



Royal African Society

# Peace, Justice & the ICC in Africa

MEETING SERIES REPORT

By Nicholas Waddell & Phil Clark



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## ***Acknowledgements***

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Discussions with the Prosecutor involved specialists on northern Uganda and the Democratic Republic of Congo (DRC) who were assembled in connection with a forthcoming book on the Lord's Resistance Army, edited by Tim Allen and Koen Vlassenroot.

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## ***About the authors***

Nicholas Waddell is Research Coordinator at the Royal African Society. Phil Clark is a Post-Doctoral Research Fellow at the Transitional Justice Institute, University of Ulster. His research explores transitional justice and other conflict-related issues in Africa.

## ***Note on meeting summaries***

For reasons of space, the coverage of the content of presentations and discussions is selective. Summaries should not be taken as representing the full institutional positions of the organisations concerned. For information on the ICC, please refer to [www.icc-cpi.int](http://www.icc-cpi.int).

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## ***Introduction***

The International Criminal Court is the first permanent international institution established to investigate and prosecute genocide, crimes against humanity and war crimes. Though it has a global mandate, the ICC's activities have been concentrated in Africa and recent months have witnessed a series of crucial developments in the Court's work on the continent. These include: the transfer to The Hague and confirmation of charges against the Court's first accused, Thomas Lubanga; the issuance of warrants for the arrest of the ICC's first suspects in relation to Darfur; and tensions around the ICC's Uganda arrest warrants and peace negotiations.

These developments and others have raised numerous questions about the ICC and the role of international justice. Much of the coverage of the ICC, however, has lacked nuance and has been presented in either/or and for/against terms. Furthermore, little in-depth debate on the ICC has taken place between specialists on different countries and from different disciplines. In March this year, the Royal African Society, supported principally by the Crisis States Research Centre (LSE), the Transitional Justice Institute (University of Ulster) and the International Center for Transitional Justice, organised a series of closed roundtable discussions and public meetings under the heading, 'Peace, Justice and the ICC in Africa,' to address some of the practical, ethical and legal dilemmas posed by the current work of the ICC.

The main issues discussed during the series were:

- The ICC's contribution to peace and stability in Africa;
- The ICC's relationship with domestic governments and judiciaries;
- The intersection between the ICC and community-based approaches to transitional justice; and,
- The role of the ICC in relation to victims and affected communities.

One of the strengths of the series was that so many concerned groups and individuals were involved; often approaching the issues from very different positions and backgrounds. The sessions included policymakers, MPs, academics, practitioners and legal professionals. It also featured extensive debate with the ICC's Prosecutor and other officials from the Court.

The purpose of this report is to capture the diverse presentations and debates included in the series, and to contribute to ongoing discussions of the impact and challenges of the ICC's work in Africa.

## **Events and speakers**

### ***Peace, Justice and the International Criminal Court in Africa***

Friday 2 March 2007, London School of Economics  
Roundtable discussion with presentations from:

**Luis Moreno-Ocampo**, *Prosecutor, ICC*  
**Nick Grono** - *Vice President for Advocacy and Operations, International Crisis Group*  
**Barney Afako** - *Legal advisor to the Ugandan peace negotiations*  
**Marieke Wierda** - *Senior Associate, International Center for Transitional Justice*  
**Richard Dowden** (Chair), *Director, Royal African Society*

### ***Justice in Conflict? War, Peace and Impunity in Africa***

Friday 2 March 2007, London School of Economics  
Alistair Berkley Memorial Lecture presented by the Royal African Society & DESTIN

**Luis Moreno-Ocampo**, *Prosecutor, ICC*  
**Nick Grono** - *Vice President for Advocacy and Operations, International Crisis Group*  
**Barney Afako** - *Legal advisor to the Ugandan peace negotiations*  
**Marieke Wierda** - *Senior Associate, International Center for Transitional Justice*  
**Helena Kennedy QC** (Chair)

### ***The ICC, Justice Systems and Reconciliation***

One-day Conference, Canada House, 8 March 2007

*Session 1: The ICC, National Governments and Judiciaries*

**Matthew Brubacher**, *Associate Analyst, Jurisdiction, Cooperation and Complementarity Division, Office of the Prosecutor, ICC*  
**Anneke Van Woudenberg**, *Senior Researcher (DRC), Human Rights Watch*  
**Chaloka Beyani** (Chair), *Senior Lecturer in Law, LSE*

*Session 2: The ICC, Reconciliation and Community-Based Justice*

**Tim Allen**, *Reader in Development Studies, LSE*  
**Phil Clark**, *Post-Doctoral Research Fellow, Transitional Justice Institute, University of Ulster*  
**Matthew Brubacher**, *Associate Analyst, Jurisdiction, Cooperation and Complementarity Division, Office of the Prosecutor, ICC*  
**Eric Joyce MP** (Chair)

*Session 3: The ICC, local legitimacy and victims' concerns*

**Fiona McKay**, *Head of Victims' Participation and Reparations Section, Registry, ICC*  
**Mariana Goetz**, *Advisor, ICC Programme, REDRESS*  
**Olivier Kambala**, *Programme Associate, ICTJ*  
**Lorna McGregor** (Chair), *International Bar Association*

## ***The ICC, Criminal Justice and Crisis States***

Wednesday, 21 March 2007, London School of Economics

A seminar discussion with presentations from:

**Graeme Simpson**, *Country Programs Unit Director, ICTJ*

**Zachary Kaufman**, *DPhil candidate (Oxford), Juris Doctor Candidate (Yale), former policy clerk in the Office of the Prosecutor, ICC*

**Phil Clark**, *TJI*, **Tim Allen**, *LSE (Chairs)*

## **Overviews**

### ***Peace Justice and the ICC in Africa***

The first two meetings in the series explored the contribution of the ICC to peace and stability in Africa. This issue is of particular significance because, unlike other bodies tasked with investigating past abuses in more stable contexts, the Rome Statute governing the ICC restricts the Court to investigating only crimes committed after July 2002. This temporal jurisdiction inevitably draws the Court into situations of actual or potential conflict. The ICC's pursuit of the leaders of Uganda's rebel Lord's Resistance Army, for example, has led to criticisms that the Court is an obstacle to a peaceful resolution to the country's protracted civil war. In the light of such controversies, a central theme of the first two meetings was the tension between the pursuit of peace and of justice. The meetings asked how effectively the ICC has negotiated these tensions in specific contexts and what early lessons can be drawn. Underlying these discussions was the fundamental question of how far the Court should consider the actual or potential implications of its actions on conflict dynamics or peace negotiations.

### ***The ICC, Justice Systems and Reconciliation***

#### ***1. The ICC and national governments and judiciaries***

##### ***Background***

Following the sessions on peace and justice, a one-day conference examined the relationships between the ICC and national as well as local institutions and processes.

The principle of complementarity in the Rome Statute stipulates that the ICC should back up national judiciaries rather than supersede them. The ICC can intervene only when national institutions are unwilling or unable to meet their obligations. The Court, therefore, often faces thorny relationships with domestic governments and judiciaries – not least when, as in Sudan, state actors are themselves suspected of committing atrocities. Complementarity means that the ICC must assess the effectiveness of domestic judiciaries – often involving difficult choices about political will, motivations and the capacities of local institutions. Some commentators and elements within the ICC have supported the idea of 'positive complementarity'. This suggests that the ICC should play an active role in encouraging states to fulfil their legal obligations and that the Court should work with domestic judiciaries and help build their capacity so that they are better able to investigate and prosecute cases domestically.

The first conference session addressed the principle of complementarity and how it was being pursued in practice. Underlining the session was the issue of how far the ICC can or should prioritise positive complementarity relative to its other roles and mandates. It asked how the ICC should work with domestic governments and what scope there was for the ICC to build the capacity of national judiciaries.

#### ***2. The ICC, reconciliation and community-based justice***

Having touched on the ICC's relationships with national governments and judiciaries, discussion turned to the ICC and community-based justice and reconciliation processes, such as local rituals in northern Uganda or village-level conflict resolution mechanisms in eastern DRC. 'Traditional justice' has attracted significant attention, often from supporters who contrast the international retributive justice of the ICC with notionally more reconciliatory local rituals orientated towards forgiveness. Proposals to revitalise, transform or even give formal legal status to community-based processes in order to address aspects of mass atrocities have, however, encountered criticism concerning their legitimacy among local populations and the extent to which it is possible or even desirable for them to take on enhanced justice and reconciliation roles. This session

explored the respective contributions of the ICC and community-based institutions to addressing mass atrocities and looked at the potential for cooperation between these approaches.

### **3. *The ICC local legitimacy and victims' concerns***

The final set of discussions explored the ICC's interactions with local populations, its popular legitimacy, outreach efforts and responsiveness to victims' concerns. International institutions, including the ICC, have been heavily criticised for their detached approach to the societies they purport to assist, delivering a form of abstract justice that provides few benefits to victims and the broader population. The ICC is distinct from its forerunners in that victims of crimes can formally take part in proceedings by having their views and concerns presented to judges. Victims can also receive reparations from the Court. The Rome Statute emphasises that the ICC must be a victim-centred institution but the question remains as to how this can be realised and how the ICC can fulfil its outreach objectives. To what extent, for example, is the ICC responsible for misconceptions and inflated expectations of the Court, and how has it addressed victim participation and victim reparations?

### ***The ICC, Criminal Justice and Crisis States***

The purpose of the final event was to address some of the wider questions that had underpinned the series. The meeting sought to examine the ICC in the context of the broader role of international justice in societies suffering from mass crimes. It examined whether international justice institutions should simply 'do justice' or whether they could contribute to other social aims.

## ***Peace, Justice and the International Criminal Court in Africa***

A closed roundtable discussion with presentations from:

**Luis Moreno-Ocampo**, *Prosecutor, ICC*

**Nick Grono** - *Vice President for Advocacy and Operations, International Crisis Group*

**Barney Afako** - *Legal advisor to the Ugandan peace negotiations*

**Marieke Wierda** - *Senior Associate, International Center for Transitional Justice*

**Richard Dowden** (Chair), *Royal African Society*

Friday 2 March 2007, 2:00pm-4:30pm, London School of Economics

### ***Luis Moreno-Ocampo***

The Prosecutor argued that the terms of any peace settlement, in Uganda or elsewhere, must conform to the law as enshrined in the legal framework agreed in Rome in 1998. He underlined this as a basic but fundamental point. He stated that, in effect, the peace and justice discussion was settled in 1998 in Rome when 120 states decided that lasting peace requires justice. In what he described as a 'legal revolution,' the Prosecutor explained that these states agreed that there could be no impunity and that states had a duty to prosecute genocide, crimes against humanity and war crimes; if they were unwilling or unable to do this, then the ICC, as an independent actor, must do it instead.

The Prosecutor commented that, sitting in London, it may be tempting to see the law as a matter of detail. He emphasised that coming from a country like Argentina with its authoritarian past impressed upon him the fundamental importance of the rule of law. In Rome, he said, the idea of respecting the law expanded from the national system to the international system.

The Prosecutor argued that, while highly desirable, reconciliation, unlike the law, was a moral idea that cannot be an enforceable obligation. Rather, he said, it had to come from the grassroots.

The Prosecutor took issue with the idea that the types of crimes covered by the ICC could be seen as 'national issues.' Instead, he said, these crimes inevitably had consequences beyond national borders and became issues of global importance.

### ***Africa***

On Africa specifically, the Prosecutor stated that, rather than the ICC's and the Rome Treaty's being forced upon African countries, the Court and the Rome System had been championed by African states. He underlined that the same ideas enshrined in the ICC were central to the Constitutive Act of the African Union (AU) and to key AU priorities. The advent of the Rome System was, he said, spearheaded by Africa, Latin America and Europe – three regions that suffered massive crimes in the past century and were therefore most keenly aware of the need to combat impunity

### ***Nick Grono***

Grono argued that, in an ideal world, the ICC would investigate past atrocities only in a context of peace and stability, but the Court's temporal jurisdiction meant that it would be drawn towards investigating situations of ongoing conflict, or the aftermath of recent conflict. Grono noted that, in such environments, the Prosecutor would inevitably confront claims that the ICC was an obstacle to peace. The Prosecutor was, he said, in an invidious position.

