



# Complexities and Dilemmas

## CHAPTER 7

*This chapter focuses on some of the issues and challenges surrounding the work of the ICC and how to deal with these issues.*

Questions about the ICC were raised by African religious leaders at an expert meeting held in Nairobi, Kenya, in May 2005. These questions seek to view the ICC from a local African perspective, and address challenges and pitfalls so that better relations can be established.

### 7.1 Some of the main issues raised were:

#### 1. *Assessing the interest of justice for victims:*

- Are there different understandings of justice depending on levels in the community?
- Are there different understandings of what is required for justice at the local, national and international levels?
- What is the role of the ICC in achieving justice, and at which levels can the ICC be effective?

#### 2. *Processes at the ICC:*

- How does the Prosecutor at the ICC decide what crimes to investigate, i.e. the Rome Statute requires a high level of neutrality and impartiality of both the Prosecutor and the Judges, but is this in fact guaranteed?
- Does the Office of the Prosecutor fully appreciate the local context?
- How should we address local perceptions of partiality of the ICC at a national level?
- Do (partisan) politics, both nationally as well as internationally, influence the Court?



### **3. *What makes a crime a crime?***

- The Rome Statute enshrines certain (internationally recognised) crimes. Are there differences between national crimes and international crimes?
- Does the fact that the ICC may not prosecute certain crimes entail that they cannot be considered serious crimes?
- What happens with crimes that are not prosecuted by the ICC?
- The concept of “victim” (of war crimes, crimes against humanity, etc.) is a “technical” legal term in the Rome Statute and is sometimes confusing. This means that a victim in a certain crime that is brought before the ICC may not be considered a victim in the legal sense.

### **4. *The ICC in communication with local communities***

- Does the ICC have the capacity to relate to the communities and community representatives where prosecutions are taking place?
- The ICC has an outreach programme, which is meant to be the communication tool between the Court and the local communities. The way in which outreach is successful is dependent on its structure, expertise and budget. Is this satisfactorily dealt with?
- How does the ICC succeed in being a link between international law and the local community?

### **5. *Expectations***

- The aims and ambitions of the ICC are high and many people have high expectations about what the ICC can achieve in terms of:
  - reparations
  - justice for victims
  - contribution to peace and reconciliation processes
- For these reasons, there is a danger of unrealistic expectations, particularly in terms of reparations.



## **6. What is the ICC?**

- The treaty establishing the ICC (the Rome Statute) is one of the most complex international treaties. What knowledge does one need to have in order to understand its basic tenets and operations?
- What is the precise mandate of the Court and, consequently, what are its limitations?
- One refers to “the Court”. Nevertheless, the Court consists of separate independent organs that may easily be confused.

## **7. Duration of proceedings**

- Both investigations and trials will take a long time: years rather than months;
- One way of getting local people and communities involved is through the participation of victims. However, proceedings take place in The Hague and most of the decisions are taken there. Local people fear they may lose control of the processes.

## **8. The ICC and other justice initiatives**

- Local communities and people are involved in many processes and initiatives regarding justice and reconciliation. To what extent does the ICC compete or harmonise with these other processes?
- How can the ICC complement national and local justice and reconciliation initiatives? To what extent does the ICC “speak the local language”?

## **9. Victims**

- Victims play a new and unique role in proceedings at the ICC, but there is much uncertainty about the question of how this participation and contribution will take effect.
- How will victims be supported and how will they be contacted for follow-up?



## 7.2 Addressing the issues

The above issues were summarised and discussed by the participants in Nairobi. How each issue might be addressed was discussed and is summarised below:

### **1. Assessing the interest of justice for victims**

There are many different views of justice: from local people, to international legal perspectives. The mandate and work of the ICC sometimes contradicts the African cultural and religious perspectives of justice and reconciliation. African understandings of justice often aim to restore relationships which may involve community mediation, rituals or the paying of compensation. Christians evoke church rituals and a cleansing process, first by trying to solve the problem by talking and mediating. The whole community is involved. However, in reality those with the position, profession, and power enjoy impunity. Traditional forms of justice and reconciliation have proven to be insufficient when dealing with widespread atrocities. How can the work of the ICC complement traditional approaches to justice in cases of mass violations?

