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ICC Monitoring and
Outreach Programme

SECOND OUTREACH REPORT

MAY 2007

**An International Bar Association
Human Rights Institute Report**



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Acronyms

ASP	Assembly of States Parties
IBA	International Bar Association
GoU	Government of Uganda
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
LRA	Lord's Resistance Army
OTP	Office of the Prosecutor
PIDS	Public Information and Documentation Section
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
UCICC	Uganda Coalition for the International Criminal Court
ULS	Uganda Law Society
UPDF	Uganda People's Defence Force
VPRS	Victims' Participation and Reparation Section

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Introduction

The IBA is currently implementing a MacArthur-funded programme to monitor the work and to conduct outreach activities on the International Criminal Court (ICC).

The IBA conducts outreach activities with the legal community and civil society in countries such as India, Sudan and Uganda and with the wider IBA membership, including its 198 member bar associations and law societies. In the course of its outreach activities, the IBA provides updates on the ICC's work; provides a forum for discussion and debate on the impact of the ICC in the society concerned; and works with lawyers to develop advocacy and litigation strategies to strengthen the capacity of national legal systems to investigate and prosecute international crimes.

Since the IBA first reported on the outreach work of the ICC,¹ outreach has been increasingly recognised as a central function of the Court. In particular, the ICC has published a *Strategic Plan for Outreach of the International Criminal Court* (Outreach Plan) which was debated at the Assembly of States Parties (ASP) meeting in November 2006. The publication of the strategy has lent greater clarity and transparency to the outreach function of the Court. Equally, however, a stronger presence and more contextual outreach activities are needed in all situation countries, particularly Sudan. As such, the first part of this Report outlines and comments upon the ICC's new Outreach Plan.

The second part of the Report engages with current debates on peace and justice in the context of Uganda. In this respect, the Report maps the public positions of the Lord's Resistance Army (LRA) and the Government of Uganda (GoU) on the ICC. As many of the discussions on the ICC have turned on the status of the five arrest warrants, the Report considers whether the arrest warrants could be 'withdrawn' in the Ugandan context. Finding the circumstances in which the arrest warrants could be reconsidered as very limited, the Report argues that the focus on the 'withdrawal' of the arrest warrants detracts from deeper discussions on the development of multiple strategies to deal with impunity and the experiences of conflict.

The Report then provides feedback from a workshop in Lira in November 2006 on the role of traditional justice systems in addressing experiences of conflict. This workshop was organised at a time when an aspect of the Acholi traditional justice system – *mato oput* – was publicly advanced as a direct alternative to the ICC. At the same time, the functioning, contributions, challenges, and limitations to using *mato oput* to respond to international crimes were relatively under-explored and as such, were critically examined at the workshop in Lira.

The final section on Uganda provides feedback from a recent workshop organised by the IBA and the Uganda Coalition for the International Criminal Court (UCICC) on implementing legislation in Kampala following the reintroduction of the *ICC Bill* 2004 before Parliament in November 2006.

The final part of this Report provides feedback on a workshop on the ICC organised by the IBA, the Bar Association of India, the Indian Society of International Law, the Criminal Justice Society of India and the ICRC in Delhi in January 2007, as a follow-up to a series of workshops in Delhi in 2006.

The annexes to this Report contain the IBA's statement calling for the 'Ugandan government to meet its obligations under the Rome Statute'; the agenda of the workshop held in Lira; the agenda to the implementing legislation workshop in Kampala; and the agenda of the workshop held in India.

In the facilitation of the consultative workshops and for valuable commentary and discussion of the issues addressed in the Report, the IBA would like to thank Mr. Lalit Bhasin (Bar Association of India), Dr. Phil Clark (the Transitional Justice Institute), Professor Momoh Taziff Koroma (University of Sierra Leone), the ICRC, Mr Stephen Lamony (UCICC), Professor Roy Lee (Columbia University), Dr. Rod Rastan (ICC), Mr. Darryl Robinson (University of Toronto), Dr. Manoj Sinha (Indian Society of International Law), the members of the IBA's Working Group in Uganda and all of the participants at the workshops.

¹ IBA, 'ICC Monitoring and Outreach Programme: First Outreach Report' (June 2006).

Part I

The ICC's new outreach strategy

Since the IBA's first report on outreach, the Registry has developed a *Strategic Plan for Outreach of the International Criminal Court*¹ (Outreach Plan) which it submitted to the ASP at its meeting in November 2006. The Outreach Plan recognises 'the need to enhance [the Court's] outreach programme and to continue to build upon its activities in that area.'² As such, the Outreach Plan is divided into four main sections: first, the general framework to outreach; second, 'factors influencing the outreach strategy'; third, the process of implementation of the Outreach Plan and finally, specific 'situation-related strategies.' The Outreach Plan considers outreach as an 'effective system of two-way communication'³ and provides six key objectives:

- (1) 'To provide accurate and effective information to affected communities regarding the Court's role and activities;
- (2) 'To promote greater understanding of the Court's role during the various stages of the proceedings with a view to increasing support among the population for their conduct;
- (3) 'To foster greater participation of local communities in the activities of the Court;
- (4) 'To respond to the concerns and expectations expressed in general by affected communities and by particular groups within these communities;
- (5) 'To counter misinformation';
- (6) 'To promote access to and understanding of judicial proceedings among affected communities.'⁴

The adoption of the Outreach Plan reflects a positive development in demonstrating the ICC's commitment to outreach as a key non-judicial function of the Court. Indeed, at the ASP meeting, Sierra Leone (a state with substantial experience on the role of outreach) led a number of states⁵ in underscoring the need to prioritise and increase outreach activities, stating that,

'The Court needs a public face and that face must be the Outreach department, tirelessly working to provide the people of these countries with a tangible Court and a sense of having a stake in the accountability process. This is not a luxury: this is a necessity for the ICC to do what it is intended to do; to bring accountability and to help turn a page in the history of the situation countries.'⁶

1 ICC-ASP/5/12 (29 September 2006).

2 *Id.* at para. 5.

3 *Id.* at para. 3.

4 *Id.* at para. 13.

5 Statement by Mr. Pekka Oinonen, Representative of Finland, on Behalf of the European Union (23 November 2006); Statement by the Hashemite Kingdom of Jordan (25 November 2006); Statement on Behalf of Germany (23 November 2006); Intervention by the Ambassador of Mexico, H.E. Sandra Fuentes-Berain (23 November 2006); Statement on Behalf of Ghana (24 November 2006); Statement by Issaskar V.K. Ndjoze, Representative of Namibia (24 November 2006); Statement by Norway to the Assembly of States Parties of the International Criminal Court (24 November 2006); Statement by Ambassador Hlengiwe B. Mkhize, South African Ambassador to the Netherlands (24 November 2006).

6 Permanent Mission of the Republic of Sierra Leone to the United Nations, 'Statement by His Excellency Allieu Ibrahim Kanu at the Fifth Session of Assembly of States Parties General Debate (n/d) at 3.

Moreover, the ASP adopted a resolution on the strategic planning process of the Court which recommended that the ICC continue to engage in a dialogue with the ASP focusing in particular on ‘the concrete implementation of the Strategic Plan, and include, but not be specifically limited to, cross-cutting issues such as location of the activities of the Court, position of victims, outreach and communication activities of the Court, and the relationship between the Strategic Plan and the budget.’⁷

Overall, the Outreach Plan clarifies the Court’s understanding and objectives in conducting outreach, and should hopefully result in an increase in outreach activities in the coming months. Indeed, Uganda provides an example of a situation country in which the level of outreach activities was notably very low in the first few years of the Court’s work⁸ but has risen significantly in recent months. Moreover, responding to recommendations for the Court to open public field offices, the Outreach Plan acknowledges the need for the field office to be ‘visible to and accessible by the general public and specific groups.⁹ Currently, the ICC has not established an office in Sudan (although there is a small office in Chad) and in DRC and Uganda, the office of Public Information and Outreach sits with the other organs of the Court which require heightened security and are therefore not accessible to the public.¹⁰ However, in order to allow public access and enable interested individuals or organisations to speak with Court officials on an informal basis, the Court plans to separate the Public Information and Documentation Section (PIDS) from the other organs of the Court in Uganda and DRC. Moreover, although meetings with representatives of the ICC in Kampala are generally made through representatives in The Hague and outreach activities are generally led by headquarters’ staff, the recruitment of Field Public Information and Outreach Coordinators for DRC and Uganda and additional outreach staff envisages an increase in outreach activity generated by the field offices themselves.¹¹

Although the Court has been criticised for limiting the types of outreach activities to workshops, ‘townhall’ meetings and bilateral meetings, the Outreach Plan also demonstrates the ICC’s intention to employ a broader range of outreach tools tailored to the audience it intends to address: the general public; international, regional and local media; civil society; victims;¹² government; traditional and religious leaders; women; children and youth; refugees and internally displaced persons; legal and academic communities; persons ‘who have participated or are participating in hostilities’; the diaspora and the international and diplomatic communities.¹³

7 ICC, ‘Strategic Planning Process of the Court,’ ICC-ASP/5/Res.2 (1 December 2006).

8 See, IBA *supra* note 1.

9 Outreach Plan, *supra* note 2 at para. 77.

10 See, also Human Rights Watch, ‘Memorandum for the Fifth Session of the Assembly of States Parties to the ICC’ (November 2006) at 16 (recommending that the Court adapt, ‘field offices to accommodate the different needed functions, such as outreach (which requires publicly accessible spaces), and investigations (which require privacy)’)

11 Outreach Plan, *supra* note 2 at paras. 77 – 84.

12 On specific outreach strategies tailored to the rights of victims, see Victims Rights Working Group, ‘Obligations to Undertake Outreach to Victims Under the Rome Statute and the Rules of Procedure’ (November 2006) (discussing the obligations within the Rome Statute and the Rules of Procedure and Evidence to conduct outreach activities at different stages in the Court’s work) at 2. See also, FIDH, ‘Paper submitted to the Board of Directors of the Trust Fund at its Third Annual Meeting’ (6 – 7 November 2006) at 6 (highlighting the direct connection between outreach and the ability of the Trust Fund for Victims to fulfil its mandate).

13 Outreach Plan, *supra* note 2 at paras. 49 – 61.

As such, the ICC is likely to increase its outreach activities; diversify the forms of outreach; and develop a stronger field presence in DRC and Uganda in the near future. Equally, however, the outreach activities planned for Sudan remain insufficient.¹⁴ Moreover, while a working document, other areas of the Outreach Plan would benefit from greater clarification, particularly those relating to the meaning of a participatory approach to outreach; the use of intermediaries; the role of the Office of the Prosecutor (OTP) and the Victims' Participation and Reparation Section (VPRS) in conducting outreach activities; and the timing of outreach.

A. The Meaning of Participation and a 'Two-Way System of Communication'

As noted above, the Outreach Plan defines outreach as an, 'an effective system of two-way communication'¹⁵ and provides two of its six key objectives as, '[t]o foster greater participation of local communities in the activities of the Court' and '[t]o respond to the concerns and expectations expressed in general by affected communities and by particular groups within these communities.' However, despite the initial commitment to a two-way system of communication, the Outreach Plan fails to define what is meant by a participatory approach to outreach and does not explain how it will engage with local communities. Rather, the bulk of the Outreach Plan discusses how the Court will distribute information. In this respect, the concept of outreach at the ICC appears to relate more to the promotion and explanation of the Court's work rather than a participatory process.

As such, in developing and implementing the Outreach Plan, it is important that the Court clarifies and expands on its understanding of outreach as 'an effective system of two-way communication.' The Special Court for Sierra Leone's thinking on outreach may prove helpful to the ICC in citing the, 'core aim of the Outreach Section [as] to serve as a catalyst for informed and reasoned dialogue about the Special Court and transitional justice ... For Outreach, receiving feedback from Sierra Leonean communities is an essential element of two-way communication, and is as important as distributing information.'¹⁶ Moreover, the Special Court, 'defines success as meeting its aim of stimulating discussion and debate about the Court as opposed to simply arguing on its behalf.'¹⁷

Indeed, a shift towards the conception of outreach as a participatory dialogue rather than simple information provision would greatly assist the Court in deepening and contextualising its current outreach work. For example, as noted above, the ICC has increased the level of its outreach activities in Uganda. However, the majority of outreach activities conducted by the Court have been of a general nature. Although a number of key issues routinely arise in the course of meetings on peace and justice, such as the timing of the issuance of arrest warrants; why arrest warrants have only been issued against the Lord's Resistance Army and not the Uganda People's Defence Force; and whether the arrest warrants could be 'withdrawn' in place of an amnesty and/or aspects of the traditional justice system, the Court has not conducted any public campaigns and has not dedicated

¹⁴ As the IBA does not currently conduct outreach activities on the ICC in the DRC, this Report does not comment on the outreach work of the Court in the DRC. However, for a recent report on outreach in the DRC, *see* the International Centre for Transitional Justice, 'Sensibilisaton à la CPI en RDC: Sortir du <Profil Bas>' (March 2007).

¹⁵ Outreach Plan *supra* note 2 at para. 3.

¹⁶ Special Court in Sierra Leone, 'Outreach Report 2003 – 2005' (2006) at 13.

sessions within its workshops and ‘townhall’ meetings to engaging with these issues.¹⁸ The absence of a campaign responding to these issues –despite specific requests for clarification – thus undermines the Court’s definition of outreach as a two-way process of communication.

