

Report on the International Conference

“10th Anniversary of the International Criminal Court: Achievements to Date and Prospects for the Future”



The International Conference on the 10th Anniversary of the International Criminal Court (ICC), hosted by the Foreign and Commonwealth Office on 21 June 2012, attracted 25 distinguished speakers, including Sir Adrian Fulford, UK High Court Judge and former Judge of the ICC in the Hague, and 110 participants for a day of discussion and debate on the first 10 years of activity of the Court and its prospects for the future.

The conference, organized by the British Institute of International and Comparative Law (BIICL) and the University of Nottingham Human Rights Law Centre, with the sponsorship of the Foreign and Commonwealth Office and Temple Garden Chambers, provided a forum for legal scholars, students and practitioners, diplomats and NGOs' representatives, to reflect on the role and relevance of the ICC for international criminal justice. Participants discussed the most relevant issues of the ICC's functioning and procedure and made recommendations on how it could withstand present criticisms and overcome challenges in the future.



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The conference commenced with a welcoming address by Professor Robert McCorquodale, Director of BIICL and chair of the opening session, which included: Henry Bellingham MP, Foreign Office Minister, as a key-note speaker, and discussants: Olympia Bekou, Associate Professor at the University of Nottingham; Marek Marczyński, International Justice Research, Policy and Campaign Manager at Amnesty International; Elizabeth Wilmshurst, Fellow of the Royal Institute of International Affairs, Chatham House; and Sir Geoffrey Nice QC, Barrister at Temple Garden Chambers. The discussion focused on the vision behind the conference and on the present standing of the ICC.



In his opening address, the Foreign Office Minister Henry Bellingham MP emphasized that the ICC now stands as a cornerstone of international criminal justice. He stressed that judicial independence of the Court is crucial for its efficient and effective functioning. The Minister noted the substantive financial contribution of the UK to the ICC's budget, and stressed the need to ensure that the Court is efficient, effective and focussed on its core objectives.



The speakers agreed that the creation of the ICC represents a major achievement in terms of a functioning international institution with jurisdiction over international crimes, for which even head of states can be held accountable. Sir Geoffrey pointed out the importance of the factual record left by the ICC, which is reliable as it is produced through collection of evidence and cross examination, and may be beneficial for the process of reconciliation.



Dr Bekou mentioned three main substantive issues which stand in the way of the ICC's future success: complementarity, cooperation of states and budget constraints. She also highlighted how positive complementarity could have a catalytic effect on the capacity building of judiciary in states concerned, as they are responsible for enabling investigations and prosecutors at the domestic level.

The discussants agreed that the tension between peace and justice is one of the main challenges for the Court in creating and maintaining an effective and fair judicial institution. Elizabeth Wilmshurst observed that the reform of the Court's procedure is a key issue and suggested that experts on criminal procedure should be involved in the reforming process. She agreed with Sir Geoffrey that the selection of judges is cardinal to build a fair institution, and suggested that states parties should put forward their best nominations. In addition, Marek Marczyński noted three other challenges: firstly the ICC's funding system, which makes the ICC a



resource-driven, rather than a criminal offence-driven institution; secondly, the controversial role of the UN Security Council in respect to the ICC; finally, the relationship between the ICC and African countries.

Sir Geoffrey portrayed the ICC as a pendulum swinging between political pragmatism on one side and the principle of the rule of law on the other side. The subsequent debate focused on proposals on how to shift the position of this metaphorical pendulum towards the rule of law's angle. The following suggestions were made: enlarging the budget; increasing efficiency but not at the expense of justice; upholding a high threshold of protection of the rights of both the accused and the victims and therefore enhancing public confidence in the fairness of the Court.

Panel One discussed the issue of the trigger mechanism of the ICC. The Panel was chaired by Alice Lacourt, Legal Counsellor at the Foreign and Commonwealth Office, and included as discussants: Dr Fabricio Guariglia, Senior Appeals Counsel, Office of the Prosecutor at the ICC; Dapo Akande, Lecturer at the University of Oxford; and Amal Alamuddin, Barrister at Doughty Street Chambers.

Dr Guariglia spoke about the creation, the goals and the practical application of article 15 of the Rome Statute, which he himself helped draft. He stressed the limits of the Prosecutor's power to initiate international criminal investigations *ex proprio motu*. In fact, the investigation must be authorised by the Pre-Trial Chamber. This authorization may include facts which have not been included in the request of the Prosecutor, and are based, for example, on the representations of the victims to the Pre-Trial Chambers. In this respect, Dr Guariglia raised the issue of the extent to which the Pre-Trial Chambers can go beyond the request of the Prosecutor. Other issues raised were that of the temporal scope of the investigation, and that of the individuation of the relevant nexus which, linking the facts together, qualifies them as a 'continuing and ongoing' crime.

