an International Crisis Group analyst noted in explaining his case selection in the DRC: "No Iturian leader poses a problem for Kinshasa, except when it comes to proving that in 2002-2003 the current minister of foreign affairs, Mbusa Nyamwisi, served as intermediary between Kabila and some active armed groups in the region. But if the ICC goes after him, it will have to go after the presidency and Luis Moreno-Ocampo will not go that far."¹⁷⁹ Phil Clark of Oxford Transitional Justice Research describes this as a "self-serving pragmatism rather than a pragmatism geared to the needs of the Congolese population."¹⁸⁰ Adam Branch, a sharp critic of Moreno-Ocampo and his investigations in Uganda, asserts that the ICC has "accommodated himself to power within Africa" rather than acting as "an instrument of universal and impartial justice."¹⁸¹

Is this a persuasive explanation and critique of why there have not yet been any cases against more powerful state actors for the violence in Ituri? Could the Prosecutor defend his choices in terms of the mandate of the Rome Statute? His office has attempted to do so by asserting that the many of the alleged crimes took place outside of the Court's temporal jurisdiction, that it does not have the kind of evidence to link state actors with the militias in Ituri that would stand up in a court of law, or that the allegations against state actors are of lesser gravity than those against rebels. Moreover, none of these state

¹⁷⁵ International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, 19 December 2005.

¹⁷⁶ UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Democratic Republic of the Congo between 1993 and 2003*, August 2010.

¹⁷⁷ Gérard Prunier, "The 'Ethnic' Conflict in Ituri: Overlapping of Local and International in Congo-Kinshasa" in Jean-Pierre Chrétien and Richard Banégas, eds., *The Recurring Great Lakes Crisis: Identity, Violence and Power* (New York: Columbia University Press, 2011), 189-194.

¹⁷⁸ This applies only to voluntary state referrals under Article 13(a), not the other triggers. Where the Security Council has referred nonparty states (Sudan and Libya) and where the Prosecutor has taken cases on his own initiative (Kenya), case selection has targeted high-level officials.

¹⁷⁹ See the comments of François Grignon in Emmanuel Chacon and Benjamin Bibas, "Has the ICC Finished in Ituri?" *International Justice Tribune*, February 18, 2008.

¹⁸⁰ Clark, "Law, Politics, and Pragmatism," 41.

¹⁸¹ Adam Branch, "What the ICC Review Conference Can't Fix" in Oxford Transitional Justice Research, *Debating International Justice in Africa*, Collected Essays, 2008-2010, 33.

actors have immunity from ICC jurisdiction, meaning that cases could be brought against them if warranted by the evidence regardless of the impact on state cooperation.¹⁸² Are these plausible rebuttals to the charges put forward by critics?

If not, and the decision to refrain from high-level prosecutions was based on pragmatic considerations, is this ethically defensible? After all, targeting powerful state actors would likely transform the Court's relationship with governments from a cooperative to an adversarial one. This could lead to the termination of all government assistance to the Court, as is the case today with Sudan over the Darfur investigations. Or governments could obstruct cooperation as leverage to persuade the Court to back off. This is what Rwandan President Paul Kagame did when he cut off cooperation with the ICTR as a means of forcing the hand of its Chief Prosecutor, Carla del Ponte, to abandon plans to build cases against the Rwandan Patriotic Front (RPF) for revenge killings of at least 20,000 Hutu civilians during the insurgency that overthrew the regime responsible for the genocide.¹⁸³ By contrast, Moreno-Ocampo sent Deputy Prosecutor Fatou Bensouda to attend Kagame's inauguration, which took place shortly after the release of the UN Mapping Report documenting RPF war crimes on Congolese territory.¹⁸⁴ While Kagame – unlike Bashir – had not been indicted by the Court and almost all the allegations in the UN report took place before to the Rome Statute came into force, some international justice supporters were critical of the appearance of an association with someone accused of the very kinds of crimes the ICC is mandated to punish.¹⁸⁵ On the other hand, the Prosecutor likely viewed the event as an opportunity to build African support for his case against Sudanese President Omar Hassan al-Bashir or for its investigations in North Kivu, whose first case is against a leader of the Hutu-led FDLR.¹⁸⁶

This reluctance to prosecute powerful state actors could be seen as the inevitable consequence of a court that lacks independent enforcement power in its dealings with governments that refer situations on their own territories. This may also explain why the Prosecutor has tried to cultivate constructive relationships with Kagame, Kabila, and Museveni. Is this a kind of judicial realpolitik that international prosecutors need to adopt if they are to secure the support necessary to bring cases to trial on the grounds that some justice is better than no justice?¹⁸⁷ Is it any different from domestic prosecutors, who often make deals with disreputable characters in order to build cases?

