
A synthesis of community-based justice and complementarity

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Introduction

The International Criminal Court (ICC) operates as the conceptual pinnacle of an interlocking system, one in which supranational and domestic court systems are meant to operate as a cohesive whole.¹ The Rome Statute was designed to address the ‘most serious crimes of international concern’ but to do so in line with the fundamental norm that the Court at all times and in all cases ‘must be complementary to national criminal jurisdictions’.² Thus, while it operates within the milieu of international politics and power, the Court’s very *raison d’être* is to seek justice for the most consequential crimes against the backdrop of an interconnected and often interdependent relationship with domestic criminal justice systems. Localised efforts to achieve justice for violations of societal norms are as desirable as they are inevitable.

‘Justice’ is, however, a far less straightforward concept than is commonly acknowledged, and often means different things to different people depending on their relationship to the crimes committed and the relevant cultural norms within the affected community or group.³ The concept of ‘justice’ may be a vital need for refugees, victims and affected communities, but its multidimensional nature and subjective shape makes it a far more nuanced aim than is always possible through a formalised prosecution and punishment of

¹ Articles 12–19, Rome Statute.

² *Ibid.*, Article 1. See also M. Newton, ‘The Quest for Constructive Complementarity’, in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

³ J.N. Clark, ‘Peace Justice and the International Criminal Court: Limitations and Possibilities’, *Journal of International Criminal Justice*, 9 (2011), 521, 523 (discussing the varying reactions of Bosnian Serbs and Muslims to the arrest of ICTY fugitive Radovan Karadžić in July 2008, as well as the diversity of responses to the release of convicted Lockerbie bomber Abdelbaset Ali al-Megrahi in 2009).

responsible perpetrators.⁴ Community-based dispute mechanisms can thus have a central role alongside formalised trials, to the extent that localised processes embody a culturally meaningful blend of restorative and retributive elements. There is often a corresponding value to seeing the Rome Statute offences through the metric of localised goals, since such offences may be widely seen as affairs between competing communities and sub-state actors; hence, the legitimacy of ‘justice’ turns on its societal resonance. Communities affected by hostilities also have legitimate interests in finding a balance between appropriate punitive procedures and a deliberate dimension of reintegration, especially insofar as community leaders may become the guarantors of a lasting and sustainable peace. By logical extension, the ICC must be open to these perspectives.

This chapter seeks to articulate an affirmative posture for the field of international criminal law and its institutions to adopt towards traditional justice processes. Based on his own experience in the transitions to peace in Kosovo and Timor-Leste, Lakhdar Brahimi strongly advocated local ownership and involvement in institutional reforms – an approach known as the ‘light footprint’ – by which capacity building emphasised the most limited international presence possible in conjunction with as many local staff as possible.⁵ Brahimi’s involvement in the early phases of post-Taliban Afghanistan adopted the ‘light footprint’ approach as a guiding model. Apart from the deeply held beliefs of communities most affected by hostilities, traditional justice mechanisms are also tinged with political importance because they often operate against the backdrop of peace negotiations and the recurrence of tensions raised by domestic amnesty provisions.

In making this argument, the chapter first describes the interface between the concept of complementary and localised systems, and then details the ICC’s authority under Article 53 – particularly that of the

⁴ There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms ‘perpetrator’ or ‘accused’. Though some delegations were concerned that the term ‘perpetrator’ would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the Elements after including a comment in the introductory chapter that ‘the term “perpetrator” is neutral as to guilt or innocence’. See UN Doc PCNICC/2000/INF/3/Add.2 (2000), in K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2002), 14.

⁵ S. Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (New York: Oxford University Press, 2004), 8.

Office of the Prosecutor (OTP) – to seek the larger ‘interests of justice’. Article 53 has been a neglected dimension of the Court’s power, particularly in its underdeveloped relationship to the complementarity regime. The following section examines recent trends in localised efforts to seek post-conflict stability in two situation-specific contexts – Uganda and Afghanistan – with a view towards illustrating the need for a holistic and comprehensive approach that balances formalised criminal systems with more community-based approaches. In the final section, the chapter articulates four specific recommendations designed to guide the Article 53 discretion of the ICC’s prosecutor and pre-trial chambers. These recommendations offer a series of affirmative steps that the Court could take to consciously implement a more consistent approach to incorporating local perspectives within its work.

Phrased another way, this chapter describes specific statutory changes that would permit a productive interface between ICC investigations and efforts by affected communities to achieve lasting peace. Taken together, the recommendations seek to ensure a cooperative and constructive relationship between a maturing Court and situation states, as well as with communities affected by conflict. Public articulation of standards for assessing the ‘interests of justice’ would provide needed consistency within the larger context of the complementarity regime and would shield the Court from charges of excessive politicisation in relation to controversial case dispositions. Indeed, a more developed understanding and subsequent implementation of the Court’s prerogatives under Article 53 could substantially strengthen its institutional aspiration to serve as a permanent supranational body that purports to advance the ‘interests of justice’.

Complementarity and community-based justice

Though it is the fulcrum that prioritises the authority of domestic forums, the precept of complementarity does not of itself logically lead to a homogenised system of national and supranational concurrent jurisdiction with a shared vision of ‘justice’. The ICC was not created to impede domestic processes or to impose its dominance over the prosecutorial practices and priorities of states with developed systems and demonstrated adherence to the rule of law.⁶ The ICC does not have

⁶ The irony of this truth is that the actual prosecution of Saddam Hussein and other leading Ba’athists took place in an internationalised domestic forum precisely because, *inter alia*,

authority to take a case to trial until the issues associated with domestic jurisdiction and the admissibility criteria have been analysed and resolved in accordance with the framework of the Rome Statute. Properly understood and implemented, the admissibility regime is thus best conceived as a tiered allocation of authority to adjudicate. The creation of a vertical level of prosecutorial authority that operates as a permanent backdrop to the horizontal relations between sovereign states in large part depended on a delineated mechanism for prioritising jurisdiction while simultaneously preserving sovereign rights and serving the ends of justice.

