The ICC and Community-Level Reconciliation: In-country Perspectives

REGIONAL CONSULTATION REPORT

Edited by Tim Murithi and Allan Ngari

IJR 10 years 2010

Transitional Justice in Africa Programme

21 & 22 FEBRUARY 2011, CROWNE PLAZA HOTEL,
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2011 IJR Regional Consultation participants, Crowne Plaza Hotel, Johannesburg

Published by the Institute for Justice and Reconcilation
Wynberg Mews, Ground Floor, House Vincent, 10 Brodie Road, Wynberg, 7800, South Africa
www.ijr.org.za

First Published 2011

ISBN 978-1-920219-31-4

Produced by COMPRESS.dsl
www.compressdsl.com

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Acronyms

AU	African Union
AUHIP	African Union High-Level Implementation Panel
CAR	Central African Republic
CIPEV	Commission on the Investigation of Post Election Violence (Kenya)
CPA	Comprehensive Peace Agreement (Sudan)
CSO	Civil Society Organisation
DRC	Democratic Republic of Congo
GNU	Government of National Unity
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Persons
IJR	Institute for Justice and Reconciliation
LRA	Lord's Resistance Army (Uganda)
MONUSCO	United Nations Organisation Stabilisation Mission (DRC)
MOU	Memorandum of Understanding
NCIC	National Cohesion and Integration Commission (Kenya)
OTP	Office of the Prosecutor
PRDP	Peace, Reconstruction and Development Plan (Uganda)
PSC	Peace and Security Council
SCCED	Special Criminal Court on the Events in Darfur
TFV	Trust Fund for Victims
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
UN	United Nations
UNSC	United Nations Security Council
UPDF	Ugandan Peoples Defence Forces

1 Executive summary

The Institute for Justice and Reconciliation (IJR), based in Cape Town, South Africa, convened a Regional Consultation on the theme of *The International Criminal Court and Community-Level Reconciliation: In-Country Perspectives*, at the Crowne Plaza Hotel in Johannesburg, from 21 to 22 February 2011. Twenty-three participants from IJR's partner organisations from seven African countries namely Burundi, the Democratic Republic of the Congo (DRC), Kenya, Rwanda, Sudan, Uganda and Zimbabwe participated in this Regional Consultation. Participants were drawn from the International Criminal Court, governments, international non-governmental organisations, civil society organisations, multilateral agencies and academia (see Appendix B for a list of the participants). The objective of the Regional Consultation was to engage practitioners in the field of transitional justice in assessing how the interventions of the International Criminal Court (ICC) are impacting upon community-level reconciliation in what the Rome Statute refers to as situation countries.

The discussions at the Regional Consultation focused on three themes: peace and justice; cooperation and complementarity; as well as the rights of victims. The theme on peace and justice examined the evident tension between peace initiatives in the DRC, Uganda, Sudan and Kenya and the investigative and prosecutorial interventions of the ICC in these countries. The second theme assessed the issue of cooperation and complementarity. On the issue of cooperation, discussions focused on the need for cooperation among states for the effective functioning of the ICC. In addition, the ICC's outreach and collaboration with situation countries in Africa was considered. The Regional Consultation also interrogated the principle of complementarity which states that national criminal jurisdictions have primacy of jurisdiction for international crimes, unless states are unwilling or genuinely unable to investigate and prosecute these crimes. Kenya was selected as the first case study to be discussed by participants because it is the first State Party to challenge the admissibility of cases before the ICC by invoking the principle of complementarity. The third theme of the Regional Consultation explored the rights of victims. In particular, discussions questioned how, despite the elaboration of international criminal jurisprudence to address the rights of victims to reparations and the participation in legal proceedings, the reality is that the system is failing to address the immediate needs of the very victims it is meant to protect. The degree of consultation with victims in the pursuit of accountability for atrocities is necessary for consolidating peace and justice initiatives.

The ICC is likely to remain implicated in international justice processes on the Africa continent. This Regional Consultation was therefore a timely intervention providing a platform for African voices from the continent to comment on issues that have been precipitated by the Court's intervention. The emphasis on the impact of the ICC on community-level reconciliation addresses an issue that has been over-looked in the analysis and research of the Court's impact on the African continent. It is on this basis that the 2011 IJR Regional Consultation was convened.

1.1 Policy recommendations

The Regional Consultation generated the following policy recommendations:

- Even though the ICC does not have the mandate to pursue peace and reconciliation, the Court should consider these initiatives as it engages in countries affected by armed conflict, as well as take into account the concerns of the victims and affected communities in its interventions. In this regard, the Office of the ICC Prosecutor should issue a Policy Paper on its strategy for addressing the tension between the administration of prosecutorial justice and the pursuit of peace and reconciliation.
- There is a role for traditional mechanisms in the wider transitional justice architecture that countries adopt for the promotion of reconciliation. Therefore, it is necessary to raise the awareness of traditional justice mechanisms by systematically documenting the function and procedures of traditional justice as complementary alternative justice mechanims.
- The ICC and the AU should strive to conclude a Memorandum of Understanding (MOU) establishing a working relationship between the two institutions. Such an MOU should include the creation of an ICC Liaison Office in Africa to coordinate the work of the ICC on the continent and to assist in meeting the objectives of the working relationship between the two institutions.
- Concomitant with positive complementarity, it is necessary to commit resources to building the capacity among states to enhance their ability to utilise national criminal jurisdictions to investigate and prosecute crimes which fall under the jurisdiction of the ICC.
- The ICC, governments and civil society should collaborate on promoting awareness-raising about the role of the ICC in situation countries. There are situations in which victims do not know the purpose and function of the Court. The ICC therefore needs to be more transparent and inclusive particularly on the issue of victim participation in the Courts proceedings.
- In addressing gender-based violence the ICC should adopt a sensitive approach to the effects of legal proceedings on victims. The ICC should work in tandem with government and civil society to ensure that there are in-country trauma support processes to ensure effective victim participation in relation to these crimes.
- African civil society organisations and academic institutions should undertake analysis and research on issues pertaining to ICC interventions and their impact on peace and reconciliation on the continent. The Court as well as governments should support these initiatives.

2 Introduction: Context and objectives

2.1 Contextualising the International Criminal Court

On 17 July 1998, the Rome Statute of the International Criminal Court (hereafter referred to as the Rome Statute) was signed by a number of States Parties. On 1 July 2001, the ICC was formally established when the requisite number of States Parties – sixty – ratified the Rome Statute. The ICC is the first permanent international criminal court whose main aim is to ensure accountability for perpetrators of the most serious crimes of international concern. The ICC has jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression. The Rome Statute, the ICC's founding treaty, recognises that the principle of complementarity is the basis of the exercise of jurisdiction by the ICC. This principle

recognises that it is the primary responsibility of states to investigate and prosecute persons accused of committing crimes within the jurisdiction of the ICC. The ICC will only exercise jurisdiction where a state is unable or unwilling to genuinely investigate and prosecute persons accused of committing such crimes.

Given the principle of complementarity, the ICC's interventions only become necessary when a state fails to establish a credible domestic process to address serious crimes. In most instances, when the ICC intervenes, it does so in a war-affected or post-authoritarian country. The political situation in such countries is often fragile and unstable. In some instances peacebuilding processes in these countries are still ongoing and an ICC intervention will have an impact on the internal political dynamics. In situations where reconciliation efforts are unfolding, an ICC intervention can either complement or undermine the processes. This is the context in which this Regional Consultation was convened.

The ICC will only exercise jurisdiction where a state is unable or unwilling to genuinely investigate and prosecute persons accused of committing such crimes

In June 2010 the Review Conference of the Rome Statute was convened in Kampala, Uganda. At this Review Conference civil society organisations (CSOs) were recognised by the Assembly of State Parties to the Rome Statute for the role that they play in engaging with the international criminal justice system. CSOs can serve as a bridge between the ICC and communities that have gone through severe trauma from the effects of armed conflict and oppressive regimes. CSOs have sought to articulate the concerns of war-affected communities and argued that the ICC is not the preserve of states.

The ICC Review Conference convened a series of stock-taking debates which recommended and emphasised the need for continued debate on issues relating to peace and justice; the cooperation between states on matters pertinent to international criminal justice; the concept of positive complementarity and the rights of victims of armed conflict. The Institute for Justice and Reconciliation (IJR) responded to this appeal by convening this Regional Consultation.

