

COMMENT

Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions

In May 2010, the states parties of the International Criminal Court (ICC) will convene in Kampala, Uganda, for the first review conference of the Rome Statute. This conference comes at a vital time in the ICC's development, and there is much to reflect on. In the last two years the court has begun its first trial, issued its first warrant against a sitting head of state, and weathered scandals stemming from the alleged misbehavior of its prosecutor.¹ Yet arguably the most significant action the ICC has taken in those years involved Uganda itself. Between 2006 and 2008, the ICC played a key role in peace negotiations in Juba, Sudan, between the Lord's Resistance Army (LRA), a guerilla movement based in northern Uganda, and the Ugandan government. The biggest sticking point in those negotiations was the fact that the ICC had issued warrants against the LRA leaders, including its top leader Joseph Kony. The ICC's inability to suspend those warrants undermined the Ugandan government's negotiating position and may have contributed to the failure of the peace process and Kony's refusal to stop fighting. The states parties should take the opportunity presented by this conference to reflect on a major question

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1. See Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFF., Spring 2009, at 23 (criticizing Luis Moreno-Ocampo, Prosecutor of the ICC, for, among other things, his decision to indict the President of Sudan, his supposedly erratic leadership style, and allegations that he sexually coerced a journalist); Joshua Rozenberg, *Why the World's Most Powerful Prosecutor Should Resign: Part 1*, TELEGRAPH (London), Sept. 14, 2008, available at <http://telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/2236288/why-the-worlds-most-powerful-prosecutor-should-resign.part-1.html> (calling for Moreno-Ocampo to resign for failing to disclose evidence in the ICC's first trial, which led to that trial's temporary suspension). *But see* Christine Chung, Letter to the Editor, *A Prosecutor Without Borders*, WORLD AFF., Summer 2009, at 104, 104 (defending Moreno-Ocampo's tenure and criticizing De Waal and Flint for failing to disclose the identities and biases of their sources).

raised by the Juba saga: whether the ICC should be able to suspend prosecutions for the benefit of peace negotiations.²

This Comment will analyze the role that the ICC played in the Uganda case and draw on that case to argue that the Rome Statute should be amended to provide a greater opportunity for peace negotiations to succeed in situations where the ICC has indicted one party to those negotiations. The argument proceeds in three parts. Part I describes the provisions of the Rome Statute that remove discretion to suspend indictments and then illustrates how that lack of discretion can harm peace negotiations through a short diplomatic history of the Juba peace talks. Part II shows how the Uganda case is one example of the unique *ex ante/ex post* problems that arise in ICC prosecutions of active participants in the midst of armed conflict. While eliminating the discretion to suspend an indictment increases the *ex ante* deterrent value of the ICC to potential war criminals, doing so may also render it more difficult to end a conflict once an indictment has been issued by the court. Since the general deterrent value of the ICC is likely to be small, and its disruptive effect on peace negotiations large, the ICC ought to maintain robust prosecutorial discretion so that it can suspend indictments if credible peace negotiations begin. Finally, Part III argues that the states parties should amend the Rome Statute to increase the Pre-Trial Chamber's discretion to suspend indictments. Specifically, it argues that they should amend Articles 17 and 19 (which govern the admissibility of cases when countries' domestic courts have jurisdiction) to allow states to supplant ICC prosecutions with proceedings that fall short of criminal trials, such as truth and reconciliation commissions, in cases where doing so is vital to an ongoing peace process.

1. THE NO-DISCRETION RULE AND THE JUBA PEACE NEGOTIATIONS

The Rome Statute gives the ICC prosecutor very little discretion to suspend or even prevent a case at any stage.³ The prosecutor is obligated to

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2. The ICC is authorized to try criminals for a limited number of crimes related to conflict, including genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Prosecution by the ICC involves being brought to and detained in The Hague, tried, and (if convicted) sentenced to up to life in prison.
 3. This is by design – the drafters of the Rome Statute believed that too much discretion would leave the prosecutor vulnerable to accusations of partiality or political bias. That goal is expressed in the legislative history of the ICC. For example, in discussing the need for uniform rules to determine when a country can deny ICC jurisdiction because of complementary prosecution, one of the drafters noted that without such rules, “the Prosecutor will be left with uncertainty and unbridled discretion. The outcome may be an *ad*

pursue any case referred to him by the United Nations (UN) or any state party⁴ unless he finds it unreasonable for one of the reasons laid out in Article 53 (for example, that there is insufficient evidence, that effective complementary proceedings have been initiated, or that it is against the interests of justice).⁵ If the prosecutor objects for an Article 53 reason, that objection can be reviewed by the Pre-Trial Chamber,⁶ either *proprio motu* (by its own motion) or by request of the referring party, and can also be withdrawn at any point by the prosecutor.⁷ Once the prosecution goes forward and the Pre-Trial Chamber approves an indictment, the prosecutor loses all discretion to halt a case. At that point, a prosecution can only be stopped if (1) the UN Security Council passes a Chapter VII resolution to postpone it for a period of twelve months,⁸ or (2) the Pre-Trial Chamber determines that the case is inadmissible under Article 17 because a state is genuinely prosecuting the crimes.