Grono stated that, even when the ICC had been established for many years, the Court would confront peace and justice tensions because prosecution was one of the few credible threats that the international community had in relation to warring parties.

Given that the ICC would regularly find itself in the middle of peace processes, Grono emphasised the importance of the international community's deciding how to balance competing and conflicting public policy goals. He said that sequencing would be an easy answer – not 'peace or justice' but justice following peace and reinforcing it – but that sequencing wasn't so easy when those being investigated by the ICC demanded a degree of impunity as a condition of putting down their weapons.

### ***Uganda***

Addressing the Uganda situation, Grono said that, in the Juba talks, the ICC had been both a spur to the process and an obstacle. The ICC made a positive contribution in encouraging the peace process in that the issuance of arrest warrants changed the calculations of the indicted leaders; it complicated Khartoum's continued support of the LRA and it also brought increased international attention and pressure to end the conflict.

Grono noted, however, that once the talks were underway, the LRA leadership insisted that the prosecutions be dropped. He observed that the mediators in Juba saw the ICC prosecutions as a complicating factor in ending the conflict. Mediators, he said, didn't like to have amnesty off the table – they liked having all tools at their disposal to influence incentives for peace.

Turning to possible ways forward, Grono said that in pursuit of an implementable peace deal, one possible and temporary solution would be to involve the Security Council and to activate the provision of the Rome Statute for prosecutions to be put on hold for a year renewable.

Grono reaffirmed the importance of accountability but said that, in the Uganda case, there was also a conflict causing intense human suffering and that we must look at the importance of ending the conflict and balance that against accountability.

### ***Darfur***

In the case of Darfur, Grono argued that the option of putting prosecutions on hold was inadvisable. He noted that there is no peace process in Darfur to speak of and that the Prosecutor's case faces huge obstacles. Grono anticipated claims from Khartoum that peace wasn't possible while the ICC process was continuing. He saw the indictments as a real threat to the Khartoum regime.

Grono drew what he felt were important distinctions between the contexts of Uganda and Sudan. He argued that, in Sudan, the situation was different in that the regime had wilfully flouted past and present agreements, and there was little reason to believe it would respect any deal that put peace before accountability. Were prosecutions to be put on hold, he said, there was nothing to indicate that the conditions of such a pause would be respected.

For Grono, a further reason not to compromise accountability in relation to Darfur concerned the deterrent signal that pursuing the Khartoum administration would send to states that might contemplate similar atrocities as a state response to rebellion in the future. In Uganda, argued Grono, the situation was different because the LRA were non-state actors. Putting the Uganda prosecutions on hold would not undermine the deterrent impact of the ICC in the same way as it would in Sudan because rebel groups such as the LRA have different motivations for committing atrocities and the possibility of ICC prosecution was likely to loom less largely in their calculations.

## **Barney Afako**

Afako opened by arguing that the question of justice presented an obstacle in the Ugandan peace process and this prompted major questions about the whole notion of international justice.

He posed the question of whether we should start our analysis at the level of the rule and the principle or whether we should say, 'What is the duty of African governments to their people in situations such as the one in Uganda?' What priority, he asked, should we give to the question of accountability and, in particular, to the form of justice?

Speaking of Africa's relationship with the West and with Western institutions, Akafo said that on paper this looked like a relationship of equals but that the reality was very different. Since the wave of African independence, there had been a history of decisions dictated by the West that affected Africa. Afako stated that African countries were still young and still negotiating what statehood meant – all in difficult economic circumstances.

Given this context, Afako asked what benefit international justice brought to the task of building effective nation states, ending conflict and moving the continent forward.

He argued that ending conflict was seen as a priority in Africa – both at the political level and also among affected communities. This was the reason, he said, that states were inclined to revisit the commitments they had made to the Rome Treaty. International justice threatened to emasculate political leadership in Africa – especially in relation to ending conflict. African countries, he said, would be scrutinising the interventions of the ICC and asking, 'Have these interventions left us better off?'

Afako said that he personally found it impossible to walk away from the opportunity to resolve the conflict in northern Uganda and to rule out the possibility of refraining from bringing some form of prosecution of the LRA leadership.

Africans needed, he argued, to grapple with the issues and to take the decisions – not to defer to The Hague. He said that national options within Uganda should be seriously considered.

Afako noted the scepticism about traditional justice but argued that when Ugandans referred approvingly to, for example, *mato oput*, this was often shorthand for saying, 'Please leave us alone and let us address these problems ourselves.'

In terms of the Rome Treaty, Afako said that there were possibilities within the Treaty to find the right form of words and alternatives to prosecutions at the ICC. This could be done, he said, at the same time as encouraging affected populations to address the need for accountability. He drew the distinction between justice and retribution, arguing that the latter may not be the best approach.

Afako argued that accountability was an important concern but not the overriding one. Most important, he said, was that African societies end conflict using all available methods. Steps that moved Africa forward should be the uppermost priority. He saw a role for international actors but argued that that role mustn't be allowed to subvert the primary purpose of stabilising Africa.

## **Marieke Wierda**

Wierda opened by saying that taking a transitional justice approach meant emphasising two core principles:

- Though problems are context-specific, countries can learn from one another.
- Justice options have to be domestically led and driven – not least for reasons of sustainability.

The debate on peace and justice had, she said, become trapped in ideological wrangles over abstract principles. Process questions were being overlooked. Wierda observed that the question most commonly asked was, 'Will the ICC indictments prevent a successful conclusion to peace negotiations at Juba?' She argued that posing this question was counter-productive when the Juba process was so frail. We were not yet in a situation, she said, where the ICC indictments were the undoing of the Juba process. Wierda argued that a more useful question was, 'What are the standards of accountability that should be included in Juba in order to achieve a sustainable peace based on legitimacy rather than expediency?'

On the issue of sequencing peace and justice, Wierda stressed that peace agreements shouldn't close the door on future options of accountability.

The second common question, she said, was whether the kind of justice offered by the ICC was culturally relevant in Uganda or indeed in Africa more widely. This was again unhelpful because framing the debate in these terms provoked a debate over alternatives – retributive justice versus restorative justice and which system had more legitimacy etc.

Wierda argued that, since the process in South Africa, and in light of recent legal developments, transitional justice emphasised that reconciliation wasn't about the absence of accountability but rather how to build an integrated approach that combined various mechanisms to meet the needs of victims.

Referring to ICTJ and Berkeley Human Rights Center research on popular perceptions of justice and accountability in northern Uganda, Wierda pointed to an array of viewpoints ranging from a desire for executions through to a desire for forgiveness. Victims, she said, wanted different things and it was difficult to speak for 'Acholi people' or 'victims' as if these were homogenous groups. Any accountability approach must involve truth-seeking and usually some form of criminal prosecution. Wierda stated that reparations and institutional reforms were also necessary.

On legitimacy, Wierda argued that, although many governments have signed and ratified the Rome Treaty, the legitimacy of many of these governments was questionable and their populations were often not consulted on such decisions.

Wierda argued that it was not impossible to marry international justice and a domestically-driven process. The ICC Prosecutor was, she said, in an unenviable position of deciding how best to catalyse debates at the national level and how to have an impact on them, while letting them run their course.

On the positive side, Wierda argued that the indictments had prompted discussions on what accountability means and what form of accountability was appropriate. These kinds of debate, she said, were absent, for example, before and during the negotiation of the Comprehensive Peace Agreement in Sudan.

## ***Discussion***

- In its present state, can the Ugandan judiciary carry out prosecutions of the LRA leadership?
- While intuitively it makes sense to say that 'the justice process should be domestically driven,' in practice this is highly problematic. What does 'domestic' mean? Does that mean national or local? It is very difficult for a domestic justice system to handle Rome Statute crimes in the context of volatility and weak and fractured national systems. It is in such contexts that recourse to an international body might be preferable. Some crimes are too big for nation states, whether in Africa or elsewhere.

Afako said that some adaptations to Ugandan law would be necessary in order for Uganda's own systems to be able to pursue the LRA cases. For example, the death penalty currently operates in Uganda, so the LRA would obviously resist the domestic route on that ground. Afako stated that the argument for a national alternative to ICC prosecutions was also that pre-2002 crimes could be considered. Therefore, he said, a more comprehensive approach would be possible.

Afako acknowledged that there was a compatibility issue between Uganda's amnesty law as it stood and the treaty obligations of the Rome Statute. The main question, he said, is what form of national accountability should be reached so that both the LRA and the government were clear and in agreement. Afako also raised the question, 'What is a prosecution?' and said that, for Uganda, there was a need to think of ways to refashion what currently constituted prosecution so that wider objectives could be considered.

Picking up on the point about whether a domestically-driven process was possible, Wierda stated that there were obvious advantages to domestic trials, not least in that they had more direct impact and were more accessible to victims. She argued that within the international justice movement there had been a trend recently towards trying to support national processes and national authorities. It would be a mistake, she said, to assume that international crimes, by definition, could not be addressed by domestic authorities.

## ***Questions and comments directed to the Prosecutor***

### **Uganda**

- Why has the ICC not acted in relation to Ugandan army officers and the Ugandan President, given their responsibility for numerous crimes?
- How do we answer the concerns of Ugandans that the ICC is carrying out a one-sided process by focusing exclusively on the LRA?
- How is the ICC's gravity threshold established? Are the gravity criteria used by the ICC sensitive to gross crimes that are not necessarily direct killings – for example, the consequences of the Ugandan government's policy of mass forced displacement in northern Uganda?
- Where does and where should the ICC stand in relation to wider questions of justice and accountability in Uganda – including in relation to crimes that fall outside the Court's temporal jurisdiction?
- Which sources did the ICC consult when it was doing its initial assessment of who had committed the gravest crimes and therefore which cases to pursue? Was there a potential for bias due to the sources that were consulted and deemed credible?
- If the ratio of crimes committed by the LRA exceeds that of the UPDF, thinking in the abstract, how close does the ratio have to be before more than one perpetrator of atrocities is investigated and prosecuted? 10:1? 2:1? 1.2:1? How is this decision made?

The Prosecutor stated that the ICC's contribution could only be fairly modest in relation to the totality of the crimes committed in Uganda over the course of the conflict. He pointed out that it was only possible to reach consensus in Rome in 1998 by agreeing that the ICC's temporal jurisdiction would be future-oriented. Governments preferred not to expose themselves to retrospective justice by permitting the investigation of past crimes. The Prosecutor agreed that many of the worst crimes in Uganda were committed prior to 2002 but underlined that the Court could not look at these. The Prosecutor said that the ICC must be selective, fulfil its mandate and, where possible, reinforce the mandate of others. The existing workload of the ICC was such that it was not possible to concentrate on additional activities such as training national prosecutors.

The Prosecutor stated that the killings committed by the LRA far outnumbered killings committed by the UPDF. He explained that, when deciding which cases to pursue, the documents and reports assessed by the Office of the Prosecutor indicated that the crimes committed by the LRA were the worst crimes. More recent evidence, he said, had confirmed this. The Prosecutor indicated his openness to reviewing any evidence of crimes committed by the UPDF. He pointed out that, by prosecuting the LRA, the ICC was not acquitting others but simply concentrating on the worst crimes as the first priority.

In terms of gravity criteria, the Prosecutor said that one measure of gravity was killings, as these were more widely reported and therefore more verifiable. However, the gravity criteria used by the Court went beyond simply numbers of killings. The Prosecutor indicated that the Court was still developing these criteria so as to have the most comprehensive system possible to determine case selection.

On the issue of ratios, the Prosecutor said that the dilemma of deciding how close the ratios of crimes must be before multiple parties are prosecuted was not one encountered in the case of Uganda or Darfur because the ratios were so far apart. He acknowledged that the issue was especially complicated with respect to the DRC.

### **Sudan**

- Were high level prosecutions of members of the Sudanese government discouraged by Western diplomatic officials (especially those from the US, UK and France) in late 2005 because of fears of having a negative impact on the peace process in Darfur but also north-south relations in Sudan? Was there pressure on the ICC in terms of the level of prosecutions?