2.2 Objectives of the regional consultation

This Regional Consultation was convened with the objective of exploring the impact that ICC interventions may have on community-level reconciliation processes. Case studies were drawn from three countries in which the ICC is currently engaged, namely: the DRC, Kenya and Sudan.

The specific objectives of the Regional Consultation were to:

1. reflect on peace and justice initiatives in Africa with a view to understanding how the interventions of the ICC can be sequenced to ensure that the stability of situation countries is maintained and the interests of victims maintained;
2. enhance the capacity of African organisations dedicated to promoting sustainable, community-level reconciliation processes by providing a platform where current experiences and lessons learned could be shared and discussed; and
3. foster civil society, government and inter-governmental engagement with a view to advancing advocacy for effective community-level reconciliation mechanisms as an aspect of positive complementarity.

The meeting also discussed the concept of cooperation with the ICC and the role of CSOs in monitoring its implementation as well as the work of civil society with victims in situation countries. The Regional Consultation facilitated an exchange of views, ideas, strategies and resources between practitioners and analysts from a range of different countries and regions.

2.3 Methodology of the regional consultation

The Regional Consultation was conducted through plenary presentations and small group discussions. The plenary sessions were facilitated by chairpersons while speakers intervened to generate comments and questions. Participants were also divided into three groups for the small group sessions. At these small groups, sessions were led by a facilitator who gave a brief introduction of the topic under discussion and guided the discussions based on pre-determined questions for the small groups as well as issues raised at the plenary.

3 Opening session

The opening session recognised that the composition of organisations and individuals present at the Regional Consultation provided an experienced group of individuals and organisations who were actively engaged in either working with the ICC or community reconciliation processes. This session was chaired by Dr Tim Murithi, Head of the IJR Transitional Justice in Africa Programme. Commenting on the topic under discussion, Dr Fanie du Toit (IJR Executive Director) noted that the Regional Consultation was well placed to assess the impact at the grassroots level of the macro developments happening at the level of international criminal justice. Dr du Toit explained that the IJR works on two levels: on the macro level where the IJR engages in the analysis of macro trends and provides policy advice, and on the community level, where the IJR engages in interventions based on community healing, research and educational initiatives. The IJR therefore constantly seeks to create platforms which bridge these two levels and bring the relevant stakeholders in these fields together.

This session noted that the problem with the international criminal justice system and specifically the ICC, as things stand today, is that Africa appears to be the exclusive laboratory for its operationalisation. The phenomenon of selective justice is self-evident because the first cases that the ICC has assessed are all in Africa, namely: Uganda, the Central African Republic (CAR), DRC, Kenya, Sudan and, more recently, Libya.

Participants in this session also discussed the necessity for the ICC to acknowledge and articulate its stance on how its investigations and prosecutions might impact on national and community peace and reconciliation initiatives. The session also deliberated on the emerging tension between the African Union (AU) and the ICC, precipitated for example as a result of the referral by the United Nations Security Council (UNSC) of conflict situations in Africa to the Court.

The problem with the international criminal justice system and specifically the ICC, as things stand today, is that Africa appears to be the exclusive laboratory for its operationalisation

4 Plenary session one: The mandate of the ICC and community reconciliation

The first plenary session was chaired by Dr Tim Murithi with presentations from Karen Mosoti, Head of ICC Liaison Office at the United Nations in New York, who presented a paper entitled 'Building an Effective International Criminal Justice System: Prospects and Challenges for the International Criminal Court'; and Dr Phillip Kasaija Apuuli, Senior Lecturer, University of Makerere, who presented his paper entitled 'The Impact of the International Criminal Court on Community Reconciliation'.

4.1 Building an effective international criminal justice system: Prospects and challenges for the ICCC

Ms Mosoti gave a historical background of the establishment of the ICC through the Rome Statute. She also outlined how the Rome Statute had contributed to the codification of international criminal law. The ICC is a treaty-based court and states voluntarily join the system. This enhances its independence and legitimacy in comparison to past international criminal tribunals.[1] The ICC is a permanent institution designed to prosecute individuals who have been accused of committing serious crimes of international concern, namely war crimes, crimes against humanity, genocide and the crime of aggression. These crimes are very detailed in the Statute and for the first time codified with an accompanying Elements of Crime document that further elaborates the composition of these crimes. It therefore has a broad although not unlimited jurisdiction. There is no statute of limitation on the crimes covered by the ICC.

The ICC Statute stipulates that through the principle of complementarity, national criminal jurisdictions have primacy of jurisdiction and that the ICC is a court of last resort. In effect, the ICC only becomes involved in a situation if the relevant state is unable or unwilling to genuinely investigate and/or prosecute persons accused of carrying out crimes within the jurisdiction of the court. One of the marked contributions of the Rome Statute to the international criminal justice system is the inclusion of the rights of victims to participate in legal proceedings even when not summoned as witnesses. In this regard, the Office of the Public Counsel for Victims has been established to cater for the participation of victims in the legal proceedings before the court.

There are currently six situations before the court: CAR, DRC, Libya, Kenya, Sudan-Darfur and Uganda. There are preliminary investigations by the Office of the Prosecutor (OTP) in Afghanistan, Columbia, Côte d'Ivoire, Georgia, Honduras, Nigeria, Guinea, the Republic of Korea and Palestine.

Fifty nations have enacted implementing legislation of the Rome Statute thereby allowing these nations to try individuals who are accused of crimes of an international nature. Presently, mediators of conflicts worldwide are required, in principle, to exclude amnesties for crimes within the jurisdiction of the ICC in keeping with UN guidelines and international law. There are an increasing number of armed forces of nations that are incorporating the provisions of the Rome Statute in their operational manuals.

The key challenge that the ICC faces includes the fact that the geographical scope of the Court is limited to the 116 countries that are party to the Rome Statute. The impact of the ICC has, however, been felt in other geographical areas that are not within the direct jurisdiction of the ICC, for example in Sudan through a referral by the UNSC through its Resolution 1593, of 31 March 2005.

4.2 The impact of the ICC on community reconciliation

Dr Apuuli gave a historical synopsis of the conflict situation in Uganda. The ICC became involved in Uganda after a state referral in terms of Article 13 (a) of the Rome Statute in December 2003. Investigations by the OTP began in June 2004. By June 2005 the ICC concluded that there was enough evidence to demonstrate that crimes within the jurisdiction of the Court may have been committed in Uganda. Arrest warrants for five individuals were then issued and these warrants were sealed. In October 2005, the five arrest warrants were

1 The Nuremberg and Tokyo Tribunals of 1945 were established by the victorious allied powers after the end of World War II and both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were constituted by the UNSC after armed conflict in the territories of the former Yugoslavia and Rwanda respectively.

unsealed revealing that the five individuals were all commanders of the armed militia group the Lord's Resistance Army (LRA), which has been engaged in violent confrontation with the Ugandan army. These individuals were Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Rsaka Lukwiya. Following the confirmed death of Lukwiya, his name was removed from the list of names pending prosecution by the ICC. The exposure of these names coincided with the LRA's withdrawal from northern Uganda into South Sudan.

Earlier in January 2005, a Comprehensive Peace Agreement (CPA) between the Khartoum Government of Sudan and the Government of South Sudan had been signed. The CPA stipulated that the LRA could no longer be stationed in South Sudan and that peace talks should be initiated between the LRA and the Uganda Government. In the meantime, the Government of Uganda had reached an agreement with the Government of Sudan for the former's armed forces to pursue the LRA within the latter's territory in South Sudan. Operation Iron Fist was the result of this pursuit that drove the LRA to Garamba National Park in the DRC. In June 2006, peace talks between the Government of Uganda and the LRA were launched but soon became subject to controversy and faltered. Participants discussed the view which suggests that one of the issues that led to the failure of the Juba Peace Agreement between the LRA and the Government of Uganda was the issuing of ICC arrest warrants for the top five LRA commanders.