B. The Role of the OTP and the Victims’ Participation and Reparation Section (VPRS)

The Outreach Plan clarifies the organ responsible for the development and implementation of the Court’s outreach activities as PIDS in the Registry.¹⁹ Prospectively, the Outreach Plan recommends the establishment of a dedicated outreach unit in the Registry. The staff in The Hague would organise ‘coordination between the organs and offices on planning and implementing activities; develop general strategies and oversee implementation of the outreach programme.’ The Outreach Plan also states that, ‘[e]ach new situation will imply the establishment of a new field office and the recruitment of field staff.’²⁰

As part of a tailored and participatory outreach programme, the Court will have to engage with sensitive and technical questions related to the ICC’s work. Inevitably, many of these issues will relate to prosecutorial strategies and the participation of victims (which is a novel concept in most common law jurisdictions). In this respect, the involvement of the OTP and the VPRS is particularly important but also requires careful planning and consideration of both the contributions and limitations to each body’s role, especially given the OTP’s prosecutorial function.²¹ However, the Outreach Plan does not provide any clarification as to how the OTP and VPRS will be included in outreach activities. Currently, both the OTP and the VPRS participate in outreach activities but pay for their travel costs from their own departmental budgets rather than the main outreach fund administered by the Registry. The division of funds in this way greatly constrains a tailored and predictable approach to outreach. Accordingly, the Court should establish a clear procedure to enable the participation of the OTP and VPRS either by allocating part of the outreach budget for each section’s participation and/or through the OTP and the VPRS preparing official positions on particular issues which the PIDS can then communicate in the course of its outreach activities.

C. The Use of Intermediaries

In the Ugandan context, the Court has publicised its use of intermediaries such as district leaders,²² local leaders,²³ the Lango Cultural Foundation²⁴ and the Iteso Cultural Union,²⁵ to disseminate information on the Court. Although the use of intermediaries will greatly increase the information distributed on the ICC, the choice of intermediaries must reflect a range of actors beyond

17 *Id.* at 13.

18 While the ICC has not conducted dedicated outreach activities on these themes, the OTP has responded to these issues when they have arisen in the course of workshops held by the ICC in Uganda.

19 Outreach Plan *supra* note 2 at para. 64.

20 Outreach Plan *supra* note 2 at para. 70.

21 ‘For the OTP’s consideration of its role on outreach, see OTP, ‘Report on the Activities Performed During the First Three Years (June 2003 - June 2006) (12 September 2006) at paras 97 - 99.

22 ICC, ‘ICC Holds Workshop in Northern Uganda with New Local Government Leaders’ (21 June 2006).

23 ‘ICC Holds Workshop with Local Leaders in Amuria District’ *ICC Newsletter* (October 2006)

24 ICC, ‘ICC holds meeting with representatives of Lango Cultural Leaders in northern Uganda’ (22 August 2006).

25 *Id.*

community and local leaders. As noted by Human Rights Watch, '[t]argeting elite groups is important, but such groups may have interests that affect how they relay information to others. This can make them inappropriate intermediaries between the ICC and the general public.'²⁶

Moreover, the use of intermediaries cannot act as a substitute for a strong and well-staffed field office, particularly as intermediaries cannot speak on behalf of the Court in relation to sensitive and technical issues. The Outreach Plan, however, only envisages the employment of four outreach staff in the outreach unit in The Hague and six in each field office.²⁷ The Plan also only provides for the head of the outreach section in The Hague as a Professional Level 2. In contrast, heads of the other sections of the Registry range between Professional Level 4 and 5. The attitude towards outreach in this respect is of particular concern as outreach activities require sensitive judgments on the political situation, contextual strategies and the security and safety of staff and participants. The level of staff also suggests that outreach is considered of lesser importance than other parts of the Registry's work.

D. Timing

The Outreach Plan divides the stages of judicial proceedings into six phases: 'analysis, investigation, pre-trial, trial, appeal and implementation' and correlates the 'scope and nature of outreach activities' to each phase.²⁸ Overall, the Outreach Plan appears to place greatest emphasis on outreach during the trial phase. Indeed, the Outreach Plan does not envisage outreach activities during the analysis phase. The Plan states, '[a]t the analysis phase, using public sources, general information will be compiled, regarding the background of the situation, potential challenges and opportunities, existing communication networks, potential partners and target groups.'²⁹ The Plan only foresees the dissemination of general information on the Court at the investigative and pre-trial phase and 'a more focused communication approach' following the issuance of arrest warrants.³⁰

The emphasis of outreach on the trial phase does not correlate with the experience of the ICC in conducting outreach to date. In Uganda, for example, many of the difficult, contextual questions on the ICC had already arisen early in the investigative phase. The negative perceptions and publicity around the ICC have meant that despite increased outreach activities, the ICC now has to overcome preconceived ideas about the Court rather than starting on an equal footing to those who oppose the Court. FIDH has also argued that, 'while the Strategy provides for activities in the investigative and pre-trial phases, no outreach activities are planned during the preliminary analysis where an investigation has not yet been launched, as in the case of the Central African Republic or Côte d'Ivoire. FIDH's experience in those two countries has revealed that there is major misunderstanding and a great need for information about the ICC and its mandate.'³¹

26 HRW, *supra* note 10 at 12.

27 Outreach Plan, *supra* note 2 at paras 77 – 83.

28 *Id.* at para. 32.

29 *Id.* at para. 34.

30 *Id.* at para 38.

31 FIDH, 'Position Paper No. 11: International Criminal Court – Recommendations to the Fifth Session of the Assembly of States Parties to the Statute of the International Criminal Court,' (23 November to 1 December 2006) at 13.

In short, the Court must be flexible to the timing of outreach activities and respond on a case-by-case basis rather than assume that most outreach initiatives will be required at the trial phase.

E. Outreach on Sudan

In relation to Sudan, conducting outreach activities in Darfur or other parts of Sudan may present practical difficulties in terms of securing access as well as involve potential security risks to ICC staff and participants alike. In this respect, the ICC has not yet conducted outreach activities on Sudan; the Outreach Plan only envisages beaming in radio programmes this year³² and generally relying, ‘more heavily on audio components, via radio or direct distribution.’³³ The Plan states that,

‘The preliminary public information and outreach assessment done by the Court confirmed that outreach in Sudan should be carefully conducted. The Court has adopted a single coordination strategy which, due to the security of potential partners, will remain at least partially confidential. The inherent limitations of the process also necessitate a realistic view of the number of people who can actually be reached in the short term. Communication activities are being focused on disseminating basic information through the international media and other available means.’³⁴

While the Outreach Plan notes that the strategy on Sudan is ‘at least partially confidential’ and therefore cannot be commented upon fully, the initiation of relatively low-level outreach activities two years after the referral of the situation of Darfur to the ICC is problematic both for the work of the Court and the involvement of the communities most affected.³⁵

Risks to security clearly reflect a genuine concern, particularly in light of the Sudanese government’s adverse reaction to the ICC’s issuance of arrest warrants over the Sudanese Secretary of State for Humanitarian Affairs and a leader of the Janjaweed.³⁶ However, as risks to security do not affect the proposed outreach strategy to use media resources, the international media could have been employed at a much earlier stage in order to distribute information on the ICC. Indeed, in situations in which security presents a challenge to the conducting of outreach activities, greater attention to the development of creative and diverse outreach tools, particularly through radio and internet resources such as the ICC’s own web-page and websites hosted outside of Sudan, is required.³⁷ In keeping with the Court’s objectives to develop a participatory approach to outreach, these strategies should not only be directed at disseminating information on the Court, but should also include ways in which stakeholders can interact with the Court, such as through the use of online forums (either in real time or with a commitment to respond to questions within a specified period of time).

³² Outreach Plan, *supra* note 2 at para. 121.

³³ *Id.*

³⁴ *Id.*

³⁵ See, Human Rights Watch Memo, *supra* note 10 at 13.

³⁶ See, ‘Sudan Rejects ICC arrest warrants’ *Mail and Guardian* (2 May 2007) (discussing the Khartoum government’s rejection of the arrest warrants).

³⁷ See, The Communications and Outreach Team of the CICC, ‘Recommendations to the Fifth Session of the Assembly of States Parties Meeting’ (20 November 2006) at 3 (recommending that, ‘the Court implement this approach to the greatest possible extent and develop alternative means of communications when it cannot operate in the field due to security constraints.’) Notably, even in DRC and Uganda, this type of strategy would be useful in increasing access to the ICC.

Until the Court is able to conduct outreach activities in Sudan itself, its outreach strategies will be largely confined to elite groups and intermediaries. In this respect, it would be useful to translate as many materials as possible into Arabic. The Court could also develop downloadable posters, fact sheets and audio materials which intermediaries could use to provide information on the Court. These materials could be available in Arabic and the main local languages of Darfur (Zaghawa, Fur and Masalit). Article 50(2) of the Rome Statute provides the working languages of the Court as English and French. Although Article 50(1) provides that Arabic is an official language of the Court, it only obliges the Court to publish the, ‘judgements of the Court, as well as other decisions resolving fundamental issues before the Court,’ in the official languages. As such, in a recent survey, the IBA found that only fifteen percent (approximately) of documents relating to the ICC’s investigation in Sudan were translated into Arabic and none into the local languages. While translation involves substantial expense, the Court presumably allocates equal funding for outreach activities to each situation. In circumstances such as Sudan in which the Court currently cannot physically go to the situation country, more outreach funds could be allocated for translation to ensure that the maximum amount of outreach activity is undertaken.

Part II

Debates on the ICC in Uganda

Since our first outreach report, the LRA and the GoU have entered into a series of peace talks, facilitated by the Sudanese Vice-President, Dr. Riek Machar, in Juba. Although the *Cessation of Hostilities Agreement* reached on 26 August 2006 expired on 28 February 2007, the truce was recently renewed for two months and talks resumed in Juba on 26 April 2007.

While the parties to the talks have only now reached the third item on the agenda –reconciliation and accountability – public commentary on the talks has largely focused on whether the arrest warrants issued by the OTP against five LRA leaders should be ‘withdrawn’ in order to ‘give peace a chance.’ As such, the arrest warrants have both been characterised as a trigger to the talks¹ and a key obstacle to their progression.²

However, as very little information is available on the peace talks, it is difficult to assess whether the arrest warrants reflect as decisive an issue as both parties publicly claim. Moreover, the debates on peace and justice have taken place with very little reference to the legal parameters within which the issuance of the warrants could be reconsidered. As such, the ‘alternatives’ to the ICC advanced by the LRA and the GoU, such as amnesty and aspects of the Acholi traditional justice system, may not actually offer a basis upon which the Court could reassess the warrants. As a consequence, the focus on the ‘withdrawal’ of the arrest warrants without reference to the legal framework may have suggested greater possibilities than actually exist. Moreover, as amnesty and aspects of the Acholi traditional justice system have been suggested as alternatives to the ICC, very little analysis and debate has been undertaken into the contributions and challenges of employing these processes as responses to the conflict. In this respect, the focus on the role of the ICC may have inhibited a broader, more holistic discussion on accountability and reconciliation processes in place of a ‘trumping’ exercise between the ICC on the one hand, and amnesty and traditional justice processes on the other.

In recent months, the IBA has held two consultative workshops in Uganda: the first on the role of traditional justice in responding to the conflict in Uganda and the second on implementing the Rome Statute into national law. The feedback from both workshops is provided below following an outline of the LRA and the GoU’s public positions on the ICC and a discussion on whether the arrest warrants can be ‘withdrawn.’

1 See, ‘Emergency relief coordinator (Jan Egeland) briefs press in Nairobi at end of eight-day, three-nation mission to Africa,’ *Office for the Coordinator of Humanitarian Affairs* (12 September 2006); ‘Briefing to the Security Council by Jan Egeland’ (15 September 2006) available at <http://ochaonline.un.org/DocView.asp?DocID=4996>.

2 See, ‘ICC Complicates LRA Peace Talks’, *New Vision* (4 July 2006); Nick Grono, ‘What Comes First, Peace or Justice?’ *International Herald Tribune* (26 October 2006).

A. POSITIONS ADVANCED BY THE LRA AND THE GOU ON THE ICC

(1) Positions of the LRA

The LRA has consistently cited the arrest warrants issued by the ICC as a significant impediment to the progression of the peace process. In its opening speech at the Juba peace talks, the LRA Delegation pointed to challenges in enforcing the arrest warrants; its perception that the ICC is biased in only issuing warrants against the LRA and not the Uganda People's Defence Force (UPDF) and the inability for 'the justice system [to] comprehensively address all the issues of accountability and reconciliation in a just and fair manner to both parties.'³

While the LRA delegation argued that the optimal means by which to resolve the conflict was to reach, 'a negotiated settlement in which both parties address the key issues of the root causes of the war, how to resolve them and draw a programme for reconciliation and accountability that guarantees lasting peace in and the national unity of the country,' it has not yet advanced a clear public position on what this programme might look like.

At the beginning of July, the Daily Monitor reported that Vincent Otti had stated that, 'we have accepted the amnesty [offered by the GoU] with both hands ... I am speaking to you on behalf of Kony.'⁴ However, in September, Mr. Otti claimed that the offer of amnesty would be insufficient for so long as the ICC arrest warrants remained in place.⁵ Around the same time, Mr. Otti talked of his willingness to go through *mato oput* (a reconciliation process in the Acholi traditional justice system) on the conclusion of a peace agreement.⁶ More recently, both Mr. Kony and Mr. Otti have indicated that they would be prepared to 'submit' themselves to trial before Ugandan courts.⁷

(2) Positions of the GoU

Although the GoU referred the situation of northern Uganda to the ICC in 2003, up until July 2006, it had vacillated between the threat of prosecution and the offer of a general amnesty.⁸ Such a shifting position has created uncertainty for the communities most affected by the conflict as to the government's position and commitment to accountability and reconciliation processes.⁹

In July, the GoU indicated that it would approach the ICC for a suspension of the arrest warrants pending the peace process and that Parliament, 'would amend the current amnesty law to include

3 'Opening Speech of LRA Delegation at Juba Peace Talks,' *New Vision* (15 July 2006).

4 'Government Happy Kony is for Amnesty,' *Daily Monitor* (9 July 2006).

5 'We Will Sign Peace Deal But Hide Until Indictments Lifted-Rebel Leader', *UN IRIN* (14 September 2006).

6 'Otti to Apologize, wants to talk to Museveni', *The Monitor* (15 September 2006).

