The International Criminal Court: Current Cases and Contemporary Debates

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This note is intended to offer a brief overview of the current work of the International Criminal Court (ICC) and the contemporary debates which surround it. The cases currently under examination by the ICC concern crimes committed in the Democratic Republic of Congo (DRC), Uganda, Sudan and the Central African Republic (CAR). The Note gives some background to these cases and highlights a number of the problems and questions raised by them. It also contains a wider discussion of the problems facing the Court as it attempts to establish itself, as well as the issues it faces in trying to bring to justice, in an international court, leaders whose cooperation in promoting peace processes is viewed by some commentators as equally, and sometimes more, important.

For a fuller discussion of the structure and procedures of the Court, see Library Research Paper 01/39, 'The *International Criminal Court Bill [HL]*'. For a discussion of the British Government position regarding the Court, see Library Standard Note SN/IA/297, 'International Criminal Court: Update'.

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1 The International Criminal Court

1.1 Introduction

On 17 July 1998 a multilateral convention known as the Rome Statute[1] was adopted by 120 states, providing the legal basis for the establishment of the International Criminal Court (ICC). It entered into force less than four years later, on 1 July 2002, after it achieved the required 60 ratifications. As of 20 April 2009 there were 108 States Parties to the Rome Statute. These include 30 African, 14 Asian, 16 East European, 23 Latin American and Caribbean and 25 Western European and other states.[2] The United States (US), Russia, China and Israel are not parties to the Statute (though the US, Israel and Russia have signed it without ratifying it).

The ICC is the first permanent international court established to bring an end to impunity for the most serious crimes, including war crimes, crimes against humanity, genocide and crimes of aggression.[3] Discussion of such a court dates back to the early 1860s when Gustav Monnier, one of the founders of the Red Cross, made an early proposal. His idea was revived once again in the period following the end of the Second World War, although a full five decades had passed before the Court finally came into existence. Previously, *ad hoc* tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone (SCSL) were set up in response to specific conflicts. The ICC in contrast has a mandate to deal with the most serious crimes committed in any country and at any point after 2002, when the Rome Statute came into force.

1.2 Operational Principles of the Court

The core principles of the Court are that it should operate with *complementarity*, in reference to the *gravity of crimes committed* and *in the interests of justice*.[4]

The word 'complementarity' has come to encapsulate that principle by which the Court operates in conjunction with, and as a support to, domestic systems of justice.[5] The term comes from Article 1 of the Rome Statute:

> An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, *and shall be complementary to national criminal jurisdictions*. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.[6] [emphasis added].

The ICC is thus authorised to act as a support to national jurisdiction. Early ICC jurisprudence has determined that this entails moving against specific transgressions where the national government or judiciary *cannot or will not prosecute* offenders who have committed crimes within host countries. As such, the principle of complementarity is

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1 *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9

2 UN, *Status of Multilateral Treaties Deposited with the Secretary-General*

3 These are defined in a specific manner in Articles 5,6,7,8 of the Rome Statute. The crime of aggression is, however, as yet undefined.

4 For the key underlying goals of the ICC, see ICC, *Rome Statute of the International Criminal Court* [undated; viewed 20 April 2009]. For a fuller discussion of the structure and procedure of the Court, see House of Commons Library Research Paper 01/39, 'The *International Criminal Court Bill [HL]*', 2001

5 W. Schabas, *An introduction to the International Criminal Court*, 3rd edition, 2007, p174

6 Article 1, Rome Statute

specifically designed to prevent governments from invoking that of sovereignty to protect the worst offenders,[7] whilst simultaneously guarding national jurisdiction against 'excessive' encroachments from an international body.

The importance of 'gravity' in relation to the crimes to be investigated by the ICC is established in Article 17(1)(d) of the Rome Statute. This underlines that only crimes deemed sufficiently serious should require further action by the Court.[8] In considering evidence for what would become the Court's first trial (that of Thomas Lubanga; see below), the Pre-Trial Chamber established the 'gravity threshold' as mandatory, explaining that in deciding whether or not to admit a case:

> The Chamber holds that the following two features must be considered. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale(…) Second, in assessing the gravity of relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.[9]

The Pre-Trial Chamber argued that the gravity threshold was intended to ensure that only senior leaders be prosecuted by the Court. The underlying purpose of such an approach is to maximise the Court's deterrent effect, by holding accountable those with greatest authority (and thus responsibility) when atrocities are committed.[10]

The third central principle of the ICC's operation is that it executes its duties 'in the interests of justice'. In practice, what this means is that the Prosecutor and the Court must base the decision as to whether to pursue an investigation on what likely impact this decision will have on the wider situation in which the crimes under question are said to have been committed. According to the NGO Coalition for the International Criminal Court, this principle reflects a compromise between the pragmatic necessities of processes like truth commissions and the pressing need to end impunity for serious crimes. It allows the Prosecutor to desist "from acting either in relation to opening an investigation or in continuing with an investigation that has been opened if it appears to him that the decision to desist would be in the interests of justice", though "the decision of the Prosecutor not to investigate or not to prosecute based on these grounds may be reviewed by the Pre-Trial Chamber on its own initiative, or at the request of the referring State or the Security Council".[11]

1.3 Case Selection

According to the Rome Statute, there are three ways in which the Prosecutor can bring a case before the ICC. These are State Party referral, Security Council referral and on the *proprio mutu* (independent) authority of the Prosecutor himself:[12]

- States that are party to the Rome Statute can invite the ICC to investigate crimes committed on their territory based, amongst other things, on their inability to prosecute criminals successfully themselves. This, as we will see below, has been the case with Uganda, DRC and CAR.