Complementarity is designed to serve as a pragmatic and limiting principle, rather than as an affirmative means to target the nationals of states who are hesitant to embrace ICC jurisdiction and authority. The provisions of the Rome Statute preserve a balance between maintaining the integrity of domestic adjudications and authorising a supranational court to exercise power where domestic systems are inadequate. In preserving this balance, complementarity is best viewed as a restrictive principle rather than as an empowering one; while the ICC has affirmative powers as a supranational court, the textual predicates necessary to make a case admissible are designed to constrain the power of the Court. Hence the operative language in Article 17 mandates that ‘the Court shall determine that a case is inadmissible’ where the criteria warranting exclusive domestic authority are met as specified in the Statute itself.⁷

The appropriate power of the ICC prosecutor will be sustained only by a relationship based on respect and an authentic partnership with sovereign authorities. As one Ugandan minister told me in confidence, ‘I think the ICC would be helpful if they cooperated with us.’ The text of Article 18 implicitly places control of investigations with states, unless the prosecutor can otherwise show that such a decision does not serve the interests of justice because the domestic investigation is automatically given primacy unless the prosecutor submits an application to the Pre-Trial Chamber.⁸ The language is unequivocal: ‘the Prosecutor shall defer to the State’s investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.’⁹ The burden thus lies with the prosecutor to prove that the

Iraqis saw grave injustice arising from prosecuting only the subset of crimes committed after 1 July 2002, as required by the jurisdictional limitations of the Rome Statute. M.A. Newton and M.P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (New York: St Martin’s Press, 2008), 76–80.

⁷ Article 17 (1), Rome Statute. ⁸ *Ibid.* ⁹ *Ibid.*

state processes are insufficient. This structure implements state primacy by making the state investigation the default response of the Court. If the prosecutor wants to proceed with the case, he or she must do so only based on the affirmation of the Pre-Trial Chamber by demonstrating that the state's investigation is inadequate.

The reliance on formal investigative and prosecutorial processes in these provisions is understandable but also inadequate, in the sense that the dominant needs of affected communities become tertiary. Indeed, neither domestic prosecutors nor international tribunals have the capacity to punish every perpetrator for every offence; in any event, the gravity threshold explicitly preserves space for domestic formal and informal authority in all cases 'that are not of sufficient gravity to justify further action by the Court'.¹⁰ The evolving discipline now termed 'international criminal law' has been described as 'the gradual transposition to the international level of rules and legal constructs proper to national criminal law or national trial proceedings'.¹¹ States around the world have implemented domestic legislation to provide the basis in criminal law for punishing perpetrators of grave crimes. This is important because the era of accountability is well under way, and it is transpiring through an interrelated system of domestic and international forums. The complementarity regime is therefore a pragmatic necessity that will disappoint local leaders and innocent civilians who expect courts to 'severely punish all war criminals with harsh prison sentences and to have a significant impact at the level of their communities'.¹² Empirical accounts demonstrate that survivors and victims in post-conflict environments 'expected to be able to go about their daily lives without encountering people whom they claim are guilty of war crimes'.¹³ Formalised processes that are centralised at the supranational level will almost always be inadequate to achieve this result. In fact, sustainable peace may depend on a synergy between formalised trials and a broader set of actions by local actors that are firmly rooted in sociological legitimacy.

¹⁰ Article 17 (1)(d), Rome Statute.

¹¹ A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 18. Mark Osiel has correctly noted that prosecutors in international forums have divergent professional and career motivations than domestic prosecutors. The divergent incentives and perspectives make the process of complete 'coherence' between international and domestic systems quite unattainable. M. Osiel, *Making Sense of Mass Atrocities* (New York: Cambridge University Press, 2009), 169–185.

¹² J.N. Clark, 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina', *Journal of International Criminal Justice*, 7 (2009), 463, 467.

¹³ *Ibid.*

The complementarity structure is thus necessarily strengthened by traditional justice mechanisms, subject to two important caveats. First, the provisions are framed in the context of official, formalised investigations or prosecutorial action and worded entirely in the present or past tense. There should be no space within this universalised body of international criminal law for personal vengeance or community vigilantism. Second, just as it is reasonable for the Court to require proof of good faith investigations and prosecutions by domestic authorities, one must be careful not to romanticise community-based processes. Localised alternatives to prosecution may well be under the control of persons who exercise inappropriate or undue influence. Community-based traditional mechanisms can enable corruption and human rights violations or further victimise individuals along local ethnic, religious or political divisions. To reiterate, the Court would be well served to develop concrete standards for assessing the efficacy of local processes to guide dialogue and decision-making of both Court and domestic criminal officials.

Article 53 and the ‘interests of justice’

The conceptual roots of integrating community-based efforts into the Court

In light of the inspiring growth of the field of international criminal law since World War II, it is often forgotten that the Moscow Declaration specifically favoured punishment through the national courts in the countries where the crimes were committed.¹⁴ The military commissions established in the Far East also incorporated the principle that the international forum did not supplant domestic mechanisms.¹⁵ The UN secretary-general is persuaded that ‘no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside

¹⁴ IX Department of State Bulletin No 228, 310, reprinted in *Report of RH Jackson United States Representative to the International Conference on Military Tribunals* (Department of State Publication 3080, 1945), 11. The Moscow Declaration was actually issued to the Press on 1 November 1943. For an account of the political and legal manoeuvring behind the effort to bring this stated war aim into actuality, see P. Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2000), 85–110.

