

# Peace, Justice and the International Criminal Court

Limitations and Possibilities

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## Abstract

*This article looks to address a core debate within the transitional justice literature concerning the relationship between peace and justice. The International Criminal Court (ICC) not only features prominently in such debates but is often invoked in support of the contention that justice poses a threat to peace, as particularly highlighted by its intervention in northern Uganda. This article directly engages with such arguments but seeks to portray the ICC neither as an obstacle to nor as an instrument of peace. Rather, it aims to offer a more nuanced, exploratory analysis focused on both the Court's limitations and possibilities as a tool of justice and peace. Stressing that justice entails far more than simply retribution, and underscoring that the relationship between criminal trials and peace remains empirically under-researched, it contends that the ICC can potentially contribute to peace but only as part of a comprehensive approach to justice that is deeper and thicker than criminal trials alone.*

## 1. Introduction

In today's transitional justice literature and debate, a central core theme concerns the relationship between peace and justice. The International Criminal Court (ICC) not only features prominently in such debates but also is often invoked in support of the contention that justice poses a threat to peace. In the words of one scholar, 'The ICC might be seen ... not just as a challenge

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to impunity, but also as a potential challenge or impediment to peace negotiations and agreements ...'<sup>1</sup> This article directly engages with such arguments but seeks to portray the ICC neither as an obstacle to nor as an instrument of peace. Rather, it aims to offer a more nuanced, exploratory analysis focused on both the Court's limitations and possibilities as a tool of justice and peace. Stressing that 'justice' is far broader than simply criminal trials, it maintains that we should not over-rely upon the ICC to deliver either peace or justice. Its work must form part of a broader, more holistic transitional justice strategy that combines retributive and restorative justice elements. The fact, however, that the Court itself, to some extent, embodies both types of justice not only represents a significant development in international criminal law<sup>2</sup> but also serves to underline that in respect of both justice and peace, the Court has potential.

Divided into three substantive sections, the first part of the article examines some of the difficulties that the ICC faces in dispensing justice, including its dependence on state cooperation and the contested nature of 'justice'. The second part of the article looks at how, despite these challenges, the ICC can nevertheless deliver some level of justice, notably by introducing greater clarity in respect of the restorative justice elements of its mandate, by increasing the visibility of its work and by working with local courts to facilitate the holding of national trials. Bringing to the fore the complex and much debated relationship between justice and peace, and focusing on the case of northern Uganda (Acholiland) as being particularly illustrative in this regard, the final part explores whether the ICC can in fact deliver peace. While underscoring that the relationship between criminal trials and peace remains empirically under researched, it argues that the ICC can potentially contribute to peace but only as part of a comprehensive approach to justice that is deeper and thicker than criminal trials alone. In short, 'A tribunal can be but one step in a process seeking to ensure peace ...'<sup>3</sup>

## 2. The ICC's Limitations as an Instrument of Justice

According to supporters of international criminal trials, the dispensing of justice helps to, inter alia, individualize guilt, curb victims' desire for revenge and

- 1 C.L. Sriram, 'Conflict Mediation and the ICC: Challenges and Options for Pursuing Peace with Justice at the Regional Level', in K. Ambos, J. Large and M. Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development – The Nuremberg Declaration on Peace and Justice* (New York, Berlin, Heidelberg: Springer, 2009) 303–319, at 305.
- 2 See A.M. de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and their Families', 20 *Leiden Journal of International Law* (2007) 207–237, at 208.
- 3 M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998), at 50.

foster peace building and reconciliation.<sup>4</sup> Notwithstanding the popularity of such arguments, it is striking that they often fail to critically engage with the concept of justice, as if its meaning were somehow self-explanatory. Arendt's insistence that the sole purpose of a criminal trial is to render justice epitomizes this trend.<sup>5</sup> Yet while justice most obviously entails the prosecution, fair trial and punishment of those who violate the law, such a formalized, procedural understanding fails to capture the inherent complexities of justice. It is in many ways a deeply subjective notion; 'delivering justice usually means different things to different people.'<sup>6</sup> This in turn means that justice can be a highly divisive and polarizing notion, as highlighted by the contrasting ways in which Bosnian Serbs and Bosnian Muslims reacted to the news of the arrest, in July 2008, of the indicted war criminal Radovan Karadžić. While members of one group protested, members of the other celebrated.<sup>7</sup> If, therefore, justice is quintessentially a 'disputed matter',<sup>8</sup> an inevitable challenge will always be one of trying to establish a broad consensus that 'justice' has been done.

The release, in 2009, of the Lockerbie bomber, Abdelbaset Ali al-Meghrahi, illustrates this point. For the Libyan government and al-Megrahi's supporters, justice was done when the Scottish Justice Secretary, Kenny MacAskill, took the decision to grant a man who is terminally ill with prostate cancer, and who has always maintained his innocence, early release on compassionate grounds. Many of the families of al-Megrahi's 270 victims, however, particularly in the United States, were deeply angered by the decision to free a man who had shown no compassion to those on board flight Pan Am 103, which exploded over Lockerbie on 21 December 1988.

If, on a conceptual level, justice is a far less straightforward concept than the transitional justice literature often seems to imply, the pursuit of justice also poses fundamental practical challenges. This first section of the article will therefore explore a combination of conceptual and practical issues that

- 4 N.J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', 59 *Law and Contemporary Problems* (1996) 127–152; P. Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (1998) 737–816; A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2–17; K.C. Moghalu, 'Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions', in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo: United Nations University Press, 2004) 197–223.
- 5 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (rev. edn., New York: Penguin Books, 1977), at 5.
- 6 H. van der Merwe, 'Delivering Justice During Transition: Research Challenges', in H. van der Merwe, V. Baxter and A.R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace Press, 2009) 115–142, at 138.
- 7 J.N. Clark, 'The State Court of Bosnia and Hercegovina: A Path to Reconciliation?' 13 *Contemporary Justice Review* (2010) 371–390, at 375.
- 8 D. Philpott, 'Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?' in D. Philpott (ed.), *The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice* (Notre Dame, IN: University of Notre Dame Press, 2006) 11–44, at 15.

arguably limit the extent to which the ICC can deliver justice. It will focus specifically on allegations of bias and selective justice, as well as the Court's dependence on state cooperation.

### A. *Allegations of Bias and Selective Justice*

If beauty is in the eye of the beholder, the same is similarly true of justice.<sup>9</sup> Hence, it must not only be done but must also be *seen* to be done. To date, however, the ICC has encountered significant difficulties in this latter regard. Questions have inevitably been raised, for example, concerning the quality and impartiality of any 'justice' dispensed by a court that is only focusing on crimes committed in Africa and is completely powerless to act against the United States.<sup>10</sup> Thus in 2009, according to the ICC's Outreach Unit, people in Uganda frequently posed questions such as: 'Why is it that powerful countries like the United States, Russia and China are not parties to the Rome Statute?' and 'Why are all the cases before the ICC coming from Africa? Is the Court a new tool for Western imperialism in Africa?'<sup>11</sup>

Particular decisions and actions taken by the ICC's Prosecutor, Luis Moreno-Ocampo, have further fuelled allegations of bias and partiality. As one illustration, in northern Uganda both the Lord's Resistance Army (LRA) and the United People's Defence Force (UPDF) have committed serious war crimes and human rights violations,<sup>12</sup> yet to date, the Prosecutor has only issued indictments against five LRA commanders — Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya (since deceased). The Prosecutor has justified this decision on the grounds of gravity:

Some people say that the only way to retain our impartiality is to prosecute both the LRA and the UPDF. However, I think that impartiality means that we apply the same criteria equally to all sides. A major criterion is gravity. There is no comparison of gravity between the crimes committed by the Ugandan army and by the LRA — the crimes committed by the LRA are much more grave than those committed by the Ugandan army.<sup>13</sup>

- 9 H.M. Weinstein and E. Stover, 'Introduction: Conflict, Justice and Reclamation', in E. Stover and H.M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004) 1–26, at 4.
- 10 T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: David Philip, 2006), at 22.
- 11 International Criminal Court (ICC), *Outreach Report 2009* (2009), available at [http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR\\_2009\\_ENG.web.pdf](http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR_2009_ENG.web.pdf) (visited 3 April 2010). Goldstone and Smith thus maintain that '...without expanding to other corners of the world, the ICC does indeed risk being branded, at best, as a selective prosecutor, and at worst, as a purveyor of racially conscious justice'. R.J. Goldstone and A.M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (Oxon: Routledge, 2009), at 113.
- 12 A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', 2 *Ethics and International Affairs* (2007) 179–198, at 182.
- 13 L. Moreno-Ocampo, 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives', 21 *American University International Law Review* (2006) 497–503, at 501.

