

The objective of this short postscript to the monograph *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (Institute for Security Studies, Pretoria, Monograph #141, March 2008), is to anticipate one response that a reader might have: “What is the place for notions of restorative justice in a paper dealing (as the monograph does), with advocacy for fuller implementation of the ICC scheme in African countries?”

This question is an important one, including because advancing a restorative justice approach to post-conflict peace and justice is a significant component of the work of the Centre of which one of us is a part. Aspects of that approach include a recognition of the significance of locally-driven processes, a need to focus on ‘bottom-up’ restorative processes both founded in the experiences of ordinary people and concerned with taking the steps that they feel would set things right – rather than attending primarily to processes involving only some elites (whether peacemakers, truth commissioners, prosecutors, or indicted persons).

The monograph focused on a selection of States likely to receive foreign fugitives from justice, rather than States themselves confronting major international crimes, where a wider range of options than mere prosecution need to be considered. It also did not purport to deal directly with the many debates about the merits of international prosecutions over national processes towards peace and justice (and the supposed tension between these two aims; of course, these issues have been vividly represented in the Ugandan / LRA situation). It is true that the ICC system is a creation of States and the international legal system, and represents a highly formalized, high-level regime organised around perhaps simplistic, lumpy notions of punishment, retribution and deterrence which may have been found to be on their own inadequate or ineffective in the regulation of crime in national settings, and which do not account for the vital aspects of healing, rehabilitation, reconciliation for victims and communities and perpetrators. It is also true that while grievances over impunity (a focus of the monograph) can lead to cycles of violence, so can humiliation, inadequate opportunities to explain or to complain or to communicate experiences, externally-led blockages to necessary co-existence between parties, or the lack of a forum for participatory communal processes through which local issues can be dealt with on local terms. In *Restorative Justice and Responsive Regulation* (2002), for example, Professor John Braithwaite noted that while there is an important role for an international criminal court, the movement for such a court might risk repeating the mistakes of domestic regulation of corporate crime: ‘select trials of demonized individuals that exonerate the collective and that may jeopardize responsive regulation to protect the vulnerable’.¹

Of course, initiating an ICC investigation or prosecution might at once undermine local peace and reconciliation efforts, while also purporting or being perceived by its pomp and solemnity to be the single comprehensive treatment of the problem, leaving many matters unresolved: stories untold, hurts unhealed, deeds unaccounted for. However, the ICC scheme does not represent the totality of possible responses where serious crimes have been committed in the course of a conflict. The answer to the hypothetical response above would be firstly that the possibility of either national-level prosecution or an ICC prosecution merely represents one component of possible ways of dealing with some of the actions of some of the parties to a conflict. Indeed the ICC scheme can perhaps best be seen not as the monopoly institution in international criminal regulation but simply as the pinnacle institution – as one element in a continuum of international and local conflict prevention and resolution devices and mechanisms, each

¹ Others have focused on whether the focus on individual responsibility is at the expense of wider restorative justice goals: see also among others Carsten Stahn, ‘Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor’ (2001) 95 *American Journal of International Law* 955; Lorna McGregor, ‘Individual Accountability in South Africa: Cultural Optimum or Political Façade?’ (2001) 95 *American Journal of International Law* 32; Stuart Wilson, ‘The Myth of Restorative Justice: Truth Reconciliation and the Ethics of Amnesty’ (2001) 17 *South African Journal on Human Rights*, 531.

having their merits, their incentives for compliance and disincentives for breach. Secondly, within itself the ICC scheme at either national or international level is not so blunt or automatic or insensitive to local realities that local imperatives for restorative justice cannot be accommodated.²

It cannot be assumed that prosecution precludes other processes. Restorative justice approaches complement ICC and national prosecution schemes (or vice versa):³ but a responsive continuum of regulation for international criminal behaviour requires that strong and ultimate sanctions be in place. The monograph advocates the need for States to have national measures in place: whether these should be used or not in any particular situation is partly a political question, one where there will often be space for recognition of the advantages of other approaches, or where it is possible to pursue multiple paths to peace and justice.

² The *Rome Statute* of the ICC is silent on locally-given amnesties, which might be a part of any locally-driven justice initiative. Some argue that this is because the *Rome Statute* was never drafted with the intention of allowing amnesty to be raised as a defence. As Max du Plessis has pointed out, however, there are a variety of mechanisms built into the Statute which would allow a genuine amnesty to be recognised in appropriate circumstances. For example, Art. 53(2)(c) of the Rome Statute allows the Prosecutor to refuse prosecution at the instance of the State or the Security Council where, after investigation, he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances.' See generally John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in Cassese et al, *The Rome Statute of the International Criminal Court – A Commentary* (2002) vol. 1.

³ As we think Braithwaite intended to acknowledge in his Preface in *Restorative Justice and Responsive Regulation*.