The Prosecutor said he and his office were independent. He said that because of the difficulties of operating in the Darfur environment and not putting victims and witnesses in danger, the challenge was how to investigate Darfur without going to Darfur. It was necessary, he said, to find witnesses outside of Sudan. Their voices were transformed into evidence – not least about the operation of the Sudanese security committees.

### **DRC**

- The main message of the DRC peace process is that violence pays. If you are strong enough and if you make enough noise then you can fight your way into the peace process. This is the recipe of power sharing that we have been promoting as an international community. This poses enormous problems for sustainable peace but also for issues such as justice, governance and reconciliation. The Congolese justice system is in total disarray: inadequate communication systems; insufficient resources, widespread impunity; a lack of possibilities for local people to claim their rights. There are no mechanisms in place to tackle and implement justice issues. The only option left is the ICC but the ICC can only look at crimes after 2002 so this is a huge limitation.
- The case of Thomas Lubanga risks reducing the credibility of the ICC in the eyes of the Congolese because there is a clear double standard. On the one hand, Lubanga has been sent to The Hague but his colleagues have been offered positions in the army and in the government. Lubanga may deserve to be in The Hague but what of others who are responsible for similar or worse atrocities? This situation

undermines the credibility of the ICC. The double standard is that certain criminals are rewarded with senior official positions, while others appear before the ICC. The international community, not the ICC specifically, is responsible for this double standard and it should be discussed as it has an impact on statebuilding, governance, justice and reconciliation.

- A further problem in the DRC is not simply the number of cases nor who is being prosecuted but also the charges brought against Lubanga. The Lubanga case is a weak one. He is facing charges for a fraction of the activities for which he is responsible and people in the DRC are very aware of this.
- The ICC has not sufficiently communicated to local people in the DRC what it can and cannot do. Expectations of the ICC were initially high and have been dashed. This has been damaging and risks disillusionment with the Court on the ground.
- Looking solely within Ituri, there are a number of crimes graver than those committed by Thomas Lubanga. Has Lubanga been selected because there was already a large body of evidence collected as a result of domestic investigations by the Bunia judiciary, thus making Lubanga more inviting for the ICC in terms of expediency?
- Was it perhaps relevant that Lubanga has relatively weak ties to key individuals in the Kinshasa administration and is therefore seen as less likely to be a destabilising element?
- In the Lubanga case, is the Court taking seriously the fact that Uganda and Rwanda were responsible for arming him? Might the ICC pursue elements in Uganda and Rwanda on these grounds?
- Is the issue in the Lubanga case that the ICC can't get evidence beyond child soldier charges, or is it that the case would become much longer and more convoluted and the ICC has an interest in getting a quick conviction?

The Prosecutor responded that the ICC was a court with limited resources, limited capacity and at an early stage of its development. That was partly why complementarity was emphasised. He argued that if expectations about the ICC were lowered in the DRC, this may be positive as it could lead people to look to domestic institutions and processes. He said that trials at the ICC, by involving victims and having them tell their stories, were likely to aid people's understanding of the Court and increase their sense of engagement.

The Prosecutor said that he was well aware of accusations of Rwanda's and Uganda's supplying weapons but that the task was to gather sufficient evidence to connect people directly with crimes.

In conclusion, the Prosecutor stressed that the source of much of the controversy surrounding the ICC was that it was a new institution doing something different from what had previously been attempted. The issue, he said, was to find legal alternatives in Uganda that conformed with the Rome System. Finally, he noted that the course of action pursued in northern Uganda would have implications for future scenarios all over the world.

## ***Justice in Conflict? War, Peace and Impunity in Africa***

**Luis Moreno-Ocampo**, *Prosecutor, ICC*

Discussants:

**Nick Grono** - *Vice President for Advocacy and Operations, International Crisis Group*

**Barney Afako** - *Legal advisor to the Ugandan peace negotiations*

**Marieke Wierda** - *Senior Associate, International Center for Transitional Justice*

**Helena Kennedy QC**, Chair

Friday 2 March 2007, 5:00pm-7:00pm, London School of Economics, Old Theatre

### ***Luis Moreno-Ocampo***

The Prosecutor spoke about what he described as 'this new idea to have law in the world' and about how Africa was leading in this area. He emphasised the novelty of the Rome Treaty of 1998 and the approach that it represented – that the worst atrocities could not go unpunished and, by extension, that solutions to conflict must be found within the limits of the law and inside the limits of the Rome Treaty in particular.

#### ***The creation of the ICC and the Rome Statute***

The Prosecutor underlined that the ICC complemented national jurisdictions in that nation states carried the primary responsibility to investigate and prosecute genocide, crimes against humanity and war crimes. It was only when states weren't fulfilling this duty that the ICC would become involved – and even then in only a tiny number of the worst cases.

The Prosecutor argued that the Rome System that guided and underpinned the ICC was a legal revolution in terms of accountability to enforce the law, first, within nation states, and, if not, through the ICC.

Ocampo said that in order to satisfy concerns that the Prosecutor might pursue cases for politically-motivated reasons, it had been necessary for the Court to establish 'gravity' criteria that must be satisfied in order for a case to proceed. These criteria gave particular attention to numbers of killings, partly because other possible indicators such as rape were under-reported. On this basis, the DRC and northern Uganda emerged as locations of mass crimes that were admissible under the ICC's treaty jurisdiction.

The Prosecutor stressed that the ICC's approach was sequential, pursuing the very worst crimes first, then, following the evidence, looking at others. In Uganda this had meant focusing on LRA crimes and in DRC, focusing on the Ituri region.

He spoke of the difficulty of investigating ongoing crimes in ongoing conflicts and how this raised problems of not endangering witnesses and victims.

#### ***Peace and Justice***

The Prosecutor said that the Court was keenly aware that others were pursuing goals such as development, peace and security and that while the ICC respected other goals (and where possible reinforced them), it must stay faithful to its own judicial mandate.

He stated that the peace and justice debate was, in effect, settled in Rome in 1998 when states agreed that lasting peace requires justice and that the terms of peace have to be within the boundaries of the law. He stressed that any solution to the northern Uganda conflict had to be compatible with the Rome Statute.

Rather than the ICC's harming prospects for peace, the Prosecutor argued that it has had a positive impact in terms of galvanising efforts to stop crimes, exerting pressure on those who supported perpetrators and even sending a signal that helps deter crimes being committed in the first place.

The Prosecutor discussed the concern that negotiations with the LRA would be undermined by the ICC's investigations against them. He argued that he had not seen sufficient evidence to demonstrate that the pursuit of the Uganda investigations would threaten the interests of justice and those of victims. He emphasised that the ICC had gone to great lengths not to hinder peace process efforts and spoke of how the Court had given serious consideration to whether the interests of victims would be jeopardised. Even when the investigation proceeded, he said, the ICC had kept a low profile to allow the peace process to continue without the ICC's work disturbing it.

The audience was told that lasting peace required the execution of the LRA warrants, which the Prosecutor believed had had a broader regional impact, helping push the LRA to negotiate.

The Prosecutor argued that the imperative of respecting the Rome Treaty in the Uganda case was not simply due to local considerations but also the broader regional and international implications in terms of the development of the international legal system.

### ***The ICC and Africa***

Concluding, the Prosecutor said that the fact that the ICC's first cases were all in Africa was not an expression of geographical bias but rather due to adherence to the ICC's 'gravity' criteria. He also spoke approvingly of African leadership in promoting justice and of how Africa had been at the forefront of the creation of the ICC and its on-going development. The ICC, he said, helped African leaders tackle impunity and worked for, and with, African people who suffer most directly from the worst crimes.

### ***The ICC as the beginning of a new era***

The Prosecutor closed by saying that the law imposed some basic but fundamental limits on what was and was not acceptable in the international system. The idea that 'you can't simply kill massive numbers of people' was, he said, a new one because the international legal system was still developing. The idea of ensuring accountability, he said, was clear but the implementation was complicated and this was why we needed to learn to harmonise our efforts to achieve peace, security and justice.

### ***Barney Afako***

Afako opened by stressing the significance of colonialism in shaping African's present predicament and by emphasising how, since independence, a young continent characterised by conflict had struggled to move forward.

Afako described the propensity of African leaders to sign treaties and voiced his scepticism about equating signatures (the Rome Treaty included), with genuine commitment.

Afako framed the 'peace and justice' debate in the context of the wider humanitarian impact of conflict. He stressed that the greatest number of casualties was not the direct result of crimes during hostilities but rather their oft-forgotten indirect consequences relating to disease and displacement.

He cast doubt on whether justice, and especially criminal justice, should be the highest value and priority in this context. Instead, he suggested that the total human destruction from the conflict, and the positive social, political and economic dividends of peace, posed the question of where justice compromises could be made.

He cautioned against looking for answers in the nuts and bolts of treaties and rules; to do so would, he said, miss the central point.

Afako then considered how the issues might look to many people caught up directly in the Uganda conflict. He argued that many people on the ground were angry and perplexed because they perceived the intervention of international criminal justice as vetoing the prospect of a resolution to their predicament. In Afako's view, the idea that criminal justice could be an impediment to alleviating the consequences of the conflict was staggeringly unbelievable to many victims.

Afako suggested that, by implication, there needed to be a better explanation of the purposes and processes of international justice.

Picking up on the 'no peace without justice' refrain, Afako voiced his scepticism of this, given the experience of countries such as Mozambique and Angola, which had achieved peace without prosecutions. He argued that the idea needed to be interrogated empirically.

Afako argued that respect for people who have suffered most from armed conflict required those who were responsible to be held accountable. He spoke of the need for more discussion of what this would mean in practice and the best mechanisms to achieve it.

He closed by stressing the need for national solutions to minimise the risk that inappropriate institutions and structures prolong suffering in Africa. This outcome would, he felt, be a disservice to the very idea of international justice. Afako argued that the particular solutions reached must have integrity and resonance not only in The Hague but in the villages of northern Uganda and in other places experiencing conflict.

## ***Marieke Wierda***

Wierda identified three areas of focus for her presentation:

- The realities on the ground in northern Uganda
- The criticisms most frequently levelled at the ICC
- Research by the ICTJ on popular perceptions in northern Uganda

Wierda underlined that the situation for Uganda's internally displaced people was critical, especially for children. In describing the IDP camps and the social breakdown in northern Uganda, Wierda also highlighted the particular stigma and economic hardship faced by women who return from the LRA. Popular exposure to violence was very high, as was the priority that local people gave to peace. Wierda pointed out that this didn't necessarily mean that justice wasn't important but, in the immediate future, peace was the preoccupation, as indeed were basic considerations such as obtaining enough food. Wierda stated that justice was itself a contested notion in northern Uganda's dynamic environment.

Wierda outlined some common criticisms of the ICC, before discussing each of them in turn:

- 'The ICC will undermine a peace agreement and therefore will increase violence or prolong it.'
- 'The fact that the ICC has charged only members of the LRA and not the Ugandan army or government is indicative of pro-government partiality.'
- 'The ICC is intent on imposing inappropriate Western forms of justice.'
- 'Local leaders are being sidelined by the ICC and international justice actors.'

Regarding peace agreements, Wierda said that we didn't yet face a situation whereby the ICC arrest warrants were themselves preventing a deal from being signed. She argued that the focus should be on what accountability measures would satisfy the victims of the conflict as well as the international community and international legal standards.

On the perceived bias of the ICC, Wierda spoke of popular anger in northern Uganda at violations allegedly perpetrated by the Ugandan army and commented that mechanisms and channels to address this discontent were presently inadequate. There was an increasingly urgent need, she said, for a wider debate about accountability in Uganda. This may result in criminal action against people behind government policy, especially regarding the IDP camps.

On the question of whether punitive justice, in the form of criminal justice, was somehow inappropriate in northern Uganda, Wierda referred to the results of extensive ICTJ and Berkeley HRC interviews in the area that showed significant appetite for so-called 'hard justice' measures, including trial and imprisonment. She emphasised that care must be taken not to treat 'victims' as an undifferentiated mass who all want the same thing at the same time. Wierda also commented that when local leaders expressed a preference for traditional forms of justice, often this was not because they believed that these forms are ready to be implemented but rather because they felt that, as northern Ugandans, they should have greater sway in decision-making.