However, these practices could undermine a more idealistic vision of the Court and work to entrench governments with weak democratic and human rights credentials by criminalizing their enemies without linking that to any improvements in those governments' own practices. They could also create legitimacy problems for the ICC

¹⁸² These were arguments presented to the author in interviews at the OTP.

¹⁸³ Kingsley Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (New York: Palgrave, 2005), 125-151.

¹⁸⁴ Colum Lynch, "What's a War Crimes Prosecutor Doing at Kagame's Presidential Inauguration," Turtle Bay: Reporting Inside the United Nations, September 3, 2010. http://turtlebay.foreignpolicy.com/posts/2010/09/03/what_s_a_war_crimes_prosecutor_doing_at_a_war_criminal_s_presidential_inauguration; and Colum Lynch, "UN: Rwandan Troops May Have Committed War Crimes in Efforts to End '94 Genocide," *Washington Post*, August 28, 2010.

¹⁸⁵ See the comments of Richard Dicker of Human Rights Watch in *Ibid*.

¹⁸⁶ See Koert Linijer, "End of the FDLR in Europe?" *International Justice Tribune*, October 20, 2010, 3.

¹⁸⁷ For an interesting article on the unstated need for international tribunals to treat some actors as "friends" and others as "enemies," see Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21:4 (2010), 941-965.

within victim communities, which might view it as protecting powerful actors.¹⁸⁸ Finally, in taking a more cautious approach toward state actors, might the Prosecutor be underestimating the normative power of the Court and the influence high-level prosecutions could have in challenging repressive privilege? Carla del Ponte was forced to back down from her prosecutions of RPF commanders not only because of Rwandan obstruction, but also Kigali's ability to make common cause with the US and other actors who wanted the ICTR to wind down rather than take on new cases.¹⁸⁹ But could the publicity surrounding high-level prosecutions and their mobilization of civil society groups have a different impact, placing pressure on Western donors to reconsider their relationships with such rights-abusive regimes? Does the Prosecutor's caution neglect normative changes in international society that are likely to make a bolder approach criminal justice more successful?

The War in North Kivu

During the period between the amnesty-for-peace deals in Ituri and the arrest of Ngudjolo, the most violent region in eastern Congo has been – and still is – North Kivu.¹⁹⁰ The chief protagonists are the Hutu-led FDLR, composed of former leaders of the Rwandan army and paramilitaries responsible for the 1994 genocide, and the Tutsi-dominated CNDP. At the time, the CNDP was led by Laurent Nkunda, a Congolese Tutsi, who served as a general in the Rwandan-backed Rally for Congolese Democracy (RCD) during the Second Congo War. After the Sun City peace agreement, Nkunda declined an appointment in the FARDC and, with Rwandan support, launched a rebellion against the transitional government in 2004, forming the CNDP two years later.¹⁹¹ Nkunda was also implicated in a massacre of 160 people in Kisangani in May 2002 and his militia had been accused by UN officials of ethnic massacres, forced displacement and sexual violence as a weapon of war.¹⁹²

Kinshasa has addressed these insurgencies through both military and diplomatic means. In early 2007, it attempted to use Rwandan intermediaries to persuade Nkunda to end his insurgency and join the FARDC. When that failed, it shifted from negotiations to force and aligned itself with the FDLR and local Mai-Mai militias.¹⁹³ In November, it signed an agreement with Rwanda in Nairobi for joint efforts against the FDLR, though senior military officials continued to provide arms to that rebel group to confront the CNDP.¹⁹⁴ The next month, the government launched a full-scale military assault against the CNDP that ended in total failure, contributing to the mass displacement of civilians who were subjected to war crimes and human rights abuses by both government and rebel forces. A Council on Foreign Relations study consequently concluded that the Congolese security forces were “incapable of restoring order [in eastern Congo]” and their

¹⁸⁸ For evidence of this in the DRC, see Stephanie Wolters, ‘Selective Prosecutions Could Undermine Justice for Congo’, *Institute for War & Reporting*, 7 March 2007.

¹⁸⁹ See Moghalu, *Rwanda's Genocide*, 132-136.

