



## **Sequencing the Administration of Justice to Enable the Pursuit of Peace**

Can the ICC play a role in complementing restorative justice?

Tim Murithi



**SEQUENCING THE ADMINISTRATION OF JUSTICE TO  
ENABLE THE PURSUIT OF PEACE: CAN THE ICC PLAY  
A ROLE IN COMPLEMENTING RESTORATIVE JUSTICE?**

IJR Policy Brief, No. 1, June 2010

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Published by the Institute for Justice and Reconciliation

Wynberg Mews, Ground Floor, House Vincent, 10 Brodie Road, Wynberg 7800, South Africa

[www.ijr.org.za](http://www.ijr.org.za)

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First Published 2010

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ISBN 978-1-920355-47-0

Produced by Compress.dsl

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## Introduction

The International Criminal Court (ICC) was established as a permanent independent institution with the mandate to exercise its jurisdiction over individuals who have orchestrated and implemented the most serious crimes of international concern including genocide, crimes against humanity and war crimes. The Rome Statute, which entered into force on 1 July 2002, is explicit on the role of the Court in exercising a criminal jurisdiction over perpetrators of these crimes. In the cases that the ICC is currently engaged in, the issue of prosecuting alleged perpetrators is problematic. More often than not individuals who have been subject to the jurisdiction of the Court are also key interlocutors in ongoing peace processes with all the complexities that this entails. Therefore, the ICC has become implicated in peacebuilding processes and has the potential to disrupt such initiatives if its interventions are not appropriately sequenced.

This Policy Brief will argue that there are a number of provisions within the Rome Statute which enable the ICC to sequence its interventions in a way that complements efforts to promote peace. Specifically, the Brief will assess the deferral role of the UN Security Council, the non-applicability of the statute of limitations and the Prosecutor's discretion to initiate an investigation. The Brief will argue that given the multiple dimensions of retributive and restorative justice, a case can be made for a delayed initiation of prosecution, by the ICC, in order to enable other domestic processes to lay the foundations for sustainable peace. The Brief will conclude with recommendations on how a review of the Rome Statute can enable the ICC to sequence its retributive justice interventions in order to complement restorative justice processes.

## Sequencing in transitional justice

The notion of justice remains an essentially contested concept.<sup>1</sup> In fact there are multiple dimensions to justice. Retributive justice seeks to ensure prosecution followed by punishment for crimes or atrocities committed.<sup>2</sup> Restorative justice strives to promote societal harmony through a quasi-judicial process of truth telling, acknowledgement, remorse, reparations, forgiveness, healing and reconciliation. Retributive or punitive justice is generally administered by a state-sanctioned legal institution or through the remit of international law. Restorative justice draws upon a range of mechanisms including truth commissions and other societal reconciliation institutions.

In both instances retributive and restorative justice have a central concern with

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- 1 Nick Grono and Adam O'Brien, 'Justice in Conflict? The ICC and Peace Processes', in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, (London: Royal African Society, 2008).
  - 2 Charles Villa-Vicencio and Erik Doxtader (eds), *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*, (Cape Town: Institute for Justice and Reconciliation, 2004).

preventing the impunity of perpetrators who have committed atrocities. Retributive justice however has a more direct impact on the condition of the perpetrators, because it summarily imposes a punitive sentence which is evident for all to witness. The impact of restorative justice is more elusive, as victims and perpetrators are often engaged in a series of face-to-face interactions designed to achieve the objectives highlighted above. The fact that the outcome of restorative justice processes are generally less dramatic than those of retributive justice means that their efficacy is generally more suspect and unquantifiable to external observers. However, we should not lose sight of the fact that both forms of justice address the issue of impunity. Impunity in this context is understood as the condition in which there has been no redress or reckoning of the past atrocities and injustices committed by a perpetrator. Retributive justice prevents the immediate impunity of the perpetrator of crime through punishment and serves as a warning for those who may be inclined to commit atrocities in the future. Restorative justice also addresses impunity by compelling the perpetrator to undergo a revelatory and confessional process of transformation, which means that he or she has not 'got away' with the crimes that they committed but rather atones for them.