7 Frank Nyakairu, 'Kony Wants Trial in Country,' *The Monitor* (21 December 2006) (quoting Kony's legal adviser as stating that, 'Kony made it clear that the ICC is biased, it has heard only side of the story and now he says he is willing to stand trial in Uganda. He mentioned Luzira and Lugore prisons which mean he is ready to face anything'); 'Otti Wants Trial in Uganda,' *New Vision* (14 October 2006) (quoted as stating that, "We would prefer to be tried in Uganda by the Uganda High Court if the Government feels we have committed criminal offences.")

8 See, Annex I: 'IBA Says Uganda Must Meet its Obligations under the Rome Statute.'

9 See, IBA *id.* and Amani Forum, the Great Lakes Parliamentary Forum on Peace, 'The Ongoing Peace Talks between the Government of Uganda and the Lord's Resistance Army' (August/September 2006) at 9 (stating that '[t]he Government of Uganda should come up with a clear position on the International Criminal Court case filed against the LRA leaders so that the ongoing peace process is not derailed.')

Mr. Kony and his four commanders on the list of rebels that are eligible for pardon.¹⁰ In the same month, a Ugandan newspaper reported that President Museveni was prepared to approach the Peace and Security Council of the African Union with the view to protecting the leaders of the LRA from the enforcement of the ICC arrest warrants. The newspaper claimed that, ‘Museveni would make the amnesty case to the African Union on the basis that it is intended to promote peace and stability in the region.’¹¹

While Dr. Ruhakana Rugunda (Minister of Internal Affairs and chief government negotiator in the Juba peace talks) stated in September that, ‘[t]he International Criminal Court will not stand in the way of a comprehensive peace agreement between the government and the Lords Resistance Army rebels,’¹² the GoU has advanced a relatively clear position in the last few months: that it will not approach the ICC with the view to discussing the ‘withdrawal’ of the arrest warrants until a peace agreement has successfully been concluded and the LRA leaders have gone through the *mato oput* process.¹³

At the same time, the GoU has also indicated that it will return to military action should the peace process fail. For example, in August, President Museveni was reported to have threatened that, ‘should negotiations break down, the armies of Uganda, south Sudan and the Democratic Republic of Congo would attack LRA leader Joseph Kony and his top commanders.’ President Museveni claimed that both President Kabila and Vice President Bemba supported the proposed consequence.¹⁴ In September, President Museveni reiterated this position that, ‘[i]f the talks fail, we shall hunt the rebels, we are moving on very well. You saw what was happening in July. If they fail the talks, we shall resume our operations.’¹⁵ Equally, however, he has been reported to have stated that, ‘the military will not attack rebels ... despite the expiry of the truce agreement.’¹⁶

B. DEBATES ON THE ‘WITHDRAWAL’ OF THE ARREST WARRANTS

The OTP has stated that any negotiated solution must be compatible with the Rome Statute.¹⁷ To date, the GoU has not approached the Court to challenge its jurisdiction or the admissibility of the cases before it. As outlined by the Prosecutor in his office’s *Submission of Information on the Status of the Execution the Warrants of Arrest in the Situation in Uganda* to the Pre-Trial Chamber,

‘[t]he Ugandan government has acknowledged, as have others, the positive effect that the warrants have had in motivating the LRA to attend peace talks, and the Government continues to seek, as stated in its correspondence, “a permanent end to the violence that serves the need

10 ‘Museveni sets new deadline for Kony,’ *Daily Monitor* (10 July 2006).

11 ‘Kony Wants to Talk to Museveni in Person’ *The Monitor* (23 July 2006).

12 ‘ICC Will Not Interrupt Peace Deal’, *The Monitor* (4 September 2006).

13 ‘We Will Sign Peace Deal But Hide Until Indictments Lifted-Rebel Leader’, *UN IRIN*, (14 September 2006) (government spokesman R.Kabushenga commented that it would be unrealistic to expect the ICC to lift the arrest warrants before the conclusion of the peace process); ‘Rugunda Explains Government Line on ICC’ *New Vision* (11 October 2006) ([i]t’s only when we are armed with a peace agreement and LRA has gone through the mato-oput process that the ICC can be asked to review the indictments’); Henry Mukasa, ‘LRA refuses to sign agreement’, *New Vision*, (23 December 2006) ; Daniel Wallis, ‘World Court Faces Tough Choices Over Ugandan Rebels,’ *Global Policy Forum*, (3 September 2006).

14 ‘Uganda: Gov’t and rebels discuss ending hostilities, demobilisation,’ *IRIN News* (21 Aug 2006).

15 ‘We Shall Pursue LRA Rebels If Talks Fail,’ *The Monitor* (23 September 2006).

16 ‘Uganda gov’t not to resume fighting LRA rebels despite expiry,’ *People’s Daily Online* (28 February 2007).

17 Fifth Session of the Assembly of States Parties, Luis Moreno Ocampo, Prosecutor of the International Criminal Court, ‘Opening Remarks’ (23 November 2006).

for peace and justice, compatible with [Rome Statute] obligations” ... in the letter from the Ugandan government, and with prior statements of this Office, that peace and justice should continue to be viewed as mutually reinforcing objectives. Importantly, there has been no request to the OTP for “withdrawal” of the warrants. Rather ... there is also broad support locally and internationally for an ideal which is one of the aims expressed in the Preamble of the Rome Statute: that lasting peace requires that there be no impunity for crimes of concern to the international community as a whole.¹⁸

While rhetoric on the ‘withdrawal’ of the arrest warrants has repeatedly featured in the media, as discussed in the introduction, it has not been placed within a legal framework. The lack of detail of the procedure and grounds upon which the arrest warrants could be ‘withdrawn’ may suggest greater possibilities than are actually provided by the Rome Statute. In reality, following the issuance of arrest warrants, the Statute may only provide limited ways in which the Court could reassess the arrest warrants.¹⁹

The IBA recognises the complexity of these issues and as such, any suggested interpretations of the Rome Statute contained in the remainder of this Report are provisional and included with the view to furthering discussion and debate on the status of the arrest warrants.

(1) The Principle of Complementarity

The principle of complementarity provides the strongest ground upon which the arrest warrants could be challenged. The principle of complementarity is threaded through the Rome Statute.²⁰ The Preamble states that measures must be taken at the national level to ensure that ‘the most serious crimes of concern to the international community’ do not go unpunished and positions the ICC as ‘complementary to national criminal jurisdictions,’ a principle reaffirmed by Article 1. The Office of the Prosecutor has thus interpreted the principle as one of *positive* complementarity, ‘aimed at actively encouraging national systems to rebuild and reform their legal institutions themselves.’²¹

Under Article 18(1), in the event that the Prosecutor determines that ‘there would be a reasonable basis to commence an investigation’ or has initiated an investigation, he must notify all ‘States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.’ Article 18(2) then provides that, ‘[w]ithin one

¹⁸ Submission of Information on the Status of the Execution the Warrants of Arrest in the Situation in Uganda Pre Trial Chamber II ICC-02/04-01/05 (6 October 2006) at 3 – 4.

¹⁹ In addition no jurisprudence has been developed as of yet to assist in envisaging whether a request for the ‘withdrawal’ of the warrants could be successfully made.

²⁰ The Preamble to the Rome Statute and Articles 1, 17, 18, and 19. For a history to the principle of complementarity, *see*, Oscar Solera, *Complementarity Jurisdiction and International Criminal Justice*, 84 IRRC (2002) 145 – 171. *See also*, Mark E. Ellis, ‘The International Criminal Court and Its Implications for Domestic Law and National Capacity Building,’ 15 *Florida Journal of International Law* (2002) 215 – 242.

²¹ ICC, ‘Seventh Diplomatic Briefing of the International Criminal Court: Compilation of Statements’ (Brussels, 29 June 2006) at 6 (stating that, ‘the Office [of the Prosecutor] has adopted a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks, and participates in a system of international cooperation. As a consequence, the effectiveness of the Court should not be measured only by the number of cases that reach the Court. On the contrary, the *absence of trials* by the Court, as a consequence of the effective functioning of national systems, would be a major success.’)

month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the informant provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation.²² In the case of Uganda, the Prosecutor has confirmed that, 'letters of notification were distributed to "all States parties under article 18, paragraph 1, of the Statute, as well as to other States that would normally exercise jurisdiction"; and that the Prosecutor had not received from any State information pursuant to article 18, paragraph 2, of the Statute.'²³ As such, Article 18(1) is no longer applicable.

Beyond Article 18, the admissibility of a case can be challenged on the grounds laid out in Article 17, namely that:

- (a) 'The case is being investigated or prosecuted by a State which has jurisdiction over it ...;'
- (b) The case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute ...;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint ...;
- (d) The case is not of sufficient gravity to justify further action by the Court.'

Under Article 19(2)(a), 'an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58' can challenge the admissibility of the case under Article 17 or the jurisdiction of the Court. Similarly, under Article 19(2)(c), a 'State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted', can challenge the admissibility of the case or the jurisdiction of the Court. Article 19(4) provides that a challenge to admissibility can only be made once and 'shall take place prior to or at the commencement of the trial.' However, in 'exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.' Finally, the Prosecutor 'may seek a ruling from the Court regarding a question of jurisdiction or admissibility' under Article 19(3). If the Prosecutor does make such a request, any victims who have already communicated with the Court (or their legal representatives) may make representations to the Chamber in writing.²⁴

²² Under Article 18(3), the 'Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.'

²³ 'Warrant of Arrest for Raska Lukwiya,' ICC-02/04-01/05-6-US-Exp, 8 July 2005. at para. 24. *Submission of Information on the Status of the Execution the Warrants of Arrest in the Situation in Uganda* Pre Trial Chamber II ICC-02/04-01/05 (6 October 2006) at 19 (noting that, '[t]he reactions to the warrants of arrest have included strong calls for the execution of the warrants to be subjugated to the end of obtaining peace. Still, there also continues to be strong support for the objective of ensuring that peace and justice continue to reinforce each other in northern Uganda. The Ugandan government continues in its latest statements to the Court and the States-parties to emphasise the role played by the warrants in bringing the LRA to the current negotiations, and the ongoing aim of finding a permanent solution "that serves the need for peace and justice, compatible with those [i.e. Rome Statute] obligations." Radio call-in shows in northern Uganda continue to draw a diversity of opinions from residents and victims there, including a strong view that impunity should not be a price paid for justice.'

²⁴ Rules 59(1) and (3) of the Rules of Procedure and Evidence.

Within the current context, neither the LRA nor the GoU has formally challenged the admissibility or the jurisdiction of the Court. In order to make a challenge, either side would have to be able to argue that the principle of complementarity was engaged by proceedings taking place at the national level. The Pre-Trial Chamber has recently confirmed that for a case to be deemed inadmissible, the national proceedings must ‘encompass both the person and the conduct which is the subject of the case before the court.’²⁵ Currently, no investigations or prosecutions are taking place within the formal criminal justice system in Uganda and beyond Mr. Kony and Mr. Otti’s singular reference to their willingness to ‘submit’ themselves to prosecution, does not appear to be envisaged in the near future.

As outlined above, however, the government of Uganda has stated that it would approach the ICC with the view to a reassessment of the arrest warrants following the conclusion of a peace agreement and the leaders of the LRA going through *mato oput*. The Court has not yet developed any jurisprudence as to whether any ‘alternative’ proceedings such as those provided by traditional justice systems might be considered within a complementarity assessment. The OTP has made clear that it considers ‘alternative’ proceedings including ‘truth seeking, reparations programs, institutional reform and traditional justice mechanisms’ as complimentary rather than direct substitutions to the ICC.²⁶ A 2003 independent Report of the Expert Group on Complementarity argued, ‘[t]he stance of the OTP with respect to alternative forms of justice should probably be framed, conceptually, under Article 53(1) (c) and (2) (c), i.e., the prosecutorial discretion not to proceed where it is not in the “interests of justice” to do so.’²⁷ However, even if the Court decided to consider ‘alternative’ proceedings as part of a complementarity assessment, such proceedings would still need to reflect the general features of a criminal process, including an independent and impartial investigation, prosecution and a form of sanction. In this respect, undergoing *mato oput* alone would not comply with these requirements.

Furthermore, any national proceedings would still be subject to an assessment under Article 17(1)(a) and (b) which provide that a case may still be admissible before the ICC, national proceedings notwithstanding, if the state is found to be ‘unwilling or unable genuinely to carry out the investigation or prosecution’.²⁸ In this respect, the GoU has referenced amnesty as part of its ‘peace package’ on a number of occasions. However, the grant of a general amnesty would indicate the Ugandan state was ‘unable’ to investigate and prosecute the crimes falling under the Rome Statute. As held by the Special Court in Sierra Leone, the amnesty provided for under the Lome Accord between the Government of Sierra Leone and the Rebel United Front was ‘ineffective in depriving an international court such as the Special Court of jurisdiction.’²⁹

25 Pre-Trial Chamber I, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest,’ ICC-01/03-01/06 (10 February 2006) at para. 31.

26 Office of the Prosecutor, Draft Policy Paper on the Interests of Justice.

27 ICC-OTP, ‘Informal Expert Paper: The Principle of Complementarity in Practice’ (2003) at 71.

28 See, the Reports of the Office of the Prosecutor to the Security Council in the situation of Sudan on complementarity assessments, Office of the Prosecutor, ‘Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to the UN Security Council Resolution 1593 (2005)’ (14 June 2006) at 4 and ‘Forth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to the UN Security Council Resolution 1593 (2005)’ (14 December 2006) at 7.

29 *Prosecutor v. Kallon*, Case No. Special Court in Sierra Leone, SCSL-2004-15-AR72(E) (2004) at para. 88. *Prosecutor v. Furundzija*, International Criminal Tribunal for the former Yugoslavia, Case No. IT095017/1-T (finding that a domestic amnesty for crimes violating norms of a *jus cogens* status, ‘would not be accorded international legal recognition.’)

As such, it is unlikely that a challenge to the admissibility of the five cases before the ICC would succeed on the grounds of complementarity.

(2) '*Interests of Justice*'

Although satisfaction of the principle of complementarity reflects a possible means by which the warrants could be reassessed, the Rome Statute provides for two other potential grounds: the 'interests of justice' clause under Article 53(2)(c) and the power of the Security Council to defer prosecution under Article 16.