These different perspectives of justice result in local leaders having high and unrealistic expectations of the ICC, and getting frustrated with the long time it takes for prosecutions and the lack of a restorative (reparations) side to the ICC role. On the other hand, the religious and traditional approaches often lack broad application and the ability to prosecute.




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#### **Guidance**

*The ICC needs to respect the traditional mechanisms for justice and reconciliation, to understand how justice works in each context, and harmonise with local leaders and processes. It is important that we all recognise that forgiveness, reconciliation and justice can complement each other. The Court should seriously consider whether prosecutions can be stopped in a situation where widely accepted traditional mechanisms genuinely result in justice and a step to reconciliation. Religious leaders can complement the work of the Court by providing restorative rituals that the ICC is not equipped to offer.*

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## 2. Processes at the ICC

How prosecutions are started (trigger mechanisms of investigations) is not widely understood, and the ICC is seen by some as biased or targeting people against the regime in power (e.g. Uganda, the DRC). People only see the ICC prosecuting in Africa, and not some of the major 'western' governments committing atrocities in wars in other parts of the world.

As a result, the ICC may be seen as foreign and partisan, resulting in lack of cooperation from the local community.



### Guidance

*Religious organisations at a local level can make it clear that anyone can submit evidence of widespread violations to the ICC's Prosecutor. It is not only governments that can trigger an investigation, the Prosecutor has the power to trigger investigations himself and the UN Security Council can also submit cases.*

## 3. What makes a crime a crime?

The ICC is a legal institution and local peace processes are mostly cultural, traditional and religious. The ICC lacks sufficient capacity to relate to cultural and religious issues and processes.

Therefore, the ICC is not sufficiently in touch with what happens on the ground and it is working in isolation on this level. ICC staff officers receive a hostile reception but they do not understand why. This limits the opportunity for the ICC to be effective and get the support of local leaders.



### Guidance

*To solve this, the ICC should work with religious and traditional leaders and should employ people with field experience. The ICC should also improve their outreach to communities. Apart from this the religious leaders should strengthen their own (inter) religious networks to promote communication and cooperation.*

## 4. The ICC in communication with local communities

ICC's initiatives for outreach and public relations have been limited. Although the ICC has a Public Information Section



to inform local people about its mandate, this has not been translated into effective action at a local level.

This affects the availability of information suitable for the local context, and raises the potential for unrealistic expectations and resistance to the ICC. The preventive nature of ICC can become severely affected. Misconceptions will limit ownership and therefore support from victims and will also affect evidence gathering.




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### **Guidance**

*Religious organisations can play an important linking role, between victims, the community and the ICC. Religious organisations can also network and lobby for increased capacity of ICC outreach. The ICC recognises the potential role of religious leaders in building trust and outreach and should continue to promote two-way communication and cooperation.*

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## **5. Expectations**

Because of the tremendous need for justice and reconciliation following widespread destruction, there are unrealistic expectations about what an 'outside' organisation like the ICC can do. Local leaders lack information and contact with the ICC, which increases the risk of misunderstanding and unrealistic expectations at a local level.

A lack of information increases expectations, frustration and criticism of the ICC.




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### **Guidance**

*Religious leaders can disseminate clear information about the mandate and limitations of the ICC. The role of the ICC needs to be understood as fitting in with other locally-driven justice and reconciliation efforts, headed by local leaders.*

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## **6. What is the ICC?**

The ICC is often seen as lacking independence in its mandate, in its constituted powers and finances. The ICC may be seen as conforming to the wishes of 'westerners' who have the capacity to fund and veto the ICC.





