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The UN Security Council: 10 Lessons from Iraq on Regulation and Accountability[1]

DAVID MALONE[*] AND JAMES COCKAYNE[**]

The UN Security Council sits at the apex of the institutional architecture designed to maintain international peace and security. Since the onset of the post-Cold War era, it has experimented with new objectives and instruments, generating vastly increased field activity by the UN and other international actors in support of Council mandates. No single country has burdened it with more difficult choices or more bitter outcomes than Iraq. The deadlock in the UN Security Council over Iraq policy in March 2003, followed by revelations of corruption and mismanagement in the UN's Iraq Oil-for-Food (OFF) Program, provide an opportunity to draw some lessons from the Council's broader experiences in Iraq, with a view to informing broader debates about coherence, accountability and responsibility within the UN.

In the past twenty-five years, when Iraq has been constantly on the Council's agenda (starting with the Iran-Iraq war), the Council has designed responses in two distinct directions: the politico-military approach and the legal-regulatory approach. These two approaches to managing peace and security provide the key to understanding many of the complexities facing the Council today. The Council's current predicament regarding Iraq results from problematic improvisation in mixing these two modes of security management; but at the same time, its experiences in Iraq may offer lessons enabling the Council–and the broader UN system–to become a more effective regulator of international peace and security.

When adopting a *politico-military* approach, the Council acts as a crisis manager and mediator: typically it authorizes a strategic approach to the resolution of an existing threat to international peace and security. This is a reactive management style. The Council typically designates actors (the Secretary-General or his agents, regional organizations, and member states) to whom it affords extensive discretion in the interpretation and implementation of a specified mandate. Political-military implementation generally involves embargoes, peace negotiations, and the observation and monitoring, and occasionally military enforcement, of peace settlements. Examples of the Council taking action in this mode in Iraq include its approach to the Iran-Iraq War after 1987 (resulting in a cease-fire and the eventual end of hostilities), the authorization in 1990 of a Coalition to respond with force to Iraq's invasion

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[1] This article draws on David Malone, *The International struggle over Iraq: Politics in the UN Security Council, 1980-2005* (Oxford University Press: 2006). We thank Ben Rowswell, the anonymous reviewers and the editors of the JILIR for their helpful comments. The views expressed here are ours alone.

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of Kuwait, and more recently, the political aspects of the UN Assistance Mission to Iraq following the 2003 invasion.

In the *legal-regulatory* approach, the Council acts more as a proactive risk manager than as a reactive crisis manager, sometimes even taking on the role of arbitrator or jury. Typically, the Council establishes detailed rules governing the behaviour of States, individuals, or other entities, then relies on a wide range of administrative agents to implement and to enforce the rules. The agents can include managers of programs created by the Council, States, specially-formed subsidiary bodies (such as investigative commissions, judicial tribunals and sanctions committees), UN agencies and programs such as the World Food Program or the International Atomic Energy Agency (IAEA), and even other organizations like the International Criminal Court (ICC). Activities typically involve fact-finding efforts, impositions of sanctions, and domestic regulation of prohibited transfers of goods, funds and persons. Examples of the Council acting in this mode in Iraq abound: the establishment of two weapons inspection commissions (UNSCOM, UNMOVIC), a complex sanctions regime, the OFF Program and the UN Compensation Commission (which reallocated US$52.5 billion from Iraqi oil revenues to those harmed by Iraq's invasion of Kuwait over the years 1991-2005[2]).

During the Cold War, strategic and political realities seriously constrained the Council's freedom to manoeuvre. Council action was limited to the politico-military approach, because superpower rivalries prevented both the development of coherent and reasonably consistent rule-making in the Council and the development of the regulatory machinery necessary to enforce those rules. A sense of strategic coherence and apparent unity that emerged in the Council at the Cold War's end offered the basis for a more ambitious approach throughout the 1990s, beginning with the Council's experiments in Iraq. Drawing heavily on the powers provided to it under Chapter VII of the Charter, the Council established and underwrote a widening array of administrative and regulatory instruments to implement evolving norms, from the international criminal tribunals for the former Yugoslavia and Rwanda, to the committees overseeing counter-terrorism and non-proliferation efforts established in Resolutions 1373 and 1540 respectively.

The Council's regulatory approach to Iraq met with mixed success at best, despite the decline of the Cold War impasse: Iraq was effectively deprived of weapons of mass destruction (WMD), and UN agencies kept millions of Iraqis alive through OFF, which, as Kofi Annan noted, was "one of the largest, most complex and most unusual tasks [the Security Council] has ever entrusted to the Secretariat – the only humanitarian program ever to have been

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[2] See United Nations Compensation Commission, "The UNCC at a glance", online <http://www2.unog.ch/uncc/ataglance.htm>.

funded entirely from resources belonging to the nation it was designed to help".[3] At the same time, however, Iraqi living-standards were massively depressed, generating strong international concern, a fracturing of the Security Council's unity on Iraq policy and arguably a deep pool of resentment towards the Council–and especially the US and the UK–within the region.

The Council's failure to understand the distinct challenges inherent in the legal-regulatory approach led it to establish weak management frameworks, creating the conditions for the OFF scandal and many other problems. In this article, we address the Council's unsatisfactory sanctions oversight in the next section. Then, we demonstrate how the Council's approach to weapons inspection in Iraq relied on similar legal-regulatory methods with findings (however accurate) that ultimately did not satisfy the political and security requirements of the US and UK. We then seek to draw lessons from these failures, which may be of utility as the Council moves forward–given the likelihood that the Council will rely increasingly on a legal-regulatory approach to deal with contemporary security threats. Some of these ideas are relevant to broader contemporary efforts to achieve meaningful reform of the UN.

I THE IRAQI SANCTIONS EXPERIENCE

Administering Sanctions

The Security Council's response to the war between Iraq and Iran in the 1980s followed its classical politico-military pattern of crisis management. It set out to broker a solution to the crisis through diplomatic intervention, involving a great deal of mediation of differences between Iraq and Iran on the path to settlement. But as Operation Desert Storm, designed to reverse Iraq's annexation of Kuwait, drew to a close in 1991, the Security Council set off on a new tack through Security Council Resolution (SCR) 687, designed to prevent Iraqi military capacity from causing future crises. The twin pillars of this approach were weapons inspections and strict economic sanctions designed to provide the inspections with teeth. Each limb of this strategy was implemented through the delegation of complex administrative activities to a range of agents, charged with ensuring Iraqi conduct did not breach standards laid down by the Council.

Economic sanctions were first imposed on Iraq under SCR 661, on 6 August 1990, as a response to the Iraqi invasion of Kuwait.[4] Following the ceasefire, the sanctions were left in place to ensure Iraqi compliance with the terms of

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[3] "On eve of its expiry, Annan hails 'unprecedented' Iraq Oil-for-Food program" *UN News Centre* (20 November 2003), online: United Nations News Service <http://www.un.org/News/>.

[4] *On Sanctions Against Iraq*, SC Res. 661, UN SCOR, 45th Sess., S/RES/661(1990).

SCR 687.[5] SCR 661 prohibited states from importing all commodities originating in Iraq, and any activities relating to export or trans-shipment of any commodities or products to Iraq (except for medical supplies and, in humanitarian circumstances, foodstuffs).[6] This regime exacerbated the humanitarian crisis which confronted Iraq after Operation Desert Storm, described by one UN official as "near-apocalyptic".[7] The Secretary-General's Executive Delegate for Iraq proposed a "mechanism whereby Iraq's own resources be used to fund" its humanitarian needs.[8] In SCR 706, adopted on 15 August 1991, the Council established an elaborate "oil-for-food" program, which allowed Iraq to export a quota of oil and to use the resulting export revenues to purchase humanitarian supplies, all under the controlling eye of the UN.[9] In creating this OFF Program, the Council decided to control a sovereign state's revenues and direct its expenditures–not only to the benefit of its own population, but also for payment of costs incurred by the UN in the destruction of Iraqi arms, to compensate victims of Iraqi military action, and to fund the Iraq-Kuwait boundary settlement process.[10]

Not surprisingly, Iraq at first refused to cooperate with this system of international financial regulation. By 1995, a humanitarian crisis in Iraq had fuelled significant worldwide opposition to the continuation of sanctions. In March 1995, Russia, France and China circulated a draft SCR that, if passed, would have lifted sanctions on Iraq.[11] While the US and UK would have vetoed any such resolution had it been brought to a vote, the need to address the concerns of their Council partners had been made clear. Thus, in April 1996, the Council passed SCR 986, providing a rare concession to Baghdad.[12] It allowed Iraq to deal directly with suppliers of goods, bringing draft contracts to the Security Council's 661 Sanctions Committee for approval, and gave Iraq the primary administrative responsibility for the distribution of humanitarian

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[5] See *On Restoration of the Sovereignty, Independence and Territorial Integrity of Kuwait*, SC Res. 687,46th Sess., S/RES/687(1991), Part F, at paras. 20-29.

[6] *Supra* note 3 at para. 3.

[7] See *Letter Dated 91/03/20 from the Secretary-General Addressed to the President of the Security Council*, UNOR S/22366, (1991), at para. 8.

[8] See *Letter Dated 91/07/15 from the Secretary-General Addressed to the President of the Security Council*, UNOR S/22799, (1991), Annex at para. 138.

[9] See also *Concerning the Release of Funds from the Escrow Account for the Purpose of Humanitarian Assistance to Iraq*, SC Res. 712, UN SCOR, 46th Sess., S/RES/712(1991).

[10] *Authorizing States to Permit the Import of Petroleum and Petroleum Products Originating in Iraq Sufficient to Produce a Sum to be Determined by the Council,* SC Res. 706, 46th Sess., S/RES/706(1991), at para. 3. See also O*n the Proceeds of Sales of Iraqi Petroleum and Petroleum Products* SC Res. 778, 47th Sess., S/RES/778(1992), at para. 5(c)(ii).

[11] Sarah Graham-Brown, *Sanctioning Saddam: The Politics of Intervention in Iraq* (London: I.B. Tauris, 1999), at 80.

[12] *On Authorization to Import, Temporarily, Petroleum and Petroleum Products Originating in Iraq, as a Temporary Measure to Provide for Humanitarian Needs of the Iraqi People*, SC Res. 986, 50th Sess., A/RES/986 (1995).

goods under the OFF formula, except in the north where distribution was administered by the UN Inter-Agency Humanitarian Program.

This allowed the operational launch of the OFF Program–the largest humanitarian relief program the UN had ever managed. [13] Over its lifetime, OFF handled $64 billion worth of Iraqi oil revenues, and served as the main source of sustenance for 60 percent of Iraq's estimated 27 million people, reducing malnutrition amongst Iraqi children by 50 percent.[14] Revenues from the sale of Iraqi petroleum were processed through an administrative arrangement between the Government of Iraq and the UN, and distributed according to a formula agreed upon by the Security Council. Assisted by independent experts, the 661 Committee had oversight responsibility for the approval of contracts under the OFF; but it failed to prevent the kickbacks and commissions that were, we now know, increasingly built into the draft contracts it approved. The final report of the Independent Inquiry Committee into the OFF Program under the leadership of former Chairman of the US Federal Reserve, Paul Volcker, detailed massive corporate corruption in pursuit of OFF contracts through Baghdad–139 out of 248 oil purchasers paid illicit surcharges, while 2,253 of the 3,614 companies that provided humanitarian goods paid kickbacks of various sorts.[15]

The US and UK attempted to exert some control over these contracts through the 661 Committee, but not very effectively.[16] By allowing Hussein's regime to exercise daily administrative control over the formation and performance of contracts, the OFF became, in Paul Volcker's words, "a compact

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[13] For brief introductions to the OFF Program *see* Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Briefing Paper* (21 October 2004), online: Independent Inquiry Committee <www.iic-offp.org/documents/Briefing%20Paper21October04.pdf>; *and see* Kenneth Katzmann, Congressional Research Service, *Iraq: Oil-For-Food Program, International Sanctions, and Illicit Trade* (16 April 2003), online: Foreign Press Centres <http://fpc.state.gov/documents/organization/19851.pdf>.

[14] Oil-For-Food Facts, 'Oil-For-Food: FAQ', online: <www.oilforfoodfacts.com>/. *See especially* Independent Inquiry Committee into the United Nations Oil-for-Food Program, *The Impact of the Oil-for-Food Program on the Iraqi People: Report of an independent Working Group established by the Independent Inquiry Committee* (7 September 2005), online: Independent Inquiry Committee <http://www.iic-offp.org/documents/Sept05/WG_Impact.pdf>, at 177 and 179, indicating that OFF reduced deaths from malnutrition, but suggesting that 661 Committee "holds" retarded this positive effect by impeding the distribution of medical goods; faulting the OFF for reliance on a "relief" rather than capacity-building approach.

[15] Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Report on the Manipulation of the Oil-for-Food Program*, 27 October 2005, online: <http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf>.

[16] In 2002 the US General Accounting Office estimated that of the 2,100 contracts then on hold with the 661 Committee, 90 percent of the holds were placed by the US: U.S., General Accounting Office, *Weapons Of Mass Destruction: U.N. Confronts Significant Challenges in Implementing Sanctions against Iraq*, (GAO-02-625), (2002) at 20.

with the devil".[17] It allowed Hussein to direct the costs of sanctions onto the most vulnerable sections of Iraqi society, while his cadres extracted rents under the apparently guileless supervisory gaze of UN officials.[18] The Council, while dimly aware of these stark realities, never adequately confronted them.

The Costs and Lessons of Poor Administration of a Regulatory Regime

Much has been made of the evils of the sanctions regime.[19] Concern over the humanitarian costs of sanctions eroded support for the containment strategy championed by the US and UK, increasingly seen as punitive rather than aimed at achieving the disarmament aims of Resolution 687. Increasingly, the regime itself was seen by many as an abuse of the Security Council's power. The Volcker Inquiry has, moreover, exposed many management deficiencies of the UN Secretariat. Just as important, however, it exposed faults in the Council's supervision, although the media has focused less on these faults than on other flaws. Together, these shortcomings allowed the manipulation and distortion of a massive international regulatory regime by the very targets of its regulation. In this section, we look briefly at the sinews of three regulatory failures within this system: an absence of administrative accountability; imprecision in administrative mandates and discretion; and a lack of systemic coordination.

An Absence of Administrative Accountability

The Security Council failed to appreciate that in moving to the legal-regulatory approach implicit in the OFF Program, it became highly dependent on agents who implemented, monitored, and enforced the rules it laid down, creating the opportunity for them to corrupt the regulatory regime, either intentionally or through negligence. What resulted was a pattern of "egregious lapses" – as the Volcker Inquiry termed them – in management, both by the UN Secretariat and, arguably, by Member States themselves.[20]

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[17] Mark Turner, "Annan accepts claim of failure on oil-for-food", Financial Times (FT.com), 7 September 2005.

[18] See *Adverse consequences of economic sanctions on the enjoyment of human rights*, (UN ECOSOCOR E/CN.4/Sub.2/RES/1997/35, (1997); David Cortright and George A. Lopez, 'Reforming Sanctions' *and* Peter van Walsum, 'The Iraq Sanctions Committee' in David Malone, ed., *The UN Security Council from the Cold War to the 21st Century,* (Boulder, CO: Lynne Rienner, 2004); Richard Garfield, "Health and Well-Being in Iraq: Sanctions and the Impact of the Oil-for-Food Program" (2001) 11 Transnat'l L. & Contemp. Probs. 277.

[19] See for example David Cortright et al., *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (Lanham, MD: Rowman and Littlefield, 1997); A. Shehabaldin and W. M. Laughlin Jr., "Economic Sanctions against Iraq: Human and Economic Costs" (1999) 3 Int'l J.H.R. 1; George E. Bisharat, "Sanctions as Genocide" (2001) 11 Transnat'l L. & Contemp. Probs 379.

[20] Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Report on the Management of the Oil-for-Food Program*, I, 4.

Mismanagement by the UN Secretariat

Amongst the Secretariat staff, the most significant allegations of corruption were made against the former chief of the OFF Program, Benon Sevan. The Volcker Inquiry asserted that Sevan improperly solicited oil allocations worth $1.5 million, and received illicit commissions of $147,000 in cash between 1999 and 2003.[21] After first being suspended, Sevan eventually resigned.[22] The Inquiry also fingered a Russian UN procurement official, Aleksander Yakovlev, as being on the take in a wide number of UN transactions.[23] Other corruption within the Secretariat was also revealed.[24] The Volcker Inquiry also directed significant criticism at the Secretary-General, the Deputy Secretary-General, and Annan's former *Chef de Cabinet* for their failure adequately to supervise Sevan.[25] It also faulted UN audit processes.[26]

The Inquiry further criticized former Secretary-General Boutros-Ghali for his role in the political manipulation of OFF tenders. Boutros-Ghali responded by labeling the Inquiry's investigators "ignorant" and describing the allegations against him as "silly", seeming to suggest that such administrative decisions were, in the UN context, inevitably political. James Traub highlights how this played out in the establishment of the OFF:

> In minutes of a meeting of the Iraq Steering Group from August 13, 1996, Chinmaya Gharekhan, one of then-Secretary-General Boutros Boutros-Ghali's closest advisers, said, "The Secretariat had come under terrible pressure from member-states; the selection of [oil] overseers, the bank, and the firm to supply oil inspection agents had all been political."[27]

Politics and contractual administration had become hopelessly entangled. Senior UN officials failed to understand that a regime which looked like a massive administrative program involving multibillion dollar contracts and

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[21] Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Interim Report* (3 February 2005); Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Third Interim Report* (8 August 2005).

[22] Benon V. Sevan, *Letter of resignation*, 7 August 2005, copy on file with the authors.

[23] Independent Inquiry Committee, *Third Interim Report* (8 August 2005). Yakovlev subsequently pleaded guilty to money laundering charges in Manhattan Federal District Court. See Warren Hoge "Panel Accuses Former U.N. Official of Bribery" *New York Times* (9 August 2005).

[24] Julia Preston "Russian Held in Scheme to Launder U.N. Bribes" *New York Times* (3 September 2005) 8.

[25] Independent Inquiry Committee, *Report on the Management of the Oil-for-Food Program*, I at 44-8.

[26] See Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Briefing Paper* (9 January 2005).

[27] James Traub, "The Security Council's Role: Off Target", The New Republic (21 February, 2005) at 14-9.

operated as such would eventually be assessed–in the court of world public opinion, even if not in the corridors of power–against standards of impartial administration and public management, not politics. Only with the revelations of the Volcker Inquiry did the "painful" lessons, "deeply embarrassing" to the UN begin to sink in, as Kofi Annan's remarks made clear:

> The inquiry committee has ripped away the curtain, and shone a harsh light into the most unsightly corners of our organization.... Who among us can now claim that U. N. management is not a problem, or is not in need of reform?[28]

Mismanagement by the Member States

While the UN Secretariat seems to be learning lessons from its own role in the maladministration of the OFF Program–perhaps under pressure from Member States–it is far from clear that Member States have done the same. And yet, they undermined the OFF Program in a number of ways: through politicization of the awarding of contracts; through inadequate supervision in the 661 Committee; through wilful blindness to oil smuggling; and through misuse of their administrative discretion.

The Volcker Inquiry criticized a UN official, Joseph Stephanides, for steering a large contract to Lloyd's Register of London. A lower tender was submitted by a French rival, but the UN ultimately decided the deal should go to Lloyd's–after it lowered its bid pursuant to obtaining confidential information from UN sources–in part because a French bank had been awarded another key contract. Stephanides was fired by Annan on 1 June 2005.[29] Significantly, however, those who had collaborated with Stephanides in the UK Mission to the UN saw nothing to apologize for. Sir John Weston, the UK Ambassador to the UN during the relevant years, made clear that the promotion of UK commercial interests was a standard part of his brief, and that he had been operating under "ministerial instructions" from London in advising Lloyd's on how to win the contract. Suggestions of improper behaviour were based on "ignorance of the practices of diplomatic missions".[30] Again, administrative probity lost out to diplomatic *realpolitik*. Carne Ross, a British diplomat assigned to the UN at the time, has described the OFF Program as "deeply politicized" and "carved up" between member states.[31] Council members thus seem to have failed at the first hurdle in providing credible

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[28] Warren Hoge, "Annan Failed to Curb Corruption in Iraq's Oil-for-Food Program, Investigators Report" *New York Times* (7 September 2005) 6.

[29] "Annan fires Joseph Stephanides for "serious misconduct" linked to oil-for-food" *UN News Centre* (1 June 2005).

[30] Philip Sherwell and Charles Laurence "The scandal Kofi couldn't cover up" *Sunday Telegraph* (6 February 2005) 17.

[31] *Ibid.*

leadership or even a basic sense of responsibility for proper administration of the OFF Program.

Further damage was done by Member States' wilful blindness to Iraqi oil smuggling to Turkey, Jordan, and Syria. While Hussein received only $1.8 billion from kickbacks, he amassed a staggering $11 billion from oil smuggling outside the OFF.[32] Both the Clinton and George W. Bush administrations made formal decisions, notified to Congress, allowing much of the oil smuggling to continue, despite its prohibition by both SCRs and prior US law, since it was in the US "national interest".[33] According to Carne Ross, "too little energy was exerted on enforcing controls. While in New York we argued ourselves hoarse in negotiation, Washington and London rarely lifted a finger to pressure Iraq's neighbours to stem the illegal flows."[34]

The Secretariat's Office of the Iraq Program (OIP) raised concerns over suspicious pricing on OFF contracts with the 661 Committee on at least seventy occasions, yet not one of these contracts was blocked by the Committee.[35] The reason seems clear: the Sanctions Committee was willing to tolerate some corruption of the Program by Hussein, as the price of its very existence. A former Ambassador to the UN with Security Council has commented:

> [U]nder Resolution 986 Saddam Hussein exercised so much control over the program … that it was only to be expected that he would find ways of turning his wide discretionary powers into money. … A total of $2bn over the whole period [1999-2000] does not seem that extravagant. Just compare this with the money Saddam would have had at his disposal if the sanctions had been lifted.[36]

Similarly, the Volcker Inquiry has written of "uncertain, wavering direction from the Security Council", and of how "differences among member

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[32] Independent Inquiry Committee, *Report on the Management of the Oil-for-Food Program*, I, Ch. 2.