Article 53(2)(c) provides that,

‘[i]f, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: ... A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime ...’

On this basis, some commentators have argued that the warrants could be 'withdrawn' in the 'interests of justice' if a peace agreement was reached.³⁰

Again, the Court has not yet developed any jurisprudence on the meaning of 'interests of justice'. Equally, however, the wording of Article 53(2)(c) suggests that the 'interests of justice' would only be taken into account prior to the issuance of arrest warrants. This reading is supported by Amnesty International which has argued that, 'Article 53 provides no basis for a suspension of an investigation or prosecution. It governs decisions whether to "initiate an investigation" or, after an investigation, whether "there is not a sufficient basis for a prosecution."'³¹

However, even if the Pre-Trial Chamber was to find that the 'interests of justice' could be taken into account after the issuance of arrest warrants, the grounds upon which the warrants could be reconsidered would be very limited and could only take place subject to the object and purpose of the Rome Statute³² and within the broader context of international law. The OTP has noted that it considers the 'interests of justice' clause to apply only in 'exceptional circumstances' although it has not publicly elaborated on what it understands these circumstances to be.³³ Human Rights Watch has argued that the 'interests of justice' only refers to the "good administration of justice" rather than political or non-legal considerations.³⁴ FIDH has also stated that, 'the "interests of justice"

30 For example, see Zachary A. Lomo, 'Why the International Criminal Court Must Withdraw Indictments against the Top LRA Leaders: A Legal Perspective,' *Sunday Monitor* (20 August 2006).

31 See, Amnesty International, 'Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice,' (17 June 2005) AI Index: IOR 40/023/2005 at 3.

32 Human Rights Watch, 'The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute' (June 2005) at 2.

33 *Supra* note 26. (The Policy Paper, however, does set out the reasons for not discussing what the 'exceptional circumstances' might entail as, 'The paper deliberately does not enter into detailed discussions about all of the possible factors that may arise in any given situation. Experience demonstrates very clearly that each situation is different. It is also noted that the Statute itself does not try to elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue. The approach taken by the Office of the Prosecutor is therefore bound to offer only limited clarification in the abstract: as is the case with many legal problems in jurisdictions throughout the world, the particular approach taken will necessarily have to depend on the facts and circumstances of the case or situation. Any fears that this approach leads to an indeterminate sphere of discretion for the Office of the Prosecutor are misplaced as any decision not to investigate or not to prosecute based solely on Articles 53(1) (c) or 53(2)(c) respectively will always require the confirmation of the Judges.')

34 Human Rights Watch *id* at 6 (referring to Articles 55(2)(c), 61, 65 and 67).

provision ... should not be interpreted as giving the Prosecutor the power to take into consideration the political context of a given situation in relation to a decision not to investigate or not to prosecute.³⁵

This reading of the ‘interests of justice’ may also find support from the bases upon which arrest warrants have been withdrawn before the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). Before both the SCSL and the ICTY, applications for the withdrawal of arrest warrants have been accepted due to the death (or presumed death) of the accused.³⁶ The ICC Prosecutor has recently applied for the withdrawal of the warrant of arrest for Raska Lukwiya on the same ground.³⁷ The ICTY has also allowed the withdrawal of charges due to the mistaken identity of the accused;³⁸ on the basis that the accused could be appropriately tried in another forum at the national level³⁹ and because of an ‘insufficient basis to justify proceeding with his prosecution on any of the counts with which he is charged within the indictment.’⁴⁰

The ‘interests of justice’ should also be distinguished from the ‘interests of peace.’⁴¹ Indeed, the Preamble to the Rome Statute focuses on ensuring that, ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and ending impunity. Within this context, to review the arrest warrants on the basis of a political agreement alone would be incompatible with the object and purpose of the Rome Statute.

The suggestion that amnesties would form part of the peace agreement again would be inconsistent with the object and purpose of the Rome Statute and international law more generally which prohibits amnesties for crimes under international law. For example, in the *Barrios Altos* case,⁴² the Inter-American Court on Human Rights held that, ‘[t]his type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the

³⁵ FIDH, ‘Open Letter to Mr. Moreno Ocampo, Prosecutor of the International Criminal Court’, (4 December 2006).

³⁶ See, SCSL, *Prosecutor Withdraws Indictments Against Sankoh and Bockarie*, 5 December 2003, <http://www.sc-sl.org/Press/pressrelease-120503.html> (withdrawn as Mr. Sankoh and Mr. Bockarie were declared dead. However, the Prosecutor noted that, ‘the withdrawal of these indictments does not mean that there will not be a record of what Sankoh and Bockarie did to the people of Sierra Leone...The whole story of the alleged crimes committed by Sankoh and Bockarie will be brought to light.’); *Prosecutor v. Goran Borovnika*, International Criminal Tribunal for Former Yugoslavia Case. No. IT-95-3-1 (21 April 2005); *Prosecutor v. Dusko Sikirica and Ors*, International Criminal Tribunal for the former Yugoslavia, (5 May 1998).

³⁷ *Prosecutor’s Request that the Warrant of Arrest for Raska LUKWIYA be Withdrawn and Rendered Without Effect because of his Death*, Pre-Trial Chamber II, ICC-02/04-01/05 (22 March 2007).

³⁸ *Prosecutor v. Goran Vajie*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-8-T (17 June 1996).

³⁹ *Prosecutor v. Dusko Sikirica and Ors*, International Criminal Tribunal for the Former Yugoslavia (5 May 1998).

⁴⁰ *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Vladimir Santic, Stipo Alilovic, Miroslav Katava, Dragan Papic*, International Criminal Tribunal for the Former Yugoslavia (19 December 1997); *Prosecutor v. Pero Skopljak*, International Criminal Tribunal for the Former Yugoslavia (19 December 1997).

⁴¹ See, Office of the Prosecutor, *supra* note 26 (noting that, ‘there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor.’) See also, Nick Grono, ‘The Role of the International Criminal Court in African Peace Processes: Mutually Reinforcing or Mutually Exclusive?’ *Institute for Public Policy Research* (November 2006) at 5. (arguing that, ‘[t]he interests of justice are different from the interests of peace, although there may be significant overlap. As the Rome Statute evidences a very strong presumption that the kinds of crimes under the Court’s jurisdiction require effective criminal punishment, the fact that negotiations are underway would not in themselves be sufficient for the Prosecutor to stop his prosecution.’)

⁴² *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)* March 14, 2001 at para. 41.

truth and receiving the correspondent reparation.⁴³ Article 24 of the UN Set of Principles on Impunity also provides that, ‘[e]ven when intended to establish conditions conducive to a peace agreement or to foster national reconciliation,’ amnesties cannot displace the state’s obligation to investigate and prosecute serious crimes under international law; the jurisdiction of an ‘international, internationalized or national’ to prosecute the accused; and cannot prejudice victims’ rights to reparation.⁴⁴

Indeed, in the Ugandan context, the GoU’s intermittent offer of amnesty has attracted substantial criticism on the grounds that amnesty for crimes under international law violates the GoU’s obligations under international law.⁴⁵ Moreover, on the basis of their own experiences in dealing with large scale human rights violations and conflict, fifteen organisations based in Latin America issued a statement highlighting that, ‘[t]he reality of our continent has demonstrated that processes to overcome internal armed conflicts and dictatorships can only be consolidated on solid ground where justice is a foundation for peace and reconciliation.’⁴⁶

Finally, 49 victims have applied to participate in the proceedings in the situation in Uganda. To reconsider the arrest warrants on the basis of an elite political agreement between the LRA and the GoU would heavily impact upon the interests of these specific individuals as well as victims considering participating in Court proceedings in the future. As noted by Amnesty International, ‘[s]uspension of an investigation on political grounds would demoralize victims and witnesses, particularly those that risked their safety and, indeed, their lives in cooperating with the Prosecutor’s investigators. It would increase the risk to victims and witnesses who had cooperated and raise the costs of pre-trial support and protection as suspensions could last years or even decades The suspension would create a sense of helplessness as the one court of last resort when no state was able or willing to investigate the most horrendous crimes informed them that it had suspended indefinitely the investigation that had previously given them hope of justice, truth and full reparations.’⁴⁷

Beyond Article 53(2) (c), Article 53(4) provides that ‘the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.’ Again, the text of Article 53(4) suggests that this Article would apply to decisions *not* to investigate or prosecute. Equally, however, it is at least conceivable that this Article could enable the Prosecutor to reconsider a positive decision to investigate or prosecute. At the same time, the Rome Statute, Rules of Procedure and Evidence (RPE) and the Regulations of the Court do not clarify the grounds upon which such reconsideration might be based and thus it is unclear whether the ‘interests of justice’ could factor in any such reassessment. Moreover, the Statute, RPE and Rules do not provide the procedure by which the Prosecutor could ‘reconsider a decision.’

⁴³ *Id.* at para. 43. See also, General Comment No. 20: *Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, Human Rights Committee (10 March 1992) at para. 15. The Committee later reaffirmed this position in the individual communication of *Rodríguez v. Uruguay*, UN. Doc. CCPR/C/51/D/322/1988 (9 August 1994) at paras. 11 – 12.

⁴⁴ *Report of the Independent Expert to Update the Set of Principles to Combat Impunity: Addendum : Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN. Doc. E/CN.4/2005/102.Add.1 8 February 2005, Article 24 (a) – (b).

⁴⁵ See, Annex I; Amnesty International, ‘Amnesty International calls for an effective alternative to impunity’ (4 August 2006) and Human Rights Watch, ‘No amnesty for atrocities – Turning a blind eye to justice undermines durable peace,’ (28 July 2006).

⁴⁶ ‘Declaration on the Inapplicability of Amnesty Laws to Cases before the International Criminal Court for Crimes under its Jurisdiction’, adopted in Bogota (29 August 2006).

⁴⁷ Amnesty International Open Letter, *supra* note 30 at 3.

(3) Article 16: Security Council Deferral

The final provision under which the arrest warrants could be reconsidered is Article 16 of the Rome Statute which provides that,

‘No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII ... has requested the Court to that effect.’

This is the only article in the Rome Statute which explicitly allows threats to peace and security to be taken into account. Nick Grono of International Crisis Group has argued that Article 16, ‘should only be exercised as a last resort, when there is a compelling case that the benefits of peace will outweigh the harm done to the cause of accountability.’⁴⁸ The LRA has recently argued in favour of the employment of Article 16, however, there has been no indication or suggestion that the Security Council might request a deferral of the ICC’s investigations or prosecutions.⁴⁹

Article 39 of Chapter VII of the Charter of the United Nations provides that the ‘Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression,’ and authorises the Security Council to take measures ‘to maintain or restore international peace and security.’ As discussed above, the arrest warrants issued by the ICC have been characterised as a trigger to the peace talks between the LRA and the GoU and as such, would not appear to engage Article 16 of the Rome Statute. Although the warrants have also been depicted as a stumbling block to the progression of the talks, very little information about the issues under discussion exists in the public domain. In this respect, it is unclear whether the warrants actually present a significant obstacle to the talks or if other issues are at stake. Moreover, Article 16 cannot be used as a means to bypass accountability. Rather, the employment of Article 16 must still align with the objects and purpose of the Rome Statute, including that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and the determination of the ICC to ‘put an end to impunity for the perpetrators of these crimes.’⁵⁰ Thus, even if the Security Council did employ Article 16, investigations and prosecutions would only be suspended for a period of 12 months and the status of the arrest warrants could still only be reconsidered if the GoU could demonstrate that it met the tests of complementarity, as discussed above.

(4) Conclusion

In this respect, the available legal grounds upon which to challenge the jurisdiction or admissibility of the cases before the ICC are much narrower than public rhetoric would suggest and the situation in Uganda does not currently appear to satisfy any of the conditions upon which the warrants could be reconsidered. As discussed above, however, the focus on the ‘withdrawal’ of the warrants has distorted the role of the ICC within the Ugandan context. The ICC was not designed and does not

48 Grono, *supra* note 40 at 2.

49 However, see Human Rights Watch, ‘Uganda: Resumption of Juba Peace Talks Welcome: Credible Prosecutions for Most Serious Crimes Key to Durable Peace’ (New York, April 25, 2007) (arguing that the employment of Article 16 would currently be inappropriate).

50 Preamble of the Rome Statute.

intend to deal with multiple and complex issues arising from the conflict in northern Uganda. As the Liu Institute and the Gulu NGO Forum have pointed out, ‘the ICC is not a silver bullet for ending impunity or preventing future war crimes. Nor is it the only obstacle in the way of peace. The current debate threatens to divert attention away from wider issues of accountability in dire need of attention. Without care, the ICC could be a scapegoat for the failure of the talks and fuel to a new era in the Uganda conflict.’⁵¹ In short, the focus on the arrest warrants has descended into an exercise over whether the ICC or projected alternatives such as amnesties and aspects of particular traditional justice systems should ‘trump,’ rather than critically examining the role, scope and limitations of each process and the possibility of complementary arrangements.

Some discussions are beginning to take place which look beyond the immediate debate on the ‘withdrawal’ of the arrest warrants towards the development of broader and integrated strategies to responding to the experiences of conflict. For example, Refugee Law Project, HURIPEC and the Makerere University Faculty of Law held a workshop in December 2006 on ‘Building Consensus on a Sustainable Peace Process for Uganda.’⁵² The Report of the meeting includes discussions of the possible establishment of a truth commission in addition to emphasising the importance of a contextual approach to dealing with experiences of conflict.

Within this context, the IBA held a workshop on the role of traditional justice processes in responding to conflict following the advancement of *mato oput* as a direct alternative to the ICC. The IBA has also continued to work on the issue of implementing legislation with a Working Group of Ugandan lawyers and recently held a workshop in partnership with the UCICC on the *ICC Bill* 2006. Feedback from both workshops follows.

