



American Society  
of International Law

---

*Kony 2012*, the ICC, and the Problem with the Peace-and-Justice Divide

Author(s): Kamari Maxine Clarke

Source: *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 106 (March 2012), pp. 309-313

Published by: [American Society of International Law](#)

Stable URL: <http://www.jstor.org/stable/10.5305/procannmeetasil.106.0309>

Accessed: 06/09/2013 14:34

---

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



American Society of International Law is collaborating with JSTOR to digitize, preserve and extend access to *Proceedings of the Annual Meeting (American Society of International Law)*.

<http://www.jstor.org>

**KONY 2012, THE ICC, AND THE PROBLEM  
WITH THE PEACE-AND-JUSTICE DIVIDE**

By Kamari Maxine Clarke\*

Spurred by the popular *Kony 2012* video that recently went “viral,” my comments today will focus on the dangerous slippage between justice and peace. This short film is just a recent example of the tendency to treat justice (popularly seen as the law) and peace (seen as political) as mutually exclusive. Unfortunately, this justice-peace binary, and discourses that perpetuate it, obfuscate some of the issues at the core of the violence on the African continent. Justice becomes reduced to law, while peace loses any justice-producing qualities. The famous adage: “We ask for justice, you give us law” speaks to part of the problem—the assumption that the search for “justice” is fundamentally about the search for law. The other part of the problem of strictly equating adjudication with “justice” is that many other actions that could also be seen by some people as “justice-producing”—diplomacy, peace negotiations, economic redistribution strategies, forgiveness rituals—fall outside of the realm of “justice” because others perceive them as lacking the “teeth” of legal accountability.

Instead, in contexts of post- or ongoing violence in Africa, the focus on international criminal adjudication as justice has recently been based on the assumption that violence in certain places in Africa—the DRC, Uganda, Kenya, or Libya—can be managed as a legal problem alone, rather than the larger structural problem that it is. Related to this, the legal doctrine of command responsibility serves as a mechanism for assigning guilt to a single chief commander and a few of his/her top aides. Its power is as much legal as symbolic—it flags the end of impunity, and that *we* are watching. The problem is that in most violence-based contexts on the continent where there are struggles over the management of resources or where violence is used to regulate civilian behavior, reassigning the guilt of thousands of people to a single chief commander neither accurately attends to the core problems involved in the making of war, nor does it produce the conditions for a violence-free future. *Kony 2012*, in the very title of the short film, does just that.

Inspired by Jason Russell’s travels, *Kony 2012* narrates Uganda’s 25-year-old war, its violence, and the consequences of that violence: the death and displacement of millions of Ugandans. The film directly links the mass violence to Joseph Kony, the leader of the Lord’s Resistance Army (LRA), and demands that he be held accountable for all of the violence committed by the LRA. As Russell narrates in the film, “Kony heads the Lord’s Resistance Army, a Christian terrorist group which has reportedly abducted and forced more than 30,000 children to fight with them since their revolt began in 1986.” He then discloses that his commitment was inspired by a promise he made to Jacob, a young Ugandan boy whose brother was killed by Kony’s men. Russell vowed he was “going to do everything possible to stop them.”

The story, then, is about how American political participation and stopping a single leader will rectify Uganda’s plight. The film’s other driving storyline is the relationship between Russell and his son. There are good guys and bad guys in Africa, Russell says, and the way to make Africa better is to stop Africa’s bad guys. Russell’s savior complex is catapulted with the message that by donating money through a simple click of your mouse, and buying a kit that will help fund Joseph Kony’s arrest, every American can also be part of the solution to help poor Ugandan victims. The simplicity of the message is compelling and suggests

\* Professor of Anthropology and International and Area Studies, Yale University.

that Africa can be transformed by our philanthropy. The sad reality is that *Kony 2012* is one of a series of ultimately flawed philanthropic and humanitarian gestures that claim that capturing a single commander will solve Africa's problems, and that justice equals law.

