



The Role of the International Criminal Court in African Peace Processes: Mutually reinforcing or mutually exclusive?

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Summary

Whenever the Prosecutor of the International Criminal Court (ICC) conducts an investigation during or in the immediate aftermath of a conflict, he is likely to face claims that his actions are an actual or potential obstacle to peace. In attempting to reconcile the often competing public policy goals in such situations, the starting point is to recognise that prosecution by the ICC is one of the few credible threats faced by leaders of warring parties responsible for atrocities. But to ensure that this continues to be the case, the ICC must secure convictions to demonstrate its credibility and effectiveness. If ICC prosecutions are consistently trumped by peace processes, the Court's value as a deterrent will be compromised.

When investigations coincide with peace talks, the Prosecutor should remain focused on carrying out his investigations. Making him responsible for weighing the needs of peace, as against those of justice, in a case already under investigation, puts him in an untenable situation. If a policy decision needs to be made to give primacy to peace – for example, if there is strong and credible evidence that this will save many lives – it should be made by the institution with political and conflict resolution mandate, namely the UN Security Council. The Security Council has the authority under article 16 of the Rome Statute to put ICC investigations on hold for renewable periods of 12 months. Such authority should only be exercised as a last resort, when there is a compelling case that the benefits of peace will outweigh the harm done to the cause of accountability.

Introduction

The Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, is in an invidious position. He currently has three investigations underway – into situations in the Democratic Republic of the Congo, northern Uganda, and Darfur. Each of these involve ongoing conflicts or their recent aftermath. In each the Prosecutor has to confront claims that his investigations are, or will become, an obstacle to peace.

In an ideal world, the Prosecutor would only investigate past atrocities, not current conflicts. He would deal with situations in which the hostilities had been resolved and robust peace processes were in place.

In this scenario the ICC would find it easier to fulfil the expectations of its founders that it 'put an end to impunity for the perpetrators of [genocide, war crimes and crimes against humanity] and thus [...] contribute to the prevention of such crimes' (Rome Statute 1998).

But this will not be a reality for years to come. The ICC is a fledgling organisation, and is only authorised under its statute to deal with crimes committed since 1 July 2002. It will be many years yet until conflicts that gave rise to such crimes are sufficiently resolved to cope with the challenges posed by an investigation into the conduct of the warring parties – many of whose leaders will be senior government or opposition figures in a post-conflict environment.

Even after the ICC has been operational for a long time, it will still be under pressure to intervene in live conflicts, as the threat of international prosecution is one of the more effective tools available to the international community to change the calculations of warring parties.

That being the case, the ICC is frequently going to find itself in the middle of peace processes. So how should the international community balance the range of competing, and often conflicting, public policy goals in such situations?

Balancing competing goals

On one authoritative view, the ICC and peace processes should be mutually reinforcing. The UN Secretary General, Kofi Annan, has ventured that 'justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another. The question, then, can never be whether to pursue justice and accountability, but rather when and how' (Annan 2004).

This may be the case in the long run – in other words, where peace processes are given time to take hold and establish roots before issues of accountability are addressed. In such situations, dealing with past abuses in a relatively stable environment ensures that past wrongs are redressed, and that those thinking about committing atrocities elsewhere cannot safely assume impunity.

But the issue cannot be so easily resolved when those being prosecuted by the ICC demand a degree of impunity as the price for putting down their arms and bringing peace to a war-torn region.

Relevant considerations

Every situation will be different, and the way forward will depend on the specific circumstances of each conflict and investigation, but some relevant considerations can be readily identified.

1. Prosecution by the ICC is one of the few credible threats faced by leaders of warring parties

One of the main challenges for international policymakers in their efforts to resolve conflicts is that they often lack incentives or sanctions of sufficient credibility to influence the calculations of the warring parties.

To take Sudan as an example, President Bashir is well aware that, for all its rhetoric, the international community will not deploy peacekeepers to Darfur without the consent of the Khartoum regime. Threats of economic sanctions have proved meaningless to date, as Khartoum is protected by its veto-wielding commercial partners, China and Russia. Talk of no-fly zones has come to nothing, and arms embargoes have been breached with impunity. And in recent months, despite the close attention of the UN and international community over the last three years, Khartoum has once again ramped up its offensive operations against the rebels in Darfur.