C. Feedback from November 2006 Workshop in Lira⁵³

On 10 - 11 November 2006, the IBA and the Uganda Law Society (ULS) held a consultative workshop in Lira to discuss the role, contributions and limitations of the traditional justice systems in responding to experiences of conflict. The workshop brought together over one hundred participants, including representatives of local government, cultural institutions in the Acholi and Langi sub-regions, NGOs, community-based organisations, the Directorate of Public Prosecutions and the Ugandan Human Rights Commission. While the workshop took place in Lira, the participation of representatives from Apac, Gulu, Kampala, Kitgum, Pader, and Soroti was facilitated. Prof. Momoh Taziff Koroma of the University of Sierra Leone (formerly Truth and Reconciliation Commission, Sierra Leone) and Dr. Phil Clark of the Transitional Justice Institute, Northern Ireland also attended to provide comparative perspectives on the use of traditional justice systems in responding to conflict.

51 Liu Institute for Global Issues, Gulu District NGO Forum, ‘The Justice and Reconciliation Project: Accountability, Reconciliation and the Juba Peace Talks: Beyond the Impasse,’ 3 *Field Note* (October 2006) at 2.

52 Refugee Law Project, Makerere University Faculty of Law and HURIPEC, ‘Stakeholders’ Dialogue: Beyond Juba: Building Consensus on a Sustainable Peace Process for Uganda,’ (December 1 – 3, 2006).

53 The remainder of the Report contains feedback from consultative workshops organised by the IBA in Lira, Kampala and Delhi. The views advanced in the remainder of this Report are not necessarily those of the IBA but attempt to convey the diverse perspectives of the workshop participants. As such, this section is included to stimulate debate and increase awareness and understanding of views, perspectives, positions and opinions in situation countries.

The following reflects the key themes discussed at the workshop:

Access to Justice

A number of participants from the Acholi sub-region commented that the Acholi traditional justice system has often been more accessible than the formal justice system and has provided speedier trials and affordable and culturally relevant remedies in cases in which reparation has been made.

Reparations

A number of participants emphasised the importance of ensuring that reparations are made to the individuals and communities most affected by the conflict. Many participants recommended that reparations should be made in a ‘pragmatic’ form which would directly improve the lives of the victims, rather than providing reparations of a symbolic nature.

A number of presentations and participants directly linked the need for reparations to the interest in using the traditional justice system. However, challenges were also raised. Traditionally, both the individual and the clan assume responsibility for the wrongdoing. However, within the current context, a number of panellists and participants highlighted the difficulty in using the traditional justice system to deal with crimes committed by the UPDF or the LRA as neither are clans but composed of individuals from different groups. Moreover, participants also argued that guilt should not be collectivised or attributed to particular clans but to responsible individuals and organisations such as the LRA and the UPDF.⁵⁴

Beyond responsibility, participants questioned how reparations could be made given the poverty of clans in northern Uganda, particularly as so much of the population is living in IDP camps.⁵⁵ In this respect, some participants argued that without large-scale government intervention, it would be very difficult for the traditional justice system to function. At the same time, opinion was divided on governmental involvement in the administration of the traditional justice systems. Some felt that the government should pay reparations outwith the context of traditional justice systems. Others raised practical challenges to reparation programmes in that there would be multiple claimants and the government may not be able and willing to effectively implement such a programme due to capacity, potential political interference and patronage. Finally, some participants felt that it would be unsatisfactory for the government to pay reparations to the families of individuals killed by the LRA. Within this discussion, participants also raised objections to the families of victims having to live in the same communities as persons allegedly responsible for their relation’s death.

⁵⁴ On this issue, *see also* the Liu Institute, *supra* note 50 at 5 (questioning how the traditional justice system would apply to Acholi soldiers fighting in the Uganda People’s Defence Force; ‘what to do when the offender is Acholi and victim is non-Acholi, remains to be seen;’ and ‘how crimes committed by non-Acholi would be held accountable within Acholi, or conversely, if Acholi crimes and systems of justice would resonate with non-Acholi victims and neighbouring clans.’)

⁵⁵ The Civil Society Organisations for Peace in Northern Uganda has reported that between 1.8 and 2 million people are living in internally displaced peoples’ camps in northern Uganda. *See*, CSOPNU, ‘Counting the Cost: Twenty Years of Conflict in Northern Uganda’ (2006).

Knowledge of Traditional Justice Systems

A substantial percentage of presentations and participants raised the incomplete knowledge of the functioning and applicability of traditional justice systems due to the lack of written records. This issue was also aggravated by an incomplete knowledge of how the different traditional justice systems in northern Uganda relate to each other. Moreover, as one panellist pointed out, ‘elders themselves may not be conversant with all the procedures, cultural norms, beliefs and related literature to the kind of compliant at hand.’⁵⁶ Within the afternoon session on Day 1 on “Using Traditional Justice Systems to Deal with Atrocities”, it was concluded that it cannot be assumed that all Ugandans know about and have accepted the traditional justice systems. In particular, participants noted the infrequent use of the traditional justice systems during the 20-year conflict generally and the fact that they have not been used to deal with the types of crimes that have been committed during the conflict. Moreover, participants pointed out that as the majority of people in northern Uganda live in camps, many people, particularly children and youth, may be unfamiliar and may not identify with the traditional justice systems.

Formalising the Traditional Justice Systems to Deal with the Experiences of Conflict

Throughout the workshop, participants consistently emphasised the differences between the various traditional justice systems and the challenges that accordingly arise in focusing on one aspect, *mato oput*, of the Acholi traditional justice system in particular. Very detailed discussions ensued on the micro differences between each system, including dialects, rituals, chieftainships, forms of reparation and punishment. These discussions were particularly relevant as participants recommended that any process adopted to deal with the experiences of conflict should be country-wide and not particular to one traditional justice system.⁵⁷

In relation to the formalisation of the traditional justice systems to deal with the experiences of conflict, some participants noted that section 126 of the Constitution enjoins the courts to administer justice having regard to the written law, the values, norms and aspirations of Ugandans. Section 2(2)(2) of the Constitution also recognises the role of custom to the extent that it does not conflict with the provisions of the Constitution. Participants therefore concluded that the use of the traditional justice systems was not new.

Some participants recommended that a baseline survey be conducted which could then form the basis for a national conference on the traditional justice systems. Others argued that such a process would be difficult because of a lack of resources, logistics, manpower, infrastructure, cultural diversity, conflicts of interest and influence from international community.

Some participants expressed concern that formalising the traditional justice system would mean that the process would become lawyer-directed and the role of cultural and traditional leaders would be

⁵⁶ For a discussion about the differences between the traditional forms of justice within the tribes affected by conflict in Uganda (Acholi, Madi, Lango and Iteso) See, Stephen Lamony, ‘Peace and Justice in Uganda’, ICC-Africa CICC Issue 2 (Sept 2006) at 4 for detailed discussions on the differences between the traditional justice systems particularly with regard to restorative and punitive elements and types of punishment.

⁵⁷ This correlates to comments made during UCICC’s outreach activities in which it has found that the focus on *mato oput* has, ‘led other communities to argue that by promoting only one tribal justice system, they are being denied access to justice, although they suffered from the same crimes as the Acholi community,’ Lamony *id.*

minimised. Other participants expressed doubt about the receptivity of Parliament to recommendations by communities on the formalisation and role of the traditional justice systems in dealing with impunity.

Some participants questioned whether communities would accept a formalised law on traditional justice as it would inevitably differ from their previous understanding of traditional justice and would thus appear modified. Other participants argued that codification may not detract from common understandings of custom as the traditional justice systems are not static but dynamic. Finally, some participants questioned whether some of the core principles of the traditional justice systems could be codified but also include safeguards, particularly to ensure the rights of vulnerable groups such as women, children and victims.

Relationship of the Traditional Justice Systems to the Formal Justice System

At the workshop, some participants questioned why the debates on dealing with impunity only focused on the ICC and aspects of the traditional justice systems. In this respect, they argued that greater consideration needed to be paid to the national judicial system.

Others argued that the trial courts already struggle to deal with their ‘ordinary’ work. As such, the introduction of complex cases involving crimes under international law may cause further delays in the judicial system. Others noted that the legal system is adversarial in nature and this may impact upon the achievement of reconciliation. On a similar point, some participants felt that the legal system was inadequate as it was not community-based. Some participants also criticised the legal system for its lack of provision for reparations or rehabilitation and resettlement.

A number of discussions took place with regard to the relationship of the traditional justice systems to the formal justice system. Some presentations noted the practice of using a combination of both the traditional and formal legal systems. As such, some participants argued in favour of harmonisation. Some participants, however, questioned whether the traditional justice systems could be used if the processes conflicted with constitutional or international legal norms.

Amnesty Does Not Equate to Traditional Justice

Despite the juxtaposition of traditional justice to offers of amnesty in public debates, participants were keen to stress that amnesty and traditional justice are two separate processes which should not be conflated. Some participants pointed out that while amnesty may absolve an individual, investigations and punishment can take place through certain procedures in the traditional justice system.

Rights of Women, Children and Victims

A number of participants raised the ability of women and children to participate in the traditional justice systems. However, the discussions suggested a lack of clarity on how traditional justice systems accounted for the rights of women and children.

Women Within group discussions, participants argued that women are often not allowed to participate in the traditional justice systems but have been particularly affected by the conflict

through the commission of gender-based violations, abductions and torture. Participants also discussed risks involved in female circumcision, inequalities in inheritance laws and educational and economic marginalisation based on gender. Participants questioned whether the traditional justice systems could deal with crimes such as rape.⁵⁸

In this respect, participants recommended that women should be centrally involved in the traditional justice system as well as the peace talks. Participants also recommended that reparations be paid to women whose human rights have been violated during the conflict,⁵⁹ with particular attention to land rights and land distribution.

Children Participants highlighted a range of ways in which children have been affected by the conflict including the use of child soldiers, children forced into early marriage, defilement, psychological torture, an increase in the number of street children, school drop-outs, child labourers and exploitation, and inadequate access to health care and education.

In this respect, participants recommended that the definition of a child should be a person below the age of 18 years. Disadvantaged children should be identified and resettled with their families; the government should establish a ministry dedicated to children in war affected areas; children should be explicitly recognised as victims and not perpetrators and in this respect, a truth and reconciliation commission could act ‘as the eyes and ears of the disadvantaged children’; NGOs should increase their commitment to providing humanitarian assistance to the disadvantaged and marginalised war-affected children in northern Uganda; and the ICC should investigate war crimes and crimes against humanity committed against children in the context of the conflict in northern Uganda, regardless of the status or nationality of the perpetrator.

Victims The question was raised as to how victims’ rights would be ensured in the traditional justice processes. In this respect, participants argued that the ICC provides better treatment for victims than local and national processes and may also provide better witness protection as this is lacking in the national system generally. However, participants noted that they felt a language barrier persisted on the ICC.

Persons with Disabilities Finally, the question was raised as to how any process responding to the experience of conflict would acknowledge and deal with the experience of persons with disabilities.

Options Beyond the Traditional Justice System

Participants noted that the lack of participation within the Juba peace process was problematic and has resulted in very little information on the process and development of the talks.

Participants also expressed an interest in understanding more about the possibilities and procedure by which the arrest warrants could be ‘withdrawn’.

‘Alternative’ or complementary processes were also discussed. In particular, the possibility of a truth and reconciliation commission was mooted on the basis that it may be transparent and open;

⁵⁸ See, Liu Institute and Gulu NGO Forum *supra* note 50 at 4 (highlighting the lack of provision for crimes beyond murder, such as ‘extra-ordinary crimes encountered during the conflict.’)

⁵⁹ *Id.* at 5 (discussing the role of women and youth in ‘major decision-making, arbitration or negotiations of the *Mato Oput* process.’)

result in the acceptance of responsibility and genuine forgiveness; encourage participation; reflect a speedy process and be less expensive than individual trials. Other participants argued that a truth process could cause more conflict and it may be difficult to assess genuine ‘reconciliation.’ Finally, others argued that there could be fear for security; confidentiality of information; and the government could be uncomfortable with some areas of inquiry under investigation.

Others favoured a hybrid mechanism such as the Special Court for Sierra Leone.

Finally, some participants questioned whether the LRA leaders could be tried in a foreign national jurisdiction, such as Sudan, instead of before the ICC.

In this respect, the workshop demonstrated a range of perspectives not just on the traditional justice systems but on the range of options available to deal with the experiences of conflict in Uganda. The diversity of opinion contrasts markedly to the consensus often suggested by the international and national media, parties to the peace talks and other elite figures in civil society and thus underscores the importance of ensuring greater participation, consultation and outreach on peace and justice issues with a broad range of actors and stakeholders in Uganda as a whole.

D. Implementing Legislation: Feedback from March 2007 Workshop in Kampala

To date, the Rome Statute has not been implemented into national law in Uganda. However, the *ICC Bill* 2004 was recently re-introduced before Parliament by the Minister of Defence, Dr. Crispus Kiyonga. Both the IBA and the UCICC have been conducting outreach activities and analysis on the issue of implementing legislation over the last two years. Responding to the recent developments, the IBA and UCICC held a joint consultative workshop on implementing legislation on 17 March 2007 at the Hotel Africana in Kampala. Hon. Frederick Ruhindi (Deputy Attorney-General); Hon. Peter Nyombi (Chairperson of the Parliamentary and Legal Affairs Committee); Mr. Moses Adriko (Chairperson, IBA Working Group in Uganda); Mr. Stephen Lamony (UCICC) and Mr. Darryl Robinson (University of Toronto, previously the OTP) gave presentations on the implementation of the Rome Statute.

The following reflects the central issues discussed at the workshop:

(1) Status of the ICC Bill 2006

Hon. Frederick Ruhindi opened the meeting by commenting that the *ICC Bill* 2004 had previously lapsed due to the volume of proposed legislation before the Seventh Parliament. He stated that the *ICC Bill* 2006 was not introduced because of the Juba peace talks but in order to comply with the GoU’s international obligations. In this respect, he argued that both the procedural and substantive aspects of the *ICC Bill* 2006 should be implemented as every state should have the capacity to investigate and prosecute crimes against humanity. Pointing to South Africa, he noted that Uganda is ‘not working from imagination’ as many other states had taken steps to implement the Rome Statute into national law.