¹⁵ ‘Persons whose offenses have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of the local jurisdiction.’ Regulation 5 (b), Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Pacific, AG 000.5 (24 September 1945).

can hope to be successful or sustainable'.¹⁶ For example, very few experts believe that a system of 'justice' can be effectively imposed upon a recalcitrant regime in conflict settings.¹⁷ The complementarity regime is predicated on precisely this principle because 'justice' is most legitimate and ultimately effective when it is most responsive to the demands of the local population.

As a moral and practical imperative, permitting external actors to supersede the established set of domestic punishments and cultural traditions, would be a modern form of legal colonialism that would undermine international prosecutions.¹⁸ Rather, the relative priorities of people affected by conflicts can be best gauged and addressed at more local levels. For some, justice means the retrieval of family remains from mass graves and the right to conduct a culturally appropriate burial. For others, disputes over property vacated under threat of imminent danger are the most pressing concern, while in other contexts the needs of refugees and religious leaders to seek restitution and reparations for damage done by former neighbours will predominate. In other words, community leaders and local political authorities deserve the frontline role in serving the needs of those whose interests they represent, but they should not be forced to subvert their own legal traditions as the price for gaining international support and assistance. Traditional mechanisms may well provide for their psychological, social and economic needs far better than any formalised prosecution.

Article 53 of the Rome Statute recognises this implicit relationship as a third dimension of justice alongside the formalised processes of the domestic state or the complexities of ICC authority; it is implicated only in circumstances where a case or situation is properly subject to the jurisdiction of the Court. The plain language requires the prosecutor to initiate an investigation unless he or she determines that there is not a 'reasonable basis to proceed'.¹⁹ As a logical extension, grounds for

¹⁶ Report of the UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN Doc S/2004/616 (23 August 2004), 17.

¹⁷ B. Crocker, 'Iraq: Going it Alone, Gone Wrong', in R.C. Orr (ed.), *Winning The Peace: An American Strategy for Post-Conflict Reconstruction* (Washington, DC: Center for Strategic and International Studies, 2004), 281.

¹⁸ For a detailed account of the Cold War politics and unravelling of wartime unity that doomed the effort to convene a second International Military Tribunal after World War II, see D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), 28–37.

¹⁹ Article 53 (1), Rome Statute. This language parallels that of Article 15, which governs the *proprio motu* powers of the Prosecutor, and provides that such *proprio motu* authority to

declining an investigation exist when there is no reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (*i.e.* a formal investigation is unwarranted), or the case would be inadmissible under the complementarity regime (*i.e.* domestic authorities are engaged in formalised judicial or investigative processes). The most significant aspect of Article 53 stands in contrast to the formalised processes by permitting the prosecutor to defer investigation when ‘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.’²⁰

Notably, the text of Article 53 is silent regarding a duty to consult with victims, domestic officials, religious leaders or prosecutors in a situation state. This stands in sharp contrast to the rights afforded the Security Council, as well as other states parties and political officials who are entitled by the Statute to an explanation of ‘his or her conclusion and the reasons for the conclusion’. In short, the communities most affected – who should be entitled to consultation or coordination when the prosecutor’s decision not to investigate or to prosecute is premised on the ‘interests of justice’ – are omitted. This disparity is puzzling in part because the affected communities are often able to assess the ‘interests of justice’ and have the most access to available information related to the perceived legitimacy of case dispositions, as well as insights into the most advisable order for bringing charges against perpetrators. Furthermore, in another ironic twist, although states parties that refer a situation (or the Security Council, in the case of an Article 13 referral) may request review when the prosecutor declines to investigate or prosecute based on the interests of justice, victims, domestic officials and affected communities have no basis for seeking such review.²¹ Article 53 only stipulates that the Pre-Trial Chamber may review the prosecutor’s ‘interests of justice’ determination on its own initiative and that in ‘such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber’.²²

open an investigation is discretionary, rather than mandatory. At least one eminent authority has surmised that Article 53 only applies to situations that have been referred to the Court either by states party or by the Article 13 action of the United Nations Security Council. W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (New York: Oxford University Press, 2010), 659.

²⁰ Article 53 (1)(c), Rome Statute. ²¹ *Ibid.*, Article 53 (3)(a).

²² *Ibid.*, Article 53 (3)(b).

The prosecutor's current policy on the 'interests of justice'

Article 53 requires a synthesis of perspectives and goals within which the ICC and local communities share information and strive towards shared objectives. In a policy paper issued in September 2007, the OTP unsurprisingly noted that "The issue of the interests of justice, as it appears in Article 53 of the Rome Statute, represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance on what the content of the idea is."²³ As Juan Mendez memorably observed, 'justice contributes to peace and reconciliation when it is not conceived as an instrument to either'.²⁴

Despite this complexity, the policy paper did not take the opportunity to clearly frame the role of formalised international justice as an interconnected and additive dimension of local needs and desires. It finds that the provisions of the Rome Statute 'clearly favour the pursuit of investigations and cases' when they meet the necessary predicates of jurisdiction and admissibility, and thus specifies that, 'Taking into consideration the ordinary meaning of the terms in their context, as well as the object and purpose of the Rome Statute, it is clear that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice.'²⁵ However, unlike the objective criteria specified in the Statute for assessing admissibility of a particular case, the Court can never implement a wholly monopolistic interpretation of the 'interests of justice'. This is because the subjective valuations of the affected community or situation state will always be relevant when weighing the merits of investigations and prosecutions, when warranted by the evidence and circumstances.

Two important applications follow from this generalised philosophical construct. First, focusing on the narrowly conceived view of the ICC as the

²³ 'Policy Paper on the Interests of Justice', Office of the Prosecutor, ICC (September 2007), 2 (OTP, 'Policy Paper on the Interests of Justice'). This approach clearly reflects the input received from Human Rights Watch, which noted that the term was not 'precisely defined', and urged a narrow construction 'most consistent with the object and purpose of the Rome Statute'. 'The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute', Human Rights Watch Policy Paper (June 2005).