[33] Elise Labott and Phil Hirschkorn, "Documents: US condoned Iraq oil smuggling" *CNN.com* (3 February 2005), online: CNN <http://edition.cnn.com/2005/WORLD/meast/02/02/iraq.oil.smuggle>; Mark Turner, "US and Congress knew Saddam was smuggling oil" *FT.com* (19 January 2005), online: <http://www.informationclearinghouse.info/article7760.htm>. Security Council members were not alone here: other UN Member States also appear to have accorded secondary importance to OFF strictures. In 2006, the Australian government was subjected to a high-profile inquiry over its failure to thoroughly test assurances offered by its monopoly wheat exporter, the Australian Wheat Board, that it was not paying kickbacks to Hussein's government.

[34] Carne Ross "War Stories" *Financial Times* (29 January 2005) 21.

[35] Traub, 'Off target', 14-17. The 661 Committee did take some steps to curtail surcharges, including moving from the proactive to the reactive pricing mechanism. It remains unclear what measures, if any, it adopted against illegal commissions.

[36] Confidential correspondence with the authors, 11 February 2005.

states impeded decision-making, tolerated large-scale smuggling, and aided and abetted grievous weaknesses in administrative practices within the Secretariat."[37] Notwithstanding these condemnations, officials of Council Member States have largely refused to acknowledge their countries' roles in the scandal. The exception–and all the more notable for it–was US Secretary of State Colin Powell, who acknowledged, prior to leaving office, "The secretary-general will have to be accountable for those management problems … [but] the responsibility does not rest entirely on Kofi Annan. … It also rests on the membership, and especially on the Security Council, and we are a member of the Security Council".[38]

The Council Members who sat on the 661 Committee exercised their administrative discretion without any sense of responsibility to the wider UN membership. This allowed them, in unintentional connivance with Saddam Hussein, to pervert the Program, not least thanks to confused lines of accountability. As the Volcker Inquiry recognizes, in the OFF,

> [n]either the Security Council nor the Secretariat was clearly in command. That turned out to be a recipe for the dilution of Secretariat authority and evasion of personal responsibility at all levels. When things went awry–and they surely did–when troublesome conflicts arose between political objectives and administrative effectiveness, decisions were delayed, bungled or simply shunned.[39]

Imprecision in Administrative Mandates and Discretion

A second lesson for the Security Council from the Iraq sanctions experience involves the need for precision in the establishment of delegated regulatory or administrative mandates. This raises issues about the proper object and purpose for which delegated discretion should be exercised, the appropriate duration of delegated mandates and discretionary powers, and the limits of an agent's enforcement powers.

The object and purpose of the Iraq sanctions regime gave rise to numerous disputes within the Council. The goal of "regime change", so often articulated in Washington (and occasionally London) after 1997 was unpopular amongst many governments at the UN, who suggested it shifted SCR 687's goalposts and its focus on disarmament. [40] When Washington and London moved to implement

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[37] Independent Inquiry Committee, *Report on the Management of the Oil-for-Food Program*, I at 2.

[38] See Nicholas Kralev "Powell urges UN Council to take blame for scandal" *Washington Times* (12 January 2005) A11.

[39] Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Report on the Management of the Oil-for-Food Program*, I at 3.

[40] See for example U.S., *Department of State, Preserving Principle And Safeguarding Stability: United States Policy Toward Iraq* (Washington D.C.: Secretary of State

regime change in Baghdad in 2002 and 2003, this long-running and sour debate handicapped their advocacy.

The dispute over the nature of the mandate underpinning sanctions and the discretion it afforded Member States purporting to 'enforce' the sanctions regime was exacerbated by the open-ended nature of the enforcement mandates created by SCR 687. A so-called *reverse veto* allowed any permanent member of the Council to block a resolution terminating the sanctions regime.[41] As the humanitarian toll of the Iraq sanctions grew, Russia, France, and China increasingly criticized the indefinite duration and rigidity of the regime.

The confusion over the goal of the sanctions regime was also in part a result of the Council's early acquiescence in the unilateralist enforcement action (relating to SCRs 661, 678, 687 and 688) by the US and the UK, mostly acting with France until the latter's defection in 1996. France then became the center of gravity of a majority of Member States voicing increasingly strident criticism of the sanctions regime. But the underlying dispute over whether Member States were entitled to take military action to enforce the Council's inspections-plus-sanctions strategy, without explicit and case-by-case approval from the Council, remained unresolved. This dispute over Member States' power to interpret and enforce earlier SCRs set the stage for the ambiguous language of "serious consequences" in SCR 1441 in November 2002, which ultimately failed to bridge the divide in the Council over the propriety of military action to overthrow Saddam Hussein.

A Lack of Systemic Coordination

The third major lesson of the sanctions experience is that the UN system must work increasingly hard to ensure the coordination of a variety of global regulatory regimes falling within its own bailiwick. The complex regulatory schemes established by the Council rapidly came into conflict with the ethos and objectives of key UN programs relevant to the welfare and development of the Iraqi population. In brief, the Council, without much forethought, set the security interests of the UN system against its humanitarian and development objectives. As a former Ambassador on the Council has commented:

> [T]he sanctions committee's brief was non-proliferation, not the development of Iraq. The more we cared about the latter, the more we could be blackmailed by Saddam. It was a lose-lose situation. If you are dealing with a dictator who has no qualms about exacerbating the suffering of his own people, you just can't win.[42]

Madeleine K. Albright, 26 March 1997), online: U.S. Department of State <http://secretary.state.gov/www/statements/970326.html>.

[41] See Cortright and Lopez, *supra* note 17 at 175-6.

[42] Correspondence with author, 11 February 2005.

As a result, UN officials, not least those on the ground in Iraq, argued against sanctions and advocated programs to blunt their impact on the population.[43] Inevitably, perhaps, the failure to reconcile the mechanisms of the sanctions regime with the broader purposes of the UN translated into institutional divisions, setting the Security Council against members of the Secretariat. That division itself slowly eroded the legitimacy of the Council's regulatory approach in Iraq.

II THE IRAQI WEAPONS INSPECTION EXPERIENCE

The second pillar of the legal-regulatory approach the Security Council took to Iraq after 1991 was the weapons inspection regime. Iraqi possession of weapons of mass destruction (WMD) had long been a source of international concern,[44] prompting Israel's bombing of the nuclear reactor at Osiraq in June 1981.[45] Iraq's nuclear weapons program was discovered, in the wake of Operation Desert Strom, to have been quite advanced. Iraqi use of chemical weapons throughout the 1980s was well known and had been addressed by the Security Council. By 1991, Iraqi possession of WMD posed a widely appreciated threat to the region, to Iraq's own people, and to global security. SCR 687 consequently made disarmament the centrepiece of a formal end to hostilities. The system of inspection and monitoring it established was, in the words of US Vice President Richard Cheney, "the most intrusive system of arms control in history".[46] This was another step towards the international administration of Iraq, and, in turn, towards Council-established global security regulation like that later created for counter-terrorism by SCR 1373.

The key trade-off envisaged in SCR 687 was the lifting of economic sanctions in return for "progress towards the control of armaments in the region", the latter to be evaluated by unimpeded monitoring of Iraqi weapons programs.[47] To oversee Iraqi disarmament, the Council took the unprecedented step of creating a subsidiary organ charged with monitoring the destruction, removal, or neutralisation of all Iraqi chemical and biological weapons, including the stocks of agents, related subsystems, components and all research, development, support, and manufacturing facilities. This organ was the United

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[43] See for example Denis J. Halliday "End The Catastrophe Of Sanctions Against Iraq," Editorial, *Seattle Post-Intelligencer* (12 February 1999) A17; H. C. Graf Sponeck, "Sanctions and Humanitarian Exemptions: A Practitioner's Commentary" (2002) 13 E.J.I.L. 1.

[44] See Richard Butler, *Talk* (September 1999), 198.

[45] Unanimously condemned by the Security Council in SC Res. 487, UN SCOR, 1981,

[46] U.S., White House Office of the Press Secretary, *Vice President Honors Veterans of Korean War*, (2002).

[47] SC Res. 687, UN SCOR, 1991 at paras. 22, 28.

Nations Special Commission (UNSCOM). The Security Council charged the IAEA with similar responsibilities in relation to Iraqi nuclear capability and activity. After initial resistance by Iraq to the inspections regime, in SCR 715 the Council established the even more intrusive Ongoing Monitoring and Verification (OMV) regime. The Resolution directed that Iraq must "accept unconditionally the inspectors and all other personnel" designated by UNSCOM, and that OMV would remain in place until the Security Council decided to remove it.[48]

Several years of sparring between Iraq and UNSCOM, which do not require retelling here, came to a head in 1998. On 13 January 1998, Iraq withdrew its cooperation from international inspectors, on the pretext that they included too many US and UK nationals. A serious US military build-up in the Gulf followed, with token support from a few allies. In contrast to the French and Soviet cooperation that the coalition had enjoyed in 1990, America was now confronted by Russian and French opposition. Paris and Moscow deplored the threat of force and pressed for change in the sanctions regime.[49] Washington nevertheless seemed set for war until a disastrous town hall meeting set up by the Clinton administration to sell military action to the American public backfired, creating a "self-inflicted … public relations disaster".[50] Washington gave way as Kofi Annan stepped in and brokered a resolution to the crisis based on compromise by the Council and by Hussein.

But when the pattern of Iraqi brinksmanship recurred at the end of 1998, Washington afforded Annan no such opportunity. Instead, the US and UK moved swiftly following a 15 December report by Richard Butler, the Executive Chairman of UNSCOM, detailing Iraqi non-cooperation. In undertaking a unilateral bombing campaign against Baghdad (Operation Desert Fox), they asserted their own right to interpret and enforce earlier Resolutions. This action weakened UNSCOM's legitimacy, and Hussein launched a campaign of complete defiance and obstruction. Soon UNSCOM was dead.

A report of 27 March 1999 to the Council concluded that "although important elements still have to be resolved, the bulk of Iraq's proscribed weapons programs has been eliminated". It nevertheless endorsed the continuation of inspections-based monitoring as the best way to guard against rearmament.[51] In its wake, the Council adopted Resolution 1284, which established the UN Monitoring, Verification, and Inspection Commission (UNMOVIC), as a successor to UNSCOM. UNMOVIC's brief period of operation in Iraq, following the passage of SCR 1441 in November 2002, also

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[48] SC Res. 715, UN SCOR, 1991.

[49] John M. Goshko, "Security Council Debate Reflects Continued Split on Iraq" *Washington Post* (19 December 1997), A20.

[50] Martin Kettle, "Iraq Crisis: The debate: White House scores a PR own goal" *The Guardian* (19 February 1998), 13.

[51] UN SCOR, 54th Year,UN Doc. S/1999/356 (1999).

does not require detailed recounting here. Instead, what is important is two specific lessons that UNSCOM and UNMOVIC provide about how the Security Council should approach the management of such regulatory regimes.

Unclear Lines of Administrative Accountability

The triangular reporting relationship between UNSCOM, the Secretary-General, and the Security Council established by SCR 687 was unusual. The Executive Chairmen–first Rolf Ekéus, later Richard Butler–were appointed by the Secretary-General, after consultation with the Council, and they formally reported to the Council through the Secretary-General. Otherwise, though, the Secretary-General exercised no control over UNSCOM. While this arrangement worked well in UNSCOM's early years, it was to prove highly problematic in 1998, when Kofi Annan and Richard Butler differed on issues of substance.[52] The lack of clarity on the basic question of whom UNSCOM ultimately answered to created significant tensions. With claims that Butler had at least acquiesced in American manipulation of UNSCOM, weapons inspection became another wedge that Hussein could drive between members of the Security Council, and between the Council and the Secretariat.[53]

Undermining Regulatory Independence Through Resource Dependence

Throughout its existence, UNSCOM was heavily dependent on Member States for the provision of the resources it needed to discharge its regulatory responsibilities, particularly analytical expertise and intelligence. This exposed UNSCOM to charges that it was not exercising its regulatory discretion impartially or independently, but rather was serving as a vehicle for the realization of the foreign policy goals of the strongest members of the Security Council. This became particularly acute after evidence emerged of CIA infiltration of UNSCOM, using it not only to mount intelligence operations inside Iraq, but perhaps to progress a (failed) coup attempt against Hussein by a group of army generals.[54] This allowed Iraq to undermine support for UNSCOM's work within the Security Council, driving a final wedge between members of the P-5, resulting in the rift of late 1998 and early 1999 that killed off UNSCOM.

In designing UNMOVIC, the Security Council clearly learned the lesson of the importance of operational independence–an important signal that the Council is capable of improving its regulatory practice over time. SCR 1284 introduced measures that helped ensure UNMOVIC's administrative

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[52] See David M. Malone, "Goodbye UNSCOM: A Sorry Tale in US-UN Relations" (1999) 30 Secur. Dialogue at 400-401.

[53] See David M. Malone, "Goodbye UNSCOM: A Sorry Tale in US-UN Relations" (1999) 30 Secur. Dialogue at 400-401.

[54] Dilip Hiro, *Iraq: In the Eye of the Storm,* (New York: Thunder's Mouth Press, 2002) at 81-8.

independence, primarily by ensuring that it was not dependent on particular Member States for resources, and by allowing only a one-way flow of intelligence into UNSCOM from national intelligence agencies. In addition, control over UNMOVIC was given to a college of commissioners, rather than being left to the already overtaxed Council principals.[55] UNMOVIC inspectors were to be recruited independently, and they would work for the United Nations (UNSCOM inspectors had often been "on loan" from their home governments, raising questions about divided loyalties). This staffing independence was secured by a 0.8 percent share of funds raised by the OFF Program–totalling roughly $100 million per year.[56]

III LESSONS FROM THE SECURITY COUNCIL'S IRAQ EXPERIENCE

Revise or Reverse?

The Security Council's experiments with a legal-regulatory approach in Iraq in the form of economic sanctions, the OFF Program and weapons inspections met with mixed success. That raises the very serious question whether, as James Cockayne and Cyrus Samii have put it, the Council should not simply *revise* its growing legal-regulatory practice, but rather *reverse* it.[57] The key lesson of the Council's Iraq experience might be that the Council is simply not cut out to establish and give unambiguous direction to legal-regulatory programs, but should stick to the broad policy-making role of the political-military approach. The veto powers of the five permanent members, in particular, appear to jeopardize the ability of the Council to work consistently as an impartial and responsive overseer of complex legal-regulatory programs.[58] Even where the Council can achieve broad consensus on an appropriate legal-regulatory mechanism, such as the OFF Program, the Iraqi experience seems to call into question whether the Secretariat and the agencies and programs of the UN are adequately equipped to effectively administer those mechanisms.

However valid these concerns, to date they have not impeded the Council's increasing embrace of the legal-regulatory approach. In fact, the Council has expanded the ambition and scope of the regulatory arrangements it

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[55] See Pascal Teixeira da Silva, "Weapons of Mass Destruction: The Iraqi Case", in Malone, *The UN Security Council from the Cold War to the 21st Century* (place published: publisher, year) at 213.

[56] Hans Blix, *Disarming Iraq: Hans Blix's Story. A Vernon Center Conversation and Spring Break Special Event*, New York University, (2004) [unpublished] - Blix put a great deal of effort into ensuring that UNMOVIC did not repeat UNSCOM's organizational flaws: see *Note [transmitting the organizational plan for the UN Monitoring, Verification and Inspection Commission (UNMOVIC) prepared by the Executive Chairman]*, UN Secretariat OR, UN Doc, S/2000/292 (2000).

[57] James Cockayne and Cyrus Samii, "Conclusion: Structural and Normative Challenges" in W. Pal Sidhu and Cyrus Samii, eds., *Iraq and World Order* (place published: United Nations University Press, forthcoming 2006).

[58] We are indebted to Ben Rowswell for highlighting this point.

institutes, moving from the country-specific mechanisms it relied upon in Iraq to global counter-terrorism and non-proliferation arrangements in SCRs 1373 and 1540. We can expect this trend to continue, for two clear reasons. First, Iraq since 2003 has demonstrated the limits of US politico-military power–and by extension, the politico-military power of the Security Council. Second, the very nature of contemporary threats, from pandemics, to nuclear proliferation, to terrorism, to crimes against humanity–diffuse, global, propagated through non-state actors–encourages a turn to the legal-regulatory approach, because they necessitate a collaborative, proactive risk management approach rather than a responsive crisis management approach. Moreover, even if they do not share American perceptions of risk–recalibrated by the events of 9/11, other UN Member States seem likely to consent often to legal-regulatory mechanisms organized through the Security Council in order to forestall unilateral American intervention.

Acceptance by the broader membership of this legal-regulatory approach (which would translate in political terms into legitimacy) will depend particularly upon whether the Council fills a legislative (or administrative) lacuna (as it did with the counter-terrorism and non-proliferation regimes it established) or whether it purports to override existing treaty obligations (as arguably occurred when the Council sought to immunize UN peacekeepers from ICC jurisdiction).[59] To buttress the legitimacy of such an approach, the Council will need to pay more attention to the procedural aspects of its maintenance of international peace and security. Serious reflection is now required on how legal-regulatory approaches developed in the context of national law may need to be adapted at the international level, particularly in the Security Council's practice. In the final section of this paper, we suggest ten basic lessons from the Council's Iraq experience that may help fuel this reflection.

Ten Lessons From the Iraq Experience

The Security Council should draw ten basic lessons from its experience with the legal-regulatory approach in Iraq. Four of these pertain to regulatory discretion, four to accountability and two to resources.[60]

Four Lessons on Discretion

In the politico-military mode, Council agents exercise substantial policy discretion: so long as they work towards the objectives established by the Council, they generally have broad discretion on tactics and methods. The boundaries of that discretion may be expressly or implicitly defined; for

[59] On the legislative aspect, see especially Paul C. Szasz. "The Security Council Starts Legislating" (2002) 96 AJIL 90; and see Gaetano Arrangio-Ruiz, "On the Security Council's 'Law-Making'" (2000) 83 Rivista di Diritto Internazionale 609.

[60] We are indebted to Ben Rowswell for comments on earlier articulations of these lessons.

example, the discretion of the Multinational Force (MNF) that executed Operation Desert Storm in 1991 was bound by its UN Charter obligations, the mandate it was given under Chapter VII, and its obligations to abide by international humanitarian law. However, within those broad parameters, the agent has substantial room to manoeuvre.

In the legal-regulatory mode, the Council delegates substantive decision-making power on narrow, and often highly technical issues to independent agents, such as UNSCOM and the UN Compensation Commission, or the various UN agencies that were charged to implement the sanctions regime and OFF. These agents have very narrow powers, but their decisions are either binding on the Council (as in the case of the UNCC and later the ICTY, the ICTR, and arguably, in exceptional cases, the ICC), or at least highly authoritative (because of their technical expertise).

Shifting to a legal-regulatory mode therefore requires a different approach to the way in which the Council delegates discretion to its agents. The Iraq experience highlights four lessons in particular.

Regulatory agencies require independent discretion

Problems can arise when the Council establishes what it seems to intend as an independent delegate, but then fails to allow that delegate to exercise truly independent discretion. In Iraq, this problem arose with political interference on a number of levels in the administration of the OFF, UNSCOM, and during the US-UK contestation of UNMOVIC's work in 2003. The mandate and operations of the 661 Committee proved particularly problematic.

Regulatory mandates should avoid ambiguity as to purpose and as to the authority of interpretation and enforcement

Resolutions adopted in the politico-military mode can afford to use vague or at least purposive language, essentially setting out the broad strategic objectives of the Council. In contrast, Resolutions adopted in the legal-regulatory mode must be much more precise, specifying what rules the Council's delegated agents are expected to implement, the powers available in implementing them, and the process by which they should be enforced. Of course, a certain deliberate vagueness or even combination of the two approaches may be likely: but such ambiguity can become problematic, as SCRs 687 and 1441 demonstrated.

SCR 687 provided the basis for extensive legal-regulatory machinery, structured around the twin pillars of inspections and sanctions; but its incorporation of the contract and treaty-law terminology of "material breach" left many questions open about what constituted substantial performance by Iraq, who could determine Iraqi compliance, and what enforcement powers were available to what actors. Over time, the Council specified more precise rules for determining Iraqi compliance. But by acquiescing in the creeping unilateralist enforcement of the US, UK, and France (which came to a head

with Operation Desert Fox in 1998), the Council sowed confusion about its intentions on both interpretation and enforcement. This state of play became particularly problematic further to SCR 1441 in 2002, with many different actors involved, including individual member states, the Council as a whole, the Secretary-General, and independent agencies such as UNMOVIC and the IAEA. Above all, the uncertain nature, timing, and trigger of the "serious consequences" threatened by the Council in SCR 1441–a classic case of the creatively ambiguous drafting used in the politico-military mode–compounded the confusion of a Council attempting to act in legal-regulatory mode.

Regulatory mandates should have a clear termination point

In the end, the ambiguity and confusion sowed by SCRs 687 and 1441 appeared to serve the purposes of the US and the UK. That said, one of the most persuasive criticisms of the argument that Operation Iraqi Freedom was authorized by SCRs 678 and 687 was that even if those authorizations to use force were revived by Resolution 1441 and subsequent events, those resolutions never authorized regime change and occupation of the country. But the US and UK argued that regime change had become necessary to effect the objectives set out in those earlier Resolutions.[61] The open-ended nature of SCRs 678 and 687 thus became a serious bone of contention a dozen years after their adoption. The delegation of enforcement powers they appeared to encompass, when married with wide discretion for the Council's agents, opened the door to very broad interpretation of how changing circumstances can redefine enforcement powers.

