

## Peace or Justice? : The Dilemma of the International Criminal Court

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### Abstract

In this article, I address the much-publicized "peace versus justice dilemma" faced by the International Criminal Court. The world's first permanent war crimes Court, the ICC has defied many of its critics by commencing its first case, investigating four situations, issuing arrest warrants in two cases, and receiving its first defendant in The Hague. However, in two of its three situations-in Uganda and Darfur-- the ICC's Office of the Prosecutor (OTP) faces the potentially delegitimizing peace versus justice dilemma: should ICC investigation or prosecution be foregone if it threatens or complicates peace in its situation countries. The coverage of the OTP's handling of the issue has been sparse and desultory. I will show, through analysis of reports and statements from the OTP throughout its two investigations put in the historical and political context of the status of peace and comments of government and rebel officials regarding the ICC, that there has been a rhetorical strategy of the OTP regarding responding to the peace vs. justice issue. I posit further that there has been a definite shift in this strategy--with evidence showing that it employed a more assertive and direct approach to dealing with the issue after heightened criticism and on-the-ground developments supported critics' claims that its investigations threatened peace.

### Introduction

Three years since becoming operational, the International Criminal Court (ICC) has defied many of its critics. Eight years after the adoption of the Rome Statute establishing the ICC, the Court is not only on the cusp of its first trial, but its Prosecutor's Office (OTP) has begun investigating four situations, <sup>1</sup> issued warrants of arrest in two cases and made its first arrest, <sup>2</sup> and successfully charged its first defendant with a war crime. <sup>3</sup> Ratification by over half of the world's states, <sup>4</sup> including the expected imminent ratification by the United Nations' second-largest contributor [Japan], <sup>5</sup> along with United States' softening opposition to the ICC, <sup>6</sup> have all given the Court considerable momentum as it nears becoming a fully operational entity. <sup>7</sup>

However, already in two of its four situations, the OTP has confronted an issue that previous accountability mechanisms such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone had also struggled with. <sup>8</sup> The ICC has found itself in the midst of what would be termed the "Peace vs. Justice" dilemma: <sup>9</sup> should an OTP investigation or prosecution be foregone if it threatens or complicates peace in its situation countries?

### My hypothesis and method

I will show that there has been a rhetorical strategy of the OTP regarding responding to the peace vs. justice issue, and that there has definitely been a shift in this strategy---with circumstantial evidence showing that it employed a more assertive and direct approach to dealing with issue after heightened criticism and on-the-ground developments supported critics' claims that its investigations threatened peace. After an initial approach to the peace vs. justice dilemma that did not acknowledge the peace negotiations in the country and distinguished the ICC's role as judicial and other institutions as upholding peace and political, the then OTP began to directly address its role in peace. In the face of intense criticism from the governments of the countries regarding the Court investigations' effects on peace in the country---with escalating violence and improving peace processes lending some credence to the claims that ICC arrests could worsen domestic peace---circumstantial evidence of a shift in the Court's rhetoric supports the view that it sought to directly counter those claims. Finally acknowledging peace negotiations in Uganda and, in both situations, stating that *lasting* peace was upheld by accountability, i.e. its prosecutions, it even made causal claims that its efforts were helping secure peace and prevent more attacks. It continued to state that it was not ultimately responsible for peace in the country, but that its investigations did help secure peace.

I will provide a comprehensive account of the developments on the ground and the OTP's responses to these dynamic situations. Literature on the peace versus justice 'dilemma' has failed to posit any trend in the OTP's handling of the issue, treating each case separately. Also, the scattered nature of the positions of the governments of the situation countries and warring rebel groups has been conflated with the ICC's position on the relationship between peace processes and ICC investigation and prosecution. By providing a cohesive account of the positions of the relevant domestic actors in the ICC's Uganda and Darfur situations and the ICC's evolving responses to these positions, I present a new approach to untangling a systemic OTP approach.

I will do this by first providing background information necessary to understand the ICC's peace vs. justice dilemma in Part I, explaining the unique role of the ICC, a general description of the peace and justice conflict the ICC faces, and the relevant parts of the Rome Statute alluding to this 'dilemma' in Part I. Then in Part II, I will first offer a detailed look at the conflicts and peace processes in both countries, highlighting the stances of the governments and relevant rebel groups subject to the ICC's jurisdiction in its Uganda and Darfur investigations. Through comments and reports of the OTP put in chronological and historical context, tracing changes in its rhetorical strategy on addressing peace vs. justice as on-the-ground developments relating to peace in the two countries developed, I will reveal the approach of the ICC towards the peace vs. justice issue. Finally, in Part III, I will conclude with a recap of my findings supporting my hypothesis, and offer recommendations for the OTP to deal with the peace vs. justice issue in the future.

## Part I. Understand the ICC's Peace vs. Justice Dilemma

### The ICC's Balancing Act

The International Criminal Court was created as a permanent institution that would prosecute the world's most serious crimes that merited international concern: instances of war crimes, crimes against humanity, and genocide.<sup>10</sup> Unlike the previous international tribunals in Rwanda and Yugoslavia, it was not established by the United Nations nor confined to investigate crimes within only one country. Instead, created by a multilateral treaty as an independent international organization, it has jurisdiction over individuals from a far wider swath of countries---signatories and even non-signatory nations in some cases.<sup>11</sup> Its OTP would be able to respond judicially to crimes that occurred all around the globe.

But another important distinction between the ICC and the ICTR and ICTY is that the ICC statute gave national courts primary jurisdiction—a feature called complementarity.<sup>12</sup> The Court can exercise jurisdiction over individuals only when national courts with jurisdiction over them were unwilling or unable to investigate or genuinely prosecute the same individuals for the same crimes as the Court alleged.<sup>13</sup> Signs of this unwillingness are investigations or prosecutions that shielded the individual in question from criminal responsibility, are marked by unjustified delays, or lacked independence or impartiality.<sup>14</sup> The test of a state's inability to investigate and prosecute individuals is a more general assessment of the State's ability to arrest the excused or gather the required evidence and testimony.<sup>15</sup>

Although the OTP could make the decision whether to commence an investigation or prosecution if the case was referred to it, taking into consideration the aforementioned facets of any national proceedings, the Pre-Trial Chamber of the Court must authorize the OTP's decisions if the State subsequently claimed it was conducting genuine national proceedings. In cases where the OTP had initiated the investigation, this approval by the Pre-Trial Chamber of the OTP's initiation of an investigation or prosecution was mandatory.<sup>16</sup> These novel features of the Court—its increased jurisdiction and deference to national investigations and prosecutions—meant the Court is empowered to consider many cases for investigation or prosecution while being bound to respecting legitimate national proceedings.

