



Royal African Society

Peace, Justice & the ICC in Africa

MEETING SERIES SYNOPSIS

By Nicholas Waddell & Phil Clark



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Note

This document is a synopsis of a meeting series, held in early 2007, that addressed some of the dilemmas posed by the work of the International Criminal Court in Africa. For summaries of all the presentations given in the series, please see *Peace, Justice and the ICC in Africa: Meeting series report*

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.

Acknowledgements

In addition to the role of the Royal African Society (RAS), the meeting series benefited from funding and input from the Crisis States Research Centre at the London School of Economics (LSE), the International Center for Transitional Justice (ICTJ), the Transitional Justice Institute (TJI) at the University of Ulster, the Conflict Research Group (CRG) at the University of Ghent and the Development Studies Institute (DESTIN) at LSE. More specifically, the series was shaped by input from Richard Dowden and Nicholas Waddell (RAS), Tim Allen (LSE), Phil Clark (TJI), Marieke Wierda (ICTJ) and Koen Vlassenroot (CRG). The lecture by the ICC's Prosecutor was an Alistair Berkley Memorial Lecture, made possible by the Alistair Berkley Fund at LSE – a fund created in the name of a former LSE student who was killed in 1988 in the terrorist bombing of PanAm Flight 103 over Lockerbie, Scotland.

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.

The organisers would like to thank the Canadian High Commission and The Suntory and Toyota International Centres for Economics and Related Disciplines (STICERD) at LSE for making their conference facilities available. Particular thanks go to Nastasya Tay for her role in organising the meetings.

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 provide an overview of issues raised during 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

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)*

Session overviews

Peace Justice and the ICC in Africa

Background

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 of 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 implications of its actions on conflict dynamics or peace negotiations.

Discussion

The discussions centred on the nature and extent of the ICC's impact on prospects for peace in northern Uganda. Reflecting common fault-lines in debates over northern Uganda, some participants suggested that the ICC's arrest warrants for leaders of the rebel Lord's Resistance Army had hampered peace negotiations in Juba, jeopardising the most promising opportunity to end the 20-year civil war. It was argued that, by removing a possible amnesty as an incentive for accused perpetrators to arrive at a settlement, the ICC's pursuit of justice in northern Uganda had become an obstacle to peace. The claim was that international advocates of criminal prosecutions for atrocities in Africa were in danger of putting their own concerns ahead of those of the affected communities and, by extension, of Africa's wider conflict resolution and developmental priorities.

Countering such criticisms, a number of participants asserted that the Court's warrants had made a significant positive contribution to efforts to resolve the conflict by, for example, focusing international attention on the situation, restricting the LRA's room for manoeuvre from Southern Sudan and pressuring the LRA to negotiate. The ICC's presence, moreover, has catalysed a serious debate on accountability in northern Uganda that would otherwise not have occurred.

Discussion also turned on whether the ICC was going against the grain of history. Contrasting perspectives were given on whether an historical analysis suggested that without justice, there could be no lasting peace, or, whether successful peace deals in the past had been made by compromising accountability and granting amnesties.

An important difference that emerged concerned participants' starting points and how the question of justice was contextualised. Some participants framed their comments around the ongoing humanitarian devastation wrought by the Ugandan civil war and the urgency of the challenge of African states such as Uganda in achieving long-term security and stability. The implication was that a degree of impunity for perpetrators may, on occasions, be the undesirable but necessary price of obtaining a negotiated settlement to a conflict.

An alternative view was that the ICC embodied the progress of the international community in combating impunity and that the terms of any peace settlement, in Uganda or elsewhere, must accord with international law, as enshrined in the Rome Statute. It was emphasised that any proposals on how to address the relationship between peace and justice must heed prior discussions at the Rome Conference in 1998 when 120 states voted to adopt the Statute of the ICC – thereby establishing a legal obligation for states to investigate and prosecute the worst crimes and giving the ICC the role of intervening where states failed to do so.

A recurrent concern from a number of participants was the coverage of the issues in terms of 'peace versus justice' and the subsequent crowding out of other important questions, notably those of who gets to decide when and how to address mass atrocities. The portrayal of the issue as a stark confrontation between the interests of peace and the interests of justice was felt to be misleading and reductionist - in relation to both goals, as well as the relationship between them. The result, it was argued, was a blinkered approach to what is a complex relationship determined largely by dynamic context-specific factors. If efforts to secure peace and to combat impunity are not necessarily harmonious, it was suggested, neither are they necessarily discordant. Various participants stated that it was unhelpful to wrangle over principles at an abstract level or prematurely to assess whether ICC warrants might hamper the Juba process. It was argued that a more constructive approach was to consider the standards of accountability necessary to satisfy diverse local concerns as well as international law. An associated issue was the need to enable domestically-driven processes and for local views to be represented and better channelled into decision-making.