Such distinctions, however, are unlikely to resonate with victims of UPDF crimes, thus exposing a critical disconnect between judicial-based and grassroots understandings of impartiality. When Moreno-Ocampo and Uganda's President Museveni held a joint press conference in January 2004, for example, to announce that the ICC would begin preliminary investigations in northern Uganda, little consideration appears to have been given to how this show of unity would be perceived on the ground.<sup>14</sup> One commentator thus maintains that, 'Until the ICC makes its impartiality evident in practice, and until it establishes its independence from the Ugandan government in more than just its rhetoric ... its capacity to establish justice or conform to the rule of law in Uganda will be seriously impaired.'<sup>15</sup> Given that the ICC is entirely dependent on state cooperation, however (see below), and in this case on the cooperation of the Ugandan government, matters are not quite as straightforward as Branch suggests. The practical realities confronting the Court and the very difficult and sensitive contexts in which it operates will arguably constrain, to some degree, its ability to deliver impartial justice.<sup>16</sup>

Polemics surrounding the neutrality of ICC justice are linked to the problem of selective justice which, once again, has less to do with the Court itself than with the circumstances in which it is functioning. When mass atrocities have occurred over a period of time, difficult decisions must necessarily be made about which crimes to prosecute and during which timeframe. The ICC is dealing only with war crimes, crimes against humanity, genocide and the crime of aggression committed since 1 July 2002, the date upon which the Rome Statute entered into force. The difficulty is that, '... while a timeline starting on 1 July 2002 makes perfect sense from the perspective of the negotiating history of the Statute, from the point of view of the situations under investigation it seems very artificial.'<sup>17</sup> According to the Victims' Rights Working Group (VRWG), for example, there is still a widespread belief among victims that the rationale for the Court's temporal jurisdiction is to protect certain groups and individuals from the risk of prosecution.<sup>18</sup> This critical gap between legal/policy decisions and the everyday lives of those directly affected thus raises

14 Allen adds that, 'The biased nature of the ICC's intervention also seems to be indicated by rumours about the investigators' use of Ugandan government vehicles and officials to facilitate their enquiries on the ground ...' Allen, *supra* note 10, at 97.

15 Branch, *supra* note 12, at 189.

16 V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), at 255.

17 M. Glasius, 'What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations', 31 *Human Rights Quarterly* (2009) 496–520, at 501. On this point, see also S. Finnstrom, 'Reconciliation Grown Bitter? War, Retribution and Ritual Action in Northern Uganda', in R. Shaw and L. Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010) 135–156, at 139.

18 Victims' Rights Working Group (VRWG), *The Impact of the ICC on Victims and Affected Communities: A Report of the Victims Rights Working Group* (2010), available at: <http://www.redress.org/Stocktakingreport2010.pdf> (visited 20 November 2010).

fundamental questions regarding the extent to which a court like the ICC can deliver justice that is perceived as such on the ground.

That the ICC can only deal with a small number of cases — an estimated two or three per year — further exacerbates the problem of selective justice. According to the ICC's 2009 Outreach Report, for example, a commonly asked question among Darfuri refugees in eastern Chad and among the Darfuri diaspora was: 'Why is the international community only focusing on crimes committed in Darfur, when there are also crimes committed in other regions in Sudan?'<sup>19</sup> Similarly, in the Democratic Republic of Congo (DRC), the VRWG reports that victims do not understand the Prosecutor's selection policy or the reasons why so few arrest warrants have been issued.<sup>20</sup> The Court's case against Jean-Pierre Bemba Gombo, the leader of the rebel Movement for the Liberation of Congo (MLC), has created additional confusion, owing to the fact that he is only being prosecuted for alleged war crimes and crimes against humanity committed in the Central African Republic (CAR) but not in the DRC itself.<sup>21</sup> This, according to Human Rights Watch, 'is a significant missed opportunity to bring justice for Congolese victims of crimes committed by MLC troops.'<sup>22</sup> Given that Bemba, a candidate in the DRC's 2006 presidential elections, is a former political and military rival of President Joseph Kabila, to whom he lost the aforementioned elections, his prosecution in The Hague has also generated controversy, by reinforcing the perception that 'the current strategy is one-sided and beneficial to Kabila.'<sup>23</sup>

Blumenson maintains that ICC prosecutions will be 'extremely selective' not least for practical reasons, including the Court's limited resources and weak enforcement powers.<sup>24</sup> The practical realities of dispensing justice in the aftermath of mass crimes, however, conflict with the very high expectations that the ICC has generated, not only among the relevant local populations but also

19 ICC, *Outreach Report*, *supra* note 11.

20 VRWG, *supra* note 18.

21 According to the ICC Prosecutor, 'Jean-Pierre Gombo used an entire army as a weapon to rape, pillage and kill civilians in the Central African Republic. Today he is brought to account for deliberately failing to prevent, repress or punish mass atrocities committed by his men in the CAR.' ICC Press Release, 'Journalists in Bangui, Kinshasa and The Hague Put Questions to Parties and Participants in the Trial of Jean-Pierre Bemba Gombo' (2010), available at <http://www.icc-cpi.int/NR/exeres/7BA1991C-707F-414F-AC34-9F15830ACA96.htm> (visited 22 November 2010).

22 Human Rights Watch, *ICC: Q&A on the Trial of Jean-Pierre Bemba* (2010), available at <http://www.hrw.org/en/news/2010/11/18/bemba-qa> (visited 26 November 2010). Prunier claims that during the Congo war, Bemba's troops practised cannibalism in Ituri. G. Prunier, *From Genocide to Continental War: The 'Congolese' Conflict and the Crisis of Contemporary Africa* (London: Hurst & Co., 2009), at 310.

23 M. Adjami and G. Mushiata, 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court' (2010), available at <http://www.ictj.org/static/Publications/ICTJ.DRC.RSRC-ImpactofICC.bp2010.pdf> (visited 22 November 2010).

24 E. Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism and Punishment at the International Criminal Court', 44 *Columbia Journal of Transnational Law* (2006) 801–874, at 818.

within the international community itself.<sup>25</sup> The extent to which the Court can actually deliver justice, therefore, will depend in part upon people's expectations. If these are too high, disappointment will inevitably follow, as in the case of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>26</sup> It is imperative, therefore, that the Court itself is clear and open about what it can and cannot achieve, as opposed to being 'caught between an idealistic vision of a global court designed to prosecute the cases that domestic jurisdictions cannot or will not prosecute, and the pragmatic concerns of a new institution seeking judicial results to secure its legitimacy'.<sup>27</sup>

### B. Dependence on State Cooperation

According to its first President, Antonio Cassese, the ICTY 'remains very much like a giant without arms and legs — it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to cooperate with it.'<sup>28</sup> This description of the ICTY is no less applicable to the ICC, which cannot fulfil its mandate without assistance from states. The Court, moreover, is powerless to enforce such cooperation; Article 87 (7) of the Rome Statute simply states that,

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.<sup>29</sup>

Critical, therefore, to the issue of whether the ICC can deliver justice is its relationship with the relevant states — notably, at the time of writing, Uganda, the DRC, the CAR, the Sudan and most recently Kenya — and more specifically

25 A. Cassese, 'Is the ICC Still Having Teething Problems?' 4 *Journal of International Criminal Justice (JICJ)* (2006) 434–441, at 441; W.W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', 49 *Harvard International Law Journal* (2008) 53–108, at 54.

26 See D.F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Institute, 2010), at 14. Available at <http://www.ictj.org/static/Publications/Orentlicher.BiH.OSJI-ICTJ.ThatSomeoneGuilty.pb2010.pdf> (visited 15 December 2010). See also, J.N. Clark, 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina', 7 *JICJ* (2009) 463–487, at 467; *idem*, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace', in G. Sluiter, B. Swart and A. Zahar (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, forthcoming May 2011).

27 P. Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo', in N. Waddell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal Africa Society, 2008) 37–45, at 39.