In comparing *Kony 2012*'s message to that of the individualization of criminal responsibility seen in the new wave of ad hoc tribunals and in the ICC, the same narrative continues: that juridical action focused on a few commanders and top-ranking leaders will end impunity, and that if we support the Court's bid to arrest and try Africa's warlords, we will end impunity. Like *Kony 2012*, the ICC indictment in Uganda highlights narratives suggesting that judicial and humanitarian/military interventions can solve Africa's problems. But the reality is that locating adjudication as the answer simply displaces the place of "the political." Re-engaging the political involves uncovering root causes at the core of violence itself and returns us to the reality that solving Africa's problems must involve African participation. It must include a deliberative process and necessary rebuilding of institutions, and its laws must emerge out of a process that Ugandans see as politically legitimate. The ICC indictment of Joseph Kony, Ugandan President Museveni's referral of the top five LRA officers to the ICC, the perception of Museveni's complicity in Uganda's violence (governmental troops also committed violence in the north), and Ugandan public responses to the ICC provide an example of the perceived distinctions between peace and justice, especially as they relate to larger questions of criminal responsibility.

#### PEACE TALKS AND TRUNCATED POSSIBILITIES

The International Criminal Court's involvement in Uganda began in July of 2003 when the ICC Prosecutor identified Uganda as a situation of concern. At that point, the Office of the Prosecutor (OTP) began examining the situation in Uganda with greater scrutiny, and on July 29, 2004, the OTP decided that there was a "reasonable basis to open an investigation." Meanwhile, in November 2003, Betty Bigombe, the former Minister of State for the Pacification of the North, had begun to meet with top LRA members in an attempt to reach a peaceful settlement to the conflict in northern Uganda. These talks resulted in a geographically bounded seven-day ceasefire between the LRA and the Ugandan Peoples Defense Forces (UPDF) on November 14, 2004, which was then renewed continuously in anticipation of a general ceasefire agreement that would be reached by year's end.<sup>1</sup>

In December 2003, President Museveni formally referred the LRA-Ugandan situation to the ICC. And in January 2004, the peace agreement was disrupted, and hostilities re-erupted in the region. Betty Bigombe continued her negotiation attempts, and with the support of the February 4, 2005, ceasefire declaration by President Museveni, peace was sustained for eighteen days. LRA attacks followed this period. The situation was further complicated when on July 8, 2005, the ICC issued sealed warrants to arrest five senior members of the LRA, including Kony. The arrest warrants were unsealed on October 13, 2005. The timing was unfortunate because Bigombe and other parties were in the midst of peace talks with the LRA, and the ICC action was perceived as curtailing that process. Thus, the ICC was condemned by large numbers of Ugandans and human rights groups, since even though its actions were being conducted in the name of promoting justice, it actually appeared to be

<sup>1</sup> ZACHARY LOMO & LUCY HOVIL, A POISONED CHALICE? LOCAL CIVIL SOCIETY AND THE INTERNATIONAL CRIMINAL COURT'S ENGAGEMENT IN UGANDA (2011), available at [http://www.law.berkeley.edu/files/ICC\\_NGO\\_engagement.pdf](http://www.law.berkeley.edu/files/ICC_NGO_engagement.pdf).

doing the opposite. What emerged was a presumption on the part of ICC actors that justice was not possible without its adjudicatory power.

By November 2005, significant public debates had been generated on the impact of the ICC on the peace process. The ICC had mounted a public relations campaign, but the locals increasingly questioned the incommensurability of ICC justice with their own senses of what justice meant to them. At the heart of this disagreement were two competing ideas of justice. First, to large numbers of the people of northern Uganda, justice was connected to any forum through which they could return home in safety and, from there, foster the growth of new forms of trust that could form the basis for sustainable peace. But, from the perspective of the ICC, the primary image of justice was that of Joseph Kony and his other four commanders being found, extradited, and brought to trial. The former emphasized the need to address structural injustice, while the latter placed an emphasis on individualized criminal responsibility as the basis for adjudication, and thus justice.