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7 "The International Criminal Court and Africa", *RUSI News Brief* , Vol 28 no 8, August 2008

8 Article 17(1)(d), Rome Statute.

9 See W Schabas, *An introduction to the International Criminal Court*, 2007, p186

10 *Ibid*. p187.

11 Coalition for the International Criminal Court, *Interest of Justice Background* [undated; viewed 20 April 2009]. See Coalition for the International Criminal Court, *Interest of Justice* [undated; viewed 20 April 2009] for a host of conflicting civil society opinions on how to interpret 'the interest of justice'.

12 W Schabas, *An introduction to the International Criminal Court*, 2007, p144

- Security Council referral, by contrast, occurs when, under the provisions of Chapter VII of the Charter of the United Nations (UN), the Security Council perceives a threat to international peace and security and takes responsibility for it by referring the matter to the Court for investigation. This has been the case with Sudan.

- The final way in which the Court's jurisdiction is triggered is under the stipulations of the Prosecutor's *proprio mutu* authority. Though a highly contentious principle (and one which initially aroused great opposition amongst the major powers),[13] this constitutes a central component of the ICC's workings. In essence, it stipulates that the Prosecutor has the power to initiate investigations into the most serious of crimes independently of any external referral, providing there is evidence of sufficiently grave crimes, that the investigation will be complementary and that the interests of justice will be served.

The Prosecutor must first go through the Pre-Trial Chamber, which acts like a trial court, and which has the power to authorise investigations and arrest warrants on the basis of evidence presented.[14]

2 Current cases

2.1 Democratic Republic of Congo

The ICC has opened four cases against Congolese rebel leaders: Thomas Lubanga, Mathieu Chui, Germain Katanga and Bosco Ntaganda. All four hail from the Ituri region and all but Ntaganda are in custody. At the time of writing, only Lubanga's case had begun.

Lacking a State Party or Security Council referral, the ICC's Chief Prosecutor, Luis Moreno-Ocampo, decided to intervene on the *proprio mutu* authority to initiate proceedings on the basis of information on crimes within the jurisdiction of the Court. He publicly invited civil society and governmental suggestions from around the world as to where the Court's investigations should begin, following which in July 2003 he announced that the Court would focus on the Ituri region of the country as being the most urgent situation to be investigated. However, before he had begun his investigation, the government of the DRC decided itself to refer the case of the Ituri region to the Court.[15] At this stage the referral concerned crimes committed in the Ituri region in general, and not specific individuals.

On 21 June 2004 the Pre-Trial Chamber was announced, after citing an estimated 5,000 to 8,000 unlawful killings in the region in the period since 1 July 2002. However, because this was the first case before the Court it took some time, and much discussion, to determine the procedure by which the Pre-Trial Chamber would progress. On 10 February 2006 the Prosecutor's application for an arrest warrant for Thomas Lubanga was granted. Mr Lubanga, who was already imprisoned in the DRC, was transferred to The Hague in March 2006. The arrest warrant concerned the recruitment of child soldiers by members of the *Forces Patriotiques pour la Libération du Congo* (FPLC). Mr Moreno-Ocampo described the charges as follows:

> The case against Thomas Lubanga Dyilo is a case about children. It is a case about young children. The Prosecution evidence will show that children as young as seven, eight and nine years old were also victims of these types of crimes. Many of the children were abducted. Abducted on the road. Abducted from schools. Abducted from

[13] W Schabas, *An introduction to the International Criminal Court*, 2007, p160
[14] *Ibid*. pp160-3
[15] *Ibid*. p42

> their parents' houses. In the presence of their families. The families did not resist. They did not resist because they were threatened with death. They feared being killed. Other children joined the FPLC troops voluntarily. They did so for a variety of reasons, such as the desire for revenge of orphans whose families were killed by the militias opposing the FPLC. Such as the wish to gain social status. Such as the need for protection and shelter, and basic survival. Such as having access to food. The children were instructed to kill the enemies regardless of whether they were combatants or civilians. The commanders forced children, boys and girls, to fight at the frontlines. Forced by threats of execution. Many child soldiers were killed. Others were seriously wounded. The Prosecution will present to the Court details of the individual cases of six children who were victims of these crimes. As the Prosecution will show, their experiences reflect those of hundreds of other children".[16]

On 20 March 2006 Lubanga became the first person to sit before the ICC to confirm the charges against him and to set a date for the first hearing of the Pre-Trial. This eventually took place on 9 November 2006. The final decision to confirm the charges against Mr Lubanga concerning the enlistment, conscription and active use of child soldiers and to press ahead with the trial was made on 29 January 2007.[17]