28 Cassese, *supra* note 4, at 13.

29 Rome Statute of the International Criminal Court (1998), available at <http://untreaty.un.org/cod/icc/statute/99.corr/cstatute.htm> (visited 30 April 2010).

their readiness to work with the Court.<sup>30</sup> Hence, in keeping with the tenets of Realist theory — according to which states are self-interested actors competing for power — it can be argued that, ‘The principal obstacles to the effectiveness of the ICC will always be *Realpolitik* and states’ interests.’<sup>31</sup> The following example highlights this. On 22 August 2006, the ICC issued a warrant of arrest against Bosco ‘the Terminator’ Ntaganda, the military chief of staff of the National Congress for the Defence of the People (CNDP) in the DRC.<sup>32</sup> However, not only does Ntaganda remain at large in the Kivus but also he and his militia group have been integrated into the Congolese army, the Armed Forces of the Democratic Republic of Congo (FARDC). Supported by the United Nations Organization Mission in the DRC (MONUC) — the UN peacekeeping force that was recently renamed the United Nations Organization Stabilization Mission in the DRC (MONUSCO) — the FARDC has absorbed the CNDP as part of its fight against the Democratic Liberation Forces of Rwanda (FDLR), an exile militia group of Rwandan Hutus. Human Rights Watch has strongly condemned such developments, insisting that, ‘[President Joseph] Kabila’s government has a legal obligation to arrest Ntaganda, not to promote him.’<sup>33</sup> Similarly, Moreno-Ocampo has declared that, ‘For such criminals, there must be no escape. Then peace will have a chance. Then victims will have hope.’<sup>34</sup> President Kabila himself, however, maintains that there are legitimate reasons for the Congolese authorities to work with Ntaganda. Highlighting the complex and heavily contested relationship between peace and justice, to be discussed in the final section, Kabila asks, ‘Why do we choose to work with Mr Bosco, a person sought by the ICC? Because we want peace now. In Congo, peace must come before justice.’<sup>35</sup>

That the ICC is strongly dependent on state cooperation may in turn affect which cases it decides to prosecute. Is it, for example, a coincidence that the ICC’s first cases in the DRC — Thomas Lubanga Dyilo, Germaine Katanga and Mathieu Ngudjolo Chui — all centre on crimes committed in Ituri? One scholar

30 Apropos of Darfur, for example, de Waal maintains that, ‘While the current polarisation and estrangement between Sudan and the international community remains, it is unlikely that the ICC will be able to achieve the successful prosecution of even two individuals’. A. de Waal, ‘Darfur, the Court and Khartoum: The Politics of State Non-Cooperation’, in Waddell and Clark (eds), *supra* note 27, 29–35, at 35. It should be noted in relation to the Sudan, however, that while three of the six individuals indicted by the ICC remain at large, including President Omar al-Bashir, the remaining three — Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus — have all appeared before the Court.

31 M.C. Bassiouni, ‘The ICC – Quo Vadis?’ 4 *Journal of International Criminal Justice* (2006) 421–427, at 426.

32 This arrest warrant was subsequently unsealed on 28 April 2008.

33 Human Rights Watch, *DR Congo: Arrest Bosco Ntaganda* (2009), available at <http://www.hrw.org/en/news/2009/02/02/dr-congo-arrest-bosco-ntaganda> (15 April 2010).

34 Cited in T. Bouwknecht, *ICC Arrest Warrant Against “Terminator” Bosco Ntaganda* (2008), available at <http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/icc/DRC/080429-ICC-Ntaganda-redirected> (visited 15 April 2010).

35 Cited in D. Smith, ‘*The Terminator*’ Lives in Luxury While Peacekeepers Look On (2010), available at <http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc> (visited 15 April 2010).



notes that, 'Of the various conflicts in the DRC, that in Ituri is the most isolated from the political arena in Kinshasa', as a result of which '...investigations and prosecutions in Ituri display the least capacity to destabilise the current government'.<sup>36</sup> The Court, in other words, needs to tread carefully. In order to conduct its investigations in the DRC, and in order to ensure the safety and security of its staff, it is essential that the ICC has the support and cooperation of the government in Kinshasa. Hence, while the Prosecutor maintains that gravity is a key criterion for selecting which cases to prosecute,<sup>37</sup> there are political and pragmatic considerations that may also enter into the equation.<sup>38</sup> The difficulty is that the exigencies of *Realpolitik* are unlikely to be readily understandable to victims on the ground, thus further underscoring the immense challenges that the ICC faces in delivering justice.

It must be emphasized that 'No mechanism will ever deliver perfect justice'<sup>39</sup> and the ICC is no exception. Furthermore, in the aftermath of such grave offences as mass rape, torture and crimes against humanity, we cannot rely solely upon a judicial institution to deliver justice; there is more to justice than the prosecution and trial of war criminals. Nevertheless, as the first permanent international criminal court, the ICC is a critical part of the justice equation — although only one part.<sup>40</sup> Hence, it is important to explore how it might realize its potential as an instrument of justice. It is argued that it can do so in three main ways — by clarifying and facilitating the exercise of victims' rights, by increasing the visibility of its work and by working with local courts in accordance with the cardinal principle of complementarity.

### 3. The ICC's Potential as an Instrument of Justice

While victims are a key constituency in deciding whether and to what extent justice has been done, historically they have played only a marginal role in trial proceedings. This, however, is now starting to change, and the Rome

36 Clark, *supra* note 27, at 40. On 11 October 2010, however, in accordance with a sealed arrest warrant issued by the ICC on 28 September 2010, French authorities arrested Callixte Mbarushimana, one of the FDLR leaders. Mbarushimana stands accused of committing war crimes and crimes against humanity in North and South Kivu. He is the first senior figure arrested on behalf of the ICC for crimes perpetrated in the Kivus.

37 Moreno-Ocampo, *supra* note 13, at 498.

38 This is true not only in the particular case of the ICC. For example, one of the reasons why the International Criminal Tribunal for Rwanda (ICTR) has so far chosen not to issue any indictments for crimes committed by the Rwandan Patriotic Front (RPF) is to avoid antagonizing or alienating the Rwandan government, largely composed of former members of the RPF. That the Tribunal is only trying Hutus, however, has inevitably given rise to allegations of bias; '...the void in prosecutions created by the absence of any RPF individuals accused of crimes has ... been the source of much criticism regarding the achievement of justice on the part of the ICTR. N.A. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Oxon: Routledge, 2010), at 121.

39 Blumenson, *supra* note 24, at 867.

40 Goldstone and Smith, *supra* note 11, at 142.

Statute epitomizes this development. It has thus been argued that ‘From the victims’ perspective, it is not far-fetched to say, the Rome Statute is a momentous advance compared to the ad hoc tribunals for not only the former Yugoslavia and Rwanda, but also Nuremberg and Tokyo.’<sup>41</sup> The Statute contains important restorative justice elements — namely Article 68 on the participation of victims in the trial process, Article 75 on the possibilities of reparative justice and Article 79 on the establishment of a trust fund for victims. Whereas such provisions are to be welcomed, they are not enough in and of themselves. In order to potentially deliver a more victim-centred justice, it is argued that the Court needs to introduce greater clarity and understanding in relation to the restorative aspects of its mandate.

### A. *Justice through Increased Clarity*

It is critical that victims fully understand and have the opportunity to exercise their rights under the Rome Statute. In other words, these rights must be clear and accessible. The current application process for victims to participate in ICC proceedings, however, has been criticized as overly complicated. According to the VRWG, ‘The application forms are lengthy and abstract, there is little feedback about the processing of applications and the procedures are slow and remote.’<sup>42</sup> Victims, moreover, have described the process as ‘bureaucratic’, ‘heavy and long’, ‘heavy and slow’ or ‘heavy and strict’.<sup>43</sup> At the same time, the process needs to be transparent. As of April 2010, for example, the ICC had received 2,035 applications for participation but had only granted 760 of these.<sup>44</sup> Victims need to understand this process, to help ensure that the rejection of their applications is not interpreted as a dismissal or negation of their suffering and trauma. It is therefore important for the Court to work closely with local victims’ organizations, in order to better understand what victims want and need, to gain valuable grassroots insight into how its work is perceived on the ground and to give victims a voice not only within the courtroom but also in identifying how the Court’s complex procedures can be improved and made more accessible.

Victims must be able not only to avail themselves of their rights. They must also have realistic expectations of what the Court can deliver, not least with respect to reparations. This is an area in which the potential for deep disappointment among victims is considerable, as the example of South Africa vividly

41 M. Henzelin, V. Heiskanen and G. Mettraux, ‘Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes’, 17 *Criminal Law Forum* (2006) 317–344, at 317–318.