Dr Apuuli stressed that the ICC is a retributive institution and therefore cannot promote reconciliation. He argued that ICC arrest warrants will have an impact on community-level reconciliation. The ICC's intervention in Uganda has polarised opinion on the ground as well as in policy fora. There is one view that argues that if these individuals have committed crimes of international concern then they should be tried. However, there are significant calls for the ICC to nuance its drive to prosecute these individuals because of the impact that this will have on promoting peace in the community and in the Northern Uganda region.

Participants discussed how the ICC intervention in Uganda has also generated a degree of controversy given the fact that the local community leaders have voiced a preference for pursuing peace with the LRA, rather than inviting a potential backlash from the movement which would further undermine their well-being.[2] The ICC's investigation and plan for prosecution means that the key interlocutors on the LRA side are subject to arrest. While this could serve the interests of retributive justice for all the atrocities that they have allegedly committed it would not chart a course for how peacebuilding, healing and reconciliation could be consolidated in the war-affected region of Northern Uganda. In keeping with its criminal jurisdiction mandate, the ICC has not issued any recognition of the ongoing peace process in Uganda, nor is it required to do so.[3]

The ICC intervention in Uganda has also generated a degree of controversy given the fact that the local community leaders have voiced a preference for pursuing peace with the LRA

Dr Apuuli also addressed the question of traditional justice mechanisms in Uganda and their required role to restore harmony and peace within communities. Traditional justice mechanisms by their very nature were used by communities and individuals in those communities to handle disagreements on the conduct of the persons concerned. While these systems might be in a position to promote restorative justice between community members for lesser transgressions and disputes, the crimes committed by the LRA are serious. There are constraints on the ability of traditional justice systems to adequately address war crimes. Participants, however, concurred that there is a role for traditional mechanisms in the wider transitional justice architecture that countries adopt.

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

3 Tim Murithi, 'Sequencing the Administration of Justice to Enable the Pursuit of Peace: Can the ICC Play a Role in Complementing Restorative Justice?', Institute for Justice and Reconciliation, Policy Brief No. 1, June 2010.

Participants argued that similar to the experiences in Rwanda, which has legally regulated the use of the traditional justice system of *Gacaca*, it is necessary to establish legislation which recognises and acknowledges the prevailing use of traditional justice systems in Uganda.

Participants discussed the controversial reality that a significant number of the LRA perpetrators are themselves victims who were abducted by armed militia. In this regard, there might be a case for such individuals to receive amnesties. Discussions also centered on the issue of how the ICC involvement in Uganda has significant impacted upon attempts to achieve a peaceful cessation of the ongoing war and signing of a comprehensive peace agreement. Some participants highlighted the fact that the ICC is in effect engaged in selective prosecution because there are also members of the Ugandan Peoples Defence Forces (UPDF) who also perpetrated serious crimes of international concern against Ugandan civilians. There the sense among the discussants was that retributive justice in the context of Uganda may not yield a stable country and that there should be an emphasis placed on utilising restorative justice processes.

There is a role for traditional mechanisms in the wider transitional justice architecture that countries adopt

5 Plenary session two: Peace and justice

The second plenary session which dealt with the issue of peace and justice was chaired by Jan Hofmeyr, Head of the IJR Political Analysis Programme. The speakers during this session were: Raphael Wakenge Ngimbi, Coordinator, Initiative Congolaise pour la Justice et la Paix and a member of the Congolese Coalition for Transitional Justice, who presented a paper entitled, 'The ICC Prosecutions and the Impact on Peace Processes in the DRC'; Moses Okello, Senior Research Adviser, Refugee Law Project, who presented a paper entitled, 'The ICC and its Impact on Peacebuilding Initiatives in Uganda'; Dr Solomon Dersso, Senior Researcher, Institute for Security Studies, who presented a paper entitled, 'ICC Arrest Warrants and their Impact on Peacebuilding Initiatives in Darfur' and Stephen Kirimi, Acting Chief Executive Officer, Peace and Development Network, Nairobi, who presented a paper entitled, 'The Impending ICC Prosecutions and their Impact on Peacebuilding Initiatives in Kenya'.

5.1 ICC prosecutions and their impact on peace processes in the DRC

Between 2001 and 2002 the series of peace negotiations and accords signed between the Government of the DRC and different armed militia groups, from Sun City in South Africa to Goma in the DRC, placed more of an emphasis on the pursuit of peace initiatives over those of justice. To concretise these agreements the National Assembly of the DRC enacted laws on amnesty in favour of armed rebel groups who were operating in the east of the DRC, and who were willing to lay down their arms in the interests of peace. However, some armed groups did not abide by the accords and continue to rein terror on civilian populations.

Ngimbi noted that four cases are being heard by the ICC in the DRC. These include cases against Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga, Matthieu Ngujolo and Callixte Mbarushimana. Thomas Lubanga, Germain Katanga, Matthieu Ngujolo and now Callixte Mbarushimana[4] have been arrested and transferred to the ICC. Bosco Ntaganda remains at large despite his whereabouts being known to the government and other key players in the international community. A key issue in the DRC has therefore been the selective cooperation by the government on the execution of ICC arrest warrants for persons within the DRC.

4 Callixte Mbarushimana, a Rwandan national, was arrested in France and transferred to the ICC to face trials for crimes committed in eastern DRC.

The controversy generated by the intervention of the ICC in the DRC surrounds the fact that the individuals currently being prosecuted at the Court are not representative of a wider selection of key perpetrators. In this context, there is the sense that the ICC is being utilised in a politically motivated fashion to pursue the government's opponents. This approach to selective justice undermines the confidence in the institution and also impacts upon peacebuilding in the country. Participants discussed the fact that one of the issues in the DRC has been the absence of victims' voices in the proceedings of the ICC. As a consequence, in the absence of all inclusive peacebuilding processes, these participants are not able to access a transitional justice process and consolidate reconciliation in the country. In addtion, some of the alleged perpetrators have taken up government positions and are actively engaged in the integration of erstwhile armed militia in the DRC's national armed forces. Therefore, impunity is still prevalent in the country.

There is the sense that the ICC is being utilised in a politically motivated fashion to pursue the government's opponents

5.2 The ICC and its impact on peacebuilding initiatives in Uganda

Okello stated at the outset that peace and justice are not mutually exclusive imperatives but rather mutually inclusive. There is a need, however, to sequence the two initiatives in order to reap the greatest benefits from interventions. With reference to the ICC interventions in Uganda, he suggested that a utilitarian approach, focusing on the use of restorative justice, should be favoured in order to first consolidate peacebuilding initiatives in Uganda.

Nevertheless, he presented some statistics indicating a shift over the past few years from peace to justice and from the tensions between the UPDF and LRA conflict to a peace and development framework. At the height of the conflict, there were 1.8 million people reportedly living in internally displaced persons' (IDP) camps under humanitarian and military control. The position is different today with most IDP camps closed down and about 50 000 people living in the remaining IDP camps. These camps are now controlled by civilians. The root problem now is not with the ICC but the government structures and this is evidenced by the triumphant military tone adopted by the Government of Uganda. Okello mentioned that from a survey conducted recently, 85 per cent of residents in northern Uganda believe there is peace but 45 per cent say that this peace is temporary, and 40 per cent perceive that it is not feasible to secure a lasting peace in the current conditions in the country.

Okello elaborated on the multifaceted nature of the peacebuilding process in Uganda. It includes a range of actors such as community leaders who are still pushing for the government to end the conflict with the LRA. There are also civil society processes which are actively advocating the adoption and implementation of a transitional justice agenda. To date, the Government of Uganda issued a Peace, Reconstruction and Development Plan (PRDP) as part of its overall strategy to consolidate peace in the country. Participants noted that these initiatives were welcome and that reconciliation efforts are still required in Uganda and it is necessary for the ICC to factor this into its ongoing prosecution interventions in the country.

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5.3 ICC arrest warrants and their impact on peacebuilding initiatives in Darfur

Controversy has defined the policy debates relating to peace and justice in Darfur following the referral by the UNSC of the Darfur situation to the ICC in 2008. The ICC issued arrest

warrants against President Omar Al-Bashir of Sudan for war crimes, crimes against humanity and genocide in Darfur. Dr Dersso mentioned that some of the arguments in these policy debates have been reductionist and have not adequately depicted the issues surrounding the conflict in Darfur. Dersso argued that the arrest warrants issued by the ICC, particularly for Al-Bashir, have complicated peace and reconciliation efforts in Darfur.