Continuing on this 'who decides' question, Wierda raised the issue of legitimacy. She argued that traditional and religious leaders needed to take steps to consult more widely with local people before they could be spoken of as fully legitimate and representative.

Turning to other issues, Wierda argued that truth-seeking, reparations, accountability and institutional reforms were all often neglected in debates about northern Uganda.

In conclusion, Wierda said that policymakers needed to put more effort into exploring local opinions and that all justice policy actors, from the local to the international, bore the responsibility for bringing this about. Finally, she noted that ICTJ/ Berkeley HRC research had suggested that all systems of justice were fairly poorly understood in northern Uganda and that awareness-raising was necessary.

## ***Nick Grono***

Grono began by noting that the ICC's targeting of a sitting government minister in Sudan was going to reveal whether or not the international community was prepared to give the Court real support.

Grono acknowledged that there were inherent challenges in reconciling peace and justice objectives, especially when it came to ending a conflict. The tension was usually most apparent during peace talks when the negotiating parties were likely to consider their future fate. In these situations, Grono argued, hard decisions were necessary regarding whether to trade a degree of justice for peace.

Grono argued that, in practice, the cost of getting a peace deal was often a degree of impunity for the perpetrators of atrocities. Many recent peace agreements contained only token transitional justice provisions and for the most part were silent on the question of accountability for atrocities.

Complicating the picture, he said, was the fact that peace, without a measure of accountability, was often unsustainable in the long term.

Grono said it was important not to take the soft path and say that 'no trade-off between peace and justice is required.'

## ***Uganda and Darfur***

Grono argued that, in the case of Sudan, the threat of ICC prosecution had been the only credible threat applied to Sudan's leadership over the past 3 years – largely because the Security Council had not been prepared to take difficult steps itself. The successful prosecution of government figures from Sudan would send a message to other world leaders that might have some deterrent effect and possibly help prevent future 'Darfurs.' Grono acknowledged that once the threat of prosecution was enacted, the government's desire was to stay in power for as long as possible – as in Zimbabwe and, more than likely, Sudan.

For the ICC to secure convictions and ensure its credibility, Grono said, strong international support was essential. He stressed that this would be a challenge in both Darfur and Uganda, as it was difficult to actually get hold of those being prosecuted. Grono noted that the ICC didn't have its own police force but rather relied on the governments of states parties for assistance. In Sudan, this assistance wouldn't be forthcoming. Grono predicted that the Darfur situation would again come before the UN Security Council and expressed his criticism of the Council's record so far in taking action.

Grono argued that, in essence, the 'peace versus justice' debate concerns what should be done when a warring party or parties insisted that a prospective peace deal was conditional on a halt to prosecutions. One temporary measure in such situations was to use the provision in the Rome Statute that said that the UN Security Council could put prosecutions on hold for a year renewable. This was a possible option for northern Uganda as it permitted some time to negotiate a peace deal and to explore accountability mechanisms.

Grono said that in the Darfur situation, he was opposed to any degree of impunity and expressed his opposition to the idea of the Security Council's suspending prosecutions on the condition that the Khartoum government ceased its atrocities. He pointed to the Khartoum government's repeated violation of previous agreements (e.g. ceasefires and disarmament accords). Grono argued that, among the instruments of the international community, the ICC was unusual in that it had some real influence on the calculations of Sudanese leaders.

Drawing a further distinction between the Uganda and Darfur contexts, Grono argued that the ICC's pursuit of members of the Khartoum government was likely to have a greater deterrent effect in the future because other governments would take greater note of the Darfur prosecutions than would rebel groups which tended to make different calculations and had different motivations for committing atrocities.

Grono concluded by emphasising that the choices were difficult but it served neither justice nor peace to pretend that choices didn't have to be made when it came to ending conflict.

## ***Discussion***

- Peacemaking is a messy business and the possibility of peace will remain remote without the possibility of offering negotiating parties the prize of impunity. We need to be honest in acknowledging this and also in acknowledging that, even with clear evidence, we are unlikely to see the ICC prosecute, for example, Israeli leaders or Tony Blair.
- Concretely, how helpful was it for the ICC to keep a low profile in the early stages of investigations during the peace process in northern Uganda?
- How helpful would it be for perceptions of justice on the ground if there were to be indictments against the Ugandan armed forces?
- Can a causal link be drawn between the ICC's investigations in northern Uganda and the fact that, since late 2004, the LRA has not launched any major attacks on civilians?
- What is the ICC going to do about evidence of President Museveni's crimes?
- Given the weakness of the Security Council's record on Darfur, what prospect is there that the ICC warrants for Sudanese suspects will be enforced?
- How are African women represented in negotiations? What voice do they have and what is being done to amplify it?
- In terms of legitimacy, would it not be better to develop the African Court of Human Rights, rather than focusing on the ICC?

## ***Responses from the panel<sup>1</sup>***

### ***Impunity***

On impunity, Afako argued that one of the effects of the ICC would be that people would look more seriously at national alternatives to the Court. There would be a raising of standards of accountability but there may still need to be a degree of impunity or a 'softening of the options' in order to secure peace.

Wierda argued that a more positive way to interpret the silence of many recent peace agreements on the question of impunity was that they no longer contained the blanket amnesties of the past. She also said that a trade-off of justice for peace was not always necessary and did not have to be set in stone at the moment an agreement was signed. Accountability measures might still be possible further down the line.

### ***The ICC's approach to investigations in Uganda***

Grono remarked that the issue of the ICC's 'keeping a low profile' in the context of peace talks pointed to the difficulty of the Prosecutor's role. Some had gone so far as to argue that the Prosecutor should simply prosecute at all costs and should not consider what possible impact that prosecutions might have on other initiatives such as peace talks.

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<sup>1</sup> Due to the ongoing nature of the ICC's investigations and prosecutions, the Prosecutor did not participate in the public question session.

Wierda added that the 'low profile' approach had come at a price in that it delayed northern Ugandans' access to information about the ICC. As a result, it had been more difficult to secure the legitimacy of the ICC.

### ***Violations by the Ugandan army***

Afako addressed the question of whether prosecutions of the UPDF would help with perceptions of international justice on the ground. He stated his wariness about using prosecutions to allay fears or to make certain political points. This would, he felt, undermine the integrity of the independence of the Prosecutor. The key issue was that the reasoning was made clear to people so that they understood why particular individuals had been selected for prosecution.

On the question of violations by the Ugandan government, Grono urged caution about suggesting any kind of moral equivalence between the respective crimes of the government and the LRA. The LRA was, he said, the most obvious and justifiable target for prosecution. He acknowledged, however, that the issue remained as to whether President Museveni was responsible for systematically forcing people into displacement camps and the consequences of these measures. Grono said that the government's response to the conflict with the LRA must be scrutinised and that the excessive mortality in the camps wasn't simply the fault of the LRA.

There should not, he said, be balance for balance's sake in who the ICC prosecutes. If actions by those in power met the criteria for prosecution by the ICC then prosecutions should follow. As in the Sudan case, what was problematic was how to prosecute those in power when the Court was reliant on the very same governments to enable investigations and prosecutions.

Wierda commented that there should indeed be concern that non-state actors were more vulnerable to prosecution because they lacked the political machinery of a government.

### ***Women and peace negotiations***

Wierda said that there were serious concerns about women's voices not being represented in the Ugandan peace talks.

### ***Political will and the execution of arrest warrants***

Afako restated that the Rome Statute depended on states to carry out enforcement. States would not act unless they had made a political calculation that it was in their interests to do so. Simply fulfilling their international treaty obligations, he said, was rarely enough. This raised the question of whether the ICC should encourage the use of force to execute warrants even if this meant, for example, engaging child soldiers in combat. A preferable route, he said, was for the ICC to stand back and let states do what was possible, while reminding them of their obligations.

Afako said that it was important to deliver justice close to where the crimes had been perpetrated. He said that, in future it would be preferable for accountability mechanisms to operate within Africa – not from remote European cities.

# ***The ICC, Justice Systems and Reconciliation***

One-day Conference

## ***Session 1: The ICC, National Governments and Judiciaries***

**Matthew Brubacher**, *Associate Analyst, Jurisdiction, Cooperation and Complementarity Division, Office of the Prosecutor, ICC*

**Anneke Van Woudenberg**, *Senior Researcher (DRC), Human Rights Watch*

**Chaloka Beyani** (Chair), *Senior Lecturer in Law, LSE*

Canada House, 8 March 2007

### ***Matthew Brubacher***

Brubacher stated that a crucial aspect of the ICC's admissibility regime was the concept of 'complementarity,' which created a new international legal framework governing the behaviour of states. In particular, he argued that the Rome Statute enshrined states' obligation to prosecute serious crimes – namely genocide, war crimes and crimes against humanity – and held that where states failed to adequately address these, the ICC would intervene to hold perpetrators accountable. Brubacher said that complementarity should be viewed as both a fundamental principle of the ICC and, in a more restricted legal sense, as a set of judicial procedures for assessing the ability and willingness of national institutions to address serious crimes. It was the role of the Pre-Trial Chamber of the ICC to make such determinations.

### ***Complementarity***

Brubacher stated that the complementarity regime was a result of the need to re-emphasise and re-enforce the fact that states bear the primary obligation to investigate and prosecute crimes of international concern. It was also a way for states to ensure that their national sovereignty would be respected. Unlike the ICTY and ICTR which had concurrent jurisdiction and primacy over national courts, complementarity, said Brubacher, implied a more horizontal relationship whereby states had the first opportunity to investigate and prosecute serious crimes committed within their borders or by their nationals. The Rome Statute, said Brubacher, held that if states did not display a genuine willingness and ability to investigate and prosecute serious crimes, the ICC should step in.

Rather than being a limitation on the ICC, Brubacher argued that complementarity was of great benefit to the Court because it reinforced states' obligation to address crimes within their own territories. Complementarity also recognised that, all things being equal, justice was best done in the national context and it avoided overburdening the ICC.

### ***Complementarity as policy***

A further crucial aspect of the ICC's principle of complementarity, Brubacher argued, was the concept of 'positive complementarity,' which suggested that the ICC should play an active role in encouraging states to fulfil their legal obligations.

Brubacher argued that the ICC pursued positive complementarity in two ways:

1. Through a limited kind of partnership with national judicial systems - encouraging states to pass legislation implementing the Rome Statute and to build local judicial and law enforcement capacity in order to allow states to investigate and prosecute cases domestically.
2. Through vigilance. If states failed to show that they were genuinely willing and able to investigate and prosecute serious crimes domestically, the ICC could usurp jurisdiction over such cases.

Brubacher argued that the two components of positive complementarity worked hand-in-hand: partnership had a catalytic effect on states, encouraging them to reform domestic practices, while vigilance ensured that states proceeded genuinely by reinforcing the ICC's constant capacity to intervene judicially if the situation so required.

Brubacher referred to examples from Colombia, Sudan and northern Uganda as illustrating the impact of the ICC's approach to complementarity.

### ***Complementarity as a Legal Framework***

Brubacher argued that complementarity must also be understood in a narrower legal sense. In particular, complementarity encompassed two broad stages of analysis regarding the admissibility of cases before the ICC:

1. A broad situational stage in which the Prosecutor determined whether national jurisdictions were genuinely willing and able to investigate and prosecute serious crimes.
2. A specific case stage, in which the Prosecutor selected particular incidents of criminality to investigate, determined the specific charges and connected them to individual suspects.

Brubacher stated that the ICC was still developing the jurisprudence on how to determine whether national jurisdictions were genuinely willing and able to investigate and prosecute serious cases.

### ***Anneke Van Woudenberg***

Van Woudenberg focused on dilemmas of complementarity in the DRC, the most advanced of the ICC's cases, with the Congolese warlord Thomas Lubanga already in custody in The Hague. She argued that the ICC had produced a mixed bag so far in the DRC, with various judicial successes and many dashed hopes. As evidence of the ICC's positive impact in the country, Van Woudenberg reported that in Bas Congo province she had heard repeated references to the Lubanga case and the crime of recruiting child soldiers. These references, she argued, showed that the ICC had sunk into the minds of major actors in Bas Congo and that this represented an important development in attempts to eradicate an entrenched culture of impunity in the DRC.