42 VRWG, *supra* note 18.

43 *Ibid.*

44 ICC, *Registry and Trust Fund for Victims: Fact Sheet*, Review Conference of the Rome Statute (2010), available at <http://www.icc-cpi.int/iccdocs/asp.docs/RC2010/Stocktaking/RC-ST-V-INF3-ENG.pdf> (visited 21 November 2010).

demonstrates.<sup>45</sup> Since the ICC is yet to complete its first trial, no reparations payments have been made to date under Article 75 of the Rome Statute. Victims are, however, already benefitting from the Court's Trust Fund,<sup>46</sup> which was officially established on 9 September 2002. According to a recent report by the Bureau on Stocktaking, the Trust Fund has so far received a total of €4.9 million from 24 states, of which '[a]pproximately €2.7 million has been available to projects in northern Uganda and the Democratic Republic of Congo'.<sup>47</sup> These projects include physical rehabilitation for victims of war, empowerment of victims through agricultural development, assistance for victims of sexual and/or gender-based violence and aid and support for victims of torture and/or mutilation.<sup>48</sup>

Notwithstanding the very valuable work that the Trust Fund is facilitating, it goes without saying that it cannot help everyone. Inevitably, this can have a significant impact on those who miss out, contributing to the belief that their suffering is being overlooked; '...many who have not had a chance to benefit from the Trust Fund's projects have been dispirited, fearing that their chance might have been lost'.<sup>49</sup> This situation, moreover, may exacerbate the aforementioned problem of selective justice. According to the VRWG, for example, many victims and affected communities in Uganda and the DRC have raised questions regarding the criteria used to determine which projects receive funding.<sup>50</sup>

The risk of unmet expectations is only likely to increase once the ICC makes its first reparations award under Article 75. While this risk cannot be entirely eliminated, it can be managed. First, one difficulty at present is a lack of clear guidelines in respect of reparations. In short, 'The Statute and the Court's Rules of Procedure and Evidence ... provide little insight as to how the Court is expected to process the waves of reparation claims that are expected to

45 According to Jobson, 'The awarding of final reparations by government was inordinately delayed. The payments themselves were limited and much reduced from the original recommendations of the TRC.... There has been no transparency in the functioning of the President's Fund and no reporting back to survivors on the disbursement of monies designated for victims.' M. Jobson, 'The TRC's Unfinished Business: Reparations', in C. Villa-Vicencio and F. du Toit (eds), *Truth and Reconciliation in South Africa: Ten Years On* (Cape Town: New Africa Books Ltd., 2006) 45–50, at 47.

46 See Art. 79 (1) ICCSt.

47 Report of the Bureau on Stocktaking, *The Impact of the Rome Statute System on Victims and Affected Communities* (2010), available at <http://www.icc-cpi.int/iccdocs/asp.docs/ASP8R/ICC-ASP-8-49-ENG.pdf> (visited 21 November 2010).

48 The Trust Fund for Victims, *Programme Progress Report: November 2009* (2009), available at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20November%202009.pdf> (visited 21 November 2010); *idem*, *Recognizing Victims and Building Capacity in Transitional Societies – Spring 2010 Programme Progress Report* (2010), available at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Spring%202010.pdf> (visited 21 November 2010).

49 G. Carayon, 'The ICC's Impact on Victims and Affected Communities', 16 *VRWG Bulletin* (2010), available at <http://www.vrwg.org/English%2016Final.pdf> (visited 20 November 2010).

50 VRWG, *supra* note 18.

reach its shores.<sup>51</sup> Article 75, for example, is very general and lacks detail. Over time, however, as the Court begins to deal with reparations claims, its jurisprudence can be expected to bring greater clarity to the issue, in the same way that it has vis-à-vis the participation of victims.<sup>52</sup> Second, the Court needs to invest more time and resources in outreach work. Communication and engagement with local communities, both directly and through victims' organizations, are critical tools for helping to ensure that people understand the Court, that victims are informed of their rights and how to exercise them and that they appreciate that limitations inevitably exist in respect of what can and cannot be achieved.<sup>53</sup>

Outreach therefore has a critical role to play in relation to justice. Not only can it help to create greater understanding and to manage victims' expectations in relation to the restorative justice components of the Court's mandate. It is also important for increasing the visibility of the Court's work, thereby helping to ensure that justice is not only done but also seen to be done.

### **B. Justice through Increased Visibility**

Like the ICTY and the International Criminal Tribunal for Rwanda (ICTR), based in The Hague and Arusha (Tanzania), respectively, what the ICC is essentially delivering is remote justice,<sup>54</sup> and this is more difficult to see from the perspective of affected local communities. Nevertheless, the Court can improve and enhance the visibility of its work by making every effort to ensure that local populations are familiar with and understand what it is doing and why. This is crucial; 'Recent experience has brought home the need for concerted efforts to ensure that, when prosecutions or truth commissions are instituted, their work is known and understood by the societies on whose behalf they operate.'<sup>55</sup> While the ICTY, created in 1993, was the first tribunal to establish an Outreach Unit, it did not recognize the necessity of reaching out to and communicating with local communities until 1999 — six years too late.<sup>56</sup> Learning from the ICTY's mistakes, subsequent tribunals have heeded the importance of early outreach work, including the ICC. According to its outreach strategy, 'Justice must be both done and seen to be done. Hence, in order

51 Henzelin, Heiskanen and Mettraux, *supra* note 41, at 320.

52 D. Haile, 'The Modalities of Victims' Participation Evolve in the Katanga/Ngudjolo Trial', 16 *VRWG Bulletin* (2010), available at <http://www.vrwg.org/English%2016Final.pdf> (visited 20 November 2010).

53 De Brouwer, *supra* note 2, at 222.

54 This term is borrowed from Gabrielle Kirk MacDonald, a former judge at the ICTY. Judge Kirk McDonald described as 'remote' the justice being dispensed by a tribunal that is geographically, linguistically and procedurally removed from the people of the former Yugoslavia. G. Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY', 2 *JICJ* (2004) 558–571, at 569.

55 D.F. Orentlicher, "'Settling Accounts" Revisited: Reconciling Global Norms with Local Agency', 1 *International Journal of Transitional Justice* (2007) 10–22, at 16.

56 J.N. Clark, 'International War Crimes Tribunals and the Challenge of Outreach', 9 *International Criminal Law Review* (2009) 99–116.

for the Court to fulfil its mandate, it is imperative that its role and judicial activities are understood, particularly in those communities affected by the commission of crimes under the Court's jurisdiction.<sup>57</sup>

The ICC began outreach work in the DRC and Uganda in 2004, extending this to the CAR and Darfur in 2007. Defining outreach as 'a process of establishing sustainable, two-way communication between the Court and communities affected by situations that are the subject of investigations or proceedings',<sup>58</sup> the Court's outreach activities are broad and diverse and informed by a bottom-up ethos.<sup>59</sup> They include the production of radio and television programmes such as 'ICC at a Glance' and 'News from the Court'; trainings for journalists; town-hall style/village meetings; the use of an internet-based Short Message Services system; the holding of workshops and seminars; focus group discussions; the dissemination of outreach materials and legal texts; and mass outreach meetings. Furthermore, there is a strong emphasis placed on working and developing relationships with local partners and intermediaries, 'particularly where ICC staff are unable to contact the general public due to lack of resources, logistical or other constraints or security concerns'.<sup>60</sup>

Outreach work, however, poses enormous challenges. Most obviously, the Court is geographically, linguistically and procedurally removed from the African continent; there are significant security issues in the countries concerned; there are high rates of illiteracy among the relevant populations,<sup>61</sup> poor infrastructure makes travel extremely difficult, particularly to remote rural areas; and the ICC faces hostile propaganda from media and politicians in countries like the Sudan. The extent to which people understand the Court, however, has been shown to affect how they perceive it,<sup>62</sup> and the way in which local communities view the ICC is critical to the issue of whether and to what extent it can deliver justice. It is thus essential that the Court continues to develop and to expand its outreach programme.<sup>63</sup> International

57 ICC, *Strategic Plan for Outreach of the International Criminal Court* (2006), available at <http://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512.English1.pdf> (visited 3 April 2010).

58 ICC, *Integrated Strategy for External Relations, Public Information and Outreach* (2007), available at <http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402.ISEn.pdf> (visited 3 April 2010).

59 According to the ICC's 2009 Outreach Report, 'The Outreach Unit communicates its messages using a bottom-up approach, taking into account the specific information needs of each of the target audiences. By working in this way, the Outreach Unit aims to give these communities ownership, rendering it an institution that works for them and in their name', in ICC, *supra* note 11.

60 ICC, *supra* note 57.

61 The CAR, for example, has an illiteracy rate of 57.3% among people aged 10 and over. ICC, *supra* note 11.

62 *Ibid.*

63 Apropos of northern Uganda, for example, where it is widely believed that the ICC itself has the powers to arrest LRA leaders, Pham and Vinck maintain that, 'The ICC should develop a strategy to manage expectations and explain the process of arresting the LRA until they are apprehended'. P. Pham and P. Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda* (2010), available at <http://www.law.berkeley.edu/HRCweb/pdfs/HRC.Uga2010final.web.pdf> (visited 21 January 2011). The Court

criminal justice ‘does not necessarily imply geographic remoteness or antiseptic procedures divorced from local realities’<sup>64</sup> and it is hoped that the ICC can demonstrate this.