But Bashir is genuinely concerned about the threat posed by the ICC investigation there. It is one of the reasons for his vehement opposition to the deployment of a UN peacekeeping force in Darfur, as he fears UN troops may end up executing ICC arrest warrants against members of his regime.

Similarly, in Uganda past efforts to negotiate peace with the murderous Lord's Resistance Army (LRA) have come to naught. But in the months following the unsealing of ICC arrest warrants in October 2005, the LRA's leader Joseph Kony and his deputy Vincent Otti initiated peace talks with the Ugandan government. While other factors – such as the mounting success of the Uganda People's Defence Force (UPDF), and a tailing off of Khartoum's support, and possibly Kony's own illness – played a role, it is clear the ICC warrants have been at the forefront of Kony and Otti's considerations.

Bashir and Kony, and other culpable leaders such as Laurent Gbagbo in Côte d'Ivoire and Robert Mugabe in Zimbabwe, are all aware that ICC prosecutions differ from other policy tools in that they are not time-limited, nor are they dependent on the inconsistent political will of world leaders. The indictment and trial of Slobodan Milosevic, the arrest of Charles Taylor and the attempted extraditions of Augusto Pinochet and Hassan Habre have all sent a chill up the spines of leaders responsible for atrocity crimes (Scheffer 2005).¹

2. Fear of prosecution can lead to entrenchment of culpable leaders

Of course, the prospect of ICC prosecution works both ways. While it can act as a deterrent to potentially abusive leaders, the threat itself can cause such leaders to entrench themselves to ensure that they do not fall into the clutches of the Court.

This calculation clearly underlies much of Bashir's opposition to the deployment of UN peacekeepers in Darfur. Robert Mugabe also fears being hauled up before an international court for crimes against humanity, and is doing everything in his power to ensure he does not meet that fate.²

Hence, in the short term, the leverage gained by the threat of prosecution has to be weighed against the likely entrenchment of threatened government leaders. The dilemma is that the benefit of threatened ICC prosecution as a policy tool in a specific conflict is largely spent once a formal investigation commences.

The picture is different over the longer term. One of the key features of the ICC is that it is a permanent court. Trying to outlast a permanent court may prove a challenge even to someone of Bashir's or Mugabe's staying power. Slobodan Milosevic thought he was safe in Serbia from the clutches of the (non-permanent) International Criminal Tribunal for the Former Yugoslavia – and he was proved wrong, to his own cost. Even well-entrenched leaders like Bashir and Mugabe are not entirely safe from coups or declining political fortunes, given enough time and pressure.

3. The ICC must secure convictions to ensure its credibility and effectiveness

There are two issues here. The first is the bigger picture one that if the ICC is unable to convict perpetrators of atrocity crimes because its prosecutions are consistently trumped by peace processes, then its value as a deterrent will be compromised. The threat of prosecution will only be credible if it is regularly and consistently carried out. Perpetrators will not fear the ICC if they know that they will invariably be able to secure actual or de facto immunity in a peace deal, regardless of the atrocities they have committed in the past.

The second issue is the practical one that until it gets some convictions under its belt, the ICC's deterrent value will be more theoretical than actual.

The Prosecutor has been in office since mid-2003. In three years he has commenced three formal investigations. In the Uganda investigation, the Court has issued arrest warrants against five LRA commanders, one of whom was killed in a clash with the Ugandan army in July 2006 but none of whom has been arrested. Progress in the Darfur investigation has been painstaking, with no warrants or arrests as yet.

In the Democratic Republic of the Congo (DRC) the Court has arrested one alleged perpetrator, Thomas Lubanga, leader of a Ugandan-backed militia in DRC's war-torn Ituri region. Lubanga has been charged with conscripting children and forcing them to fight in the DRC's civil war. While welcoming these charges, and Lubanga's arrest, many rights groups have argued that the charges do not go far enough, and that the evidence exists for Lubanga to be charged with responsibility for systematic rapes, torture and summary executions.