The debate over whether either a retributive or restorative approach to justice should be deployed in the aftermath, or at the point of a conclusion, of a war has not been resolved definitively. Nor can this debate be resolved definitively, because the type of justice that might be appropriate in the context of one country cannot be transplanted to another. In this regard, there is a certain degree of context-specificity in the administration of justice. A combination of retributive and restorative processes of justice can be deployed to address the needs of a society in transition. Therefore, transitional justice can be understood as the legal and quasi-legal processes, mechanisms and institutions that are operationalised to address the reality of past crimes and lay the foundation for more equitable and just societies. In practice, transitional justice frameworks are put in place to enable a society to make a transition from a previously oppressive to a more open, pluralistic and democratic dispensation.

The sequence in which either retributive or restorative justice processes are initiated is also not a precise science. In the majority of cases, retributive and restorative justice processes might be instituted and operationalised simultaneously. In some instances failure of a government or a society to embrace a restorative approach to justice and reconciliation can require the establishment of an international retributive/punitive justice process. In other instances the demands of a restorative justice process – with its emphasis on truth telling and the collective psychological transformation of promoting forgiveness and reconciliation – means that efforts to administer punitive measures may need to be carefully sequenced so as not to disrupt these healing processes. It is often the case that individuals and leaders who have been accused of planning, financing, instigating and executing atrocities against citizens of another group, all in the name of civil war, can be investigated by the ICC if the respective country is a State Party to the ICC or if the issue is referred to the Court by the United Nations (UN) Security Council. It is often the case that these individuals and leaders are the very same people who are called upon to engage in a peace process that will lead to the signing of an agreement and ensure its implementation. Characteristically, most peace agreements will have provisions for peacebuilding and, within this process, a framework for promoting

restorative justice through the form of truth commissions as a means for promoting national reconciliation.

A punitive approach to justice cannot deal with the grievances that often underpin structural violence, identity conflict and the economic marginalisation of the majority of people in war-affected countries, and thus establish a sustainable basis for peace.<sup>3</sup> It will however prosecute key individuals who had the greatest responsibility for committing atrocities. Therefore, there is a need to adopt a strategy to ensure the sequencing of how a punitive approach is instituted in the context of transitional justice.

Sequencing in transitional justice requires the deliberate operationalisation of a coordinated retributive or restorative justice process in order to ensure that stability, and ultimately peace, is achieved in a given country-context. In the international justice fora, at least two camps have emerged: those that adopt a fundamentalist approach to prosecution; and those that advocate for a more gradual approach predicated on giving time for peacebuilding and reconciliation to take root. Prosecutorial justice is not a misguided school of thought and its intentions are noble in so far as they attempt to ensure that those who bear the greatest responsibility for war crimes, crimes against humanity and genocide are summarily brought to book. However, prosecutorial fundamentalism, like all other fundamentalisms, can be blighted and become subsumed by a narrow, legalistic desire to bring the accused to justice at all costs, including the undermining of the prospects for peace.

A more nuanced approach would suggest that there is a time and a place for prosecution and, in the context of a civil war, it may not always be immediately after the cessation of hostilities between the belligerent parties. At this point the tension within the country tends to be uncharacteristically high and any initiative to prosecute individuals and leaders is often seen as an attempt to deliberately continue the 'war by other means' by targeting the main protagonists. Effectively what is called for in these situations is a period of time in which the belligerents can pursue the promotion of peace. In such a situation the efforts to promote peace – including its restorative justice dimension – would have to be given precedence to the administration of punitive justice. This is with a view to laying the foundations for the stability of the society.

## Provisions in the Rome Statute that enable the sequencing of punitive justice

The mandate of the ICC is unambiguous, as stated in Article 1, in that it seeks to 'exercise its jurisdiction over persons for the most serious crimes of international concern'.<sup>4</sup> Article 5 lists these as: a) the crime of genocide; b) crimes against humanity; c) war crimes; and d) the crime of aggression.<sup>5</sup> The mandate of the Court is therefore to prosecute individuals who commit these crimes either acting alone or in concert with others. Therefore, in this sense, the function of the ICC is to mete out retributive or punitive justice. It views

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3 James Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia', *Journal of Peace Research*, 42(3), 271–289.