Aside from outreach, the problem of remote justice could potentially be addressed within the terms of the Rome Statute itself. While Article 3(1) states that, ‘The seat of the Court shall be established at The Hague in the Netherlands’, Article 3(3) adds that, ‘The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute’. Article 4(2) further stipulates that, ‘The Court may exercise its functions and powers... on the territory of any State Party and, by special agreement, on the territory of any other State.’<sup>65</sup> Rule 100(1) of the Court’s Rules of Procedure and Evidence reiterates this, stating that, ‘In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State.’<sup>66</sup>

Were the Court to conduct some of its trials not in The Hague but in those countries where the crimes that it is prosecuting took place, this would give its work a greater immediacy akin to that of a hybrid court like the Special Court of Sierra Leone. This in turn could help to foster a sense of local ownership, by allowing communities to actually witness the justice process and be a part of it — rather than simply distant onlookers. Without this local engagement and interest, the ICC risks being perceived as a remote and incomprehensible ‘foreign’ institution with little relevance to people’s everyday lives, a commonly held view of the ICTY in Bosnia–Herzegovina (BiH).<sup>67</sup>

*In situ* trials would of course pose significant practical, logistical and in some cases security challenges. Certainly, it would not be feasible to hold in-country trials in states where conflict is ongoing (for example, the DRC) or where the government is opposed to the ICC (as in the case of the Sudan). To overcome such obstacles, one possibility would be to establish a regional chamber of the Court. This might encourage witnesses to come forward;<sup>68</sup> it would require a

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itself acknowledges that ‘...a lot more needs to be done to increase the Court’s visibility within the affected communities’. ICC, *supra* note 57.

64 P. Akhavan, ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’, 99 *The American Journal of International Law* (2005) 403–421, at 421.

65 Rome Statute, *supra* note 29.

66 ICC Rules of Procedure and Evidence, ICC-ASP/1/3, available at <http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules.of.procedure.and.Evidence.English.pdf> (visited 30 April 2010).

67 Clark, ‘The Limits of Retributive Justice’, *supra* note 26, at 484.

68 Ford observes that ‘One of the most interesting results of the ICC’s exploration of moving part of the Lubanga trial to the DRC was that even though the parties and the Trial Chamber seemed to agree that having local hearings was desirable, the witnesses were overwhelmingly opposed to testifying in the DRC’. S. Ford, ‘The Promise of Local or Regional ICC Trial Chambers: Incorporating the Benefits of the Hybrid Tribunals into the ICC’ (2010), available at: <http://ssrn.com/abstract=1605294> (visited 24 November 2010).

lesser degree of cooperation with the state in which the crimes being prosecuted took place, thus helping to avoid fuelling perceptions of bias and impartiality; and it would still allow the Court to deliver a more visible and accessible justice than it is currently doing. A second possibility would be for the Court to hold a limited number of in-country hearings, where circumstances permit. Extensive consultation with victims' organizations would, however, be a critical prerequisite, in order for the Court to identify those cases of particular importance to victims and local communities.

In addition to conducting regional or *in situ* proceedings, a third and final way for the ICC to deliver justice is by working closely with local courts, as well as the broader international community, in order to facilitate the holding of domestic trials.<sup>69</sup> This in turn would help to address the 'impunity gap' created by the very limited number of ICC prosecutions.

### C. Justice through Increased Cooperation

Complementarity is one of the core principles of the Rome Statute. Article 1 provides that the Court's jurisdiction 'shall be complementary to national criminal jurisdictions'; and Article 17 underlines that primacy of jurisdiction rests with states themselves, not with the ICC.<sup>70</sup> The ICC thus has a valuable role to play in working with and assisting these national courts, thereby contributing to the delivery of a more local justice. In other words, just as States Parties should cooperate with the Court, there is also significant potential for 'reverse cooperation'.<sup>71</sup> The type and extent of support that the Court should provide, however, is much debated and a number of different concerns have been expressed. One such concern is that aiding countries to conduct their own national trials should neither detract from the Court's primary function of prosecuting those who commit heinous crimes nor over-burden it. Baylis, for example, is sceptical of the idea that the ICC 'might devote any substantial resources to assisting with national trials', based in part on the

69 Recent research by Pham and Vinck in northern Uganda revealed that among the 2,498 respondents, there was more support for trials in Uganda by Ugandan courts (35%) than for trials at the ICC, whether in The Hague (28%) or in Uganda (22%). Pham and Vinck, *supra* note 63. According to similar research in the DRC in 2007, 85% of the 2,620 respondents in Ituri, North and South Kivu expressed a preference for trials held in the DRC. Of this 85%, moreover, 82% expressed the view that the international community should aid domestic courts. P. Vinck, P. Pham, S. Baldo and R. Shigekane, *Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo* (2008), available at <http://www.ictj.org/images/content/1/0/1019.pdf> (visited 21 January 2011).

70 Rome Statute, *supra* note 29.

71 Art. 93(10)(a) ICCSt. stipulates that 'The Court, may upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State'. *Ibid.*

Court's resource constraints.<sup>72</sup> Burke-White notes that the provision of direct technical assistance to states would be particularly demanding on the Court's limited resources, and hence 'must be pursued with the utmost caution'.<sup>73</sup>

A second concern is that by providing assistance and training to national courts, the Court may risk antagonizing communities on the ground, not only by undermining local ownership of the judicial process but also by exacerbating perceptions of bias and selective justice. In short, '...dialogue and partnership with states may compromise the independence and appearance of impartiality of the Prosecutor'.<sup>74</sup> The Office of the Prosecutor (OTP) itself has similarly recognized this. In its 2009–2010 Prosecutorial Strategy outline, for example, it underlines apropos of the preliminary examination phase that 'The Office cannot be the adviser to national jurisdictions as it would risk tainting future proceedings'.<sup>75</sup>

A third important concern is that the Court's efforts to foster meaningful complementarity could engender 'legal mimicry' at the expense of a more nuanced and culturally sensitive legal process. Drumbl, for example, opines that complementarity 'may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out'.<sup>76</sup> Such homogeneity, in turn, means that 'the content of local practices may be excluded regardless of the legitimacy with which these practices are received',<sup>77</sup> thereby further obstructing a sense of local ownership of the process.

In view of the complex questions and challenges that complementarity thus raises, it is perhaps unsurprising that the Court has adopted a somewhat cautious approach to the issue. In its 2009–2012 Prosecutorial Strategy, for example, the OTP articulates its policy of 'positive complementarity'. According to this '...the Office will encourage genuine national proceedings where possible' by, inter alia, providing information to national judiciaries, sharing databases of non-confidential materials and inviting local officials and lawyers from those countries in which the Court is conducting its investigations to participate in the OTP's investigative and prosecutorial activities. The Strategy also, however, sets limits upon what this positive approach to complementarity entails. It thereby endorses the definition of positive complementarity put

72 E. Baylis, 'Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks', 50 *Boston College Law Review* (2009) 1–70, at 22.

73 Burke-White, *supra* note 25, at 94.

74 C. Stahn, 'Complementarity: A Tale of Two Notions', 19 *Criminal Law Forum* (2008) 87–113, at 108.

75 Office of the Prosecutor (OTP), *Prosecutorial Strategy 2009–2012* (2010), available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (visited 30 September 2010).

76 M.A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), 143.

77 *Ibid.*



forward in the Report of the Bureau of Stocktaking, wherein the term is used to refer to:

all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.<sup>78</sup>

Whereas it remains to be seen exactly how this policy of positive complementarity will translate into practice, three important points should be made. The first is that while both the ICTY and the ICTR, in contrast to the ICC, have primacy of jurisdiction over national courts, one of the criticisms of these ad hoc tribunals has been that they have not done enough to aid and to reach out to local judiciaries. The ICTY's former Deputy Prosecutor, for example, has argued that both tribunals 'have had little impact on the legal infrastructure in these countries [the former Yugoslavia and Rwanda]'.<sup>79</sup> Since adopting its Completion Strategy in 2003, the ICTY in particular has now started to invest considerable time and resources in local judiciaries in the former Yugoslavia, including via training programmes and the transfer of materials and expertise. However, while such capacity-building work is likely to constitute one of the ICTY's most important and valuable legacies, it arguably should have started much earlier, particularly given that local courts in the former Yugoslavia will have the main responsibility for prosecuting war crimes cases once the Tribunal closes its doors. The fact, therefore, that the ICC, at a relatively early stage of its existence, has sought to clarify and to concretize the notion of complementarity is to be welcomed.