It took another two years for the actual trial to begin, on 26 January 2009. This followed a number of delays including one attributed to the failure of the prosecution to disclose evidence which might have exonerated Mr Lubanga. The Times reported on the long, and much-delayed, process of bringing Lubanga to trial:

> The trial is the climax of six years' work by the court's first Prosecutor, Luis Moreno-Ocampo of Argentina, who set up investigations into four African conflicts…'The first trial is the first trial, so I think it's very, very important for the court to show how well it works,' Mr Moreno-Ocampo said last week. However, he has faced strong criticisms over the way the case had been handled and for putting the trial at risk….The three judges hearing the trial, headed by the British High Court judge Sir Adrian Fulford, ruled last summer that the trial would have to be 'stayed' because key evidence that might have exonerated Mr Lubanga had not been disclosed to the court or the defence. The court ordered Mr Lubanga's release, but he was kept in custody pending an appeal which lifted the 'stay' and refixed the trial for today.[18]

The trial is significant because it represents the inaugural trial before the ICC. How the trial proceeds will therefore set a precedent for future trials. The ICC has also set a precedent by having the victims of war crimes represented. No other international or *ad hoc* tribunal has done this and more than 90 victims will participate in the proceedings.

More significant still is the fact that the trial is focused on the use of child soldiers, a frequent casualty of conflict situations in many countries. It will highlight the plight of these children and, human rights groups hope, also provide a deterrent to the future use of children in conflict. Human Rights Watch have even reported that the trial was already having an impact on the conduct of militia leaders in the DRC when they conducted a survey in 2007:

> It was clear that militia leaders knew that Lubanga was being tried on charges relating to child soldiers and were aware of their own vulnerability to prosecution. Militia leaders in Ituri who in the past openly admitted to having children in their ranks denied having any children under their command. The charges have also helped raise awareness

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16 Luis Moreno Ocampo, Opening remarks, Fifth session of the Assembly of State Parties, 23 November 2006

17 W. Schabas, *An introduction to the International Criminal Court*, 2007, p47

18 "African warlord is first to stand trial at war crimes court", *The Times*, 26 January 2009

> among those who previously thought that crimes relating to child soldiers were not 'serious' - including parents in Ituri who gave their children to militia groups willingly.[19]

Mr Lubanga's fellow prisoners have also been indicted for the forced conscription of child soldiers, as well as for other, similarly serious war crimes. Katanga and Chui are set to face trial this year for their role as commanders of the *Forces de Résistance Patriotiques en Ituri* (FRPI) during the massacres at Bogoro. Ntaganda is still at large and is reportedly the new leader of the *Congrès National pour la Défense du Peuple* (CNDP) the following the overthrow of Laurent Nkunda. As such, he now represents a potentially new player in Eastern DRC's long and tortuous peace process.[20]

2.2 Sudan

In 2005, after much diplomatic wrangling, the UN Security Council tasked Prosecutor Moreno-Ocampo with investigating crimes committed in the Western Sudanese region of Darfur. This referral was widely condemned by the Sudanese and their allies, though received much praise from activists around the world[21].

In February 2007, the Prosecutor announced that Ahmad Muhammad Harun and Ali Kushayb had been identified as key suspects, accused of war crimes and crimes against humanity. The two men had been selected as two of those bearing greatest responsibility for the hundreds of thousands of deaths that had occurred in Darfur over recent years of the conflict between rebels and the government/pro-government militias. Harun was identified because, as Minister of State for the Interior in 2003-4, he had portfolio responsibility for Darfur. He has denied the charges against him: "My conscience is clear. I have no regrets" and added that the ICC was in effect conducting a political vendetta against Sudan that had little or nothing to do with justice:

> We believe the ICC has digressed from its main objective and become part of the international political conflict. It is another phase of international colonisation. It targets mainly the Africans. It reminds us of the 19th century, when the white people were dominating here in Africa.[22]

Kushayb is the leader of the Janjaweed militia said to be responsible for the most serious crimes in the region.

Although arrest warrants were issued in May 2007, both men remain at large, as Sudan has so far refused outright to cooperate with the ICC warrants.[23] In part as a result of this fact, in July 2008 Moreno-Ocampo applied for an international arrest warrant for the President of Sudan, Omar Hassan al-Bashir, citing evidence of personal and political responsibility for genocide, crimes against humanity and war crimes, including the murder of at least 135,000 people in Darfur. This was the first such move ever against a serving head of state. International Crisis Group welcomed the charges:

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19 Human Rights Watch, *The International Criminal Court Trial of Thomas Lubanga*, 23 January 2009

20 Jacques Kahorha, "ICC Urges Congo to Hand Over Ntaganda", *Institute for War and Peace Reporting*, 23 January 2009. For further information on the DRC, see Library Research Paper 06/51, *The African Great Lakes Region: An End to Conflict?* 25 October 2006, and Library Standard Notes SN/IA/4503 *The African Great Lakes: An Update,* 13November 2007and SN/IA/5012, *Democratic Republic of Congo: An Update*, 17 March 2009

21 "ICC judges issue arrest warrants for Darfur suspects", *Reuters*, 2 May 2007

22 "Mastermind of Darfur tragedy says allegations are a colonialist plot", *The Guardian*, 4 December 2008