The discretion of the US and UK was, of course, further enlarged in the Iraqi case by the *reverse veto*, which allowed them unlimited discretion to block attempts to terminate their own mandates earlier delegated by the Council.[62] The resulting creation of an "ongoing" authorization for the use of force has probably cemented the practice of the Council specifying an end-date for delegated mandates: since the late 1990s, France has asserted that it would never again accept open-ended sanctions regimes.[63]

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[61] A related argument concerned the question of whether the US and UK in 2003 could be said to be "Member States co-operating with the Government of Kuwait" – the phrase used in SC Res. 678, UN SCOR (1990) to delimit the set of states mandated to carry out delegated enforcement action.

[62] See David D. Caron, "The Legitimacy of the Collective authority of the Security Council" (1993) 87/4 A.J.I.L.; Lutz Oette, "A Decade of Sanctions Against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council" (2002).13 E.J.I.L. 93.

[63] See for example UN SCOR, 55th Year, 4128th Mtg., UN Doc. S/PV.4128) (2000) at 9 for French views.

The Council should ensure coherence of multiple regulatory objectives, if necessary through coordination with other global regulators

Perhaps the greatest failure of the Council's experimentation with the legal-regulatory approach in Iraq was its inability fully to alleviate the human devastation caused by its sanctions arrangements. The sanctions approach inevitably set the Council's objectives of securing Iraqi disarmament against the developmental, humanitarian and arguably human rights objectives of the broader UN system. While the Council sought to find ways to balance these objectives, for example through the creation of the OFF Program, its work often occurred in something of a bubble. The Council would do well to learn, from its Iraq experience, the legitimacy and effectiveness pay-offs that come from close coordination and consultation with other sources of authority and expertise, both within the UN system and beyond, when it takes the intrusive measures implied by the legal-regulatory approach. The Council should reflect upon the fact that while Chapter VII gives it a special role in global rule-making and a monopoly on authorizing the coercive enforcement of those rules through military action, it does not give it a monopoly on rule-making itself. The Council needs to reach out more meaningfully to other global bodies, whose cooperation is sometimes vital to the success of its legal-regulatory strategies; for example, the international financial institutions, the World Health Organization, and the International Criminal Court. Improving management of the collective security system will require reaching an understanding about the limits of the Council's *own* discretion, and how it should interface with these other organizations. The new Peacebuilding Commission, in particular, may provide lessons for how the Council can take a more inclusive approach in its decision-making.

Four Lessons on Accountability

The second major challenge for the Council arising from its Iraq experience relates to accountability of its agents. In the politico-military mode, accountability is less of an issue, because the discretion afforded to agents is both more open-ended and more targeted to one specific outcome than in the legal-regulatory setting. In the legal-regulatory mode, agents often act on a variety of objectives and following a number of criteria established by the Council, but with a broad discretion on the application of the criteria in a particular case. When the Council delegates substantial authority for the interpretation and implementation of a regulatory and administrative regime to an agent, it follows that this agent should be accountable to the Council, to ensure its decisions in any given case align with the Council's broader policy objectives, and that the regulatory processes involved do not violate fundamental values protecting individuals (such as human rights) and do not unduly offend states (for example, regarding their sovereignty).

The Council must improve arrangements ensuring the accountability of its regulatory agents, including self-correction mechanisms

All too often accountability systems were lacking in the Council's handling of Iraq. The issue arose as early as 1990, while the Council was still operating in an essentially politico-military mode, with a number of states voicing concerns about the absence of meaningful feed-back mechanisms in the resolutions which authorized military enforcement action by the Multinational Force.[64] Those concerns led to stricter controls on the Council's military agents in later actions,[65] but the Council did not take to heart the lesson drawn by Sir Frank Berman:

> In practical terms, a process of 'authorization' presupposes some form of continuing exchange between the mandated member states and the Council over both the realization of the stated objectives and, where necessary, the means granted to them to achieve them.[66]

Accountability of regulatory agents clearly requires the original empowerment of the agent being expressed in such a way that such a "continuing exchange" is established. In SCR 678, the coalition forces were required only to "keep the Security Council regularly informed". This led, perhaps unsurprisingly, to bland and un-detailed reporting by the concerned member states.[67] This, in turn, induced the Council to step up reporting requirements to monthly or bi-monthly in subsequent resolutions authorizing Member States to take military enforcement action.[68] The sense of effective oversight of the Coalition Provisional Authority in Iraq outlined in SCR 1511 authorizing the multinational force in Iraq in 2003 was, however, so slight that the Council requested the US to report merely "as appropriate and not less than every six

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[64] See for example the statement of the Malaysian delegation on adoption of Resolution 678 in UN SCOR, 45th Year, UN Doc. S/PV.2963 at 58. For related academic criticism see N.D. White, *The Law of International Organisations* (publishing info, 1996) at 191-199; J. Quigley, "The United States and the United Nations in the Persian Gulf War: New Order or Disorder" (1992) 25 Cornell Int'l. L.J. 1.

[65] Helmut Freudenschuß, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the Security Council' (1994) 5 E.J.I.L. 492.

[66] Frank Berman, 'The Authorization Model: Resolution 678 and Its Effects' in Malone, *The UN Security Council: From the Cold War to the 21st Century* (Boulder: Lynne Rieneer, 2004) at 158.

[67] See United Nations, *The United Nations and the Iraq-Kuwait Conflict 1990-1996* (New York: United Nations Department of Public Information: 1996) 159.

[68] Monthly: IFOR and SFOR. Bi-monthly: UN SC Res. 1080 (1996), UN SCOR, 3713th Mtg., S/RES/ 1080 (1996) (Eastern Zaire), UN SC Res. 1101(1997), UN SCOR, 3758th Mtg., S/RES/1101(1997) and UN SC Res. 1114 (1997), UN SCOR, 3791st Mtg., S/RES/1114 (1997) (Albania), UN SC Res. 1125 (1997), UN SCOR, 3808th Mtg., S/RES/1125 (1997) (Central African Republic).

months".[69] Partly as a consequence, the Council has often lacked the information needed to interact meaningfully with parties on the ground in Iraq since 2003.

When the Council shifted to a legal-regulatory mode, with its open-ended discretion, broad and often highly intrusive regulatory reach, it failed to appreciate the resulting proliferation of opportunities for manipulation and corruption (in the broadest sense) of its program. Avoidable failures of the sanctions regime, OFF and of UNSCOM detailed in the earlier sections of this article ensued, in part because the Council failed to exercise adequate oversight, and in part because it failed to build in adequate self-correction mechanisms, such as robust internal auditing.

In short, the Council's experiences in Iraq indicate that the Council must build effective feedback mechanisms into the regulatory programs it establishes. These mechanisms should anticipate the probability–and not simply the possibility–of corruption of objectives and perhaps even officials, and take robust steps of both prevention and accountability.

The Council must accept responsibility for the outcomes of regulatory regimes it establishes

A related lesson, simply stated, but absolutely essential to the effective operation of Council regulatory mechanisms, is that the Council members must accept responsibility for the outcomes of those mechanisms. Council members were quick to blame the UN for the failures of sanctions, of the OFF and the perceived failures of weapons inspection. The UN Secretariat has been excoriated for mismanagement and worse but, so far, Security Council members have largely enjoyed a free ride.[70] They took little responsibility for their own contributions to the costs of the regulatory regimes they established in Iraq. What the Council must learn, if the regimes it establishes are to sustain their effectiveness, is that scapegoats rarely make effective or legitimate deputies.

Council decision-making should promote transparency

The intrusive nature of the legal-regulatory approach also prompts calls for increased Security Council transparency, particularly from countries affected by Council decision-making.[71] These concerns are not merely procedural; they also affect the substantive outcomes of Security Council decision-making. Greater clarification of the procedural aspects of the exercise of Council discretion, greater care in establishing regulatory and administrative frameworks, and

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[69] UN SC Res. 1511(2003), UN SCOR, 4844th Mtg., S/RES/1511 (2003).

[70] See Nicholas Kralev, "Powell urges UN Council to take blame for scandal", *Washington Times* (12 January 2005) A11.

[71] See Bardo Fassbender, "Uncertain Steps Into a Post-Cold War World: The Role and Functioning of the UN Security Council After a Decade of Measures Against Iraq", (2002) 13 E.J.I.L. at 289.

enhanced transparency of Council deliberations, will buttress its legitimacy. Confidentiality, some of which is required for negotiating processes is, in any event, over-rated at the UN, where pretty well all information to which more than two actors are party leaks. Securing greater support from the membership at large through enhanced *performance legitimacy* related to the quality of its decisions is now an urgent priority for the Council, which it can promote through more transparent working methods, including more flexible membership and representation arrangements. Wholesale membership reform now seems unlikely in the short term. As a consequence, the burden on the Council to ensure adequate participation opportunities through flexible working methods will only increase.

Regulatory mechanisms with potentially adverse impacts on individual interests should provide for adequate representation and due process

Even with reforms improving the transparency of Council decision-making to affected states and the broader public, legitimacy concerns dictate that the Council should take steps to ensure improved opportunities for participation in decision-making by those whose interests may be adversely affected by the decisions of the Council or its regulatory agents. The increasingly intrusive nature of the legal-regulatory approach, with the freezing of individuals' assets and the naming and shaming of corporations involved in misconduct, gives an increased urgency to questions of the limitation of Security Council discretion by human rights[72] or humanitarian[73] law, or customary international law[74] or *jus cogens*.[75]

In a recent case involving Iraq, for example, the UK High Court decided that SCR 1546, authorizing UK control of Iraqi territory following the end of major military operations there, overrode the UK *Human Rights Act*, and on that basis denied an applicant's claim for review of his detention in Iraq by UK military forces under that Act.[76] The Council's failure to incorporate due process

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[72] *See* Cohen-Jonathan, 'Le Conseil de Sécurité et les droits de l'homme', in J.-F. Flauss and P. Wachsmann (Eds.), *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob* (1997) 40; de Wet, « Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime », (2001) 14 Leiden J. Int'l L. at 279.

[73] Judith Gardam, "Legal Restraints on Security Council Military Enforcement Action" (1996) 17 Michigan J. Int'l L. at 302; David Scheffer, "Beyond Occupation Law" (2003) 97 A.J.I.L. at 844-846.

[74] Abdullah El Erian, "The Legal Organization of the International Society", in Max Sørensen (Ed.), *Manual of Public International Law* (London: MacMillan & Co. Ltd, 1968) at 79-80.

[75] Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" (2005) 16 E.J.I.L. at 59; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004) 187-191.

[76] *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* (2005), [2005] E.W.H.C. 1809 (Admin). See also *Yassin Abdullah Kadi v.*

standards into its decision authorizing the UK's activities risks exposing it not only to political and academic criticism, but also to litigation and refusal to enforce its decisions.[77] As the UK High Court noted in *Al Jedda*, the Council's use of its Chapter VII powers to create intrusive regulatory regimes has a "stark effect on … domestic law. Enforceable rights [can be] displaced by a resolution unconsidered by Parliament, the effect of which might well have passed unnoticed until long after the resolution was promulgated."[78] National judicial deference in such circumstances will only last so long, and refusal by just a small number of courts to accept certain Security Council decisions over domestic legal protections might have a rapid chilling effect on other states' willingness to implement the measures in question, and perhaps to support the Council's new and often sweeping legal-regulatory approach. Following protests by Member States over poorly framed decisions, the Council now takes such issues more seriously, ensuring, for example, that individuals are afforded a right to contest their listing by sanctions committees through the mechanism of diplomatic protection.[79] But this in itself may be inadequate in the absence of judicial review, and many individuals will not be able to avail themselves of the protection of their state, which may have caused their listing in the first place.[80] This highlights the clear need for further consideration of how national and global due process requirements apply to the decision-making of the Council and its regulatory agents.

Two Lessons on Resources

Adequate (in quality and quantity) resources are essential for effective regulation. If the Council delegates to UN agencies and programs tasks for which it will not provide adequate resources, then one option remains, as the Volcker Inquiry suggested: that these bodies "simply put their collective feet down and refuse".[81] If the Council, in other words, decides not to reverse the trend towards the legal-regulatory approach, adequate resourcing is a *sine qua non* of sustainability in this regard, let alone success.

Council of the European Union and Commission of the European Communities (2005) Ct. of First Instance of the European Communities, Case T-315/01, [Kadi]

[77] See David Dyzenhaus, "The Rule of (Administrative) Law in International Law", IILJ Working Paper 2005/1, Global Administrative Law Series, Institute for International Law and Justice, New York University School of Law, online: <http://www.iilj.org/papers/documents/10120505_Dyzenhaus.pdf>.

[78] *Al Jedda*, supra note 75 at para. 74.

[79] See e.g. UN SC Committee established pursuant to resolution 1267(1999) concerning Al-Qaida and the Taliban and associated individuals and entities,*Guidelines of the Committee for the Conduct of its Work* (adopted 7 November 2002, amended 10 April 2003, revised 21 December 2005), online: <http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf>.

[80] Compare *Kadi*, supra note 75 at paras. 261-288.

[81] Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on the Management of the Oil-for-Food Program* (2005) I at 5.

Regulatory agencies must be adequately resourced to avoid becoming beholden to interested parties

Adequate resourcing is also essential to ensure that agents do not become dependent on partial interests, or even susceptible to corruption by those they are attempting to regulate. In the absence of adequate resources, regulators are likely to become beholden to interested parties, as the UNSCOM experience amply demonstrates. The burden placed on Member States to scrutinise contracts in the 661 Committee provides another example: with the exception of the US, and to a lesser extent the UK and France, most Council members lacked the expert analytical personnel necessary to perform this task adequately. The result was a dysfunctional Committee dominated by a few Member States.

Intelligence will likely remain a key resourcing issue for the Council in years to come.[82] We now know that the conclusions on Iraqi WMD capacities drawn from US and UK intelligence, based largely on satellite imagery and self-interested exile informants, were wrong. On the other hand, the UN's information, and its cautious approach to drawing conclusions from contradictory indicators was right. We were not, as David Kay asserted, all wrong: in exercising prudence in judgement, Mohamed ElBaradei and Hans Blix turned out to be right.[83] As George A. Lopez and David Cortright have commented:

> The crisis of intelligence that pundits and politicians should be considering is not why so many officials overestimated what was wrong in Iraq; it is why they ignored so much readily available evidence of what was right about existing policies. By disregarding the success of inspections and sanctions, Washington discarded an effective system of containment and deterrence and on the basis of faulty intelligence and wrong assumptions, launched a preventive war in its place.[84]

Regulatory agencies must have control over their own expertise

OFF and other such ambitious undertakings mandated by the Council require a body of independent, technically expert, international administrative staff that can implement and oversee complex administrative mechanisms, while ultimately being subject to political control by UN Member States. Country and region-specific expertise of the depth required to assist in charting a new course

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[82] On the use of intelligence in the UN system, see generally Simon Chesterman, *Shared Secrets: Intelligence and Collective Security* (Sydney: Lowy Institute, 2006).

[83] Fareed Zakaria, "We had good Intel – The UN's", *Newsweek*. (9 February 2004) 39; Jessica Mathews, "Inspectors had the real WMD clues", *Financial Times* (9 February 2004) 15.

[84] George A. Lopez and David Cortright, "Containing Iraq: Sanctions Worked", (2004) 83 Foreign Aff. At 103.

for conflict countries is rarely connected to national and international decision-making. The International Crisis Group and several other research organizations have bravely and often successfully sought to fill this breach, but the absence of historical, anthropological, sociological, and economic knowledge of societies the UN seeks to help–and to regulate–is striking. Increasingly, the Security Council delegates fact-finding roles to groups of experts or commissions of inquiry with appropriate technical and contextual knowledge–for example, in the Democratic Republic of Congo, Liberia, Lebanon following the assassination of Prime Minister Hariri, and in Darfur to assess evidence of genocide.[85] Yet the Council, particularly members of the P-5, is much inclined to second-guess these experts. Ultimately, that is exactly what the US and UK did with UNMOVIC in 2003, even though, or perhaps because, they had relinquished control over the selection of UNMOVIC staff, after learning the lesson of the importance of independent staffing from UNSCOM.

Yet resource constraints on the UN system are hard to overstate. Managers, including decision-makers in the Security Council, will likely face increasing pressures for delegation, secondment and outsourcing of analytical, administrative, monitoring and even enforcement tasks. At the same time, they will need to find ways to balance these imperatives with the need to ensure that such agents are not captured by external interests. That will not be a straightforward task.

IV CONCLUSION

These ten lessons drawn from the Council's legal-regulatory approach in Iraq offer insights not only into the Council's own role, but also into broader questions of coherence, accountability and responsibility within the UN system as a whole.

The role of the Council at the apex of the international peace and security architecture, its binding authority, its unique power to mandate military enforcement action, and its agenda-setting role all point to the need for a close examination of the Council's record in establishing, implementing and learning from legal-regulatory systems. Such an examination would yield lessons not only for the UN Secretariat, and the Organization's funds, programs and specialized agencies when acting as agents of the Council, but also for when they operate as principals in their own right. Much of the contemporary work to develop programs for UN system and management reform, including the work of the High-Level Panel on System-Wide Coherence in the Areas of Development, Humanitarian Assistance and Environment, may require mapping and rationalizing relationships between various actors within the

[85] *See* Philip Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations" (2005) 3 J. Int'l. Criminal Justice 600.

UN system, to avoid the kinds of regulatory and management pitfalls identified by the Council's experiences in Iraq.[86]

The Council itself seems likely to continue to develop its legal-regulatory approach, influenced by increased emphasis on conflict prevention, civilian protection and strategic pre-emption. This suggests a need for a more detailed consideration, both within the Council and beyond, of the Council's access to the necessary elements of effective regulatory systems. Key questions include the access of the Council and its enforcement agents to analytical expertise, professional regulatory expertise (including scientific expertise and even mediation capacity) and intelligence; and the clarification of norms surrounding preventive military action, whether under the rubric of the Responsibility to Protect or of counter-terrorism and non-proliferation.

If it fails to develop adequate regulatory capacity, the Council may be better off abandoning such an ambitious agenda, rather than risk further failure with its attendant costs to Council legitimacy. The Council's second-guessing of UNMOVIC in 2003 may, in fact, point to the limits of the type of fact-finding which the Council is willing and able to delegate to a *regulatory* agency. Ultimately, Council members may consider that the determination of the threat posed by a particular regime or situation cannot be reduced to narrow technical questions susceptible to legal-regulatory determination, but is an essentially political question, properly handled through the political-military decision-making processes of the Council itself. How and where Council members draw this line in future years will be controlling in determining the extent to which the Council relies on the legal-regulatory approach. There is no single correct approach that the Council should adopt in discharging its duty to maintain international peace and security: in most cases, it will need to continue with experimentation in exercising its role at the apex of a system of law and as security watchdog in the heart of a treaty framework. But where it *does* choose to adopt a legal-regulatory approach, as it did, without sufficient reflection, in Iraq in the 1990s, it needs to address at the outset issues of discretion, accountability and adequate resourcing. Going forward, the Security Council's experience in Iraq will provide invaluable lessons in this regard.

[86] See "Secretary-General Announces Formation of New High-Level Panel on UN System-Wide Coherence in Areas of Development, Humanitarian Assistance, Environment", UN Doc. SG/SM/10349, DEV/2567, IHA/1150, 16 February 2006.

The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?

ADRIAN DI GIOVANNI*

I INTRODUCTION

On 13 October 2005, the International Criminal Court ("ICC") unsealed the arrest warrants and indictments for five senior leaders of the Lord's Resistance Army ("LRA") for crimes against humanity and war crimes allegedly committed since July 2002.[1] The five leaders are Joseph Kony, Vincent Otti, Dominic Ongwen,[2] Okot Odhiambo, and Raska Lukwia. The warrants were originally issued on 8 July 2005, but had been kept under seal to protect the safety of victims, potential witnesses and their families, and to keep their identities or whereabouts unknown. Both the issuing and the unsealing of the indictments marked the first time that the nascent Court had taken such steps. Far from simply being a "first" however, the unsealing of the indictments was significant because, in the immediate term, it put an end to a controversy that has surrounded the Court since it announced its intervention in Uganda. At issue was a debate over peace versus justice – in particular, whether the Court should even bring the indictments and pursue prosecution, or hold off otherwise risking to undermine efforts to achieve lasting peace.

It is too early to tell what the ultimate effect of bringing the indictments will be.[3] More immediately, the indictments signify that the Prosecutor has cleared a major hurdle on the way to one of the ICC's first

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[1] International Criminal Court, Press release, "Warrant of Arrest unsealed against five LRA Commanders press release," \(14 October 2005), online: ICC Press Releases <http://www.icc-cpi.int/press/pressreleases/114.html>. The ICC is created by virtue of the *Rome Statute of the International Criminal Court*, U.N. Doc. 2187 U.N.T.S. 90, *entered into force* July 1, 2002 [hereinafter "Rome Statute" or "Statute"].

[2] Ongwen was reportedly killed in combat in November 2005, see e.g. "Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court: Informal meeting of Legal Advisors of Ministries of Foreign Affairs" (24 October 2005), online: ICC Office of the Prosecutor <http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf> [hereinafter "Ocampo Statement"]. Interpol, however, recently issued wanted persons notices for the five suspects, including Ongwen, see infra note 58.

[3] At early stages after the release of the indictments, the LRA had allegedly targeted humanitarian aid workers, which it has rarely done in recent years. Some have attributed these attacks to the bringing of the indictments, though it is uncertain whether the attacks were intended specifically to target NGO workers. For a report see: "NGO Attacks Condemned in Uganda" *BBC News* (27 October 2005) and "Uganda rebels 'kill mine experts'" *BBC News* (1 November 2005).

prosecutions.[4] The prospect of prosecutions, in turn, also raises the possibility of yet another first, not just for the Court but for international criminal law more generally: reparations orders. The ICC is the first international court to be given powers to make reparations orders directly against perpetrators to compensate victims for crimes committed under the Court's jurisdiction.[5] This new power has been cited as "a significant step forward in the recognition of the rights of victims in international criminal proceedings."[6] In particular, it represents a shift in international criminal law, from a purely retributive to a more restorative focus, which is "more meaningful and fair" to victims.[7] Indeed, victims are accorded a central status in the ICC's framework, for instance, with a Victims and Witnesses Unit established under the Court's Registrar.[8] This Victims and Witnesses Unit appears already to have started a process of outreach and consultations with victims in Uganda, as part of the Unit's mandate to foster victim protection and participation in Court proceedings.

