



Summary Report¹

“The Relationship between International Criminal Justice and Conflict Resolution: Focus on the International Criminal Court”

A Working Meeting

December 12-13, 2005
Joan B. Kroc Institute for Peace & Justice
University of San Diego

Purpose

This working meeting was designed to focus on the work of the International Criminal Court (ICC), the challenges facing it as it pursues justice in ongoing conflicts, and the opportunities for the ICC to enhance chances for peace. This meeting was convened as a follow-on to annual meetings previously held under the auspices of the Center for Human Rights and Conflict Resolution at the Fletcher School of Law and Diplomacy at Tufts University. Although we regretted that neither of the co-directors of that program were able to attend, Graham Dyson and Joyce Neu, members of that group, took part in this meeting.

From the perspective of the peacemaker, the meeting examined how peace processes function once the ICC takes a case. The case of Uganda, where indictments were issued in May and made public in October 2005², was examined as an exemplar of likely future cases facing the ICC

¹ The Joan B. Kroc Institute for Peace & Justice would like to thank Emiko Noma, rapporteur and author of this report.

² The first announcements of the indictments did not come from the ICC itself. On Sunday, October 2, 2005, New Vision, the government-supported Ugandan newspaper, reported that “UN Under-Secretary General for Political Affairs Ibrahim Gambari said that the warrant of arrest was written on Tuesday but has not been publicised by the ICC, a unit of the UN, until now.” On October 10, the UN’s IRIN ran an article, “Uganda: ICC indictments to affect northern peace efforts, says mediator.” The article notes that “The ICC last week issued five indictments for LRA commanders - the first ever to be issued by the court.” International Justice Tribune (www.justicetribune.com) reported December 5, 2005 that the arrest warrants were transmitted September 27 to Uganda, Sudan, and the DRC. Because the warrants were kept sealed, Moreno Ocampo was prohibited from speaking about them. According to the official ICC website, the OTP unsealed the indictments on October 13, 2005 and announced them on October 14 (see statement by Prosecutor Luis Moreno Ocampo, October 14, 2005 at http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf)

(e.g., Darfur, the Democratic Republic of the Congo [DRC]). The goals of the meeting were to open a discussion on these issues and develop a number of proposals for consideration by non-governmental organizations (NGOs) and the ICC.

Overview of the ICC

Justice Richard Goldstone presented an overview of the ICC, including a breakdown of the organs and staffing of the ICC, the structure and policies of the Office of the Prosecutor (OTP), a brief history and timeline of the ICC's development, and the process of referring cases to the ICC and its subsequent selection of investigations. Cases can be referred to the ICC by a state party, by the UN Security Council, or by individuals or nongovernmental organizations. The presentation also covered the jurisdiction of the ICC and a summary of the three current investigations: Uganda and the DRC, both state-referred cases – and Darfur, referred by the UN Security Council.

Overview of the Uganda Case

Dr. Joyce Neu provided background information on the almost 20-year conflict in northern Uganda, the first case accepted for investigation by the ICC. The historical context was presented in order to gain an understanding of the conflict and the ICC's current role in the country. In December 2003, Ugandan President Yoweri Museveni referred the situation in the north to the ICC, requesting that Prosecutor Luis Moreno-Ocampo investigate the rebel group, the Lord's Resistance Army (LRA). The formal investigation began in July 2004; sealed arrest warrants were issued in May 2005 and unsealed and made public in October 2005.

Several issues have arisen with respect to the ICC's involvement in Uganda. During the investigations and subsequent ICC activities, including trials, the ICC needs to work with other international organizations, including the UN, to ensure that victims and those testifying are given security. There needs to be a guarantee of protection for the Acholi people in the north – the indictments may be a hindrance to the peace process as those indicted may be less willing or able to engage in dialogue, and more willing to go on the offensive to prove they are still viable as a rebel group. This places the Acholi people – particularly those living in internally displaced peoples (IDP) camps – in a vulnerable situation.

Procedurally, the ICC must concern itself with the arrest of the indictees. The ICC relies entirely on member states for their policing activities; it is now up to the government of Uganda or its regional neighbors to make the arrests. Despite ongoing military campaigns against the LRA, the government of Uganda has been unable to capture LRA leaders over the past two decades; the government of Sudan, providing safe harbor and support for the LRA for almost a decade, may be unwilling to do so.

The government of Uganda referred the case to the ICC, yet the Prosecutor has stated that he will examine all relevant parties to the conflict, including the government army, the Uganda People's Defense Forces (UPDF). Though the OTP has announced this intention, indictments have only

been issued for LRA leaders; word of investigations into the UPDF has yet to reach civil society in the north³.

The Ugandan government may believe it can simply retract the referral, and nullify the work of the ICC, if the UPDF is implicated. It is not clear that the government understands that once an investigation is launched, it can only be delayed by the UN; it cannot be revoked. A sustained educational outreach campaign needed to have taken place to ensure that civilians, other parties in civil society, and even the government itself, understood the process and procedures of the ICC.