4 Rome Statute of the International Criminal Court (2002), art. 1.

5 *Ibid.*, art. 5(a)–(d).

atrocities of ‘international concern’ as requiring a process of redress, as the Preamble to the Rome Statute states, ‘to put an end to impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes’.<sup>6</sup> In effect, the ICC views itself as having a preventive and deterrent role through its rulings.<sup>7</sup>

Whilst the Preamble of the Rome Statute recognises ‘that such grave crimes threaten the peace, security and well-being of the world’,<sup>8</sup> it does not further elaborate how the Court will contribute towards advancing ‘peace’ in the broader sense beyond ensuring that the perpetrators of these crimes are punished. In fact, the Rome Statute does not engage with the issue of peace beyond making this point in the Preamble. This explains why the activities of the ICC have focused on exercising its criminal jurisdiction without engaging in the wider issue of how its actions contribute towards consolidating peace. In this regard, the Prosecutor of the ICC, Luis Moreno-Ocampo, has on several occasions intimated that his interest is not in the political aspects of a crisis. He has remained emphatic in arguing that his sole interest is to prosecute those who bear the greatest responsibility for crimes under the jurisdiction of the Court.

Suffice to say the ICC has no legal obligation whatsoever to sequence its actions in a way that complements efforts to promote restorative justice. Indeed, the Rome Statute does not directly engage with this issue of the complementarity of its actions to those of other peacebuilding process in the aftermath of a conflict. Furthermore, the Rome Statute does not explicitly articulate a definition of justice, but it does tacitly allude to the need for international justice to ‘put an end to impunity’ and redress the effects of ‘unimaginable atrocities that deeply shock the conscience of humanity’.<sup>9</sup> The Rome Statute does indicate that the ICC is ‘complementary to national criminal jurisdictions’,<sup>10</sup> but does not refer explicitly to other quasi-judicial mechanisms such as truth commissions. Therefore, there is scant guidance within the Rome Statute as to whether the ICC can complement and enable national restorative justice processes. In effect, there are no explicit provisions within the Rome Statute to provide an insight as to whether there should be the sequencing of the ICC’s criminal jurisdiction with the domestic efforts of truth commissions and other restorative justice processes. There are however a selection of stipulations within the Rome Statute which could provide a basis for enabling restorative justice processes to either take precedence or function in parallel with ICC interventions.

## Deferral of investigation or prosecution and the sequencing of justice

Specifically, with reference to the deferral of investigation or prosecution, Article 16 states that ‘no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under

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6 Ibid., preamble.

7 Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, vol.1, (Oxford: Oxford University Press, 2002).

8 Rome Statute of the International Criminal Court (2002), preamble.

9 Ibid., preamble.

10 Ibid., preamble.

Chapter VII of the Charter of the United Nations, has requested the Court to that effect'.<sup>11</sup>

Chapter VII is invoked by the Security Council to 'determine the existence of any threat to peace, breach of the peace, or act of aggression' and according to Article 39 of the Charter, it empowers the body to make recommendations or decide what measures should be taken to address the situation.<sup>12</sup> Article 40 however gives the Council the leeway 'to prevent an aggravation of the situation' by calling 'upon the parties concerned to comply with such provisional measures as it deems necessary or desirable'.<sup>13</sup> Articles 41 to 51 of Chapter VII go on to outline how the Security Council can invoke and impose a range of punitive economic and military sanctions upon a party in order to ensure the compliance with its decisions.