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[4] Assuming of course that the suspects are in fact arrested and delivered to the Court. Note also that in the meantime the ICC also brought indictments in the case concerning the Democratic Republic of Congo, and Thomas Lubanga Dyilo of the D.R.C. has been delivered to the Hague as the first detainee. For more information see International Criminal Court, Press Release, "Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo" (17 March 2006), online: ICC Press Releases <http://www.icc-cpi.int/press/pressreleases/133.html> and International Criminal Court, Press Release, "Initial appearance of Mr Thomas Lubanga Dyilo before the Pre-Trial Chamber I" (20 March 2006), online: ICC Press Releases <http://www.icc-cpi.int/press/pressreleases/136.html>.

[5] "For the first time in the history of humanity, an international court has the power to order an individual to pay reparation to another individual; it is also the first time that an international criminal court has had such power." International Criminal Court. "Reparation for Victims," online: ICC, Victims and Witnesses <http://www.icc-cpi.int/victimsissues/victimsparticipation.html>. See discussion below at Section IV for more detail.

[6] Claude Jorda & Jérôme de Hemptinne, "The Status and Role of the Victim," in Antonio Cassese, Paola Greta & John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1387 at 1408 [hereinafter "Jorda & Hemptinne"]. See also at 1387-8 citing the reparations power as a "new step forward." Silvia A. Fernández de Gurmendi, "Victims and Witnesses," in R. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedures and Evidence* (Ardsley, NY: Transnational Publishers, Inc., 2001) 427 at 427 [hereinafter "de Gurmendi"] cites the power as an "historic step forward" and "significant step forward"; and Peter Lewis & Håkan Friman, "Reparations to Victims" in Roy Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedures and Evidence* (Ardsley, NY: Transnational Publishers, Inc., 2001) 474-at 474 [hereinafter "Lewis & Friman"] cite it as an "advancement of victims rights".

[7] Christopher Muttukumaru, "Reparation to Victims," in R. Lee, ed., *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 262 at 264 [hereinafter "Muttukumaru"] as a shift from a purely retributive focus to a restorative one; and Ilaria Bottigliero, *Redress for Victims of Crimes Under International Law* (Leiden: Martinus Nijhoff Publishers, 2004) [hereinafter "Bottigliero"] at 214 as more "meaningful and fair".

[8] For more info on the Unit see e.g. the ICC's website at: http://www.icc-cpi.int/victimsissues.html.

Through its Victims Participation and Compensation Unit, the Victims Unit is currently in the process of developing standard forms to be used to eventually help assess victims' reparations claims.[9]

My goal in this paper is to argue that the ICC should proceed with extreme caution on the issue of reparations, and not – as it arguably did in first taking up the case – succumb to an eagerness to exercise its new powers. There are crucial and inherent limitations to what the ICC can hope to accomplish with a reparations process, assuming the Ugandan case actually results in prosecutions and convictions. These limitations arise in two main forms. First, the ICC may not be able to meet the "internal" goals of reparations, of ensuring that similar victims are compensated similarly, for similar harms. In Uganda, there is a large and undefined pool of victims, in a conflict dating back almost twenty years. By contrast, the ICC's jurisdiction to award reparations has clear limits. Many victims thus stand to be excluded from the ICC reparations process for having suffered the "wrong" crimes, committed by the "wrong" perpetrators or at the wrong time. Even where the ICC has the power to award damages, there are doubts that the Court could secure the funds needed to fulfill those awards, leaving otherwise rightful claimants empty-handed. The challenges in securing funding point to the second, and perhaps deeper, limitation of an ICC reparations process. There are strong doubts that the process would be able to fulfill the "external" goals of reparations, to foster and integrate within a wider system of transitional justice processes. Achieving these goals would currently be impossible, because as of yet, there is no larger transitional justice process in Uganda, nor any sign on the part of the Ugandan government of the political will needed for one.

If the Court is not attuned to these limitations, even at this early stage, it could risk undermining its own credibility, and therefore its ability to render, and to be perceived as rendering, justice. The main risk is that the ICC will raise expectations among the victim population which are too high to ever satisfy. Under Rule 96, the Court's Registrar is obliged to publicize the reparations proceedings "as widely as possible and by all possible means."[10] By eventually giving wide publicity to the proceedings and consulting victims to assess their reparations claims (as it now plans to do, for instance, by handing out standard reparations forms), the Court would risk sending the message to the victim population that they will indeed be compensated, in some form or

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[9] *Ibid*.

[10] Rules of Procedure and Evidence, International Criminal Court, Official Records, ICC-ASP/1/3 (Adopted by the Assembly of States Parties, First Session, 3-10 September 2002) [hereinafter "Rules of Procedure" or "Rules"] at Rule 96. See e.g. Bottigliero, *supra* note 7 at 224 noting that the drafters of the *Rome Statute* envisaged the reparations proceedings as a widely publicized process. As Lewis & Friman, *supra* note 6 at 482 note, in drafting this Rule, there was "A general recognition that special considerations apply to reparations and that the general rule on notifications needs to be *augmented* by a special rule on the publication of reparation proceedings" (emphasis added).

other, for wrongs committed against them. These are expectations which might be more easily created than dispelled. With respect to Uganda, research has revealed that the population, where it is aware of the ICC, already holds high expectations of what the Court can accomplish.[11] Further, the population affected by the conflict has voiced a strong desire for reparations, but also for alternative processes such as truth-telling and symbolic commemoration, as methods for recognizing their suffering.[12]

In sum, the ICC – entirely consistent with its own mandate – can expect to meet only some of the victim and local population's needs. It should therefore tread with extreme care in order to avoid raising expectations (however inadvertently) as to what it can accomplish, whether with respect to reparations or to the population's other transitional justice desires. Otherwise, the net result could be to create disaffection, by reinforcing the sense among victims that the Court is not meeting their needs. To echo the words of Eric Stover, "if the ICC is not thoughtful, prudent, and practical about how it manages these expectations, it could end up digging its own grave with the spade of good intentions."[13] To be clear, the argument here is not that the ICC should assume a larger mandate, or be seen as a prime mover on reparations or more general issues of transitional justice and national reconciliation. Rather, to the extent that the ICC acts within its more limited mandate, it must nonetheless recognize the implications of proceeding with a novel power and a more restorative focus. In other words, in order to meet its goal of being more responsive to victims and to deliver justice in a more restorative sense, the ICC should recognize both the challenges in exercising its reparations power in a coherent way, and the interrelation between this power and a broader transitional justice context. After all, much of the controversy surrounding the ICC case was arguably caused by the Court's failure to, at the outset, be attuned to the deeper social and political processes at play in Uganda. Accordingly, the ICC should not act alone on reparations. Despite strong doubts that there would be the political will, either currently or at a later stage, for a larger transitional justice process, there is still large scope for the ICC to link its efforts to local mechanisms for addressing the legacy of suffering and conflict. The Court could thereby fulfill its more limited role as a prosecutor with reparations power, and be truly responsive to the victim population's needs and expectations. However, if it fails in this respect, the Court risks jeopardizing not only the work of its own mandate and the specific goals of reparations, but

[11] See *infra* note 85.

[12] See *infra* note 86.

[13] Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague*, (Philadelphia: University of Pennsylvania Press, 2005) [hereinafter "The Witnesses"] at 150.

also larger efforts to achieve a lasting peace and national reconciliation in Uganda.

The structure of my discussion will be as follows. In Section II, I begin by providing a bit of background about the current conflict in Northern Uganda and the tensions which have arisen in the ICC case. Section III then provides an overview of the goals of reparations programs in transitional justice contexts. In Section IV, I discuss briefly the ICC's reparations powers under the *Rome Statute*. The goals of reparations programs will then serve as benchmarks for assessing whether the ICC's reparations efforts can be successful, in view of the powers and structures the Court actually has. In Section V, I shall examine in detail the problems with using the ICC as a venue for awarding reparations in the Northern Ugandan case. Complications arise, in the first place, in identifying who the victims are, who the perpetrators are, and what damages could actually be compensated through an ICC reparations order. As we shall see, the link between perpetrator, victim and crime are often clouded. Granted that a great many victims would nevertheless be eligible for reparations awards, I shall then examine in more detail the complications in securing the funding needed to fulfill those awards. Here we shall see the confluence of a fledging institution in the ICC and its Victims Trust Fund, the intransigence of the Ugandan government vis-à-vis its own displaced populations and the ragtag resources of the perpetrators in the LRA. In the conclusion, I shall argue in more detail why the ICC should not attempt to implement a reparations scheme alone and how such a scheme could be included as part of a larger transitional justice process.

II THE LRA CONFLICT AND CONTROVERSY SURROUNDING THE ICC CASE

The announcement that the ICC would be looking into the situation in Northern Uganda was first made on 29 January 2004, in a joint press conference with Uganda's President Yoweri Museveni, and the ICC's Chief Prosecutor, Mr. Luis Moreno Ocampo.[14] This case was the first that the ICC would officially look into and appeared as straightforward as it was appropriate. The Prosecutor had taken up the matter after a referral from President Museveni in December 2003.[15] As a result, the Court would not be faced with some of the thornier issues of jurisdiction and "complementarity" that it will inevitably encounter in future cases.[16] At the same time, the LRA was a prime candidate for the ICC to

[14] *International Criminal Court, Press Release, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC," (29 January 2004) online: ICC Press Releases <http://www.icc-cpi.int/press/pressreleases/16.html>.*

[15] *Ibid*. The reference was made on 16 December 2003.

[16] Issues of complementarity arise from Article 17 of the *Rome Statute* under which the ICC can exert jurisdiction over are where "the State is unwilling or unable genuinely to

pursue. The LRA's legacy of atrocity is as undeniable as it is brutal, even since 2002, the period over which the ICC has jurisdiction. This legacy is reflected in the counts listed in the indictments. They span a range of acts allegedly arising from attacks on unspecified camps that constitute both war crimes and crimes against humanity.[17] Included among war crimes are counts of rape, inducing rape, attacks against the civilian population, cruel treatment of civilians, pillaging, murder and enlisting of children. The crimes against humanity include counts of enslavement, sexual enslavement, rape, murder, and inhumane acts of inflicting serious bodily injury and suffering.[18]

History and Legacy of LRA[19]

Post-independence, Uganda has been besieged by turmoil and insecurity. Since President Museveni took power in 1986, Uganda has known its most stable period, yet the country has been stage to fourteen separate insurgencies.[20] Fighting in Northern Uganda has endured throughout that period, and has gone through several phases in its 20-year history. The current conflict against the Lord's Resistance Army ("LRA") is the longest and most recent. Initially, the fighting in the region took the form of more conventional uprisings, as a reaction to Museveni's new regime.[21] It later took on a spiritual dimension under

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carry out the investigation or prosecution." Some commentators predict that there may eventually be tugs of war between the international and domestic courts, should the domestic court decide to take up a case but the ICC deems that this process not be adequate enough to fulfill the requirements under international criminal law. In the Ugandan case, government consent and cooperation meant that the ICC would not be conducting its activities in a hostile environment, or in the face of government intractability.

[17] The camps are internal displacement camps and their names and the dates of the attacks have been redacted in certain cases, so as to protect the identity and safety of the victims.

[18] Joseph Kony was charged with 33 counts, Vincent Otti with 33, Okot Odhiambo with 10, Dominic Ongwen with 7 and Raska Lukwiya with 4. The various arrests warrants are available at: http://www.icc-cpi.int/cases/current_situations/Uganda/ug_decision.html.

[19] The account provided in the remainder of this Section borrows heavily from the Background from the report: P. Pham et al., *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, (International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley: July 2005) [hereinafter "Forgotten Voices"]. The views in this paper reflect my views only and are in no way intended to represent those of any of the other co-authors or organizations associated with that report.

[20] *Ibid.* at 4.

[21] R. Doom & K. Vlassenroot, "Kony's message: A new Koine? The Lord's Resistance Army in Northern Uganda" (1999) 98 African Affairs [hereinafter "Doom & Vlassenroot"]; Refugee Law Project, "Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda," Refugee Law Project Working Paper No. 11 (Kampala: Refugee Law Project, Faculty of Law, Makerere University, 2004) [hereinafter "Behind the Violence"] at 5; Robert Gersony, *The Anguish of Northern Uganda: Results of a Field-based Assessment of the Civil Conflicts in Northern Uganda*,

Alice Lakwena. Her Holy Spirit Movement "sought to energise the northern Acholi society and restore the imbalance and disorder caused by all of the violence they faced."[22] The LRA rose out of the remnants of these earlier, failed uprisings, with Kony reportedly claiming to have inherited Lakwena's spiritual powers. The LRA remains the government's main opponent, and is responsible for much of the violence in Northern Uganda.[23] Kony himself is "shrouded in mystery, and there is no clear consensus on his motivations."[24] A common account of Kony is that he wants to establish a society ruled by the Ten Commandments.[25] He is said to have apocalyptic visions, and to see himself as a messenger of God and a liberator of the Acholi people. However, it remains unclear whether Kony is guided by a coherent political agenda and quest for political control, or by some other aim derived from his greater spiritual project, and whether his messages are destined only to Northern Uganda and Acholi society or to the whole country.[26]

Much clearer is the legacy of violence and suffering that the LRA has caused. Ignoring for now the modalities of the ICC's reparations scheme, this legacy of harm readily demonstrates the sheer number of victims who, under a general conception of reparations, would be deserving of compensation for the harm caused to them. Kony has received "considerably less" popular support than the earlier uprisings.[27] He has responded to this rebuke by increasingly turning against the local population, using violence, especially against them,

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submitted to the US Embassy, Kampala and USAID mission, Kampala, August 1997 [hereinafter "Gersony"] at 25.

[22] The violence was, in particular, in the previous uprisings. The Acholi are one of the main ethnic groups in Northern Uganda. A folk hero, Lakwena claimed to possess special powers, which would protect her soldiers when going into battle. *Gersony*, *supra* note 21 at 24; Doom & Vlassenroot, *supra* note 21 at 16-8; *Forgotten Voices*, supra note 19 at 45. *The Hidden War: The Forgotten People, War in Acholiland and its Ramifications for Peace and Security in Uganda* (Kampala: Human Rights and Peace Centre, Faculty of Law, Makerere University, 2003) at 37 refers to her movement as a response to the Acholi notion of *pina rac*: "when the whole thins is out of hand, that the entire apparatus of the culture cannot cope with the menace any more".

[23] Determining the present number of LRA members is an elusive task, with estimates ranging between 1,000 to 3,000, including a core of 150 to 200 commanders. *Forgotten Voices*, *supra* note 19 at 13; Doom & Vlassenroot, *supra* note 21 at 22.

[24] *Forgotten Voices*, *supra* note 19 at 13.

[25] *Ibid*.: He is said to have apocalyptic visions, and to see himself as a messenger of God and a liberator of the Acholi people. Like Lakwena, Kony apparently holds the traditional spiritual view of the need to cleanse Acholi culture and has invented his own set of rituals and belief-system, drawing from a mix of Christianity, Islam and African spiritualist beliefs.

[26] See e.g. *ibid*.: "Kony has repeatedly called for Museveni's demise and the overthrow of the Ugandan government." For a more recent account of Kony and his motivations see e.g. "Uganda LRA rebel leader 'speaks'" *BBC News* (15 April 2004).

[27] *Doom & Vlassenroot*, *supra* note 21 at 23. He was also purportedly rejected by local traditional and spiritual leaders.

as a tool to instil fear and thereby maintain control over the communities.[28] "The severity of attacks appears to come in waves, with major massacres interspersed across an ongoing campaign of low-intensity, small-scale assaults. The major massacres tend to come in retaliation for government initiatives (such as the launching of a new military campaign or successes achieved through the amnesty process) as a sign by the LRA of its continued effectiveness and defiance.[29] The overall effect has been to inflict deep psychological trauma on the civilian population.

Even in the cases of small-scale assaults, the brutality of the attacks cannot be understated. The LRA usually raids villages and internal displacement settlements at night for food and supplies. These raids appear to increase during the harvest period to take advantage of what few crops the population has planted. When attacking population settlements, LRA members perpetrate mutilations and killings, abduct children and commit rape and other acts of sexual violence against women and girls. The LRA routinely cuts off lips, ears and breasts, gouges eyes, and amputates limbs.[30] "Men who are killed are forced to lie on their fronts, and their heads are smashed. Women are forced to lie on their backs and their throats are cut."[31] These attacks are usually committed with machetes and axes to spread maximum panic.[32]

The brutality of the LRA is exemplified best by its abduction and treatment of children. The LRA has long resorted to abductions as its main form of recruitment. Over the years, it is estimated that the LRA has abducted between 20,000 and 25,000 children – over 12,000 since 2002, a sharp increase and the highest recorded rate of child abductions.[33] The result is that more than 80% of the LRA forces are children, leading to the description of the LRA conflict as one "fought by, with and against children."[34] "The LRA reportedly favours 9 to 12 year-olds for combatants because that age group is the most malleable."[35] Although adults are also frequently abducted, their captivity usually lasts only a short period, long enough to help transport looted goods.[36]

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[28] *Forgotten Voices*, *supra* note 19 at 13. This has been particularly the case where the local population is perceived to be aiding the government's efforts to defeat the LRA.

[29] *Ibid*. 13-14.

[30] *Ibid*. 14: This is apparently motivated by the LRA belief that "with your lips you betray us, with your ears you hear us and betray us, with your eyes you see us and identify us and betray us."

[31] *Ibid*.

[32] *Behind the Violence*, *supra* note 21 at 23.

[33] "A Ugandan Tragedy", UN Office for the Coordination of Humanitarian Affairs (10 November 2004).

[34] *Ibid*.

[35] *Forgotten Voices*, *supra* note 19 at 14; *Behind the Violence*, *supra* note 21 at 34, 20.

[36] Ibid.

This is in stark contrast to the child abductees, who represent upwards of three fourths of abductions, and can remain in the LRA's grip for years.[37]

The LRA conscripts the abducted children into three general roles: soldiers, porters, and sexual slaves. The child soldiers form the front-line of the LRA, engaging in armed combat against government soldiers and carrying out raids and further abductions.[38] The role of the "porters" is mainly to carry pillaged loot and provide the LRA with the mobility which has made it so elusive as an army. The LRA reportedly treats the porters as "disposable": an asset because of their ability to walk long distances at a fast pace, but quickly killed or punished and then killed "if they slow down, or are unable to keep up in the first place."[39] In addition to playing these roles, girl abductees are subjected to a further layer of brutality. Girls represent about half the number of boy abductees but are subjected to "long hours of grueling domestic work (e.g. walking long distances to fetch water and firewood, cooking, and working in the fields)."[40] This is especially the case for the younger girl abductees. "The LRA reportedly favors preadolescent girls because they are believed to be free of sexually transmitted diseases."[41] These girls are apparently spared from rape so that they can eventually be married off to the commanders, free of infection when they are 14 or 15.[42]

In response to the LRA's campaign of violence, the Ugandan government has taken a decidedly militaristic approach, which has arguably worsened the suffering and humanitarian crisis in Northern Uganda.[43] As part of its ongoing efforts to defeat the LRA since 1986, Museveni's government has launched six large-scale military offensives. "The first was Operation North, in 1991, which was the first coordinated attempt to eliminate the LRA. Operation North succeeded in weakening the LRA and, by 1992 and 1993, the

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[37] *Ibid.* and Human Rights Watch, *Abducted and Abused: Renewed Conflict in Uganda* (New York: Human Rights Watch, July 2003) [hereinafter "*Abducted and Abused*"] at 17-18. This has led to the "night commuter" phenomenon whereby, every evening, thousands of children pour into the urban centres, such as Gulu town, to seek refuge and avoid being abducted at night. See e.g. *Abducted and Abused*, at 68-70, and Kathryn Westcott, "Sex slavery awaits Ugandan schoolgirls" *BBC News* (25 June 2003), online: BBC News <http://news.bbc.co.uk/2/hi/africa/3019838.stm>.

[38] They "are often forced to commit atrocities as soon they are abducted in order to 'make a clean break' and to make it more difficult for them to contemplate return." *Forgotten Voices*, *supra* note 19 at 14.

[39] Ibid., which is not uncommon given that the children are poorly fed and become exhausted; and *Behind the Violence*, *supra* note 21 at 20-1.

[40] *Forgotten Voices*, *supra* note 19 at 14-5; *Behind the Violence*, *supra* note 21 at 28, generally at 28–31.

[41] *Forgotten Voices*, *supra* note 19 at 14-5 citing *Abducted and Abused*, *supra* note 37 at 19.