This inability of the ICC prosecutor or the Pre-Trial Chamber to suspend a case after the indictment stage undermined the peace negotiations in Juba between the LRA and the Ugandan Patriotic Defense Force (UPDF). When the talks began in 2006, the two sides had been fighting for two decades and had collectively killed an estimated 100,000 people,⁹ abducted over 30,000

hoc practice likely to produce discrepancies in dealing with different situations. This would diminish the perception of impartiality and fairness of the Prosecutor's office in dealing with different cases and different countries." 1 M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 133 (2005).

4. The prosecutor can also initiate a case on his own, but this has never happened, probably in part because the approval process is lengthy and burdensome. See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 87-88 (2003); HÉCTOR OLÁSULO, *THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT* 89-90 (2005).
5. Rome Statute, *supra* note 2, art. 53(2).
6. The Pre-Trial Chamber is a panel of three ICC judges that authorizes investigations, confirms or denies the prosecutor's indictments, issues warrants, and handles other motions.
7. Rome Statute, *supra* note 2, art. 53(3)-(4).
8. Under Article 16, the maximum length of any one postponement is twelve months. The postponements, however, can be renewed indefinitely. In practice, it would be difficult to convince all of the permanent members of the Security Council to vote to protect a war criminal from prosecution. See, e.g., John B. Bellinger, III, Legal Advisor to the Sec'y of State, Remarks at the Fletcher School of Law and Diplomacy, U.S. Perspective on International Criminal Justice (Nov. 14, 2008), available at <http://2001-2009.state.gov/s/l/rls/111859.htm> (noting the Bush Administration's opposition to efforts to secure an Article 16 deferral for Sudanese President Omar Al-Bashir).
9. Steve Bloomfield, *Uganda and Rebels Set for Truce After 100,000 Deaths*, INDEPENDENT (London), Aug. 29, 2006, available at http://www.nzherald.co.nz/uganda/news/article.cfm?l_id=108&objectid=10398599.

people,¹⁰ and committed widespread rape, sexual enslavement, execution, mutilation, and other crimes against civilians.¹¹ President Yoweri Museveni referred the LRA to the ICC in 2003 and the ICC indicted five LRA leaders – including Kony – and, in 2005, issued public warrants for their arrest.¹² Shortly after the talks began, Museveni offered full amnesty to the top LRA officials and requested that the ICC withdraw its indictments.¹³ An ICC spokesman rejected this request, stating that “[t]he position of the court is that these warrants of arrest remain in force,” and demanding that the arrest warrants against Kony and his lieutenants be executed as soon as possible.¹⁴

In June 2007, the government and the LRA agreed that the LRA leaders would face trials in Ugandan courts as part of the final settlement. These trials would involve an alternative penalty regime with relatively light sentences that would “reflect the gravity of the crimes or violations; promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual’s admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims.”¹⁵ This arrangement was calculated to rule out ICC prosecution by making the case inadmissible under the complementary prosecution provision of Article 17, which provides that the ICC cannot bring a case if a state is willing and able to prosecute. As a government spokesman put it, “We know the ICC’s main problem is the issue of impunity; we hope that once all agenda items are signed we will be able to go to them and present an argument that our agreement