### Peace vs. Justice

Operating amidst this tension between imparting international justice and allowing domestic justice to take its course has become difficult for the OTP. The steadily increase in civil wars instead of interstate wars since World War II,<sup>17</sup> many characterized by violent power struggles<sup>18</sup> where war crimes are committed without intervention from the international community—with many of these states under the jurisdiction of the ICC as signatories or through referral by the UN Security Council-- has meant the ICC has had to and will have to deal with 'situations'<sup>19</sup> of ongoing conflict.

In these 'situations', or instances of crimes within the jurisdiction of the Court potentially occurring, ICC investigation or prosecution may not only be occurring simultaneously with domestic trials but also peace processes. What if rebel leaders or government officials involved in peace negotiations condition their promise of peace on immunity from ICC prosecution? The threat of prosecution leading to possible life sentences is certainly enough to dissuade military leaders from the requirements of ending hostilities and disarming that most peace accords entail. Faced with a trial at The Hague versus a return to fighting, many alleged war criminals may choose the latter. This possibility creates a conflict between the ICC's mandate to enforce international justice and the separate function demanded of it by outside voices to foster domestic peace.

### Guidance of the Rome Statute

Looking to the relevant provisions on peace and justice in the Rome Statute, the elliptical provisions support scholars' views that the Statute left the development of the question of how to balance peace and justice, and even if amnesties often granted in peace accords, up to the Chief Prosecutor as a matter of prosecutorial discretion.<sup>20</sup> No mention is made of a clash between domestic peace and justice in the Rome Statute, nor an explicit prohibition of amnesty. In fact, while justice is constantly referred to as a goal in the Statute, the only mention of peace is in the Preamble and describes the nature of the crimes under the Court's jurisdiction, i.e. threats to peace.<sup>21</sup> Only in two articles that do not seem, at first glance, to deal with a clash between peace and justice can any consideration of the potential issue be seen.

Article 53's clauses (1) (c) and (2) (c) of the Rome Statute instructs the OTP to inform the Pre-Trial Chamber or UNSC—upon referral—of the decision to not initiate an investigation or prosecution if “the interests of justice” call for it, after taking into account factors such as the gravity of the crimes and the interests of victims.<sup>22</sup> Clause 53(4) additionally states that the OTP can decide to reconsider investigation or prosecution at any time, though if done so solely on the interests of justice the Chamber must approve the decision for it to take effect. But nowhere does the Statute clarify what the phrase the interests of justice means and what the threshold for stopping or deciding against initiation of an investigation is.<sup>23</sup>

The second article dealing with peace and justice, but even less apparently so, is Article 16. It complicates the picture further by delegating certain powers to the United Nations Security Council. Under Article 16, the Security Council can suspend prosecutions for renewable periods of twelve months. The Security Council is the UN organ charged with the “primary responsibility for the maintenance of international peace and security.”<sup>24</sup> Further, Article 16 concerns only resolutions adopted under Chapter VII, or “Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression,” leading some scholars to believe that this deferral power is the way to deal with conflicts of peace and justice.<sup>25</sup>

Though the internal conflicts that the Court will likely deal with may not seem to affect international peace and security, supporters of the above reading have argued that war crimes and crimes against humanity even in civil wars can meet this standard.<sup>26</sup> The Security Council set this precedent of establishing tribunals as responses to threats to international peace and security by creating the ICTR and ICTY under Chapter VII.<sup>27</sup> Additionally, in the Rome Statute, the UNSC can also, under Article 53 (3) (a), ask the Pre-Trial Chamber to review the decision of the OTP to not proceed with an investigation if not based on the interests of justice. If the Trial Chamber supports the UNSC's finding, it may initiate a review of the decision itself.

But, despite the ambiguous reference to the interests of justice and empowering of the Security Council to defer prosecutions or investigations, the Court's treaty does not indicate how the Prosecutor should balance peace and justice. Recognizing this, the OTP—during its biannual consultation with nongovernmental organizations (NGOs) in December 2004—requested comments by NGOs on the meaning of the “interests of justice” provision in Article 53. Two of the Court's investigations have pressed the OTP to develop its policy and stance in the peace versus justice issue—its situations in Uganda and Sudan.

## Part II. The Uganda and Sudan Situations

### The Uganda Situation

#### Background to the conflict

Since 1986, Northern Uganda had been mired in war.<sup>28</sup> The conflict had claimed tens of thousands of lives, witnessing some of the grisliest warfare of the past century. Fulfilling the stereotypes of African armies replete with child soldiers, 80-90% of the rebel forces of charismatic warlord Joseph Kony's Lord's Resistance Army (LRA) fighting against government forces were children—usually taken from their homes and forced to join. Methodically desensitized to raping and mutilating women, children, and government soldiers, the child soldiers themselves were subjected to sexual slavery and constant threats of death at the hands of their commanders. 1.5 million people were driven from their homes from in Northern Uganda, the nexus of the conflict.<sup>29</sup>

Since 1998, the Government of Uganda (GOU) had offered amnesty in some form to all members of the LRA.<sup>30</sup> The most sweeping amnesty offered was in 2000, under the Amnesty Act, which gave any Ugandan rebel willing to surrender immunity from prosecution, without any requirements of truth-telling or participation in local restorative justice processes.<sup>31</sup> Although 14,000 LRA and other rebel group soldiers had taken up this offer by 2004, the war with the LRA continued and peace talks continued to founder.<sup>32</sup>

#### Referral to the ICC

Finally, resorting to other measures, the GOU referred the ‘situation’ of the LRA's atrocities to the International Criminal Court in December 2003.<sup>33</sup> The move was seen as a military strategy to end a war<sup>34</sup> that had begun to damage Ugandan President Yoweri Museveni's image both domestically and abroad.<sup>35</sup> Supporting this view was the letter by Museveni referring the situation to the Court, where he referred to the situation as encompassing only the crimes of the Lord's Resistance Army. Moreno-Ocampo quickly replied in February 2004 to inform the government that he would investigate all crimes in Northern Uganda, including those committed by the UPDF, not only the LRA's crimes.<sup>36</sup> This incipient misconception by Museveni of such a fundamental aspect of the ICC's process would augur both his misunderstanding of the Court and the GOU's view of an ICC investigation as merely another policy tool to end the war.