Article 16 of the Rome Statute implies that the initiation, or the threat of the initiation, of an ICC prosecution is part and parcel of the range of 'provisional measures' that the UN Security Council can call upon. The UN Charter however is not explicit on what these additional 'measures' might entail and therefore it is not beyond the realm of possibility for the Security Council to call for the operationalisation of a restorative justice process in order to redress a 'breach of peace'. In this regard, Chapter VII can be invoked and utilised to defer an ICC investigation or prosecution to allow a restorative justice process, which could include truth commissions. Article 16 also empowers the UN Security Council to request a renewal of the deferral for a further 12 months. This would enable a sequencing of the ICC's intervention to provide adequate time to consolidate a restorative justice process. However, the deliberate vagueness of Chapter VII of the UN Charter on the nature and range of provisional measures that can be adopted to resolve a breach of peace, can be addressed by amending Article 16 of the Rome Statute to enable the Security Council to request a deferral of investigation or prosecution in a resolution adopted under both Chapter VI and Chapter VII of the UN Charter.

Chapter VI of the Charter of the United Nations refers to the peaceable settlement of disputes. Specifically, Article 33 states that 'parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.<sup>14</sup> Article 33 makes reference to conciliation and other peaceful means under which the range of restorative justice processes are located. Therefore Chapter VI, and in particular Article 33, provides for a more multi-dimensional approach to dealing with crisis and atrocities. If Chapter VI were included in an amendment of Article 16 of the Rome Statute, it would provide the UN Security Council with the additional and optional discretion to request the Court to sequence its interventions after conciliation and other peaceful means have been given the opportunity to work. Article 36 of the UN Charter states that 'the Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment'.<sup>15</sup> This means that attempting to ensure international peace and security

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11 Rome Statute of the International Criminal Court (2002), art.16.

12 Charter of the United Nations, chapter VII, art. 40.

13 *Ibid.*, art. 39.

14 Charter of the United Nations, chapter VI, art.33.

15 *Ibid.*, art.36.

under Article 33 of Chapter VI of the UN Charter does not preclude at a later stage the invocation of Chapter VII and more robust, if necessary, punitive measures. The interplay between Chapter VI and Chapter VII of the UN Charter also provides insights into the value of sequencing interventions in order to effectively pursue the promotion of peace.

The framers of Article 16 of the Rome Statute included the reference to Chapter VII of the UN Charter because it is traditionally associated with the body's authority to impose punitive sanctions. As discussed above, the ICC's mandate is also squarely geared toward ensuring punitive or retributive justice, and therefore there is a natural complement between the actions of the UN in a resolution adopted under Chapter VII of its Charter as well as the overall ethos of the Rome Statute. However, when re-thinking and advocating for how the ICC can complement efforts to promote restorative justice, this would also require that the Rome Statute be revised in order to explicitly reflect this broader agenda.

The inclusion of a reference to Chapter VI of the UN Charter in Article 16 of the Rome Statute would not undermine the remit of the Court. It would in fact add value to the efficacy of the ICC, as it would explicitly acknowledge the complementary role that the Court can play through its interventions in promoting peace processes. Such an amendment to the Rome Statute would still ensure that impunity is addressed, albeit through other quasi-judicial restorative justice processes.

## **The statute of limitations and the sequencing of justice**

As far as the non-applicability of the statute of limitations is concerned, Article 29 states that 'the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'.<sup>16</sup> In effect, as far as the ICC is concerned, there is no time limit imposed upon the prosecution of individuals who commit atrocities and the most serious crimes of concern to the international community. This therefore provides an opening as to how ICC prosecutorial interventions can be sequenced with national efforts to promote restorative justice. Specifically, given the fact that there is in effect no time constraint on when the ICC can initiate, implement and conclude the prosecution of perpetrators, then there is scope for the Court to sequence its interventions in ways that enable other peacebuilding processes – such as the establishment and operationalisation of restorative justice processes – to take precedence. This would of course have to proceed on the assumption that there will be a national peacebuilding process in the aftermath of a conflict in which serious crimes of international concern were committed. The ICC would have to make an assessment and a judgment as to whether a particular country is genuinely engaged in a process geared towards national reconciliation. There are no standardised indicators of whether a national healing process is being pursued. However, through detailed and regular consultations with civil society, the ICC is in a position to get a relatively accurate picture of the sequence of events in a country in which it is considering to launch, or has already launched, an investigation. It is not beyond the realm of imagination for a country's political and business elite to institute what appears on the surface as a restorative justice process, replete with truth commissions and other healing paraphernalia, as a delaying tactic or a maneuver designed to perpetuate impunity and evade their responsibility for committing atrocities.