[42] *Ibid.*

[43] The arguable effects of the Ugandan government's handling of the conflict will be discussed more in Section 5 as part of a discussion about the difficulty of using the ICC's reparations scheme to compensate many of the harms in the region.

intensity of the conflict was greatly reduced."[44] The government then seized the opportunity in 1994 to engage in peace talks with what was by then a beleaguered LRA.[45] Betty Bigombe, then Minister for the North, and a resident of Gulu was appointed by the government as the main peace negotiator and mediator to the process. Bigombe succeeded in holding secret talks with Kony and his army commander, Komakech Omona, which eventually resulted in a cease-fire and safe-conduct guarantees between the two warring sides.[46] At that time, there was great optimism and a feeling that a peace agreement was imminent. However, this would not be the case. It is unclear which side, or what event, precipitated the eventual collapse of the peace process, except to say that a growing suspicion between the two sides triggered the process' downfall.[47] In the aftermath of the peace talks, the LRA reportedly began receiving significant support from Sudan. This in turn marked a new stage in the conflict, as the revitalized LRA embarked on a new and more drastic campaign of violence.[48]

It was not until ten years later, in late 2004, that Uganda again saw the most promising prospects for peace. In the intervening years, Northern Uganda saw "alternating periods of violence and calm, with notable lulls in 1996 and 2000."[49] By 2001, with the LRA largely settled in Sudan, there was a great wave of hope in the region that the conflict was slowly dying away. Plans were even afoot to prepare the displaced population for their eventual return to their villages.[50] The Ugandan government, however, took this as an opportunity to try to finally defeat the LRA, and launched two new large scale military operations: Operation Iron Fist I in 2002 and Operation Iron Fist II in March, 2004. A central component of operations Iron First I and II was a protocol signed between the Ugandan and Sudanese governments, which was made possible due to warming relations between the two governments. Under this protocol, concluded first in 2002 and renewed in 2004 as part of Iron Fist II, the Sudanese government agreed to allow Ugandan UPDF troops to cross the border into Sudan to pursue the LRA.[51] The LRA's typical response to each new campaign has been to escalate the intensity of its own attacks on the

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[44] *Forgotten Voices*, *supra* note 19 at 16.

[45] Doom and Vlassenroot, *supra* note 21 at 24.

[46] *Forgotten Voices*, *supra* note 19 at 16.

[47] On the LRA's side, the suspicion was reportedly that government was never serious about achieving peace and was using the process to lure top LRA leaders out of hiding. On the government's side, the suspicion was also reportedly that the LRA was not serious about peace and simply using the process to stall long enough to secure support from the Sudanese.

[48] *Forgotten Voices*, *supra* note 19 at 16.

[49] *Ibid*., noting that "The LRA has reportedly used the calmer periods to regroup."

[50] *Ibid*.

[51] *Ibid*.

population.[52] The Iron Fist campaigns, however, did appear to weaken the LRA and by the end of 2004, the Ugandan government initiated a new peace process, again appointing Betty Bigombe as mediator.[53] These talks produced some initial successes, including a cease-fire at the end of November 2004, which lasted until February 2005 after being extended a few times.[54] By October 2005, prior to the release of the indictments, the peace process seemed stalled with less certain prospects for peace and "low-level fighting between the LRA and UPDF continued, as did LRA attacks on civilians."[55]

The most recent developments in efforts to achieve peace, were in May 2006 when President Museveni made a new overture to Kony, guaranteeing him safety until the end of July 2006, if he agreed to end the war by then.[56] A week later, the rarely seen Kony appeared in a DVD with Riek Machar, the vice-president of southern Sudan's autonomous government. In the footage, Kony appealed for peace but questioned the motives of the Ugandan government. He also took $20,000 in cash from the vice-president to halt LRA attacks in southern Sudan and accepted an offer by the vice-president to act as a peace mediator.[57] Finally, in early June 2006, as part of ongoing efforts to give effect to the ICC's arrest warrants, Interpol issued wanted persons notices for the five suspects currently under indictment in the Ugandan case.[58] It is unclear how these various developments will play out – in particular, the ICC's continued demands that governments fulfill their obligations to give effect to the arrest warrants in the face of respective calls from Kony and Museveni for peace, Museveni's offer of safety to Kony and Southern Sudan's hitherto unforeseen offer to act as a mediator. In Northern Uganda, however, this type of uncertainty is by no means new, especially with regards to efforts to achieve

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[52] For instance, the LRA responded to Operation Iron Fist with a new campaign of violence against the civilian population, but this time, the LRA spread the conflict east into the non-Acholi districts of Lira and Soroti. The LRA responded to the launching of Iron Fist II by unleashing a number of massive attacks, most severely on the Barlonya camp in Lira and the Pagak and Lukodi Camps in Gulu. *Ibid*. at 17, noting that respectively, the latter attacks led to upwards of 200, 39, and 41 deaths, in addition to other injuries and destruction of property. One can speculate as to whether these camps are the ones cited – but not revealed – in the indictments because soon after the attack on Barlonya, the ICC Prosecutor Ocampo stated that he would be investigating the attack as part of his then larger investigation to determine whether there was a basis to bring indictments.

[53] *Forgotten Voices*, *supra* note 19 at 17.

[54] As ICTJ notes, *ibid*., in February 2005, the peace process may have faltered at as Sam Kolo, who had been one of the LRA's top leaders and Bigombe's chief contact in the negotiations, surrendered to the government.

[55] *Ibid*.

[56] "New Overture to Uganda's Rebels" *BBC News* (17 May 2006), online: BBC News <http://news.bbc.co.uk/2/hi/africa/4990086.stm>.

[57] "Ugandan Rebel Chief in Peace Plea," *BBC News* (24 May 2006), online: BBC News <http://news.bbc.co.uk/2/hi/africa/5014520.stm>.

[58] "Interpol Push for Uganda Arrests" *BBC News* (2 June 2006), online: BBC News <http://news.bbc.co.uk/2/hi/africa/5039620.stm>.

peace. These recent dynamics are significant because they could potentially give rise to a controversy similar to the one that initially surrounded the ICC's intervention in Uganda, namely, a perceived tension between trying to achieve peace and the pursuit of justice through prosecution by the ICC.

A New Player: The International Criminal Court

The clarity of hindsight would suggest that the ICC was perhaps hasty in how it first took up the case in Northern Uganda. Although the international community welcomed the Prosecutor's announcement about Uganda and the LRA,[59] the ICC's intervention soon "sparked considerable controversy in Uganda."[60] The Court's critics emerged largely from Northern Uganda, and included religious and traditional leaders, especially of the Acholi people, as well as local and international organizations advocating on behalf of the displaced population. Some questioned "whether the Ugandan government should be allowed to limit the terms of the referral to crimes committed by the LRA."[61] From the beginning, perhaps sensitive to the politicised nature of his investigation, the Prosecutor has stated that he would investigate all crimes in Northern Uganda, regardless of who committed them.[62] However, the Prosecutor announced the initial referral of the case in the company of President Museveni. This was criticized and interpreted as a sign that the Prosecutor would not "investigate the UPDF with the same rigor as the LRA."[63] More specifically, the referral of the case has been viewed as an attempt by President Museveni to shore up international support and "reassert his democratic credentials."[64] The timing of the referral is significant.[65] Prior to the

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[59] See e.g. statements by Human Rights Watch and Amnesty International respectively at "ICC: Investigate All Sides in Uganda; Chance for Impartial ICC Investigation into Serious Crimes a Welcome Step" Human Rights Watch (New York, 4 February 2004), and Amnesty International, "Uganda: First steps to Investigate Crimes must be Part of Comprehensive Plan to End Impunity" Amnesty International Press Release AFR 59/001/2004 (Amnesty International: 30 January 2004).

[60] *Forgotten Voices*, supra note 19 at 18, noting that "President Museveni has further exacerbated the situation by making public statements that appear to contradict his support of the ICC. In August 2004, just as the peace process was gaining momentum, he indicated that he would allow Kony and other LRA commanders to participate in the amnesty program (even though the ICC has clearly indicated that it does not consider itself bound by the Amnesty Act). Then, in November 2004, when prospects for peace were looking hopeful, Museveni announced that he would seek to withdraw the referral to the ICC and find other ways to deal with the LRA."

[61] *Ibid.*

[62] "ICC Assigns Cases on DR of Congo, Northern Uganda to Pre-trial Chambers" *UN News Service* (7 July 2004), online: UN News Service http://www.un.org/apps/news/story.asp?NewsID=11272.

[63] *Forgotten Voices*, *supra* note 19 at 18. "UPDF" is the Ugandan army and stands for Uganda Peoples Defence Force.

[64] Refugee Law Project, "ICC Statement," (Kampala: Faculty of Law, Makerere University, 23 July 2004) [hereinafter "*ICC Statement*"] at 4.

[65] *Ibid.* at 2.

referral, the government had been the object of increasing criticism from both within Uganda and the international community for its handling of the conflict, and for its failure to work towards a peaceful resolution.[66] In making the referral, the government thus sought to supplant international focus on the effects of the war and the need for peaceful negotiations with "discourses on justice and punishing perpetrators of crimes against humanity and war crimes."[67]

It was feared by some advocates that the ICC case would undermine the efforts to achieve peace in progress at that time, and, in the long-term, the prospects for a wider process of reconciliation within Uganda.[68] These concerns became heightened after the ICC had already formally commenced its investigation in Northern Uganda, as Bigombe's new peace negotiations started to produce initial success and to generate optimism. Bigombe became concerned that with the prospect of indictments hanging over their heads, the LRA leaders would abandon any efforts at reaching a peaceful compromise and would take their chances by continuing to fight, having already evaded capture by the Ugandan army for so long. Bigombe was so concerned about the possible deleterious impact of the ICC case on peace that she threatened to step down as peace negotiator were the case to proceed, and led a delegation to the Hague to meet with the Chief Prosecutor.[69] (In the immediate aftermath of the indictments, and despite some initial uncertainty, however, Bigombe announced that she would continue in her role as mediator and would attempt to start fresh peace talks with the LRA.[70])

Critics of the ICC case also feared that the Court's intervention would thwart an amnesty process which has been in place since 2000 and has since been successful in luring a large number of LRA combatants out of fighting.[71] In principle, the amnesty process would be largely untouched by the ICC case. But concerns were nonetheless voiced that the case could risk undoing much of the progress achieved by the amnesty process by creating confusion and distrust.[72]

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[66] *Ibid.* at 4.

[67] *Ibid.*

[68] See generally e.g. *supra* note 64 for an articulation of this view.

[69] See e.g. IRIN, "UGANDA: ICC jeopardising local peace efforts - northern leaders," (25 March 2005), online: IRIN <http://www.irinnews.org/report.asp?ReportID=46323>. The prosecutor met with another delegation in April 2005 composed of Acholi, Langi, Iteso and Madi leaders.

[70] "Bigombe Plans Fresh LRA Talks" *The New Vision* (Kampala: 21 October 2005), online: http://www.newvision.co.ug/D/8/16/461902.

[71] Since the passing of an Amnesty Act in 2000, some 14,000 former combatants have applied for amnesty, including approximately 6,000 LRA. See Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act: The Potential for Conflict Resolution and Long-Term Reconciliation*, (Working Paper 15), (Kampala: Refugee Law Project, February 2005) and *Forgotten Voices*, *supra* note 19 at Annex 3, for a deeper discussion of the Amnesty Act.

[72] For one thing, many of the LRA soldiers are juveniles and would thus not fall under the ICC's jurisdiction. *Rome Statute,* U.N. Doc. A/CONF.183/9 (1998) at Article 18. See

As one official from the Amnesty Commission has noted, it has taken a long time to create proper awareness about the amnesty process. The ICC case was thus seen as a potential threat to this already delicate process.[73]

The impetus for initiating the amnesty process came mostly from advocates in Northern Uganda as part of a larger alternative approach to achieving peace. This approach, in contrast to the government's military campaigns, "aims at a negotiated settlement followed by widespread reintegration."[74] To facilitate the reintegration process, traditional Acholi leaders have advocated for the use of traditional justice ceremonies, and have already began reintroducing them.[75] The priority given to these ceremonies reflects yet another general critique of the ICC, namely, that it will not allow the Acholi "to respond to the legacy of past atrocities in their own way and employ means that resonate and accord with local traditions."[76] More radically, some groups have argued that the ICC should refrain from intervening altogether, and that traditional, restorative processes for justice, such as the Acholi *mato oput*, should be used instead.[77] In the view of these groups, the ICC is a divisive adversarial process, and thus a possible barrier to societal reintegration.[78]

At a deeper level, the divisive nature of the ICC case has been framed in terms of the historical divisions in Uganda. The ICC case has been viewed as an attempt by the government to impose an end to the Northern Ugandan conflict by dictating, in the form of the ICC referral, the processes and notions

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also William A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed. (Cambridge: Cambridge University Press, 2004) at 24. For another, the Prosecutor has indicated that any eventual prosecution would only be against the top members of the LRA. International Criminal Court Office of the Prosecutor, "Paper on Some Policy Issues Before the Office of the Prosecutor" (September 2003), online: <http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> at Section 2.1.

[73] Comments by Sister Mary, Amnesty Commissioner in Justice Resources, *Record of ICC Discussion Meeting at Acholi Inn, Gulu* (13 August 2004) (on file with author) [hereinafter "*Gulu ICC Discussion*"] at 12. See also *Behind the Violence*, *supra* note 21 at 45-6 on some of the difficulties in bringing the amnesty process into operation.

[74] *Forgotten Voices*, *supra* note 19 at 17, noting that this approach "is supported by many international humanitarian organizations active in Northern Uganda, as well as by victims' groups and other human rights organizations. Increasingly, these groups have begun to focus on joint advocacy activities."

[75] *Ibid*. For a more in-depth description of the Acholi traditional justice mechanisms, see e.g. *Roco Wat I Acoli: Restoring Relations in Acholi-land: Traditional Approaches to Reintegration and Justice,* Liu Institute for Global Studies & Gulu District NGO Forum (September 2005); online <http://www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-2005.pdf> [hereinafter "*Roco Wat I Acol:*"].

[76] *Forgotten Voices*, *supra* note 19 at 18.

[77] *Gulu ICC Discussion*, *supra* note 73 at 12.

[78] *ICC Statement*, *supra* note 64 at 8-9.

of justice for doing so, but without addressing the underlying grievances that pre-date the fight with the LRA.[79] As such, the case would risk feeding into a historical cycle of violence and revenge which has replicated itself in post-independence Uganda, whereby each subsequent group holding power has sought to both marginalise its opponents through violence and to avoid accountability for its own acts.[80] By potentially playing into this cycle, the fear was that the ICC's intervention would work against any hope for long-term peace and reconciliation in Uganda.

In response to this series of criticisms, supporters of the ICC's intervention have argued that the case has had a positive impact on the situation in Northern Uganda. For one thing, the case "has contributed to a renewed focus on the conflict in Northern Uganda," which has in turn "helped prompt Sudan to stop supporting the LRA."[81] Further, the opening of the ICC case in Uganda has been credited as the reason for the LRA's participation in the 2004 peace process.[82] As the International Center for Transitional Justice (ICTJ) notes, "[s]upporters argue that many factors beyond the Court have contributed to a continuation of the violence, and that a permanent peace will have to be accompanied by accountability."[83]

Finally, it is not clear that the debate over the ICC's intervention, and in particular its either/or quality, was representative of the views of the population affected by the conflict. Recently, a population-based survey entitled *Forgotten Voices*[84] was conducted in Northern Uganda, to gauge the population's attitudes concerning peace and justice. The results revealed that the population does not make such a clear-cut distinction between pursuing peace and justice. While the population polled stated predominantly that its most immediate needs were peace and food, there was also a clear recognition of a need and desire for accountability for the atrocities committed by both the LRA and the government in the region.[85] There was no consensus as to how the

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[79] For an in depth discussion of these grievances, see e.g. *Gersony*, *supra* note 21, *Behind the Violence, supra* note 21 at 4-6 for a brief account.

[80] For instance, the Amin and Obote II regimes are notorious for their legacy of political violence and human rights violations that, under each regime, saw upwards of 300,000 killings. Revenge and violence in Uganda, have further followed each change in power, and have roughly fallen along ethnic lines and pre-existing tensions between north and south. The general pattern is that, with each change of power, the new government has targeted the supporters of the previous regimes. *Behind the Violence*, *supra* note 21 at 8.

[81] *Ibid*. at 18.

[82] For a very clear and succinct articulation of these views, see e.g. Payam Akhavan, "The *Lord's Resistance Army* Case: Uganda's Submission of the First State Referral to the International Criminal Court," (2005) 99 A.J.I.L. 403.

[83] *Forgotten Voices*, *supra* note 19 at 18.

[84] *Ibid*.

[85] When polled as to their most immediate needs, 33% of respondents cited food, while 31% cited peace. *Ibid*. at 25. For results as to how the polled population would sequence the pursuit of justice and peace see *ibid.* at 34. Basically, a slight majority of Acholi

pursuit of peace and justice should be sequenced, and even disagreement over who should be held accountable. In the Acholi regions, which have suffered the majority of the abductions, there was a majority preference for pursuing only senior LRA leadership and not the rank and file members. By contrast, in other non-Acholi regions, the majority preference was for pursuing all LRA members. Interestingly, the population was largely unaware of the ICC, but where they were, they exhibited strong expectations of what the Court could accomplish (e.g. that it could arrest LRA members, contribute to peace and provide justice for past abuses).[86] Finally, the population surveyed expressed a strong desire for additional transitional justice mechanisms, such as truth-telling, remembrance and reparations.[87]

III DEFINITION AND GOALS OF REPARATIONS

The ICC is the first international court with the power to order reparations directly against individual perpetrators.[88] The use of international mechanisms to compensate victims of grave violations of human rights and humanitarian law is not new.[89] Previously, however, any kind of reparations at the international level could generally only be sought against states, for instance, as a matter of state responsibility for human rights violations. In this vein, regional human rights tribunals have made reparations orders against States

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respondents (56%) preferred peace with amnesty over peace with trials and punishment whereas a majority of non-Acholi preferred the opposite (61%).

[86] *Ibid*. at 33. Similarly, there were relatively low levels of knowledge about traditional justice ceremonies, especially outside of the non-Acholi regions, *ibid*. at 31. In the Acholi regions, slightly more than the majority knew about them (Gulu, 53%, Kitgum 57%), which represented five times more than in non-Acholi regions. Where there was knowledge of these processes, the role that they can play in assisting with reconciliation was cited most often as a reason for why the ceremonies would be useful to deal with the LRA, *ibid*. at 32.

[87] *Ibid*. at 35. The results are cited in more detail *infra* in Section 6.

[88] See e.g. Thordis Ingadottir, "Victims of Atrocities – Access to Reparations" from *Searching for Justice: Comprehensive Action in the Face of Atrocities,* York University, Canada, June 4-6, 2003 [hereinafter Ingadottir] at 13; Peter Fischer, "The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme," (2003) 17 Emory Int'l L. Rev. 187 [hereinafter *Fischer*] at 200. For an oft-cited quote by ICC president Kirsch see "President Kirsch Welcomes Board of Directors of the Victims Trust Fund" (August 2004) *ICC Newsletter #1* at 6, online: <http://www.icc-cpi.int/library/about/newsletter/ files/ICC-NL1-200408_En.pdf> Lewis & Friman, *supra* note 6 at 474-5.

[89] See generally, Bottigliero, *supra* note 7 at 193-6.

for past human rights violations against their citizens.[90] More recently, a restricted power to make awards for the restitution of unlawfully taken property was included under the Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda.[91] This power has been termed an indirect approach to reparations because victims can only obtain compensation (based on the Tribunal's awards) by initiating an action before "national courts" or "other competent body."[92] To date, neither Tribunal has made use of its compensation scheme.[93] In this sense, the inclusion of broader reparations powers under the *Rome Statute* represents an attempt to overcome some of the difficulties the earlier Tribunals have faced in implementing their compensation schemes.[94] This in turn was part of a more general effort by the drafters of the *Rome Statute* to grant broader participation rights to victims in the ICC's proceedings. Indeed, the ICC's reparations powers marked a very explicit decision on the part of the drafters to move away from the purely retributive approach to justice of the ICTY and ICTR to justice in a wider sense:

> There was a gradual realization that there had to be a recognition in the Statute that the victims of crimes not only had … an interest in the prosecution of offenders but also an

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[90] For an account of practice in the Inter-American system, see e.g. Jo M. Pascqualucci, "Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure," (2003) 18 Mich. J. Int'l. L. 497.

[91] Where "such property was unlawfully taken in connection with a crime under the Statute for which a person has been found guilty." Bottigliero, *supra* note 7 at 198-9, referencing Rules 98 (ICTY) and 88 (ICTR).

[92] Common Rule 106 of the two tribunals, respectively at International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996 and International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995. See also Bottigliero, supra note 7 at 200-2, Jorda & Hemptinne, *supra* note 6 at 1391-2. In addition, restitution proceedings before the two tribunals can only be instituted to the prerogative of the Prosecutor, in contrast to the ICC where victims can apply directly for reparations on their own initiative.

[93] Indeed, there have also been calls made to try to make the compensation schemes more efficient to use. Bottigliero, supra note 7 at 202-5, 211, The Project on International Courts and Tribunals, *Internationalized Criminal Courts and Tribunals*, Eds. Cesare P. R. Romano, André Nollkaemper & Jann K. Kleffner (Oxford: Oxford University Press, 2004) [hereinafter "PICT"] at 287. The responses of the judges of both the ICTY and ICTR to the proposals of their prosecutors to improve victim participation in the respective tribunals' proceedings can be found, respectively, at *Letter from the Secretary-General addressed to the President of the Security Council* UN Doc S/2001/1063 (2 November 2000) and *Letter from the Secretary-General addressed to the President of the Security Council* UN Doc S/2000/1198 (14 December 2000). PICT also notes at 287-8 that neither the Serious Crimes Panels in East Timor and the Special Tribunal for Sierra Leone address the issue of reparations. Both tribunals do contemplate a trust fund for victims but in both cases it has yet to be established.

[94] Jorda & Hemptinne, *supra* note 6 at 1399.

> interest in restorative justice, whether in the form of compensation or restitution or otherwise.[95]

The novelty with the ICC's scheme then, is that reparations can be awarded directly at the international level, against individual defendants, to compensate victims for harms arising from crimes under the *Rome Statute*.[96] Before looking at the nuts and bolts of the ICC reparations powers, it is first important to examine what is meant by reparations more generally. My aim here is not to delve into the deeper debates surrounding reparations, but to highlight some of the general goals and meanings which are ascribed to the term.[97]

The term "reparations" is generally associated with the notion of compensatory justice.[98] Reparations are aimed at rectifying the wrong done to a victim,[99] and are tied to notions of responsibility, namely "as the materialization of a recognition of responsibility."[100] Reparations can be material, for instance, monetary compensation or the provision of services, or symbolic, for instance, an apology or a monument. Additionally, reparations can be aimed at individual victims or collective groups of victims. In its broadest form, the term "reparations" encompasses all measures aimed at addressing the consequences of certain crimes. The UN's *Basic Principles on the Right to a Remedy*

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[95] Muttukumaru, *supra* note 7 at 264. Bottigliero notes similarly that "the drafters of the ICC came to the realization that an International Criminal Court with competence over some of the most heinous violations of fundamental rights and freedoms could be more meaningful and fair if some basic provisions on victims' redress were included." Bottigliero, *supra* note 7 at 214.