Immediately, Museveni's referral—while drawing praises from international human rights NGOs like Amnesty International<sup>37</sup>—invoked condemnation by government factions and domestic interest groups alike, who alleged that ICC prosecution would only prolong the war and upset the peace process.<sup>38</sup> They also pointed to local reconciliation processes such as the Northern Ugandan *mato oput*, which was centered on forgiveness and communal reintegration of offenders,<sup>39</sup> as preferred alternatives to prosecution because they would not disrupt the peace process. The Government's Amnesty Commission itself came out against the investigation, stating that it would make peace impossible.<sup>40</sup>

Nevertheless, when the Court received the request from President Museveni to investigate the situation in Northern

Uganda, it had its first situation. Despite the concerns over upsetting the peace process in Uganda, in February 2004, the Chief Prosecutor, Luis Moreno-Ocampo, stated that he planned to investigate the LRA and specifically Kony.<sup>41</sup> His decision triggered a new barrage of criticism from concerned Ugandan civil society and Northern Ugandans. So, in response, he engaged his critics, receiving two groups of Northern Ugandan traditional, religious, and political leaders, who accused his investigation of being “counterproductive to peace in the north.”<sup>42</sup> He responded in March 2004 by acknowledging the OTP’s responsibility to consider the “interests of . . . justice”; but, while saying that national and local leaders had an important role to achieve peace, justice, and reconciliation—and that he was sensitive and mindful of their efforts—Moreno-Ocampo clarified the OTP’s role as a focus on those bearing the greatest responsibility.<sup>43</sup> With this rhetoric, he maneuvered away from having to consider domestic peace processes and amnesty, while still showing that he was aware of his Article 53 obligation to consider if his prosecution was in the interest of justice.

### The renewed peace process and Museveni’s ‘withdrawal’

After 5 months of investigation, Moreno-Ocampo chose to proceed with the investigation in July 2004.<sup>44</sup> The OTP was moving steadily towards its first case.<sup>45</sup> Initially, the investigation yielded positive results: it pressured LRA soldiers to more seriously consider amnesty to shield themselves from prosecution, and also impelled the Sudanese government to stop supporting the LRA.<sup>46</sup> But, ironically, this success in weakening the LRA came back to haunt the OTP. Along with a loss of funds and increased defection by the LRA, the UPDF’s war of attrition began to finally yield decisive results. Massive UPDF offensives, bolstered by the withdrawal of aid to the LRA from the Sudanese government, had significantly weakened the LRA.<sup>47</sup> This confluence of events forced rebel leader Kony and his top officials to soften their stance on surrender and take peace talks more seriously. Though previous talks had failed and only allowed Kony and the LRA time to regroup, the latest round of peace talks—which began in late 2004, though in weak form—had greater rigor and showed surprising early promise.<sup>48</sup>

With these rapid developments offering better prospects for peace in Uganda than anytime in recent memory, the Government quickly moved for flexibility in their policy options. With the tide turning, as early as November 2004 and reported again in January 2005,<sup>49</sup> media reports had the President and army officers stating that if peace negotiations were successful the GOU could ask the ICC to stop its investigation.<sup>50</sup> Declaring that the ICC’s purpose was to solve the Kony problem, Museveni alleged that the Court should only become involved in situations when the host country could not or would not track down a war criminal.<sup>51</sup>

And, by early 2005, with the UPDF observing a unilateral ceasefire as LRA attacks had died down, the President seemed to change his rhetoric for good, with peace prospects improving and criticism of his referral peaking. Pressure on President Museveni to follow through and “stop” the investigation increased. Civil society groups, traditional leaders, and local politicians coalesced to publish a joint statement in February asking the ICC to suspend its investigation until the peace process was over.<sup>52</sup> In April 2005, criticism continued, as the government’s lead negotiator threatening to end her tenure if the Prosecutor issued arrest warrants for Kony.<sup>53</sup> Her argument was buoyed by Kony’s new level of cooperation with the government, assuming the role as the main interlocutor for the LRA in the peace talks in April,<sup>54</sup> and lending credence to the hopes of the government that a peace process was finally on the horizon.

For his part, Museveni exhibited again his priorities, and willingness to consider a range of options to end the insurgency, among which the ICC was just one. To entice Kony to surrender to the ICC, he announced in May 2005 that, if caught rather than accept amnesty, Kony would be tried under Ugandan law and be eligible for the death penalty—unlike any ICC prosecution. Museveni’s stance of the ICC’s role seemed to solidify in the view that the Court was an instrument of the GOU, to be utilized at his discretion.

### The ICC’s Response

Meanwhile, despite the GOU’s shocking about-faces concerning its referral, the ICC’s investigation speeded ahead as it applied for arrest warrants against Kony, his second-in-command Vincent Otti, and three other senior LRA commanders. On October 14, 2005, the ICC’s Pre-Trial Chamber II approved its application and unsealed five arrest warrants for the OTP’s requested 5 LRA leaders after determining that the OTP had provided reasonable grounds for proving the commanders had committed crimes against humanity and war crimes.<sup>55</sup>

In his statement concerning the arrest warrants, Moreno-Ocampo first acknowledged the ICC’s complicated task of conducting a prosecution alongside a domestic peace process. Delineating his complex reading of the Rome Statute, he stated that he was “guided by” the interests of victims and respected local traditions, citing twenty missions to Uganda hearing the concerns of various domestic parties and fifty trips overall in the course of the investigation. Ocampo said that the ICC and Ugandan communities were working together to achieve the broad goals of justice, reconciliation, redevelopment, and peace.<sup>56</sup>

His references to peace and reconciliation to defuse the strident Ugandan criticism of the ICC were such a departure from any previous comments that the Pre-Trial Chamber itself asked the Chief Prosecutor in December 2005 if he was considering a suspension of the prosecution under Article 53 (3), in the ‘interests of justice’.<sup>57</sup> Clarifying its words in a response revealing that his earlier comments were likely overstatements to appease its critics painting it as ignorant of the dynamics of the peace process; the OTP replied that it had not made any decisions regarding Article 53 (2), or determining that there was not a basis for prosecution because of consideration of the ‘interests of justice.’ It contended further that the judges had to be involved in interpreting any article of the Statute,<sup>58</sup> a maneuver to avoid saddling itself with the responsibility of contributing actively to the peace process to the detriment of its prosecution.

### The LRA’s response

However, the OTP’s placating but nebulous support for reconciliation and peace did little to defuse initial fears of an LRA backlash and undermining of the peace process upon the issuance of arrest warrants. After the ICC’s arrest warrants were issued in unsealed form in October 2005, naming Kony and four other top LRA officials as indictees, the following weeks saw a marked escalation in the incidence and violence of LRA attacks, including on NGO workers.<sup>59</sup> Humanitarian and human rights NGOs had predicted as much to Moreno-Ocampo earlier in 2005.<sup>60</sup> Indeed, the first few months after

the issuance of warrants saw violence against civilians increase “dramatically”; the insular and paranoid Kony regarded the indictments as an indication of the intention of the GOU to use the peace talks as a ruse and his heightened attacks were meant to discredit the ICC and show the LRA's continuing power.<sup>61</sup>

### The GOU and LRA's Flip-Flopping

The government's response to the increase of LRA attacks in defiance, with its independent lead negotiator—Betty Bigombe—following through on her promise to suspend negotiations with the LRA, was characteristically ‘flexible’. For a short period, Museveni withdrew his offer of amnesty to all LRA fighters, supporting the ICC prosecutions in the hopes of capitalizing on the international attention brought by the warrants to ask UN Security Council to strike a death blow to the LRA.<sup>62</sup> In April 2006, the Ugandan Defense and Foreign Ministers announced their intention to work with neighboring countries to apprehend and transfer the indicted LRA suspects to The Hague,<sup>63</sup> even asking for permission to pursue the rebels into the DRC. This was accompanied by the tangible step of the nation's Parliament passing the 2003 Amnesty Amendment Bill which empowered the Minister of Internal Affairs to submit a list of names—subject to Parliamentary approval—that could be excluded from a government pardon.<sup>64</sup> This amendment was thought to be a move towards supporting ICC prosecutions domestically by excluding top LRA commanders from the list.