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16 Rome Statute of the International Criminal Court (2002), art.29.

The issue of how long the ICC should wait before instituting its own proceedings will always depend on the specific domestic and national context of the crisis it is addressing. In some cases national reconciliation process could be initiated immediately after a conflict or following the change of an authoritarian regime, and the Court would need to take into account the need to allow for the consolidation of these processes. If the Court were to institute an investigation into a particular case which targeted key individuals who were integral to a national reconciliation process, then these actions could easily undermine any efforts to lay the foundations for sustainable peace in the short to medium term. In some instances the potential intervention by the ICC could paradoxically trigger the operationalisation of a restorative justice process. However, such a sequence of events would expose the political elite as only having been motivated by a desire not to see some of their own colleagues end up in the docks of the ICC. Such situations would have to be closely monitored by the Court for attempts to sabotage or undermine genuine national reconciliation efforts.

## Sequencing and the interests of justice

Another stipulation within the Rome Statute which can provide a basis for sequencing retributive and restorative justice is outlined in Article 53(1)(c), which states that the Prosecutor can decline to initiate a process if he or she determines that after 'taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.<sup>17</sup> As already indicated, the Rome Statute does not proffer a definition of justice beyond making reference to what it should be seeking to redress, namely impunity for serious crimes of international concern. Therefore, the reference to the 'interests of justice' in Article 53 of the Statute opens up the possibility for a broader interpretation of the notion of justice. Article 53 effectively gives the Prosecutor the discretion to decide on whether there are 'substantial reasons' not to initiate an investigation. Given the fact that the Rome Statute outlines a criminal jurisdiction, one could make a reasonable assumption that a reference is being made here to the interests of punitive or retributive justice. In addition, when we take into account the earlier part of Article 53(1)(c) and its reference to the 'interests of victims', then one could also make the case that other considerations to either protect victims or enable them to go through another quasi-judicial or reconciliation process, such as a truth commission, could equally inform the decision of the Prosecutor not to pursue a prosecution.

In September 2007, the Office of the Prosecutor issued a Policy Paper on the Interests of Justice, in which it noted that 'the Statute itself does not try to elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue'.<sup>18</sup> The Policy Paper concedes that 'the approach taken by the Office of the Prosecutor is therefore bound to offer only limited clarification' on this issue of the interests of justice. The Prosecutor's Policy Paper attempts to downplay the role of

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<sup>17</sup> Ibid., art.53(1)(c).

<sup>18</sup> Office of the Prosecutor, *Policy Paper on the Interests of Justice*, (Hague: International Criminal Court, September 2007), p.1.

the ICC in peacebuilding by stating ‘that there is a difference between the concepts of the interest of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor’.<sup>19</sup> However, the Policy Paper, effectively reverses this assertion by acknowledging that the ICC has an impact on a peace process when it accepts that ‘with the entry into force of the Rome Statute, a new legal framework has emerged and this framework necessarily impacts on conflict management efforts’.<sup>20</sup> This is perhaps the clearest recognition by the Office of the Prosecutor that its actions could potentially have either a positive or adverse effect on peacebuilding processes. In some respects, it is impossible to avoid this conclusion when one considers what has transpired in the situations currently under investigation by the ICC. Indeed, the Prosecutor’s Policy Paper goes one step further and recognises that it may have to in fact sequence some of its interventions in a complementary manner when it concedes that ‘in relation to other forms of justice decided at the local level, the Office of the Prosecutor reiterates the need to integrate different approaches. All approaches can be complementary’.<sup>21</sup> In effect, the Office of the Prosecutor is accepting that ‘the pursuit of criminal justice provides one part of the necessary response to serious crimes of international concern’.<sup>22</sup> The Policy Paper even makes a tacit argument for sequencing when it concludes that the Office of the Prosecutor ‘fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of broader justice’.<sup>23</sup>

There is a fail-safe mechanism in Article 53 because if the Prosecutor determines that he would not proceed with an investigation or prosecution in the interests of justice, he or she has to inform the Pre-Trial Chamber. Through Article 53(3)(b), the Pre-Trial Chamber can on its own initiative review the decision of the Prosecutor if he or she decided that there was no reasonable basis to initiate an investigation or prosecution because it would not ‘serve the interests of justice’. Furthermore, according to Article 53(4), the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts and information, so this does not preclude the ICC from subsequently taking action at a later stage.