### ***Broad Complementarity Dilemmas in the DRC***

Van Woudenberg argued that, while the ICC's policy of positive complementarity in the DRC represented a good idea in principle, overall it was not working. In particular, the ICC's stated attempts to pursue partnership with national judicial systems highlighted various problems, not least how the ICC should deal with abusive domestic systems that did not hold fair trials or were vulnerable to political interference. Van Woudenberg asked what the impact had been on the ICC's operations of recent domestic investigations and prosecutions of serious crimes in Ituri province.

She pointed to a growing willingness among Congolese authorities to prosecute cases of serious crimes. Many of the improvements in the Congolese judiciary had occurred in the military courts, which had begun

employing parts of the Rome Statute in their cases, even though the government hadn't yet passed legislation enacting the Rome Statute nationally. However, Van Woudenberg argued that the military courts were also the most open to political interference and had often been used by the government to crack down on political opponents. Furthermore, the military courts had the capacity to impose the death penalty. These issues, Van Woudenberg said, raised the question of how a civilian court like the ICC should interact with military courts.

### ***Practical Legal Dilemmas of Complementarity in the DRC***

Van Woudenberg highlighted a range of practical legal challenges that the ICC faced in the DRC.

Domestic courts in Ituri had expressed frustration that the ICC had not provided them with more information stemming from the Lubanga case which they could use in other criminal cases. Van Woudenberg argued this raised important questions, principally:

- Given that the ICC's investigations would yield varied and significant evidence, was the ICC obligated to share it with other courts, for example in the prosecution of other suspects or the same suspects for other crimes?
- The ICC had a moral obligation to share evidence to enable domestic prosecutions, but the ICC could not always control how that evidence would be used. What did these quandaries mean for the relationship between the ICC and national courts?

Van Woudenberg argued that after three years of operating in the DRC, the ICC should have had clearer guidelines for sharing evidence with domestic institutions.

- How should the ICC respond in cases where the domestic courts were violating principles of due process and the state was responding to criticism by arguing that it was waiting for the suspects to be tried by the ICC or that the ICC possessed the evidence which would enable domestic prosecutions?

Van Woudenberg argued that the ICC must clarify its position on several other important issues in the DRC:

- Would it share witnesses from the Lubanga trial with domestic jurisdictions? If so, would it aid the domestic protection of these witnesses, and how?
- Given that the ICC had only charged Lubanga with crimes related to the recruitment of child soldiers, would it share evidence with national jurisdictions regarding other charges against Lubanga?
- Did the ICC intend to speak to Ugandan and Rwandan authorities about the role of actors from their countries in eastern DRC - particularly in Ituri? This issue also impinged on the ICC's attempts at complementarity with national jurisdictions in the wider Great Lakes region.

Van Woudenberg concluded by saying that the ICC could play an important role – through the principle of complementarity – in urging states to meet the standards of the Rome Statute and in building domestic judicial capacity by sharing expertise in areas such as witness protection and forensic analysis. States parties to the Rome Statute, she said, must also dedicate themselves to aiding the ICC in this regard and to funding national institutions directly in countries like the DRC. After three years of the ICC's operations in the DRC, the Court and states parties must outline a clearer plan for addressing issues of complementarity with national institutions and building national judicial capacity.

## **Discussion**

### **Questions and comments directed to Van Woudenberg**

- The EU judicial reform process in Ituri isn't sustainable because the international community can't continue paying judges' salaries in the province and can't extend the process elsewhere. Therefore, given their reliance on EU funding, we should be wary of expecting too much of the Congolese courts.
- We should be cautious regarding complementarity and not expect too much from the ICC. The ICC should be a court of last resort and a catalyst for national courts to prosecute serious cases within their territories. This doesn't necessarily mean the ICC should share evidence with domestic institutions, particularly if they fail to meet international legal standards. A broad definition of complementarity risks implicating the ICC in unsound domestic practices and is beyond the ICC's core work.

Van Woudenberg argued that concerns about the sustainability of judicial reform in eastern DRC were well-founded. Much good, Van Woudenberg said, had come out of the EU's reform project in Ituri and it provided important lessons for donor countries, in particular that to provide judicial infrastructure and training alone is inadequate and that paying judicial officials proper salaries increased the quality of justice delivered.

The ICC, she said, needed to be much clearer about what positive complementarity meant in practice. In particular, the ICC needed to be clearer on how it would relate to the Congolese government, which had applied its own laws poorly and offered amnesties to serious perpetrators. This trend toward amnesty in the DRC was extremely worrying and had received very negative reactions from the population in Ituri. An issue all parties should consider, Van Woudenberg said, was whether something in between the ICC and the national courts was required in the DRC, to close any impunity gap. For example, an ad hoc chamber or tribunal functioning within the Congolese judicial system may be necessary to deal with complicated cases, especially regarding crimes committed before 2002 that fall outside of the ICC's jurisdiction.

### **Questions and comments directed to Brubacher**

- How does the ICC relate to domestic institutions such as the Sudanese Special Tribunal, which display little commitment to investigate and prosecute serious crimes? What is the ICC's capacity for monitoring the workings of the Sudanese Special Tribunal?
- How does the notion of a division of labour between the ICC and national jurisdictions, which holds that they should pursue 'big fish' and 'small fish' respectively, square with the Rome Statute's guidelines for admissibility? Isn't the ICC's first task to assess the willingness and ability of states to prosecute cases, rather than establishing a division of labour?
- Given its limited resources, the ICC can't go around the world training domestic actors and rehabilitating national institutions everywhere. Therefore, which aspects of its mandate does the ICC – and particularly the Office of the Prosecutor – emphasise?
- How does the ICC cooperate with the Congolese government, which consists of many former belligerents and has on occasion offered amnesty to perpetrators of serious crimes?

Brubacher responded that the emphasis of the ICC – and of the Office of the Prosecutor in particular – was on catalysing rather than directly enabling domestic institutions. He stated that the role of the ICC in facilitating positive complementarity was broader than simply establishing a division of labour with national jurisdictions and that its catalytic potential was imperative. To maximise the ICC's impact in the countries where it operated, he said, it must adopt multifarious strategies of complementarity. In the Congolese

context, this meant maintaining close contact with national authorities, while balancing the ICC's judicial interests, those of national actors, and the overall need to protect witnesses and other individuals who could potentially be harmed by any sharing of information. Brubacher said that the ICC must pursue positive complementarity very carefully in dangerous environments such as in the DRC.

Brubacher said that assessing the admissibility of cases always involved a dual test: first, the ICC examined whether there were any national efforts to investigate and prosecute crimes; second, it assessed the genuineness of those efforts.

Domestic amnesties, Brubacher stated, were never sufficient to bar the admissibility of cases to the ICC.

## **Session 2: The ICC, Reconciliation and Community-Based Justice**

**Tim Allen**, *Reader in Development Studies, LSE*

**Phil Clark**, *Post-Doctoral Research Fellow, Transitional Justice Institute, University of Ulster*

**Matthew Brubacher**, *Associate Analyst, Jurisdiction, Cooperation and Complementarity Division, Office of the Prosecutor, ICC*

**Eric Joyce MP**, (Chair)

### **Tim Allen**

Allen said he would be setting out the case against the current enthusiasm for traditional justice measures in Africa. Focusing particularly on Uganda, he argued that much of the external enthusiasm for establishing councils of traditional chiefs and promoting certain rituals (notably *mato oput*) as alternatives to conventional prosecution was, at best, naïve.

#### ***Dangers in promoting 'traditional' chiefs in Acholiland***

Allen argued that there were major problems with current attempts by international aid agencies and other groups to establish the authority of Acholi 'traditional chiefs' (known as *rwodi*). This enthusiasm had, he stated, resulted in the recent creation of paramount chiefs for the Acholi and other northern groups, such the Madi and Langi.

In the past, none of these populations had recognised such figures. The power of many Acholi *rwodi* in the past was, said Allen, associated with their understandings of natural forces and the spirit world, especially their power over rain, rather than political power. He acknowledged that there was also a tradition of spirit mediums that were not possessed by ancestral ghosts, but by wild spirits that could interpret the dramatic changes occurring in society. He gave the example of Alice Lakwena who had taken on a vital spiritual role, performing healing and accountability ceremonies for soldiers returning from southern Uganda after their defeat by Museveni's forces.

#### ***Inadequate understanding of the role of local rituals***

Allen argued that the current focus on the Acholi ritual *mato oput* in the context of responding to mass crimes in northern Uganda was deeply problematic. He argued that *mato oput* was being reified as an ideal mechanism for incorporating international and national justice in local practices. However, at root in the promotion of *mato oput*, he said, was opposition to the ICC, rather than a genuine understanding of the role of rituals in local cultures. Allen stated that in 2004 and 2005 he had not been able to not find a single case of *mato oput* being practised in Acholiland that related to reintegrating LRA combatants; all observed cases related instead to homicides in the community. The current prevalence of *mato oput* and/or supposed *mato oput* was, he said, a result of funding by aid agencies. Allen argued that there was a severe lack of historical and cultural understanding in current debates about *mato oput*.

#### ***Problems of codifying Acholi rituals***

Allen argued that there were major problems with the proposed codification of Acholi rituals, particularly *mato oput* and *gomo tong*. In particular, he argued that codifying rituals meant transforming them and, in the process, undermining their popular legitimacy. According to Allen, attempts to promote local rituals in the current context lent support to certain patrilineal hierarchies that were resented or rejected by many people living the IDP camps. Codification of rituals, he said, would simply build upon aspects of indirect colonial rule

in Ugandan history that had tried to co-opt local practices for political purposes. Allen argued that there was no integrated system of Acholi justice or healing. In contrast to what he described as the static ritual processes proposed, Allen said that people had dynamic, pluralistic ways to hold perpetrators accountable and to heal themselves.

### ***Not a national project***

Allen argued that the most important problem with attempts to promote and codify certain Acholi rituals was that this was not a truly national project. Focusing solely on Acholi rituals had helped paint the Acholi as a race apart, with different ways of seeing the world and of dealing with conflict. These discussions, Allen argued, had supported government propaganda against the Acholi, and international actors had often unwittingly been caught up in this process. The Acholi, he said, were just like people everywhere who wanted conventional justice for crimes committed and protection from harm.

If local or traditional practices were to be used to address crimes in Uganda, it must, he said, be a truly national project like gacaca in Rwanda, employing mechanisms not specific to one particular group and also delivering accountability for government crimes and not only those of the LRA or other armed forces.

For only northern Ugandan groups to have rituals formalised into 'traditional' justice mechanisms, would, Allen argued, be to infantilise the region. It would, he said, mistakenly imply that the people of the northern part of the country were somehow less in need of modern institutions than the people of the south. Allen argued that local rituals would play an important role in helping some families recover from recent upheaval, but that the ad hoc turning of rituals into an alternative to conventional justice would be a dangerous misinterpretation of their traditional purposes.

### ***Phil Clark***

Clark looked at local justice and reconciliation mechanisms across the Great Lakes region of Africa. He expressed some agreement with Allen but argued that the problems with local processes weren't as acute or as stark as he had suggested.

Clark argued that we should be wary of talking about 'traditional' practices, given that so-called 'indigenous mechanisms' were in fact often dynamic syntheses of diverse influences, shaped to fit particular circumstances. Clark stated that a complex trend in transitional justice had emerged recently, particularly in Africa, combining the very local (e.g. gacaca in Rwanda, the *barza inter-communautaire* in the DRC, community-based rituals in northern Uganda) and the very global (e.g. the ICC). He argued that, while many debates had focused on links between international and national processes, it was also important to explore the intersections of international and community-based practices.

### ***Rwanda (Gacaca)***

Clark argued that the design of the gacaca courts in Rwanda had been motivated by a range of pragmatic and profound objectives, including the need to deal with the immense backlog of genocide cases, to discover the truth about genocide crimes, and to achieve reconciliation.