¹⁹⁰ For background, see Part A, 30.

¹⁹¹ See Reyntjens, *The Great Congo War*, 211-215.

¹⁹² See Lemarchand, *The Dynamics of Violence in Central Africa*, 17-19, 276-277.

¹⁹³ International Crisis Group, *Congo: Bringing Peace to North Kivu*, Africa Report No. 133, October 31, 2007, 13-14.

¹⁹⁴ Anthony W. Gambino, *Congo: Securing Peace, Sustaining Progress*, Council on Foreign Relations, Special Report No. 40, October 2008, 15.

predatory behavior toward the civilian population “[did] more to compound insecurity than to bring peace.”¹⁹⁵

After this setback, President Kabila sought to address the CNDP insurgency through a US and UN-led mediation in Goma, the capital of North Kivu. On January 23, 2008, the government negotiated a cease-fire and peace agreement with 22 armed groups, including the CNDP, aimed at ending hostilities in North and South Kivu. One sticking point in the negotiations was the question of amnesty, particularly for Nkunda, who was under indictment for war crimes in Kinshasa and it was widely believed that there was a sealed ICC warrant for his arrest. Yet given the gravity of his alleged crimes, extending an amnesty would have been contrary to the DRC’s obligations under the Rome Statute and even if offered, would have lacked credibility since the ICC would not have been bound by it – a point made emphatically clear a few weeks later when the ICC issued an arrest warrant for the amnestied Matthieu Ngudjolo.¹⁹⁶

The cease-fire broke down almost immediately and heavy fighting between government and CNDP forces resumed in late August 2008. The FARDC was once again routed and Nkunda’s forces advanced to the outskirts of Goma, posing a serious threat to the regime.¹⁹⁷ As with previous hostilities, the civilian population was attacked and abused by both rebel and government forces, worsening the region’s humanitarian crisis with an additional 250,000 IDPs.¹⁹⁸ Despite its presence in the region, MONUC was neither able to prevent the CNDP offensive nor protect civilians from attacks by all sides outside of the major cities. The most notorious example of this was in Kiwanja, where it failed to stop a CNDP massacre of 67 civilians suspected of assisting the government despite the presence of 120 “blue helmets” in a camp less than a mile away.¹⁹⁹

Eventually, Kabila solved his Nkunda problem by conspiring with Rwanda, whose military was allowed to intervene in North Kivu in January 2009 and apprehend its former ally, placing him under house arrest in Kigali, where he is likely to remain given his ability to implicate Kagame. In exchange, Kabila allowed the Rwandan army to launch a 35-day military offensive against the FDLR in alliance with the CNDP, now led by Nkunda’s former chief-of-staff, Bosco Ntaganda, himself subject to an ICC arrest warrant on charges of recruiting child soldiers in Ituri.²⁰⁰ After the Rwandan army withdrew, the FARDC launched its own military operations against the FDLR with CNDP forces, which were officially integrated into the Congolese army, and in which the indicted Bosco Ntaganda is reported to be a deputy operational commander.²⁰¹

The Rwandan and FARDC campaigns were successful in dispersing and weakening the FDLR, but not defeating it. The civilian consequences of the fighting were

¹⁹⁵ Ibid.

¹⁹⁶ Davis and Hayner, “Difficult Peace, Limited Justice,” , “Difficult Peace, Limited Justice,” 19.

¹⁹⁷ Peter Eichstaedt, *Consuming the Congo: War and Conflict Minerals in the World’s Deadliest Place* (Lawrence Hill Books, 2011), 98.

¹⁹⁸ International Crisis Group, *Congo: Five Priorities for a Peacebuilding Strategy*, Africa Report No. 150, May 11, 2009, 3.

¹⁹⁹ Human Rights Watch, *Killings in Kiwanja: The UN’s Inability to Protect Civilians*, December 2008.

²⁰⁰ Jason Stearns, “In Congo’s Conflict, a Surprising Twist,” *Current History* (May 2009), 206-207.