Following the overview of the ICC and the case of Uganda participants focused on the specific issues of complementarity, timing of ICC activities, role and protection of witnesses and vulnerable populations, and securing justice in the midst of conflict.

Complementarity

This principle, elaborated in the Rome Statute, says that the ICC is the court of last resort and that states have a duty to exercise criminal jurisdiction. If they are unable or unwilling to do so, then the ICC may get involved. With respect to this principle, can local mechanisms of justice – including non-judicial systems – work in concert with the process undertaken by the ICC? The Acholi people of Northern Uganda have traditional systems of justice that may not resemble western ideas of adjudication since they are not punitive in nature. A question discussed was whether such traditional systems of justice can be considered to fulfill the criterion of complementarity in light of the work of the ICC.

Complementarity seems to apply in cases where the alternative systems of justice contain a punitive element – the system must incorporate a criminal prosecution and this system must be written into law. For example, the gacaca courts in Rwanda involve punishment, and therefore, complementarity could apply – meaning that the ICC would respect the mode of justice and not take up the case. Justice Goldstone suggested that in northern Uganda, where the indigenous reconciliation process does not involve a criminal prosecution or punitive measures, it may not satisfy the principle of complementarity because the process is strictly restorative, not punitive. Indigenous systems can work in concert with the ICC, however. The ICC indicted only the top five rebel leaders in Uganda; child abductees (who are a large portion of the LRA) and other LRA combatants can use traditional processes and the Amnesty Law to reconcile and reintegrate into their communities.

Timing of ICC activities

Participants discussed whether the ICC should work with peacemakers in considering timing and actions. Reiterating the idea that the Prosecutor's role is legal and judicial, Justice Goldstone said that after taking up a case, political concerns can no longer be a factor for the actions of the

³ The OTP released a public document January 11, 2006 stating that “inquiries and analysis of information and potential evidence” regarding the UPDF are ongoing. This statement was released in anticipation of a status conference to be held January 13, 2006. See http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-76_En.pdf

OTP. Though peacemakers in northern Uganda were initially stunned by the news that the ICC would take the case referred by President Museveni, many local leaders and NGOs did meet with Prosecutor Moreno-Ocampo during the investigatory period. However, this begs the question, do you want a prosecutor, who is supposed to be independent, meeting with peacemakers who are part of political processes? It is important for peacemakers to be informed of the judicial processes, but some participants argued that political discussions of timing and actions with the OTP should be avoided.

One of the reasons peacemakers are concerned about timing of indictments is the feasibility of peace processes continuing once arrest warrants have been issued. Would indicted war criminals be able or willing to engage in peace talks? Would the other parties to the conflict or the mediators be able to meet with the indictees? Participants agreed it was difficult to draw general conclusions because each case will have a specific context and the repercussions of introducing indictments are unpredictable. In Bosnia, indictments against Republika Srpska President Radovan Karadzic and military commander Ratko Mladic in July 1995 made it impossible for them to attend the Bosnian peace talks in Dayton, Ohio. Justice Goldstone noted that then-President of the Federal Republic of Yugoslavia, Slobodan Milosevic, after being indicted for war crimes in the Balkans wars, did not let the indictment deter him from meeting with international mediators and agreeing to NATO's conditions for bringing to an end the military action on Kosovo. This point supports the premise that the Prosecutor should not concern him/herself with political matters. In the case of Uganda, the LRA leaders are hesitant to engage in peace talks because they fear arrest and worse. The government will no longer offer protection to the primary mediator, Betty Bigombe, because it would appear the government was catering to indicted leaders. Though immediately after the indictments were unsealed there was an upsurge in violence by the LRA, the long-term repercussions are still unknown.

The role and protection of witnesses and vulnerable populations

What voice do victims and vulnerable populations have in whether and how the cases move forward since this may further endanger them? While victims are entitled to have their voices heard, they do not necessarily need to be consulted for prosecution to move forward. If the main purpose of the ICC is deterrence and prevention, the question was raised about where the concerns of victims fit in. Tribunals, truth commissions – any mode of justice – cannot be disconnected from the people they purport to be helping. In Uganda, many victims of the LRA and the government army opposed the timing of the ICC involvement during an ongoing peace process – the first such process in a decade. They viewed the ICC intervention as a threat to peace. Victims need a voice to bridge the disconnect between justice and reconciliation mechanisms.

Articles 43 and 68 of the Rome Statute establishing the ICC provide for a Victims and Witnesses Unit within the Registry of the ICC. Though this is an important step in protecting victims, there is a concern over how this translates on the ground. In Uganda, Northerners were aware of who spoke with ICC investigators. Cooperating with the ICC compounds the vulnerability of victims and their families. Reforms are needed concerning how victims are approached and handled when they testify; in addition, education needs to take place to inform civilians what the Victims' Unit does.

