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Author: *Natalia Kubesch*

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The International Criminal Court and the Justice vs. Peace Debate

*Natalia Kubesch*¹

Introduction

Critics of the International Criminal Court (ICC) have long considered it to be an impediment to peace negotiations and regional stability.² Focusing in particular on the ICC's intervention in Uganda and the Democratic Republic of Congo (DRC) they have contended that prospects of prosecution risk jeopardising fragile peace talks, thus prolonging or even intensifying violent conflicts.³

This paper challenges this claim by portraying the ICC as a crucial mechanism of

¹ Dickson Poon School of Law, King's College London, Strand, London, WC2R 2LS, email Natalia.Kubesch@Kcl.ac.uk

² Siriam, 2009:305

³ Human Rights Watch (HRW), 2009:1

transitional justice with the potential of achieving positive peace.⁴ To this end, first, it will outline the concept of transitional justice then explain how it determines a new approach to the ‘peace-versus-justice’ debate. It will subsequently provide an overview of the relevant provisions of the Rome Statute relating to this debate. Finally, it will look at the ICC investigations in Uganda and DR, as these cases demonstrate the Court’s contribution to encouraging peace negotiations, promoting the rule of law and deterring atrocities; in a word, peace-building.

Transitional Justice and the ‘Peace-versus-Justice’ Debate

⁴ Okafor and Ngwaba, 2015:1

The claim that the ICC pursues justice at the expense of peace rests on the idea that justice and peace are mutually-exclusive objectives in the context of armed conflicts.⁵ In this ‘peace-versus-justice’ debate, those favouring justice, on the one hand, emphasise the prosecution of serious crimes in order to deter their future occurrence.⁶ Peace proponents, on the other hand, regard the risk of prosecution as a dangerous obstacle to conflict resolution.⁷ They argue that war criminals would have no incentive to lay down their arms, unless they believe that they will not face trials.⁸ Thus, they consider amnesties to be necessary for achieving peace⁹, which in turn excuses a suspension of justice.

5 Kerr and Mobekk, 2013:2

6 Fischer, 2011:409

7 HRW, 2009:1

8 *Ibid.*

9 Fischer, 2001:409

The transitional justice (TJ) literature challenges this ‘peace-versus-justice’ dichotomy. TJ describes a set of judicial and non-judicial mechanisms that engage with a legacy of human rights violations so as “to ensure accountability, serve justice and secure reconciliation.”¹⁰ It seeks to promote peace and strengthen the rule of law in post-conflict environments. Proponents of TJ support a “peace and justice continuum” position.¹¹ They propose that peace-building initiatives and justice mechanisms compliment and reinforce each other.¹² Neither peace nor justice can exist without the other. This position is founded upon holistic understandings of peace and justice. Peace is understood in a positive sense, to mean the presence of social justice, equal opportunities and human

10 UNSC, Report of the Secretary-General S/2004/616

11 Simpson, 2008:74

12 *Ibid.*

well-being.¹³ Unlike negative peace, which prioritises the cessation of violence in the short-term, positive peace seeks to achieve sustainable peace by addressing the underlying causes of violence.¹⁴ Building positive peace requires diverse justice mechanisms.¹⁵ Justice is understood as including elements of retributive as well as restorative justice. As such, mechanisms of justice are not limited to criminal prosecutions but also involve ways of addressing fractured relationships, such as truth-seeking projects, victim reparations and institution-building.¹⁶

In this framework, the ICC assumes an important role. With its mission to put an end to impunity, the Court is considered capable of

¹³ Galtung, 1964

¹⁴ Simpson, 2008:74

¹⁵ *Ibid.*

¹⁶ *Ibid.*

creating an atmosphere conducive to conflict reduction and peaceful co-existence. It is said to have the capacity to facilitate peace negotiations, institutionalise the rule of law in war-torn societies and reduce long-term violence by raising the risk of prosecution. In short, the ICC helps lay the foundations for positive peace. This paper assesses these ‘capabilities’ and identifies the extent to which the Court has carried them out during previous investigations.

The Rome Statute

Prior to considering cases of ICC investigations, it is vital to outline the provisions of the Rome Statute that reflect the compromise between peace and justice inherent to the establishment of the Court.¹⁷ These provisions

¹⁷ Kerr and Mobekk, 2013:59

relate to the Court's jurisdiction and its relationship with the Security Council of the UN.