23 ICC, *Investigation: Situation in Darfur, Sudan*, ICC-02/05 [viewed 20 April 2009]

> In charging President Omar Hassan al-Bashir of Sudan with genocide, crimes against humanity, and war crimes in Darfur, and asking the International Criminal Court to issue a warrant for his arrest on Monday, Chief Prosecutor Luis Moreno-Ocampo marked a momentous day for international justice. These are the first charges of genocide and the first charges against a head of state to be brought before the court.[24]

Such an assessment was not universal, however. A number of academics and activists were highly critical of both the timing and the content of the indictment, for a number of differing reasons. As *The Economist* summarises:

> Once again, the battle between peace and international justice has been joined. On one side are those who predict that this week's decision by Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court (ICC), to seek to indict Sudan's president, Omar al-Bashir, for genocide will bring even more bloodshed and suffering to Darfur, his country's ravaged western region. On the other are those who say that giving in to Mr Bashir's blackmail--by withholding an indictment in the hope that he will co-operate with UN and other peacekeepers--will undermine the fledgling court's credibility and encourage other murderous tyrants.[25]

When the arrest warrant was finally issued by the Pre-Trial Chamber on 4 March 2009, the charge of genocide had been rejected, though this did little to calm the controversy surrounding the Court's decision. At present, President Bashir remains at large and it is unclear whether the international community will act to arrest him, should he enter a State Party to the Rome Statute.[26] When he attended the annual summit of the Arab League in Qatar in March 2009 (which was also attended by the UN Secretary-General Ban Ki-moon), a joint statement was issued by the Arab League saying, "We stress our solidarity with Sudan and our rejection of the ICC (International Criminal Court) decision".[27] Qatar is not a State Party to the Rome Statute.

2.3 Uganda and The Lords Resistance Army

In 2003 the Government of Uganda referred "the situation concerning the Lords Resistance Army (LRA)" to the ICC. Though the referral was made by the Ugandan government with regards specifically to the LRA, the Prosecutor was clear that he would investigate *all* crimes committed in Northern Uganda, and not solely those attributable to the LRA. Nevertheless, to date, no government officials have been indicted, while in October 2005 arrest warrants were issued for five leaders of the LRA on grounds of war crimes and crimes against humanity. These warrants were for Joseph Kony, the LRA's leader, Vincent Otti, Raska Lukwiya, Okot Odiambo and Dominic Ongwen. Otti and Lukwiya have since died (the former reportedly assassinated by Kony after expressing a desire to surrender[28] and the latter believed to have been killed in battle[29]) while the others are all still at large.

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[24] Nick Grono, "Justice in Sudan not the same as peace", *Boston Globe*, 16 July 2008.
[25] "ICC: Sudan's leader is accused but others can expect to follow", *The Economist*, 19 July 2008
[26] Under Article 93 of the Rome Statute, States Parties are required to cooperate with the Court in the arrest of suspects.
[27] "Arab leaders back 'wanted' Bashir", *BBC News online*, 30 March 2009
[28] "Ugandan rebel deputy feared dead", *BBC News online*, 7 November 2007
[29] ICC, *Facts and procedure regarding the situation in Uganda*, October 2005.

These arrest warrants, the first to be issued by the ICC, have generated much debate in Uganda and more widely.[30] Many credit them with having given a fresh impetus to peace talks, while others see them as precisely the obstacle to the successful completion of those talks. One thing is certain, however – Kony, Odiambo and Ongwen remain at large.[31]

2.4 Central African Republic

In December 2004, the government of CAR referred the situation of crimes committed within the country since 2002 to the ICC. This was a State Party referral made after the *Cour de Cassation*, CAR's highest court, determined that the national judicial system could not handle the investigations required to prosecute the full scope of crimes committed during the conflict between governmental forces and rebel groups. On 22 May 2007, the Prosecutor announced his decision to open an investigation into abuses in CAR, focusing on allegations of killing and rape in 2002 and 2003, a period of intense fighting between the government and the rebels. On 23 December 2008, the Court issued an arrest warrant for a former Vice President of DRC, Jean-Pierre Bemba, for abuses committed by a rebel group he commanded during its involvement in the conflict in CAR during 2002-3.[32] He was arrested in Brussels the following day and is currently in ICC custody awaiting trial. According to the ICC, this is the first trial in which the charges of sexual violence will far outweigh those of murder.[33]

3 Criticism and Debate

Although the ICC has managed to survive despite the early opposition it faced,[34] the institution still remains far from free of critique. Its detractors are many and varied. Some point to what they perceive as its neo-colonial bias in case selection; others to what they see as its jeopardising of peace in the service of a dogmatic attachment to certain notions of justice. This section will outline some of the key criticisms of the work of the Court to date and will highlight a number of the major debates in which it is involved.

3.1 Justice vs. Peace?

According to certain commentators, in many conflicts there is a fundamental tension between establishing justice and creating peace. One does not automatically equate to the other, it is held, and bodies like the ICC which fail to recognize this only serve to undermine the latter in doctrinaire service of the former.[35] The cases of Uganda and Sudan are widely invoked to illustrate this position.