Clark argued that at the heart of gacaca had been an attempt to facilitate restorative justice – that is, punishment shaped in deliberately reconciliatory ways – such as through community participation and engagement in hearings as well as through community service and compensation as forms of punishment. Gacaca had highlighted the problems of debates about Western versus African justice, as it was a hybrid institution, incorporating traditional gacaca's emphasis on public participation within formal, codified legal boundaries.

## ***Trends across Great Lakes***

Clark argued that the revitalisation – and in some cases creation – of local justice and reconciliation practices in the Great Lakes was not new and did not automatically delegitimise them. Nonetheless, he argued, we must be conscious of the volatile political context in which these processes occur. In many cases, the re-emergence of local institutions coincided with debates over the legitimacy of local leaders, such as the *rwodi* in Acholiland who had only recently been reinstated to their customary positions.

Clark argued that all of the local institutions in the Great Lakes faced certain challenges, including to what extent traditional practices could be codified, how populations could be sensitised to revitalised institutions, how these processes would operate concurrently with other institutions (particularly national and international courts), and how to maintain popular ownership and participation.

Clark stated that local processes also faced the profound challenge of how to deal with the legacies of mass crimes. No local, national or international processes, he argued, were automatically able to handle such complex situations, necessitating creative responses.

Clark argued that jettisoning any romanticism about ‘traditional’ practices did not inherently mean discarding them as possible responses to mass crimes. Local practices, he said, often incorporated values, beliefs and processes that could be valuable in addressing crimes in affected communities. Many criticisms of the use of local mechanisms in this context, Clark argued, were themselves based on romantic notions of traditional practices, seeing them as static and somehow ‘pure’ from outside interference.

Clark argued that we must afford local practices the same degree of flexibility and capacity for evolution as we would national or international institutions, giving them the necessary space for reform in order to meet the needs of communities affected by mass conflict.

## ***ICC and Local Practices***

Clark argued that the ICC must consider the intersection of international and community-based practices, especially how an understanding of local processes impinges on the ICC’s outreach programmes and relations with victim communities. He said that the Rwandan case had highlighted instances of overlap between the ICTR and *gacaca*, particularly regarding sharing evidence. It was likely, Clark argued, that community-based processes would be needed to reconcile and reintegrate the mass of low-level perpetrators of serious crimes, while national and international institutions handled middle- and high-ranking officials.

Clark argued that the greatest virtue of local processes was their ability to foster face-to-face engagement between parties in conflict. This, he said, was necessary for parties to address the root causes of their conflicts and ultimately to facilitate reconciliation, a task beyond the reach of international institutions.

## ***Matthew Brubacher***

Brubacher said that the Office of the Prosecutor was conscious that it was operating in an environment where different types of transitional justice mechanisms were in play. He also stated that the OTP operated on the assumption that there was no one-size-fits-all approach to conflict situations. There was often the need to coordinate different mechanisms and to recognise that in communities as diverse as those in northern Uganda, for example, there were a wide range of needs to be addressed.

### ***A ‘comprehensive approach’***

Brubacher stated that the OTP had a ‘comprehensive approach’ to addressing crimes wherein the ICC was only one part of a much larger whole that included actors addressing security, humanitarian relief, mediation, peacebuilding and justice concerns. He said that the ICC was only one part of the justice

component and that the other areas, such as security and humanitarian relief, were outside of the Court's legal remit. The justice component, he said, could incorporate a variety of mechanisms, including criminal trials, truth commissions, reparations, and community-based or traditional justice.

### ***The ICC's specific mandate***

Brubacher argued that, while recognising the efforts of other actors, the ICC must maintain its independence. It must stick to its legal mandate, while respecting as far as possible the mandates and methods of other actors. In accordance with the principle of complementarity, the ICC intervened judicially only when domestic institutions were unwilling or unable to investigate or prosecute serious crimes. Even then, Brubacher said, the ICC had to be selective about the cases, specific perpetrators and crimes it addressed.

### ***In the interests of justice and in the interests of victims***

In determining the admissibility of cases before the ICC, Brubacher said, an important consideration was what served the interests of justice and, within this, the interests of victims. He said that this determination required the OTP to visit affected communities and to formulate a strategy that best integrated the different interests and approaches of relevant actors in addressing crimes committed.

### ***Links between the Office of the Prosecutor and the Registry***

Brubacher stated that the OTP and the Registry collaborated closely in the Court's outreach activities. He said that it was vital for the Court to explain its motivations, objectives and methods to victims and to show how victims' concerns could be incorporated into the Court's prosecutorial strategy. Thus, he said, the work of the OTP linked closely with that of the Registry.

### ***The challenge of incorporating victims' concerns***

A major challenge for the ICC, Brubacher said, was ensuring that it incorporated victims' concerns into all of its operations and thus maintained its legitimacy. He reinforced that the ICC was only a small institution with a limited mandate and resources and therefore was unable to address all of victims' concerns. However, Brubacher argued that the Court could encourage a comprehensive strategy in which it played its specific role and other actors took up the mantle to address the needs of the majority of victims.

## **Discussion**

- There seems to be a problem of insisting on a 'national project' of transitional justice in countries with many different cultures. In northern Uganda, for example, how would a national project work?
- Do local practices accord or conflict with international legal standards and human rights norms?
- There often seems to be a narrow vision of what justice and accountability should mean. Why do we focus only on trials and criminal prosecutions? We shouldn't write off other mechanisms, especially truth commissions, which have been successful in various countries. Truth commissions can help address the root causes of conflict, generate national debates and assist in reconciliation.
- When *mato oput* is invoked, this appears to be shorthand for 'we want to solve these problems for ourselves.' Isn't much of the support for *mato oput* really an expression of concern over the distance of the ICC from local communities, various power asymmetries in current instances of transitional justice, and the lack of community involvement in many post-conflict processes?
- Isn't there a danger that a complementarity system will push states to enact structures of government-imposed informalism, as the Rwandan government has by using *gacaca* to control local processes and to impose a sense of collective guilt on all Hutu?
- Since the 1970s, amnesties have re-emerged as common responses to mass crimes, particularly those committed in internal armed conflicts. What does the ICC do when there is a state referral, as in Uganda, then a state says that it wants to employ an amnesty for some serious perpetrators?

### **Local justice in Uganda**

Allen argued that many current attempts to revitalise local rituals amount to problematic attempts to reconstruct Acholi culture. We need to see rituals as part of daily life, he said, not as things to be codified and used as set pieces.

Regarding the need for a national project, Allen argued that Uganda needed its own equivalent to popular national debates about *gacaca* in Rwanda. At the moment, many sources appeared to believe that the Acholi were a race apart, with peculiar ways of doing things. This perspective increased their marginalisation in Ugandan life.

Allen argued that notions of justice, illness, accountability and healing were inextricably linked in cultures such as the Acholi and Madi, as they all pertained fundamentally to issues of wellbeing. When components of this worldview were removed from their context and institutionalised, they could easily become parts of an unhelpful national project and sources of political control. The key was to ensure that, as in Rwanda, a national project focused on the needs and concerns of victim communities, rather than those of the government or other elites, both inside and outside of the country.

Part of the Acholi desire for conventional justice, Allen argued, was an articulation of Acholi identity and a demand to be heard in a country where that identity has often been suppressed. He said that the notion of Acholi identity has historically been an expression of marginalisation. In IDP camps today, Allen said, this expression manifested itself as a question: can the ICC get the UPDF out of the camps?

Brubacher argued that, in discussing mechanisms to address the needs of affected populations in the Ugandan conflict, southern Sudan had been almost entirely ignored. Furthermore, he said, during the conflict between 2002 and 2004, Langi and Iteso communities had been as affected as the Acholi, and the Madi had also suffered immensely. These points underscored the breadth of the challenges and the need for diverse responses.

### ***Truth Commissions***

Allen said that questions about the virtues of truth commissions were especially pertinent, and he had discussed this issue with several LRA leaders. He said that they had been very interested in court hearings or any fora that would allow them to tell the truth about crimes committed by the Ugandan government.

Clark said that there was a disturbing trend in transitional justice toward imposing models from different contexts. Gacaca was tailored to the very specific circumstances of post-genocide Rwanda, and attempts at replication of gacaca in Uganda would be a mistake. In the DRC case, the statute of the recently-created TRC was, in places, almost a verbatim replication of the statute of the South African TRC despite the very different contexts they were supposed to serve. Furthermore, the Congolese TRC was over-stretched due to its dual mandate of conflict mediation and truth-recovery – an agenda largely driven by foreign donors, suggesting the TRC is more for the international community than for the local population.

Clark stated that Rwanda had considered the South African TRC model but rejected it as insufficiently punitive. The Rwandan example, he said, showed the importance of each country's deciding on transitional justice mechanisms appropriate for its particular context, in consultation with victim groups.

On the issue of truth commissions, Brubacher argued that, in certain circumstances, truth commissions were appropriate and could operate in tandem with the ICC.

### ***State manipulation of Gacaca***

Clark argued that there had been much state involvement in gacaca, especially in communities close to Kigali. However, on the periphery, gacaca had often operated very differently. Clark argued that much of the analysis of gacaca so far was extremely poor – focusing mainly on urban areas and neglecting the way in which gacaca had been shaped by local populations.

### ***Domestic amnesties***

Brubacher responded that the ICC was never bound by domestic amnesties and could continue investigating and prosecuting serious crimes. In the Ugandan case, he said, there was an amnesty for LRA combatants since 2000, and the ICC has maintained a dialogue with the Ugandan government on this issue since the Court began investigations in the country. The government, he said, viewed the ICC as a crucial actor in addressing mass crimes committed in Uganda.

## **Session 3: The ICC, local legitimacy and victims' concerns**

**Fiona McKay**, *Head of Victims' Participation and Reparations Section, Registry, ICC*

**Mariana Goetz**, *Advisor, ICC Programme, REDRESS*

**Olivier Kambala**, *Programme Associate, ICTJ*

**Lorna McGregor** (Chair), *International Bar Association*

### **Fiona McKay**

McKay opened by stating that the legitimacy of international courts and tribunals rested significantly on the success of outreach and on local impact. She also posed the open question of what 'justice for victims' actually means vis-à-vis other aspects of justice.

McKay said that the ICC was distinct from its forerunners in that victims of crimes could formally take part in proceedings by presenting their views and concerns to judges via legal representatives and could receive reparations from the Court.

She said that ICC reparations proceedings had yet to occur but that the legal texts of the Court envisaged that it would approach them as a flexible concept to be adapted to local circumstances and priorities. The precise workings of reparations and victim participation would, she said, be clarified by the judges as cases progress. Present uncertainties made it harder to explain the issues to victims in concrete terms.

In addition to addressing these particular rights of victims in ICC proceedings, McKay summarised what the ICC's wider outreach work was trying to achieve, including:

- To provide accurate and comprehensive information to affected communities concerning the ICC's role.
- To promote understanding of the ICC's role, during the various stages of proceedings.
- To foster greater participation of local communities in the activities of the Court.
- To respond to concerns and expectations expressed by affected communities and particular groups.
- To counter misinformation.
- To promote access to, and understanding of, judicial proceedings among affected communities.

McKay addressed the issue of the Court's outreach budget. Noting that this budget was set by States Parties, she acknowledged that outreach had been insufficient in previous years but that the 2007 budget had seen a significant increase in outreach funding.

Outreach, McKay said, was a two-way process – it was not just about informing people but also about the Court's awareness of people's concerns on the ground. The Registry tried to inform people about what opportunities existed for them to engage with the Court so that they could make informed decisions about their involvement.

She enumerated a number of challenges for the Court, which she said were relevant both for the role of the Registry in facilitating victims' access to the Court and the wider work of the Court as a whole in conducting outreach to affected communities:

- Establishing field presence was key – the ICC had been late to establish this.
- Overcoming logistical hurdles to engaging with dispersed victim populations.
- Tailoring outreach to context and languages in terms of communication tools used.
- Building partnerships with key local actors.

- Identifying community representatives with strong legitimacy and who didn't privilege their own interests and agendas.

McKay touched on several further challenges to ensuring that victims were able to participate effectively in the ICC's proceedings, for example through presenting their views and concerns and seeking reparations.