However, while it is essential that the Court demonstrates in time that perpetrators of such crimes will be brought to account, the short-term imperative must be for the Court to demonstrate its effectiveness by getting its first conviction. The Prosecutor is right to proceed against Lubanga on those charges for which he has the strongest evidence – even if that means that other heinous offences are not added to the charge sheet for now. Additional charges can and should be brought against Lubanga later. And other parties to that conflict are likely to be charged soon, at which time more broad-ranging charges can be laid.

4. The ICC's effectiveness is dependent on the domestic and international support it receives

The ICC does not have its own police force. It relies on the governments in those countries in which it is investigating to provide it with the assistance it needs. It depends on these governments to provide it with access, to protect its investigators and witnesses, and to arrest suspects. It also requires international support when domestic support is insufficient or lacking.

In Uganda's case, the ICC has received good cooperation from Ugandan authorities, and almost none from the international community. If the international community had provided real assistance in executing the warrants – in the form of intelligence and enhancement of the Ugandan special forces' capabilities – then the LRA leadership may well have been arrested, and it would not be necessary to talk of trading peace for justice.

In Sudan there will be no such government cooperation, as the targets of an investigation are senior figures in the government itself, and the regime is utterly opposed to the investigation. As a result, the Prosecutor is almost entirely dependent on international backing. But to date the international community has long displayed a lack of political will in dealing with Khartoum. This is going to be an ongoing challenge for the Prosecutor. He will soon have to challenge the regime to meet its obligation to cooperate. And as Khartoum is currently conducting a renewed military campaign in Darfur, he should also be publicly reminding Sudan's leaders that they will be held responsible for any atrocities committed during this campaign. This will likely result in Khartoum halting even its token efforts at cooperation, but as those efforts are directed at delaying the investigation, not facilitating it, that will not be a high price to pay. And it may have the benefit of shaming the international community into providing more substantive assistance and pressure.

5. The Prosecutor's job is to prosecute

The role of the Prosecutor is to investigate and prosecute those he believes on credible grounds to be most responsible for atrocity crimes.

While that may appear to be self-evident, the position is not so straightforward when those he is prosecuting are engaged in peace talks. As has been starkly demonstrated in Uganda, in such situations the Prosecutor will face vociferous calls to abandon his investigation or prosecution to enable a peace deal to be

made. But if such political decisions have to be made, they should not be made by an institution with a justice mandate. Instead they should be made by the institution with political and conflict resolution mandate, namely the UN Security Council, which has explicit authority under Article 16 of the Rome Statute to put ICC investigations and prosecutions on hold for a 12-month renewable period.

In any event, perhaps fortunately for the Prosecutor, his options in such circumstances are somewhat constrained. Under Article 53 of the Rome Statute, the Prosecutor can stop a prosecution if it is in the interests of justice to do so. The interests of justice are different from the interests of peace, although there may be significant overlap. As the Rome Statute evidences a very strong presumption that the kinds of crimes under the Court's jurisdiction require effective criminal punishment, the fact that negotiations are underway would not in themselves be sufficient for the Prosecutor to stop his prosecution (Seils and Wierda 2005). At very least he would likely require a peace deal with robust accountability mechanisms for the individuals under prosecution. Robust accountability here almost certainly does not mean customary reconciliation and accountability ceremonies.

In the event that a state goes further, and exercises its own criminal jurisdiction, in the form of genuine domestic prosecutions of the perpetrators, then the ICC would no longer have the jurisdiction to proceed, as the Rome Statute gives priority to such domestic prosecutions on the principle of 'complementarity'.³

6. Impunity should always be a last resort

The crux of the whole peace and justice debate is what should be done when a prospective peace deal is made conditional on a halt to ICC prosecutions.

To give a recent example, here is what the BBC reported on 6 September 2006 about the LRA peace talks. 'Mr Otti said that LRA fighters would not surrender unless the ICC charges are dropped. "No rebel will come out unless the ICC revokes the indictments," he said' (BBC Online 2006).

The dilemma here is that, unless leaders subject to ICC prosecutions face utter defeat, they are unlikely to agree to end the conflict if that means they will be prosecuted and imprisoned. In these circumstances the overriding policy issue is whether the important but uncertain prospect of deterring future perpetrators and reducing future conflicts takes precedence over more certain benefits of an immediate end to an ongoing conflict.