Interestingly, issues around social location were central to the problem. One grouping—those in Uganda—was living under conditions of bare survival; the other represented conditions of privilege and judicial aspirations for ending violence. People understood that there was a huge divide between the social location and stakes for each side. While the prosecution of Kony certainly may have been a critical component of that process, many Ugandans felt that it should not happen at the expense of the victims (many of whom had become refugees) who wanted to return home and rebuild their lives.

These depictions of justice are not mutually exclusive. And, as many documenting this process have argued, they do not deny that the ICC/OTP wanted to see people return to their homes or that those in the north did not want to see Kony held accountable for his actions.<sup>2</sup> What these differences highlight is the extent to which tackling the atrocious fallout from the war was being driven by conflicting conceptions of priorities.

#### CONTESTATIONS OVER JUSTICE, CLARIFYING PEACE

By the beginning of the 1990s, a new language of “justice” shaped discourses in new international and transnational spheres that were different from earlier periods. Academics, practitioners, victims, and lawyers all asked the questions: What, exactly, *is* justice? What is the relationship between justice and human rights? What is the relationship between justice and law? The chief Prosecutor of the ICC, Luis Moreno-Ocampo, sought to establish a framework through which the Court could initiate and successfully prosecute cases in a way that was sensitive to local cultural realities without sacrificing the Court’s mission. But, as he realized, the ICC must be committed both to the prosecution of crimes—that is, “the most serious crimes of concern to the international community as a whole,” as Article 5 of the Rome Statute puts it—and to the shifting, often contested terrain within which the Court was forced to operate. In the end, the Prosecutor found an opening in Article 53 of the Statute, which outlines the conditions under which the Court can decline to begin a prosecution. Among the conditions, the Article creates an ambiguous limiting condition around the “interests of justice.” Its ambiguity derives from both parts of this provision: the Statute does not specify what kind of “interests” the Court should consider, nor the kind of “justice” on whose behalf these unarticulated interests should be working.<sup>3</sup>

<sup>2</sup> *Id.*

<sup>3</sup> MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA (Kamari Maxine Clarke & Mark Goodale eds., 2010).

Some commentators have analyzed Article 53 as an international legal form of prosecutorial discretion and have argued that its nuances and institutional potential are much greater and should allow for larger systematic consideration. The provision “in the interests of justice” has developed in the OTP through consultation and debate, and as a complicated mechanism for mediating tensions between an abstract universality and actual contingencies within which the ICC investigates and prosecute its cases. For some, Article 53 provided the opportunity to allow prosecutorial discretion to consider the political ramifications of ICC judicial action. For others, “justice” is idealistic, and the interpretation of the “interests of justice” provision should be exercised in restrictive terms. In the end, the Prosecutor’s position paper on this matter set a standard for action that involved balancing the interests of victims, peace, and judicial action. However, in the initial months of the Ugandan investigation (March 2004–November 2005), alongside criticism from victims’ groups in Uganda, the OTP sought to work with some Ugandan organizations to achieve a range of peace goals. It made clear that its role was not that of peacekeeping but was adjudicatory. Moreno-Ocampo was explicit that the Court’s contribution to securing peace was in the Ugandan prosecution alone. Later, in the Darfur situation, the OTP shifted the onus of responsibility for maintaining peace to the Security Council—again pushing the responsibility of peace elsewhere.

By July 2006, the OTP clarified that Uganda’s best chance for peace was ICC adjudication, yet the reality was that the release of ICC arrest warrants for Kony and his four commanders actually led to the early truncation of the peace talks that were underway. By insisting on the artificial division between politics and adjudication, the OTP has maintained that Uganda’s peace negotiations fell outside of the realm of the office’s judicial mandate. Thus, while the OTP’s position paper on Article 53 may map out particular possibilities that offer the office significant discretion for action, the reality is that by upholding binary divisions that locate peace as political and justice as embedded in the terrain of the legal, the end result was the reinforcement of social myths about peace and justice.

The two concepts of justice and peace are often bandied around as if they are polar opposites and must be dealt with by different bodies. The presumption here is that one deals with politics and the other deals with law, and that the two must be maintained as distinct. But the reality is that focusing on individual criminal responsibility in the midst of larger systematic conditions of violence actually contributes to the denial of the political basis for justice. This is what I call *fictions of justice*.<sup>4</sup> These fictions lie at the heart of the assignment of criminal responsibility to a single individual and are a significant part of the power of the *Kony 2012* discourses being mobilized in pursuit of humanitarianism in Africa.