[96] Bottigliero *ibid*. at 222-3 notes that this was one of the more controversial issues debated during the Rome Diplomatic Conference. See also Muttukumaru, *supra* note 7 at 264, noting that some delegations took the view that "the very establishment of the Court would be an act that already implicitly recognized victims' rights through its retributive and deterring functions, and if a conviction resulted, there would be an effective guarantee of non-repetition of the crime against victims." The push for greater victims rights to redress under the *Rome Statute* has been attributed in large part to the efforts of victims rights NGOs lobbying for a more restorative notion of justice, Bottigliero, *supra* note 7 at 214 and Jorda & Hemptinne, *supra* note 6 at 1400.

[97] For more theoretical discussion of the topic of reparations see e.g. Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) [hereinafter Minow] at 89-117; Jeremy Waldron, "Superseding Historic Injustice," (1992) 103 Ethics 607.

[98] Namely, whereby some form of compensation is given to the victim of a crime or wrong. Minow, *supra* note 96 at 104.

[99] Dinah Shelton & Thordis Ingadottir, "The International Criminal Court Reparations to Victims of Crimes (Article 75 of the *Rome Statute*) and the Trust Fund (Aritcle 79)" Prepared by the Center on International Cooperation, New York University, for the *26 July – 13 August 1999 Meeting of the Preparatory Commission for the International Criminal Court* [hereinafter *Shelton and Ingadottir*] at 7.

[100] Marieke Wierda & Pablo de Greiff, "Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims" prepared for the International Center for Transitional Justice, online: Victims Rights Working Group Publications < http://www.vrwg.org/Publications/02/ICTJ%20Trust%20Fund%20Paper.pdf> [hereinafter *Wierda & de Greiff*] at 2.

and Reparation list five basic categories of reparations: (i) restitution or *restitution in integrum*, which is aimed at restoring the victim to the *status quo ante* or "original situation" before the violation occurred; (ii) compensation, whereby every quantifiable harm is compensated; (iii) rehabilitation, which could include all relevant medical, psychological, social and legal support services; (iv) satisfaction, which is fairly broad and would include such varied measures as public apologies, truth-finding processes, sanctioning perpetrators; and (v) guarantees of non-repetition, including institutional and legal reform, and promoting mechanisms to prevent and monitor future social conflict.[101]

In their narrowest form, reparations provide benefits strictly to victims, for losses caused by specific crimes committed against those victims. However, an overly narrow reparations program, such as a court assessing reparations on a case-by-case basis, risks disaggregating the harm suffered by victims and fragmenting various victims groups. As Wierda and de Greiff note, "what needs to be redressed in the aftermath of systematic crime is *not only* individual harm but human and social relations that have been violently destroyed."[102] Narrow conceptions of reparations may thus exclude from their purview harms caused to members of society who, while not the object of specific identifiable crimes, have nonetheless suffered greatly from the period of turmoil or violence. A broader notion of reparations, by contrast, would include compensation for collective harms. However, if stretched too far, reparations can begin to resemble a development program. Such programs are themselves largely unsatisfactory for reparations purposes, because they are only remotely directed towards the wrongs suffered by victims and also suffer from a high level of uncertainty in their results.[103]

Broadly speaking, reparations aim to restore the position of victims at both an individual and a societal level. At an individual level, reparations seek to provide justice to victims and to restore their dignity by acknowledging responsibility for the wrongs done to them and, as much as possible, attempting to restore the *status quo ante*. By recognizing and attempting to restore wrongs, reparations recognize victims as citizens and as unique and irreplaceable

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[101] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res., UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005) [hereinafter "Basic Principles"] at paras. 19-23. See also, e.g. The International Center for Transitional Justice, "Parameters for Designing a Reparations Program in Peru" (September 2002) online: ICTJ <http://ictj.com/downloads/Peru%20Reparations--Paper.pdf> [hereinafter *ICTJ/APRODEH*] at 5; *Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.* UNESCOR, 56th Sess. UN Doc. E/CN.4/2000/62, (January 18, 2000) which provides a comprehensive outline of reparations.

[102] Wierda & de Greiff, *supra* note 99 at 6.

[103] ICTJ/APRODEH, *supra* note 100 at 12.

individuals.[104] At a societal level, reparations seek to promote a sense of justice and contribute to constructing the rule of law by building up civic trust and social solidarity.[105] That is, through the process of reparations, the goal is to re-establish, in part, the trust of victims in their public institutions and fellow citizens. The drafters of the *Rome Statute* appear to have been attuned to the role that reparations play at both the individual and societal level. In this case, the value of reparations was expressed in terms of reconciliation. According to Muttukumaru, as the negotiations over the ICC's reparations powers unfolded:

> It was increasingly recognized that reparations could contribute to a process of reconciliation. Reconciliation was capable of working at two planes, at the individual level and at the level of facilitating the restoration of a society more general. In turn, the process could help to create the conditions in which the risk of further violations might be diminished.[106]

Conversely, the risk in not having reparations is that "victims will always have reason to suspect that even if the other transitional mechanisms are applied with some degree of sincerity, the 'new' democratic society is being built on their backs."[107]

The concern about victims feeling that the transitional period is being undertaken at their expense speaks to another broad goal of reparations programs, namely, that the reparations should be coherent. The coherence of a reparations program can be analysed at two levels, internally and externally. "*Internal* coherence refers to the relationship between the different types of benefits a reparations program distributes."[108] In this sense, a reparations program will be considered internally coherent if it provides the same types of reparations to similar victims, for similar crimes (e.g. symbolic reparations for

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[104] Reparations are "in a sense, the material form of the recognition that citizens owe to individuals who have suffered a violation of their most fundamental rights." ICTJ / APRODEH, *supra* note 100 at 10.

[105] *Ibid*. at 7 and Wierda & de Greiff, *supra* note 99 at 7.

[106] Muttukumaru, *supra* note 7 at 264. Lewis & Friman, *supra* note 6 at 475 also cites "the importance of reconciliation in societies torn apart by conflict" as an argument for the reparations provisions in the *Statute*. In canvassing a number of theoretical underpinnings for reparations, Ken Cooper-Stephenson notes that: "Underpinning these [seven] justice concepts is a perception of (a) the inherent right of individuals to be treated with respect as fully participatory human actors; and (b) the need for community harmony and social peace in order that individuals are able to progress with their chosen life-plans." Ken Cooper-Stephenson, "Theoretical Underpinning for Reparations: A Constitutional Tort Perspective," (2003) 22 *Windsor Y.B. Access Just.* 3 at 7. Further discussion of the theory of reparations as found in tort law is beyond the immediate scope of this paper.

[107] ICTJ / APRODEH, *supra* note 100 at 11.

[108] Wierda & de Greiff, *supra* note 99 at 14.

the same types of harms, such as collective harms, and the same level of material compensation for all similar types of physical harms).

External coherence refers to the relationship between the reparations program and other transitional justice programs. More specifically, a reparations program will be externally coherent where it is given a balanced status within a larger transitional process. To illustrate, a truth-telling process performed in the absence of any reparations process might, in the eyes of the victims, make the truth process an empty gesture, "both 'cheap' and inconsequential."[109] Similarly, prosecutions without reparations might also send the message that justice is being performed at less than its full cost. Alternatively, it might send the message that the process is aimed solely at finding fault of those responsible, rather than benefiting the victims.[110] Again, the broader roles accorded to victim participation and reparations in the *Rome Statute* appear to be aimed at avoiding the experiences of the predecessor international tribunals, which were seen as aimed solely at finding fault. By contrast, a reparations program performed in the absence of prosecutions might be perceived as an attempt to buy the support or loyalty of victims, or as a distribution of dirty money.[111] Finally, institutional reform without reparations might undermine efforts to gain the needed support and trust of victims in the new regime, whereas reparations without institutional reform might leave victims feeling that their struggles were ultimately in vain. In other words, even with the recognition of victims' harms through symbolic or material reparations, without institutional reforms, victims might be left feeling that their struggles have failed to produce any meaningful, long-term change. Issues of internal and external coherence are important to underscore here because they will be the central challenges faced by the ICC in attempting to deliver reparations in Northern Uganda. However, to understand these coherence-related challenges, especially the internal ones, it is first necessary to examine the framework for reparations under the *Rome Statute*.

IV ICC'S REPARATIONS FRAMEWORK

The ICC has the power to make reparations orders under Article 75 of the *Rome Statute*, and in particular, to "establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[112] The Court is further empowered to determine the extent of

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[109] ICTJ / APRODEH, *supra* note 100, at 8.

[110] *Ibid*.

[111] *Ibid*.

[112] Article 75(1) *Rome Statute*. Here we see that the goal of satisfaction of non-recurrence is not included. As Wierda and de Greiff note, this goal is not included because it has a much broader scope that is generally associated with state responsibility. Wierda & de Greiff, *supra* note 99 at 3, fn4. See also Muttukumaru, *supra* note 7 at 266-7 for a

"any damage, loss and injury to, or in respect of, victims" either upon request or, in exceptional circumstances, on its own motion.[113] The reparations order can either be made against a convicted person or, where appropriate, through the Victims Trust Fund.[114] The Court cannot make an order against the State.[115] The Court nonetheless can enlist the assistance of State parties in two ways: first, through a request for cooperation under Article 93, to identify, trace and freeze *inter alia* proceeds of crimes for forfeiture; and, second, by requiring State parties to give effect to fines and forfeiture orders under Article 109.[116]

Article 75 is fairly broad and leaves open two crucial questions: who qualifies as a "victim" entitled to reparations and what is the scope of reparations? The first question was not specifically discussed during the drafting of the *Rome Statute* but was the subject of extensive debate during the drafting of the Court's *Rules of Procedure and Evidence*.[117] Rule 85 defines a victim as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."[118] This means that there has to be some link between victims and crimes committed under the *Rome Statute* (i.e. war crimes, crimes against humanity and genocide).[119] How

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background account on the debates during the drafting of Article 75 concerning what types of reparations should be included in the *Statute*.

[113] *Ibid*. at 3.

[114] Article 75(2) *Rome Statute*.

[115] Schabas *supra* note 72 at 149 citing Muttukumaru, *supra* note 7 at 267. See also Ingadottir, *supra* note 87 at 20. During the drafting of the *Statute* there was great concern from some delegations that the ICC's reparations powers could create state responsibility for redress. It was eventually decided that state responsibility would be abandoned, for fear of losing the support of certain delegations for any reparations power, and on the view that since the ICC was geared towards finding individual responsibility for crimes, it should only have a correlative power to order reparations against individuals. Those delegations supporting a broader power, including state responsibility, cited the need to support international efforts to promote this responsibility, as enshrined for instance in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res. 40/34 (29 November 1985), which establish a state responsibility for victim redress. This responsibility has been reaffirmed in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, *supra* note 100 at para. 16. See Muttukumaru, *supra* note 7 at 267-9 more generally for a discussion on the issue of state responsibility during the drafting of the *Rome Statute*.

[116] Article 75(3) and 75(4) *Rome Statute* respectively.

[117] See de Gurmendi, *supra* note 6 at 427-433 for a discussion of the drafting of the Rule 85 on the definition of victim. As the authors note at 428, the definition was not discussed much in the drafting of the *Statute* "despite the major and distinctive role contemplated for" victims. According to the authors further at 476 this issue and the scope of reparations were left unresolved in Article 75 due to the "late introduction of concrete text proposals, a general time constraint, and the very large complex issues involved."

[118] Rule 85(a). Rule 85(b) provides further that victims can include organizations and institutions where they have suffered damages *inter alia* to property dedicated to religion, education or historic monuments or hospitals. See *ibid.* at 433 for discussions of how broadly to include organizations and monuments.

[119] Article 5(1) *Rome Statute*. I have omitted aggression for the time being since this crime has yet to be defined. See Article 5(2).

remote the link between the harm and the commission of the crime has to be in order for a victim to be eligible for reparations is not immediately clear. This very issue caused controversy during the drafting of Rule 85. On the one hand, "the vast majority of delegations supported in principle a broad definition of victim based on the Victims Declaration" which extends the link between harm and victim to include family members of victims.[120] On the other hand, some delegates feared that an overly broad definition would impose logistical constraints on the Court and overwhelm it with the "very large number of victims" who might thereby be expected to participate fully in the Court's proceedings and request reparation.[121] The debate over how broadly to define victim in the *Rules* was ultimately left unresolved. As such, the current wording of Rule 85 was intended as a guide for the Court, which will clarify how broadly to define victim at a future date, when applying the *Statute* and *Rules* to the facts of individual cases.

Rule 97, which governs the assessment of reparations, appears to provide some leeway for the Court in interpreting the concept of victim. This Rule gives the Court the option to make individual awards or, where appropriate, awards on a collective basis.[122] Further, Rule 97(2) gives the Court a wide range of options to assess injury and loss and to determine the "various options concerning the appropriate types and modalities of reparations." The Court, accordingly, could validly make an order directed at a whole group of victims or a community or both.[123] In other words, there appears to be scope for the Court to award reparations, for instance, to a whole community that was terrorized by violence. Even then, Rule 85 leaves yet another issue of interpretation unresolved: do victims have to participate in the Court proceedings in order to qualify for reparations?[124] This issue could be decided either way. On one hand, Rule 94 stipulates that, to apply for reparations under Article 75, victims have to file a written application with the Court's Registry containing specific information and evidence.[125] As noted above, the

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[120] de Guzmendi, *supra* note 6 at 428 and the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, *supra* note 114. The broader definition has been used in various reparations programs, such as in Peru, South Africa. See ICTJ/APRODEH, *supra* note 100 at 22 for an overview of the different definitions of victims used in past national reconciliation processes.

[121] de Guzmendi, *supra* note 6 at 429 and 478 for the text of earlier competing proposals on how broadly to define victims during the drafting of Article 75 of the *Statute*.

[122] Rule 97(1). Lewis & Friman, *supra* note 6 at 483 notes that there were lengthy discussions over individual versus collective awards in drafting the Rules. "Sub-rule 1 emphasises that reparations should normally be on an individualised basis unless the Court considers it appropriate to make the award on a collective basis or both." Collective awards are consistent with the *Basic Principles*, *supra* note 100 at para. 8.

[123] "Participation of Victims in Proceedings and Reparations," online at: ICC <http://www.icc-cpi.int/victimsissues/victimsparticipation.html>.

[124] Wierda & de Greiff, *supra* note 99 at 3 and Fischer, *supra* note 87 at 222.

[125] Rule 94: Evidence includes (a) address of claimant, (b) description of harm, (c) location an date of incident, (d) description of property, etc.

ICC has indicated that its Victims and Witnesses Unit is in the process of preparing a standard form for victims to fill out, to facilitate applications for reparations.[126] On the other hand, Rule 97, by giving the Court the option of making awards on a collective basis, might enable the Court to make more general awards, thus obviating the need for each and every victim to approach the Court and apply for reparations.[127]

Questions of whether the Court will make individual or collective reparations awards relate directly to the second broad question left open to interpretation in Article 75 of the *Rome Statute*. It is unclear, under Article 75, how the Court will formulate its orders for making payment of the reparations to victims. As the ICC itself queries, as "a general rule, is individual reparation paid directly to the victims?" [128] Three scenarios arise. The first scenario would be for the Court to order that the reparations be made directly from the perpetrator to the victims.[129] In this scenario, the Court would presumably be making more specific awards, or at least awards "sufficiently practicable, clear and precise to be capable of enforcement in the courts of, or by the other relevant national authorities of, the States Parties."[130] This scenario contemplates more directly awards made to individuals who have already identified themselves to the Court's Registry or its Victims and Witnesses Unit.[131]

Second, the Court can make an order through the Victims Trust Fund. The Trust Fund is created by virtue of Article 79 of the *Rome Statute*, for the benefit of victims and their families. Article 79 empowers the ICC to order that money and property collected through fines and forfeitures, be transferred to the Fund.[132] As Wierda and de Greiff note, if the order is specific enough, and specifies "the nature of reparations and the identities of victims to whom reparations should be made, the role of the TFV may simply be to implement the order."[133] As a third alternative, the Court might make a lump sum order, and stipulate general principles for the Trust Fund to follow in developing the more specific parameters for delivering reparations. In this case, the

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[126] *Supra* note 122.

[127] Moreover, under Article 75(1) of the *Statute*, the Court may to award reparations "on its own motion in exceptional circumstances." Delegations supported this wording in the text on the argument that "peasant communities in remote parts of the world, for example, were unlikely to be able to mount any coherent claim for reparations in an international tribunal, especially if there was evidence of State complicity in the crimes." Muttukumaru, *supra* note 7 at 269.

[128] *Ibid*.

[129] Rule 98(1). Wierda & de Greiff, *supra* note 99 at 4. Bottigliero, *supra* note 7 at 225.

[130] Schabas supra note 72 at 149 citing Muttukumaru, *supra* note 7 at 267. This view is confirmed by the ICC itself where it states that, in contrast to individual awards, collective awards may be ordered through the Victims Trust Fund.

[131] The Victims and Witnesses Unit is governed by Rules 16-19 of the *Rules of Procedure*.

[132] Article 79(1) and (2).

[133] Wierda & de Greiff, *supra* note 99 at 4. The basis for such orders is found in Rule 98(2).

reparations order would resemble a collective award.[134] Finally, Rule 79(5) permits the Trust Fund to use its other resources for the benefits of victims.[135]

In these various scenarios, we see represented the opposing conceptions of reparations. The options that would involve transfering awards as directly as possible from the perpetrator to the individual victim represent a narrower notion of reparations. Conversely, the scenarios which would give more discretion to the Trust Fund, and which would grant greater leeway in devising collective types of awards, point to a broader notion of reparations.[136] Another way of understanding the difference in scenarios is in terms of whether the Trust Fund should cover a narrower pool of victims, by aligning its activities primarily with those of the Victims and Witnesses Unit, or a wider pool by including victims having less of a connection with the ICC proceedings. The advantage of a wider pool of victims, according to Bottigliero, is that the Trust Fund could help to avoid discrimination among victims in the awarding of reparations.[137] Simone Veil, the Chair of the Board of Directors of the Trust Fund makes this point using somewhat stronger language:

> the Fund should not serve the sole purpose of providing financial reparations for such victims as may be able to take part in the proceedings. For this would be tantamount to a fresh injustice since it would in reality make the right of victims to reparations dependent on the discretion of the Prosecutor in his policy regarding investigation and prosecution of cases.[138]

Avoiding discrimination or a fresh injustice, in other words, would ensure that the reparations awards are internally coherent. Extending the pool of victims

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[134] *Ibid*. The basis for these two options of using the Victims Trust Fund is derived from Rules 98(3). Note also by virtue of Rule 98(4), the Court could order that the awards be made through an international, intergovernmental or national organization approved by the Trust Fund.

[135] The regulations established to govern the Victims' Trust Fund contemplate each of these various scenarios and specifies the modalities for the Trust Victim to handle each scenario and type of order. Generally see, *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, adopted at the 4th plenary meeting, (3 December 2005), at Chapter II – V.

[136] Bottigliero, *supra* note 7 at 231.

[137] *Ibid*. "Arguably, a Trust Fund which provides support only to victims having a particular role in the Court's proceedings might discriminate among victims of the same crime who, instead, have to access domestic reparation systems to obtain redress even where they may be wholly inadequate for such purpose." Indeed, as Bottigliero, *supra* note 7 notes at 225-6, the Trust Fund might become the primary source of victims' reparations in the ICC, given the difficulties of obtaining compensation through other mechanisms, international and domestic alike.

[138] Simone Veil, Chair of the Board of Directors of the Trust Fund for Victims of the International Criminal Court Fourth Session of the Assembly of States Parties, (Speech at The Hague, 28 November 2005), online at: ICC <www.icc-cpi.int/library/vtf/SpeechMme_Veil_2005_EN.pdf>.

too widely, however, might not be consistent with the spirit of Article 79(1), "which provides that the Trust Fund is established for 'victims of crimes within the jurisdiction of the Court' and for their families."[139] In a similar vein, Wierda and de Greiff argue that the Court should by and large give an active role to the Trust Fund to devise reparations orders. Courts are generally good at making *restitutio in integrum* awards on a case-by-case basis, whereas the Trust Fund would have more flexibility in designing reparations orders, which could better aggregate victims and their harms and, consequently, would be more coherent.[140]

Assuming that the Court could devise the most finely-tuned reparations order, it would still face what is perhaps the most daunting challenge of its reparations framework: securing actual funds to give effect to the reparations awards. As previously noted, unlike a human rights tribunal, the ICC does not have the power to order a State to pay reparations for violations. The Court can only make reparations orders, or fines and forfeiture orders, against individuals. However, trying to secure funds from individuals poses a number of challenges. First, individual perpetrators often do not have funds, either because they are themselves indigent, or their money has been sheltered in foreign accounts.[141] Where perpetrators have no money, making a reparations order against them would be at best symbolic. In cases where perpetrators do have assets, the Court can enlist State parties to seize the funds. Past experience however demonstrates that this option is very unreliable.[142] In any event, in cases of mass atrocity, such as those under the ICC's jurisdiction, there is a strong chance that the perpetrator would not have enough assets to provide meaningful reparations to victims. As a matter of basic arithmetic, where

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[139] *Ibid*.