When the LRA proved elusive and the Security Council noncommittal, Museveni dropped this strategy. A May 2006 meeting with Kony showed the GOU negotiator giving the LRA \$20,000, a quick and hypocritical turn in policy.<sup>65</sup> Museveni tried to assuage concerns by saying on May 4 that Kony and the other commanders would have to face trial before the ICC,<sup>66</sup> but only a week later offered Kony safety if a peaceful settlement was accomplished by July 2006.<sup>67</sup> The next month the GOU's Security Minister said Kony would not be given amnesty,<sup>68</sup> but Museveni did just that in July 2006.<sup>69</sup> In his statement, he blamed the UN forces in the DRC of knowing Kony's location but doing nothing to arrest him. Museveni went on to claim that the ICC could not force the GOU to go back on its word if amnesty was promised to Kony, because “they can't make us violate our culture.”<sup>70</sup>

This climate of uncertainty was posited by some as a tactic to soften up the LRA and force them to the negotiating table, while others hypothesized that it was frustration with other states' and its own inability to execute the arrest warrants.<sup>71</sup> As an additional possibility in the aftermath of the issuance of the warrants, with top LRA officials wary of attending peace talks for fear of apprehension,<sup>72</sup> offers of a blanket amnesty were necessary to get the LRA to even come back to the table. The vacillation of the GOU in its policy towards the ICC continued into September. In July 2006, the Minister of Internal Affairs, also chief government negotiator in the peace talks, stated that the ICC would not be allowed to impede the peace talks.<sup>73</sup> One of the GOU's ministers even claimed that the GOU was not obligated to enforce the ICC arrest warrant.<sup>74</sup> The GOU also announced in July that it would ask the ICC to suspend the arrest warrants until the peace process ended, and that Parliament would again revise the amnesty law to include the indicted LRA commanders.<sup>75</sup>

As the GOU had done and, emboldened by Museveni's abandonment of support for the ICC investigation, the LRA showed an utter disregard for the ICC's investigation and capriciousness in its desired terms for settlement. Waning military strength, along with a third-party Sudanese monitoring presence and protection, brought them to the table in July 2006. Cognizant of its decreased bargaining power, the LRA adopted a change in tone, moving from their previous hard-line demands such as political equality as a precondition to peace. They requested only that they “want[ed] to go home.”<sup>76</sup> And, on July 8, Otti announced that Kony and the LRA had accepted the amnesty<sup>77</sup> and the rebels agreed to a cease-fire as a show of good faith in August 2006.

However, the celebration was short-lived as, in September 2006, a month after agreeing to a formal ceasefire with the GOU, Kony and Otti both demanded deals protecting them from prosecution from the ICC arrest warrants before agreeing to a peace deal.<sup>78</sup> Soon, they renege from their acceptance of amnesty completely and said that the ICC arrest warrants had to be withdrawn.<sup>79</sup> They reprised their threat of going back to the bush and resuming their attacks if their terms weren't met.<sup>80</sup>

So, trying to salvage the cease fire and possibly secure a peace deal, in September 2006, President Museveni declared his intent to approach the African Union's Peace and Security Council for an amnesty shielding the indicted LRA members from ICC prosecution.<sup>81</sup> One of his chief government negotiators was more moderate in October, calling the ICC an ally of the GOU and stating that the government recognized that they had not authority to withdraw the indictments as the rebels wanted; he ended, however, with the reminder to the LRA that with a peace agreement the indictments be reviewed by the ICC.<sup>82</sup>

For the LRA, approaching desperation in seeking protection from the ICC, it was time to change tactics and rhetoric. Hoping to receive leniency domestically that they would not abroad at the hands of the ICC, both Kony and Otti made the surprising announcement in October 2006 that they would be willing to undergo trial in Uganda instead of the “biased” ICC.<sup>83</sup> This came despite a statement one month earlier from Otti proposing to the government his submission to his own ‘traditional’ version of a Northern Ugandan reconciliation ceremony<sup>84</sup>; yet the increasingly realistic and weary Otti likely realized that the likelihood emerging from the conflict unscathed legally was slim.

But, with little progress made on this front and the distrust between the two unreliable parties great enough for only a maintenance of no-offensive policies in early 2007, the agenda of the talks stalled. In the phase of negotiations the two parties were engaged in, discussing comprehensive solutions and reconciliation and accountability, uncertainty on the part of both sides was enough to preclude a peace accord. Perhaps wary of immediate arrest without peace talks and showing that they were acutely aware of the ICC investigation, in a gesture of goodwill in February 2007, Otti apologized to the Southern Sudanese for LRA atrocities but refused to do the same in northern Uganda because of the effect it would have on his case.<sup>85</sup> But when a new two-month truce was signed in May and talks were set to resume in June with the ICC indictments as the first item, Otti's—then in the Democratic Republic of Congo (DRC) with other LRA officials—brinkmanship returned and he repeated his threat of returning to war if the indictments were not dropped.<sup>86</sup> Currently, sporadic clashes and a glacial pace of negotiations define the peace talks.

Thus, the prevailing view of the GOU was that the ICC was its policy instrument. Even in its most encouraging signs of support to the ICC, such as the Ugandan Solicitor General writing to the ICC's Registrar indicating the GOU's desire to

apprehend the indictees, there is the indication that this was only because “there was no peace agreement.”<sup>87</sup> Similarly, during an annual address in October 2006 to the East African Law Society, Museveni praised the Court for neutralizing support for the LRA from the Sudanese government, but again referred to the ICC as a tool<sup>88</sup> to force the surrender and acceptance of amnesty by the LRA.<sup>89</sup> Further defying the ICC’s investigation, in November 2006 the GOU even provided the indicted LRA commanders with briefs from Ugandan lawyers on the investigation. The lawyers suggested a range of punishments, but none involving the ICC or even involving incarceration.<sup>90</sup>

### The OTP’s latest word

Amidst the vacillations of the GOU, and equally volatile demands and agreements of the LRA, regarding the status of its referral, the OTP remained consistent. Choosing not to respond to the specifics of the GOU’s constantly changing statements, and thereby not giving credence to the politicized use of the ICC by the GOU, the OTP was content to restate its clearest obligation under the Rome Statute—to ensure accountability for the worst crimes in the region.