The second point is that while the ICC has a central role to play in facilitating domestic prosecutions, the onus in this regard does not lie solely with the Court. The Preamble of the Rome Statute, for example, emphasizes that '...the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.<sup>80</sup> Hence, the broader international community should be involved in assisting national courts to conduct their own trials. Indeed, the Report of the Bureau on Stocktaking insists that 'Activities aimed at strengthening national jurisdictions... should be carried out by States themselves, together with international and regional organizations and civil society, exploring interfaces and synergies with the Rome Statute system'.<sup>81</sup> If, therefore, one way in which the ICC can deliver justice is through increased cooperation, this

78 Report of the Bureau on Stocktaking, *Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap* (2010), available at <http://www.icc-cpi.int/iccdocs/asp.docs/ASP8R/ICC-ASP-8-51-ENG.pdf> (visited 20 November 2010).

79 D. Tolbert, with A. Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies', 29 *Harvard Human Rights Journal* (2006) 29–62, at 37.

80 Rome Statute, *supra* note 29.

81 Report of the Bureau on Stocktaking, *supra* note 78, at 4.

includes greater cooperation between the Court and States Parties in general. That is to say that, 'As in the case of all international and hybrid courts, the ICC has to work as part of a broader rule-of-law network.'<sup>82</sup>

The third and final point is that through the implementation and practice of complementarity, the Court can potentially have a significant catalytic effect.<sup>83</sup> This is illustrated by the establishment in 2008 of a War Crimes Division of Uganda's High Court and, more recently, by the country's adoption of the International Criminal Court Act 2010, thereby incorporating the Rome Statute into Ugandan law. As one commentator underlines, 'Even when the Court is already investigating crimes under its jurisdiction, its intervention is still capable of acting as a catalyst for both legislative change and the building of capacity on the domestic level.'<sup>84</sup> If further concrete examples of the Court's catalytic effects emerge, a detailed analysis of these effects would be an important area for future research. This would help us to gauge whether and to what extent the Court is indirectly delivering some level of justice. Perhaps more significantly, these effects would provide a useful criterion for measuring the Court's impact, thereby helping to address a significant 'impact gap' within the transitional justice literature. This gap is particularly pronounced vis-à-vis the impact of criminal trials on peace and reconciliation.<sup>85</sup> It is to this relationship between justice and peace that the final part of this article now turns.

#### 4. The Peace and Justice Debate

Thus far, this research has focused on the ICC as an instrument of justice, evaluating both its limitations and possibilities. Can it also, however, be an instrument of peace? This is a question that goes to the heart of scholarly debates regarding the relationship between peace and justice, the extent to which the two concepts are compatible and which of the two needs to come first. Uganda features prominently in such discussions and will therefore form the

82 International Centre for Transitional Justice (ICTJ), 'Victims and the ICC Review Conference: Interview with David Tolbert, President of the ICTJ' (2010), available at <http://www.ictj.org/static/Newsletter/Transitions.June.2010.pdf> (visited 20 November 2010), at 2.

83 According to the OTP's Prosecutorial Strategy, for example, 'The preliminary examination offers a first opportunity for the Office to act as a catalyst for national proceedings'. OTP, *supra* note 75.

84 M. Wierda, *Stocktaking: Complementarity*, ICTJ Briefing (2010), available at <http://www.ictj.org/static/Publications/ICTJRSRC-Complementarity.bp2010.pdf> (visited 20 November 2010), at 3.

85 Delpa, for example, remarks of the ICTY that 'its impact in terms of its purported contribution to peace and reconciliation has been extrapolated rather than observed. It has been mainly derived from other historical experiments, such as the Nuremberg trials, for its alleged pedagogical value, or the South Africa Truth and Reconciliation Commission, for its supposed reconciliatory effect'. I. Delpa, 'In the Midst of Injustice: The ICTY from the Perspective of some Victims Associations', in X. Bougarel, E. Helms and G. Duijzings (eds), *The New Bosnian Mosaic: Identities, Memories, and Moral Claims in a Post-War Society* (Aldershot: Ashgate, 2007) 211–234, at 216.

main focus of this final section, which begins by briefly examining two main viewpoints within the transitional justice literature on the nexus between justice and peace.

### A. *Peace versus Justice/Peace via Justice*

The first aforementioned viewpoint regards peace and justice as being in tension, such that we need to choose one or the other. Historically, moreover, it is this notion of ‘peace versus justice’ that has prevailed. During the 1980s, for example, countries such as Chile and Argentina made the decision to amnesty military officers rather than prosecute them, on the grounds that amnesties would be more conducive to long-term peace and stability than criminal trials, which could create new tensions and friction. Similarly, South Africa chose to deal with the legacy of the apartheid years by establishing a truth and reconciliation commission (TRC) and amnestying those who fully confessed to their crimes, in the conviction that what the country most needed to heal and move forward was truth. Criminal trials, it was judged, risked doing more harm than good.<sup>86</sup> Hence, in both South Africa and in Latin America, justice — in the sense of criminal trials — was traded for peace; it was felt that it was not possible to have both.

More recently, however, there has been a shift away from the notion that we have to choose between peace and justice to a very different viewpoint — the idea that we need to have justice *in order* to have peace. This ‘peace via justice’ position can be particularly associated with the ICTY and ICTR, both of which are based on the premise that there can be no peace without justice. To cite Graham Blewitt, the former ICTY Deputy Prosecutor, ‘... the ICTY is essentially an instrument of peace: the criminal prosecution of persons responsible for serious violations of international humanitarian law is regarded as being central to the peace process in the former Yugoslavia.’<sup>87</sup> Notwithstanding such confident assertions, the actual effects of criminal trials and the extent to which they do in fact aid social peace and stability remain empirically under-explored.<sup>88</sup> Arguably, one reason for this is that the task of actually measuring impact presents significant challenges. Peace, for example — not in the negative sense of an absence of conflict but in the thicker, more positive sense of reconciliation — is an intangible concept that cannot be easily measured or quantified. Gauging impact, moreover, necessarily raises difficult issues

86 D. Tutu, *No Future without Forgiveness* (London: Rider, 1999), at 27.

87 G.T. Blewitt, ‘The International Criminal Tribunal for the Former Yugoslavia and Rwanda’, in M. Lattimer and P. Sands (eds), *Justice for Crimes Against Humanity* (Oxford: Hart Publishing, 2006) 145–160, at 146.

88 See K.C. Moghalu, ‘Prosecute or Pardon? Between Truth Commissions and War Crimes Trials’, in C.L. Sriram and S. Pillay (eds), *Peace Versus Justice? The Dilemma of Transitional Justice in Africa* (Scottsville, KZN: University of KwaZulu-Natal Press, 2009) 69–95, at 90; H.M. Weinstein, L.E. Fletcher, P. Vinck and P.N. Pham, ‘Stay the Hand of Justice: Whose Priorities Take Priority?’ in R. Shaw and L. Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford, CA: Stanford University Press, 2010) 27–48, at 31.

pertaining to causation, particularly when the court in question is not based in-country. Fundamentally, the impact of transitional justice processes ‘can be difficult to ascertain or quantify because it may be highly collinear with other factors, contingent on precise constellations of circumstances, modified by numerous variables and subject to complex interaction effects.’<sup>89</sup>

Although various commentators have addressed the relationship between justice and peace (reconciliation), they have focused more on whether justice *can* foster reconciliation as opposed to whether it has *actually* done so in practice.<sup>90</sup> Until this ‘impact gap’ is sufficiently addressed,<sup>91</sup> therefore, the relationship between criminal trials and peace will continue to be highly ambiguous and open to speculation. The ICC’s investigations, and in particular its

89 D. Backer, ‘Cross-National Comparative Analysis’, in H. van der Merwe, V. Baxter and A.R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace Press, 2009) 23–89, at 159.

90 See, for example, A. Fatić, *Reconciliation via the War Crimes Tribunal?* (Aldershot: Ashgate, 2000); M. Humphrey, ‘International Intervention, Justice, and National Reconciliation: The Role of the ICTY and ICTR in Bosnia and Rwanda’, 2 *Journal of Human Rights* (2003) 495–505; L.A. Barria and S.D. Roper, ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR’, 9 *The International Journal of Human Rights* (2005) 349–368; R. Kerr, ‘Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia’, 7 *Southeast European and Black Sea Studies* (2007) 373–385.