²⁴ J.E. Mendez, 'Justice and Prevention', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011), 33, 36.

²⁵ OTP, 'Policy Paper on the Interests of Justice', 3.

instrument of international accountability, the policy paper pledges to work 'constructively with and respect the mandates of those engaged in other areas' but insists that the 'judicial mandate' operates 'independently' and implicitly superior to other considerations arising from community perspectives. While expressly noting the 'complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice',²⁶ the paper omits any mention of specific measures to accomplish such a synergy between formalised prosecutorial efforts and the larger efforts to achieve justice within a given society and situational context. There is no affirmative vision that postulates the OTP's vision of the factors that could, in the aggregate, warrant a finding that the 'interests of justice' mitigate against further investigation or prosecution. Indeed, the paper expressly sets forth the aspects that the prosecutor will not consider when weighing the 'interests of justice', but there is nothing explicit in the policy that leads to a cohesive sense of what factors can, and should be, considered as serving justice. Hence, affected states and communities are left to guess what factors might or might not be determinative.

Second, and more controversially, the OTP's paper juxtaposes the 'interests of justice' criteria against the more problematic controversy surrounding the appropriate role for the ICC as an instrument of international diplomacy. The policy states in its introduction that 'there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor'.²⁷ In fact, the secretary-general of the United Nations has stated that 'Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives'.²⁸ Nevertheless, official OTP policy remains at the time of this writing that a broad conception of the Article 53 mandate would violate the very object and purpose of the Rome Statute. This argument assumes that the formalised trials in the Court play an irreplaceable role as the sole arbiter of international justice, which itself contravenes the well-established complementarity framework. This is even more problematic when read in light of Richard Goldstone's caution that 'the word "justice" is demanding . . . yet few would aver that it is "demanding" in the sense that it is always retributive'.²⁹ The OTP policy makes no allowance for a situation state

²⁶ *Ibid.*, 5. ²⁷ *Ibid.*, 1. ²⁸ Report of the UN Secretary-General, para. 49.

²⁹ R. Goldstone and N. Fritz, "In the Interests of Justice" and Independent Referral: The ICC Prosecutor's Unprecedented Powers', *Leiden Journal of International Law*, 13 (2000), 655, 662.

to represent the human interests of its citizens, apart from filing formal challenges to admissibility under the procedures of Article 19. Finally, it bears noting that the narrowest possible framing of Article 53 reflected by the OTP policy is absolutely unsupported by the diplomatic history. As William Schabas has noted, ‘an amendment to article 53(1)(c) to the effect that “the interests of justice shall not be confused with the interests of peace” would “surely not have met with consensus”’.³⁰

In sum, rather than setting out an affirmative and powerful vision of a synergy between formalised prosecutions, whether at the domestic or international level, and the far more common usage of community-based justice mechanisms, the current OTP policy paper provides little clarity for the future. This represents an intentional trade-off of overall legitimacy and efficacy in favour of expediency. At the time of writing, there is also no authoritative statement from the Court regarding the conditions or circumstances in which domestic action would warrant abeyance of supra-international ICC authority in a particular case. This is a significant concern for two reasons: 1) it permits allegations that a particular approach to a particular perpetrator is ad hoc and that future decisions are not taken in the context of a consistent and defensible policy, and 2) it clouds the relationships with domestic officials, victims and affected communities in ways that hinder effective investigations and movement towards both sustainable peace and justice.

Local ownership for localised objectives: Uganda and Afghanistan

Justice that benefits from a sense of local-level ownership is actually a mosaic of prosecutions, accountability, reconciliation, reparations, institutional reform, reintegration, truth-telling and retribution. The artificial polarisations between peace and justice have clouded debates about the most appropriate ways to address conflict and its aftermath, implying either/or choices when combinations of these elements often better reflect popular perceptions and lead to more effective practical strategies. As framed by the aspiration of a leading Ugandan lawyer, the creation of a modern holistic system of accountability for international crimes should serve as the interface of the ICC and domestic processes that ‘link together in an inseparable synergy the restorative/traditional, official and international justice mechanisms’.³¹

³⁰ Schabas, *The International Criminal Court*, 663.

³¹ F. Okumu-Alya, ‘The International Criminal Court and Its Role in the Northern Uganda Conflicts – An Assessment’, *Uganda Living Law Journal*, 4 (2006), 16, 48.

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In response to accusations from the ICC that the use of community-based justice practices actually reinforce impunity in Uganda, a leading local NGO expert claimed that ‘if you are pursuing peace then justice is not optional, it is an integral part of peace. Done wrongly (as we would argue has happened in northern Uganda), the pursuit of international justice can undermine the pursuit of peace, but done correctly’ using ‘a whole array of transitional justice approaches, the pursuit of peace and the pursuit of justice should and can go hand in hand’.³² The single-minded and mechanical pursuit of punitive justice by the ICC in complex situations like Uganda, where victims want an immediate end to their anguish, has been described by local actors as ‘iniquitous, especially in the presence of more pragmatic efforts like peace negotiations’.³³ The current ICC Article 53 policy paper seems to reaffirm this single-minded focus on prosecution as the only viable option for achieving justice.

The controversies over the role of the ICC in Uganda, which led in a linear fashion to the policy paper on Article 53, arose from the history of the conflict and the structure of the Juba Accords themselves. The Lord’s Resistance Army (LRA) rampaged across northern Uganda for nearly two decades, in the process abducting children, murdering families and terrorising villages across northern Uganda. On 21 January 2000, Uganda adopted an Amnesty Act providing unconditional amnesty for anyone who had engaged in armed rebellion against the government since the ‘26th day of January 1986’ and who agreed to renounce and abandon such rebellion.³⁴ The act subject to amnesty was broadly conceived,³⁵ amidst the declaration that ‘amnesty means a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form

³² C. Dolan, ‘Imposed Justice and the Need for Sustainable Justice in Northern Uganda’, Presentation to the Beyond Juba Project/AMANI Forum training in Transitional Justice for Parliamentarians (18 July 2008).