## The ICC and the sequencing of justice in Africa

The ICC has become a key actor in the transitional justice processes of four African countries, namely the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Sudan and Uganda. On 31 March 2010, Pre-Trial Chamber II granted the Prosecutor the authorisation to open an investigation *proprio motu* into the situation in Kenya, following the post-electoral violence of 2007 and 2008. The value of sequencing will be briefly discussed with reference to Sudan and Uganda.

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19 *Ibid.*, p.1.

20 *Ibid.*, p.4.

21 *Ibid.*, p.7.

22 *Ibid.*, p.7.

23 *Ibid.*, p.8.

## Sudan's Darfur Region

In the situation in Darfur, Sudan, three cases have been initiated: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*; *The Prosecutor v. Omar Al Bashir*; and *The Prosecutor v. Bahar Idriss Abu Garda*. The ICC Pre-Trial Chamber I has issued three arrest warrants for Harun, Kushayb and Al Bashir for crimes against humanity and war crimes. Meeting shortly after the ICC's decision, the African Union Peace and Security Council (PSC) issued a communiqué, PSC/PR/COMM(CLXXV) on 5 March 2009, which lamented that this decision came at a critical juncture in the ongoing process to promote lasting peace in Sudan.<sup>24</sup> Additionally, through its communiqué of 5 March 2009, the PSC requested the UN Security Council to exercise its powers under Article 16 of the Rome Statute to defer the processes initiated by the ICC to give peace a chance. The PSC subsequently expressed its regret over the UN Security Council's failure to exercise its powers of deferral and effectively postpone any ICC action. Consequently, on 3 July 2009 at the Thirteenth Annual Summit of the Assembly of Heads of State and Government held in Sirte, Libya, the African Union (AU) decided not to cooperate with the ICC in facilitating the arrest of Al Bashir. However, this was not a unanimous position and some countries expressed their reservations. Chad entered a reservation on the AU decision, and Botswana publicly stated its disagreement with this decision. South Africa subsequently indicated that its legal obligations as a State Party to the Rome Statute did not permit it to subscribe to the AU's decision.

The AU is in effect advancing an argument for sequencing with respect to Al Bashir's case. There are undoubtedly political reasons for such a request since the arrest and arraignment of a sitting head of state in Africa could set a precedent for a significant number of other leaders on the continent, who could potentially be subject to the criminal jurisdiction of the ICC for their own actions. Therefore, rallying behind Al Bashir, who was re-elected as the president of Sudan in April 2010, could not only be construed as a face-saving exercise but one that seeks to prevent the ICC from having such a remit in the administration of international justice on the continent. However, the AU also makes the point that Sudan finds itself at a critical juncture of its peacemaking process in Darfur and is also engaged with a peacebuilding process in the south, and in both instances Al Bashir is the key interlocutor with the armed militia and political parties. This argument clearly cannot be wished away or ignored. Sudan has not yet even begun to initiate a reconciliation process, even though the AU High Level Panel on Darfur (AUPD), also known as the Mbeki Panel, has recommended the establishment of a restorative justice process, including the creation of a Truth Justice and Reconciliation Commission and the use of hybrid courts to prosecute individuals who have committed atrocities, in its report entitled *Darfur: The Quest for Peace, Justice and Reconciliation*.