91 Increasingly, however, scholars are recognizing the importance of examining and devising ways to empirically test the impact of criminal tribunals. Orentlicher, for example, has undertaken very comprehensive research on the ICTY’s impact both in BiH (Orentlicher, *supra* note 26) and in Serbia: See D.F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, Washington DC: Open Society Justice Initiative, 2008, available at <http://www.soros.org/initiatives/justice/focus/internationaljustice/articlespublications/publications/serbia.20080520/serbia.20080501.pdf> (visited 1 December 2009). While not focused exclusively on the issue of impact, extremely important work — in the form of population-based surveys — is also being done by staff at the Human Rights Centre at the University of California, Berkeley. See, for example, P. Pham, P. Vinck, E. Stover, A. Moss, M. Wierda and R. Bailey, *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (2007), available at <http://www.ictj.org/images/content/8/8/884.pdf> (visited 21 January 2011); P. Pham, P. Vinck, M. Balthazard, S. Hean and E. Stover, *So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (2009), available at <http://www.law.berkeley.edu/HRCweb/pdfs/So-We-Will-Never-Forget.pdf> (visited 21 January 2011); P. Pham and P. Vinck, *Building Peace, Seeking Justice: A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic* (2010), available at <http://www.law.berkeley.edu/HRCweb/pdfs/BuildingPeace-SeekingJustice-CARAugust2010.pdf> (visited 21 January 2011); Pham and Vinck, *supra* note 63 and note 69. This author’s own research has sought to empirically explore whether and to what extent the ICTY has contributed to peace (in the specific sense of reconciliation) in post-conflict BiH. It has found that overall the Tribunal has had little positive impact on reconciliation in BiH. Indeed, it has questioned whether it is in fact realistic for a complex judicial body, located in another country, to aid such a personal and individual process as reconciliation. See Clark, *supra* note 26; *idem*, ‘From Negative to Positive Peace: The Case of Bosnia and Hercegovina’, 8 *Journal of Human Rights* (2009) 360–384; *idem*, ‘Judging the ICTY: Has It Achieved Its Objectives?’ 9 *Journal of Southeast European and Black Sea Studies* (2009) 123–142; *idem*, ‘Transitional Justice in BiH: The International Criminal Tribunal for the Former Yugoslavia’, in L.A. Barria and S.D. Roper (eds), *The Development of Institutions on Human Rights: A Comparative Study* (New York: Palgrave Macmillan, 2010) 83–97.

controversial intervention in northern Uganda, highlight this. They have helped to re-ignite debates concerning the nexus between peace and justice, and how we perceive this relationship will in turn critically influence our views on whether or not the Court can facilitate peace. If we lean towards the notion of peace versus justice, the Court's ability to foster peace will necessarily be negligible. If, however, we adopt the alternative peace via justice position, clearly there is far more scope for the ICC to make a positive contribution to peace.

### *B. The ICC as an Obstacle to Peace*

It has been argued that '...no one should underestimate the prospect of genuine "peace versus punishment" dilemmas',<sup>92</sup> and such dilemmas have particularly arisen in the context of the ICC's intervention in northern Uganda. When Moreno-Ocampo issued arrest warrants against five LRA commanders in 2005, this drew immediate criticism from both within and outside of Uganda. A major objection was that the arrest warrants contravened Uganda's Amnesty Act, passed in 2000 to allow those who renounced violence to return to their communities without fear of possible prosecution. One detractor thus maintains that 'ICC arrest warrants fly in the face of the popular demand for general amnesty',<sup>93</sup> rendering the Act inapplicable to the very people to whom it most needs to be applied for peace to arrive'.<sup>94</sup> Linked to this, a more fundamental objection to the ICC's involvement in northern Uganda is that it represents a threat to peace. According to this view, the ICC's work in Uganda is inimical to peace as it will discourage the very people upon whom peace depends — most notably, the LRA leader Joseph Kony — from coming forward and signing a peace agreement. Scharf, for example, insists that it is unrealistic to expect leaders involved in conflict to agree to a peace deal if thereafter they face the risk of arrest and imprisonment.<sup>95</sup>

Whereas such arguments cannot be simply dismissed, they must be seriously questioned. Most obviously, is it not somewhat short-sighted to contend that the ICC's arrest warrants represent a threat to peace, given that there has

92 Blumenson, *supra* note 24, at 832.

93 'According to recent studies, 70% of the people in the North [of Uganda] want conditional amnesty for Kony'. K.P. Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', 4 *JICJ* (2006) 179–187, at 184.

94 Branch, *supra* note 12, at 184.

95 M.P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (1999) 507–527, at 508. Similar arguments have been expressed within Uganda itself, in particular by members of the Acholi Religious Leaders Peace Initiative (ARLPI), established in 1998. See, for example, Allen, *supra* note 10, at 85. Following the Juba peace talks in 2006, the LRA and representatives of the Ugandan government signed a Cessation of Hostilities Agreement. However, the peace talks ultimately collapsed and hence a final peace agreement was not signed.

been no real peace in northern Uganda since 1986?<sup>96</sup> Furthermore, to argue that the ICC will deter men such as Kony from signing a peace accord appears to assume that a peace agreement is a guarantee of peace. The reality, however, is far more complex; ‘...violence is not switched off like a tap by the mere agreement of a peace accord. Much violence is structural in nature and often immune to the provisions of a peace accord...’<sup>97</sup> This highlights the important distinction between positive and negative peace<sup>98</sup> which the Court’s critics often gloss over.

The contention that the ICC’s arrest warrants pose a threat to peace in northern Uganda not only conceptualizes peace in a very narrow, negative sense — as the absence of physical violence — but also privileges a very short-term view of peace. Understanding peace in a broader, positive sense and adopting a more long-term perspective, however, can bring an important new dimension to debates about the relationship between peace and justice. In the words of Méndez, ‘This removal [of people like Kony] by the fact that they are now under indictment may initially be seen as an obstacle to peace, but further down the road it may be exactly what is needed to get a stable peace in Northern Uganda.’<sup>99</sup> Finally, while critics of the ICC’s work in Uganda submit that peace should come before justice,<sup>100</sup> the complexities and particularities of individual post-conflict societies demand contextually sensitive and tailored responses rather than general formulae. Peace and justice, in other words, ‘do not necessarily follow a linear peace-then-justice trajectory’.<sup>101</sup>

If we adopt the position that peace and justice are fundamentally incompatible and in conflict, the ICC will inevitably represent a potential impediment

96 Today it might be argued that there is some level of negative peace in Uganda, largely due to the fact that the LRA has now shifted its campaign of terror and violence to the DRC and the CAR. According to the United Nations, for example, the LRA killed more than 1,200 civilians in the DRC in 2009. X. Rice, ‘Lord’s Resistance Army Terrorises Congo after Ugandan Crackdown’ (2009), available at <http://www.guardian.co.uk/world/2009/sep/14/lords-resistance-army-terrorises-congo> (visited 18 April 2010). In March 2010, LRA fighters kidnapped more than 50 people and killed 10 people in the eastern prefecture of Haut-Mbomou in the CAR. X. Rice, ‘Lord’s Resistance Army Rebels Kill 10 in the Central African Republic’ (2010), available at <http://www.guardian.co.uk/world/2010/mar/23/lords-resistance-army-rebels-attack> (visited 18 April 2010).

97 R. Mac Ginty, *No War, No Peace: The Rejuvenation of Stalled Peace Processes and Peace Accords* (Hampshire: Palgrave Macmillan, 2008), at 112.

98 According to Simpson, ‘At its most basic, this is a distinction between peace processes that prioritise ending violence in the shorter term, as opposed to building more durable peace through addressing the underlying causes of violence’. G. Simpson, ‘One Among Many: The ICC as a Tool of Justice During Transition’, in Waddell and Clark (eds), *supra* note 27, 73–80, at 74.

99 J.E. Méndez, cited in IRIN, *Justice for a Lawless World? Rights and Reconciliation in a New Era of International Law – Part II* (2006), available at <http://www.irinnews.org/pdf/in-depth/RightsAndReconciliationPart2.pdf> (visited 5 April 2010).

100 Refugee Law Project, *Peace First, Justice Later: Traditional Justice in Northern Uganda* (2005), available at <http://www.refugeelawproject.org/workingpapers/RLPW17.pdf> (visited 5 April 2010).