By drawing on the *Kony 2012* and the Ugandan-ICC contestations over justice examples, what I have tried to highlight is that the Court’s agenda and the language deployed by human rights/rule of law advocates have afterlives that go well beyond the enactment of the law and the courtroom. Such discourses are neither inconsequential nor unresolvable. They shape the conditions of the possible—of what can be mobilized. They shape the terms on which life and death are selectively parsed. And whether our goal is simply to establish doctrinal decisions that might deter violence, and/or to rectify the structural problems that undergird

<sup>4</sup> KAMARI MAXINE CLARKE, *FICIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* (2009).

that violence in the first place, attending to the language of justice as inclusive and generative of larger structural problems is a critical start.

## **REMARKS BY OLIVIA SWAAK-GOLDMAN\***

### INTRODUCTION

International criminal justice and its components were put to the test during the latest African Union summits. Past African Union decisions, such as the refusal to cooperate with the ICC in the arrest and surrender of Sudanese President Al Bashir and the rejection of the establishment of an International Criminal Court liaison office for the AU in Addis Ababa, are examples of the unrest regarding the ICC activities. Anti-ICC elements in Africa have been at work to discredit the Court by lobbying for non-support and non-cooperation with complete disregard for legal arguments.

What is often understated, however, is that the practice clearly indicates that the engagement and cooperation of individual African states with the ICC has not diminished over time and remains excellent. Over the last nine years, African states have consistently assisted the ICC at each step of its activities, such as opening investigations, conducting investigations, pursuing and arresting individuals sought by the Court, and protecting witnesses. African states receive more than 50 percent of the Office of the Prosecutor's requests for cooperation, and some 80 percent of these requests are met with a positive response.

### EXAMPLES OF AFRICAN COOPERATION

Some concrete examples of cooperation can help to illustrate this point. Uganda, the Democratic Republic of Congo, and the Central African Republic have all referred the situations within their territory to the Court, requesting its intervention. Similarly, almost all segments of Kenyan society have welcomed the Court's investigation into the post-election violence. Recent polls indicate that a majority of the Kenyan population (over 60 percent) favors the Court's activities into the matter. African states have also lent support to the intervention of the ICC into the situations in Darfur and Libya through their representatives in the United Nations Security Council (UNSC). UNSC Resolution 1593,<sup>1</sup> which referred the situation in Darfur to the Court, included positive votes from Benin and Tanzania, as well as an abstention from Algeria. Similarly, UNSC Resolution 1970,<sup>2</sup> which unanimously referred the situation of Libya to the Court, included positive votes from Gabon, Nigeria, and South Africa.

Additionally, in May 2011, President Ouattara of Côte d'Ivoire confirmed his wish for the Office of the Prosecutor to conduct independent and impartial investigations into the most serious crimes committed since November 28, 2010, in the territory of Côte d'Ivoire by confirming the acceptance of jurisdiction of the Court under Article 12(3) of the Statute.<sup>3</sup> Moreover, at last December's Assembly of States Parties, Prime Minister Soro reiterated the previous statement and indicated Côte d'Ivoire's commitment to ratify the Rome Statute very soon.<sup>4</sup> Finally, Libyan authorities cooperated with Court officials during their mission

\* Head, International Relations Task Force, Office of the Prosecutor, International Criminal Court.

<sup>1</sup> S.C. Res. 1593 (Mar. 31, 2005).

<sup>2</sup> S.C. Res. 1970 (Feb. 26, 2011).

<sup>3</sup> Letter from Alassane Ouattara, President of Côte d'Ivoire, to the President of the International Criminal Court (Dec. 14, 2010), at <http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>.

<sup>4</sup> [http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.8032081/k.2C39/April\\_2012brC244te\\_dIvoire.htm](http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.8032081/k.2C39/April_2012brC244te_dIvoire.htm).