³³ S. Oola, ‘Bashir and the ICC: The Aura or Audition of International Justice in Africa?’ *Oxford Transitional Justice Research Working Paper Series* (27 February 2009).

³⁴ The Amnesty Act, 2000.

³⁵ *Ibid.*, para. 2 (1):

(1) An amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by—
actual participation in combat;
collaborating with the perpetrators of the war or armed rebellion;
committing any other crime in the furtherance of the war or armed rebellion; or
assisting or aiding the conduct or prosecution of the war or armed rebellion.

of punishment by the State'. The Ugandan Constitutional Court has since held that even a former child soldier who rose to become a senior LRA commander and who was captured by government forces remains constitutionally entitled to amnesty for his criminal acts even though he failed to claim amnesty until after his detention.³⁶ At the time of writing, nearly 27,000 individuals have received amnesty pursuant to the act, and Uganda is more or less at peace.

The Agreement on Accountability and Reconciliation (commonly referred to as the 'Juba Accords') was consciously negotiated in light of the complementarity framework of the Rome Statute, and shaped by the refusal of LRA leaders to submit to the authority of the ICC. What observers have commonly termed the 'Spirit of Juba' actually represented the kind of sophisticated synthesis that one might well have expected to arise from a formal OTP policy with respect to the Article 53 'interests of justice' criteria. The preamble of the Agreement (the Annexure has no preamble) sets out the purpose of the Agreement to prevent impunity, to promote redress to promote reconciliation and to achieve peace. The second paragraph also clarifies that the goal is 'lasting peace with justice' – evidently a nod to the peace *versus* justice debate triggered by the ICC warrants of arrest against LRA leadership.³⁷

The Juba Accords contain a number of different mechanisms, which often explicitly or implicitly subsume the language of the Rome Statute, and the complementarity framework in particular. According to Clause 1, the term 'alternative justice mechanisms' covers not only traditional mechanisms but also any mechanism that is 'not currently administered in the formal courts' of Uganda. Clause 5.3 of the Agreement provides that the alternative justice mechanisms shall consist of traditional justice mechanisms, as well as 'alternative' mechanisms or features within the formal proceedings, such as 'alternative sentences'. In addition, the term 'formal' appears in several places, for example in Clause 4.2, which speaks of 'prosecutions and other formal accountability proceedings.' This is culturally significant due to the wide variation between regional practices within the situation state.³⁸

³⁶ *Thomas Kwoyelo alias Latoni v. Uganda* (Const. Pet.No. 036 Of 2011(reference)) [2011] UGCC 10 (22 September 2011). Article 28 (10) of the Ugandan Constitution states, 'No person shall be tried for a criminal offense if the person shows that he or she has been pardoned in respect of that offense.'

³⁷ On this debate, see Refugee Law Project's statement on the ICC investigation in northern Uganda (5 August 2004).

³⁸ See J. Latigo, 'The Acholi Traditional Techniques of Conflict Management', *Uganda Living Law Journal*, 4 (2006), 1, and J.F. Adong, 'Restorative Justice as a Strategy for

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The Afghan Ministry of Justice continues to implement a halting and conflicted process of determining the optimal blend of localised mechanisms amidst a revitalised but fragile formal justice system. Approximately 80 per cent of the private civil and criminal disputes in Afghanistan are resolved through some form of community-based dispute resolution process, rather than in a courtroom or, in the case of most rural communities, the district office.³⁹ This has led many analysts to describe Afghanistan as having two justice systems: a 'formal' (state-run) judicial sector and an 'informal' (community-based) judicial sector. Where they do exist, locals generally view the formalised processes as corrupt, slow, expensive, inept and less legitimate than the long-standing customary practices emphasizing local resolution of disputes.⁴⁰ In a recent survey, Afghan citizens complained that 'interactions between the citizen and the state resemble a bazaar economy, where corruption has become the nation's new currency'.⁴¹ These factors – corruption in the public judicial process and widespread acceptance of customary practices – explain why community justice is such a vital institution in Afghanistan.

The 'informal' system is comprised of local dispute resolution councils, which are led by community elders and are convened on an ad hoc basis to resolve specific disputes arising between members of a community as well as between different communities. More than just a customary practice, *Jirga* is 'an historical and traditional institution and gathering of the Afghans, which over the centuries, has resolved our nation's tribal and national political, social, economic, cultural and even religious conflicts by making authoritative decisions'.⁴² When reliable evidence, in the form of either witness testimony or documentation, is unavailable, *jirgamaran* render *islahi* decisions – or 'equity-based' decisions – to keep peace within the community.⁴³

Achieving Lasting Peace, Justice and Reconciliation in the Northern and North Eastern Uganda', *Uganda Living Law Journal*, 5 (2007), 27.

³⁹ *Progress in Peace Building: Afghanistan*, United States Institute of Peace (February 2011).

⁴⁰ T. Barfield, N. Nojumi, and J. Their, 'The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan', in D. Isser (ed.), *Customary Justice and the Rule of Law in War-Torn Societies* (Washington, DC: United States Institute of Peace, 2011), 159–193, 160.

⁴¹ M. Gardizi, K. Hussmann, and Y. Torabi, 'Corrupting the State or State Crafted Corruption?', Afghanistan Research and Evaluation Unit (June 2010), 3.