The Rome Statute of 1998, which came into force in July 2002, established the ICC.¹⁸ According to the Statute, the ICC is an independent, permanent court mandated to try persons for genocide, war crimes and crimes against humanity¹⁹, with the overarching aim to protect peace.²⁰ As a treaty-based court, it does not have universal jurisdiction. It may only exercise its jurisdiction if the accused is a national of a State Party, the crime took place on the territory of a State Party or the Council has referred the situation to the ICC Prosecutor. In addition, the ICC operates under the principle of complementarity, making it a

18 International Bar Association, 2006

19 Rome Statute, 1998: Art. 1

20 *Ibid.* Preamble

court of last resort.²¹ Thus, it cannot act if a domestic court is investigating a case, unless the national proceedings are not genuine.²² These jurisdictional provisions limit the ICC's power over States with a view to protect national sovereignty. Furthermore, the principles of state consent and complementarity ensure that the ICC neither supplants the national justice systems nor imposes justice. Rather, it acts as an extension of national criminal jurisdictions, helping those that exist to fulfil their international law obligations.²³

The link between justice and peace in the Statute is best illustrated by the ICC's relationship with the Security Council. For example, Article 16 allows for a twelve-month suspension of investigations on the basis of a resolution adopted

²¹ *Ibid.*

²² *Ibid.* Art.17

²³ Bassiouni, 2010:181

under Chapter VII of the UN Charter. Chapter VII empowers the Council to take measures to maintain peace where it considers it to be at risk. As such, the Statute safeguards the Council's primary responsibility in matters of international peace, and even encourages intervention where prosecutions are considered detrimental to peace and stability.²⁴

Contribution to Peace Negotiations

The ICC's arrest warrants for war criminals are often criticised on the grounds that they will lead to further violence.²⁵ However, experience of ICC involvement illustrates that such claims are not true.²⁶ In fact, criminal indictments can facilitate peace negotiations by marginalising suspected

²⁴ Kerr and Mobekk, 2013:71

²⁵ HRW, 2009:19

²⁶ *Ibid.*

criminals and changing power dynamics.²⁷ Therefore, insisting upon justice can be instrumental to peace and stability.

The case of Uganda provides an important example of where the ICC's investigations played an active role in encouraging peace negotiations.²⁸ The war between the Lord's Resistance Army (LRA) and the Ugandan army spanned three decades and was one of Africa's longest and most violent conflicts.²⁹ The LRA is a heterodox Christian Cult and military group that was founded by Joseph Kony in 1988 in northern Uganda, with the aim to overthrow President Yuweri Museveni's government and rule Uganda according to the Ten Commandments and Acholi nationalism. LRA soldiers soon became known for their brutality,

²⁷ *Ibid.*

²⁸ Grono and O'Brien, 2008:15

²⁹ Bundeszentrale für Politische Bildung, 2013

killing, mutilating, and torturing of thousands of civilians. During the conflict, at least 25,000 children were abducted and used either as sex slaves or child soldiers.³⁰

Uganda's referral to the ICC made it difficult for the Lord's Resistance Army (LRA) to receive support from its key ally, Sudan. Beginning in 1994, the Sudanese government had provided Kony with weapons, training and transportation.³¹ The ICC's involvement, however, raised the stakes for Sudan. As Khartoum feared being targeted by the ICC's investigations in Uganda for supporting the LRA³², it terminated its relationship with the rebel group and decided to cooperate with the Court. As a result, the LRA was forced into a temporary "survival

³⁰ Bundeszentral für Politische Bildung, 2013

³¹ Grono and O'Brien, 2008:15

³² O'Brien, ICG, 2007

mode”.³³ Its isolated position triggered a number of defections, made continuing war extremely costly and therefore provided an incentive to negotiate peace.³⁴

Furthermore, the ICC’s investigation attracted the attention of the international community to the Ugandan civil war, which had previously been described as “the biggest, forgotten emergency in the world today.”³⁵ Greater awareness resulted in international financial and political contributions that helped address humanitarian needs and furthered the peace talks.³⁶ Finally, the ICC’s attempt to prosecute LRA leadership helped entrench accountability into the peace negotiations. In 2008, the parties accepted