The situation in Darfur does not offer any easy answers to the question of sequencing the intervention of retributive and restorative justice, but rather problematises the issue further. Whereas prosecutorial fundamentalists would prefer to see Al Bashir in the ICC docks, there is less clarity – and perhaps concern – on their part as to how this would impact upon peacemaking in Darfur, currently being conducted by mediators in Doha,

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24 African Union Peace and Security Council, Statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir, PSC/PR/Comm.(CLXXV), 5 March 2009.

Qatar. The fact that Al Bashir has now been re-elected as the president of Sudan also raises a conundrum for those engaged in peacebuilding and efforts to promote national reconciliation. The Prosecutor of the ICC has so far received non-compliance from the Sudanese government with regards to his arrest warrant, and even other African countries have declined to arrest Al Bashir and others cited in the warrants. In this case, the prosecution is being delayed not because of the decision and discretion of the Court, but because of the non-compliance of the international community in seeing through its request.<sup>25</sup>

### *Uganda*

In the situation in Uganda, the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard before Pre-Trial Chamber II. In this case, warrants of arrest have been issued against these four leading members of the Lords Resistance Army (LRA), which is engaged in a conflict with the Ugandan government. The ICC intervention in Uganda has also generated a degree of controversy given the fact that local community leaders have voiced a preference for pursuing peace with the LRA, rather than inviting a potential backlash from the movement which would further undermine their well-being.<sup>26</sup> The ICC's investigation and plan for prosecution means that the key interlocutors on the LRA side are subject to arrest. While this could serve the interests of retributive justice for all the atrocities that they have allegedly committed, it would not chart a course for how peacebuilding, healing and reconciliation could be consolidated in the war-affected region of northern Uganda. In keeping with its criminal jurisdiction mandate, the ICC has not issued any recognition of the ongoing peace process in Uganda, nor is it required to do so. This, notwithstanding the fact that the ICC, through the authority vested in the Prosecutor by Article 53, could have sequenced the quest for punitive justice in Uganda in order to provide a basis for laying the foundations for peacebuilding through restorative justice processes.

## **The perceived politicisation of the ICC and the merits of sequencing**

William Schabas has argued that the ICC has 'moved into dangerous political territory by jeopardizing its base of support among the African States' in the specific case of the arrest warrants issued with reference to Darfur.<sup>27</sup> Schabas is identifying a key concern that has begun to taint the supposedly well-intentioned interventions by the ICC, namely the notion that the Court is somehow politically motivated. The cases with respect to Darfur were referred to the ICC by the UN Security Council, which is effectively dominated both diplomatically and financially by its Permanent Five (P5) – China, France, Russia, the

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25 Alex de Waal, 'Darfur, the Court and Khartoum: The Politics of State Non-Cooperations', in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, (London: Royal African Society, 2008), p.31.

26 Chris McGreal, 'African Search for Peace Throws Court into Crisis: Uganda Fears First Crucial Test for Tribunal Could Prolong Brutal 20-year Civil War', *The Guardian*, 9 January 2007.

27 William Schabas, 'The International Criminal Court', in David Black and Paul Williams (eds), *The International Politics of Mass Atrocities: The Case of Darfur*, (London: Routledge, 2010), 134–153, p.149

United Kingdom and the United States.<sup>28</sup> Given the historical fact of the politicisation of the actions of the Security Council – not least its failure to act during the April 1994 Rwandan genocide – international observers and other countries have intimated that even this deferral was tainted by political imperatives. This would expose the ICC, which is supposed to be an independent Court, as a useful tool to achieve the Security Council’s objectives if it cannot fulfill them by other means. The UN Secretary-General, Ban Ki-Moon, speaking on the sidelines of the Fourteenth AU Summit convened in Addis Ababa on 31 January 2010, stated that ‘the prosecutions of the ICC are not dictated by political considerations. The Court is composed of independent jurists who do not receive orders from any government’. The fact that Ki-Moon had to issue such a statement is evidence of the fact that there is a perceived politicisation of the actions and interventions of the ICC. This entrenched perception has to be addressed.