Dersso emphasised that it was necessary to debunk the common perception that the AU Peace and Security Council (PSC) was opposed to the prosecution of President Bashir. The AU's demands with respect to the ICC interventions in the country were initially related to the timing of the issuing of the arrest warrant in light of regional efforts to bring peace to Darfur and the greater Sudan territory. Consequently, the tensions between the AU and the ICC led to a decision by the AU Summit of Heads of States not to cooperate with the ICC with respect to the enforcement of the arrest warrant against President Al-Bashir. In addition, the AU halted discussions with the ICC on the establishment of an ICC Liaison Office at the AU Headquarters in Addis Ababa – an office which is aimed at coordinating the activities of the ICC in the continent's situation countries. Such an edict of non-cooperation is unique in the history of the African Union. It is the first time that the AU has utilised the diplomatic equivalent of a surface-to-air missile to express its displeasure with a fellow inter-governmental organisation. This situation also complicated the relationship between the PSC and the UNSC which effectively refused to respond to the AU's request for a deferral of Al-Bashir's prosecution.

Dersso noted that the ICC arrest warrants for key figures in Sudan also had the potential to derail the implementation of the CPA, and the recommendations for peacebuilding contained in the report of the AU High-Level Implementation Panel (AUHIP) on Darfur in Sudan.

Dersso noted that the ICC interventions relating to Darfur undermine the principle of complementarity. While it is true that the national criminal justice system in Sudan needs to be strengthened, there is still a case for using the opportunity to prosecute perpetrators within Sudan. The Government of Sudan amended the Criminal Act of 1991 to reflect international crimes. In addition, the AUHIP on Darfur Report, of 29 October 2009, proposed the establishment of a Special Criminal Court on the Events in Darfur (SCCED) and a Hybrid Criminal Court whose function would be to 'exercise original and appellate jurisdiction over individuals who appear to bear particular responsibility for the gravest crimes committed during the conflict in Darfur'.[5] These proposals are yet to be implemented and therefore the warrants issued by the ICC are still pending.

Participants argued that ICC interventions do not often take into account the historical effects of marginalisation, ethnic conflict and government oppression when considering contemporary crises. More often than not, manifestations of violent atrocities are linked to a history of violence in situation countries, and the act of merely prosecuting a handful of individuals does not address the much deeper structural and socio-economic issues which a community has to confront in order to ensure stability and reconciliation in the future.

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5.4 The impending ICC prosecutions and their impact on peacebuilding in Kenya

Kirimi briefly outlined Kenya's history since attaining independence in 1963, with a specific focus on the ethno-political dimensions of governance in the country. He noted that Kenya had characteristically experienced violence, prior to and during previous election periods.

5 African Union High-Level Panel on Darfur, *Darfur: The Quest for Peace, Justice and Reconciliation,* PSC/AHG/2(CCVII), Addis Ababa: African Union, 2009, p. 86.

The same occurred sporadically and in the preparations for the elections. The 2007 presidential, parliamentary and civic elections were marred by violence after the incumbent, President Mwai Kibaki and the leader of the opposition, Raila Odinga, both claimed that they had won the poll. The violence that ensued left over 1 300 persons dead and over 400 000 internally displaced.

On 28 February 2008 a mediation effort lead by Dr Kofi Annan, the former Secretary General of the United Nations, culminated in the signing of the National Accord and Reconciliation Agreement by Mr Kibaki, the current President and Mr Odinga, the present Prime Minister of Kenya. The National Accord Act paved the way for the Commission of Inquiry into the Post Election Violence (CIPEV), which released a report containing recommendations for the establishment of a national criminal tribunal that met international standards to try persons accused of committing crimes related to the post-election violence in Kenya. Kirimi highlighted that the condition for failing to abide by this recommendation was that the two principals would agree to refer the situation in Kenya to the ICC for investigation and prosecution.

Kirimi identified challenges that the Government of Kenya faced in attempting to establish a national tribunal. After several failed attempts at the establishment of a national tribunal, Dr Annan submitted the CIPEV report to the ICC Prosecutor and a sealed envelope containing names of individuals that were identified in the CIPEV report as having played key roles in planning, organising, facilitating or funding the post-election violence in Kenya. The ICC Chief Prosecutor on his own motion requested the ICC Pre-Trial Chamber for authorisation to initiate investigations in Kenya. On 31 March 2010, Pre-Trial Chamber II granted the Prosecutor the authorisation to open an investigation *proprio motu* into the situation in Kenya, following the post-electoral violence of 2007. In 2011, the OTP's investigations culminated in the naming of six prominent Kenyans who the Chief Prosecutor deems most responsible for the crimes related to the post-2007 election violence in Kenya. These individuals include: William Ruto, Henry Kosgey, Joshua Arap Sang, Francis Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali. All of these suspects appeared before the ICC on 7 April 2011.

Mr Kirimi noted that the impact of the impending ICC prosecutions was illustrative of a loss of confidence among Kenyans in the country's judicial system as well as its political leaders. However, the ICC interventions have also augmented the level of tension in the country and have impacted on a national reconciliation process that is faltering. Participants noted that some of the indicted individuals are powerful regional leaders and could potentially mobilise their ethnic groups to effectively disrupt governance and stability in the country. With the 2012 national elections approaching the situation in Kenya remains on a precarious footing with indications that some groups are already re-arming themselves in anticipation of a potential escalation of conflict.

ICC interventions have also augmented the level of tension in the country, and have impacted on a national reconciliation process that is faltering

6 Group discussions: Regional issues on peace and justice

Participants noted that peace and justice are mutually reinforcing processes. The over-emphasis on one at the expense of the other does not lead to long-term stability. There was considerable agreement among participants that the consideration of the sequencing of peace and justice should be assessed and implemented on a case by case basis. Participants noted that even though the ICC does not have the mandate to pursue peace and reconciliation, the Court should consider these initiatives as it engages in countries affected by armed conflict, as well as take into account the concerns of the victims. Participants noted that while

many victims desired peace, some also demanded accountability for crimes committed during the conflicts and they acknowledged that both the ICC and national criminal jurisdictions can play an important role in meeting these needs.

Even though the ICC does not have the mandate to pursue peace and reconciliation, the Court should consider these initiatives as it engages in countries affected by armed conflict, as well as take into account the concerns of the victims

It was noted that at the ICC level the participation by victims in the legal proceedings can only be enhanced through state cooperation, which is necessary to facilitate their engagement with the Court. There is still a discrepancy in the ability of victims to engage and participate in the proceedings of the Court. Victims in Uganda, for example, have had an opportunity to engage with the ICC whereas in Darfur the Court has not yet been able to establish a durable presence due to the insecurity in the region. Participants also discussed the possibilities of traditional justice mechanisms complementing other justice initiatives in promoting peace, particularly in situations where the crimes committed do not fall under the category of war crimes, crimes against humanity or genocide. Participants also called for the ICC to engage civil society organisations in Africa more actively in order to solicit their views on community-level reconciliation processes and the impact of interventions by the international criminal justice system.

7 Plenary session three: Cooperation and complementarity

The third plenary session centered on the themes of cooperation by states with the ICC and the principle of complementarity. The session was chaired by Silas Chekera, Defence Lawyer for Charles Taylor at the Special Court for Sierra Leone which was convened in The Hague. The speakers on the panel were: Yolande Dwarika, Legal Counsellor, South African Embassy to The Netherlands, who presented a paper entitled, 'The ICC and National Criminal Jurisdictions: The Function of Complementarity'; Professor Ron Slye, Commissioner, Kenya Truth, Justice and Reconciliation Commission, who presented a paper entitled, 'Complementarity: The Kenyan Way – A Case Study'; and Stephen Lamony, Africa Outreach Liaison and Situations Advisor, Coalition for the International Criminal Court, New York, who presented a paper entitled, 'The ICC's Outreach and Collaboration in Africa: The Need for Cooperation'.