Dapo Akande's presentation focused on the interpretation of the crime of aggression as defined by Article 8 *bis* of the ICC Statute, adopted at Kampala conference in July 2010. He pointed out that the main controversy rests on the meaning of the requirement that the act of aggression be a 'manifest' violation of the Charter of the United Nations. While it seems that there was an intention to exclude cases of minor use of force, it is unclear whether the act has to be 'an obviously



illegal violation, a violation with serious consequences or a violation which is both illegal and serious' in order to amount to a crime of aggression. Akande referred to Understanding 7, which states that 'the three components of character, gravity and scale must be sufficient to justify a "manifest" determination', but no component alone can satisfy the standard itself. He concluded that in any case 'either or both of gravity and scale must justify the conclusion that the use of force is a manifest violation of the UN Charter'. Akande then discussed a second controversial issue, namely who will be bound by the amendment when it comes into force, as there are two different applicable clauses in the Statute – Article 121(4) and (5) –, and in particular whether the amendment will apply to state parties which did not accept it, unless they opt out.

Amal Alamuddin discussed the UN Security Council's powers to initiate an investigation by referring a situation to the Prosecutor, and to defer an investigation or prosecution, acting under Chapter VII of the UN Charter (Articles 13 (b) and 16 of the Rome Statute). While observing that these powers may create the possibility for encroachment on the ICC's independence, Alamuddin explained that checks and balances are in place to safeguard the Court's independence. Firstly, the UN Security Council is not the only subject entrusted with the power to activate an investigation; secondly, the UN Security Council has the power to create an *ad hoc* Tribunal; thirdly, the referral mechanism would be broad; lastly, the ICC can always reject a case referred by the Security Council. Other factors, however, generate a potentiality for encroachment on the ICC, including geographical and time limitations and inconsistency by the UN Security Council.

The discussion then focused on the two essential issues of judicial independence versus encroachment on the Court, and of justice versus peace. Participants observed that universal ratification of the Statute of Rome should be strongly advocated and national prosecution encouraged. A suggestion was made for the ICC to issue guidelines on the interpretation and scope of powers of states parties, the prosecutor and the UN Security Council to trigger an investigation. Amal Alamuddin suggested a more transparent use of the mechanism of deferral. In answering a question on when a referral ends, the panel agreed that there is no automatic end to the referral. While Dapo Akande pointed out that this is problematic, Amal Alamuddin thought that this should not constitute a problem, provided that the independence of the Court is safeguarded and the Statute of the Court is respected.



Panel Two on ICC crimes and admissibility was chaired by Dominic McGoldrick from University of Nottingham and the speakers included: Dr Mark Ellis, Executive Director of the International Bar Association; Dr Sarah Nouwen, University Lecturer from University of Cambridge; and Olympia Bekou, Associate Professor from University of Nottingham.

Dr Ellis discussed the principle of complementarity in relation to difficulties of national courts when applying the principle domestically. His general observation was that international criminal law is becoming less international and more domestic. However, he pointed to the problem of 'unwillingness' and 'inability' of national courts to put into operation an efficient criminal justice system on domestic grounds.

In order to assess implementation of the principle of complementarity one has to look at the effects that have taken place. Dr Nouwen, who undertook case studies in Uganda and Sudan, argued that there has been a catalysing effect of complementarity in these two cases. The catalyzing effect is most apparent in the debate on transitional justice and the establishment of national courts to address international crimes. In Uganda and Sudan complementarity means that 'we do something similar to international standards'. However, although judicial systems are in place, this does not necessarily address questions of impunity.

The inability of state parties to address these issues is mainly due to a lack of capacity and a lack of training, especially in post-conflict states. Thus, according to Dr Bekou there was a positive outcome in Kampala as the conference addressed these points. She highlighted that the ICC is not a development agency and one should bear in mind the dilemma of whose justice we are trying to achieve on the domestic level.

The overall agreement of the Panel was that the Statute itself contains vague definitions and obligations for states parties on how domestic courts should work. However, by conveying knowledge and legal skills to developing judicial systems, domestic courts can strengthen their legal framework and become more accountable in the future.

Panel Three discussed the ICC and victims. It was chaired by Fiona McKay, Chief of the Victims Participation Section in the Registry of the ICC. The speakers included: Dr Mia Swart, Research Fellow in the Rule of Law at the Bingham Centre



(BIICL); Pieter de Baan, Executive Director of the Secretariat of the Trust Fund for Victims; and Gaelle Carayon, ICC Outreach and Advocacy Officer at REDRESS.