Hon. Peter Nyombi provided a history to the *ICC Bill* 2006. He noted that in December 2006, the Legal and Parliamentary Affairs Committee received six pieces of proposed legislation. Before

analysing the bills and making recommendations, the Committee held a workshop for Committee members in order to discuss the issues arising out of the proposed legislation. At this workshop, the Attorney-General officially introduced the *ICC Bill* 2006 to the Committee in line with normal practice.

At the Legal and Parliamentary Affairs Committee workshop, Hon. Nyombi explained that a number of issues were raised in relation to the *ICC Bill* 2006:

- First, the Committee commented on the length of the Bill (209 pages) and asked whether it would be possible to pass a Bill with only one or two main clauses. By way of example, the Committee referenced the implementation of the Treaty for the Establishment of the East African Community 2000;
- The Committee sought to clarify Uganda's obligations following ratification of the Rome Statute;
- Members of the Committee questioned whether the implementation of the Rome Statute was timely in light of the peace talks ongoing between the LRA and the GoU;
- Members of the Committee sought to clarify the relationship of the Rome Statute to the Constitution and questioned whether the Rome Statute was ratified in accordance with national law;
- Members of the Committee questioned the difference between the ICC and the International Court of Justice (ICJ);
- Finally, members of the Committee sought to clarify the relationship between the *ICC Bill* 2006 and the traditional justice systems, reconciliation and the *Amnesty Act* 2000.

Hon. Nyombi stated that the *ICC Bill* 2006 would be the last bill to be considered by the Committee. He commented that if the Committee dealt with the first five bills within the next two months (e.g. by mid-May), it would then be able to address the *ICC Bill* 2006 and predicted that this process would take a month. Hon. Nyombi also confirmed that the Committee would seek public opinions and commentary on the *ICC Bill*. Participants at the workshop urged the Committee to provide a clear timeframe within which the Bill would be considered and the views of the public and civil society solicited in order to enable sufficient time for civil society to prepare. The failure of the Chairperson of the Committee to provide a clear timeframe was noted as a challenge to a public, transparent and participatory process.

(2) Substantive Issues Raised at the Workshop

Beyond process, a number of substantive issues arose at the workshop in relation to the ICC as an institution; the GoU's position on peace and justice; and the implementation of the Rome Statute into national law.

ICC as an Institution

In his opening speech, Hon. Frederick Ruhindi highlighted victim participation as an important aspect of the ICC. However, he commented that the ICC should have more judges from Africa (the

ICC has eighteen judges with three from Africa). He also noted that the ICC faces challenges because it does not have its own police force.

GoU's Position on Peace and Justice

One participant commented that government thinking on peace and justice was unclear and as a result, the public was receiving mixed messages. Another participant argued that the GoU only appears to support the ICC when it considers it useful to its political objectives rather than maintaining a consistent position from the outset. Within this context, a participant questioned whether the Executive was politically willing to prosecute the leaders of the LRA in national courts. The Hon. Frederick Ruhindi responded by saying that the GoU considers justice and peace as 'mutually inclusive not exclusive' and commented that he believed the arrest warrants played a significant role in bringing the LRA to negotiations.

The Hon. Frederick Ruhindi then explained that he had written to the Ugandan Law Reform Commission with the view to introducing legislation on traditional justice. In this respect, he suggested that if peace talks were successfully concluded, aspects of the traditional justice system such as *mato oput* instituted and amnesty provided, this would reflect a 'meaningful' process and would give the GoU sufficient grounds to make an admissibility challenge before the ICC.

However, other participants contested this position, arguing that complementarity would not be satisfied short of genuine criminal proceedings in Ugandan courts. Mr. Darryl Robinson noted that controversy exists amongst international lawyers as to whether the use of the traditional justice system could be considered within a complementarity assessment. He also acknowledged a wider recognition of the prohibition of amnesties for ICC crimes under international law. Finally, he argued that it would be procedurally onerous to make a successful admissibility challenge as the GoU or the LRA would both have to convince the Prosecutor and then the Pre-Trial Chamber that traditional justice met the test of complementarity.

Mr. Moses Adriko also argued that perpetrators of crimes under international law cannot be rewarded with impunity under the guise of reconciliation. He noted that Ugandans have been victims of serious international crimes since 1960. As such, he maintained that the *ICC Bill* 2006 should not be narrowly attached to the resolution of the current conflict in northern Uganda but as a potential means to deal with ongoing impunity for international crimes. In this respect, he urged participants to divorce the *ICC Bill* 2006 from the current context, especially as there is no guarantee that these crimes will not continue to be committed. At the same time, he noted that the *ICC Bill* 2006 will complement the peace process by forcing every actor to engage in peaceful politics.

Finally, another participant noted that although many people claim to speak on behalf of the 'victims', the parties to the peace talks and civil society more generally do not appear to have sought, engaged with and understood the views of victims of the conflict in a serious or sustained manner.

The Relationship between International and National Law

The Hon. Frederick Ruhindi confirmed that in disputes between national and international law, international law prevails. However, he noted that this does not mean that international judicial institutions supplant national judicial institutions.

Initiation of Prosecutions

Section 17 of the Bill provides that, ‘[p]roceedings for an offence against any of sections 7, to 16, shall not be instituted in any Ugandan court without the consent of the Attorney General.’

Participants identified this section as problematic as it conditions the initiation of a prosecution on the consent of the Attorney-General. Participants argued that section 17, in its current form, could enable the Attorney-General to make political judgments in determining whether or not a case would go ahead. As such, participants argued that s17 should conform with section 120 of the Constitution which vests the Director of Public Prosecutions, in his or her independent office, with the exclusive power to determine whether or not to initiate prosecutions.

This issue relates to the general concern of the participants that the *ICC Bill* 2006 should enable the investigation and prosecution of all persons alleged to have committed international crimes, including high-level officials.

Obligations in Implementation: Cooperation

As Mr. Darryl Robinson discussed, the Rome Statute obliges states to implement the provisions relating to judicial assistance and cooperation; privileges and immunities of the Court; offences against the administration of justice and appropriate conditions of imprisonment.

First, states parties are required to cooperate fully with the Court in its investigations and prosecutions⁶⁰ and ensure the availability of procedures for cooperation under their national law.⁶¹ Specific obligations are imposed requiring compliance with requests for arrest and surrender⁶² and the authorisation ‘through its territory of a person being surrendered to the Court by another State.’⁶³ Article 93 of the Statute sets out a non-exhaustive list of other forms of assistance that the Court may request from the States parties in relation to investigations or prosecutions. States parties are required to comply with such requests in accordance with the Statute and procedures under national laws.⁶⁴

Second, states parties are required to provide the Court with the privileges and immunities ‘necessary for the fulfilment of its purposes.’⁶⁵ In addition, states parties are required to provide the same privileges and immunities as would be accorded to heads of diplomatic missions, to the

60 Art 86.

61 Art 88.

62 Art 89(1).

63 Art 89(3)(a).

64 Art 93(1).

65 Art 48(1).

judges, the Prosecutor, the Deputy Prosecutors and the Registrar in relation to the official business of the Court. These parties are also to be provided, after the expiry of their term in office, with ‘immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.’⁶⁶

Finally, although there is no obligation to receive prisoners, if a state is willing to accept sentenced persons, the conditions of imprisonment must ‘be consistent with widely accepted international treaty standards governing treatment of prisoners.’⁶⁷

Implementation of the Crimes

Beyond the obligatory components of the Rome Statute, Mr. Robinson outlined opportunities provided by the implementation process to strengthen the capacity of national legal systems to investigate and prosecute international crimes. In particular, he focused on the implementation of the crimes into national law. On the face of the Rome Statute, the implementation of the crimes (genocide, war crimes and crimes against humanity) is optional. However, as discussed above, the ICC will intervene in situations in which the state has not investigated or prosecuted or where national proceedings have been undertaken but the state concerned is not considered genuinely ‘able’ or ‘willing’ to investigate and prosecute. In cases in which the Court is required to make a complementarity assessment, the state’s failure to have implemented the crimes under the Rome Statute may suggest an inability to prosecute. Moreover, the failure to implement undermines the larger project to end impunity, deter the commission of international crimes and ensure predictability in the enforcement of their prohibition.

Implementation and Jurisdiction

Mr. Robinson also discussed the options available to states on jurisdiction. First, he highlighted that states can provide for jurisdiction over the geographical territory; nationals wherever they are in the world (both offenders and victims); and universal jurisdiction. Currently, section 18 of the Bill provides that,

- ‘For the purpose of jurisdiction where an alleged offence against sections 7 to 16 was committed outside the territory of Uganda, proceedings may be brought against a person, if –
- (a) the person is a citizen or permanent resident of Uganda;
 - (b) the person is employed by Uganda in a civilian or military capacity;
 - (c) the person has committed the offence against a citizen or permanent resident of Uganda; or
 - (d) the person is, after the commission of the offence, present in Uganda.’

Second, he discussed the options available for temporal jurisdiction which was of particular interest to the participants at the workshop. One participant commented that it would be useful for the *ICC Bill* to reach back further than the date on which the Rome Statute came into force as in the course

⁶⁶ Art 48(2).

⁶⁷ Art 106(2)

of the outreach activities on the ICC conducted by the UCICC, accountability crimes committed before 2002 is routinely raised, especially since the conflict dates back 20 years. Another participant pointed to the gap in access to justice between 1989 and 1995 when the Human Rights Commission was established.

In this respect, Darryl Robinson set out a range of options in dealing with temporal jurisdiction. At a minimum, the legislation can apply *prospectively*, meaning that it will only apply to crimes committed after the legislation comes into force. Alternatively, the legislation can apply *retrospectively*. In this respect, a number of options are available. The first would be to make the legislation applicable to crimes committed after 1 July 2002, the date upon which the Rome Statute came into force. Uganda could also choose to make the legislation applicable to crimes committed after 17 July 1998, the date upon which the Rome Statute was adopted at the Rome Conference on the basis that the states concerned recognised the crimes in the Rome Statute as customary international law. Uganda could also choose a date earlier than 17 July 1998; however, in order not to violate the principle of *nullum crimen sine lege* or non-retroactivity, it would be necessary to ensure that the crimes were punishable under international conventional or customary international law. This was the approach taken by Canada, for example.

In Canada, the *Crimes Against Humanity and War Crimes Act* 2000, distinguishes the temporal jurisdiction of the Canadian courts on the basis of the specific crime. For crimes against humanity and genocide committed in Canada, section 4(3) provides for jurisdiction if, ‘at the time and in the place of its commission, constitutes a crime against humanity [or genocide] according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.’ For war crimes, section 4(3) provides that the Canadian courts will have jurisdiction if, ‘at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.’ Section 4(4) also provides that, ‘[f]or greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.’

For offences committed outside of Canada, section 6(3) mirrors section 4(3). However, section 6(4) provides that, ‘[f]or greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.’ In addition, section 6(5) provides that, ‘[f]or greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:

- (a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

(b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.⁶⁸

Victims' Rights

One participant argued that it was important for the implementing legislation to include the rights of victims. In this respect, she questioned how victims could benefit from international standards in order to ensure that they are able to participate in national proceedings and are not re-traumatised as well as making provision for reparations. Mr. Moses Adriko noted that the *ICC Bill* 2006 will have a positive impact on national jurisprudence, particularly with regard to victims who currently only appear as witnesses. One participant commented that victims should not wait for changes in the national law of Uganda but should apply to participate in the proceedings before the ICC.

Gender Crimes

One participant highlighted the importance in implementing the Rome Statute in order to ensure that rape was defined in national law.

Rights of the Defence

One participant pointed out that in the current context the rights of the defence are often not respected. In this respect, he recommended that when reference is made to offenders, it is prefaced with 'alleged'.

Death Penalty

Under Article 77(1)(a) of the Rome Statute, the maximum applicable penalty is imprisonment, 'which may not exceed a maximum of 30 years.' As the Ugandan constitution provides for the death penalty⁶⁹, the differences in punishment between the ICC and the Ugandan courts presented a central aspect of the discussion as it could mean that leaders prosecuted in The Hague would receive a lesser punishment than those prosecuted in Uganda. One participant commented that the judicial officer determining the sentence in Uganda would still have discretion as to whether to apply the death penalty. In his opinion, he thought that it would be unlikely that the judicial officer would choose this route in relation to ICC crimes in order to stay in line with international practice.

Bilateral Immunity Agreement with the US

One participant questioned whether the GoU had signed a bilateral immunity agreement with the United States of America and if so, the significance thereof.⁷⁰

⁶⁸ See also, Special Court in Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Case Number SCSL-2003-14-AR72(E) (31 May 2004) (determining whether the prohibition on child recruitment and individual responsibility thereof enjoyed customary international law status at the time the crime was committed in order to ensure that the principle of *nullum crimen sine lege* was not breached).

⁶⁹ Article 22(1) provides that, 'No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.'

⁷⁰ In June 2003, the GoU signed a bilateral immunity agreement with the United States to prevent the surrender or transfer of nationals of either country to the ICC.

The Role of Civil Society

Although a number of organisations are members of UCICC, and the UCICC and the IBA Working Group in Uganda coordinate their activities, it was recommended that civil society should work together more to ensure a coordinated approach on the implementation of the Rome Statute. The Uganda Law Society (ULS) was criticised for not having led the debate on the ICC and the implementation of the Bill to date. In this respect, it was recommended that ULS adopt a clear legal position on the ICC and also encourage the legal fraternity to apply to become list counsel at the ICC.⁷¹ Participants also recommended that the legal fraternity and civil society disseminate information on the Bill – and the Act, if subsequently passed – in an understandable manner to the broader public. Finally, it was recommended that the positions of Members of Parliament on the *ICC Bill 2006* should be identified and engaged with.

⁷¹ Information on how to become apply to become list counsel for the defence is available on the ICC website at: <http://www.icc-cpi.int/defence/defcounsel.html>; information on how to apply to become a Legal Representative of Victims is available on the ICC website at: <http://www.icc-cpi.int/victimsissues/victims counsel.html>.