In the case of Uganda, for example, the leaders of the LRA have repeatedly cited their fear of the ICC arrest warrants as a key obstacle to their signing a permanent peace deal.[36] Joseph Kony has stated openly that until the warrants are lifted, he and his men will not leave the

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30 For example, Human Rights Watch, *Benchmarks for assessing possible national alternatives to ICC court cases against LRA leaders*; Tim Allen, "Defending the ICC", *Prospect*, May 2007; Richard Dowden, "ICC in the dock", *Prospect*, May 2007; P Clark and N Waddell, "Dilemmas of justice", *Prospect*, May 2007; and A Branch, "Uganda's civil war and the politics of ICC intervention", *Ethics and International Affairs*, Vol 21.2, summer 2007.

31 "Congo terror after LRA rebel raids", *BBC News*, 23 October 2008

32 "Court Examines Alleged Abuses in Central African Republic", *Washington Post,* 23 May 2007

33 ICC press release, *Prosecutor opens investigation in the Central African Republic*, 22 May 2007

34 W Schabas, *An introduction to the International Criminal Court*, 2007, p32

35 Tristan McConnell, "Uganda: peace vs justice?", *Open Democracy*, 14 September 2006

36 CAFOD, Christian Aid, Conciliation Resources, Quakers and World Vision, *Memorandum submitted to the UK Parliament's International Development Committee inquiry on the prospects for sustainable peace in Uganda*, July 2007

bush.[37] Similarly, according to the Sudanese Ambassador to the UK, Omer Mohammed Ahmed Siddig, the fragile peace process between the Sudanese government and the various Darfuri rebel groups has been shattered by the decision to indict President Bashir,[38] while others have even claimed that the Comprehensive Peace Agreement (CPA) that ended the long and bloody war between North and South Sudan is now in jeopardy.[39]

Such perspectives have produced numerous critiques of the ICC and its backers for pursuing justice when really what matters is peace. Iman Kurdi, for example, has argued that it is "folly" to try and attain court-justice before ending hostilities,[40] while the UN Head of Humanitarian Affairs, Jan Egeland, has openly stated that peace must be the top priority.[41] Clearly, then, for the detractors of the ICC, promoting the cessation of hostilities is paramount, and the Court is guilty of failing to take this sufficiently into account.

In contrast to these opinions, however, a number of activists, observers and academics have been quick to identify apparent gaps in the arguments outlined above. In the case of Uganda, for example, it is claimed that the ICC warrants influenced the LRA's decision to come to the negotiating table in the first place when the Government of Southern Sudan offered to host peace negotiations in Juba in July 2006, while the publicity related to the warrants has allegedly triggered a greater level of international attention on the conflict, which may in the long-run make a resolution more likely.[42] On top of this, it is noteworthy that the issuing of ICC warrants did coincide with one of the longest periods of peace and stability in Northern Uganda for over two decades, as the LRA decided negotiation would be preferable to any potential international trial (although it must also be recognised that the violence now seems to have re-ignited, only in DRC as opposed to Uganda).

Furthermore, some commentators raise questions about the genuine intentions of belligerents involved in the peace talks under discussion. With the LRA, for instance, some insiders doubt whether Kony is sincere in his offers of reconciliation. Tim Allen has pointed to Kony's often under-highlighted condition that he be made Vice-President of Uganda in exchange for laying down his weapons as an illustration that he is not serious in his negotiations.[43] Similarly, with Sudan, de Waal claims that one of the main reasons the ICC decided to press ahead with their warrant for Bashir is that the political establishment of that country systematically refused to genuinely cooperate with peace initiatives anyway, consistently placing the interests of their political survival ahead of those of their people[44] (as, many argue, is evidenced again by the decision to expel aid agencies from Darfur following the issuing of a warrant for President Bashir).

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37 "No deal after U.N. official meets Ugandan rebel Kony", *Reuters*, 12 November 2006

38 "Indicting Bashir: Sudan and the International Criminal Court", meeting convened by ODI and the Royal African Society, 6 March 2009

39 Dr Lam Akol Ajawin (SPLM), Former Minister of Foreign Affairs within the National Unity Government of Sudan, "Security Ramifications of the ICC Indictment on the CPA and Darfur", *Prosecuting Presidents: The Challenges of International Indictments of African Leaders*, Joint RUSI - CFPA Conference 27 March 2009

40 "ICC: The folly of putting justice before peace", *Arab News*, 8 March 2009

41 Tristan McConnell, "Uganda: peace vs justice?", *Open Democracy*, 14 September 2006

42 House of Commons Select Committee on International Development, *Prospects for Sustainable Peace in Uganda*, 9th Report of 2006-07, HC 853, 24 July 2007, para 7

43 T Allen, "Joseph Kony and the Lord's Resistance Army: Peace vs. Justice?", *Prosecuting Presidents: The Challenges of International Indictments of African Leaders*, Joint RUSI - CFPA Conference 27 March 2009

44 A De Waal, "Darfur, the Court and Khartoum: The Politics of State Non-Cooperation", in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008