For example, despite his earlier statements promising to consider the effects of the investigation on peace, Moreno-Ocampo reminded the Ugandan government of its duty under the Rome Statute in May 2006, after a year of enduring the GOU’s conflicting statements regarding its commitment to support the ICC’s efforts. The ICC merely reiterated that any offer of amnesty to the LRA contravened the Rome Statute that the country had ratified in June 2002.<sup>91</sup> Three weeks later an OTP spokesperson repeated the company line that the GOU, along with the governments of Sudan and the DRC, were required to give effect to the arrest warrants and that the OTP had nothing to do with domestic peace negotiations.<sup>92</sup> Removing itself from ‘politicized’ processes such as peace negotiations, the ICC concerned itself only with identifying those most responsible for the crimes in Northern Uganda.

In July 2006, the Chief Prosecutor added specifics to its efforts to ensure accountability and follow its mandate, stating that, irrespective of any considerations—Kony would eventually face a trial.<sup>93</sup> This comment, unlike any made by the GOU, was firm but based nearly verbatim on the Rome Statute to avoid being perceived as anything but a legal certainty. The OTP remained steadfast in pursuing prosecution and the only mention it made of peace was maintaining that the best hope for peace was to arrest the top brass of the LRA.<sup>94</sup> In mid-July 2006, in the only nod to the specifics of the GOU’s demands, it commented that the GOU had not requested the withdrawal of the warrants<sup>95</sup> and, instead, both the GOU and ICC both felt that justice and peace could work together.

Even at the peak of the peace talks, and with the formal cease fire signed in August 2006 marking the greatest signs of progress in negotiations to date, the OTP made no mention of its investigations interfering with or being influenced by the peace talks, saying only that it would allow the government to update it on the talks.<sup>96</sup> Finally, at the meeting of the Court’s legislative body in November, the Assembly of States Parties, the Chief Prosecutor made sure to clarify that any conclusion of the talks would have to be compatible with the ICC’s Statute. The government, Moreno-Ocampo said again, desired both peace and justice. But, said Moreno-Ocampo in closing, the Preamble of the Rome Statute upheld the ideal that a condition of lasting peace was that there would be no impunity for crimes under the Statute.<sup>97</sup>

## The Darfur Situation

### War Crimes by GOS

The African country of Darfur had experienced civil war since it gained independence in 1956, moving from a primarily North-South conflict ending in 1956-72 to a more complicated battle since 1983. Originally it was again a North-South battle over resources and political power, fraught also with religious and ethnic elements, as the Arab and Muslim government of the National Islamic Front (NIF) of Omer al-Bashir fought against the rebel group and political party of the non-Arab and non-Muslim Sudan People’s Liberation Army (SPLA) of the South.<sup>98</sup> However, as the NIF and SPLA conflict began to wind down—eventually turning into a peace deal in January 2005—two rebel groups from the neglected, non-Arab western region of Darfur attacked government sites in 2003 to protest economic and political marginalization.<sup>99</sup>

In response, the government, fearing that without a decisive response other insurrections would be encouraged, answered brutally. They unleashed onto the Darfur region not only their military but also Arab nomads called the “Janjaweed” that they armed and gave free rein to wreak havoc. Horrific brutalities against the rebel groups and Darfurian civilians ensued, and by 2006 an estimated 200,000 had died and 2 million people were forced from their homes.<sup>100</sup> As the conflict began to spillover into neighboring Chad, and the extent of the Government of Sudan’s (GOS) atrocities began to be understood, human rights groups started to frame the conflict as at least a clear case of ethnic cleansing, at worst genocide.<sup>101</sup> As early as 2004, the United States, so hesitant to label Rwanda as a genocide, used the term to describe the crimes perpetrated against the people of Darfur.<sup>102</sup>

### International Response: Security Council Referral

Despite the growing international awareness of the Darfur situation, with the United Nations even calling the conflict the “worst humanitarian crisis in the world” in 2004, the UN’s main action by the end of 2004 was to create an International Commission of Inquiry to investigate whether violations of international humanitarian law or genocide had occurred.<sup>103</sup> The Commission’s finding was that genocide had not occurred, but the systematic nature of the government’s attacks could be classified as crimes against humanity.<sup>104</sup> Though it issued humanitarian aid and pressured the GOS to honor numerous cease fires, the UN proved unable to supplement the meager Africa Union forces with its own peacekeepers<sup>105</sup> (this may soon change: the UN will reportedly send 3,000 troops in June 2007<sup>106</sup>).

However, though the Security Council could not summon the consensus needed to authorize peacekeeping troops under its Chapter VII mandate, it did respond to the crisis in another way. On March 31, it exercised its ability to refer cases to the International Criminal Court, and referred the situation in Darfur to the Court to address violations of international humanitarian and human rights law—with surprising abstentions by three permanent members [U.S., China, and Russia] originally expected to oppose the move.<sup>107</sup> Resolution 1593 also took note of the “need to promote healing and reconciliation” but, like the Prosecutor had done, indicated that these domestic institutions like truth and reconciliation commissions would be complements to “judicial processes.”<sup>108</sup>

### Khartoum's Backlash

Upon referral by UNSC, the Darfur case seemed a perfect fit for the ICC's jurisdiction and mandate as delineated by the Rome Statute.<sup>109</sup> With the UN Commission of Inquiry's Report recommendation for a referral,<sup>110</sup> documentation and allegation of war crimes and crimes against humanity,<sup>111</sup> and delivery of 51 high-level to the OTP,<sup>112</sup> the OTP already had a leg up on its previous investigations. That the case had reached it by a Security Council referral, thought by some international NGOs as the most "authorit[ative]" of the three ways for the OTP to investigate a situation,<sup>113</sup> the OTP had a situation lauded as an "affirmation of its [ICC] legitimacy"<sup>114</sup> because of the Security Council's unprecedented move.

But the case had extraordinary complications as well, and the pressure on the OTP and the UN to clarify or develop precedents for dealing with prosecutions that could imperil domestic peace was further intensified.<sup>115</sup> Where the Ugandan government had referred the case to the Court and made initial comments—admittedly, diluted by contradictory ones—supporting the Court, the OTP faced a far different party in the GOS. Even before the referral, President Bashir had vowed to "never hand any Sudanese national to a foreign court."<sup>116</sup>

Immediately, the government blasted the referral and refused to cooperate by allowing investigators in the country or extradite accused suspects.<sup>117</sup> In the aftermath of the Security Council vote, the country considered by some as the most Arab Islamic state in the world<sup>118</sup> challenged the motives of both the UNSC and ICC. Labeling the referral a casualty of the struggle between supporters and opponents of the ICC, the Sudanese representative called the Court a "tool to exercise cultural superiority" that was used by strong states against weak states, and warned that it would "complicate the situation on the ground" while "weaken[ing] the prospects for settlement."<sup>119</sup> The representative also initiated the complementarity argument by stating that the Sudanese judiciary had already held trials and delivered verdicts.