²⁰¹ International Crisis Group, *Congo: No Stability in Kivu Despite a Rapprochement with Rwanda*, Africa Report No. 165, 16 November 2010, 6-11. On Ntaganda’s role, see Human Rights Watch, *You Will Be Punished: Attacks on Civilians in Eastern Congo*, 2009, p. 43; and Final Report of the Group of Experts on the Democratic Republic of Congo,” United Nations Security Council S/2009/603, 23 November 2009, 46.

devastating, with another 400,000 internally displaced.²⁰² When the Congolese army was unable to hold those areas cleared from the FDLR, the Hutu insurgents returned and inflicted violent reprisals against the local villagers, whom they accused to treason.²⁰³ Government forces launched indiscriminate attacks against civilian areas under FDLR control and subjected Congolese civilians to looting, abductions, rape, and extrajudicial killings. UN reports indicated that the integrated CNDP forces were among the worst abusers.²⁰⁴ Despite an explicit mandate to protect civilians, MONUC was unable to reconcile this with supporting the FARDC campaign against the FDLR, which it was also authorized to assist. It could neither protect civilians from reprisals from rebels, nor did its efforts to train the FARDC in international humanitarian and human rights law have a major impact on abusive behavior toward civilians in war zones.²⁰⁵

Issue #1 – The Impact of the ICC on Peace Processes in North Kivu

One question that emerges from these events is what impact the ICC's decisions in Ituri had on conflict resolution in North Kivu and whether that ought to be a consideration for the Prosecutor. First, the negotiations in Goma took place from January 6 – 26, 2008 and the ICC unsealed the arrest warrant for Ngudjolo on February 8, even though the warrant had been issued in July 2007 and Ngudjolo had arrived in Kinshasa in November 2007. Through interviews with UN diplomats, one NGO study reported that there was some judicial accommodation to the peace process in terms of timing.²⁰⁶

Apparently the Court had planned to have Ngudjolo arrested in Kinshasa even while peace talks were under way in Goma in January 2008. It was feared that this arrest might alarm militia leaders who were poised to sign the Goma agreement (especially since Ngudjolo had himself signed the 2006 Ituri Agreement just 14 months earlier). Key international participants at the Goma talks reportedly urged the ICC to delay unsealing the warrant for his arrest. The ICC accepted these concerns, and the arrest took place shortly after the signing of the Goma agreement.

Is it likely that the diplomats are correct in their assessment of why the arrest warrant was unsealed after the Goma negotiations had been completed? If so, would it have been ethical for the Prosecutor to have adjusted his decision-making to needs to peace facilitators? Could doing so be reconciled with the 2007 OTP policy paper on “the interests of justice”? Would it have been in line with the Human Rights Watch position

²⁰² Center for International Cooperation, *Annual Review of Global Peace Operations 2010*, (Boulder: Lynne Rienner, 2010), 46.

²⁰³ International Crisis Group, *Congo: No Stability in Kivu*, 8.

²⁰⁴ *Ibid*, p. 9; Also see Center for International Cooperation, *Annual Review of Global Peace Operations 2011* (Boulder: Lynne Rienner, 2011), 29-30.

²⁰⁵ For reporting on MONUC's weakness as an instrument of civilian protection, see Jeffrey Gettleman, “U.N. Was Told Not to Join Congo Army on Operation: Despite Legal Advice, Peacekeepers Supported a Devastating Mission,” *New York Times*, December 11, 2009, p. A7; and Jeffrey Gettleman, “4-Day Frenzy of Rape in Congo Reveals U.N.'s Troops Weakness” *New York Times*, October 4, 2010, A1.

²⁰⁶ Davis and Hayner, “Difficult Peace, Limited Justice,” 33.

that the timing of potentially destabilizing public actions should be discreetly delayed, only if absolutely necessary and without public acknowledgment?²⁰⁷

Second, what are the implications of the Ngudjolo arrest warrant – or overall ICC jurisdiction over those parts of eastern Congo still at war – in terms of the utility of amnesty as a tool of peacemaking? Article 17 of the Rome Statute stipulates that amnesties for international crimes (which are “inconsistent with an intent to bring the person to justice”) are not a bar to admissibility. The Ngudjolo arrest warrant makes clear the Court’s authority to override domestic amnesties and its willingness to do so, even if the Prosecutor waited until the completion of the Goma negotiations to unseal it. This also demonstrates, as Priscilla Hayner and Laura Davis put it, “the ICC remains the one factor that cannot be negotiated away; nor can any national law provide immunity from it”²⁰⁸ If so, this creates what Tom Ginsburg of the University of Chicago Law School calls the “clash of commitments” between the ICC’s obligation to prosecute international crimes the peace facilitator’s need to make a “credible promise . . . *not* to prosecute or to grant an amnesty”:²⁰⁹

The presence of the ICC thus makes the promise of an amnesty less credible. Even if the government is sincere in promising an amnesty, the operative decisions to prosecute are no longer under the direct control of the government. The lack of control has the effect of . . . reducing the scope of a deal. A government that wants to make a decision to forgive cannot do so, once it has signed the Rome Statute.