A further argument often advanced is that, as an international court focused on the prevention and punishment of the most serious crimes, the ICC's remit is not to involve itself in negotiations for peace, but rather to ensure that justice is done, in the present *and* in the future. Indeed, one of the ICC's principle purposes is to serve as a deterrent for those at risk of committing the gravest crimes by "bringing an end to impunity".[45] Thus, it is argued, to defer on justice in the service of peace would be to undermine both the Court and the deterrent effect it is designed to have (and thus the prospects for peace in future conflicts).[46]

Other commentators, however, seek to transcend the zero-sum 'justice or peace' dichotomy. Grono and O'Brien, for example, maintain that debates on which should come first – peace or justice – are grounded in sterile distinctions that bear only tangential relationship to reality.[47] For them, as for Simpson:

> as long as justice is treated as synonymous with prosecutions alone and peace-building is reduced to the process of negotiating peace agreements, then peace and justice will remain at loggerheads. An alternative approach to transitional justice recognises the potential for a *peace and justice continuum* in which diverse accountability mechanisms can contribute to peace-building.[48]

By this understanding, it is precisely the 'fundamentalism' attached to certain notions of peace and justice that presents the principal obstacle to achieving either. Those who take this view argue that peace and justice mean different things to different people and so what must be worked towards is a sequential, flexible approach to ending conflict and creating accountability. This may include a mixture of approaches to justice – including truth commissions, amnesties and traditional as well as international courts – each occurring as part of a phased end to violence. It should however be noted here that sceptics argue that, welcome though such an approach may be, there is a danger that it hides that fact that in certain contexts 'trade-offs' may be unavoidable.

3.2 Different Conceptions of Justice?

One of the major consequences of the debate over whether justice or peace should be prioritised in the workings of the Court has been the emerging discussions over 'whose justice' should be employed. Spurred on by positions advocating a more multifaceted approach to justice, some civil society activists have argued that its 'traditional' forms should be employed instead of the 'hegemonic', 'Western' justice that is arguably represented by the ICC.

Christian Aid's Gemma Houldey, for example, has claimed that a tension exists between retributive and restorative justice:

> The people of the North would prefer restorative justice (…) That is rooted in their culture and they would argue that the ICC have no grounding with what is going on in the region if it thinks (sic.) the answer is to pull out a whole lot of rebels".[49]

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45 ICC, *Rome Statute of the International Criminal Court* [undated; viewed 20 April 2009]

46 N Grono and A O'Brien, "Justice in Conflict? The ICC and Peace Processes" in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008

47 *Ibid*

48 G Simpson, "One among Many: The ICC as a Tool of Justice during Transition", in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008, p.75.

49 Cited in Josefine Volqvartz, "ICC Under Fire Over Uganda Probe", *Global Policy Forum*, 23 February 2005

Her outlook was echoed by Bishop Ochola of Kitgum, in Northern Uganda, who lost his wife to an LRA landmine. He maintains that "real justice is not punishment. Real justice is not killing someone because someone has killed your child, because now you're becoming a killer just like him or her". As such, he argues, in its failure to see this, the ICC has become more of a hindrance than a help for the people of Acholi-land.[50]

At first sight, then, it would appear that there exists a gulf between the wishes of the LRA's victims 'on the ground' and their international 'advocates' at the ICC. On closer examination, however, the picture becomes much more complex. Tim Allen, for example, disputes the validity of the notion of 'traditional' justice itself. In fact, Allen argues, what is commonly understood as 'traditional justice' in this context (the *Mato Oput* ceremony of the Acholi people), is in fact no more than one recently-formalised ceremony applicable to only one among many ethnic groups party to the conflict and resident in the country.[51] These ceremonies, so widely backed by many civil society actors, do not even apply to the Madi or Langi groups, for example, many of whom have suffered similar atrocities to the Acholi.[52]

Moreover, some have suggested that such 'traditional' ceremonies are problematic not solely because they do not reflect the practices of all ethnic groups, but also because they fail to reflect the preferences even of all members of those groups. Allen argues that they represent "gendered hierarchies of particular lineages",[53] while Simpson disputes the notion that every individual supports what is presented as the dominant position. "It should be underlined", he suggests, "that victim communities do not articulate homogeneous views and are themselves fractured and fragmented, along with the societies from which they come. Furthermore, victims' needs and expectations change over time". According to this view, debates regarding 'traditional' or 'Western' justice are undermined by "unhelpfully aggregated and static identities representative of competing versions of an archetypal victim, on whose behalf numerous actors claim to speak".[54]

Allen has concluded that, in fact, the majority of people in the Northern Uganda *do* want to see the leaders of the LRA punished, as opposed to being granted an effective amnesty in traditional ceremonies.[55] His findings therefore directly contradict the suggestion that most Ugandans would prefer to 'forgive and forget' than see the perpetrators of mass crimes brought to trial for their actions. Such a perspective is also arguably supported by those individuals most affected by the violence in neighbouring Sudan. In a recent talk in London, Dr Abdullahi El-Tom of the Darfuri rebel Justice and Equality Movement argued vociferously

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50 Cited by Julius Ocen, "Can Traditional Rituals Bring Justice to Northern Uganda?", *Institute for War and Peace Reporting*, 25 July 2007

51 T Allen, "Joseph Kony and the Lord's Resistance Army: Peace vs. Justice?", *Prosecuting Presidents: The Challenges of International Indictments of African Leaders*, Joint RUSI - CFPA Conference 27 March 2009; See also T Allen, "Ritual (Ab)use/ Problems with Traditional Justice in Northern Uganda", in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008

52 Julius Ocen, "Can Traditional Rituals Bring Justice to Northern Uganda?", *Institute for War and Peace Reporting*, 25 July 2007

53 T Allen, "Ritual (Ab)use/ Problems with Traditional Justice in Northern Uganda", in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008, p48

54 G Simpson, "One among Many: The ICC as a Tool of Justice during Transition", in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008, p76.