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10. See TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY 62 (2006).
 11. HUMAN RIGHTS WATCH, ICC: INVESTIGATE ALL SIDES IN UGANDA 1 (2004).
 12. Evidence suggests that the decision to issue warrants increased the LRA’s subsequent willingness to negotiate with the UPDF for various reasons. See Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT’L L. 403, 416 (2005); Kasajja Phillip Apuuli, *The ICC Arrest Warrants for the Lord’s Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT’L CRIM. JUST. 179 (2006); Nick Grono & Adam O’Brien, *Justice in Conflict? The ICC and Peace Processes*, in COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 13, 15-16 (Nicholas Waddell & Phil Clark eds., 2008).
 13. Michael Wilkerson & Frank Nyakairu, *Museveni Offers Kony Amnesty*, MONITOR (Uganda), July 4, 2006, available at <http://allafrica.com/stories/200607040115.html>.
 14. Frank Nyakairu, *Uganda: Museveni Amnesty to Kony Illegal—ICC*, DAILY MONITOR (Uganda), July 6, 2006, available at <http://www.afrika.no/Detailed/12493.html>.
 15. Agreement on Accountability and Reconciliation, Uganda-Lord’s Resistance Army/Movement, at 6, June 29, 2007, available at http://www.beyondjuba.org/peace_agreements.php.

ensures that the commission of crimes in the conflict does not go unpunished.”¹⁶

The conflict between the ICC and the negotiating parties subsequently came to a head. On February 29, 2008, the Pre-Trial Chamber sent Museveni a letter asking how the agreement between the LRA and UPDF would affect the ICC warrants against Kony and his lieutenants. Then on March 5, Prosecutor Luis Moreno-Ocampo was reported to have reiterated that the ICC warrant must be executed.¹⁷ On March 11, Museveni announced that Kony would not go to the ICC and would instead be subject only to a “traditional judiciary process.”¹⁸ The negotiations ended when Kony failed to show up to sign the final agreement on April 9 after demanding clarification of the judicial arrangement, particularly which punishments he could face.¹⁹ He subsequently returned to fighting and is currently at large in the Congo.²⁰

It is impossible to know whether the Juba talks could have succeeded had the ICC gone along with Museveni’s plan. One general of the UPDF claims, for example, that the LRA was only stalling with the talks and was simultaneously committing violence against civilians and rebuilding its forces through abductions.²¹ Yet the LRA negotiators claimed as late as March 12 that “[i]f Museveni can put this in writing, black and white . . . that the warrants are not a problem anymore and that he asked the ICC to withdraw the warrants, Kony will sign the agreement.”²² Such a guarantee was, of course, never forthcoming. Museveni was thus forced to play an impossible double game—placating the ICC with assurances of trials and Kony with assurances of amnesty. Regardless of whether the negotiations could have succeeded, the role that the ICC played

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16. *Uganda: LRA Talks Reach Agreement on Accountability*, REUTERS, June 30, 2007, <http://www.alertnet.org/thenews/newsdesk/IRIN/a8b609fdd19c38270bdcdfoa43fe13a.htm>.
 17. *ICC Rejects Uganda Rebel Overture*, BBC NEWS, Mar. 5, 2008, <http://news.bbc.co.uk/2/hi/africa/7277577.stm>.
 18. Tendai Maphosa, *Museveni Says Uganda Rebels Will Not Face International Criminal Court*, GLOBALSECURITY.ORG, Mar. 11, 2008, available at <http://www.globalsecurity.org/military/library/news/2008/03/mil-080311-voa07.htm>.
 19. Milton Olupot, *Uganda: Rebel Chief Refuses To Sign Peace Deal*, NEW VISION (Uganda), Apr. 10, 2008, available at <http://allafrica.com/stories/200804110001.html>.
 20. See Jack Kimball, *Ugandan Troops Begin Congo Pull-Out*, REUTERS, Mar. 16, 2009, <http://reuters.com/article/idUSLG275929>.
 21. Frank Mugabi, *Uganda: Army Ready To Attack LRA Rebels*, NEW VISION (Uganda), June 15, 2008, available at <http://allafrica.com/stories/200806160001.html>.
 22. Alfred Wasike & Raymond Baguma, *Uganda: Museveni Remarks Excite LRA Rebels*, NEW VISION (Uganda), Mar. 12, 2008, available at <http://allafrica.com/stories/200803130020.html>.

in the saga is deeply troubling. The ICC maintained that any effort to reach peace with the LRA violated Uganda's obligations under the Rome Statute and that the only solution for Museveni was to continue fighting until Kony was either killed or sent to The Hague.