The LRA conflict has exacted a horrendous toll on the people of northern Uganda over the last 20 years, with some 25,000 children kidnapped to become child soldiers, porters or sex slaves, and some 1.7 million Ugandans forced to live in squalid internally-displaced persons (IDP) camps. Almost 1000 people are dying each week in northern Uganda from conflict-related disease and malnutrition (Ministry of Health of Uganda and WHO 2005). If a peace deal can bring an end to these horrors, when all other options have failed, then it has to be seriously considered – even if the cost is a degree of impunity for the perpetrators.

There are provisos. The most important is that such deals often fail to produce peace. Failed amnesty agreements brokered with the likes of Foday Sankoh in Sierra Leone and Jonas Savimbi in Angola, and their violent aftermath, demonstrate the potential costs of impunity.

But deals have been done in the past that have offered limited or full immunity from prosecution, and have helped bring an end to conflict and instability. One obvious example is the one made with Charles Taylor to get him out of Liberia and bring an end to the conflict there. In mid-2003, rebel groups were advancing on Monrovia, shelling the city and attempting to starve it into submission. Taylor declared his intention to stay and fight the rebels – but Nigeria's offer of asylum ensured Taylor fled Liberia in July. His departure enabled the deployment of West African peacekeepers, bringing a degree of peace to the country, and saving many lives. Certainly that was the view of Nigeria's President Obasanjo, who claimed, 'By giving this one man asylum I have saved thousands of lives. What more does the international community want?' (Power 2003).⁴

In a different context, in South Africa, outgoing leaders were given amnesty as part of a truth and reconciliation process in an effort to bring 34 years of apartheid to an end. The likely alternative was many more years of conflict.⁵ In Mozambique, after sixteen years of civil war ended in 1992, the Parliament adopted a general amnesty pursuant to which reconciliation processes took clear precedence over accountability. Since then Mozambique has become one of Africa's most successful states.

Such decisions should not be entered into lightly. There is a credible school of thought that peace is not sustainable without accountability. The whole field of transitional justice is founded on the premise that accounting for and addressing past abuses is essential to enable societies to heal after a period of repressive rule or armed conflict.

Because justice and peace are each of fundamental importance, one should only be traded off against the other when there is no realistic alternative – that is, when there is a compelling case that the benefits of peace will outweigh the harm done to the cause of accountability. Even though ‘amnesty is always on the table in [peace] negotiations’ – whether explicitly or implicitly – it must be a last resort, not an opening gambit (Scheffer, quoted in Scharf 1999).⁶ Before some form of impunity is offered, all other options should be exhausted. If justice has to be traded off, negotiators need to explore whether other more limited options will suffice – such as a domestic as opposed to international prosecutions, or other robust accountability mechanisms (for example, a truth commission with amnesty conditioned on full disclosure and acknowledgement of crimes) or asylum in another country.

In the end, however, the unpalatable reality is that sometimes the cost of ending an ongoing conflict, and the associated death and destruction, will be a degree of impunity for perpetrators. On such, hopefully rare, occasions, the amnesty or asylum offered should be part of a package of measures to address at least some of the legacies of past abuses. Such measures may include traditional reconciliation ceremonies, broad-ranging truth commissions, and reparations.

Even when amnesties are granted, there are a number of constraints on their effectiveness. For a start, state amnesties for atrocity crimes will not be binding on the Prosecutor. If a state gives an amnesty to an alleged perpetrator of such crimes, then it is effectively ‘unwilling or unable’ to deal with the case, ensuring the Prosecutor has jurisdiction to continue his investigations.

Second, countries that have ratified the Rome Statute have a binding treaty obligation to ‘cooperate fully’ with the Court. This includes an obligation to arrest and hand over to the ICC anyone who is the subject of an ICC arrest warrant. In breach of such obligations states may grant amnesties and refuse to comply with the ICC’s demands, as Museveni has periodically threatened to do in respect of the LRA leaders, and there is little that the ICC can do about it. But its warrants will still be of international legal effect, and the indictees would be subject to arrest if they ever left the country.