101 Moreno-Ocampo, *supra* note 13, at 498.

to peace. Such dichotomous thinking, however, is ultimately unhelpful.<sup>102</sup> Undoubtedly, tensions between peace and justice can and do exist, yet this does not mean that we must make a choice between the two. Such Manichaeism will only entrench the very binaries that we need to overcome. Crucial to exploring and understanding the relationship between peace and justice is to conceptualize justice in a much fuller and deeper sense than merely criminal trials. In essence, 'Working for both peace and justice requires a broader and more holistic view of how both of these aims are achieved and the important connection between them.'<sup>103</sup>

### C. The ICC as a Potential Facilitator of Peace

'Justice' is a multi-dimensional concept that encompasses judicial and non-judicial forms, retributive and restorative elements. To understand it solely or primarily as criminal trials, therefore, is not only short-sighted<sup>104</sup> but also places a huge burden on judicial bodies like the ICC. To return to the case of northern Uganda, the Acholi people have their own indigenous forms of justice. The rite of *mato oput*, for example, is traditionally used when a member of one clan kills a member of another. Informed by restorative justice principles, *mato oput* entails a process of mediation, confession, payment of compensation, a reconciliation ceremony during which two sheep are slaughtered and exchanged and finally the drinking of the *oput* root, to symbolize the washing away of bitterness between the two clans. Contrary to claims that the ICC's intervention in Uganda rides roughshod over such indigenous justice practices,<sup>105</sup> international criminal justice and traditional justice are not alternatives but rather complementary forms of justice that should be concurrently pursued. As one legal authority underscores, '...it would be loading too much on the ICC to see it as the sole mechanism for delivering justice (in the fullest sense of the word)'.<sup>106</sup>

As part of a comprehensive justice strategy that includes but does not over-rely upon criminal trials, however, the Court can potentially contribute to peace in northern Uganda and elsewhere.<sup>107</sup> Of course, the emphasis must be on the

102 J.N. Clark, 'The ICC, Uganda and the LRA: Re-Framing the Debate', 69 *African Studies* (2010) 141–160.

103 P. Hayner, 'Negotiating Justice: The Challenge of Addressing Past Human Rights Violations', in J. Darby and R. Mac Ginty (eds), *Contemporary Peacemaking: Conflict, Peace Processes and Post-War Reconstruction* (2nd edn., Hampshire: Palgrave MacMillan, 2008) 328–338, at 336.

104 Menkel-Meadow underscores that, 'just as military solutions to "war" may not bring us peace, an exclusive focus on "legal" needs and interests may not bring us justice.' C. Menkel-Meadow, 'Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice', 70 *Fordham Law Review* (2002) 1761–1774, at 1774.

105 See, for example, K. Southwick, 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court', 1 *Yale Journal of International Affairs* (2005) 105–119.

106 Justice A. Sachs, 'Foreword', in Waddell and Clark (eds), *supra* note 27, at 6.

107 Mendéz, for example, argues that in a number of cases — including the Ivory Coast, Georgia and Guinea — the ICC has prevented violence. In 2004, when he was a special advisor to the United Nations Secretary-General, Mendéz gave a press statement in the Ivory Coast, emphasizing that since the country had made the decision in 2002 to accept the ICC's jurisdiction, those individuals responsible for inciting hatred and violence faced the risk of

word ‘potentially’; to reiterate, the relationship between criminal trials and peace remains empirically under-explored and thus constitutes a critical area for future research. Yet, simply by understanding justice as a more textured and multi-dimensional term than just criminal trials, our conceptual starting point can progress beyond narrow peace versus justice debates towards a more sophisticated ‘*peace and justice continuum* in which diverse accountability mechanisms can contribute to peace-building efforts, rather than compromise them.’<sup>108</sup>

That the ICC is still a relatively young institution dealing with only a small number of cases means that its ability to actually contribute to peace remains to be seen. The fact that it may aid peace in one context, moreover, does not necessarily mean that it will do so in another. As Bassiouni underlines,

Every post-conflict situation is *sui generis*, and the prospects for the Court’s investigations and prosecutions will vary in each case depending upon a number of factors including the context and circumstances in which the crimes occurred, accessibility to evidence, logistical considerations and, above all, the political willingness of the interested states in providing support to the Court.<sup>109</sup>

To illustrate this point, while the ICC’s intervention in northern Uganda has revived peace versus justice debates, an example from Namibia suggests that the relationship between peace (as reconciliation) and justice can be viewed far more positively. In November 2006, a Namibian NGO — the Namibian National Society for Human Rights (NSHR) — made a submission to the ICC, in which it identified four particular individuals — including former President Sam Nujoma — as having committed grave human rights violations during and after the period of Namibia’s quest for independence (1966–1990). What is significant is that instead of approaching justice and peace as polar opposites that require an either/or choice, the NSHR, ‘...used an international justice mechanism to demand what they saw as reconciliation in Namibia.’<sup>110</sup>

The critical point, therefore, is that rather than viewing the ICC as either an obstacle to peace or as an instrument of peace, a more nuanced perspective is ultimately required. We need, in other words, to acknowledge and to examine both the Court’s limitations and its potential, and thus to recognize that as regards the relationship between criminal justice and peace, there are no clear-cut answers. Rather, ‘efforts to prosecute war crimes suspects may both enhance and complicate efforts to achieve and maintain peace.’<sup>111</sup>

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criminal prosecution in The Hague. Recalling how it was later established that ‘the prospect of ICC prosecution was carefully analyzed by persons in authority and their legal advisers’, he notes that 48 hours after his press release was widely broadcast, calm returned to the country. For him, therefore, ‘...the incident is evidence that the threat of prosecution can stay the hand of perpetrators’. J.E. Mendez, *The Importance of Justice in Securing Peace*, ICC Review Conference of the Rome Statute (2010), available at <http://www.icc-cpi.int/iccdocs/asp.docs/RC2010/Stocktaking/RC-ST-PJ-INF.3-ENG.pdf> (visited 24 November 2010).

108 Simpson, *supra* note 98, at 75.

109 Bassiouni, *supra* note 31, at 423.

110 S. Höhn, ‘International Justice and Reconciliation in Namibia: The ICC Submission and Public Memory’, 109 *African Affairs* (2010) 471–488, at 487.

111 Peskin, *supra* note 16, at 257.



## 5. Conclusion

For one prominent legal scholar, 'Most intriguing about the response of trials to mass atrocities is the close proximity of idealism and cynicism surrounding the entire project.'<sup>112</sup> Seeking to carve a middle ground between these two extremes, this article has explored both the ICC's limitations and possibilities in delivering justice and peace. While identifying three particular ways in which the ICC can potentially realize its capacity as a vehicle of justice — namely increased clarity, increased visibility and increased cooperation — it has also emphasized that there is far more to justice than criminal trials. Hence, notwithstanding the important concessions to restorative justice within the Rome Statute, we cannot over-rely upon the ICC to deliver justice after mass atrocities. To cite Goldstone and Smith, '...the menu of how best to deal with such crimes has become enriched and multifaceted.'<sup>113</sup>

Turning to the Court's potential as an instrument of peace, this research has argued that while tensions can and do arise between peace and justice, this does not necessarily mean that the ICC represents a threat to peace. Rather than engaging in narrow peace versus justice debates, a 'dichotomous dilemma [that] is often overstated',<sup>114</sup> the way forward is to explore whether and how the ICC can contribute to peace as part of a comprehensive and holistic justice strategy. As Moreno-Ocampo himself underscores, '...we must think about an integrated approach and how to combine justice with other areas, such as rehabilitation and development, in order to produce better communities.'<sup>115</sup> That the Court has recognized the importance of restorative justice — notably by making provision for the participation of victims and for reparative justice — thus represents a significant starting point.

Although no definitive conclusions can be drawn at this stage, the work of the Court has undoubtedly injected important new substance into discussions about the relationship between criminal trials, justice and peace. To the extent that such debates to date have tended to adopt a more theoretical focus, it is hoped that the polemics surrounding the ICC will provide the catalyst for more empirical research in this area. Such research is essential for generating realistic expectations — 'One must not expect too much from justice, for justice is merely one aspect of a many faceted approach needed to secure enduring peace in a transitional society'<sup>116</sup> — and for providing critical insight into the strengths and weaknesses of criminal trials in post-conflict societies in Africa and elsewhere.

112 Minow, *supra* note 3, at 28.

113 Goldstone and Smith, *supra* note 11, at 142.

114 C.L. Sriram, 'Introduction: Transitional Justice and Peacebuilding', in C.L. Sriram and S. Pillay (eds), *Peace versus Justice? The Dilemma of Transitional Justice in Africa* (Scottsville, KZN: University of KwaZulu-Natal Press, 2009) 1–17, at 1.

115 Moreno-Ocampo, *supra* note 13, at 503.

116 R. Goldstone, 'Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals', 28 *New York University Journal of International Law and Policy* (1996) 485–505, at 485–486.