II. THE EX ANTE/EX POST PROBLEM: WEIGHING DETERRENCE AGAINST CONFLICT

The failure of the Juba peace negotiations raises a major question of institutional design about the Rome Statute: to what extent do we want actors in the ICC to be able to suspend cases to help bring about peace agreements? This is a classic *ex ante/ex post* problem.²³ If the ICC lacks discretion to suspend a case, then, *ex ante*, it will more effectively deter aspiring war criminals who will understand that they cannot negotiate away the threat of being imprisoned in The Hague. *Ex post*, however, a rule of no discretion forces the ICC to prosecute war criminals even in cases where doing so causes more harm, such as when a defendant credibly promises to stop fighting in exchange for amnesty. The question of which rule the ICC should choose thus turns on three empirical questions about how criminals respond to ICC indictments: (1) How strong a deterrent is the threat of ICC prosecutions to people considering becoming war criminals? (2) How much of that deterrent value is lost by allowing war criminals to negotiate for amnesty? (3) How badly does the fear of a future prison sentence in The Hague disrupt peace negotiations?²⁴ If, as this Comment argues, the ICC is a weak deterrent, little is lost by letting criminals negotiate for amnesty, and if the fear of a future prison sentence disrupts peace negotiations, the case is strong for increasing prosecutorial discretion.

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23. See generally WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 3 (2007) (describing the tension between using the law to set *ex ante* incentives and using the law to do justice to the parties *ex post*). The ICC is arguably the first international court to face these issues. The Nuremberg and Tokyo Tribunals, as well as the various *ad hoc* tribunals of the 1990s, were entirely *ex post* affairs—they were constituted after fighting ended to mete out justice to the losers. As a permanent body, the ICC must consider how actors will respond to its signals before a conflict ends.
24. Deontologists might add a fourth question: is there a moral imperative to attempt to bring war criminals to justice regardless of the positive or negative consequences? This Comment assumes without argument that such deontological imperatives are trumped by consequentialist imperatives when considering what actions the ICC should take.

The youth and singularity of the ICC, and the attendant scarcity of data on its direct effects, render these inquiries largely speculative.²⁵ This is especially so because the deterrent value of the ICC will be heavily dependent on it achieving successful, high-profile convictions, which it has not yet done. It is worth noting however that some scholars have used quantitative methods to attempt to shed light on the deterrent value of the ICC. Michael Gilligan has constructed a game theoretic model to show that even without enforcement, the ICC may marginally deter atrocities by reducing the credibility of offers of asylum.²⁶ Julian Ku and Jide Nzelibe, meanwhile, have used data on the fates of failed coup plotters in Africa to demonstrate that the risks inherent in committing atrocities are already so high (death, etc.) that fear of international prosecution would be a marginal consideration.²⁷

Additional arguments against the ICC's deterrent value stem from simple qualitative analysis: the ICC has thus far issued public warrants for only thirteen people, has captured five of those, and has not yet convicted any.²⁸ It depends on states parties to execute its warrants, and it cannot impose the

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25. See James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1 (2009) (surveying the empirical literature and noting the impossibility of empirically measuring the ICC's deterrent impact).
 26. Michael J. Gilligan, *Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime*, 60 INT'L ORG. 935, 942-46 (2006).
 27. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006). While their argument rests on the debatable assumption that failed coup plotters are a good proxy for ICC targets, the central insight is convincing: a life sentence in The Hague is probably low on the list of terrible outcomes for warlords like Kony.
 28. See International Criminal Court—All Cases, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases> (last visited Nov. 28, 2009). Of the five captured suspects, one appeared voluntarily (Bahr Idriss Abu Garda), Prosecutor v. Garda, Case No. ICC-02/05-02/09, Case Information Sheet (Feb. 8, 2010), one was arrested while on vacation in Europe (Jean-Pierre Bemba Gombo), Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Case Information Sheet (Mar. 12, 2010), two had already been arrested and held by Congolese authorities when their indictments were issued (Thomas Lubanga Dyilo and Germain Katanga), Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Case Information Sheet (Nov. 25, 2009); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Case Information Sheet (Sept. 16, 2009), and one was arrested after having given up fighting as part of a peace agreement (Mathieu Ngudjolo Chui), IBA Human Rights Institute, Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_DRC_Kat_Chui.aspx (last visited Mar. 22, 2010). A rational warlord might look at these cases and conclude that the safest course of action is not going on vacation, not accepting peace agreements, and not being captured, rather than not committing war crimes.

death penalty.²⁹ Even if the ICC had already achieved several high-profile convictions, it seems unlikely that guerrilla warlords who operate in rural Africa, such as Kony, would have heard of the ICC before being indicted by it. Finally, even in the context of normal crimes prosecuted by domestic criminal justice systems that present a more credible threat of capture, there is strong evidence that prison sentences fail to deter.³⁰ Prosecution by the ICC thus seems like a fairly remote concern for somebody considering committing war crimes, especially when weighed against the immediate motives for those war crimes.³¹ On the other hand, amnesty agreements and truth and reconciliation commissions that immunize war criminals from prosecution have helped end many violent conflicts throughout the world, and especially in Africa.³² It therefore seems unwise to trade the possibility of peace through amnesty for the benefits of such a speculative deterrent.