In the accompanying discussions, participants sought clarification and expressed concerns about precisely how the ICC established which cases to pursue and why certain individuals (all in Africa) had been the subject of ICC warrants while others of apparently equal culpability had not. This involved debates about how the ICC defined the 'gravity' of crimes – one of the main criteria determining the ICC's selection of crimes and suspects to be investigated – and the strengths and weaknesses of this definition. Furthermore, participants questioned whether it was the case that non-state actors were more vulnerable to prosecution because they lacked the political machinery of a government. Participants argued that many northern Ugandans were concerned that, in focusing on the LRA rather than the Ugandan state or the Ugandan People's Defence Force (UPDF), the ICC was carrying out a one-sided process. In the DRC context, the Prosecutor took questions about how and why the Court was prosecuting Thomas Lubanga rather than other alleged perpetrators of more serious crimes, especially those more closely connected to the government in Kinshasa. Participants inquired into what factors the ICC had taken into account when deciding to prosecute Lubanga and determining the charges against him.

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. Underlying 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.

Discussion

It was underlined that complementarity was both a principle and a set of judicial procedures for assessing whether or not national institutions were willing and able to investigate and prosecute serious crimes. The issue arose of how exactly to determine this willingness and ability (not least in fluctuating contexts) and of how developed were the Court's criteria in this area. On positive complementarity, the case was made that while the ICC could encourage states to reform domestic practices, it could only form limited partnerships with national judicial systems rather than building their capacity more directly.

In the context of the DRC, it was argued that the ICC's stated attempts to pursue partnership with national judicial systems confronted several difficult issues. Where these systems flouted international legal standards, for example, how could the Court avoid compromising itself and avoid jeopardising people's safety and security? Concerns were voiced about how the ICC handled questions of evidence and witness sharing with national judiciaries, and the call was made for greater overall clarity from the court on how positive complementarity could be carried out in practice.

2. The ICC, reconciliation and community-based justice

Background

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.

Discussion

A common concern in the discussion was the need to ask who was adopting what position on community-based justice and why. The importance was stressed of examining the agendas that shaped the stance of local, national and international actors towards traditional justice mechanisms. It was argued that often debates about local mechanisms were not based on informed perspectives on the practices concerned so much as wider divisions over international justice and the ICC. It was suggested, for example, that support for the Acholi ritual *mato oput* is sometimes born of desire for a greater local involvement in determining decisions about transitional justice and of a concern that the ICC is a distant and alien institution.

The argument was made that, in the Uganda context, much of external actors' promotion of traditional justice measures was misguided and ill-informed, not least because it tended to single out Acholi rituals whereas the involvement of traditional processes needed to be a truly national project. It was suggested that local practices had been misconstrued and that any adaptation of them would sacrifice the qualities that gave them local meaning and legitimacy. Other participants suggested that, while the danger of romanticising traditional institutions was real, there was nonetheless a need to think creatively and to see these institutions as dynamic and as capable of adaptation as national and international institutions. The point was made that local practices could be valuable in addressing crimes in affected communities particularly in fostering face-to-face reconciliation between victims and perpetrators. If local processes were to be developed, the issue arose of how they would operate concurrently with other institutions, particularly national courts, and how popular ownership and participation could be fostered.

Caution was expressed about transitional justice mechanisms that had resulted from particular social and political circumstances (e.g. the South African Truth and Reconciliation Commission or Rwanda's *gacaca* system) being inappropriately promoted in other environments. Each country, it was argued,

should decide on transitional justice mechanisms appropriate for its particular context, in consultation with victim groups. Participants also noted that the overwhelming focus on the Acholi rituals in northern Uganda had come at the expense of attention to other groups affected by the war. It was suggested that a broader comparative debate was needed about the role of transitional justice mechanisms in other country contexts and their relationship to international justice.

As in discussions about the ICC and peace processes, the question arose of how the ICC's mandate should be interpreted and applied and how far the ICC should be flexible in terms of seeking to reinforce the mandate of other institutions. It was argued, for example, that while the Court's role was not to facilitate reconciliation directly, it could nonetheless have a huge impact on the efforts of other actors to further reconciliation. It was suggested that in order for the Court to play its part in a 'comprehensive approach,' it may be necessary for the Court to coordinate more effectively with other actors and initiatives.