⁴² A. Wardak, 'Jirga – Power and Traditional Conflict Resolution in Afghanistan', in J. Strawson (ed.), *Law After Ground Zero* (London: Glasshouse Press, 2002), 187, 190.

⁴³ D.J. Smith and S. Manalan, 'Community-Based Dispute Resolution Processes', Bamiyan Province, Afghanistan Research and Evaluation Unit – Case Study Series (December 2009), 41.

The continued vitality of community-based justice in post-Taliban Afghanistan owes largely to the elders, or *jirgamaran*, who resolve disputes; they are widely trusted by the community, and as such are thought of by community members as being 'just' and having the wider community's interest in mind.⁴⁴ As one villager who has served as a *jirgamaran* put it, the elders who are selected to locally resolve disputes 'are familiar to us and respected by the people – and they should resolve our disputes and problems honestly and respect the rights of the villagers'.⁴⁵ These local elders possess a type of authoritative power that derives not from any formal affiliation with the state or its ability to physically enforce its directives, but rather from their longevity and the perception that their judgments are an organic part of community life. ICC officials seldom share these perceptions in situation states.

Furthermore, a categorical distinction between an 'informal' and 'formal' justice sector contains several inaccurate assumptions: (1) that these two modes of dispute resolution are separate, distinct and unconnected in practice; (2) that the existence of one sector undermines the legitimacy and efficacy of the other and (3) that policymakers and military analysts should work towards the creation of one dominant sector to serve as Afghanistan's primary modality for both public and private dispute resolution. ICC officials also commonly voice these perspectives.

It would be a mistake, however, to presume that public and private institutions in modern Afghanistan operate either in isolation or in tension. For many Afghan citizens, the interface of traditional and formal processes permits the freedom to turn to one where the other has not succeeded or would be predictably inappropriate. Many Afghans consider a variety of factors in choosing which forum to resolve their disputes, such as the preference for local resolutions by arbiters who have a deep knowledge of them, their dispute and their community; the desire for speedy resolution of disputes and the emphasis on restoring communal stability over retribution.⁴⁶ Thus, while a cleavage between 'formal' and 'informal' justice may be superficially appealing, it ignores the nuanced interaction between state justice institutions, administrative bodies and local dispute resolution councils, as well as the role customary

⁴⁴ D.J. Smith, 'Community-Based Dispute Resolution Processes', Nangarhar Province, Afghanistan Research and Evaluation Unit – Case Study Series (December 2009), 11.

⁴⁵ *Ibid.* ⁴⁶ *Ibid.*, 30.

practices have played in creating political stability in areas of the country where formal governmental authority has been undermined.⁴⁷

Proposals for reimagining the ICC's role

In his inaugural address, the first ICC prosecutor was correct in noting that, 'As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'⁴⁸ The provisions of the Rome Statute provide for a triangular relationship whereby three sets of actors should operate in a productive tension with each other: the local actors who will directly benefit from the restoration of the rule of law; the sovereign authorities that are responsible for protecting the human rights of the population, but also for creating the conditions of societal stability; and the appropriate role of the ICC alongside the domestic judiciary.

Yet the relationship between the 'interests of justice' under Article 53 and the larger admissibility regime remains largely undeveloped, even though the relationship between the efforts of the ICC and domestic institutions may well represent the most definitive measure of success over the long-term life of the Court. After all, the existential imperatives for the formation and costs of the supranational court lie in the overarching goal of creating a productive relationship with local accountability efforts that makes genuine progress towards the commonly proclaimed goal of 'ending impunity for the most serious crimes of concern to mankind'. This section offers a series of specific considerations that might well be incorporated into an amended ICC policy with respect to the 'interests of justice'.

Specific rationales for determining the 'interests of justice'

In the first place, a revised Article 53 policy should clearly articulate a set of factors that help to determine the deference that should be accorded to traditional processes. In effect, this is a two-level problem whereby domestic prosecutors must make a similar determination vis-à-vis

⁴⁷ D.J. Smith, 'Examining Community-Based Dispute Resolution Processes', Podcast, Afghanistan Research and Evaluation Unit (3 November 2010).

⁴⁸ L. Moreno-Ocampo, 'Statement made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court' (16 June 2003).

traditional mechanisms, even as the ICC undertakes its own independent analysis of the 'interests of justice' within the meaning of the Rome Statute. Afghanistan provides a good example of traditional processes for seeking justice and resolving disputes that function to fill a necessary void in state authority. Nevertheless, there have been many instances when the traditional processes have been co-opted by Taliban influences. A revised Article 53 policy should thus acknowledge that any process demonstrably controlled by a specific religious, tribal or other informal faction should be entitled to less deference than purely communal processes. Phrased another way, when traditional processes provide a functional substitute for the conduct of hostilities, they ought to be substantially discounted, if not disregarded.

Second, the very nature of conflict may well have altered the distribution of power within a region or village, or indeed between competing clans or sects. For instance, where local processes have been hijacked, they may well be seen as counterproductive to the twin interests of lasting stability and reconciliation. If local processes have been overcome by intrinsic corruption to the degree that they have lost the communal power of reconciliation, they should also be entitled to less deference. Traditional authorities will generally be the most sensitive to shifts in the power relationships within a region, and the corollary relationships between domestic prosecutors and local populations should be informed by these shifts. As a logical extension, when local accountability mechanisms operate to entrench gender inequalities or to subvert established internationally recognised human rights, they cannot be presumed to represent the 'interests of justice' simply by virtue of their 'local' provenance.