- Victims may have more confidence in groups with less capacity to represent them.
- Intermediaries sometimes struggled to raise funds to undertake their work.
- Working through local intermediaries could disempower local people if views and information were misrepresented.
- Victims needed to be informed of provisions available to them but also assisted with accessing those provisions (e.g. filling out complex documents).
- Balancing the ICC's attention to the collective with attention to the individual.

McKay concluded by discussing the need to avoid further inflating expectations among local people about what the Court could do and the extent of the reparations potentially available.

## ***Mariana Goetz***

Goetz discussed the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation. This document, she said, upheld victims' rights for international crimes and had fed into the Rome Statute partly because it evolved alongside it. Covering both substantive and procedural rights, the Basic Principles elaborated on rights to reparation as encompassing restitution, rehabilitation, compensation, satisfaction (e.g. an apology or a commemoration) and guarantees of non-repetition (e.g. reform of the military so that past abuses couldn't reoccur).

Goetz referred to the concept of universal jurisdiction – the idea that certain crimes carry an international obligation to either prosecute or extradite suspects – as being useful in allaying the suspicions of local people as to why the ICC had become involved and what its agenda was.

Goetz regretted that mandates of the ad hoc tribunals for Rwanda and the former Yugoslavia only provided for victims to be considered insofar as they were witnesses without recognising their right to justice. The treatment of victims at the ICTR was, she said, a major reason why most Rwandans saw the tribunal as almost useless and irrelevant.

Noting that it was International Women's Day, Goetz underlined that gender considerations were vital to these debates and argued that women's rights were often very poorly provided for when it came to traditional justice.

On the question of legitimacy, Goetz observed that local perceptions were often influenced by people's impressions of the institutional backing of the justice process (thus, for example, the UN Security Council-mandated ICTR carried negative associations given the UN's inaction in Rwanda during the genocide).

The ICC was, she said, distinctive in having a strong reparative mandate – victims had standing as independent parties and could seek legal aid. A few victims were already participating in the Lubanga case with their own lawyers. It was essential that the Court undertake more outreach to victims, supporting them and engaging with communities to foster a sense of ownership and to avoid the situations at the ICTY and ICTR, where affected communities had been overlooked and forgotten. For victims, justice is as much about the process as it is about the outcome. Unless affected populations felt included, then it would be irrelevant to them.

## ***Olivier Kambala***

Kambala queried how much the ICC had learnt from the ICTY and the ICTR in terms of managing local perceptions and expectations of the Court. In the Ituri region of the DRC, he said, the ICC was seen as just another international mechanism and even an arm of MONUC.

After Lubanga's indictment, Kambala said, local people had been asking whether there would also be indictments of Lendu suspects. The Court was seen to be political and this was problematic.

The timing of the referral of the DRC case to the ICC, in Kambala's view, had also been problematic. In the context of the transitional government, Kabila's referral had been seen by the Congolese vice-presidents as a political manoeuvre. Kambala described how, in Bunia in 2004, rumours had circulated that the Court would be distributing money to those who filled in the correct forms. It had seemed, he said, as if victims had been defined through the circulation of forms. Militias had been watching closely and the security and protection of those seen to be involving themselves with the Court had been an issue.

The cut-off date in the ICC's temporal jurisdiction had left people wondering what would be done about pre-2002 crimes.

Kambala said that the ICC was introducing a legal approach that was new to the Congolese system and that the DRC's legal framework was poorly equipped to absorb this.

The ICC needed to be seen in a broader context of transitional justice in which it was simply one element. Truth-seeking (not only through a truth commission), reparations and institutional reform, for example, were often neglected.

## ***Burundi***

Kambala drew on aspects of the Burundi context that he saw as relevant to the DRC, including the issue of carrying out public consultation when considering the design of a holistic policy to address the consequences of crimes. On the question of traditional justice, Kambala discussed the Bashingantahe, a traditional Burundian institution comprised of individuals considered to be keepers of the society. Although its links with the ruling party had partially dented the credibility of the Bashingantahe, many Burundians felt that prosecutions (whether international, hybrid or domestic) had to be supplemented by measures involving this traditional authority.

## ***Discussion***

- When is outreach most appropriate? At what stage(s) of investigations and/or prosecutions should the ICC concentrate its finite outreach resources?
- The ICC faces two sets of issues in terms of local legitimacy. The first is about perceptions of the ICC and expectations. The second is about what the ICC is actually doing. That's key for legitimacy and isn't simply a question of outreach. The Lubanga case is an example in which a particular community feels that it has been singled out. The ICC needs to establish its legitimacy through legitimate action. Outreach cannot compensate for problems of prosecutorial strategy and other aspects of the work of the Court.
- A challenge for the ICC's outreach strategy is that the questions and concerns of local people are different within and among the countries where the ICC is working. The outreach strategy needs to identify what people's concerns and questions are, and then it needs to come up with viable ways of addressing these issues. Questions and concerns are always specific to the local context – they relate to what people know and have already experienced. So far the ICC's outreach has been more about giving information about the Rome Statute, the Court's jurisdiction etc. – rather than explaining why, in northern Uganda, for example, there is no current case against the UPDF.
- The ICC has basically been absent in terms of outreach in the DRC – the first major test-case for the Court.
- What happens if the results of the ICC's public consultations show overwhelming opposition to international bodies such as the ICC?
- In consultation processes, there is the risk that more powerful and mobilised groups will be able to project their own views at the expense of others.
- Are there certain challenges that are simply too large to be overcome through outreach and engagement with local people?
- Is it really the ICC's role to engage with local people on the ground? Is that where it should be concentrating its efforts? Are we expecting too much of the ICC in this respect? Shouldn't the ICC concentrate on prosecutions, not wider questions of transitional justice and reconciliation?
- There's been talk about the physical distance of the ICC possibly having an alienating effect among victims, but another alienating factor is legal process and legal jargon. The information on the ICC website is difficult enough to follow for those who study the Court, let alone non-specialists from situation countries.
- Despite people's best intentions and talk of 'local partnership,' there are huge power asymmetries between international actors and local actors. How are these asymmetries addressed?
- In the end, when the sums have been calculated, is it not the case that reparations are very low down on the priority list of the global community when it comes to issues of justice? Donors are inclined to concentrate their funding on the set-piece theatre of the trials themselves.
- 'Victims' implies that a crime has been committed. Who are the victims? In northern Uganda, the victims aren't simply people who have suffered crimes committed by those for whom there are arrest warrants. Most northern Ugandans are surely also victims of crimes perpetrated by the Ugandan state. Looking for those who perpetrated crimes appears to be completely disconnected from looking for those who are victims.

- Among local NGOs, there is considerable hostility towards the ICC in both northern Uganda and Darfur. The ICC needs to do more to engage these actors, not least because they shape the perceptions of local populations.
- In terms of legitimacy, the predominance of young Europeans at the ICC is striking. Much more effort needs to go towards ensuring that the ICC's workforce is more diverse – especially in terms of African representation. Having a couple of, for example, northern Ugandans doing some outreach does not hide nor compensate for this imbalance. The imbalance speaks of an ethnocentric mentality within the ICC.
- Yes, the ICC is a small part of a big picture but it would be wrong to say that there's too much focus on the ICC. The Court has a long way to go before it fulfils its mandate. We need to see rights on paper become rights on the ground.
- It is extremely difficult to draw clean lines between victims and perpetrators. Perpetrators themselves are often previously victims. Perhaps 'survivors' is a more apt term as it doesn't infantilise victims and gets away from the neat division between victims and perpetrators.
- Outreach is not a question of doing local people a favour – it is in the ICC's own interest to get outreach right. Beyond the Court's moral obligation to engage local populations, the success of its own practical operations relies on trust and positive working relations on the ground. The issue is not 'can it afford to do outreach?' but 'can it afford not to?' In northern Uganda the ICC didn't get this right and the damage has been huge.
- The ICC was not conceived by the drafters as a vehicle for humanitarian assistance and development. There has to be a clear link established between the victim and the crime committed. Victim status can surely only be assigned once a guilty verdict has been reached, otherwise the presumption of innocence is compromised. The reparations scheme should be seen in this context, lest we put the cart before the horse.

In the discussion, Mariana Goetz addressed the issue of who is a 'victim' and when victims could participate.

Goetz stated that victim participation had been the subject of much debate between the Office of the Prosecutor and victims' representatives. The Prosecutor was, she said, very opposed to victims participating in the absence of a specific crime under investigation. However, Pre-Trial Chamber I had decided in early 2006 that victims should be able to participate in the earliest phase – i.e. at the 'situation' or 'investigation' stage before there was an indictment. The Prosecutor had argued, understandably, that there could not be victim participation if there wasn't yet a crime. The judges had ruled against the prosecution and had decided that all the victims of the entire situation were entitled to participate so long as they were victims of the crimes within the jurisdiction of the Court. Goetz said that the reason given was that it was precisely at the earliest phase (during the investigation and before there was an indictment) that the interests of victims and the prosecutor were most divergent – not least because the Prosecutor was likely to favour an expeditious proceeding with limited crimes. Consequently, it had been decided that victims could have direct access to the judges by bringing them their own independent stories.

Goetz said that in the DRC, for example, there were victims participating in the investigation proceedings as well as victims participating in the Lubanga case on a far narrower definition of 'victim.' The victims participating in the Lubanga case, she said, had to be victims of the specific crimes listed in the arrest warrant. Because Lubanga was accused of crimes relating to child soldiers, this meant that only children that had been enlisted, conscripted or used in hostilities could participate as victims in the case.

In northern Uganda, Goetz said, all victims of genocide, crimes against humanity or war crimes committed after July 2002 could participate in the investigations, even if they had been victims of the government forces and not the LRA. However, to participate in a case, they would need to satisfy the more specific criteria corresponding to the arrest warrants of Kony et al. These included, she said, specific crimes

committed in specific locations at specific times. Only victims of those crimes would be able to participate in the cases.

It was very important, Goetz said, that reparations didn't seep into the general humanitarian and developmental needs of the country. Reparations were about the specificities of harm suffered individually or collectively.

The ICC's Victims' Trust Fund, in comparative terms, would, she said, never have enough funding to compensate all the victims, but its board of directors was looking at how small amounts of money could go a long way – including more symbolic measures that could have a moral as well as monetary impact.

## **Session 4: History, politics and transitional justice discourse**

### Open Discussion

**Nicholas Waddell**, Royal African Society (Chair)

#### ***Points made in the course of discussion:***

- Although the ICC is supposed to be insulated from the demands of politics, in fact, the ICC and ad hoc courts cannot be disentangled from the politics of the situations they address. It is an unhelpful conceit to imagine that they can be.
- We need to approach the whole area of transitional justice in a more historically- and contextually-informed way so that lessons and experiences from particular places at particular moments aren't applied unthinkingly and inappropriately.
- Often in discussions about transitional justice, Africa is spoken of as if it were a one-dimensional backdrop for 'mechanisms' and institutions such as the ICC. Transitional justice debates often lack historical and political analysis and privilege the technocratic and legalistic. In fact, the strength of the transitional justice agenda is when it emphasises historical and political factors and when it is explicit about real issues of tensions and trade-offs.
- Points made in the context of discussions on traditional justice could equally well be directed at the international justice movement in terms of, for example, organising myths, which discourses are powerful, which discourses are marginal etc.
- Transparency and self-reflection are lacking in the international justice movement. Aid agencies, for all their faults, have at least begun to address some of these issues through, for example, evaluations (however flawed). Problematizing this whole endeavour isn't attacking it but helping its long-term credibility and legitimacy.
- Regarding complementarity: everything is potentially complementary or uncomplementary. The question is, 'under what conditions will or won't things work together?'

#### ***The ICC and expectations***

- To what extent can the responsibility for the misinformation that circulates about the ICC be laid at the door of the Court?
- The point is often made that we need to lower our expectations of the ICC and that local people have been disappointed because they have had unrealistic hopes. The ICC has itself been responsible for creating unrealistic expectations by, for example, making grand claims about the contribution of its work to ending crimes and creating peace and stability.
- The ICC has limitations imposed upon it by its creators – it is a creature of compromise. There are certain features of the ICC that may not have been deliberately intended by the drafters and reflect the limitations of negotiation. The ICC is no way near as beautiful and empowered as some of us would like it to be and, given the hopes that surround it, the Court is bound to disappoint. The ICC cannot be all things to all people – the dispenser of justice, the solver of conflict etc. It is a treaty body, created by states, with all the associated baggage and limitations.

