

Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court

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Let me start by thanking Opinio Juris and the *Virginia Journal of International Law* for hosting this online symposium. I am also honored that Mark Drumbl has graciously agreed to be my respondent.

In 2005, the International Criminal Court issued warrants for the arrest of Joseph Kony, the leader of Uganda's murderous Lord's Resistance Army, as well as four other high-level LRA suspects (two of whom reportedly have since died) to answer charges of crimes against humanity and war crimes. The warrants proved controversial when the fate of promising peace negotiations appeared to hinge on the ICC's willingness to defer to Ugandan efforts to address LRA atrocities in other ways. According to the terms of a draft accord, the highest-level LRA suspects would face a special domestic court charged with imposing "alternate penalties and sanctions," whereas lower level suspects would undergo traditional, highly ceremonial village proceedings. In all cases, the apparent goal was to emphasize truth-telling, forgiveness, and reconciliation over prison time. Notably, Uganda cited strong support among the LRA's victims for this solution. When Kony ultimately refused to sign the long negotiated agreements, he blamed the ICC warrants for his hesitation. Since then, LRA atrocities have continued, spreading outside Uganda's borders, while military efforts to defeat the group have failed.

For students of international law and politics, the episode presents a familiar dilemma of transitional justice. For the ICC, however, the dilemma points to a parallel institutional crisis that exposes deep uncertainties in the Court's mandate. On the one hand, the ICC exists as a court of last resort: its system of "complementary" jurisdiction requires deference to "genuine[]" domestic investigations and prosecutions. On the other hand, the Court's statute fails to resolve perennially contentious debates over precisely what sorts of legal responses to mass atrocities-including arrangements that fall short of conventional prosecution-are permissible.

This imbalance is especially problematic because it undermines the rationale that has most powerfully justified the establishment of the ICC in the first instance: the argument-consistently advanced by the Court's supporters and staff-that prosecution of international crimes is a fundamentally legal matter that must be entrusted to legal professionals and shielded from undue political interference. In particular, this rationale provides a ready explanation for a key and controversial feature of the ICC's institutional design: the Court's authority, in cases involving the suspects or territory of a treaty party, to proceed independently with investigations and prosecutions without need for prior clearance from the UN Security Council or another political body. If, however, the standard account of the ICC is wrong, and if the Court must be recharacterized as a de facto administrative agency charged with broad policy discretion to approve or disapprove domestic transitional justice policies without the assistance of meaningful legal standards, then justifying the ICC becomes a more difficult proposition.

My [Article](#) takes up this problem through a focused analysis of the ICC's response to the Ugandan peace process. My three principal claims are as follows: first, the Rome Statute does not, in fact, provide meaningful guidance to the Court as it navigates the particular dilemmas of transitional justice in Uganda.

Second, the development of ex ante guidelines to cabin prosecutorial discretion-a potential source of legitimation that others scholars have found attractive-is unlikely to remedy adequately the underlying legitimacy deficit and has failed to do so thus far. On this score, I am especially fascinated by ICC

Prosecutor Luis Moreno-Ocampo's public statements on the Ugandan peace process. Consistent with his generally stated policy of focusing on select high-level perpetrators, the prosecutor has insisted on conventional prosecutions for the handful of high-level perpetrators whom he has already targeted, while also suggesting that Uganda is free to proceed with alternate measures for all other perpetrators. The obvious attraction of this approach is that it supplies a relatively bright-line standard that allows the Prosecutor to proceed with the prosecution of some horrific offenses while at the same time affording Uganda significant room to negotiate the compromises and dilemmas of transitional justice. But this juridical flexibility regarding the great mass of perpetrators already concedes so much to the logic of compromise that it becomes difficult to explain why Moreno-Ocampo should not also signal flexibility regarding the three remaining perpetrators, especially if that is the approach necessary for a peaceful resolution of Uganda's conflict with the LRA. Doing so, however, would sacrifice the certainty of clear guidelines for precisely the sort of wide-ranging policy balancing that the prosecutor is understandably reluctant to attempt.

Third, and finally, I suggest that legitimation of prosecutorial policy in Uganda may ultimately be in the hands of other actors. I consider several actors who have figured prominently in the Prosecutor's policy statements, including international officials and NGOs, the ICC's judges, the LRA's victims, and the UN Security Council. I conclude (somewhat ironically in light of the ICC's history), that it is the Security Council that possesses the greatest ability to safeguard the ICC's integrity. Where the Security Council affirmatively refers a case to the ICC (as it has done with respect to Darfur), the referral should create a strong presumption in favor of prosecution and against deference to domestic efforts. Where, on the other hand, the Council acts to block an ICC proceeding in favor of domestic efforts, its doing so will shield the ICC from the difficulty of having to face that decision itself.

These last observations are, of course, little comfort in situations where, as with Uganda, no such guidance has been forthcoming. On that score, I have no easy answer and fear the problem may be insoluble. On balance, I support Moreno-Ocampo's insistence on ICC prosecution for the accused, but that support relies more on a sense of the legitimacy crisis that would result if the Court withdrew the warrants than it does from confidence that the outcome is optimal for societies like Uganda itself. In the end, then, the ICC may be destined to proceed with a perennial question mark hanging over its operations.

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