How would you assess this argument insofar as it influences the instruments available to international mediators or the Congolese government in negotiating an end to insurgencies in North Kivu, either by the CNDP or the FDLR? Is this morally problematical because the likely alternative to negotiating with those accused of war crimes is the continuation of violence? Or does it facilitate a new approach to conflict resolution without the social ills that inevitably accompany peace without accountability?

Proponents of international criminal justice answer the last question affirmatively. With respect to the DRC, they note that that the model of power-sharing as a means of co-opting war criminals has not brought peace to the region. It has also created incentives for new militias to commit violence in order extract more concessions in negotiations.²¹⁰ Prosecution, by contrast, could neutralize criminal actors and deter further criminality.²¹¹ It is also necessary for reconciliation in a war that is not just between militias, but also between communities, all of whom have legitimate grievances. The CNDP, for example, represents the fears to the Tutsi population, which has been subjected to discrimination and extreme violence, particularly by the FDLR. Hence, “the arrest and trial of prominent leaders of Hutu militias most responsible for human rights

²⁰⁷ Human Rights Watch, *The Meaning of the ‘Interests of Justice’*, 21-22.

²⁰⁸ Davis and Hayner, “Difficult Peace, Limited Justice,” 33.

²⁰⁹ Tom Ginsburg, “The Clash of Commitments at the International Criminal Court” *University of Chicago Law School* 9 (Winter 2009), 500, 508.

²¹⁰ See the comments of the Congolese police officer after the mass rapes in Luvungi in Gettleman, “4-Day Frenzy of Rape.”

²¹¹ See the discussion of the benefits of indicting Nkunda in International Crisis Group, *Congo: Consolidating the Peace*, Africa Report No. 128, July 5, 2007, 23.

abuses against the Tutsi minority would drastically undercut the CNDP's support structure."²¹² And given the brutality of the CNDP within eastern Congo, the prosecution of its top leaders, such as Nkunda and Ntaganda, are necessary if the local population is to reconcile with the Congolese Tutsis.²¹³

The counterargument is that excluding the leaders of insurgencies from peace negotiations on the basis of past behavior biases the conflict resolution process toward military solutions – which would be the preconditions for putting the leaders of the CNDP or FDLR on trial. This was the critique of the ICC's "no impunity" mandate put forward by Fabrice Weissman of *Médecins Sans Frontières*, shortly after the confirmation of the arrest warrant for Sudan's President, when he argued that 'a theory of peace through [prosecutorial] justice is above all a theory of just war.'²¹⁴ To expand on this use of Just War Theory,²¹⁵ there certainly would be "just cause" for the use of force against the CNDP or FDLR given the gravity of their crimes against the civilian population in eastern Congo. To satisfy another "just war" criterion, however, the use of force would have to lead to a better peace. Do the humanitarian consequences of previous FARDC campaigns against rebels raise questions about whether this test can be passed – either in terms of the capacity to defeat insurgents and pacify the region or the mass displacement and human rights abuses that have accompanied those campaigns?

One alternative would be to transfer the dominant counterinsurgency role to a better-resourced MONUC (renamed MONUSCO in July 2010) with a stronger enforcement mandate. After all, the deployment of Operation Artemis and the decision to bolster MONUC's resources and mandate improved the human security situation in Ituri by forcibly confronting militia leaders, persuading them to demobilize and establishing the preconditions for surrendering three of them to The Hague.²¹⁶

Replicating that experience in North Kivu, however, seems unlikely. First, President Kabila has been putting pressure on the UN to withdraw its peacekeepers and it is likely that the operation will be drawing down over the next few years.²¹⁷ Second, MONUC itself moved away from a peace-enforcement role since the pacification of Ituri.²¹⁸ Instead, its primary role has been to support Congolese army in its campaigns to dismantle armed groups. Security Council Resolution 1856 (22 December 2008) also authorizes it to facilitate the integration of rebel forces into the FARDC, provide logistic support and training for joint operations, both to improve their effectiveness but also their compliance with international humanitarian and human rights law. This last goal is particularly important since the Security Council stipulated that MONUC's top priority is "protection of civilians . . . under imminent threat of violence."²¹⁹

²¹² Jake Goodman, "The Grease in the Gears: Impunity in the Democratic Republic of Congo and the Opportunity for Peace," *Loyola Los Angeles International and Comparative Law Review* 32 (2010), 228-229.