III. PEACE THROUGH COMPLEMENTARITY

Given the weak evidence for ex ante deterrence and the strong case for allowing ex post peace deals, the Rome Statute should be amended to give the prosecutor and the Pre-Trial Chamber wider discretion to suspend a case. In the past few years, a number of scholars have raised this very issue in the context of the failure of the Juba negotiations. Some of these have focused on the power of the prosecutor to prevent a case from going forward under Article 53³³ if it is “not in the interests of justice,” arguing that this should be read to include cases that would undermine peace agreements.³⁴ Unfortunately, this solution happens at the wrong stage—in Uganda, the ICC prosecution had already been initiated and the warrants issued when peace negotiations began.

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29. Rome Statute, *supra* note 2, art. 59 (describing arrest proceedings in custodial states); *id.* art. 77 (describing penalties, which are limited to prison terms, fines, and forfeitures of property).
 30. See, e.g., David S. Lee & Justin McCrary, *Crime, Punishment, and Myopia* (Nat'l Bureau of Econ. Research, Working Paper No. 11491, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=762770 (showing that the likelihood of a person committing a crime does not decrease when he or she turns eighteen, despite the fact that the likelihood of incarceration increases).
 31. See ALLEN, *supra* note 10, at 64-65 (describing the strategic advantages of the LRA's practice of abducting children as soldiers and forcing them to murder their families).
 32. See Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SEC., Winter 2004, at 1, 5.
 33. Rome Statute, *supra* note 2, art. 53.
 34. See Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 832 (2006).

Others have argued that the Pre-Trial Chamber should interpret Article 17's complementarity exception to apply to nonjudicial proceedings, such as truth and reconciliation commissions.³⁵ This would allow states parties like Uganda to offer effective amnesty to their enemies while getting the ICC off their backs in a legal, procedurally clear way. Unfortunately, this solution runs up against the text of the statute. The complementary proceeding exception of Article 17 does not apply if the Pre-Trial Chamber determines a state is "unwilling or unable genuinely to prosecute."³⁶ That determination is made according to three factors enumerated in Article 17: whether the proceedings are intended to shield the suspect from prosecution, whether there has been an unjustified delay in the proceedings, and whether they are being conducted independently and impartially.³⁷ Under this rubric, Museveni's plan in the Juba negotiations would almost certainly fail, as its purpose was quite explicitly to shield Kony from the ICC.³⁸ Indeed, the ICC Pre-Trial Chamber held as much in an opinion issued nearly a year after the peace negotiations broke down, noting "the paramount criterion for determining the admissibility of a case is the existence of a genuine investigation and prosecution at the national level."³⁹

Instead, the states parties should amend Article 19 so that, in the context of peace negotiations, states with relevant jurisdiction can initiate complementary proceedings that are legislatively guaranteed to give light or suspended

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35. See, e.g., William W. Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, 7 J. INT'L CRIM. JUST. 257 (2009); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695 (2005). Other scholars have argued for solutions that involve general prosecutorial discretion or the substitution of nonretributive justice mechanisms. See, e.g., Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583 (2007); Louise Parrott, *The Role of the International Criminal Court in Uganda: Ensuring that the Pursuit of Justice Does Not Come at the Price of Peace*, 1 AUSTL. J. PEACE STUD. 8 (2006). Still other authors have argued that the ICC should recognize amnesty agreements only in particular circumstances. See, e.g., Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 320-26 (2007) (advocating a multifactor balancing test to determine when amnesties are acceptable).
36. Rome Statute, *supra* note 2, art. 17.
37. *Id.*
38. See Burke-White & Kaplan, *supra* note 35, at 271 (stating that the Ugandan government "must reform the Amnesty Act so as, at the very least, to exclude ICC indictees from amnesty").
39. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision on the Admissibility of the Case Under Article 19(1) of the Statute, ¶ 36 (Mar. 10, 2009).

sentences, or that come with the promise of an administrative pardon. In doing so they should add something like the following subsection:

12. If a State which has jurisdiction challenges a case's admissibility under paragraph 2(b), the Pre-Trial Chamber or Trial Chamber shall ignore questions of sentence severity and promises of administrative pardons for purposes of determining jurisdiction under 17(2)(a) and 20(3)(a), if it determines that a. the suspect in question is willing to submit themselves to the State's jurisdiction but not that of the ICC, and b. efforts to bring the suspect into ICC jurisdiction would risk violence and jeopardize peace.