7.1 The ICC and national criminal jurisdictions: The function of complementarity

Dwarika began her presentation on the principle of complementarity by stating that the African continent was an experimental terrain for recent developments of international criminal justice. She stated that it was important to remember that African states were at the forefront in the Rome Conference of Plenipotentiaries negotiating for the Statute and were very vocal in presenting convincing arguments for its adoption. African states remain an integral and important part of the international criminal justice system as they represent the largest block of states at the Assembly of States Parties of the ICC Statute. There are currently thirty African countries who are State Parties to the Rome Statute.

Dwakira noted that states were realistic at the Rome conference in that they were not willing to completely cede their sovereignty on criminal jurisdiction to the ICC. They retained the primary responsibility for punishing those who are deemed most responsible for serious crimes for themselves. This is the essence of the principle of complementarity. Dwarika stated that there were three advantages in emphasising the centrality of national criminal prosecutions, namely (1) justice would be administered and delivered at the national level, (2) victims would be closer to the legal proceedings, and (3) the position of the ICC as a court of last resort would remain a key feature of international criminal justice.

The principle of complementarity is innovative in the international criminal justice system. When functioning correctly, the ICC will effectively only function as an extension of national criminal jurisdictions. The Rome Statute created an international criminal justice system whose efficacy is dependent on the workings of both the ICC and national courts.

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Dwarika stated that although states have primacy of jurisdiction with respect to war crimes, crimes against humanity and genocide, unwillingness and inability by states to genuinely investigate and prosecute persons accused of committing these crimes, will activate the principle of complementarity. Once a situation is before the ICC, the assessment of this inability or unwillingness of a state to investigate and prosecute is legally determined by the ICC Chambers.

Articles 17 and 19 of the Rome Statute govern issues related to admissibility and challenges of cases before the ICC. The jurisprudence of the ICC has developed a two-pronged approach on the admissibility of cases before it. Firstly, it interrogates whether there are any initiatives in the particular state to launch the investigation and prosecution of crimes which fall under the jurisdiction of the ICC. Where there is inactivity, the case then becomes admissible to the ICC. Secondly, if there are initiatives in the particular state, an interrogation is carried out by the ICC Chamber concerned with the matter to establish whether the investigations and prosecutions are genuine and whether they conform to the standards set out in the Rome Statute system. The ICC addressed an admissibility challenge with reference to its activities in the Central African Republic. In that particular case the challenge was unsuccessful.

Participants engaged with the issue of the criticism of double standards leveled against the ICC for initiating cases solely on the African continent. Dwakira observed that a proper interpretation of the principle of complementarity reveals that countries that are indeed unable and unwilling to handle serious crimes of international concern will be the subject of the ICC's focus as the Court's key aim is to address the persistence of impunity. This, however, does not exempt countries from other regions from being subject to interventions by the ICC.

Dwarika argued that the notion of positive complementarity was one way of improving the efficacy of the Rome Statute system. The focus would be on building capacity among State Parties to the Rome Statute and would address the issues of the inability of a state to investigate and prosecute crimes. In this regard, there is a role for the ICC, CSOs and the international community in enhancing positive complementarity among States Parties of the Rome Statute. As a way forward, Dwarika encouraged enhancing the synergies between recipient and donor countries to focus on capacity building in states so that they can address serious crimes of international concern occurring in their territory.

7.2 Complementarity: The Kenyan way – a case study

Professor Ron Slye observed that Kenya is the first situation where the ICC Prosecutor has used his *proprio motu* powers to initiate an investigation under Article 13 (b) of the Rome Statute. Kenya had the opportunity to invoke the principle of complementarity by establishing a national special tribunal with a mix of international and national judges and other tribunal staff members. However, the country had already experienced a lack of prosecution of state actors who committed gross human rights abuses in Kenya's history, as well as the absence of a credible, impartial and independent judiciary.

On 3 July 2009, the Government of Kenya sent a high level team to meet with the ICC Prosecutor and his team. They pledged that by September 2009 they would provide Ocampo with an update of the investigations and prosecutions relating to the post-election violence, measures taken to protect the identity of witnesses and the efforts in setting up a Special

Tribunal for Kenya. The understanding at the time was that failure to provide this to the OTP would then lead to Kenya making a referral to the ICC for the opening of investigations in a similar fashion to what transpired in Uganda, DRC and CAR.

On 9 July 2009 Annan, who mediated the Kenyan peace agreement, was handed an envelope containing a list of suspects believed to be most responsible for the 2007 post-election violence accompanied by documents containing supporting evidence. On 22 July 2009, the Government of Kenya brought into effect the Kenya Truth, Justice and Reconciliation Commission (TJRC) which is one of five commissions created in 2008 after the end of the negotiations for peace in Kenya.

There were attempts made to amend the TJRC Act to give the TJRC criminal jurisdiction on the post-election violence. The commissioners of the TJRC issued a press release indicating that they were not interested in prosecutorial powers but they were in support of the creation of a complementary process to prosecute persons accused of committing crimes during the post-2007 election violence. In August 2009, a bill on the creation of a Special Tribunal for Kenya was published. In November 2009, the Kenyan Parliament failed to muster sufficient quorum to discuss the contents of the bill which led to its demise, deploying a tried and tested parliamentary strategy to reject bills presented before it.

Slye noted that Kenya had adopted two strategies to stop the ICC process: the challenge of admissibility under Article 19 of the Rome Statute and seeking a deferral under Article 16 of the ICC Statute. The UNSC indicated that it would not support the deferral. In making its case that the principle of complementarity should prevail, the Kenyan government's challenges on the basis of admissibility were based on the recent constitutional, electoral, police and judicial reforms. In August 2010, the Kenyan president promulgated a new constitution for the country and the argument is that the new constitutional dispensation in Kenya provides for a framework of prosecution of serious crimes of international concern. However, there have been challenges in implementing the constitutional reforms.

Participants observed that the reforms in Kenya were proceeding at a slow pace and almost seem to be reacting to external pressure from actors such as the ICC. The country's demonstration of a historical lack of political will reinforces the 'unwillingness' test of the principle of complementarity. The admissibility challenge must show that actual investigation and prosecution of the six suspects is happening in Kenya. Overall it is maybe too early to assess whether the incursion of the ICC into the dynamics of Kenyan politics has had a positive or negative effect. The fact that the country is debating confronting impunity after years of misrule is a welcome development and contributes towards infusing a sense of urgency into the country's transitional justice architecture.

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7.3 The ICC's outreach and collaboration in Africa: The need for cooperation

Lamony defined outreach by the ICC as the process of establishing a sustainable two-way communication between the ICC and the situation countries which are subject to the ICC's investigations and proceedings. Cooperation with the ICC by states is governed by Part IX of the Rome Statute; Article 86, in particular, obliges States Parties to cooperate with the ICC in its investigations and prosecution of cases.

Lamony noted that without cooperation of states, the ICC is in effect prevented from carrying out its full mandate. In Sudan, there have been significant challenges to cooperation with the ICC. The Sudanese government has declined to surrender its nationals including

its president, Al-Bashir, whose arrest warrants are pending. Nevertheless, there are two suspects who voluntarily appeared before the ICC and their cases are currently being considered. The non-compliance by Sudan complicates the ICC's efforts to collect evidence and also engage victims with regard to their right to participate in the legal proceedings. Chad has allowed ICC staff members to visit refugee camps in its territory to speak to victims from Sudan and collect evidence. However, Chad has also demonstrated a reluctance to fully cooperate with the ICC. In July 2010, Al-Bashir visited Chad but the government, which is a State Party to the Rome Statute, declined to arrest the Sudanese president, on the grounds that it was upholding an AU decision not to cooperate with the ICC. Similarly, Al-Bashir has also travelled to Kenya and Djibouti. This illustrates the limitations of the ICC fulfilling its mandate. The open defiance of the member states of the AU with respect to executing the ICC's arrest warrants does not augur well for the future relevance of the Court. If heads of state and government are openly defying the ICC then its role in implementing international criminal justice in Africa will gradually become eroded. In the absence of an international police force willing to arrest alleged perpetrators, the ICC continues to rely on the goodwill of its State Parties and other inter-governmental organisations to function effectively. Participants noted that the ICC should be striving to mend its fractured political relationship with the AU if it hopes to regain the judicial initiative on the African continent.