²¹³ *Ibid.*, 229-231.

²¹⁴ Fabrice Weissman, 'Humanitarian Aid and the International Criminal Court (2)', Social Science Research Council Blog, *Making Sense of Sudan*, 21 July 2009. <http://africanarguments.org/2009/07/21/humanitarian-aid-and-the-international-criminal-court-grounds-for-divorce-2/>

²¹⁵ The classic work on this subject is Michael Walzer's *Just and Unjust Wars* (New York: Basic Books, 1977).

²¹⁶ See Part A, 31-32.

²¹⁷ *Annual Review of Peacekeeping Operations 2011*, 27-28.

²¹⁸ Stian Kjerksrud and Jacob Aasland Ravndal, *Protection of Civilians in Practice – Emerging Lessons from the UN Mission in DR Congo*, Norwegian Defense Research Establishment, December 15, 2010,

²¹⁹ Cited in Daniel H. Levine, *Civilian Protection and the Image of the "Total Spoiler": Reflections on MONUC Support to Kimia*, Working Paper, Center for International and Security Studies at the University of Maryland, October 2010, 10.

MONUC's ability to reconcile its support of FARDC offensives with its civilian protection mandate has, at best, produced marginal results. For the most part, it has neither been able to protect civilians from FDLR reprisals nor from FARDC abuses.²²⁰ In December 2009, a scandal emerged when MONUC supported a FARDC operation which involved widespread abuses despite its mandate not to assist the Congolese army "if there are substantial grounds for believing there to be a real risk of them violating international humanitarian law."²²¹ In response, the UN developed a stricter conditionality policy that suspends cooperation with brigades that violate international law "to reduce the number of abuses committed by the FARDC without stopping the anti-FDLR offensive."²²² An unintended consequence of this was that more than 70% of the FARDC operations were run unilaterally without MONUC oversight.²²³ In other words, UN peacekeepers are confronted with the unpalatable choice of either cooperating with rights-abusive units in order to limit some of their worst violations or refusing to cooperate and losing the ability to monitor and influence their behavior.

Given the humanitarian consequences of the campaign against the FDLR, some analysts argue there is a need to compromise justice in the interests of peace.²²⁴

Any sort of compromise or accommodation with the group is likely to end with the leaders either retiring into comfortable exile or having positions of influence in the DRC or Rwanda. This seems odious, and it is. But we should ask ourselves if the massive civilian cost of operations against the FDLR would be justified by the goal of bringing the leaders to justice. Some strict moralists might say "yes," but I think it is hard to maintain that judgment and take the situation seriously – it is a very harsh deontology that would say to one of hundreds of civilians raped or killed during Kimia II that this is obligatory to avenge past misdeeds . . . If we put it starkly, and ask if we ought to be willing to countenance violence against hundreds if not thousands of civilians, so that leaders of the FDLR will get their just desserts, I think a moral logic of proportionality would say "no." Proportionality sometimes does mean that one lets evil go unpunished because the costs of accountability are too great.

This advocacy raises a number of ethical questions in terms of both duties and consequences. Is the pardoning of rebel leaders most responsible for atrocity crimes against the civilian population of eastern Congo – some of whom were complicit in the Rwandan genocide – a violation of moral duties to victims and legal duties under international law? Can these duties be honored without the humanitarian costs that accompany the continuation of the war? Does the goal of holding FDLR leaders accountable require a military solution and, if so, what commitments would have to be undertaken to minimize the costs to innocents? Are there alternatives to military solutions in negotiating an end to the insurgency while still demanding accountability or

²²⁰ Thierry Vircoulon, "After MONUC, Should MONUSCO Continue to Support Congolese Military Campaigns?" (International Crisis Group, 2010).

²²¹ Jeffrey Gettleman, "U.N. Was Told not to Join Congo Army on Operation; Despite Legal Advice, Peacekeepers Supported a Devastating Mission" *New York Times*, December 11, 2009, A7.

²²² International Crisis Group, *Congo: No Stability in Kivu*, 11.

²²³ Stian Kjerksrud and Jacob Aasland Ravndal, *Protection of Civilians in Practice – Emerging Lessons from the UN Mission in DR Congo*, Norwegian Defense Research Establishment, December 15, 2010, 16-18.