Part III

Feedback on workshop in India, January 2007

As a follow-up to workshops held in India in February 2006, the IBA held a two-day workshop on the ICC on 12 – 13 January 2007 in partnership with the Bar Association of India, the Indian Society of International Law, the Criminal Justice Society of India and the International Committee of the Red Cross. The workshop was attended by over 100 lawyers in addition to Professor Roy Lee from Colombia Law School and Dr. Rod Rastan from the OTP.

The following reflects the central themes discussed at the workshop:

A. The Shift from India's Position Historically to the Present

Mr. F.S. Nariman (President of the Bar Association of India) opened the workshop by sharing Mr. Cherif Bassiouni's regret that China, India and the USA had not ratified the Rome Statute. Historically, he noted that India was the only state to have ratified the League of Nations treaty for an international criminal court in 1937. In contrast, he argued that India has currently isolated itself from the ICC.

Other panellists highlighted the changing positions of other key states which had initially objected to the ICC. The position of the USA was provided as a specific example. On May 6, 2002, John Bolton (Former Under-Secretary of State for Arms Control and International Security) sent a letter to the UN Secretary General, Kofi Annan, 'unsigning' the Rome Statute, citing concerns over the independence of the ICC Prosecutor, sovereignty and the risk that US service persons stationed abroad might be indicted by the ICC.¹ Since then, the US has signed bilateral immunity agreements with 100 countries and enacted the *American Service Members Protection Act* 2002 which provides that 'no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.' More recently, however, the attitude of the US towards the ICC has become much more nuanced. For example, the US did not object to the United Nations' Security Council resolution which referred the situation in Darfur, Sudan to the ICC, despite the fact that Sudan is not a state party to the Rome Statute. The Deputy Secretary of State, Robert Zoellick, has noted that the ICC investigation in Sudan sends 'a signal about accountability' and is a 'useful deterrence against others and allows us to emphasize a tool about the need to stop violence.'² One panellist argued that these developments may not result in ratification of the Rome Statute in the immediate future but demonstrate an increasing willingness on the part of the US to cooperate with the ICC.

¹ John R. Bolton, 'International Criminal Court: Letter to UN Secretary General Kofi Annan', (May 6, 2002).

² State Department, 'Press Briefing on Sudan,' (May 27, 2005).

B. Reasons Advanced for India to Support the ICC

Complementarity

A number of participants pointed to the principle of complementarity and its impact in strengthening national criminal justice systems as a key reason for India to support the ICC. Mr. Nariman emphasised the ‘culture of legality’ promoted by the ICC, commenting that, ‘[t]he spirit of the Rome Statute lies not in more cases or parties but in the encouragement it gives to countries to administer criminal justice.’ Mr. KTS Tulsi (President of the Criminal Justice Society of India) also underscored the role of the ICC in combating impunity for international crimes and reflecting ‘common minimum standards’ for the prosecution of genocide, war crimes and crimes against humanity. A number of presenters argued that India should not view the ICC as a threat to state sovereignty due to the principle of complementarity which ensures that the Court cannot override the jurisdiction of the national system provided it investigates and prosecutes international crimes.

Victims’ Rights

Saumya Uma, the Coordinator of ICC-India argued that, ‘the rights of victims and protection of witnesses are issues that have not been developed well within the Indian legal system as yet. For example, in the cases after the Gujarat carnage, it is ironic that the first conviction was of a victim (Zahira Sheikh) for contempt of court. There is no legal regime for protection of witnesses; victims are treated by law as prosecution witnesses, and have very little right to participate in the proceedings; Indian law has a much narrower concept of “compensation” as compared to “reparations” enshrined in the ICC statute. The ICC provisions on victims’ issues can give an impetus to bring about the necessary law reform in India.’

A Means to Implement International Humanitarian Law (IHL)

The session sponsored by the ICRC first located IHL in the Geneva Conventions and their Additional Protocols but noted the resulting challenges to IHL due to the shift in the nature of armed conflict following the September 11 attacks in the USA. In the South Asian region in particular, the ICRC highlighted the relatively poor record of ratifications to international treaties dealing with IHL. In relation to the ICC, the panellists provided an overview of the current position of states in the South Asian region as: Bangladesh has cited a constitutional impediment to signing the Rome Statute; Nepal appears to be moving towards ratifying the Statute; and discussions do not appear to be taking place in Sri Lanka. As such, the ICRC session focused on the ICC as a means by which to ensure the implementation of IHL, particularly at the national level.

A number of participants noted that some states in South Asia believe that by supporting the ICC, they would limit the means available to them during armed conflict. Prof. Lee responded by stating that such a fear was baseless as international law, particularly international humanitarian law, already restricts states when engaged in armed conflict.

Finally, Mr. U.C. Jha discussed similarities and differences between the ICC and the national military justice systems in South Asia. Drawing on the principle of complementarity, he argued that the

focus on the ICC could create the impetus to bring the military justice systems in South Asia into line with international law.

Fair Trial Standards

As the workshop took place shortly after the execution of the former Iraqi President, Saddam Hussein, considerable attention was paid to the role of tribunals dealing with international crimes whether international, hybrid or national. Some participants argued against the use of tribunals due to the deficiencies in the trial of Saddam Hussein. Other participants distinguished the Iraqi Higher Tribunal from the ICC, arguing that the irregularities in the trial of Saddam Hussein underscored the importance of the standards embodied in the Rome Statute.

Saumya Uma argued in favour of support for the ICC as it sets a higher standard for fair trial principles which ‘can be used as a yardstick for India.’ She argued that, ‘[w]ithin the Indian legal system, there has been a constant erosion of fair trial principles. In the name of pragmatism, speedy trials are held through “fast track courts” with procedures that often violate fair trial principles; there is an erosion of the right to silence, with a suggestion to make adverse inference of an accused who remains silent; move to water down “beyond reasonable doubt” test in search of “truth” (Malimath Committee recommendations); peace is considered to be diametrically opposite to justice, and in the name of peace, justice is forgotten and not pursued.; invasive practices including narco-analysis, brain-mapping tests on accused with “consent” of the accused, arguably violate right against self-incrimination.’

A Means to Deal with Impunity

Saumya Uma discussed shortcomings in the national legal system and argued that through the complementarity principle, these issues might be addressed. She noted that, ‘[t]he State currently has the power to make laws that legitimize or delegitimize violence. It has the power of a) defining crimes; b) naming certain persons as perpetrators, and incarcerating them while allowing others, especially state agencies, to act with impunity. The selectivity in its use of power serves the interests of powerful stakeholders. Some examples include the Armed Forces (Special Powers) Act which authorizes state agencies to ‘shoot to kill’ in contrast to the lack of political will to prevent torture, indiscriminate / extra-judicial killings, enforced disappearances; the laws on terrorism which exclude state-sponsored terrorism; and the exclusion of state officials from the prohibition of using no more force than required for self-defence. These situations result in a RULE BY LAW as against RULE OF LAW.’

Moreover, she argued that, ‘[i]n India, there has been a history of impunity for mass crimes, including communal (religion-based) violence, suppressing political dissent through violent means and mass crimes against marginalized groups including dalits & adivasis (indigenous peoples). Some examples of a lack of accountability include the Nellie massacres in Assam in 1983 when more than 3300 persons were killed, the anti-Sikh riots in Delhi in 1984, extra-judicial killings of Muslim youth in Hashimpura, UP in 1987, communal violence in 1992-93 in Mumbai and Surat and the Gujarat carnage, 2002, enforced disappearances in Punjab in 1980s. Potential for incorporation of

ICC principles exists in 3 initiatives for law reform: a) Communal Violence Bill; b) reform of Police Act; c) recommendations for witness protection ... the ICC Statute provides the language and framework to talk about impunity and individual accountability – a framework in which crimes are defined and individuals prosecuted for the same.'

International Status

A number of participants recommended that powerful states such as India should sign up to the Court as a demonstration of their commitment to international criminal and international humanitarian law. Mr. Shankardass noted that it would be an 'international embarrassment' for a state to be committed to the objectives of the ICC but to fail to sign up.

An Opportunity to Argue Why India Believes Terrorism Should be a Specific Crime under the Rome Statute

Currently, the ICC only has jurisdiction to prosecute individuals responsible for genocide, crimes against humanity and war crimes. As such, terrorist acts can only be prosecuted if they fall within one of these three categories. As noted at the IBA's first series of workshops on the ICC in India, the lack of provision for terrorism as a specific crime in the Rome Statute reflected one of the Indian government's key points of concern during the Rome Conference. At the workshop in January 2007, participants were divided as to whether the Rome Statute should provide for terrorism as a specific crime. However, some participants pointed out that if India wants the Rome Statute to address terrorism, the deployment of weapons of mass destruction and nuclear weapons, it should become a party to the ICC and negotiate the inclusion of terrorism as a specific crime at the Rome Conference in 2009.

C. Outreach

In order to increase support for the ICC in the region, participants recommended tailoring strategies according to whether or not the state concerned had taken any steps towards signing, ratifying or implementing the Rome Statute. Throughout this process, participants emphasised the importance of strong civil society involvement in lobbying, mobilizing local resources, organizing seminars and conferences on the ICC in order to allay states' concerns about the ICC and respond to and clarify any misconceptions.

D. Concluding Comments

At the end of the two-day conference, Prof. Roy Lee submitted the following closing remarks:

'At the end of this two-day conference, I would like to submit the following points for your consideration:

'First, the views expressed during the past two days seem to confirm that international criminal law has become a well-established branch of international law. The ICTY, ICTR and many national courts prosecuting international crimes have all contributed to this important development

'The establishment of the ICC as a permanent world-wide institution further increases the reach and strength of international prosecution and punishment of atrocity crimes. More importantly, the main objective of the ICC is to encourage States themselves (whether or not parties to the Rome Statute) to exercise criminal jurisdiction and to punish atrocious crimes. The ICC recognizes the priority of national jurisdiction and fills a vacuum when the State with jurisdiction does not act or is unable or unwilling to act. The ICC has also created an international justice system based on established international human rights standards providing due process and fair trial for all accused, even those who are accused of committing the most atrocious crimes.

'Many speakers have urged India to join this development and some also recommended India's membership in the ICC. In their view, India should adopt these international crimes and introduce them into its legal system as they would help deter violation and enhance further stability in India.

'Some participants advocated further inclusion in the Rome Statute of such additional crimes as terrorism, drug trafficking and the use of weapons of mass destruction. It was pointed out that these and other matters were likely be considered by the ICC States Parties in its review conference in 2009 and that if India would like to participate in the review process, it should become a party to the Rome Statute.

'Some participants referred to certain sovereignty issues and constitutional provisions (including, for instance, article 34 of the Constitution of India) which could prevent India from joining the ICC. In their view, these issues would have to be carefully studied and addressed before India could accept the ICC.

'My second point is that most of the international crimes discussed in the conference – war crimes, crimes against humanity and genocide – as they are reflected in the Rome Statute are already customary international law. This is not only the general view expressed in this conference but also evidenced in the judgments of reputable international courts and tribunals, government practice and writings of recognized international law publicists.

'As customary law, we are all bound to recognize these crimes and to ensure their compliance, whether or not we are parties to the Rome Statute. Thus, in any armed conflicts, we must make clear distinction at all times between civilian and combatants and between civilian objects and military objectives. We are also prohibited, to give another example, from employing methods of warfare causing superfluous injury or unnecessary suffering, or widespread, long term and severe damage to the natural environment. Any violations are subject to prosecution and punishment. Government forces, insurgents or organized armed groups are all legally bound to comply with these rules. Ignorance of the law, superior orders and official capacity are no defense or excuse to criminal responsibility. In other words, we are now bound by a much higher humanitarian standard than we had before.

'Some of us may not be fully aware of this obligation and might be under the misconception that such prohibitions were still treaty-based and apply only to parties to the ICC. They thought that they might be able to avoid observing this obligation by not joining the ICC. The fact is that this is customary international law and we are all legally bound to comply whether or not we are parties to the Rome Statute.

'This leads to my third point. During the past two days, many references were made to the principle of complementarity under the Rome Statute. No doubt, this is the foundation of the ICC which recognizes the primacy of national jurisdiction over that of the ICC. This means that so long as the state with jurisdiction is willing and able to take the necessary action, the ICC cannot step in.

'I would like to emphasize, however, that no State would be able to claim that priority if the specific crimes that a citizen is accused of has not been criminalized in its domestic law. Thus, any State wishing to exercise jurisdiction over the ICC crimes must first incorporate such crimes into its legal system and to make them prosecutable and punishable. This requirement is based on the well-established criminal law principles recognized in almost all legal systems: nullum crimen sine lege and nulla poena sine lege – the conduct must be criminalized and the punishment must be stipulated.

'At present, about thirty States in the world have enacted national criminal laws to punish the crimes of genocide, war crimes and crimes against humanity. Many States are still in the process of doing. In other words, only those States that have criminalized such crimes in their laws will be able to claim priority of jurisdiction over that of the ICC. Without criminalizing such crimes, there is no effective defense for refusing the ICC intervention.

'Several speakers pointed out that certain war crimes, torture, genocide or crimes against humanity were foreign to Indian criminal law. Nor are forced disappearances or mass sexual offences covered under the system. True, a crime is a crime is a crime. But nomenclature is important and, in this case, expresses the gravity and heinousness of the crimes.

'The crimes pronounced in the Rome Statute are widely recognized as the most atrocious and extraordinary criminal acts. They were so termed to be distinguished from the ordinary and conventional ones. This is one of the main reasons why over 100 governments have recognized these crimes and agree to enforce the law. India is one of the oldest civilizations in the world and the largest democracy in Asia. There is therefore ample justification that India should consider seriously criminalizing such crimes into its system. Incorporating such crimes would not only send a strong message to the would-be perpetrators, manifest India's willingness to punish violation but also provide a valid legal basis for the exercise of its jurisdiction

'Indeed, various groups under the auspices of the Organizers of this conference have met in the past year to consider the issues mentioned above. It seems desirable that these groups should continue their deliberation focusing particularly on the need for incorporating the international crimes into the system. If possible, they should also disseminate their analysis and findings to stimulate broader discussion.'