## ***The purpose and role of the ICC***

- The ICC's role is not to facilitate reconciliation. But at the same time there needs to be recognition that the ICC's processes can have a huge impact on the efforts of other actors to further reconciliation. If the ICC is serious about comprehensive approaches then it needs to accept itself as a partner in various processes. The Court often suggests that the onus is on other institutions to reform themselves so that they conform with the ICC's idea of a comprehensive strategy. That's not enough. The ICC may also need to adapt itself to play the best role it can in a wider picture.
- The ICC is necessarily perpetrator-focused. Criminal prosecutions should not try to be victim-centred. Expectations about the role of the ICC should be managed so that people don't have any illusions about the extent to which the ICC is about the victims. It is important for the Court to point to other jurisdictions that are better positioned to pursue other crimes and other issues.
- In discussions on these issues we sometimes lose the central point – namely, to try to improve the situation of those who have been affected most by these crimes. This ultimate purpose should underpin all transitional justice approaches.
- A component of the ICC's role is symbolic – it sends an important signal regarding ending impunity, even if there are problems with implementing that principle. In Sudan, for example, when the UN commission of inquiry talked about referral to the ICC and produced the list of 50-plus suspects, the Sudanese cabinet sat up and took note.
- The deterrent purpose of the ICC should not be overlooked. Protecting future victims may prove as important as involving past/present victims. It seems from anecdotal evidence that the ICC is having a stronger effect on potential future perpetrators than it is on victims.
- Misunderstandings about the ICC can also help the ICC – at least in the short term. In Sudan or in DRC, international actors have invoked the threat of ICC investigations in order to exert influence. Misconceptions about the real reach of the ICC have to some extent assisted in terms of deterrence. As cases progress, however, and the limited leverage of the Court becomes clearer, the Court's deterrent significance may dwindle.
- States may be willing to prosecute now but is that not a fig leaf for larger failures regarding the responsibility to protect? It is easier to send gowns and wigs into a situation than it is to put boots on the ground. Discussions of transitional justice can be a distraction from responsibilities not to let atrocities occur in the first place.

## ***Criminal Justice and Crisis States***

A seminar discussion with presentations from:

**Graeme Simpson**, *Country Programs Unit Director, ICTJ*

**Zachary Kaufman**, *DPhil candidate (Oxford), Juris Doctor Candidate (Yale), former policy clerk in the Office of the Prosecutor, ICC*

Chairs: **Phil Clark**, *TJI*, **Tim Allen**, *LSE*

21 March 2007, 4:30pm-6:30pm, Hong Kong Theatre, London School of Economics

### ***Graeme Simpson***

Simpson began by underlining that there were a number of unhelpfully polarised ways that debates about the ICC, and international justice, had been framed. In order to really understand the strengths, weaknesses, opportunities and constraints of the ICC, it was necessary, he said, to extract the Court from the largely premature demands and expectations that surrounded it. He also stressed that, rather than focus on the ICC in isolation; we needed to see the Court in the context of, and co-existing with, a range of other mechanisms and institutions that should be used in complementary ways.

Simpson argued that the 'peace versus justice' prism through which the Court has often been viewed has been detrimental to thinking about justice, accountability and peace in a more integrated way, and to recognising how these processes could reinforce one another.

Simpson outlined a number of unhelpful ways in which the issues have been presented:

- 'Peace' has often been reduced to 'peace talks' even though the negotiation of a peace settlement is simply one period, albeit a crucial and volatile one, in a longer-term process.
- Peace negotiations are a particular period during which the tensions in the peace and justice relationship are at their starkest. It would therefore be a mistake to draw conclusions about the general relationship between peace and justice by looking only at peace talks.
- There is an implicit assumption that the justice agenda is a punitive one that will necessarily jeopardise peace. There is a range of accountability mechanisms that can bring different kinds of justice.
- Whether in terms of resource allocation or prioritisation, the pursuit of justice is misleadingly spoken of as if it detracts from addressing 'root causes' such as underdevelopment.
- Punitive measures associated with international justice and criminal law are pitted against reconciliation processes. In the process, both are oversimplified.
- International justice institutions are treated as a substitute for domestic justice despite the fact that, for example, the ICC can help build the capacity of national or local justice institutions.
- Issues of sequencing and timing are under-appreciated. For example, accountability may not be achievable in the short-term but there may be longer term prospects for justice to be done.
- Local practices are either romanticised or demonised as being inherently superior or inferior to other options.

Simpson argued that the result of the polarised debate was that the potential for common ground between transitional justice concerns and the concerns of building durable peace have been overlooked.

## ***Building popular trust in fragile states***

Simpson argued that reconciliation and the building of durable peace required a reshaping of the social fabric in ways that cultivate civic trust – i.e. strong relations between citizens and the emerging state. He said that institutions such as the ICC could have a positive impact at a critical moment to bolster state institutions and win back civic trust.

### **Victims**

Simpson welcomed the ICC's preparedness to be innovative with respect to the roles of victims in the judicial process. He expressed concern, however, over how the Court defined victims and perpetrators and argued that the Court's approach could do more harm than good unless it is re-examined. He argued that the ICC needed to appreciate fully that victim communities weren't homogenous and their needs and demands weren't static.

Simpson emphasised the necessity of reparations but argued that the intervention by the ICC into this area was worrying as the Court was ill-suited to this task.

### **Challenges**

- Simpson pointed to a risk that civic trust would be undermined if the ICC generated inflated expectations about what domestic institutions in crisis states were able to deliver.
- He acknowledged that sequencing different mechanisms and approaches was necessary but easier said than done. Care must be taken during peace negotiations so that short-term concerns didn't lead longer-term judicial accountability to be 'designed out' of agreements.
- Finally, Simpson noted that the ICC tended to think in terms of national solutions to conflicts and problems that were in fact regional in character. The focus on national investigations, he said, overlooked the interconnectedness of the issues.

### **Conclusion**

Simpson concluded by emphasising that the ICC wasn't the only option and wasn't the only actor when it came to transitional justice. The focus, he argued, should be on thinking about how different tools and mechanisms could be used in complementary ways.

### **Discussion**

- An historical reading of how wars have ended points to the importance of a certain degree of guaranteed impunity. The messy reality of statebuilding means that we have to be pragmatic. We must also not fool ourselves that the international architecture of power doesn't make for double standards. While Africans are in the dock, high-tech killers from more developed countries continue to escape justice.
- The term 'justice' is used but making a tiny minority of perpetrators face the law is very different from establishing justice.
- The most important question is, 'can the ICC make things better or worse in relation to war and atrocities?' In Darfur, the ICC's indictments make war more difficult and intractable. Peace processes may indeed be only one period in a longer term process but they are the most critical moment. The image of an hourglass comes to mind with peace processes in the middle. What do we do when belligerent parties won't reach a negotiated settlement? We need to make negotiations more attractive – to influence incentives and disincentives for peace. The threat of prosecution simply makes belligerents more intransigent and less inclined to reach a settlement. The ICC's work in relation to Darfur is unhelpful and counterproductive. How concerned is the ICC about its negative impact?

In response to these points and others, Simpson noted that some people said that the ICC was too concerned about the impact of its work on other areas such as peace and security. According to this argument, Simpson said, the point at which prosecution played politics is the point at which the integrity of prosecution was undermined forever. Simpson stated that the ICC was aware of the dangers and that the issue was *how far* the Court's approach and actions should be informed by calculations about possible effects on conflict and peace dynamics.

Looking at northern Uganda, Simpson said that, but for the ICC, there was a strong argument that the LRA wouldn't be at the negotiating table at all. He expressed concern at the way negotiated processes were represented and posed the question of who gets a seat at the table and who does not. Simpson argued that victim communities in particular were often neglected.

### ***Further points from Simpson***

- We must avoid thinking in terms of a very narrow paradigm of justice. We need to think beyond the narrow band of possibility that prosecution offers.
- Finding ways to disarm, demobilise and re-integrate those who wield arms is crucial, but simply rewarding such groups is a troubling approach. We should be alert to the risk that ex-combatant groups simply re-constitute themselves in new guises.
- The point at which we define justice to mean one thing is the point at which justice becomes meaningless. The most important thing is that the justice approach in question is meaningful to normal people in the societies concerned. The selection for prosecution of a small fraction of perpetrators is inevitable. The fact that we can't prosecute everyone doesn't mean that we should prosecute no one. Punitive processes aren't necessarily always the most effective as a deterrent or even in terms of vengeance. Other kinds of justice – social and economic justice, for example – may be more effective.
- In terms of how to coordinate and sequence different approaches and mechanisms, context is vital. Decisions should be on a case-by-case basis, using strategic approaches to maximise what is achievable. It is a matter of high strategy rather than high principle.
- We set the ICC up to fail if we assume that it is the only route through which justice for atrocity crimes can be pursued.

### ***Zachary Kaufman***

Kaufman spoke about the politics of establishing war crimes tribunals. To broaden the focus from the ICC and because other transitional justice institutions, including *ad hoc* tribunals, were likely to operate alongside the ICC, Kaufman looked more generally at the establishment of war crimes tribunals and, in particular, at the politics of establishing the ICTR. He argued that focusing on the politics of the establishment of the ICTR provided a specific example of the kinds of political dynamics that surrounded the establishment of all international justice institutions.

Kaufman stated that although neither the UN nor the US intervened during the Rwandan genocide, the UN, through the Security Council, actively engaged in the transitional justice process in Rwanda and the US played the most significant role of any state in the establishment of the ICTR.

Other states, Kaufman said, had also played important roles in the establishment of the ICTR. For example, the Spanish government, a non-permanent member on the Security Council, had proposed the establishment of the UN Independent Commission of Experts on Rwanda. The French and Russian governments had objected to the US's initial proposal to expand the jurisdiction of the ICTY to include the Rwandan genocide, favouring instead the creation of a separate *ad hoc* UN tribunal for Rwanda. The New Zealand government, another non-permanent member of the Security Council, had proposed the compromise design of creating an *ad hoc* UN tribunal for Rwanda (established by the Security

Council's Chapter VII powers) that would share some bureaucracy with the ICTY. This was the option that would become the ICTR.

After discussing the politics behind various decisions made in the process toward the establishment of the ICTR, Kaufman drew two primary conclusions. First, the international community had only seriously considered one alternative to the ICTR, the expansion of the ICTY's jurisdiction. Second, the single most important determinant of the international community's decision to support the creation of the ICTR had been the precedent of the ICTY.

Kaufman argued that the example of the ICTR highlighted that international justice is not a pristine apolitical realm, but was instead inevitably influenced by politics, particularly the agendas of major powers.

## ***About the series organisers***

**Royal African Society** Now more than 100 years old, the Royal African Society today is Britain's primary Africa organisation, promoting Africa's cause. Through its journal, *African Affairs*, and by organising meetings, discussions and other activities, the Society strengthens links between Africa and Britain and encourages understanding of Africa and its relations with the rest of the world.

**Crisis States Research Centre (Development Studies Institute, London School of Economics)** explores the causes of crisis and breakdown in the developing world and the processes of avoiding or overcoming them. The Centre explores why some political systems and communities in fragile states have broken down even to the point of violent conflict while others have not.

**International Center for Transitional Justice** assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

**Transitional Justice Institute (University of Ulster)** is an international institute dedicated to examining how law and legal institutions assist (or not) the move from conflict to peace. The TJI pursues an active research agenda, wherein engagement with institutions, policy-makers and communities (internationally and in Northern Ireland) generates research, and research generates engagement.

**Conflict Research Group (University of Ghent)** is a multidisciplinary research unit at the University of Ghent (Faculty of Political and Social Sciences). It analyses the micro-level of civil conflicts, with an interest in both livelihood and governance issues, and concentrates on the impact of civil conflicts on local communities, and on the links between local and global dimensions of conflict.

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