Dr Swart examined the history of international criminal law and reparation judgements since Nuremberg and the relationship between civil law and criminal law. Victims are at the centre of the court's concern; however, the way in which the Court will implement its reparation powers is still an open question. She pointed to the fact that the Court has to address two issues which usually come in a sequence (first conviction, followed by reparations). According to the ICC's mandate these two issues may be decided in parallel which can lead to certain inconsistencies in proceedings.

Pieter de Baan emphasized that reparations are not imposed, and are only offered by judges on a case-to-case basis. Individual reparations do not necessarily mean financial reparations; in individual cases it also encompasses bringing a sense of dignity to the victim. From the social perspective reparations can assist to promote the reconciliation process. He also addressed the tension between the question of complementarity and effectiveness on one side and redress of victims on the other.

Gaelle Carayon highlighted the importance of victim participation in international justice. With two trials at the stage of completion, one of successes of the ICC is that participation of victims in proceedings contributes to the establishment of truth. Thus, victim participation should be as meaningful as possible and not merely symbolic. Further steps to improve the procedure would be to bring the Court closer to victims with more definite structures on the ground. In addition, the court needs sufficient resources to review its own process.

The panel agreed that victims should get recognition for suffering they have been through. There is a degree of co-existence between the Statute of Rome and the reparation systems at a domestic level. However, the panel was unanimous that it is important for the ICC to have adequate reparations prerogatives at its disposal.

Panel Four discussed the prospects for the ICC. The panel was chaired by Dr Andraž Zidar, Dorset Senior Research Fellow at BIICL, and included: Professor William Schabas, NUI Galway and Middlesex University (key-note speaker); Dr Stephen Humphreys, Lecturer at LSE; Rodney Dixon, Barrister at Temple Garden Chambers; and Professor Robert Cryer from the University of Birmingham.



In a key-note address Professor Schabas discussed the history of the ICC as well as future expectations. He pointed out that plans for an international criminal court were on the diplomatic agenda already after the Second World War. However, realities of the Cold War put those ideas on hold. At the time of drafting of the Rome Statute expectations were conservative but hopeful. The ICC was perceived as a prospective international forum for justice. However, through the years it was difficult to explain and justify the length of proceedings – the recent Lubanga decision took nearly 6 years to complete. Professor Schabas suggested that a number of procedural improvements could be made, for example to streamline and remove extra stages that add to the length of trials.

Dr Stephen Humphreys suggested that in the Lubanga trial the ICC didn't succeed in providing a comprehensive factual assessment of the conflict in DR Congo. Consequently, background to the conflict resulted in a confusing narrative. The reason for this may be in still under-developed capacity of the Court.

Rodney Dixon highlighted the following elements, which would contribute to better functioning of the ICC in the future: a need to engage critically with legal questions; more efficient procedure for the collection of evidence; protection of rights of the accused and better measures to prevent witness intimidation; and a need to ensure an overall transparency of the ICC.

Professor Cryer pointed out that in reference to the two Security Council referrals to the ICC there is a general impression that these cases have proven to be unsuccessful. This is so because of a lack of support from the Security Council for consideration of cases after the referrals. He urged that the ICC should not accept cases simply because they have been referred and should develop autonomous argumentation in reaching a decision about referrals.

The overall assessment of the panel was that the functioning of the ICC presently lacks sufficient clarity and that the Court would need to be more transparent if it was to gain more credibility in the future. However, the panel agreed that the establishment of the Court was a great achievement and the decade ahead would be determinative of its success and general acceptance.



The closing session was opened by Iain Macleod, Legal Advisor at the Foreign and Commonwealth Office. The closing speech was delivered by Sir Adrian Fulford, High Court Judge in the United Kingdom and former Judge of the ICC in Hague, introduced by Dominic Grieve QC MP.



Sir Adrian reflected on his 9 years of judicial experience at the ICC which he regarded as a once in a lifetime opportunity. He was appreciative of the fact that a significant number of countries have signed up to create a functioning system of international criminal justice. Sir Adrian suggested some practical steps to be taken in order to relieve the length of judicial proceedings. One of the issues was the significant amount of testimonies and witnesses. Although testimonies represent an important element in the overall judicial assessment, he considered it unnecessary for witnesses to travel a long way for a day's worth of evidence. Instead, testimonies in a pre-trial session could be obtained through the use of advance technologies, such as video equipment.



Additionally, he pointed out that it would be useful to assign some judicial tasks to individual judges instead of making decisions in a wider collegiate setting. In his opinion, flaws and strengths of the Court will become more apparent over time, in particular by the appeal system and academics interested in scholarly analysis of the Court's work.