Under international law there may also be a burgeoning duty to prosecute crimes such as genocide, torture and serious violations of the Geneva Conventions. If so, amnesties for such crimes would be of no legal effect (Scharf 1999). Certainly that appears to be the view of Kofi Annan who has stated that ‘United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights’ (Annan 2004).⁷

Finally, there is Article 16 of the Rome Statute which, as mentioned above, gives the UN Security Council explicit authority to put ICC investigations and prosecutions on hold for a 12-month renewable period, pursuant to a Chapter VII resolution. Strictly speaking, such a resolution does not amount to an amnesty, as it simply puts a temporary freeze on the ICC prosecutions, and does not end them. But if repeatedly renewed, it would amount to a *de facto* amnesty. Before it can exercise such a power the Security Council would have to decide that there was a threat to international peace and security – not too difficult a hurdle if the alternative to halting the prosecutions is renewed conflict. This article gives the Security Council the flexibility to accept alternative accountability mechanisms that may not meet the ICC’s more rigorous standard, while retaining the threat of renewed prosecution should the peace deal fail.

The ICC’s current investigations

Those are the general considerations. How do they apply to the Prosecutor’s current investigations?

The DRC investigation was the first announced by the Prosecutor, and is the most straightforward from a peace and justice perspective. The Prosecutor wisely limited his initial investigations to the situation in Ituri. There were widespread atrocities in Ituri post July 2002, whereas in the rest of the Congo the worst abuses generally took place before then. Also, the key players in the Ituri hostilities do not have strong powerbases in Kinshasa, so there is only minimal risk of the investigation destabilising the government, and hence generating governmental obstruction.

The challenge for the Prosecutor will come when he looks beyond Ituri. One of the options he is considering is whether to investigate the massacres carried out by the Mai Mai militias in the Katanga region. This would cause far more concern for the transitional government, as the Mai Mai still retain close links to many senior government figures. Having said that, it is the transitional government's policy to disband the Mai Mai and integrate them into the police and army. That being so, the Prosecutor should not feel constrained in carrying out investigations into Mai Mai abuses and holding those responsible accountable.

The investigation into the situation in northern Uganda was the second announced by the Prosecutor – and is very much in the news right now. The ICC indictments of Kony and four of his senior commanders have been important in bringing the LRA to the negotiating table, but they are now complicating the peace negotiations.⁸

Balancing the need for accountability with the requirement to offer an inducement to the indicted leaders to make peace is not easy. Kony and Otti still command a force capable of inflicting significant destruction. And until the conflict ends, Museveni has no incentive to end the squalid and miserable conditions of some 1.7 million Ugandans living in IDP camps. Kony and Otti want a deal for personal security that shields them from prosecution. Strong justice and accountability mechanisms must be central to any agreement that can win domestic acceptance and broader international support. Because of constraints on the ICC Prosecutor, an agreement that calls for the indictments to be put on hold would require a UN Security Council resolution to this effect, made pursuant to Article 16 of the Rome Statute. A deal would probably also require the UN to play a significant monitoring and implementation role. Hence, if the parties conclude a robust peace agreement, the least worst option would be for the UN Security Council to suspend the prosecutions and monitor the LRA's compliance. The prosecutions would remain alive, though the Security Council would have the option to renew the suspension annually, provided the LRA kept the peace.

Finally, there is the Darfur investigation. Unlike the other two investigations, this one was referred to the ICC by the Security Council. The Sudanese government is implacably opposed to this investigation because it has the potential to undermine its hold on power. While prosecutions of senior government officials would be unlikely to lead to their arrest in the short term, as the government would not comply with arrest warrants and the ICC has no effective way to execute the warrants in Sudan, they would seriously damage the already tarnished credibility of the regime. They would also restrict the ability of the indicted figures to travel outside Sudan. And, unless the figures being prosecuted were the most senior in the government, indictments may lead to them being ditched by the regime in its own self interest, with potentially destabilising consequences.

Hence, as soon as it becomes clear that the Prosecutor is serious about pursuing those in the government most responsible for atrocities, he will face claims that his investigation is blocking peace in Sudan. Khartoum, and some in the international community, will assert that senior government leaders should be given amnesties, so that they can proceed to implement whatever peace agreement is on the table at the time.