³³ HRW, 2009:32

³⁴ O’Brien, ICG, 2007

³⁵ Agence France-Presse, 2013, quoting Jan Egeland UN under-secretary-general for humanitarian affairs

³⁶ HRW, 2009:33

that accountability for crimes committed during the war should be achieved via a special division of the High Court and community-based rituals.³⁷ The ICC's impact was noticeable given that similar accountability mechanisms had not featured in previous peace initiatives with LRA or other rebel groups in Uganda during Museveni's presidency.³⁸

Despite the fact that the peace negotiations eventually failed due to Kony's refusal to sign the final agreement, two distinct conclusions may be drawn from the Court's course of action. First, the ICC cannot be charged with having prevented peace talks. To the contrary, the Court's involvement helped pressure the LRA to the negotiating table and raised the necessary resources

37 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army, 2007

38 Grono and O'Brien, 2008:16

for sustaining the talks. Second, the ICC's arrest warrants spurred debates on accountability.³⁹ The final agreement acknowledged the need for accountability and designed a framework in which non-formal justice mechanisms would operate supplementary to judicial mechanisms rather than as alternatives.⁴⁰ As such, the ICC was important in developing accountability as a norm in conflict resolution, which is instrumental to achieving sustainable peace.

Rule of Law

The ICC's contributions towards ensuring criminal accountability comprise one branch of its wider aim to strengthen the rule of law and enhance the enforcement of domestic law in post-conflict

³⁹ Otim and Wierda, 2008:27

⁴⁰ *Ibid.*

environments. The principle of the rule of law provides justice, social stability and individual freedom.⁴¹ It dictates that everyone is subject to the law – one must respect the rights of others and resolve conflicts in accordance with the law. Given this function, the rule of law can be considered a necessary principle that guides peace-building initiatives.⁴² One may even contend that peace is where the rule of law governs.⁴³

The mandate of the ICC is to establish and strengthen the rule of law in war-torn societies that lack the adequate constitutional frameworks needed to prosecute serious crimes. It is expected to promote international legal standards and engage in ‘capacity-building’ of domestic justice mechanisms, to ensure future, peaceful co-existence. The ICC

⁴¹ Shinoda, 2001

⁴² *Ibid.*

⁴³ Nouwen, 2012:4

successfully carried out this mandate in Uganda, where its investigations had a far-reaching impact on the country's domestic justice mechanisms for international crimes.

First, ICC intervention triggered the adoption of the International Criminal Court Act (2010). This Act incorporates the laws of the Rome Statute into domestic law and allows Ugandan courts, for the first time, to try war crimes, crimes against humanity and genocide. It also excludes the application of the death penalty for international crimes; as this would be inconsistent with the Rome Statute.⁴⁴ As such, the Act reforms the substantive laws of the Ugandan criminal code and contributes to the observance of international criminal law.

⁴⁴ Parliament of the Republic of Uganda, 2010

Second, the ICC catalysed the creation of the “International Crimes Division” (ICD) of the High Court of Uganda. This division has the authority to prosecute the most serious crimes and is modelled upon the structure of international criminal tribunals, that is to say, the judges, prosecution, defence and registry sit under “one roof”.⁴⁵ The ICD was essentially a product of the LRA peace talks and although the final accord has not been signed, the court has commenced its work.⁴⁶ However, as only one case of LRA member Thomas Kwoleye has reached the trial stage of the division so far, it remains to be seen whether the ICD is capable of delivering credible justice to victims.⁴⁷ Nonetheless, its establishment marks a significant step towards eliminating impunity for human rights abuses in Uganda.

45 Nouwen, 2012:10

46 HRW, 2012:1

47 *Ibid.*

Finally, the ICC may be commended for raising awareness of international legal standards of procedure.⁴⁸ The principle of complementarity has fostered a belief amongst Ugandan officials that if they are to remain outside the ICC's jurisdiction, their domestic court proceedings must attain the same standard as ICC proceedings.⁴⁹ As one official put it "We have to be complementary to the ICC, even with sentences, otherwise we have to justify why we differ."⁵⁰

To conclude, the ICC helped institutionalise the rule of law in Uganda by improving its justice mechanisms for international crimes. Its intervention has led to a new act, a new criminal court and increased observance of international

48 Nouwen, 2012:10

49 *Ibid.*:11

50 *Ibid.* quoting interview with senior JLSO official

standards.⁵¹ These reforms represent important advancements in addressing impunity and protecting human rights in Uganda. Even though these changes have been partial – i.e. the reforms only address laws relating to war crimes – they nonetheless suggest a move towards a judicial system that resolves conflicts peacefully and in accordance to international standards.