55 T Allen, "Joseph Kony and the Lord's Resistance Army: Peace vs. Justice?", *Prosecuting Presidents: The Challenges of International Indictments of African Leaders*, Joint RUSI - CFPA Conference 27 March 2009; See also T Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 2006 p125

that what people in Western Sudan want to see is Bashir and his acolytes tried in an international court.[56]

Finally, it should also be noted that, in certain situations, including that of Sudan (and the CAR, where the ICC is also active), pursuing 'traditional' justice as an alternative to its international counterpart is not even an option. In Sudan, the government has persistently demonstrated itself to be unwilling to prosecute *anyone* involved in atrocities in Darfur and it is very unlikely to support grass-roots initiatives to this end; while in CAR, the capacity to do so is lacking. In such a context, the ICC asks, what alternatives are on offer?

3.3 Bias: Neo-Colonial and Pro-State?

In line with the view that the justice embodied by the ICC is decidedly (and overly) 'Western' is that which posits the Court as little more than an extension of Western, 'neo-imperial' power. A number of commentators have drawn on the fact that the focus of the Court has so far been exclusively African to highlight what they perceive to be a persistent bias in its operations. For example, Omer Siddig, Sudan's Ambassador to the UK, has repeatedly opined at what he sees as a colonial intervention on the part of a 'Security Council envoy', while commentators such as Glendening, Laughland and Pilayiwa all agree that there is a structural bias in the way the Court operates.[57] It has been argued that the ICC's position in this regard was not helped by the oft-cited words of former British Foreign Secretary, Robin Cook, who stated that "this is not a court set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States",[58] or by the Prosecutor's decision not to investigate alleged crimes committed in either Iraq by the US and its allies, or in Gaza by Israel, despite hundreds of recommendations to the contrary.[59]

Similarly, the Court also faces the widely held opinion that it operates as little more than a tool of corrupt host governments. In CAR, Uganda and DRC, for example, government and pro-government forces are widely documented as having committed major atrocities during the course of conflict. However, none of the ICC investigations into crimes committed in these countries have yielded warrants or charges against these forces. Indeed, charges have only been laid against individuals explicitly hostile to the prevailing government. This has led some to question the independence of the Prosecutor and of his investigating teams.

While such accusations of bias may ring true for many critics, then, defenders of the ICC state that there are important considerations which need to be taken into account before any final assessment as to the independence of the Court can be made. The first is that, contrary to much popular perception, the Prosecutor *did* begin a preliminary enquiry as to whether it would be appropriate to launch a full investigation into crimes committed in Iraq.[60] One major conclusion from this was that, although the war's legality is often disputed, the ICC as yet cannot investigate crimes of aggression, since such crimes remain to be defined in the Court's Statute.[61] (That the said crime remains undefined is of course both a matter for debate and critique, though it is largely indisputable that the 'fault' for the lack of a definition lies elsewhere than the Court itself.) This naturally leads to the position that criticism for the

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56 Dr Abdullahi El-Tom, Justice and Equality Movement (JEM), *Prosecuting Presidents: The Challenges of International Indictments of African Leaders*, Joint RUSI - CFPA Conference 27 March 2009.

57 Their views were expressed during on-the-record talks at: *Prosecuting Presidents: The Challenges of International Indictments of African Leaders*, Joint RUSI - CFPA Conference 27 March 2009.

58 Graham Stewart, "Above the law", *The Spectator*, 4 August 2001

59 "The International Criminal Court and Africa", *RUSI News Brief*, Vol. 28, no 8, August 2008

60 See Moreno-Ocampo's Public Letter on the matter for details.

61 Moreno-Ocampo, p3

ICC not having brought charges against the US for its actions must lie with those drafting the ICC's guiding document, rather than the ICC itself. Furthermore, having enquired as to the nature of violence experienced by Iraqi civilians at the hands of invading armies, the Prosecutor concluded that, whilst "the available information established that a considerable number of civilians died or were injured during the military operations...[it] did not indicate intentional attacks on a civilian population", nor did "the resulting information […] allow for the conclusion that there was a reasonable basis to believe that a clearly excessive attack within the jurisdiction of the Court had been committed".[62]

Moreover, some commentators have noted that whilst it is true that the four cases currently under investigation by the ICC do focus on the continent of Africa (and, indeed, on one particular region of that continent), it would be naïve to assume that this automatically equates to foul play, or that it is without good reason.[63] These commentators point out that three of the four African countries under investigation by the Court invited the Prosecutor to commence proceedings of their own volition. On top of this, it would be hard to deny that Africa has been wracked by more serious violent conflict than any other continent in recent years or that the human rights record of a good number of its regimes is lamentable.[64] Wars in the DRC, CAR and Northern Uganda have been among some of the most devastating on earth and the humanitarian crisis in Darfur is widely condemned as catastrophic.[65] As such, it is asked, how could the ICC not begin its work here?