Within the first two months after the referral, the feared backlash through attacks on civilians and a further destabilization of the region seemed to occur, albeit in muted form. UN Secretary-General Kofi Annan reported to the UNSC in the month after the referral that not only were attacks on aid workers increasing as a possible result,<sup>120</sup> but that Sudanese officials on the International Commission of Inquiry's list—which some estimated went as high up as Vice President Ali Osman Taha—were potentially "destabilizing the region more generally through violence" as a response.<sup>121</sup> Additionally, there were warnings from the Sudanese Foreign Minister, saying that the referral would "become another Iraq in terms of arrests and abductions" of foreigners, and top paramilitary officials warning of an "explosion" upon ICC prosecution.<sup>122</sup> Some experts contended that instead, the ICC's involvement has "encourage[d] a sense that there is nothing for the NIF [governing party] to lose in pursuing present policies in Darfur."<sup>123</sup> The worsening situation in Darfur since the referral<sup>124</sup> potentially undermined optimistic predictions of the ICC investigation's deterrent effect.<sup>125</sup>

### The ICC's Removal of Responsibility for Peace

Nevertheless, on June 5, 2005, the OTP decided to open an investigation into the Darfur situation. Moreno-Ocampo, with his first referral from the Council, echoed the referring Resolution's language, stating that the Court should support efforts to promote the rule of law, along with reconciliation at local levels to "restore long-lasting peace."<sup>126</sup> He stated that the investigation would be part of the effort to stop violence in Darfur, but added that it would complement African Union and other initiatives and be concerned with promoting justice. Also, showing cognizance of the complementarity argument of the GOS, he stated that traditional African mechanisms could help achieve local reconciliation, but would be complementary to the ICC's work.<sup>127</sup>

In his first of biannual reports to the UNSC following its referral in June 2005, as mandated by Resolution 1593,<sup>128</sup> the Chief Prosecutor devoted an entire section to the question of the "Interests of Justice." With a terse few lines, he said only that the investigation was intended to end impunity and that the OTP had no reason to believe that it would not serve the interests of justice. However, he promised to remain apprised of the situation.<sup>129</sup> His only acknowledgment of responsibility for maintaining the peace and ending the conflict was in reference to cooperation of the OTP with other organizations, such as the Arab League and AU. He closed by stating the need for comprehensive peace, but maintaining that the ICC would only "cooperate with and support" these efforts, not assume responsibility for them.<sup>130</sup>

In remarks to the press after his report, he was peppered with questions about the potential effect of his investigation on the peace process and, tellingly, identified the Security Council as being encharged with peace and security while the ICC was concerned with justice.<sup>131</sup> Meanwhile, the Sudanese representative reprised his complementarity argument, and stated that it was up to Sudan to establish impunity. However, encouragingly, he also said, to press after the meeting, that Sudan would grant the OTP access to suspects if needed and it would cooperate on "all matters."<sup>132</sup>

The debate on the effects of the ICC investigation on peace was hardly over. The doubts were enough to merit the comments of ICC President Philippe Kirsch on December 12. Kirsch had been recalcitrant to talk about the Court's specific work up to that point but, on the cusp of the Chief Prosecutor's second report to the Security Council, he attacked allegations that the ICC was a political institution that should be involved in diplomacy. Reiterating the Chief Prosecutor and former ICTR and ICTR Prosecutor Richard Goldstone's line about the ICC being only a judicial institution,<sup>133</sup> he pointedly referred to the Darfur referral as a sign of the increasing legitimacy of the Court as an impartial, judicial body.<sup>134</sup>

As Chief Prosecutor Ocampo traveled to New York to deliver his 2nd report and address the Security Council, he was fresh off having to answer, in response to international legal figures no less prominent than Louise Arbour and Antonio Cassese, that the responsibility for security in Darfur rested with the UNSC while the OTP's job was to ensure prosecution and accountability.<sup>135</sup> In his address to the Council, he made only a passing mention of the consideration of the interests of justice, saying only that he would continue to monitor "various national and international efforts to achieve peace and security."<sup>136</sup> In his accompanying report, he again included a portion on the Interests of Justice, but repeated that the OTP would continue to monitor efforts to achieve peace and security and that it had set up contacts to accomplish this.<sup>137</sup> Also, nearly identical to his 1<sup>st</sup> report, he stated that the Office would "reinforce" the work of other organizations to achieve peace, but that its contribution would be by pursuing "accountability for the most serious crimes."<sup>138</sup>

As the ICC investigation continued, and in the interim period between the Prosecutor's 2nd and 3rd report, the Sudanese government began to show signs of its hardening line to the Court. An interview on December 13 with the

Sudanese Justice Minister had yielded the first statement of non-cooperation, with the Minister saying that Sudan would not allow ICC investigators to enter the Darfur region.<sup>139</sup> But when the Prosecutor made no mention of non-cooperation from Sudan in his report or statement to the Security Council, and as the same Minister praised the OTP's report as objective and fair, the comment seemed to be a misstatement.<sup>140</sup>

But, in February 2006, the GOS's repeated statements that its courts were investigating all the necessary crimes hardened into outright opposition to the ICC. President el-Bashir himself said that the GOS would not extradite suspects of the ICC.<sup>141</sup> The GOS and two rebel parties had begun to meet for peace talks consistently in Abuja, Nigeria, but allegations by the United States and other countries persisted claiming that atrocities were in fact were continuing in Darfur.<sup>142</sup> Then, one month before the Chief Prosecutor's 3<sup>rd</sup> report and statement to the Security Council, a peace deal was ultimately signed between the GOS and the main rebel group in May 2006.<sup>143</sup> As a result of the agreement, bolstering a national immunity act permitting prosecution of officers only with authorization from the GOS,<sup>144</sup> the President issued an Amnesty Decree in June 2006 granting immunity for prosecution to those accepting the Darfur Peace Agreement;<sup>145</sup> though originally intended to apply only to rebel groups, already in the next month it would be applied broadly to provide amnesty to government officials.<sup>146</sup> The Decree had no mention of the category of crimes covered under the amnesty or how applications would be decided on.