Securing justice in the midst of conflict

What mechanisms are needed to ensure the ICC's effectiveness? First, participants agreed on the necessity of a clear line of communication from the ICC to the various stakeholders, including those affected by the conflict. Second, more education is needed on the procedures of the ICC with respect to member states so that governments are clear on the consequences of inviting the ICC to investigate. Third, the ICC needs to carefully scrutinize such requests from states to understand the motivations behind such requests. Uganda was cited as an example where many saw the President inviting the ICC to investigate as a political maneuver against his political enemies in Sudan and within Uganda. Fourth, protection for witnesses, investigators, envoys, and vulnerable populations needs to be assured. Otherwise, collection of information is compromised. Finally, the ICC's Assembly of States Parties may be called on to assist in applying pressure or aid to fellow states matters in the arrest of indictees.

Participants initially centered on the debate between whether the use of international criminal law is consistent with the goal of peace in Uganda. Does the pursuit of justice affect the peace process in a positive or negative manner? With a mandate under Chapter VII of the UN Charter, the ICC is considered a peace-restoring mechanism; yet, there is the potential that the prosecution of war criminals can end negotiations and sabotage the attempt for peace. Justice Goldstone said that the Prosecutor is only to make decisions with respect to legal issues; any political effects are to be of no concern to the OTP. According to the ICC's mandate, it is the UN Security Council that has the political power to choose when investigations can be suspended. If the OTP chooses to take political factors, such as peace processes, into account, the work of the ICC can be undermined.

The development of international criminal law, particularly since the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), was posited to have had a deterrent effect on government actors, as military lawyers and policy-makers are more conscious of war crimes. However, the likely deterrent effect on non-state actors – such as terrorists or rebels – remains to be seen. It is very difficult to measure deterrence. This applies not just to international justice efforts but even to domestic justice efforts.

Conclusion: Proposals and work in progress

This preliminary working meeting on the ICC elicited several proposals and participants shared work in progress on this issue. Most of the ideas concerned creating dialogue among the relevant parties to the issue.

Proposals

1) A small network of those attending the meeting, and other interested parties, such as the group formerly constituted under the aegis of the Fletcher School of Law and Diplomacy's Center for Human Rights and Conflict Resolution, should be developed to further the discussions begun here. This network could be an e-mail group and would do such things as alert members to relevant meetings and research being conducted on the ICC and peace processes.

- 2) Though it is important for peacemakers and NGOs to foster dialogue with the OTP to understand the workings of the ICC, it was suggested that a more effective approach might be to understand and engage with the Registry and the Victims and Witnesses Unit of the ICC. Since the Uganda referral is the most developed ICC prosecution to date, it is critical to take action now. The procedures created and followed in this case will inevitably serve as the default procedures in future cases.
- 3) On Uganda, a proposal was made that because roughly half of the national budget is funded by international donors, NGOs and other relevant institutions should encourage donor governments to put pressure on Museveni to resolve the conflict and to refrain from using the ICC as a political tool. With the United States contributing non-lethal military aid to the Ugandan army, with a new government in Norway eager to be seen as a peace broker, and with Norwegian Jan Egeland, Undersecretary-General for Humanitarian Affairs, raising awareness of the plight of northern Ugandans, there is great opportunity for third parties to pressure Museveni.

Work in progress

- 1) The Carter Center is considering convening a high-level conference involving experienced scholars and policy-makers from a broad range of fields (e.g., international law, the social sciences, diplomacy, conflict resolution, etc.). The goal would be to discuss actual experiences in post-conflict situations, such as the former Yugoslavia, Rwanda, and South Africa. Case studies would be examined to uncover any consistency regarding justice mechanisms and their effects.
- 2) The Institute for Conflict Analysis and Resolution at George Mason University is engaged in action research regarding a dialogue between the ICC and humanitarian or other NGOs; informing the ICC of victims' issues concerning the justice process; and surveying stakeholders to gain a general understanding of their knowledge and concerns about the ICC.



--- AGENDA ---

December 12, 2005 at 6:30pm: Opening Dinner, Conference Room G

December 13, 2005 *All sessions will take place on the 2nd floor, in the Conflict Resolution Center*

- 8:30 – 9am* Continental breakfast
- 9:00am* Welcome and introductions
- 9:30am* Overview of the International Criminal Court (R. Goldstone)
- 10:30am* Break
- 10:45am* The case of Uganda (J. Neu)
- 11:30am* Questions for discussion:
- 1) Does the ICC work with peacemakers in considering timing and actions?
 - 2) With complementarity a key component of the ICC, can the ICC consider non-judicial justice (e.g., Truth Commissions, other indigenous mechanisms for justice) satisfactory?
- 12:30pm* Lunch, Conf. Rm. H
- 1:30pm* Questions for discussion:
- 3) What is the ICC's responsibility to protect people made vulnerable by the ICC process?
 - 4) Can victims have a say in whether and how the case moves forward?
 - 5) What is the feasibility of peace processes continuing once indictments have been issued?
 - 6) What mechanisms are needed to ensure the ICC's effectiveness (e.g., securing arrests when indictments are issued, protection of vulnerable people)?
- 3:30pm* Draft plan for next steps



--- **PARTICIPANTS** ---

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