²²⁴ Levine, *Civilian Protection and the Image of the "Total Spoiler"*, 16.

does Ginsburg's "clash of commitments" render that impossible? In other words, how should the social ills associated with impunity be balanced against those associated with the continuation of the insurgency and is there a means of addressing both issues that effectively balances peace and justice?

Issue #2 – Arresting Bosco Ntaganda

Finally, how should the ICC and its supporters in the international community respond to the fact that the Congolese government has refused to arrest and surrender Bosco Ntaganda despite an ICC warrant for his arrest for the use of child soldiers in Ituri? Kabila had cooperated with the apprehension of the three other Ituri militia leaders, in large measure since their removal from power facilitated the central government's control over a region that had been dominated by insurgents. Initially, he probably took the same view when the Ntaganda arrest warrant was unsealed on April 28, 2008 since Ntaganda was then chief of staff in Nkunda's CNDP – a militia with whom the government was at war. All of that changed after Rwanda intervened to depose Nkunda and both Kinshasa and Kigali chose Ntaganda to lead the integration of the CNDP into the Congolese army and the fight against the FDLR. As a result, for the first time, the ICC demanded the arrest of an important strategic ally of the government. The Ntaganda case raises the question of whether states that invite ICC investigations on their own territory can use the Court for their own political ends, assisting it when prosecution marginalizes their enemies, but not when it indicts powerful actors who are politically useful.²²⁵

In terms of international law, these political calculations should be irrelevant. The DRC, as a party to the Rome Statute, has a binding obligation to execute the arrest warrant and surrender Ntaganda. Kabila has defended his noncompliance citing the familiar conflict between peace and justice: "Why do we chose to work with Mr. Bosco, a person sought by the ICC? Because we want peace now. In Congo, peace must come before justice."²²⁶ What is unfamiliar in this rendition of the "peace versus justice" argument is that the aim is not to persuade Ntaganda to lay down his arms, but rather to align his forces with those of the army in its war with the FDLR, whose successful completion would presumably bring peace. As a result, Kabila has not only refused to surrender Ntaganda, but has actively supported him through providing resources to his militia, releasing one of his most notorious allies from his Ituri days (Innocent Kayina) from prison, and instructing prosecutors not to build cases against CNDP fighters for alleged crimes in North and South Kivu.²²⁷

There is also some question as to whether Kabila could arrest Ntaganda should he try to do so. Prior to its official integration into the army, the CNDP's forces were stronger than those of the government. In addition, the CNDP has not been fully integrated into the FARDC and has stockpiled arms independently of the government, which it uses to run a parallel administration within North Kivu.²²⁸ For the time being, this creates a disincentive for Kabila to act since arresting Ntaganda is not a simple police

²²⁵ This view that self-referrals are a "trap" for the ICC is put forward in William A. Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts" *Criminal Law Forum* 19 (2008), 18-22.

²²⁶ David Smith, "Congo Conflict: 'The Terminator' Lives in Luxury While Peacekeepers Look On," *Guardian* February 5, 2010.

²²⁷ International Crisis Group, *Congo: Five Priorities for a Peacebuilding Strategy*, 8-9

²²⁸ International Crisis Group, *Congo: No Stability in Kivu*, 11-12.

operation and would likely provoke a military confrontation. Moreover, Ntaganda's independent power base is a strong reason for Kabila to secure his cooperation in the war against the FDLR, which he has defined as the principal spoiler in eastern Congo.

Given Ntaganda's value to the Congolese government, what influence does the Prosecutor have in securing his arrest and surrender? In theory, it could rely on MONUC/MONUSCO, part of whose mandate under Security Council Resolution 1856 is to "cooperate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international law."²²⁹ In practice, however, this is unlikely to lead to the arrest of Ntaganda because of potential conflicts with other parts of the peacekeeping mandate. MONUSCO operates with the consent of the Congolese government. As a result, it has no authority to arrest anyone on its own. As Alan Doss, the former Special Representative for the Secretary General to the Congo noted, UN peacekeepers "have no more jurisdiction to pluck someone from a tennis court in Goma [in North Kivu] than they would have in Wimbledon."²³⁰ They can only assist the Congolese security forces in arresting those indicted by the ICC – which is highly improbable given their relationship with Ntaganda in fighting the FDLR. One scholar consequently concluded that "[l]eaving the decision to arrest Ntaganda with President Kabila allows the latter to discredit the ICC."²³¹