3. The ICC local legitimacy and victims' concerns

Background

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?

Discussion

Participants underlined that the ICC must learn from the mistakes of previous international justice institutions regarding outreach and their involvement – or lack of it – with victims and affected communities. It was argued that the legitimacy of international courts and tribunals rested significantly on the success of outreach efforts and on their local impact. For victims, it was suggested that justice was as much about the process as the outcome and that unless affected populations felt included and engaged, then it would be largely irrelevant to them.

The ICC was criticised for having made limited efforts to build relationships with local actors and for having missed early outreach opportunities. Concerns were also voiced about the limited lengths to which the ICC had gone to make outreach a genuinely two-way process whereby the Court distributed generic information but also listened to local people's concerns and formulated direct responses to them.

The discussion arose, however, about the extent to which the ICC should be channelling its energies and resources towards engaging local people as opposed to concentrating on its investigations and prosecutions. Participants questioned whether too much was expected of the ICC's outreach and suggested that it was entirely appropriate that the Court was perpetrator- rather than victim-focused. In response, the point was made that outreach could not be a secondary concern. Even discounting moral obligations, it was seen to be in the Court's own interest to conduct effective outreach because its operations relied on trust and cooperation on the ground. According to this perspective, the question was not whether the ICC could afford to emphasise outreach but whether it could afford not to.

It was also argued that, in terms of the ICC's legitimacy, no amount of outreach could substitute for the legitimacy that would come through well-conceived and well-conducted investigations and prosecutions. Managing perceptions and expectations could not compensate, for example, for problems of prosecutorial strategy.

The latter portion of the meeting concerned difficult legal and moral debates around the definition of 'victims' and when victims could participate in ICC proceedings. Queries arose over how the ICC's proposed reparations schemes would operate in practice. While some participants argued that reparations would constitute only token responses to mass crimes, it was also argued that reparations needed to remain distinct from general humanitarian and developmental assistance and that even modest monetary and non-monetary reparations could nonetheless have symbolic significance.

The ICC, Criminal Justice and Crisis States

Background

The purpose of the final event was to address some of the wider questions that had been raised by 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.

Discussion

It was argued that the ad hoc tribunals that preceded the ICC, particularly the International Criminal Tribunal for Rwanda (ICTR), highlighted that international justice was not a pristine apolitical realm, but one inevitably influenced by politics and the agendas of major world powers.

The question arose regarding appropriate expectations of the ICC as a fledgling institution that depends on the support of States Parties and must often make invidious decisions in difficult contexts with finite funding and capacity. It was argued that, in order to arrive at a balanced assessment of the strengths, weaknesses, opportunities and constraints of the ICC, it was necessary to extricate the Court from the largely premature demands and expectations that surrounded it. It was suggested that 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 and if we also lay significant additional responsibilities at the Court's door concerning conflict resolution, reconciliation and national judicial capacity building.

The question of expectations recurred throughout this event. While acknowledging the conflicting pressures on the Court, a different strand of comments argued that the Court itself had often been responsible for inflating local, national and international expectations through its own actions and statements. Similarly, it was asserted that although it was a new institution, the Court had missed opportunities to apply lessons learnt from its own operations and that, a number of years since its establishment, key areas remained poorly defined and communicated. In particular, areas such as 'positive complementarity' or the criteria by which the Court selected the crimes and suspects it would investigate.

It was argued that a polarised debate about the ICC had hampered efforts to consider peace, justice and reconciliation in a more integrated way, and to recognise the potential for these goals to be mutually reinforcing. Rather than debates focusing on the ICC in isolation, the Court, it was argued, should be seen as one of a number of mechanisms and institutions that could make distinct but complementary contributions to societies afflicted by mass crimes. The main question, it was suggested, was exactly how, and on whose terms, this range of mechanisms, institutions and actors, often with conflicting mandates and priorities, could be combined in a comprehensive fashion to address the range of needs and demands on the ground.

About the series organisers

Royal African Society Now more than 100 years old, the Royal African Society 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.

Development Studies Institute (London School of Economics) promotes interdisciplinary post-graduate teaching and research on processes of social, political and economic development and change. The Institute explores problems of poverty and late development within local communities, national political and economic systems and in the international system.



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