A revised Article 53 policy should also require that a specific set of factors be developed in conjunction with prosecutors and local authorities in every case where the prosecutor moves towards initiation of an investigation. This would have the effect of making the 'interests of justice' a regular and required consideration, albeit one that would commonly be insufficient to warrant abeyance of an investigation. The criteria listed in Article 53 itself are intended neither to be dispositive nor to deny a more comprehensive consideration of the circumstances of each offence. A revised policy paper could state, for example, that, 'the choice of forum for the adjudication of any particular case shall depend, amongst other considerations, on the nature and gravity of the offending conduct, the age and interests of the victims, and the role of the alleged perpetrator in that conduct'. In particular, such determinations should be required to rest upon an individualised assessment of the alleged offences in light of the assessed operation of

other domestic courts, traditional justice mechanisms and any process for national truth-telling or historical documentation. A determination not to proceed with a particular case, and the reasons warranting such a determination, should be prepared in writing and provided to the Pre-Trial Chamber's pro forma. Similarly, the ICC should provide such determinations to national or local prosecutorial authorities upon request.

In reaching these determinations, the ICC should clearly articulate the factors within each case and the charges under consideration that indicate what interests are served (or in many cases left unprotected) by the interaction of traditional justice mechanisms as an alternative to formalised prosecutions. These factors would include: ensuring accountability for those perpetrators whose prosecution is deemed essential, promoting truth-telling and contributing to the historical record of wrongdoing, facilitating reparations and providing available redress for victims of international crimes and human rights violations and facilitating reconciliation within the affected communities and in the situation state more generally.

These written determinations could go a long way towards dispelling arguments that the ICC prosecutor's decisions hinge on an inappropriately politicised rationale, personal vendetta or other inappropriate factors. Lastly, a new deliberative policy with designated criteria could well serve to provide specific legal rationale for the declination of prosecutorial action. This demonstration of the 'interests of justice' might well have a beneficial effect on traditional processes, and would at a minimum strengthen the triadic relationship between the ICC, domestic authorities and local actors as one based on transparency, mutual respect and comity.

Closer cultural coordination

A revised prosecutor's policy should clearly establish coordination mechanisms for feedback and consultation with both domestic justice officials and community leaders. This would be achieved through the designation of a formal point of contact and clear timelines for communication within the policy. A formal process of consultations is vital to ensure mutual understanding. Nor should linguistic difficulties be overlooked: in Uganda, for instance, the concepts of 'amnesty', 'forgiveness', 'reconciliation' and cessation of criminal punishments are not conceptually distinct in the Lwo language.⁴⁹ Similarly, loose dialogue of

⁴⁹ Tim Allen offers the example of the word *timo-kica*, which means reconciliation/doing forgiving, but is often used by people who are simultaneously enthusiastic for

'forgiveness' may also mean different things to different communities; therefore, communication between the ICC and affected communities should be strong and constant. Finally, Court representatives must have absolute granularity regarding the circumstances of each particular perpetrator and the related but distinct goals of reconciliation or atonement at the individual and the collective levels.

In practice, culturally sensitive communication accompanied by a clear set of guidelines can help focus investigative efforts in ways that serve the 'interests of justice'. The traditional models of justice in Afghanistan seek restitution rather than retribution, 'compensation for the wrong done and social reconciliation, not the punishment of the perpetrator'.⁵⁰ Yet formalised prosecutions may well be needed to achieve those purposes. The phrase 'after full accountability' is also used in the Juba Accords in the definitions of all the traditional mechanisms, but there is no correlative explanation of the interaction of those terms. Hence, formalised prosecutions might well be appropriate for perpetrators who participate in traditional systems involuntarily, who do not follow through on promised restitution or whose expression of remorse was demonstrably insincere. Similarly, traditional processes that do not serve inter-communal interests or lasting social cohesion should be entitled to less deference. If a traditional process fails to adequately address inter-communal gaps, then the overlay of actual prosecution might well transcend the communal divide. These often countervailing interests must be carefully balanced in practice through clear and consistent communications channels.

Addressing amnesty

The role of amnesties in the context of situation states remains controversial because even selective grants of amnesty have the potential to (re)ignite a false dichotomy between peace and justice. Some large-scale, so-called blanket, amnesties have been implicitly accepted as a matter of state practice.⁵¹ There is scant empirical support for the proposition that amnesty for the class of crimes within the jurisdiction of the Rome Statute will predictably lead to a culture of impunity that incentivises

prosecutions and punishments. T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006), 13.

⁵⁰ Barfield et al., 'The Clash of Two Goods', 167.

⁵¹ L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Portland: Hart Publishing, 2008).

violence.⁵² The suggestion of the Special Court for Sierra Leone that a domestic amnesty is prohibited as a matter of customary international law and can never have preclusive effect is at best unsupported, and at worst corrosive, to the harmonised system of cooperative synergy that provides the conceptual model underlying the Rome Statute.⁵³ One scholar has thus concluded that the combination of amnesty with some form of broader truth-seeking ‘largely defines state practice – massively and pervasively, throughout the world’.⁵⁴ Indeed, in Afghanistan, as in other conflict settings, discussion of the appropriate role for amnesties, and the conditions precedent for achieving a lasting peace have been a persistent thread over the past decade of conflict.

The current OTP Article 53 policy provides no guidance over the circumstances in which the authority of the ICC might be secondary to an ongoing domestic amnesty process. It is also conceptually possible that ICC prosecution might in certain circumstances be entirely appropriate to supersede domestic amnesty in suitable circumstances. While the premise that the Court may assert jurisdiction even in the face of a domestic amnesty (as warranted by the particular circumstances of a particular perpetrator) is incontrovertible, a revised policy could nevertheless contribute to a consistent set of criteria for assessing when the ‘interests of justice’ warrant supranational prosecution. Factors that should provide guidance with respect to the relationship between domestic amnesties and the circumstances of a particular perpetrator might include:

- Whether the perpetrator has complied with any conditions attached to the amnesty, such as restitution or active efforts to eliminate intra-community tensions;
- Whether there is any other state that could exercise criminal jurisdiction over a particular subset of the offences otherwise subject to amnesty;

⁵² L. Sadat, ‘Exile, Amnesty, and International Law’, *Notre Dame Law Review*, 81 (2006), 955, 966.