Schabas argues that ‘it is fine for the Court to provide a service to the Security Council, but it must understand that when it does so, it becomes necessarily subservient to political imperatives’.<sup>29</sup> This need for understanding on the part of the Court can be extended to the issue of sequencing. The ICC needs to recognise the merits of sequencing and establish the necessary modalities to operationalise its interventions in a way that can complement efforts to promote restorative justice. This suggests that an attitudinal change might be necessary. A purely prosecutorial fundamentalism can cause more harm than good, but the opposite is also true, in the sense that an allergy towards prosecution can prevent serious atrocities from being addressed, which would impact upon achieving sustainable peace in the future. A happy medium needs to be found. A more nuanced approach to instituting cases is required, based on an assessment of what is in the interests of justice and what sort of justice should be pursued at what juncture. The sequencing of retributive and restorative justice would thus contribute towards the overall goal stated in the Preamble of the Rome Statute to ensure the peace, security and well-being of the world.

## Policy recommendations

In terms of specific policy recommendations:

- 1) Article 16 can be amended to include a reference to enabling the UN Security Council to adopt a resolution under Chapter VI of the UN Charter which provides for other efforts to address the issue of impunity, including conciliation and other peaceful means. If Article 16 included a reference to Chapter VI, then the retributive justice which would be meted out by the Court could be sequenced to enable restorative justice processes to impact upon the target society.
- 2) The Rome Statute can be reviewed to accommodate the provision of sequencing the administration of justice. With specific reference to Article 29 on the statute of limitations, there is no time limit for the ICC to act with respect to situations which fall under its jurisdiction. Therefore, the Prosecutor and the

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28 Matthew Happold, ‘Darfur, the Security Council and the International Criminal Court’, *International and Comparative Law Quarterly*, 55, 2006.

29 *Ibid.*, p.147.

Pre-Trial Chamber can deliberately sequence an investigation or prosecution of a particular case in order to enable restorative justice processes, including truth commissions, to lay the foundation for peace and reconciliation.

- 3) The Prosecutor should utilise his or her discretion under Article 53 to decide whether an investigation or prosecution is in the interests of justice. This discretion could be the basis for justifying a sequencing of the Court's intervention in a particular case, particularly if fragile peacebuilding processes are underway.
- 4) Article 10 stipulates that nothing in the Rome Statute 'shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law'.<sup>30</sup> Therefore, in the medium to long term, initiatives could be undertaken to further elaborate on the notions of justice in international law to include both retributive and restorative dimensions. This could also provide an international legal framework for the ICC to more effectively complement the efforts to promote restorative justice in countries in transition.

## Conclusion

The ICC is a court of last resort and not a court of first instance. Ideally, national criminal jurisdiction should take precedence in efforts to address impunity. This establishes the principle of complementarity between the ICC and national criminal jurisdictions. The idea being that domestic efforts to address impunity are preferable to international fora. However, when a State Party is unwilling or unable to operationalise such a national criminal jurisdiction, then the ICC has to step in. While this principle is clear and has been established with respect to retributive or punitive justice, the Rome Statute does not make any special provisions for restorative justice processes. This is clearly an omission that needs to be rectified given the highly volatile and politicised situations that the ICC has become involved in and may engage with in the future. The ICC's prosecutorial branch has even acknowledged this emerging reality in the Policy Paper on the Interests of Justice, issued by the Office of the Prosecutor in September 2007, which 'fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of broader justice'. Therefore, the merits of sequencing should be informed by an understanding that there can be a constructive relationship between administering punitive sanctions and pursuing inclusive peace.

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30 Rome Statute of the International Criminal Court (2002), art.10.

# IJR Policy Brief, No. 1, June 2010

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The Institute for Justice and Reconciliation contributes to the building of fair, democratic and inclusive societies in Africa before, during and after political transition.

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The Institute promotes its main vision through the following key areas of work:

- Research and analysis of economic, social and political trends prevalent during political transition
- Reconciliation and reconstruction in post-conflict communities through capacity building and partnerships
- Context-sensitive education resources, tools and interventions to foster reconciliation through teaching
- Stimulation of public dialogue and policy intervention to build fair, democratic and inclusive societies.

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