This solution imposes legal process while still letting a state give the criminals what they most want—the ability to avoid a long jail term—and thus a bigger incentive to stop fighting. Under Article 17, the complementary proceeding must still be independent, impartial, institutionally competent, not unduly delayed, and intended to bring the suspect to justice. If it fails to meet these criteria, the prosecutor can file a motion to restore the ICC's jurisdiction. Further, there will be no problem of multiple failed attempts: under Article 19, a state party can move to take jurisdiction from the ICC only once.

It might be argued that the requirement of a complementary proceeding in this proposed solution, even one without any serious punishment, is too risky—better to allow conditionless amnesty deals than force a formal trial-like process on the parties. One clear downside of conditionless amnesties is that they allow suspects to evade prosecution through bad faith negotiations and then return to fighting. The solution proposed here provides an additional benefit over conditionless amnesty: it may actually improve the negotiating position of states seeking peace by giving them a limited but statutorily credible window to grant amnesty, which the suspects must take or risk prosecution. If a suspect is worried about being captured, the conditions attached to suspension of an ICC prosecution could allow a state to press for better terms (for example, public apologies or even prison sentences) with the argument that the peace agreement must be sufficiently credible to placate the ICC's Pre-Trial Chamber.⁴⁰

40. It is conceivable, for example, that war criminals could see being moved to The Hague as a worse punishment than imprisonment in their home country. To take one example, the terrorist and drug lord Pablo Escobar repeatedly attempted to negotiate to be sent to jail in Colombia (first building his own prison in Medellín, then offering to go to a normal prison in Bogotá) in exchange for not being extradited to face trial in the United States. See MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD'S GREATEST OUTLAW* (2001).

It might also be argued that, given the bleak view of the ICC's deterrent value articulated in Part II, this solution is inferior to forcing the ICC to operate in secret until its suspects are captured or to simply abolishing the ICC altogether. Admittedly, amending Article 19 in the way proposed here may fail to secure peace in situations where the suspect is unwilling to submit to a national proceeding even with the guarantee of a light or suspended sentence or where a suspect does not trust the national tribunal to proceed effectively and thus believes the tribunal's jurisdiction will be stripped by the ICC. While these more extreme solutions might therefore encourage amnesty-based peace deals more effectively than the solution proposed here, they would eliminate a major benefit of the ICC: it politically isolates its targets. Many observers believe that the ICC warrants motivated the LRA leadership to negotiate for peace in the first place.⁴¹ Similarly, international warrants politically undermined dictators Slobodan Milosevic and Charles Taylor,⁴² and the threat of embarrassment from an ICC investigation may have helped prompt the recent split between warlord Laurent Nkunda and the government of Rwanda.⁴³ By keeping the ICC's warrants public, the referring parties can continue to use the ICC to undermine war criminals and even to drive them to the negotiating table. Indeed, with the reform proposed here, the ICC may well become a tool not only for holding war criminals accountable, but also for bringing conflicts to an end.

CONCLUSION

The 2010 ICC review conference provides an opportunity to reflect on the moral consequences of levying the machinery of international law against warlords who retain the power to fight. The Preamble to the Rome Statute affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished." Yet retribution cannot be the only goal of international criminal law. In the Uganda case, and more recently

41. Specifically, the warrants caused the LRA's Sudanese allies to withdraw their support, which motivated Kony to negotiate for peace. See Grono & O'Brien, *supra* note 12, at 15-16. Note that while such political isolation causes major problems for war criminals, it does not undermine the arguments provided in Part II against the ICC's ex ante deterrent value. Before the ICC takes interest in a suspect, the threat of such isolation is just as speculative as the threat of imprisonment in The Hague.

42. See PRISCILLA HAYNER, *NEGOTIATING PEACE IN LIBERIA: PRESERVING THE POSSIBILITY FOR JUSTICE* (2007).

43. See David Lewis, *SCENARIOS: Nkunda Arrest Boosts Risky Congo Peace Plan*, REUTERS, Jan. 23, 2009, http://www.reuters.com/article/homepageCrisis/idUSLN479797._CH_.2400.

in the Sudan case, the ICC has issued arrest warrants for men in charge of armies. If the ICC is to continue this practice, it should provide a robust process by which its cases can be suspended in the interests of peace, such as the one proposed in this Comment. In fighting humanity's monsters, we must not lose the chance to tame them.

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