But in his third statement and report to the Security Council in June 2006, the Chief Prosecutor failed to refer to either the peace deal nor the President's amnesty decree. Instead, he seemed to pre-empt questions of the ICC's stance on its investigation changing, reminding the Security Council that it itself had affirmed that justice and accountability were essential for Darfur becoming peaceful and secure. As evidence, he pointed to its referring Resolution 1593, and a more recent April 2006 Resolution which he summarized as concluding that ending impunity was essential to preventing crimes and only a part of the comprehensive approach to peace.<sup>147</sup> In his report, he not only failed to state any progress made on the issue of the interests of justice,<sup>148</sup> but removed his previous mention and promise of support to local and international efforts to achieve peace and security, distancing himself further from the topic of domestic stability.

In Darfur, reports continued into June 2006 that the GOS opposed a UN force to replace the depleted African Union (AU) peacekeeping contingent, which had failed to contain the violence,<sup>149</sup> because of fear that UN troops would assist the ICC.<sup>150</sup> Despite the recent developments on the ground in Darfur, in his annual message to the legislative body of the ICC, the Chief Prosecutor made no mention of peace or considering the interests of justice in the OTP's investigation.<sup>151</sup> Then, in his most recent report and statement, his 4<sup>th</sup>, to the Security Council pursuant to Resolution 1593, he finally explicitly said that the restoration of security was the responsibility of the Security Council, the GOS, and other organizations. The ICC's role was to enact justice for crimes, which would "contribute to enhancing security."<sup>152</sup>

Then, finally addressing the Darfur Peace Agreement, he cited numerous instances of continuing acts perpetrated by the parties to the accord. To support his claim of the importance of the ICC's work to contribute to peace and security despite the signing of the accord, the DPA he stated that the perpetrators of these acts were the ones impeding "progress towards peace and security in Darfur."<sup>153</sup> Again, his reference to the Interests of Justice was identical, indicating no change in the OTP's consideration of the Article influencing its investigation.<sup>154</sup> He also emphasized, for the first time, the link between his investigative team looking into current crimes and the advancement of peace. And, closing his most decisive attack against allegations of his investigation threatening domestic peace, he referenced the words of the Security Council itself, which said that lasting peace and security require justice.<sup>155</sup> His accompanying statement to the Security Council ended on the same note, making a sophisticated and new distinction of the relationship between his investigation and peace. The Chief Prosecutor stated that the ICC's investigation was a warning to those contemplating committing future crimes that they would not go unpunished; but, he added, the "strength and impact" of the signal was dependent on the Security Council, the GOS, and other states.

Since that December statement, the Chief Prosecutor followed through on his promise to near the end of his investigation and was successfully granted the issuance of arrest warrants against the Interior Minister of the GOS<sup>156</sup> and a janjaweed commander. The GOS reacted violently but not unexpectedly, first threatening to "cut the throat" of any official trying to try to jail and extradite a GOS official to the ICC when told of the OTP's application for arrest warrants.<sup>157</sup> Skeptics of the ICC investigation continue to allege that the GOS is in "full-scale survival mode" and that indictments of senior officials would make them "even more defiant and reckless."<sup>158</sup>

### Part III. The OTP's Rhetorical Strategy in Dealing with Peace vs. Justice

While the ICC's investigations in Darfur and Uganda are separate and the OTP's comments have never addressed the issue of the conflict between peace and justice with regards to both situations, trends and shifts in the OTP's rhetoric regarding the issue in totality can be observed.

#### Distinguishing the solely judicial role of the OTP

In the initial months of both investigations, in the face of threats of escalation of violence by the Government of Sudan and criticism from civil society and victims' groups in Uganda, the Prosecutor's comments have been to acknowledge that it is aware of the interests of justice provision. In the Uganda situation, from March 2004 to November 2005, the OTP's comments indicated that it was working with other organizations in Uganda to achieve several goals--peace among them. Similarly, in Darfur from March 2005 to mid-2006, it said that it would consider the interests of justice and cooperate with others to secure peace. But, from the beginning of its investigations in both situations, it also made sure to delineate that its role was not as peacekeeper, but as prosecutor, implicitly stating in Uganda that that prosecution alone was its contribution to securing peace in the area and explicitly saying so in the Darfur situation, shifting the onus of responsibility for maintaining peace to the Security Council.

Then, in 2006, in a small variation, the ICC elaborated slightly in its Uganda case by, after half-a-year of repeating that the government had to allow the ICC investigation, it finally acknowledged the peace negotiations by contrasting the talks as political and its role as judicial. In the face of the several vacillations of the Government of Uganda-- and its view until that time that it could withdraw the arrest warrant--along with demands of amnesty from the LRA and escalating violence in



response to the issuance of arrest warrants-- the ICC never directly responded to those comments nor referred to the ongoing peace process in Uganda, choosing instead to reiterate the ICC's distinct role as prosecutor in the region and that Kony would eventually face trial. It also proceeded to issue the arrest warrants. Even in response to a particularly tumultuous month of reversals in opinion regarding amnesty and the ICC investigation by the GOU, the OTP straightforwardly and simply repeated that the government was committed by its ratification of the Statute to allow the Prosecution. It also, in May 2006, as it had done in its initial comments about the Darfur situation, the OTP again contrasted its role with the Security Council and GOS, saying that those parties had a political role and its role was judicial.

### The OTP as a component in achieving lasting peace: establishing impunity

But, in its latest comments about the Uganda and Darfur situation starting from July 2006, as peace negotiations peaked and a cease fire was signed, the OTP finally acknowledged the peace negotiations. But its new rhetorical strategy was to again clarify its role as judicial and remove responsibility for establishing domestic peace from its mandate, but also to directly rebut claims that its investigations threatened peace. Instead, it said with regard to the Uganda situation in July 2006, the best hope for peace was the ICC's work---arresting the top brass of the LRA. Again, in November 2006, it reiterated that there would be no lasting peace without impunity. Similarly, in its Darfur situation, it used the Security Council's words to make this same point, saying that justice and accountability were essential for peace.

This approach continued its earlier rhetoric of distinguish its role from the Security Council—which it charged with maintaining peace---but directly defined the ICC's view of how it contributed to that effort. In the face of a swiftly progressing peace situation in Uganda and violent rhetoric regarding accepting the Court and escalation of violence in Darfur, the OTP addressed the current status of peace in both countries and said that its investigation was actually furthering peace. Its claim was that peace, specifically long-lasting peace, required justice.

## Part IV: The ICC-- Today and Tomorrow

### Conclusion—Strategy to the Present

The OTP's statements in the Uganda and Darfur situation, facing host governments that have linked its investigations and issues of warrants as interfering with domestic peace processes, have shared some salient commonalities. The Office of the Prosecutor initially refused to respond to any specific development in peace processes as influencing their investigation. It has characterized such processes as, because of their political and not judicial nature, as outside the scope of its considerations or duties. As it stated in 2006 regarding the peace vs. justice issue in both Uganda and Darfur, it respected the mandates of other organizations---such as those conducting peace talks—but *its* mandate was the pursue accountability for those bearing the greatest responsibility. Further, in its Draft Regulations providing the most current guidelines on its present interpretation of principles, it stated that the difference between the interests of justice and interests of peace were that the interests of peace fell under the mandate of institutions other than the OTP.