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Uganda and the DRC have both cooperated with the ICC. Uganda has provided the OTP with information on the indicted LRA commanders. In May and June 2010, Uganda hosted the ICC Review Conference in Kampala. However, participants questioned whether such a degree of intimacy between the ICC and the Government of Uganda would enable it to be impartial when it has to pursue charges against members of the Ugandan army if they are implicated as alleged perpetrators of serious crimes. The DRC has arrested suspects and transferred them to the ICC. Bosco Ntaganda, however, remains at large even though the DRC government knows about his whereabouts. Furthermore, Ntaganda has interacted with the UN Organisation Stabilisation Mission in the DRC (MONUSCO) but this has also not led to his arrest by the UN. This suggests that the UN is also not in a position to fully uphold its obligations due to the political constraints under which it operates. Kenya has paid lip service to cooperation with the ICC to avoid the ICC from prosecuting its citizens. It has nevertheless established an ICC Field Office in Kenya to assist in the investigation of the cases currently before the Court.

8 Plenary session four: The rights of victims

The fourth plenary session addressed issues relating to the rights of victims and was chaired by Dr Yusuf Nsubuga, Director of Basic and Secondary Education, Ministry of Education, Government of Uganda. The speakers on the panel were: Lino Owor Ogora, Project Officer, Justice and Reconciliation Project, Uganda, who presented a thought-provoking paper entitled, 'The Rights of Victims in the Context of the ICC Interventions and Community Reconciliation Initiatives'; and Stella Yanda, Executive Secretary of the Initiative Alpha Women Peace Association, who presented a paper entitled, 'Contextualising Sexual Violence as an International Crime in the DRC'.

8.1 The rights of victims in the context of ICC interventions and community reconciliation initiatives

Ogora focused on the perspectives of victims. Between 28 000 and 38 000 children have been abducted and coerced into serving as soldiers by the LRA in Northern Uganda. At the peak of the conflict approximately 1.8 million people were internally displaced. It was reported that an estimated 1 500 people were dying per week in the IDP camps. The ICC's intervention in Uganda was initially opposed by traditional and religious leaders as well as segments of civil society on the grounds that a blanket amnesty was in effect and efforts were underway to convene the Juba Peace Process. This amnesty process encouraged a number of LRA combatants to strive to reintegrate into their communities. The ICC intervention altered the dynamic of this demobilisation and reintegration process. There was a marked decrease in the number of combatants taking advantage of the amnesty, even though the ICC arrest warrants were only issued for five leading LRA commanders. The important factor is that the ICC lacked local legitimacy and support largely due to misperceptions about what the Court was striving to achieve.

Ogora noted that the ICC is to be commended on its efforts to combat impunity in Africa, but the timing of its interventions were not conducive to enabling Uganda to chart its own course towards stability and ultimately to reconciliation. The UPDF was in the process of executing 'Operation Iron Fist', which sought to neutralise and eliminate the LRA. The IDPs in the camps bore the brunt of these attacks, which meant that there was a significant constituency that emphasised the pursuit of peace. Ogora stated that for the LRA commanders who attended the Juba Peace Process by proxy representation, the issue of the ICC arrest warrants was high on their list of concerns. The LRA commanders systematically called for the arrest warrants to be withdrawn in order to facilitate a ceasefire and a genuine peace. Ogora observed that in the absence of a withdrawal of the arrest warrants, the LRA commanders had another issue which they could exploit in declining to sign the Juba Peace Agreement. However, Ogora concurred that the ICC intervention was not the only reason why the Juba Peace Process failed.

Ogora stated that there is a perception that the ICC is insensitive to the needs of the victims. In one particular instance, for example, when the images of what appeared to be modest detention facilities at the ICC in The Hague were published in Ugandan newspapers, they were met with derision and disbelief. When these detention facilities were juxtaposed with the squalid living conditions of the IDP camps, a number of victims questioned the form of justice that the ICC would mete out. Even though this question might seem trivial to the wider issue of administering justice, this was an instance of poor public relations and an ineffectual communication strategy by the ICC towards victims who are supposed to be its primary referents.

There is a perception that the ICC is insensitive to the needs of the victims

Ogora posed a challenging question: if the arrest warrants issued by the ICC for the LRA commanders played a role in denying victims the right to a lasting peace, can we conclude that a body which infringes on the right to lasting peace is in effect promoting the rights of victims? If the victims in Northern Uganda could not pursue their own strategies to achieving peace, would this not infringe on their rights?

Ogora noted that at the grassroots level the ICC is not perceived as being impartial in Uganda. Even though atrocities have been committed by both the LRA and UPDF, no arrest warrants have been issued against any official of the UPDF. In addition, the ICC Prosecutor announced his arrest warrants in a joint press conference with the President of Uganda, Yoweri Museveni, who is the commander-in-chief of the UPDF. It is also a known fact that

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the investigations by the OTP at IDP camps were carried out with the assistance of the UPDF, yet victims of the conflict have intimated that the UPDF has also perpetrated crimes against them.

Ogora argued that the ICC is not the ideal institution to address matters of transitional justice in Northern Uganda because the temporal jurisdiction of the ICC (the ICC only has jurisdiction for crimes committed after 1 July 2002) limits the scope of justice for international crimes committed in Uganda since the start of the war in 1986. The ICC Trust Fund for Victims (TFV) that looks at reparations for victims is also limited by this temporal jurisdiction and therefore it cannot provide for reparation to victims who have suffered harm prior to 1 July 2002. The issue that arises in the minds of victims is whether those who suffered transgressions prior to 2002 are any less worthy that those who were victimised in subsequent years.

Ogora elaborated on the two mandates of the TFV in dispensing with reparations to victims. The first pertains to reparations linked to an ongoing case. The OTP has adopted a strategy of calling a limited number of witnesses in order to limit the number of individuals exposed to potential reprisals. This in effect limits the ability of the TFV to intervene in fulfilling its first mandate with respect to victims. The TFV also has the mandate to receive funds from other sources, however, the funds disbursed are shrouded in secrecy. The organisations operating in Northern Uganda, where a bulk of the victims of the conflict in Uganda live, are under a strict confidentiality agreement with the TFV and can neither disclose amounts received nor publicise to the victims that they have the capacity to provide physical, psycho-social and material assistance. This practice is very exclusionary towards the victims.

Participants acknowledge the need to implement transitional justice mechanisms in Northern Uganda, especially now that IDP camps have closed down and people are returning to their communities. There was a sense that community reconciliation initiatives could assist in addressing the thousands of cases where atrocities have been committed in the communities. Ogora emphasised that there is a role for traditional justice in advancing community reconciliation in Uganda. It is necessary to systematically document the essence and procedures of traditional justice mechanisms which can serve as a component of the wider transitional justice architecture adopted by countries.

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8.2 Contextualising gender-based violence as an international crime in the DRC

Yanda's presentation focused on gender-based violence in the DRC. The Rome Statute recognises gender-based violence in its category of war crimes and crimes against humanity. Yanda noted that gender-based violence in the DRC originates from the structural violence in the country's institutions and laws which systematically discriminate against women. Specifically, the DRC's family laws still entrench discrimination on the basis of gender and undermine women's rights.

Yanda stated that gender-based violence, notably rape, has been used as a tactic during conflict to harm, humiliate and brutalise civilian populations. Women are abducted and used as sex slaves. The women who give birth to children fathered by armed militia create a situation in which there is severe community discord. Young men have also been subject to sexual violence by armed militia in the form of sodomy.

Given the patriarchy entrenched in the DRC's judicial system, the local courts do not

adequately address the issues of gender-based violence. In the absence of a local jurisdiction competent to address gender-based violence, it is necessary for the international criminal justice system, and in particular the ICC, to ensure that there is an adequate focus on this serious category of crimes. In this regard, the processes through which victims, particularly of gender-based violence, can access the international criminal justice system need to be widely circulated through a public awareness raising campaign.