Deterrence

A final argument relating to the ICC's contribution to peace is that prosecution can deter international crimes and therefore reduce violence in the long-term. The ICC raises the risk of punishment, which can factor into the strategic calculations of an abusive leader and “tip the cost-benefit scale away from the commission of a war

⁵¹ *Ibid.* 12

crime.”⁵² However, given that deterrence only has a negative proof (i.e. that an event did not occur)⁵³ finding factual evidence of it remains problematic. In addition, the ICC is still a young institution that has not yet been able to establish a conclusive track record of deterrence. Nevertheless, there is some anecdotal evidence that suggests that the risk of ICC prosecution gives rise to some deterrence benefits.⁵⁴

In the DRC, the ICC’s arrest warrant for Thomas Lubanga on charges of conscripting children as soldiers had a deterrent effect and educational impacts on army and rebel leaders. Lubanga was the founder of the Union of Congolese Patriots, a military group in the DRC and a key figure in the Ituri conflict. Rebels who were under his command were accused of large-scale human

⁵² Grono, ICG, 2012

⁵³ *Ibid.*

⁵⁴ HRW, 2009: p.123

rights violations, including ethnic massacres, torture and forcibly conscripting child soldiers. Following Lubanga's conviction, Human Rights Watch noticed a fear of arrest among Congolese army leaders, as well as an increased interest in what constituted a war crime.⁵⁵ Lubanga's arrest furthered the army's and the rebel group's awareness that the use of child soldiers was a war crime, which would result in prosecution.⁵⁶ According to the report of the UN Secretary-General on children and armed conflict in DRC, the recruitment of child soldiers decreased by eight percent a year after the arrest warrant.⁵⁷ Moreover, the Lubanga case had a similar spill-over effect in the Central African Republic (CAR). Upon learning that the use of child soldiers violates international law, rebel groups in CAR justified their conduct by "unawareness" and

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ UNSC, S/2007/391:5

immediately offered to demobilise their child soldiers, which they later did.⁵⁸

Clearly, the effectiveness of deterrence always depends on the degree of certainty of future prosecution.⁵⁹ The ICC currently suffers from a lack of enforcement mechanisms. It enforces arrest warrants exclusively through the cooperation of its member States, which have not always been willing to help.⁶⁰ Given these deficiencies, the ICC must expand and strengthen enforcement mechanisms in order to achieve effective deterrence.⁶¹

Nonetheless, these examples do indicate that credible threats of ICC prosecutions can influence leaders of warring parties in their policy choices and

⁵⁸ HRW, 2009:127

⁵⁹ *Ibid.*:123

⁶⁰ Barnes, 2011

⁶¹ *Ibid.*

prevent them from committing war crimes.⁶² In the long-term, prosecutions may help the entrenchment of human rights norms and thus discourage future generations from the commission of such crimes.⁶³

Conclusion

An assessment of the ICC's impact in Uganda and DRC illustrates the Court's capacity to "accommodate the need for peace with the demands of justice."⁶⁴ First, ICC prosecutions were able to enhance peace prospects by driving conflict parties to the negotiating table. Second, its investigations influenced domestic legal systems and jurisprudence. It increased awareness regarding accountability, human rights values and international legal standards, thus helping the

⁶² Grono, ICG, 2012

⁶³ *Ibid.*

⁶⁴ Grono and O'Brien, 2008:19

creation of a system based on the rule of law. Lastly, it has had the potential to reduce long-term violence, by raising the risks of punishment. Together these achievements have laid the foundations for positive peace and thus emphasise the ICC's crucial role in peace-building initiatives. In sum, the ICC's insistence on justice promotes rather than threatens peace.