Finally, defenders of the ICC note that while it is the case that the Court has so far avoided bringing charges against state supporters in DRC, Uganda or CAR, one must not forget that in Sudan the Court has charged the President himself, and in Uganda investigators have been explicit about their intention to investigate *all* crimes committed in the North, and not solely those committed by the LRA.

3.4 The Importance of Pragmatic Considerations

Though largely overlooked in many discussions of the ICC, many commentators claim that a fair analysis must include consideration of the day-to-day pragmatics of establishing and sustaining an international institution in the face of massive opposition and pressure. In their view, it is certainly true that the staff of the Court have made a number of important mistakes in their attempt to establish legitimacy,[66] and indeed that the Court finds itself subject to authorities greater and more politically-motivated than it may be,[67] but it would be unfair to dismiss the Court entirely without at least understanding the practical obstacles it faces. From the beginning, the Court has understood that it has been legally hamstrung by the compromises inherent in establishing an institution that should wield authority over numerous international actors with very different interests. These compromises are embodied in the notions of 'complementarity' and indeed in the failure of the drafters to define 'the crime of aggression'. In both instances, at play was the sovereignty of numerous nations whose

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62 *Ibid*. pp6-7

63 See for example T Allen, "Joseph Kony and the Lord's Resistance Army: Peace vs. Justice?", *Prosecuting Presidents: The Challenges of International Indictments of African Leaders*, Joint RUSI - CFPA Conference 27 March 2009.

64 Anup Shah, "Conflicts in Africa—Introduction", *Global Issues*, 3 January 2009

65 Amnesty International, "Sudan (Darfur): Amnesty International adopts powerful technology in campaign to protect people in Darfur", 6 June 2007

66 P Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda", in N Waddell and P Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, 2008, p36

67 See Allen, T. (2006), *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, London: Zed Books.

negotiators felt too threatened by the potential existence of a body that could be used against them, or to curtail their actions.

First, as Schabas has noted, although the Court represents an international attempt at actualising the ideal of an independent, objective, supra-national body of justice, this very fact has led it, from the outset, to face grave opposition from many powerful states, including notably the US.[68] The US greeted the coming into force of the Rome Statute with the negotiation of dozens of bilateral treaties ensuring that States Parties to the Statute would not arrest or extradite US citizens.[69] This unquestionably dealt a blow to the legitimacy of the fledgling Court and, when coupled with the US's subsequent Security Council decision to refer to it the case of Darfur, has seen the institution shrouded in a hypocrisy that is not of its own making.

Second, the Court's defenders argue, the refusal by the US and other major states to back the Court materially has meant that, in both human and financial terms, it remains severely under-resourced. Though the Court has a mandate to investigate crimes the length and breadth of the globe, its staff number less than 600 and none of these are military personnel to guard investigators whilst they carry out their enquiries in some of the world's most dangerous places. As such, observers note, the Court remains beholden to the countries with which it works for both basic resources and protection.[70] These are unquestionably important considerations when deciding if, when and how the Court should act. It would simply not be possible, for example, to investigate crimes committed in a country hostile to the Court itself, which means that the Court's work suffers from an almost inherent structural bias. Phil Clark claims that the ICC finds itself "caught between an idealistic vision of a global court designed to prosecute the cases that domestic jurisdictions cannot or will not prosecute, and the pragmatic concerns of a new institution seeking judicial results to secure its legitimacy" in what can often be a hostile environment.[71]

Finally, and some would argue, most importantly, the Court has been designed in such a way as to lack any independent means of enforcement. It has no military or police powers and therefore finds the implementation of its judgements entirely dependent on States Parties. While, theoretically, this should not be a problem (as Article 86 of the Rome Statute clearly stipulates that States Parties must cooperate with the Court), it remains to be seen whether this will actually be the case.

4 Conclusion

This Note has attempted to provide an overview of how the ICC has performed and how it is viewed as it enters its seventh year of operation. It has discussed the four countries in which the Court is currently involved and has highlighted the debates and controversies that this involvement has generated. Although it is unquestionable that the Court faces significant challenges, both pragmatically in terms of its operation, and symbolically in terms of the legitimacy it is striving for, its defenders argue that it has achieved much in the short period since its inception, and this in the face of grave challenges. Overall, for all the opposition it faces, it now seems unlikely that its detractors will succeed in derailing the project in the way

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68 W Schabas, *An introduction to the International Criminal Court*, 2007, p32

69 *Ibid*. p29

70 Many of these reflections come from the work of Phil Clark.

71 P Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda", in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa,* 2008, p39

that was first feared. The view that the world should work with and through the Court, rather than against it, seems strongly in the ascendant.[72]

[72] W Schabas, *An introduction to the International Criminal Court*, 2007, p32