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9 Group discussions on cooperation, complementarity and victim's rights

9.1 The rights of victims

The group discussions on the rights of victims noted that it was necessary to consider the role that sequencing can play in ensuring that prosecutorial processes do not undermine peace processes. Participants observed that a majority of the victims in the situation countries under the mandate of the ICC are unaware of their rights as stipulated in the ICC Statute or in international law in general. Therefore, the ICC, governments and civil society should collaborate on promoting awareness-raising about the role of the ICC in situation countries. In particular, civil society can develop training manuals which can provide victims and other citizens with an understanding of how to engage with the Court. In addition, the ICC can liaise with governments and civil society organisations in enabling victims to participate in the proceedings of the Court. On the issue of reparations, participants noted that it was the primary obligation of the state to provide reparations to victims. However, given the existence of an ICC reparations regime, victims should also have access to reparations that may be ordered by the Court and the Trust Fund for Victims. In order for this to proceed effectively, it will be necessary to overcome the secrecy and lack of clarity which currently surrounds the procedure for disbursing funds.

A majority of the victims in the situation countries of the ICC are unaware of their rights as stipulated in the ICC Statute or in international law in general. The ICC, governments and civil society should collaborate on promoting awareness-raising about the role of the ICC in situation countries

9.2 Complementarity

The group discussions on complementarity observed that reconciliation is a process that is aimed at restoring and healing the fabric of society. In this regard, the key challenge on this issue is one of how to reconcile criminal prosecution efforts with reconciliation initiatives within communities. There should ideally be no competition between the institutions which are tasked to achieve this objective. The ICC and national criminal jurisdictions should be actively seeking to break the cycle and culture of impunity for serious crimes of international concern. The ICC, national courts and traditional mechanisms should work in tandem to achieve this goal. Therefore, building upon the notion of positive complementarity, an emphasis should be placed on enhancing the capacity of national criminal

An emphasis should be placed on enhancing the capacity of national criminal jurisdictions as well as recognising the supportive role that traditional justice mechanisms can play in providing the overall transitional justice architecture

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10 Roundtable discussion session five: Justice and reconciliation in Africa – the way forward

The final plenary session was chaired by Justice Dan Akiiki-Kiiza, Presiding Judge of the International Crimes Division of the Ugandan High Court. He introduced the speaker, Professor Charles Villa-Vicencio, a member of the Board and former Executive Director of the IJR. The speaker challenged the perception of participants at plenary with his paper entitled, 'Reflections on the ICC, Justice and Reconciliation'.

10.1 Reflections on the ICC, justice and reconciliation

Professor Villa-Vicencio began by highlighting that the ICC eradicates impunity for war crimes, crimes against humanity and genocide. It strengthens the laws of emerging democracies to counterbalance the draconian laws of the perpetrators of the old regime. It does not promote prosecution to the potential collapse of an emerging democracy. The ICC constitutes a major step forward in the international struggle for the respect for human rights.

His presentation raised questions on the implementation of the Rome Statute and the ICC's interventions on the African continent. Villa-Vicencio argued that the 2010 ICC Review Conference avoided genuinely addressing a number of issues. He quoted the words of Jean Ping, Chair of the AU Commission who stated that the 'ICC is a part of the imperialism of the West to civilise Africa'. He noted that this phrase captures the polarisation which still afflicts the relationship between the AU and the ICC. Ultimately, this does not augur well for the ICC's role in Africa, particularly if this perception becomes entrenched on the continent. Villa-Vicencio argued that as a result of the tensions between the AU and the UNSC, and by extension the ICC, the impact of the ICC on global justice will be determined in Africa.

Transitional justice is a process where the outcome is uncertain but the process itself is important to the parties

He noted that transitional justice is a process where the outcome is uncertain but the process itself is important to the parties. Although the parties may not agree on the process, the outcome is owned by all the parties allowing these parties the confidence to return to the table for further and better outcomes. Likewise, justice cannot be achieved without the aggrieved having the right to be heard.

He noted four points that are crucial to transitional justice as a process. First is the relationship between globalisation and universalism. Globalisation in practice has resulted in the imposition of values, insights and resources of the centre onto the periphery. Universalism as opposed to globalisation is important to the debate on transitional justice. International law cannot be reduced to that imposed through the barrel of a gun or to a police officer with an arrest warrant in hand. Authentic and legitimate international values can only emerge through continued and ongoing debate that takes into account the views of the periphery as seriously as those of the centre.

Second, there is a serious entanglement between the law and politics. All accused persons on charges of war crimes, crimes against humanity and genocide say in their standard defence that they are the victims of political manipulation and organisation. Politics is intertwined with how the law is implemented in Africa. It is important to recognise this reality.

Third, on individual and collective responsibility, the focus of the international criminal

justice system is on individual criminal responsibility. This emanates from the Nuremberg principles which were established after the Nuremberg and Tokyo Tribunals after World War II. However, those individuals identified by the international criminal justice system are invariably shaped by their interaction with organisations which gives birth to organisational thinking. The question to ask then is to what extent does the ICC also contribute to the thinking on collective culpability? This is an important consideration that the Review Conference did not address.

Fourth, Villa-Vicencio argued that the ICC is being used as a political tool to serve certain ends. The ICC has delved into dangerous political territory despite its persistent claims of being an independent and impartial court. He challenged participants to ask why the international community has ignored the African traditional justice mechanisms. If as much effort and muscle was put into the African traditional justice mechanisms as is put into the ICC, there may be progress in peacemaking, peacebuilding and reconciliation in Africa.

The ICC has delved into dangerous political territory, despite its persistent claims of being an independent and impartial court

Villa-Vicencio ended his presentation by stating that the struggle for international and African judicial complementarity has only just begun and we would be making a crucial error if we try to sweep it under the carpet. The Review Conference was therefore a missed opportunity to address some of these issues. Transitional justice is a process and there is no one-size-fits-all.

11 Policy recommendations

The Regional Consultation generated the following policy recommendations:

- Even though the ICC does not have the mandate to pursue peace and reconciliation, the Court should consider these initiatives as it engages in countries affected by armed conflict, as well as take into account the concerns of the victims and affected communities in its interventions. In this regard, the office of the ICC Prosecutor should issue a policy paper on its strategy for addressing the tension between the administration of prosecutorial justice and the pursuit of peace and reconciliation.
- There is a role for traditional mechanisms in the wider transitional justice architecture that countries adopt for the promotion of reconciliation. Therefore, it is necessary to raise the awareness of traditional justice mechanisms by systematically documenting the function and procedures of traditional justice as complementary alternative justice mechanisms.
- The ICC and the AU should strive to conclude a Memorandum of Understanding establishing a working relationship between the two institutions. Such an MOU should include the creation of an ICC Liaison Office in Africa to coordinate the work of the ICC on the continent and to assist in meeting the objectives of the working relationship between the two institutions.
- Concomitant with positive complementarity, it is necessary to commit resources to building the capacity among states to enhance their ability to utilise national criminal jurisdictions to investigate and prosecute crimes which fall under the jurisdiction of the ICC.
- The ICC, governments and civil society should collaborate on promoting awareness-raising about the role of the ICC in situation countries. There are situations in which victims do not know the purpose and function of the Court. The ICC therefore needs to be more transparent and inclusive particularly on the issue of victim participation in the Court's proceedings.

- In addressing gender-based violence, the ICC should adopt a sensitive approach to the effects of legal proceedings on victims. The ICC should work in tandem with government and civil society to ensure that there are in-country trauma support processes to ensure effective victim participation in relation to these crimes.
- African civil society organisations and academic institutions should undertake analysis and research on issues pertaining to ICC interventions and their impact on peace and reconciliation on the continent. The Court, as well as governments, should support these initiatives.

12 Conclusion

The ICC interventions in Africa have precipitated debate about the role of transitional justice processes in stabilising war-affected and post-authoritarian countries. The focus of this Regional Consultation was therefore timely and relevant to the contemporary efforts to administer international criminal justice in Africa. The fact that the ICC system has declined to publicly recognise how its interventions can adversely affect community-level reconciliation processes, suggests that there is a substantial amount of dialogue that needs to be conducted within the Court, government, academia and civil society on this issue. The Institute for Justice and Reconciliation will continue to play its role in this regard and will do so in partnership with governments, inter-governmental organisations and the ICC.