References

- Agence France-Presse (2003) “War in northern Uganda world’s worst forgotten crisis”, available at: <http://reliefweb.int/report/uganda/war-northern-uganda-worlds-worst-forgotten-crisis-un>
- Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army, Juba, Sudan, June 2007
- Al Jazeera (2014) “Profile: The Lord’s Resistance Army”, available at: <http://adexchangeprediction.com>
- Barnes, G. P. (2011) ‘The International Criminal Court’s Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir’ *Fordham International Law Journal*, 34(6), 1584-1619
- Bassiouni, M. (2010) *Introduction to International Criminal Law*, (Boston: Martinus Nijhoff Publishers)
- Bundeszentrale für Politische Bildung (2013) “Interstaatliche Konflikte: Nord-Uganda”, available at: <http://www.bpb.de/internationales/weltweit/innerstaatliche-konflikte/54675/nord-uganda>
- Fischer, M. (2011) Transitional Justice and Reconciliation: Theory and Practice, in B. Asutin, M. Fischer, H.J. Giessmann (eds.) *Advancing Conflict Transformation: The Berghof Handbook II*, (Leverkusen: Barbara Budrich Publishers), 406-430
- Galtung, J. (1964) ‘An Editorial’ *Journal of Peace Research*, 1(1):1-4
- Grono, N., O’Brien, A. (2008) Justice in Conflict? The ICC and Peace Processes, in N. Waddell, P. Clark (eds.),

Courting Conflict, Justice, Peace and the ICC in Africa,
London: Royal African Society, 13-20

Grono, N., International Crisis Group (ICG) (2012) *The deterrent effect of the ICC on the commission of international crimes by government leaders*, (New York: ICG), available at: <http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx>

Human Rights Watch (HRW) (2009) *Selling Justice Short: Why Accountability Matters for Peace*, New York: HRW, available at: <https://www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace>

Human Rights Watch (HRW) (2012) *Justice for Serious Crimes before National Courts, Uganda's International Crime Division*, New York: HRW, available at: https://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_0.pdf

International Bar Association, (2006) *ICC Structure*, available at: http://www.ibanet.org/ICC_ICL_Programme/About_the_ICC/ICC_Structure.aspx

Kerr, R., Mobekk, E. (2013) *Peace and Justice*, (London: Wiley)

Nouwen, S. (2012) *The ICC's Intervention in Uganda: Which Rule of Law Does it Promote?*, (Cambridge: University of Cambridge, Faculty of Law)

O'Brien A., International Crisis Group (ICG) (2007), *The UN Security Council (2007) Report of the Secretary-*

General on children and armed conflict in the Democratic Republic of the Congo, S/2007/391, available at:

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2007/391

Impact of International Justice on Local Peace Initiatives, New York: ICG, available at:

<http://www.crisisgroup.org/en/publication-type/speeches/2007/obrien-the-impact-of-international-justice-on-local-peace-initiatives.aspx>

Okafor, O.C., Ngwaba, U. (2015) The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections, *International Journal of Transitional Justice*, 9, pp. 90-108

Parliament of the Republic of Uganda, Parliamentary Debates, Hansard Official Report, Wednesday 10 March 2010.

Shinoda, H. (2001) *Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals*, Hiroshima: Hiroshima University, Institute for Peace Science

Simpson, G. (2008) One among Many: The ICC as a Tool of Justice during Transition, in N. Waddell, P. Clark (eds), *Courting Conflict, Justice, Peace and the ICC in Africa*, London: Royal African Society, pp. 73-79

Sriram, C.L. (2009) Conflict Mediation and the ICC: Challenges and Options for Pursuing Peace with Justice at the Regional Level, in K. Ambos, J. Large and M. Wierda (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and*

Development – The Nuremberg Declaration on Peace and Justice, New York: Springer, pp. 303-319

UN General Assembly (1998), *Rome Statute of the International Criminal Court (last amended 2010)*

UN Security Council (2004) *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, available at:

<http://www.refworld.org/docid/45069c434.html>

Wierda, M., Otim, M. (2008) Justice at Juba: International Obligations and Local Demands in Northern Uganda, in N. Waddell, P. Clark (eds.), *Courting Conflict, Justice, Peace and the ICC in Africa*, London: Royal African Society, pp. 21-28