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**Guidance**

*Religious leaders can help promote the ICC by clarifying how the ICC was established, and urging their governments to abstain from ratifying the bilateral agreements with the USA. Through a nation-wide outreach and information dissemination strategy communities should be informed about e.g. the independence of the ICC and the worldwide adherence to the Rome Statute (100 countries have now ratified, 27 of them from Africa).*

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**7. Duration of proceedings**

This issue involves both the length of procedures and timing of prosecutorial steps. The lengthy ICC procedures conflict with expectations for a rapid solution to the problem. The timing of the ICC to start investigating in ongoing war situations is also highly complex. For example, the talk on issuance of warrants of arrest during war disturbs the peace process and people also think that the ICC is out of touch with reality.

This results in a loss of confidence in the ICC and the perception among some that the ICC is a waste of time. The ongoing war makes witnesses increasingly vulnerable. The ICC activities might even result in increasing violence.



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**Guidance**

*The ICC needs to liaise with local and religious organisations to help them understand why the ICC is carrying out investigations. Religious leaders have easy access to ordinary people, and are able to better pass on information because they know and understand the local context and language.*

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**8. The ICC and other justice initiatives**

Both from the legal and from the traditional perspective, justice is a set of rules put in place to govern people. Justice is also fairness and should also have mercy with the people involved (victim, perpetrator, community). Reconciliation goes further and provides restitution of what is wrongly taken away or destroyed.



This means that there is a divide between local justice and reconciliation processes in comparison with the processes of the ICC. People fear that the ICC is not sufficiently aware of what is happening at the local level. It is difficult for the people to grasp the potential of the ICC for their specific situation. This leads to the situation that people misunderstand the mandate and potential of the ICC. This results in rejection and confusion. They think that the ICC interferes with their local peace, justice and reconciliation process. They further distrust the ICC because of local and national political interference in the prosecutions of the ICC. This causes divisions locally.




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### **Guidance**

*Meetings should be organised between ICC staff, expert human rights NGOs and religious (primary top) leaders to promote understanding of the ICC. The ICC should provide sufficient information to religious leaders, which can then be circulated to congregations. Religious leaders should also network with other types of leaders and communities.*

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## **9. Victims**

The ICC provides for a high level of participation of victims. This is positive in principle, but there are some limitations to how this works at a local level. Problems can arise if it is not clear how to participate, if not all sides of a conflict are able to participate as victims, or are not treated well by the ICC in the prosecution process, or when the outreach and community relations of the ICC is insufficient or inappropriate for the local situation. Some may *not* see themselves as victims (abducted women, children), or may be deterred from participating due to fear of stigmatisation.

The effect of this, if not handled well, could be unrealistic expectations and frustration, or if only one side participates as victims the ICC can be seen as partisan and lose credibility - then the cycle of violence is not broken and hatred remains. If not handled well, the participation of victims could lead to re-traumatisation. If religious leaders would encourage participation, people would not be stigmatised.



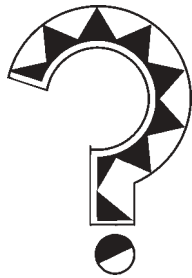


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### **Guidance**

In theory, the ICC is open to victims of all sides, groups, and communities. With the help of religious communities, victims need to be well informed, with clear information about what a victim can expect and not expect from the ICC. Victims will need guidance and support from local leaders in the process, e.g. with filling in forms. Victims can be organised into supportive groups (numbers can be an important security), and the limitations, particularly in terms of reparations, need to be stressed. African approaches to reconciliation tend towards a collective approach to reparations. The ICC has the potential to cause some problems if its procedures about reparations are not clear to the victims. Management of expectations should be carefully handled!

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### **7.3 Key questions**

1. Can you see any complexities and dilemmas related to the work of the ICC in your particular context? How can these problems be addressed?
2. How could an ICC network and lobby group be established? Who would be involved? How could effective two-way communication best be developed with the ICC?