This characterization has served to distinguishing the UN Security Council and national government's role of dealing with internal security from the ICC's role of investigating those most responsible, seeking to insulate the OTP from blame when accusations of its investigation heightening violence in Darfur arise. Quite simply, says the Prosecutor, the ICC's job is to ensure accountability for those most responsible for crimes under its jurisdiction in situations referred to or initiated by the OTP; security and peace in situation countries is dependent upon other organizations like the UN and the host state.

By denying the political aspect of the OTP's work, à la John Roberts comparison of a judge's role to an umpire and not a player,<sup>159</sup> the Chief Prosecutor has presented his approach as a straightforward reading of the Statute.<sup>160</sup> This assertion is strengthened when juxtaposing the Prosecutor's rhetoric with that of both the LRA and GOU, which have shown a disregard for operating within the legal framework of the Rome Statute.<sup>161</sup> Further, not allowing himself to become mired in the explosive 'Interests of Justice' clauses of Article 53, the Chief Prosecutor has changed barely a single word from his 2004 to 2006 reports of the Sudan situation, for example, despite dynamic situations on the ground in Darfur.

But then, in statements and reports since mid-2006 regarding both countries, the strategy of the OTP to defuse the peace vs. justice question has been on on display. In its comments on the Ugandan situation, the ICC has resolved the 'dilemma' with rhetoric alleging that the two are not exclusive but mutually dependent<sup>162</sup>: lasting peace is not possible without justice. In its 3 year retrospective on the status of its investigations and development of the principles of the Rome Statute, the OTP confirmed that this was their public view by noting that the Security Council's referral in Darfur had confirmed the "intrinsic link" between peace and justice, and that this was one of the seminal achievements of the Court and also international justice.<sup>163</sup> For the first time in an official report, it attempted to even offer empirical proof of this claim, stating that crimes in Northern Uganda had "drastically decreased" since its arrest warrants were issued.<sup>164</sup>

An extension of this more aggressive response of the OTP to the peace vs. justice question---in response to its earlier approach of simply refusing to acknowledge that it had any role in establishing peace---tackles why, despite the ICC establishing impunity, it is asked to do more. The OTP has consistently stated as a maxim that its contribution to peace is fulfilled completely by ensuring accountability and establishing impunity in the area, a retread of its previous comments. Its view has been, at most, to show international justice as a part of achieving comprehensive peace, but has assumed that pursuing accountability will always aid in this process.

But, especially in its latest report to the Security Council, it has more clearly distinguished its role from the GOU, GOS, UN, and other international organizations. It states that though its investigation and prosecution helps achieve the peace by sending the important signal that crimes will not go unpunished, it is ultimately up to other organizations directly responsible for peace and security in the region-to strengthen that signal to establish a lasting peace. It may seem to be merely a subtle variation of its first strategy, namely explaining that it is not responsible for establishing peace and security in a country. But here it accepts the argument of its most ardent critics by agreeing that it does have a role, just not the decisive role in securing peace in a country. The OTP strategy is that justice is an essential component of ending conflicts, but not the only one.

### Suggestions for the Future

In its uniquely reflective and illuminating three-year report on its activities, the OTP considered two issues that arose during the investigation of its cases and would remain relevant. The second was what it termed the "Interplay between ICC Investigations and Conflict Resolution Initiatives." It predicted that this issue, also known as peace vs. justice, would arise in the majority of its situations and be a constant challenge. Up to the present, the ICC has taken an ad hoc approach and ambiguous approach to defining what its investigations and prosecutions' relationship with domestic peace is. Along with its two current situations necessitating some explanation of that interplay, its future caseload of 4-6 investigations over the next three years <sup>165</sup> demands clarity on the 'dilemma'. A clearly delineated policy on constituent issues involved in peace vs. justice, such as amnesty, would provide legal certainty and avoid confusion from warring parties and governments in future cases. <sup>166</sup>

Article 53's "Interests of Justice" provide the clearest means for establishing what would constitute adequate grounds for deciding not to initiate or stop an investigation or prosecution. From 2003, the OTP, in its draft policy paper on regulations that provides one of few insights into its interpretation of the Rome Statute, refused to define what the "exceptional circumstances" were that would trigger the 'interests of justice' clause, saying that every situation and the factors that would determine if the clause would be applied would be different. The OTP's rebuttal for those that alleged that this ambiguity led to an "indeterminate sphere of discretion" was that any decision to not investigate or prosecute solely under Article 53 (1) (c) and 52 (2) (c) would still have to be confirmed by the Judges. But, though the Pre-Trial Chamber could lend some certainty to the reading of the Interests of Justice clause, action by the OTP under the interests of justice clause would be the most direct way for a Pre Trial Chamber to establish some precedent on this matter.

Finally, as regards Article 16 empowering the Security Council to suspend investigations for renewable periods of one year. This would, as the OTP has indicated it believes should be done, take the onus off of the OTP from making increasingly politicized decisions about domestic peace processes. Thus far, unfortunately, the Council has unduly undermined the Court, damaging the ICC's legitimacy when it excluded reference from Security Council Resolution 1706 of August 2006-- expanding its imminent mission in Darfur-- to make the statement more acceptable to Sudan. <sup>167</sup> Also, in its Resolution 1653 on January 2006 urging an end to the Northern Ugandan conflict, the Security Council encouraged the country to take measures to build domestic judicial institutions to put an end to impunity; no mention was made of the International Criminal Court and the tension between upholding international law and respecting the ICC's work, and the contradictory support for the domestic peace process. <sup>168</sup> Secretary General Kofi Annan echoed the thoughts of the Security Council, expressing his support for the pursuit of the peace process by the GOU and urging the national Amnesty Commission to continue its work in June 2006. <sup>169</sup> Such contradictions only make the difficult road the ICC has to climb to carry out its mandate in Darfur and Uganda even more arduous.

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22. Article 53 (1) of the Rome Statute reads: The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber. Article 53(2) reads: If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
23. Though the phrase is included in other parts of the Statute, such as in assigning counsel to a defendant if he or she is unable to pay (Article 55 (2) b), have counsel present at the confirmation of charges hearing (Article 61 (2) b), or allowing the Trial Chamber to respond to an admission of guilt where it feels more facts are required (Article 65 (4)). But these are all distinct from the Article 53 requirement and more in line with the use of the phrase in the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda Statutes, seeking to guarantee a proper prosecution.
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