[140] See Wierda & de Greiff, *supra* note 99 generally for arguments. In particular, the authors argue that using the Trust Fund as a vehicle for devising reparations schemes would enable an administrative set-up which would avoid many of the shortcomings of litigation: e.g. cost, delay, reparations only to victims appearing before court etc. Also the Court's administrative capacity will already be overburdened, even without any responsibility for overseeing reparations. *Ibid.* at 7. See also Jorda & Hemptinne, *supra* note 6 at 1410 on the issue relieving the Court of the burden of too many reparations claims and at 1411-15 on issues such as the Trust Fund being better placed to assess reparations than the Court and the difficulties of using the Court a vehicle for reparations, such as meeting a standard of evidence. Finally, as Bottigliero, *supra* note 7 at 240 points out, assessing reparations will involve a unique ability to harmonize and reconcile various theories of domestic private law from civil and common law systems, for the purposes of creating a reparations regime under international law in the public sphere. Judges in turn may not be best placed to do so in the confines of individual cases.

[141] Jorda & Hemptinne, *supra* note 6 at 1415, citing the experience of the ICTY and ICTR which have had often to defray the costs of alleged perpetrators defence. See also Ingadottir, *supra* note 87 at 20-1.

[142] This has been the case for instance, with which Marcos plundered in the Philippines. See e.g. Fischer, *supra* note 87 at 218 for a description of this case. See also Wierda & de Greiff, *supra* note 99 at 9, referencing ICTY and US ATPA cases ("[I]nternational experience in recovering funds from perpetrators is dismal.").

victims number in the tens or hundreds of thousands, as they do in Uganda, the amount needed to satisfy victims' claims would be colossal.[143] In this light, Wierda and de Greiff argue that orders should be made against individual perpetrators only where the perpetrator has assets which have been seized, there is a clear link between the accused and the victims, and the case concerns a limited or clearly definable, closed group of victims.[144]

As an alternative to making orders against perpetrators, the Court could rely on the Victims Trust Fund, which is funded by sources beyond those recovered from perpetrators. The Trust Fund is empowered to collect voluntary contributions from States, non-state organisations and private individuals. Despite this capability, however, the Trust Fund will face significant challenges in building up a sufficient pool of resources to satisfy future reparations awards. One should bear in mind that, at present, the Court is officially investigating situations in Uganda and the Democratic Republic of Congo, has had the situation in Darfur, Sudan referred to it by the UN Security Council, and is considering a referral from the Central African Republic.[145] These situations each involve hundreds of thousands, if not millions of potential victims which would suggest that the Trust Fund might face an insurmountable task in trying to raise enough funds to provide for reparations across the ICC's various cases. As of April 2006, the Trust Fund had received approximately €1,310,237 in voluntary contributions, with an additional €275,000 pledged.[146] The ICC and Trust Fund, thus, will face challenges similar to those of many transitional governments, which are forced to confront a

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[143] To illustrate, following an agreement with the Peruvian government, the Inter-American Court of Human Rights set the level of reparations awards for various violations in Peru at between $175,000 and $250,000 in *Barrios Altos Case*, Reparations, (2001), Inter-Am. Ct. H.R. (Ser. C) No. 87. Paul Van Zyl estimates that applying the findings of the Peruvian Truth Commission concerning the number of victims in Peru (approximately 77,000), the levels of reparations set by Inter-American Court would have meant that, to satisfy the claims of all similar victims, the Peruvian government would have been on the hook for over $15 billion in reparations. (These calculations are taken from a lecture of Professor Paul Van Zyl in the *Transitional Justice Seminar* (lecture at the NYU School of Law, 14 October 2004).) For additional discussion of the issue of reparations in Peru, and how its Truth and Reconciliation Commission attempted to deal with reparations for past human rights abuse see e.g. Lisa Magarrell, "Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice," (2003) 22 Windsor Y.B. Access Just. 85. For rates of exposure to violence in Uganda, see e.g. *Forgotten Voices*, *supra* note 19 at 20-22.

[144] Wierda & de Greiff, *supra* note 99 at 10.

[145] For more information on any of these situations see e.g. "Situations and Cases," online at: ICC <http://www.icc-cpi.int/cases.html>.

[146] These figures are available at: "Trust Fund for Victims," online at: ICC <http://www.icc-cpi.int/vtf.html>. Bottigliero, *supra* note 7 at 229 notes that "voluntary contributions to the Trust Fund will prove indispensable for achieving adequate compensation for victims."

history of mass crimes with a limited budget, except that the ICC Trust Fund will likely be even more resource-starved.[147]

In view of the real challenges that the Victims Trust Fund will confront in helping to fund reparations, it will be crucial for the ICC and the Trust Fund to be sensitive to their own limitations and to the expectations of victims. It will be important for the ICC and Trust Fund to avoid building up expectations among victims about potential reparations orders which may ultimately be impossible to fulfill. In other words, victims must be made aware that the ICC and Trust Fund – despite their otherwise good intentions – are not currently well-placed to satisfy claims to reparations. This will be especially critical in the ICC's initial cases, such as the one in Uganda, because the Trust Fund will likely have a fledgling pool of resources at that stage, meaning that victims could at best expect a token sum in reparations (unless of course current funding levels change drastically). As a consequence, the Court and Trust Fund will need to manage expectations because, as Stover underscores, "the court's statute could create high expectations on the part of survivors—expectations that the court, with its limited mandate and resources, will be unable to fulfill." [148]

More generally, the need to manage expectations suggests that, in embarking on any reparations process, the Court and the Trust Fund should concentrate their efforts on working with local groups and institutions. For one thing, this would enable the Court and Trust Fund to perform the needed outreach to sensitise the local populations about the limited role of any ICC-based reparations programs.[149] For another, working with local groups and mechanisms would help the Court and Trust Fund to ensure that any prosecutions and reparations-scheme are coherent. For instance, the Court and Trust Fund could appeal to government officials to develop a broader-based, national reparations scheme, to supplement the limited funds of the Trust

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[147] Wierda & de Greiff, *supra* note 99 at 4-5 and note 6. See also Ingadottir, *supra* note 87 at 20-1 noting that ad hoc tribunals have generally received only modest voluntary contributions to their respective trust funds. Note, as a final more circuitous route for reparations, victims could try to invoke the ICC's court reparations orders in their own national courts, but this would presume there being a sufficiently (re)established rule of law and court system and the same problem of finding a source of funds would again arise. Related, it might be possible to seek reparations from the government as a matter of state responsibility for failing to protect victims from the crimes they suffered, as a matter of state responsibility, but this again would require either that national courts be functional and responsive to such arguments or pursuing the long and uncertain process of going before regional human rights bodies (as with e.g. the IACtHR and Peru).

[148] *The Witnesses*, *supra* note 13 at 150. Stover notes further, that "[s]ome ICC staff are also concerned about the flood of compensation claims that could be filed in cases where an accused is convicted of victimizing entire communities. How does one distinguish between victims when so many suffered equally? Such claims could potentially choke the system and quickly exhaust existing funds." See also, Fischer, *supra* note 87 at 218, arguing that victims of earlier cases will receive less money.

[149] Wierda & de Greiff, *supra* note 99 at 11.

Fund.[150] Alternatively, if funds are sure to be insufficient, the Court and Trust Fund could try to ensure that the disbursement of funds is counter-balanced with other symbolic reparations such as commemorative holidays, monuments or changing street names.[151] Ideally, the Court and Trust Fund would try to integrate or combine any limited reparations with other transitional mechanisms such as a truth-telling process. The more general point is that for the reparations process to be constructive – and not detract from any perceptions created by prosecution that justice is being achieved – it cannot be performed in isolation. To apply Bottigliero's words, "ICC provisions on victims' reparation and participation are not designed to work in a vacuum."[152] Thus, in the face of clear limitations, fulfilling the aim of the *Rome Statute* of being more responsive to victims may require balancing any reparations process with other transitional justice mechanisms. Alternatively, where no such mechanisms exist, or where the Court and Trust Fund choose not to link their activities with existing mechanisms, the Court and Trust Fund will need to tread extremely carefully.[153] As we shall now see, there is strong reason to believe that this might be the reality in Uganda.

V CHALLENGES WITH ICC REPARATIONS IN UGANDA

The main challenges in using the ICC as a vehicle for reparations in Northern Uganda are three-fold: (i) the victims and perpetrators are often one and the same, which means that it would be unrealistic to seek reparations from the perpetrators; (ii) there may at best be a tenuous link between the harm suffered by the victims and crimes committed under the ICC's jurisdiction; (iii) there are currently no viable alternative sources of funding, or transitional justice processes, to satisfy or complement any reparations orders.

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[150] The States would thereby arguably fulfill their obligations to provide redress as enunciated for instance under the *Basic Principles*, *supra* note 100. Again this is envisaged by Rule 98(4), which enables reparations awards to be transferred through the Trust Fund to national organizations.

[151] Wierda & de Greiff, *supra* note 99 at 11.

[152] Bottigliero, *supra* note 7 at 215.

[153] Again, lest victims feel like their suffering is being bought off, without a proper truth-telling process or prosecution, or that they feel like justice is being done on the cheap by simply having prosecutions and paltry reparations, and so on. On this point, Wierda and de Greiff, *supra* note 99 at 11., suggest that care will have to be taken to ensure that victims have "a realistic sense of what they are to expect as outcomes of the process and to engage them in how they would like to see the resources available used." Note that a further issue arising here is to what extent the Court and Trust can or would coordinate their own activities. The two bodies although established under the same *Statute* have separate and independent identities. Conceivably, a situation could thus arise where the two bodies act in counteracting ways in trying to perform outreach, which could itself lead to confusion and unrealistic expectations among the victim population. Further consideration of the relationship between the Court and Trust Fund is beyond the scope of this paper.

Child Soldiers as Victims and Perpetrators

The conflict against the LRA is perhaps most characterised by the LRA's abduction and forced conscription of children as soldiers. To be clear, the ICC only has jurisdiction over crimes committed since 2002. The immediate reality is that a vast array of crimes committed by the LRA in the 16 years prior to the ICC's coming into force would fall outside of any ICC reparations scheme. Nevertheless, the level of mass crimes in Northern Uganda has been steady since 2002, markedly worsening the humanitarian crisis in the same period.[154] Of particular note has been the spike in the levels of recorded abductions and, in turn, the sheer brutality inflicted on the children, girls and boys alike, once abducted.

The bleak result is that the LRA conflict is essentially one waged by children against children and their own communities. Children are victimised first by being the direct targets of violence and abductions and then victimised again by being forced to attack their own communities, abduct more children, and face battle against the Ugandan army. There would thus be little doubt that the harm caused to child soldiers is the result of crimes under the jurisdiction of the ICC.[155] Indeed, the Victims Trust Fund very explicitly lists child soldiers as a category of victims.[156] Moreover, as we have seen, some of the counts listed in the current indictments against the five LRA leaders are for abduction, enlisting children and enslavement. With respect to reparations, the challenge posed by the fact that there are so many child soldiers is that the pool of perpetrators against whom reparations orders can be made becomes increasingly narrow. Most of the front-line "perpetrators" in the conflict in Northern Uganda are themselves victims and, as children, could not in any event be subject either to prosecution or a reparations order.[157]

To suggest that reparations should be made against such a pool of "perpetrators" would also send a perverse message. It would misattribute responsibility for harms caused by failing to recognise that those individuals

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[154] This coincided with the government's decision that it would no longer seek a peaceful resolution to the conflict and would seek to defeat the LRA once and for all through Operation Iron Fist.

[155] To cite a few: abducting and forcing children under 15 years of age to fight (Article 8(2)(e)(vii)); forced labour and abduction (Article 8(2)(e)(vi)), and more general acts of murder mutilation and cruel and unusual treatment (Article 7(1)(a), Article 7(1)(k) and Article 8(2)(c)(i). All Articles from *Rome Statute*. Article 38 of the *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (September 2, 1990) also prohibits the use of children under 15 years of age as soldiers.

[156] "Victims can include child soldiers - minors pressed into military service who may have suffered great ordeals as a result of being forced into front line service." From the ICC website, online: < http://www.icc-cpi.int/vtf.html>.

[157] The ICC after all has "no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime." *Rome Statute*, Article 26.

are first and foremost victims. The general result, in other words, would be to undermine the very goals of reparations of responsibility and recognition. In the Acholi regions, which have seen the highest levels of abductions, the majority of respondents in the recent *Forgotten Voices* survey stated that lower-ranking LRA members should not be punished for their crimes.[158] Far from assisting in the process of justice, then, the result of attributing reparations to the direct "perpetrators" of crimes might only be to increase the current ambivalence that many Northern Ugandans feel about the conflict, whereby they are constantly caught between attacks from the LRA (viz. their own children) and the government rhetoric of "crushing" the LRA (viz. again the children from their own communities).

Any reparations orders against LRA members would thus have to fall on the senior members, who in any event are the only ones to have been charged so far. This would create a number of problems in terms of securing funding for the reparations. First, it would create a much larger pool of victims whose reparations claims can in turn only be satisfied by a much narrower pool of perpetrators. In other words, the potential class of beneficiaries for reparations orders made against senior LRA members would then include child soldiers as victims and potentially their family members, on top of the community members who were victim to the attacks of the children. It is doubtful that the LRA leadership, in particular, the five leaders currently under indictment, have a meaningful store of assets to fulfill any reparations orders, let alone orders directed at such a huge pool of victims. The LRA has survived over its approximately 19-year existence largely by relying on raids of villages and internally displaced person ("IDP") camps to replenish food and supply stocks, and through military support from the Sudan. The Sudanese government, however, has apparently stopped supporting the LRA since the ICC case was brought and, even before that, as part of a peace process with the Sudanese People's Liberation Army. This would have greatly curtailed the resources available to the LRA. LRA leaders such as Kony thus appear not to have large reserves of resources as in cases of former heads of state, such as Marcos or Pinochet, who pillaged the treasury of their respective countries while also conducting a campaign of repression against their people. The LRA leaders, if one follows Wierda and de Greiff's criteria, are therefore not suitable candidates for having individual reparations orders made against them.[159]

Finally, it should be noted that in the case of child soldiers, the more meaningful reparations would most likely not be monetary awards but broader programs such as ensuring proper psycho-social services to help former combatants and their families cope with reintegration and the trauma caused

[158] *Forgotten Voices*, *supra* note 19 at 26.

[159] Namely, there are no assets to be seized, to be awarded to a sufficiently connected, identifiable, and closed class of victims.

by abduction and the conflict more generally. This would require establishing a broad range of services and structures in the communities, such as education and health facilities, on top of rebuilding the communities themselves which have in many cases been completely destroyed by LRA attacks and forced displacement. These types of programs, simply stated, quickly begin to resemble more general development-type programs and would likely extend beyond the immediate ambit or capacity of a reparations scheme, let alone the more modest mandate of the Victims Trust Fund.

Problems of Disaggregated Harms and Victims

Even assuming full funding could be secured for reparations, be it from the LRA's leaders, the Victims Trust Fund, or a combination of both, the ICC's reparations scheme might still be ill-suited for fulfilling the reparations needs in Northern Uganda. In short, it is unclear that a sufficient link could be made between the harms suffered by Northern Ugandans and the crimes committed by the LRA leadership which fall under the ICC's jurisdiction. Here is where we again see that the ICC would potentially have a hard time meeting the expectations of the affected population. When polled, a majority of respondents to the recent *Forgotten Voices* survey expressed that compensatory measures should be made for the community as a whole and not just the individual.[160] This result stands as compelling evidence that the population would not welcome an approach which assesses damages solely on a victim-by-victim basis, and only when the damages can be attributed to a specific wrong under the *Rome Statute*. Further, it is unclear whether and how the ICC could make reparations orders which would satisfy "the community as a whole" or, even then, all of the communities affected by the conflict. At a certain point, the nexus between the crime and the damage may become too remote. The indictments against the five LRA leaders after all only cover a limited number of victims and instances of abuse, in a limited number of undisclosed camps. Thus, neither all of the abuses suffered by the communities – especially those abuses occurring before 2002 – nor all of the communities in the region could be captured by the reparations orders. Moreover, not all of the harm has been caused by the LRA.

To be clear, many of the attacks against the civilian population and the crimes committed against them, such as rape, killing, mutilation, torture and pillaging and destruction of their villages, can be traced directly to crimes committed by the LRA under the *Rome Statute*. However, where a lacuna arguably arises is with respect to the forced displacement of the local population. Next to child soldiers, the humanitarian crisis in Uganda is perhaps most exemplified by the mass displacement of the local population. It is difficult to give an exact figure for the number of internally displaced persons

[160] *Forgotten Voices*, *supra* note 19 at 36.

in Uganda. Official figures in February 2005 cited 1.4 million IDPs, which was down from a high of 1.6 million in June 2004. These figures, however, only represent the number of IDPs in camps officially recognised by the government. The real number could be upwards of 2 million, if one includes persons living with relatives or in camps not officially recognised.[161] The issue of displacement becomes tricky for the purposes of reparations because while a good deal of the displacement in Northern Uganda was spontaneous and can be attributed to the LRA's ongoing campaign of violence, an equal magnitude of displacement has allegedly been due to the direct and deliberate orders of the government.[162]

On a number of occasions, the Ugandan government is said to have issued mandatory blanket orders in Northern Uganda for various populations to move to designated settlements or camps, often located near UPDF army barracks. The most recent large scale orders were allegedly in 2002 and early 2003 as part of Operation Iron Fist. This military campaign coincided with a four-fold increase in displacement. The government's strategy in ordering the displacement of large portions of the population is basically to separate the civilian population from the LRA. In other words, civilians are confined to camps and anyone else is presumed by the UPDF to be an LRA member or collaborator. As a result, this has meant that civilians who travel outside of the camps, for instance, in an attempt to tend to their crops back home, face the serious risk of being targets of indiscriminate attacks by UPDF soldiers.[163] Women, who are often called on to search for clean water or fire wood outside of the camps, also face great risk of rape and sexual violence from the UPDF, local defence units and LRA members.[164] Women have reportedly been victims of sexual violence at the hands of UPDF soldiers both inside and outside of the camps. In addition, the UPDF has allegedly destroyed many of the villages,

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[161] For most recent figures, see Internal Displacement Monitoring Centre, online: <http://www.internaldisplacement.org/8025708F004CE90B/(httpCountries)/04678346A648C087802570A7004B9719?OpenDocument>. To put the numbers into context, IDPs constitute upwards of 94% of the local population in the northern districts of Gulu, Kitgum and Pader, which have seen the greatest level of displacement. *Nowhere to Hide: Humanitarian Protection Threats in Northern Uganda* Kampala: Civil Society Organizations for Peace in Northern Uganda, 2004 [hereinafter "Nowhere to Hide"] at 63. This figure has also been estimated at 82%. See e.g. *Behind the Violence*, *supra* note 21 at 22.

[162] To be clear, this is a fact that the government now contests. "Uganda: Interview With the Minister for Disaster Preparedness and Refugees", UNOCHA-IRIN (June 2005), online: <http://www.irinnews.org/S_report.asp?ReportID=47570>.

[163] Indeed the climate in Northern Uganda has been described as one of impunity, that is, whereby UPDF soldiers are essentially given free rein in attacking anyone outside of the camps. See e.g. *Nowhere to Hide*, *supra* note 160 at 86.

[164] Local Defence Units ("LDUs") were created by the UPDF to help patrol the camps and provide security. Members of the LDUs are drawn from the camp population and are, in general, under-paid and called on to do menial tasks by the UPDF.

once the inhabitants have been ordered into camps, in an effort to clear the battlefield and discourage return.[165]

The net result is that the population has suffered by virtue of being in the camps. This increased suffering can arguably be attributed to the government. First, there have been many acts of violence by the UPDF and its local defence units against the population in the camps with little legal redress available.[166] More distressingly, in making the displacement orders, the government has failed to plan the IDP camps properly or provide adequately for their protection. The lack of planning is further evinced by the government's failure to establish basic facilities for the IDP camps in anticipation of or following the blanket displacement orders. In addition, the government has failed to adopt a disaster relief policy, which has hindered the access of humanitarian assistance to the camps.[167] The apparent disinterest of the government in the plight of Northern Ugandans is demonstrated by the decision to entrust the handling of the humanitarian crisis to the Office of the Prime Minister, which has a low profile within the government and already suffers from poor administrative capacity, let alone the capacity needed to address such a huge crisis.[168] Meanwhile, the government has drastically increased military spending in the face of protestations of international donors (who account for 50% of Uganda's budget), yet without significantly increasing any spending for disaster relief, despite the multiplying rate of displacement.[169]

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[165] *Nowhere to Hide*, *supra* note 160 at 66-7. For a more recent account of the abuse faced by the local population see Human Rights Watch, "Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda" (September 2005) at 14-24 for an account of alleged LRA abuse; 24-36 for an account of alleged UPDF abuse; 50 for an account of the weak judicial system in Uganda and the need for the ICC to complement it; and 61-71 on the lack of protection by the government of the displacement camps and civilian population.

[166] Reports of abuse by the UPDF on the civilian, camp population range from "extortion and theft to rape, assault and even murder, and are reported to be occurring on a daily basis" but with little redress from government authorities. *Nowhere to Hide*, *supra* note 160 at 82.

[167] See *ibid*. at 42 for a greater description of the government's proposed National Disaster Management Policy. The main effect of this policy would be to facilitate access of assistance to camps. Some camps, for instance, have gone almost a year without assistance. Access to camps by humanitarian agencies has also been hindered by poor security in the camps and on the roads and by relatively scarce or unpredictable availability UPDF armed escorts. I discuss the lack of institutional capacity for responding to the humanitarian crisis, and its implications for international law in "'Falling through the Cracks': The Critical Necessity of an Institutional Focus for Promoting IDP Protection in International Law" (August 2005) (manuscript on file with author).

[168] *Nowhere to Hide*, *supra* note 160 at 96-8.

[169] *Ibid*. at 116: President Museveni "ordered a massive cut of 23% across all line ministries in order to supplement the Ministry of Defence and the UPDF"; and at 92-3: "no significant central budget allocation has yet been made for disaster response in northern Uganda, even though the region has suffered from chronic disaster conditions for many years."