The Regional Consultation discussed how the ICC is a court of last resort and not a court of first instance. Ideally, national criminal jurisdiction should take precedence in efforts to address impunity. This establishes the principle of complementarity between the ICC and national criminal jurisdictions, the idea being that domestic efforts to address impunity are preferable to the international fora. However, when a State Party is unwilling or unable to operationalise such a national criminal jurisdiction then the ICC has to step in. While this principle is clear and has been established with respect to retributive or punitive justice, the Rome Statute does not make any special provisions for restorative justice and reconciliation processes. This is clearly an omission that needs to be rectified given the highly volatile and politicised situations that the ICC has become involved in and may engage in in the future. Rather than avoiding addressing the issues and challenges that have been precipitated by the ICC's interventions in Africa, there are merits for assessing how sequencing can be informed by an understanding that there can be a constructive relationship between administering punitive justice and pursuing inclusive peace and reconciliation.

The Rome Statute does not make any special provisions for restorative justice and reconciliation processes. This is clearly an omission that needs to be rectified given the highly volatile and politicised situations that the ICC has become involved in and may engage in in the future

APPENDIX A: AGENDA FOR THE REGIONAL CONSULTATION

DAY ONE: MONDAY, 21 FEBRUARY 2011

	CHAIR: DR TIM MURITHI
09.00 – 09.15	**WELCOME** Dr Fanie du Toit, Executive Director, Institute for Justice and Reconciliation Dr Tim Murithi, Head Transitional Justice in Africa Programme, IJR
09.20 – 09.35	**Building an Effective International Criminal Justice System: Prospects and Challenges for the International Criminal Court** Karen Mosoti, Head of ICC Liaison Office at the United Nations, New York
09.35 – 10.05	**The Impact of the ICC on Community Reconciliation** Dr Philip Kasaija Apuuli, Senior Lecturer, University of Makerere
10.05 – 10.30	**Questions and Discussion**
10.30 – 10.45	TEA AND COFFEE BREAK
	CHAIR: JAN HOFMEYR
10.50 – 11.10	**The ICC Prosecutions and their Impact on Peace Processes in the DRC** Raphael Wakenge Ngimbi, Coordinator, Initiative Congolaise pour la Justice et la Paix
11.10 – 11.30	**The ICC and its Impact on Peacebuilding Initiatives in Uganda** Moses Okello, Senior Research Adviser, Refugee Law Project
11.30 – 11.50	**ICC Arrest Warrants and their Impact on Peacebuilding Initiatives in Darfur** Dr Solomon Dersso, Senior Researcher, Institute for Security Studies, Addis Ababa
11.50 – 12.10	**The Impending ICC Prosecutions and their Impact on Peacebuilding Initiatives in Kenya** Stephen Kirimi, Acting Chief Executive Officer, Peace and Development Network, Nairobi
12.10 – 13.00	**Questions and Discussion**
13.00 – 14.00	LUNCH BREAK
14.00 – 15.00	**Small Group Discussions in Regional Formation on Peace and Justice**
15.00 – 15.15	TEA BREAK
15.15 – 16.30	**Feedback from Small Groups on Discussions on Peace and Justice**
19.00	COCKTAIL RECEPTION
20.00	DINNER

DAY TWO: TUESDAY, 22 FEBRUARY 2011

CHAIR: SILAS CHEKERA

09.00 – 09.25 **The ICC and National Criminal Jurisdictions: The function of Complementarity**
Yolande Dwarika, Legal Counsellor, South African Embassy to The Netherlands

09.25 – 09.45 **Complementarity: The Kenyan Way**
Prof. Ron Slye, Commissioner, Kenya Truth Justice and Reconciliation Commission

09.45 – 10.05 **The ICC's Outreach and Collaboration in Africa: The Need for Cooperation**
Stephen Lamony, Africa Outreach Liaison and Situations Advisor, Coalition for the ICC, New York

10.05 – 10.30 **Questions and Discussion**

10.30 – 10.45 TEA AND COFFEE BREAK

CHAIR: DR YUSUF NSUBUGA

10.50 – 11.10 **The Rights of Victims in the Context of the ICC Interventions and Community Reconciliation Initiatives**
Lino Owor Ogora, Project Officer, Justice and Reconciliation Project (Gulu)

11.10 – 11.30 **Contextualising Sexual Violence as an International Crime in the DRC**
Stella Yanda, Executive Secretary, Initiative Alpha Women Peace Association (DRC)

11.30 – 12.00 **Questions and Discussion**

12.00 – 13.00 LUNCH BREAK

13.00 – 14.15 **Small Group Discussions on Cooperation with the ICC, the Principle of Complementarity and the Rights of Victims**

14.15 – 15.00 **Feedback from Small Group Discussions on Cooperation with the ICC, the Principle of Complementarity and the Rights of Victims**

15.00 – 15.15 TEA AND COFFEE BREAK

CHAIR: JUSTICE DAN AKIIKI-KIIZA

15.20 – 15.40 **Reflections on the ICC, Justice and Reconciliation**
Prof. Charles Villa-Vicencio, Senior Research Fellow and Member of IJR Board

15.40 – 16.00 **Questions and Discussion**

16.00 – 16.15 **CLOSING REMARKS AND VOTE OF THANKS**
Dr Fanie du Toit and Dr Tim Murithi

APPENDIX B: LIST OF PARTICIPANTS

Ahmed Hussein Musa Hassan	Paralegal Association of Blue Nile, Sudan
Boniface Ojok	Project Officer, Justice and Reconciliation Project, Uganda
Prof. Charles Villa-Vicencio	Board Member, Institute for Justice and Reconciliation, South Africa
Fatuma Mohamud Mohamed	Commissioner, Kenya National Cohesion and Integration Commission
Glen Mpani	Programme Director, Open Society Initiative, South Africa
Irenee Bugingo	Institute de Recherche et de Dialogue pour la Paix, Rwanda
Jean de Dieu Basabose	Shalom Educating for Peace, Rwanda
Jean-Marie Kavambagu	Ligue Iteka, Burundi
Justice Dan Akiiki-Kiiza	Head of the War Crimes Division, Ministry of Justice, Uganda
Karen Mosoti	Head of the Liaison Office, International Criminal Court, New York
Lino Owor Ogora	Justice and Reconciliation Project, Uganda
Moses Chrispus Okello	Senior Research Adviser, The Refugee Law Project, Faculty of Law, Makerere University, Uganda
Pauline Onunga	Justice and Reconciliation Officer, African Union, Sudan
Dr Phillip Kasaija Apuuli	Senior Lecturer, Department of Political Science, University of Makerere, Uganda
Prof. Ron Slye	Commissioner, Kenya Truth, Justice and Reconciliation Commission
Rachel Nyadak Paul	Upper Nile Women's Welfare Association, Sudan
Raphael Wakenge Ngimbi	Initiative Congolaise pour la Justice et la Paix, DRC
Silas Chekera	Defence Counsel, Special Court for Sierra Leone, The Hague, The Netherlands
Dr Solomon Dersso	Senior Researcher, Peace and Security Council Report Programme, Institute for Security Studies, Ethiopia
Stella Yanda	Executive Secretary, Initiative Alpha Women's Peace Association, DRC
Stephen Kirimi	Executive Director, PeaceNet, Kenya
Stephen Lamony	Africa Outreach Liaison and Situations Adviser, Coalition for the International Criminal Court, New York
Taban Kiston	South Sudan Law Society, Sudan
Yolande Dwarika	Legal Counsel, South Africa Department of International Relations and Cooperation, The Hague, The Netherlands
Dr Yusuf Nsubuga	Director of Basic Education, Ministry of Education, Uganda

Institute for Justice and Reconciliation Staff, Cape Town, South Africa

Allan Ngari	Project Officer, Uganda Desk, Transitional Justice in Africa Programme
Anthea Flink	Programme Administrator, Transitional Justice in Africa Programme
Aquilina Mawadza	Senior Project Leader, Zimbabwe Desk, Transitional Justice in Africa Programme

Carolin Gomulia	Head of Strategic Management and Communications
Dr Fanie du Toit	Executive Director
Dr Tim Murithi	Head of the Transitional Justice in Africa Programme
Friederike Bubenzer	Senior Project Leader, Horn of Africa Desk, Transitional Justice in Africa Programme
Jan Hofmeyr	Head of the Political Analysis Programme
Kate Lefko-Everett	Senior Project Leader, Political Analysis Programme
Marian Matshikiza	Senior Project Leader, Great Lakes Desk, Transitional Justice in Africa Programme
Paulos Eshetu	Research Assistant, Transitional Justice in Africa Programme