Moreover, MONUC was tasked with the goal of facilitating the integration of the CNDP into the FARDC, even if its officials were forbidden from having direct contacts with Ntaganda. While such policies may have indirectly supported an indicted war criminal, they also served another part of MONUC's mandate – namely, that of consolidating the sovereign authority of the government in Kinshasa. As MONUC political officer explained it:²³²

The realignment of the CNDP was probably the most significant development here for 15 years. . . Last year, before the agreement, the CNDP almost took over Goma. If you can't beat them, you might as well have them. You can't defeat them militarily, so what's the choice? Would the NGOs prefer an autonomous military group to continue to be stronger than the army?

Yet this objective required MONUC to facilitate the integration of a militia complicit in some of the worst anti-civilian violence in North Kivu, one of whose leaders is a fugitive from the ICC. Given MONUSCO's consent-based mandate and the priority given to creating a united national army to fight the FDLR, it is unlikely that it can serve an instrument of international law enforcement against Ntaganda or any one else currently aligned with the government's agenda.

Another option would be for the Prosecutor to adopt a more forceful policy of public exhortation to expose noncompliance with the Court's orders and mobilize social pressure on Kinshasa and the international community to increase the prospects for the prosecution of Ntaganda or ending the widespread impunity of the security forces. In a study of prosecutorial strategy at the ICTY and ICTR, Victor Peskin refers to this as the

²²⁹ Janine Natalya Clark, "UN Peacekeeping in the Democratic Republic of Congo: Reflections on MONUSCO and its Contradictory Mandate" *Journal of International Peacekeeping* 15(September 2011), 375.

²³⁰ *Ibid.*, 376-377.

²³¹ *Ibid.*, 377.

²³² Smith, "Congo Conflict."

practice of conducting “virtual trials” or “trials of cooperation” in which the moral authority of the Court is deployed to shame recalcitrant governments to accept their legal duties or to put pressure on powerful third parties to act as “surrogate enforcers,” who link incentives and penalties to compliance with the Court. Peskin found that over time the prosecutors at the ICTY (but not the ICTR) were able to secure the cooperation of Western governments and institutions to link reconstruction aid and a path to EU membership to willingness of the former Yugoslav republics to cooperate with the tribunal. This, in turn, persuaded the Croatia and Serbia to accept the domestic political costs of surrendering individuals who were viewed by local nationalists as war heroes.²³³

This raises the question of whether the ICC Prosecutor could pursue a comparable strategy of mobilizing social norms and civil society pressures on the UN and donor states to act as surrogate enforcers toward the Kabila government and the protection it has afforded to Ntaganda and others implicated in criminal violence in eastern Congo. If he succeeds in doing so, the DRC’s dependence on foreign support creates at least as strong a potential for linkage as there was in the Balkans. As Adam Hochschild notes:²³⁴

The outside world has influence over the Congolese army, because we're partly paying for it. The national government depends on aid money to make ends meet, depends on the UN force to retain control of the east, and sometimes even needs UN planes to transport its soldiers, for there is no drivable road from one side of the country to the other. At a bare minimum, the Western powers have leverage to pressure Congo into purging its army of thugs in senior positions—and could demand far more as well.

In theory, a more high-profile strategy of prosecutorial shaming could be directed at the Security Council to authorize MONUSCO to arrest those indicted by the Court rather than being dependent on the consent of the Congolese government or make that consent a condition for the UN’s assistance. The Prosecutor could also target donor states, which pay for a substantial portion of Kinshasa’s budget, to persuade them to link their largesse to cooperation with the Court and a stronger commitment to accountability for war crimes and human rights abuses. He might also directly change Kabila’s calculations by promising to hold senior officials in the government – including the President himself – criminally responsible for the violence perpetrated against civilians by Ntaganda’s forces in their war with the FDLR. On the other hand, the priority placed by Kinshasa, the Security Council, and the donor states on defeating the insurgencies in eastern Congo could effectively negate pressure to take stronger action against impunity. If so, would a more aggressive prosecutorial strategy risk alienating powerful actors on whom the Court is dependent rather than opening up more political space for international criminal justice? In other words, will politics set the parameters for international criminal justice or can the Court expand those parameters so that politics is more supportive of the law?

²³³ Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press, 2008).

²³⁴ Adam Hochschild, “Rape of the Congo” *New York Review of Books* 56:13, August 13, 2009.