⁵³ Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, *Prosecutor v. Morris Kallon*, SCSL-2004-15-AR72(E), and *Prosecutor v. Brima Bazzy Kamara*, SCSL-2004-16-AR72(E), Appeals Chamber, SCSL, 13 March 2004. The decision notes that states are free to grant amnesties to be governed exclusively by domestic law that have no binding effect on institutions governed by international law.

⁵⁴ Conversely, amnesty itself provides no obvious path towards reintegration or reconciliation. Some recipients of amnesty can also become a visceral focal point within a community, one that reminds citizens of the past and serves to re-victimize others. Osiel, *Making Sense of Mass Atrocities*, 233.

- Whether the amnesty itself was a central imperative to ending hostilities or a self-serving afterthought;
- Whether a perpetrator holding amnesty from domestic prosecution has nevertheless become a focal point of tension within a community or is re-victimising civilians;
- Whether the amnesty operates in tandem with other accountability measures, such as truth-telling or traditional community processes;
- Whether the amnesty was enacted through democratic procedures and lengthy debates, or imposed by authoritarian decree;⁵⁵ and
- Whether prosecution in the domestic state might be permitted by the terms of the amnesty, but foreclosed by other aspects of the domestic criminal procedure.

Adding reciprocal rights to Articles 53 and 93

Despite its complexity, the Rome Statute nowhere specifies a regime for requiring a harmonisation between the investigative and prosecutorial efforts of the ICC and those of domestic states. The OTP is obligated to notify ‘all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction’ prior to proceeding with a *proprio motu* investigation. This obligation is subject to limitation based on the needs of confidentiality and the preservation of evidence, but is notably not accompanied by any obligation to assist a state that is both willing and able to prosecute or investigate a perpetrator. There is no correlative process accompanying notification for actually providing assistance to those states that are willing and able to initiate investigations and prosecutions, where appropriate, using the applicable domestic procedures. In addition, neither the prosecutor nor the Pre-Trial Chamber is obligated to consult with state or local officials when considering whether to suspend investigation or decline prosecution based on the interests of justice.

This gap in the Rome Statute structure creates a one-sided scheme whereby states parties must comply with their obligations to cooperate but the Court need not reciprocate. This gap is especially prominent in the context of Article 53, in which the process of ascertaining the ‘interests of justice’ should always involve a collaborative discourse. Simply put, the use of traditional or customary mechanisms that might well serve

⁵⁵ C.P. Trumbull IV, ‘Giving Amnesties a Second Chance’, *Berkeley Journal of International Law*, 25 (2007), 283, 320.

to sustain the conditions of a lasting peace need not be facilitated by the Court. The Statute therefore creates an imbalance that, at best, undermines the rights of states to exercise complementarity, and at worst creates barriers to the effective and efficient use of domestic forums that are capable of assisting the efforts of the Court to create a comprehensive system of criminal accountability. To effectuate a productive collaboration, Article 93 (10)(a) should be amended to impose an affirmative duty on the Court, such that:

The Court *shall*, upon request, cooperate with and provide assistance to a state party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting state.

In addition, Article 54 (3)(c) should permit the prosecutor to interface with community leaders and organisations in making the ‘interests of justice’ assessment and should be amended to read as follows: ‘Seek the cooperation of any State, *local*, or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; *in particular when analysing whether there are substantial reasons to believe that an investigation would not serve the interests of justice within the meaning of Article 53.*⁵⁶

These basic changes, while textually minimal, would signal a profound shift of the Court’s current approach towards domestic states and local communities. They would better harmonise communication between states parties and the ICC, specifically regarding investigations. Amending Article 93 would help foster a climate of trust and cooperation between states and the Court. These amendments balance the operational aspects of a viable complementarity regime by providing for the sharing of information in both ICC and domestic investigations. Conversely, Article 53 (3) should add a textual basis for affected states, victim groups and community leaders to provide informed input to the OTP in its assessment of the ‘interests of justice’. Improving the constructive dynamic between the Court, domestic prosecutors and local leaders would help to harmonise decision-making with respect to each perpetrator under the specific circumstances of each charge.

⁵⁶ Proposed additions indicated in italics.

Conclusion

The pursuit of 'justice' is socially and politically complex. The decade plus of practice since the entry into force of the Rome Statute reveals that the Court's institutional role will be contested by families, communities and victims affected by conflict. Just as the nature of the relationship between the state and the supranational court is evolving, the balance among prosecutions, reintegration, forgiveness, reparations, truth-telling and apology is itself a delicate process, often in flux. Although the complementarity regime focuses exclusively on formalised processes in allocating power between the ICC and situation states, the external interference of the Court may well be a controversial and complex aspect of 'justice' from the perspective of victims and community leaders. Furthermore, to ameliorate what will be a recurring problem as it begins its second decade of operation, the ICC needs to develop a consistent and analytically defensible framework for understanding community-based mechanisms in light of the 'interests of justice' analysis permitted under Article 53.

If the ICC ploughs new jurisprudential pathways by imposing its determinations on domestic systems in a manner that undermines local preferences and overrides local conceptions of the rule of law, it will continue to be subject to charges of legal neo-colonialism in violation of its own central tenets. These are not idle fears. Early in its existence, the Court has already been presented with an array of complexities and challenges that underscore its inability to serve as the sole forum for 'international justice'. The Court's long-term viability thus depends upon sustaining a cooperative synergy with domestic jurisdictions, both states parties and other states, which leads to a sense that the Court and local jurisdictions share a common objective. What I term a 'cooperative synergy' entails a well-crafted and consciously implemented approach to incorporating local perspectives in the pursuit of international criminal accountability.