Such claims will have to be treated very sceptically. This is a regime that has ruthlessly implemented a large-scale ethnic cleansing campaign over the last three years. It is a regime that has repeatedly made agreements, and then torn them up when it suited its purposes.⁹ Until significant costs are threatened, Khartoum has no incentive to stop its current campaign of atrocities – let alone agree to the deployment of a UN force, disarm the Janjaweed militias, and protect civilians in Darfur.

ICC prosecutions are one way of making very clear the price of non-cooperation. The Prosecutor needs to publicly challenge the regime to cooperate. He needs to expedite his investigations, while at the same time warning the regime that it will be held accountable for any further atrocities.

There is absolutely no basis for the international community to intervene any time soon to halt the investigations or forthcoming prosecutions. On the contrary, it should provide wholehearted support for the Prosecutor's efforts. If in the future there is a real prospect of peace then the UN Security Council may once again be in the invidious position of having to decide whether to put a temporary halt on the investigations. But in light of Khartoum's duplicitous and murderous conduct in the past, the presumption should be very much against any halt to prosecutions, on the very practical grounds that Khartoum, by its conduct in Darfur and in implementing the Comprehensive Peace Agreement with southern Sudan, has displayed absolutely no integrity or willingness to abide by its commitments. Instead of undermining the institution of the ICC, and the powerful threat of accountability, the opportunity should be seized to remind the world that there are real consequences, however belatedly realised, for those responsible for atrocities that shock the conscience of mankind.

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Note: web references correct at November 2006

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Notes

1. Scheffer, the former US Ambassador-at-Large for War Crimes issues, argues that we should use the generic expression 'atrocity crimes' for genocide, war crimes and crimes against humanity in order to avoid semantic arguments over the particular circumstances of each case, leaving it to the prosecutors and judges in the international courts, or courts exercising international jurisdiction, to work out whether the conduct amounts to genocide, a war crime or a crime against humanity in each instance.
2. Recognising that this is yet another obstacle to the prospects for a peaceful transition in Zimbabwe, the opposition Movement for Democratic Change (MDC) (Morgan Tsvangirai's faction) has offered an amnesty to Mugabe should he step down.
3. Pursuant to Article 17 of the Rome Statute, the ICC is required to determine that a case is inadmissible when it is being, or has been, dealt with appropriately by a state's justice system. It is unlikely that customary accountability and reconciliation ceremonies will satisfy this requirement, as they are unlikely to be regarded as falling within a state's 'criminal jurisdiction' or amounting to an 'investigation or prosecution'.
4. In March 2006, under strong international pressure, President Obasanjo agreed to hand Charles Taylor over to the newly elected President of Liberia, Ellen Johnson Sirleaf. Taylor briefly escaped from his house arrest on 26 March 2006, before being arrested and handed over to Liberian authorities and then the Special Court for Sierra Leone. While Taylor had apparently broken the (never published) terms of his asylum regularly during his years under house arrest, Obasanjo appears to have based his decision on the political grounds that he was complying with a request of the Liberian government: see Polygreen (2006). The failure to explicitly base Taylor's handover on the grounds that he had breached his amnesty agreement will make it much more difficult to make such a deal in future without iron-clad guarantees that the asylumed leader will not simply be handed back when political circumstances change.
5. See, for example, van Zyl (1999), and Scharf (1999). Strictly speaking, amnesty in South Africa was only given to those who met certain criteria and made full disclosure of their crimes to the Truth and Reconciliation Commission, but in practice none of the senior leaders of the Nationalist government were prosecuted for human rights abuses, whether or not they appeared before the TRC.
6. David Scheffer, the US Ambassador-at-Large for War Crimes issues, quoted in Scharf (1999).
7. Report of the Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies', op. cit.; but cf, for example, William A. Schabas, *Genocide in International Law* (Cambridge, 2000) at 399.
8. For background to the peace talks, see International Crisis Group (2006).
9. For example, Khartoum has promised on six occasions to neutralise or disarm the Janjaweed and has failed to do so on each occasion.