Conclusion

Outreach is often seen as a soft public relations exercise annexed to the more 'serious' work of an international tribunal. However, the experience of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone and now the ICC demonstrate the key and central non-judicial function of outreach in connecting to the communities most

affected by the crimes being investigated and prosecuted and deepening the impact of international criminal justice processes at the local and national level.

In this respect, the ICC's adoption of the Outreach Plan reflects a positive development and one which must be built on and expanded in coming months. In developing and implementing the Outreach Plan, the ICC should not only increase the level of outreach activities in all situation countries but also clarify its conception of a participatory approach to outreach and introduce outreach strategies tailored to the context and stakeholders involved.

For further information on the IBA's ICC Monitoring and Outreach Programme, including previous monitoring and outreach reports, please visit our website at www.ibanet.org/humanrights/ICC_Monitoring_and_Outreach_Project.cfm.

ANNEX I



NEWS RELEASE

INTERNATIONAL BAR ASSOCIATION **the global voice of the legal profession**

[For Immediate Release, Thursday 13 July 2006]

IBA says Ugandan Government must meet its obligations under the Rome Statute

The **International Bar Association** (IBA) is deeply concerned by Ugandan President Yoweri Museveni's recent offer of a blanket amnesty to Joseph Kony, leader of the Lord's Resistance Army (LRA). Mr Kony is one of five LRA leaders against whom the International Criminal Court (ICC) issued arrest warrants in 2005 for allegedly committing war crimes and crimes against humanity in northern Uganda.

Justice Richard Goldstone, Co-Chair of the IBA's Human Rights Institute, Former Prosecutor at the International Criminal Tribunal for the former Yugoslavia, and retired South African Constitutional Court Judge today stated: *'The ICC is not a political tool of the Ugandan Government. Uganda is a State Party to the Rome Statute. It cannot unilaterally withdraw the ICC arrest warrants as it is under an international legal obligation to ensure that they are enforced.'*

He adds, *'The ICC is an independent judicial institution mandated to investigate and prosecute the most serious crimes of international concern. In order to avoid a case going before the ICC, a state must demonstrate that it is genuinely willing and able to investigate and prosecute these crimes. A blanket amnesty would not meet this test or the requirements of international law'*

generally and would only serve to undermine the fight to combat impunity. Peace and justice go hand in hand; one cannot be achieved without the other.'

Since President Museveni first referred the situation of northern Uganda to the ICC on 16 December 2003, the Ugandan Government has made a number of contradictory statements on the availability of amnesty to the LRA leaders. On 4 May 2006, President Museveni stated that, ‘unconditional forgiveness for all will be a big mistake. Kony and the other four commanders must face trial in The Hague’.¹ Only a week later, however, the President was reported to have made assurances over Kony’s safety if he ‘got serious about a peaceful settlement’ by the end of July.² However, military spokesperson, Major Felix Kulayigye, then told the Associated Press that, ‘[t]he indictees will face international law. It would be illegal for Uganda’s Government to sit down and discuss with the indictees’.³ Most recently, President Museveni offered a blanket amnesty to Mr Kony, ‘if he responds positively to the talks with government in Juba, southern Sudan and abandons terrorism’.⁴ The Deputy Premier and Information Minister, Kirunda Kivejinja, is also reported to have stated that the Ugandan Government is not obligated to enforce the ICC arrest warrants.⁵

IBA Executive Director, Mark Ellis, comments that, ‘*Impunity is the antithesis of accountability. Whether acting out of political expediency or deliberately undermining justice, impunity is a policy premised on bartered settlements and the misguided belief that the choice is between justice and peace.*’ He concludes: ‘*This is a false paradox. In actuality, there can be no lasting peace without justice and justice cannot exist without accountability.*’

ENDS

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¹ Felix Osike, ‘Museveni Rules Out Talks with the LRA’, *The New Vision* (4 May 2006)

² ‘Uganda: Museveni Gives Rebels Ultimatum’, *IRIN News* (17 May 2006)

³ Katy Pownell, ‘Amid War’s Devastation, Ugandans wonder if Sudan talks offer chance at Peace’, *FindLaw* (23 June 2006)

⁴ Onapito-Ekomoloit, Press Secretary to H.E. The President, ‘News Release: Museveni Assures Kony of Safety’, *State House* (5 July, 2006).

<http://www.statehouse.go.ug/news.detail.php?newsId=900&category=News%20Release>. The amnesty has been offered until 12 September 2006.

⁵ ‘Uganda: Gov’t, LRA to hold talks despite ICC indictments’, *IRIN News* (3 July 2006)

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Editors' Notes

Article 86

Article 86 of the Rome Statute mandates States Parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’ and Article 59 provides that a State Party ‘shall immediately take steps to arrest the person in question.’

Background to the Amnesty Law in Uganda

In 2000, legislation was passed to grant amnesty to ‘any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of Uganda’.⁶ However, in April 2006, the Amnesty Amendment Bill 2003 was passed to ‘deny amnesty to leaders of rebellion [against the government of the Republic of Uganda]; and to provide for the grant of amnesty to persons abducted, those coerced into rebellion and those who apply for amnesty in reasonable time, in good faith and who have demonstrated repentance’.⁷ According to a newspaper report, the Act empowers the Minister of Internal Affairs, on the advice of the security services, to name the individuals excluded from the ambit of the amnesty process by statutory instrument, subject to the approval of Parliament.⁸ However, in relation to President Museveni’s recent statements, the Chairperson of the Amnesty Commission, Justice Peter Onega, is reported to have stated that as the Minister of Internal Affairs has not yet named any individuals to be excluded from the Amnesty Act 2000, Kony continues to be eligible.⁹

⁶ Amnesty Act 2000, section 3(1).

⁷ Object of The Amnesty (Amendment) Bill 2003.

⁸ ‘No Amnesty for Rebel Leaders’, *Daily Monitor* (19 April 2006).

⁹ ‘Museveni Amnesty to Kony Illegal – ICC’, *Daily Monitor* (6 July 2006).

ANNEX II: UGANDA WORKSHOP AGENDA NOVEMBER 2006



UGANDA LAW SOCIETY

the global voice of
the legal profession

CONSULTATIVE WORKSHOP

THE ROLE OF TRADITIONAL JUSTICE IN DEALING WITH CONFLICT

LIRA HOTEL, LIRA

10 – 11 NOVEMBER 2006

Initiative Supported by the John D. and Catherine T. MacArthur Foundation

DAY 1, FRIDAY 10 NOVEMBER 2006

10 – 10.30am Coffee and Welcome Address

- His Highness Rwot Yosam Odur
- His Highness Rwot Achana II
- Chairperson, Lira Local Government
- Mr. Ogwali Shaban, Lira NGO Forum
- Mr. Oyet Moses, Uganda Law Society
- Ms. Lorna McGregor, International Bar Association

10.30–11.30am The Role of the Traditional Justice System in Dealing with Conflict: A Comparative Perspective

Chairperson: Lorna McGregor

- Professor Momoh Taziff Koroma (University of Sierra Leone)
- Dr. Philip Clark (Transitional Justice Institute, Northern Ireland)

11.30–11.45am Tea and Coffee

11.45–12.45am Overview of Traditional Justice Systems in Uganda

Chairperson: Mr. Owiny-Dollo

- Hon. Santos Okema Lazech
- Hon. Odongo Joel

12.45 – 1.45pm Lunch

1.45–3.15pm Using Traditional Justice Systems to Deal with Atrocities

Chairperson: Commissioner Aliro

- Mr. Komakech Kilama (Komakech-Kilama & Co. Advocates)
- Mr. Owiny-Dollo
- Dr. Phil Clark
- Prof. Momoh Taziff Koroma

3.15–3.30pm Tea and Coffee

3.30–5.30pm Break-Out Sessions on Role of Traditional Justice System in Dealing with Conflict



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UGANDA LAW SOCIETY

CONSULTATIVE WORKSHOP

THE ROLE OF TRADITIONAL JUSTICE IN DEALING WITH CONFLICT

LIRA HOTEL, LIRA

10 – 11 NOVEMBER 2006

Initiative Supported by the John D. and Catherine T. MacArthur Foundation

DAY 2, SATURDAY 11 NOVEMBER

9 – 11.30am **Gender and Child Rights in Traditional Justice Systems**

Chairperson: Lorna McGregor

- Prof. Momoh Taziff Koroma
- Dr. Phil Clark

Interactive Discussion on Gender and Child Rights in the Traditional Justice Systems in Uganda

11-11.15am **Tea and Coffee**

11.15-12.45pm **Due Process and the Role of Lawyers in Traditional Justice Systems**

Chairperson: Mr. Nicolas Opiyo (Foundation for Human Rights Initiative)

- Mr. Kibwanga Rajab Adams (Uganda Human Rights Commission)
- Mr. Moses Adriko (Chairperson of IBA Working Group of Lawyers)
- Prof. Momoh Taziff Koroma

Interactive Discussion

12.45-1.45pm **Lunch**

1.45 – 3.30pm **Break-Out Session: Relationship of Traditional Justice Systems to the Formal Legal System at the National and International Level**

3.30 – 3.45pm **Tea and Coffee**

3.45-4.15pm **Closing Session**

- Mr. Deo Rubumba Nkunzingoma (President ULS)
- Commissioner Aliro
- Lorna McGregor

ANNEX IV



**Ugandan Coalition for
the International Criminal Court**



the global voice of
the legal profession

WORKSHOP ON IMPLEMENTING THE ROME STATUTE

17 MARCH 2007

HOTEL AFRICANA, KAMPALA

Initiative Supported by the John D. and Catherine T. MacArthur Foundation

9.30 – 9.45 **Introduction and Welcome**

- Mr. Stephen Lamony, UCICC
- Ms. Lorna McGregor, International Bar Association

9.45 - 11.15 **Session I: Current Status of the Bill and Comparative Experience**

Update on the Current Status of the Bill and Perspectives on its Utility

- Mr. Peter Nyombi, Chairperson of the Legal and Parliamentary Affairs Committee
- Hon. Frederick Ruhindi, Deputy Attorney-General

Presentation on the Principle of Complementarity and Comparative Experiences on Implementing Legislation

- Mr. Darryl Robinson, University of Toronto, formerly Office of the Prosecutor, International Criminal Court

11.15 – 11.30 **Tea and Coffee**

11.30 – 1 **Session II: Perspectives by Civil Society: Initiatives, Contributions and Challenges**

- Mr. Stephen Lamony: initiatives undertaken by UCICC and future steps
- Mr. Moses Adriko: efforts by the legal community to analyse implementing legislation from a technical legal perspective

1 – 2 **Lunch**

ANNEX V: INDIA WORKSHOP AGENDA JANUARY 2007



CONFERENCE ON
**THE INTERNATIONAL CRIMINAL COURT:
RESPONSE OF STATES IN SOUTH ASIA**

*Initiative supported by The John D. and
Catherine T. MacArthur Foundation*

12-13 JANUARY 2007

Silver Oak
INDIA HABITAT CENTRE
Lodhi Road, New Delhi

THE INTERNATIONAL CRIMINAL COURT:
RESPONSE OF STATES IN SOUTH ASIA

India Habitat Centre
PROGRAMME

12 January 2007

4 – 5pm	Inaugural Function Introductory Remarks : Shri Lalit Bhasin, General Secretary, Bar Association of India. Address by : Shri Ram Niwas Mirdha, President, Indian Society of International Law Address by : Shri F.S. Nariman, President, Bar Association of India Presentation of Theme : Ms. Lorna McGregor, Programme Lawyer, International Bar Association
5 – 5.30pm	Tea
5.30 - 7pm	Session I: An Overview of the International Criminal Court Chair: P.P. Rao, Senior Advocate Dr. Rod Rastan, Office of the Prosecutor, International Criminal Court Shri A.S. Chandiok, President, Delhi High Court Bar Association Shri KTS Tulsi, President of Criminal Justice Society of India Shri Sidharth Luthra, Advocate
Dinner	India Habitat Centre Keynote Speech: Mr. R.K.P. Shankardass, Former President of International Bar Association

13 January 2007

9.30am – 1pm	Session II: Response of South Asian Countries to the ICC <i>Session Sponsored by the International Committee of the Red Cross (ICRC)</i> (tea break at 11am) Speakers from Sri Lanka, Bangladesh, Nepal, Geneva and New Delhi
1 – 2pm	Lunch <i>Sponsored by the ICRC</i>
2 – 5pm	Indian Perspectives on the ICC (tea break at 3.30pm) Chair: Ms. Lorna McGregor, Programme Lawyer, International Bar Association Dr. Rod Rastan, Office of the Prosecutor, International Criminal Court Shri C. Jayaraj, Advocate & former Secretary General, Indian Society of International Law, <i>India Should become Party to the Rome Statute</i> Shri Y.S.R. Murthy, Director PR [PMO, President's Secretariat and Cabinet Secretariat], <i>International Terrorist crimes, current State practice and possible role for ICC</i> Ms. Saumya Uma - ICC India Prof. V.M. Peshwe, Former Principal, Amalok Chand Law College, Yavatmal, Maharashtra Dr. Manoj Kumar Sinha, Director, Indian Society of International Law Valedictory Address : Prof. Roy Lee Professor of Law (adjunct), Columbia Law School and former Executive Secretary of the United Nations Diplomatic Conference Establishing the International Criminal Court Concluding Remarks : Shri Lalit Bhasin



ICRC



*International Bar Association,
The Bar Association of India,
Criminal Justice Society of India,
The Indian Society of International Law,
International Committee of the Red Cross
cordially invite you to*

Workshop on International Criminal Court
on 12th & 13th January 2007

at

India Habitat Centre,
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R.S.V.P.

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Supreme Court of India
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Lalit Bhasin
Chairman
Organising Committee

(Programme enclosed)