Without belabouring the point, as a result of the lack of planning, the inhabitants have not been provided with proper water, hygiene and medical facilities. It has also meant that the camps are over-crowded. The lack of spacing between homes has facilitated the spread of disease, and made it more difficult to patrol the camps and protect against LRA incursions. The concentration of inhabitants into camps has made the civilian population much easier targets for the LRA attacks, and this threat is compounded by the lack of actual security protection provided in the camps. Relatively few soldiers are dispatched to protect the camps.[170] Moreover, the camps were for a long time set-up in such a way that the UPDF barracks are either directly in the middle or far from the camps–giving the impression that the inhabitants are protecting the soldiers–and the few soldiers often provide little protection, either staying in their barracks or hiding far from the camps.[171] Confinement in camps has also meant that the camp inhabitants have become entirely dependent on outside food assistance, which is effectively causing Northern Ugandan communities to lose their traditional agrarian livelihood and culture.[172] The insecurity in the camps has also posed a threat to family life and cohesion. The ICTJ captures the profound social disintegration caused by life in the camps in the following stark terms:

> There is little work for men, who often resort to self-destructive coping mechanisms, such as alcoholism. Suicide is common. The rate of HIV/AIDS is reportedly higher in the camps than elsewhere. Domestic violence and rape are widespread… Nearly 30 percent of the children who live in the camps are orphans. Basic schooling is available for those who can afford a small fee, but many cannot.[173]

The erosion of culture and family is typified by the so-called night commuter phenomenon, as children leave their homes in the evening to seek refuge in the city centres.[174]

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[170] For instance, 60 troops for a population of 10,000. *Ibid*. at 76.

[171] In the Ugandan government's defence, there have been some reports of improvements and increases of troop deployment in recent weeks. Troops now reportedly patrol around and outside the camps. These improvements, however, would not excuse the government's past violations in failing to deploy troops properly. Discussion of author with NGO officials, Gulu, July 2005.

[172] *Nowhere to Hide*, *supra* note 160 at 25-6.

[173] *Forgotten Voices*, *supra* note 19 at 16.

[174] Parents can provide little protection to their children or, alternatively, have abdicated responsibility over them, preferring that they seek the services offered by NGOs and relief agencies in the city. The net result is that children are extremely vulnerable: "they are highly exposed to public health threats such as malaria and URIs, and to other threats such as rape, defilement and injury at the hands of other night dwellers." *Nowhere to Hide*, *supra* note 160 at 94. See also, e.g. *Abducted and Abused*, *supra* note

The true nature of the harm and suffering in Northern Uganda cannot be entirely attributed to LRA crimes. To be sure, reparations orders could be made against the LRA for attacks and abductions of camp inhabitants, even where the LRA was not directly responsible for the victims' forced displacement. However, it is far less clear whether the harm caused simply by being confined to the camps could be attributed to LRA crimes. That is, a large part of the displaced population's suffering is due simply to abhorrent conditions in the camps. Responsibility for this suffering is less aptly attributed to LRA crimes, but more to the government's alleged strategy of displacement and general failure to plan for, manage and protect the camps. In addition, the incidents of abuse committed by the UPDF are entirely unconnected to the crimes committed by the LRA. This means that an ICC case against the LRA for the crimes it has committed would cover neither all victims and communities in Northern Uganda, nor all of the harms they have endured.[175]

Problems of Internal Coherence of Reparations

The conclusion that a case against the LRA would not capture all of the harm in Northern Uganda leads to three possible scenarios. The first is the current one, in which a case is brought against the LRA only. In this scenario, however, reparations risk losing internal coherence because they would be available only to persons directly attacked or abducted by LRA members, but not to those persons who were victim to LRA crimes not covered by the indictments of the case or who have suffered solely due to government actions, mismanagement or malfeasance (for instance, losing one's home and livelihood because of UPDF destruction of one's village and agricultural fields, and then suffering from gross mal-nutrition and illness in the camps, or being the victim of rape or sexual violence by UPDF members). In addition, as noted above, the ICC does not have jurisdiction over crimes committed prior to 2002. This means that, at most, only the harm of victims from LRA crimes committed after 2002 would be eligible for reparations. By implication, the largest class of victims, who have suffered from the countless LRA crimes committed prior to 2002, would fall outside of an ICC reparations scheme. That is not to suggest that, as a rule, there is any reason for the ICC to assume the responsibility of ensuring the internal coherence of reparations. Rather, if the ICC continues to follow the current scenario, it should recognize that its own reparations process will not be coherent vis-à-vis the larger victim class and, thus, needs to manage victim expectations accordingly.

Second, the ICC Prosecutor could later bring another case, albeit more tenuous, against the government on the grounds, for instance, of forced

37 at 68-70, and Kathryn Westcott, "Sex Slavery Awaits Ugandan Schoolgirls" *BBC News* (25 June 2003).

[175] Again, this would be especially true in the current case granted the relatively limited scope of the indictments against the five LRA leaders.

displacement or cruel and unusual treatment or forced starvation.[176] Although the Prosecutor has indicated that he would be considering the crimes of all individuals, and not just LRA members, this scenario – were it actually to happen – would likely be counter-productive. Bringing a case against government or army officials would risk antagonising the Ugandan government. As a result, at the extreme, the ICC could lose the ability to conduct its case altogether (e.g. the government could deny the Court all access to victims, evidence and perpetrators).[177] In that case, the hopes of any justice being performed, whether through prosecution or reparations, would be greatly dashed. Moreover, while perhaps wealthier than LRA leaders, members of the government are also unlikely to have enough assets to fulfill a reparations order.[178] In any event, in the immediate term, the first indictments have only been brought against the senior LRA leadership. Thus, any suggestions of possible prosecutions against the government, let alone convictions and reparations, remain highly speculative.

The third scenario would be for the ICC to ensure that any reparations scheme, through the Victims Trust Fund or otherwise, is carried out in conjunction with a national reparations program, which would extend to all victims in Northern Uganda, and not simply those who have been harmed as a result of LRA crimes since 2002. A crucial and obvious obstacle in that scenario, as highlighted above, would be to raise the funds needed to meet the cost of reparations for victims. This would be an issue even for the more restricted category of victims whose harm can be traced directly to LRA crimes, post-2002, which are the subject of the current indictments. The two immediate candidates for alternative funding would be the Ugandan government and the international community. Both options, however, leave serious room for doubt. With respect to the first candidate, there is little reason to believe that the Ugandan government would make funds available for reparations, especially if

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[176] Incidents of rape could also rise to the level of crimes against humanity and war crimes if the rape is determined to be sufficiently widespread. Article 7(1)(g) and Article 8(2)(e)(vi) *Rome Statute*. The Prosecutor has given the following explanation for why the first case was brought against the LRA only: "In Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by all groups -- the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started with an investigation of the LRA." *Ocampo Statement*, *supra* note 2 at 7.

[177] See e.g., Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court," (2003) 97 A.J.I.L. 510 at 527-8 on how the Prosecutor will need ultimately to rely on government cooperation to perform his functions. President Museveni once mused himself that if peace were to come he might withdraw the ICC case (raising the question of whether that would be possible), which was interpreted potentially as a sign that he and his government would also want to avoid facing scrutiny from the ICC. "ICC May Drop LRA Charges" *The New Vision* (Kampala) (15 November 2004).

[178] Again, as with the LRA, the victim class likely would not be narrow enough to make a reparations order against individual perpetrators practicable.

those reparations would largely be directed at harms caused by the government's own alleged mismanagement and failings. In other words, on the question of reparations, the Ugandan government is more likely to display the same intransigence and ambivalence towards the victims of the conflict in Northern Uganda that it has already demonstrated in its failure to plan for and address the current humanitarian crisis. The government has not been willing to spend money or to develop institutional structures to address the humanitarian crisis now, which raises serious doubts about whether the government would do so after the fact, in the form of reparations. These doubts are important to probe because weak political will towards reparations has been cited as a general reason for the denial of redress and reparations in other cases of serious violations.[179] In any event, Uganda is one of the world's poorer countries and its government's budget is heavily dependent on foreign assistance. Thus, even if it were willing, it is unclear how many funds the government would actually have, to devote to a reparations scheme.[180]

There are equally serious grounds for questioning whether funds would be forthcoming from the international community. In this scenario, the glaring reality is that, as Jan Egeland the UN Under-Secretary for Humanitarian Affairs has declared on more than one occasion, the situation in Northern Uganda is the biggest *neglected* humanitarian crisis in the world.[181] In this sense, before the international community can be looked to as a serious source for reparations funds, much greater efforts would be needed to foster international awareness, and in turn, benevolence, concerning Uganda's humanitarian crisis. Relying on the international community to provide reparations funding might still produce uncertain results, even if a significant international fund were collected. Two possible results could present themselves. First, the Ugandan government could be resistant to outside funding for reparations. The funding might be seen as an attempt to inject significant funds into Uganda but by circumventing the government.[182] Again, funding for a larger reparations

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[179] See e.g. Ilaria Bottigliero, "Redress and International Criminal Justice in Asia and Europe," public lecture delivered at United Nations University, Tokyo, Japan (8 August 2005) online: <http://www.iias.nl/au13/files/active/0/Bottigliero.pdf,> at 6.

[180] Especially given that President Museveni has openly defied the dictates of donors, and even lost donor contributions as a result. This raises doubts as to whether the international community could effectively put pressure on the Ugandan government foreign assistance for reparations.

[181] "War in Northern Uganda World's Worst Forgotten Crisis," *Agence France-Presse* (11 Nov 2003). "UN Urges End to Ugandan 'Horror'" *BBC News* (22 October 2004). Egeland repeated this call on November 11, 2004:"Top UN Relief Official Spotlights Crisis in Northern Uganda" *UN News Service* (11 November 2004).

[182] Indeed, an early controversy in devising the rules governing the Victims Trust Fund was that the Trust Fund's use of approved agencies under Rule 98(4) ("the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund"), could lead to an infringement of sovereignty if organizations could simply

program might be seen as an implicit rebuke of the government. President Museveni, moreover, is already on record as stating that donors pose a threat to Ugandan sovereignty, and he could thus perceive an outside reparations fund – especially one tacitly critical of his regime – in a similar light.[183] This would especially be the case if any eventual reparations scheme were perceived to be connected to current pressure exerted by the donor community for President Museveni to stick to a promised process of transition to greater democratic rule.[184]

Alternatively, the Ugandan government might welcome a reparations fund, in the same way it has welcomed and even requested the ICC's intervention. The concern in that case would be that international funding of reparations might erode part of the purpose of reparations: the (material) recognition of responsibility for wrongs committed. An international reparations fund, especially one directed at harm caused by government inaction or mismanagement, might have the effect of absolving the government of any responsibility for the harm it has caused. In this scenario, the government could conceivably acknowledge its responsibility, but without bearing the burden that taking such a responsibility would otherwise carry. To be blunt, by taking responsibility in this way, the government would not be putting its money where its mouth is. Such a gesture might thus be received as an empty one by the victim population – especially if government leaders were to escape other burdens such as the threat of prosecution or political accountability.[185] In the extreme, an injection of funds in this way could be perceived by the affected population as an attempt by the international community to buy their peace on behalf of the government.

In sum, in either scenario, relying largely on the international community for funds, especially where the government is perceived as getting a free ride, would throw into question whether the reparations program could

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intervene in the affairs of states. "Because of these concerns sub-rule 4 was drafted to ensure that the Court would only order that an award be dealt with by these organizations after consultations with the interested States and the Trust Fund itself." Lewis & Friman, *supra* note 6 at 487.

[183] For President Museveni's comments on donors see e.g. Fortunate Ahimbisibwe, "Donors Can't Dictate to Us" *The NewVision* (Kampala) (2 May 2005) and "Uganda Leader Hits Back at Donors" *BBC News* (2 May 2005). The recent controversy in Uganda arose when the UK cancelled part of its foreign assistance as a rebuke to President Museveni for failing to bring about previously promised democratic reforms.

[184] *Ibid*.

[185] Evidence in support of this (albeit speculative) point is confirmed for instance by the fact that population displayed a strong desire to see UPDF held accountable in some form for their wrongs. This in turn might exacerbate the feelings of political marginalization and exclusion they currently hold. *Forgotten Voices*, *supra* note 19 at 26.

meet its underlying aims of fostering greater civic trust and social solidarity.[186] With the prospect of not being able to fund reparations in a satisfactory way, we also begin to see how the ICC's prosecution might lose coherence. Justice, in other words, could be perceived by the victims as being done "on the cheap".

VI CONCLUSION: ANY HOPE FOR EXTERNAL COHERENCE?

As the ICTJ and APRODEH note, although "reparations are a well-established legal measure in legal systems all over the world," they are ultimately "more a part of an overall political project than simply the result of judicial process."[187] This, in the final analysis, might be the crucial problem confronted by any ICC reparations program in Uganda. The ICC is setting out to prosecute and provide reparations, but without any signs that these activities will be accompanied by any meaningful processes of truth-telling, institutional reform or national reconciliation. There is no larger process of transition or reconstruction of the political community underway in Uganda and, if anything, current signs point in the opposite direction. President Museveni appears to be moving away from attempts to engage in reconciliation and an earlier promised transition to democracy.[188] The ICC case should thus be read against this backdrop of the government's attempts to monopolise power, while avoiding wider processes of national reconciliation. As noted above, one interpretation of the government's motivations in referring the case to the ICC is that President Museveni is attempting to bring an end to the conflict against the LRA, but without addressing pre-existing grievances in Northern Uganda and, all the while, trying to shift attention away from the government's failures to address the humanitarian crisis and address corruption in the army.

The bleaker conclusion to draw then is that the ICC could risk undermining the very role it is intended to play. Through prosecution or eventual reparations, the Court could threaten any transitional justice process in Uganda by playing into the government's political strategies. A less drastic conclusion to draw is that the ICC should tread carefully on issues such as reparations. If the ICC is ultimately to be effective–to be seen as rendering justice–its efforts to prosecute and provide limited reparations will have to be externally coherent. What the issue of reparations reveals in fairly stark terms

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[186] Wierda & de Greiff, *supra* note 99 at 7-8. As the authors note, however, relying on international funds could strengthen perceptions about the reliability of international institutions.

[187] ICTJ / APRODEH, *supra* note 100 at 6.

[188] In particular, the President brought amendments to Uganda's Constitution which, among others, have allowed him to remain in power by removing presidential term-limits, while possibly curtailing the powers of the Ugandan Human Rights Commission and the independent inspector of the government. Museveni was recently elected to a third-term with initial reports from observers citing a lack of a "level playing field" in the election. See e.g., "Uganda's Museveni Attacks Rival," *BBC News* (27 February 2006).

is that, as the situation currently stands in Uganda, the ICC cannot achieve this goal. Currently, there is no hope for external coherence because the government has neither put in place other transitional justice mechanisms to complement the ICC's activities, nor shown any inclination to do so. This may point to a key limitation of the ICC: the Court can play a role, but not the sole role, in transitional justice processes.

The Court, consequently, needs to manage expectations about what it can accomplish. To put this concern into perspective, from its first beginnings, extremely high expectations have been placed on the ICC as to what it can accomplish. The UN Secretary-General, for instance, proclaimed that in "the prospect of an international criminal court lies the promise of universal justice"[189] A situation such as Uganda demonstrates that a more tempered stance is in fact called for. Whether the ICC is ultimately seen as successful in fulfilling its mandate of prosecuting perpetrators of the worst crimes may yet depend on whether the Court can ground its efforts within broader, local processes of transitional justice. [190] And the importance of local institutions and processes is far from alien to the ICC. After all, central to the ICC's structure is the notion of complementarity, namely, that local institutions should play the primary role in dispensing justice. Moreover, there is a clear desire on behalf of the local population for the ICC's current intervention to have a definite Ugandan component.[191]

In fairness to the Court, it appears to have been performing an active outreach program in Uganda since the unsealing of the indictments.[192] There is

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[189] "United Nations statement re: Establishment of an International Criminal Court-overview" online: <http://www.un.org/law/icc/general/overview.htm>. Along similar lines: "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law." "Secretary-General says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law" UN Press Release L/2890 (20 July 1998), online: <http://www.un.org/News/Press/docs/1998/19980720.l2890. html>.

[190] In this vein take for instance the sobering words of Bottigliero who argues that to "work effectively for the benefit of victims, the ICC reparation regime requires the full cooperation of States Parties, non-States Parties and all other concerns." Bottigliero, *supra* note 7 at 238.

[191] Again only 27% percent of population polled in a recent survey in five Ugandan regions affected by the conflict had knowledge of the ICC. Of those 91% said the ICC should involve Ugandans in the justice process. Of these, 31% believed Ugandans should serve as judges, 25% as witnesses, 20% as experts and 13% as lawyers. There was also a strong preference for trials to be held in Uganda, with some pointing to the northern region of Uganda. *Forgotten Voices*, *supra* note 19 at 33-34. Note, the Court is empowered to hold trials outside of the Hague, "whenever it considers it desirable," by virtue of s. 3(3), *Rome Statute*.

[192] See e.g. "Information Meetings for Lawyers and Journalists Held in Uganda" *ICC Press Releases* (Kampala: 31 October 2005) online: <http://www.icc-cpi.int/press/pressreleases/118.html> and "ICC Holds Seminar with Ugandan Judicial Authorities," *ICC Press Releases* (Kampala: 31 October 2005) online: <http://www.icc-cpi.int/press/pressreleases/115.html>. Earlier on, however, ICTJ notes that the opposite was the case, viz.: the ICC "refrained from implementing a

definite potential, however, for yet further engagement with local actors and, in particular, for the Court to find creative ways to coordinate any eventual reparations programs with local mechanisms. Most notably, the idea of providing compensation or reparations for harms done is central to the traditional justice mechanisms which have been advocated as alternatives to prosecution by some of the, primarily Acholi, traditional and religious leaders in the North.[193] The issue of reparations, in this sense, provides a potentially fruitful area for the ICC to link up or embed its efforts in the local context. In other words, a starting point for constructing a more externally coherent transitional justice process could be for the Court to coordinate its victims outreach and reparations program with efforts at the local levels which, in turn, could do a lot to reconcile any possible tensions or discord between international and local mechanisms and constituencies.

Perhaps more urgently, the local population has expressed a strong desire for mechanisms both to remember the legacy of past abuses in Northern Uganda and talk openly about what has happened to them.[194] There is thus a strong need for a truth-telling process and symbolic reparations or remembrance in Northern Uganda. The further consequence is that for the ICC's intervention to be effective and comprehensive, it cannot satisfy itself simply with exercising and managing expectations about its prosecutorial and reparations powers. Any such interventions will only be meaningful – in the sense here of being externally coherent – if accompanied by complementary transitional justice mechanisms. Even with the current case, and the most robust victims outreach process, the Court could not hope to achieve the type of symbolic reparations desired by the affected population, for instance, of an official day of remembrance.[195] At the same time, the current case against the five LRA leaders, assuming it proceeds to prosecution and conviction, is unlikely to serve as an adequate platform for allowing victims to talk openly about what happened to them.[196] With respect to Uganda, moreover, a more comprehensive and externally coherent transitional justice process might require a truth-telling process, for instance, to settle conflicting accounts of past atrocities such as the massacres in the 1980s in Luweero Triangle, which continues to be a divisive issue.[197] The truth-telling process could also examine the various

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comprehensive outreach program in Northern Uganda because it believe[d] the sensitivity of the investigations merits a 'low profile' strategy." *Forgotten Voices*, *supra* note 19 at fn 40.

[193] Generally, see *Roco Wat I Acoli*, *supra* note 75.

[194] *Forgotten Voices*, *supra* note 19 at 35.

[195] *Ibid*.

[196] Unless, of course, in the unlikely scenario, the ICC were somehow to perform outreach with victims in a comprehensive and coordinated way, with all victims, and not just for the limited purposes of gathering facts and speaking to those victims directly relevant to the cases under consideration.

[197] These massacres took place in the Luweero Triangle region of Uganda, prior to Museveni taking power during fighting between his army and his opponents.

strategies and rationales that the government has followed in handling the conflict against the LRA and the resulting humanitarian crisis. At a minimum, a transitional justice process would require an end to fighting, and the chance for communities in the North to re-establish themselves and begin healing the social and cultural bonds which have currently been so devastated by the conflict.

The Prosecutor has decided, for now, to pursue justice without waiting for a certain peace. Justice in the form of prosecution, however, might ultimately be of cold comfort to the local population if lasting peace and reconciliation are not achieved in Uganda. To be clear, justice in the form of prosecution has a crucial role to play in those processes. Whether the ICC's intervention proves ultimately to be destabilizing to achieving peace, or can serve as the impetus finally to stop Joseph Kony and the LRA's legacy of violence remains to be seen. What is more certain is that prosecution alone will not bring lasting peace in Uganda. While the local population has expressed some desire for prosecution and accountability, they have also other pressing needs and desires, such as truth-telling, compensation and remembrance. Whether the Prosecutor rushed in first taking up the case against the LRA remains a point of debate and, in any event, is largely academic at this stage. However, in the case of reparations, the ICC still has time to plan for the future, in order to avoid some of the pitfalls and controversies it has faced with respect to prosecutions. In turn, the Court can ensure that any reparations program it ultimately implements will be sensitive to, and play as constructive a role as possible in larger efforts of to deliver restorative justice and to achieve lasting peace and national reconciliation.

Perceptions outside of northern Uganda are that the massacres were caused by Acholi soldiers. Most recently, see Museveni's allegations that Vincent Otti was responsible for the killing in Luweero: Chris Ochowun and Dennis Ojwee, "Otti Killed People in Luweero - Museveni" *New Vision* (Kampala) (20 October 2005). Ongoing disagreement over the events in the Luweero Triangle was witnessed in April 2005, in Ugandan newspapers. Compare e.g. Andrew Mwenda, "Museveni is Responsible for Most of the Killings in Luweero" *The Monitor* (Kampala) (15 April 2005) and Fortunate Ahimbisibwe, "Obote Must Answer for Atrocities" *The New Vision* (Kampala) (2 May 2005).