



## **AIUSA International Justice Day 2007**

### **Q&A with Jonathan O'Donohue of AI's International Justice Project**

*Jonathan O'Donohue is a Legal Adviser for Amnesty International's International Justice Project. He has worked for the Project since 1999. In this role, Jonathan represents Amnesty International at the International Criminal Court and other international and internationalized courts. In particular, his work focuses on ensuring that international courts fully implement the rights of victims to protection, support, participation and reparations. He also coordinates AI's worldwide campaign for universal ratification and full implementation of the Rome Statute.*

*We thank Jonathan for taking the time to answer questions from AIUSA activists as they prepare for International Justice Day celebrations on or around Tuesday, July 17.*

*Jonathan: First of all thank you for inviting me to participate in this Q&A. Over the last eight years I have followed the outstanding work that AIUSA has undertaken on international justice issues. One major highlight of course was its campaigning for President Clinton to sign the Rome Statute, which happened on 31 December 2000, hours before the deadline for signature closed. New projects on international justice that AIUSA has been working on for the last year are equally exciting. I am very pleased to have this dialogue with activists who are having an important impact on a range of international justice issues.*

#### **Q1: How was AI involved in the process of establishing the International Criminal Court (ICC)? What kind of roles do NGOs or civil society groups play to support the ongoing work of the ICC?**

AI first began working on the ICC in 1993 - at the very beginning of the process to draft the Rome Statute, the treaty that created the ICC. AI was involved at all stages of the drafting process and made detailed submissions on a range of important legal issues to the International Law Commission, the Preparatory Committee and finally the Rome Conference in 1998 where the Rome Statute was adopted by an overwhelming majority of states. Following adoption we followed the Preparatory Commission's preparation of other important supplementary documents to the Rome Statute, including the Rules of Procedure and Evidence and the Elements of Crimes.

At the same time, in July 1998, AI launched a worldwide campaign for all countries to sign, ratify and implement the Rome Statute. Our sections and structures around the world lobbied their governments to sign the Rome Statute before the deadline of 31 December 2000 to indicate their support for the ICC and their intention to ratify. AIUSA was of course extremely active in the successful campaigning for President Clinton to sign. 138 states other states also signed confirming the overwhelming support for the ICC. Campaigning for universal ratification and for all states to implement the Rome Statute is a long term goal for AI. To date, 104 states have ratified the Rome Statute. In 49 of those countries national AI sections and structures successfully campaigned for their country to ratify, in most cases they worked with other national civil society organizations. AI's 50<sup>th</sup> successful national campaign is expected very shortly as Japan is about to complete its ratification and become the 105<sup>th</sup> state party. AI has also been actively involved in lobbying many other countries where we do not have a section or structure. Recognizing that implementation of the Rome Statute is essential if states are going to fulfill their primary obligation to investigate and prosecute the crimes before national courts and to provide full cooperation to the ICC, AI is analyzing national laws and commenting on draft implementing legislation in many countries to ensure that national implementation is effective.

The pace of ratifications between 1999 and 2003 was much quicker than anyone expected. The 60<sup>th</sup> ratification which allowed the ICC to be established was deposited in April 2002 and the Rome Statute entered into force on 1 July 2002. Since then AI has provided input to ICC staff in the setting up the ICC and its systems. We have made submissions to the Office of the Prosecutor in developing its strategy. We have been particularly involved in providing input and advice to the ICC on implementing its progressive mandate on victims, including protection, support, participation and reparations. Recognizing that political support of states is essential for the success of the ICC, we have lobbied the Assembly of States Parties to provide effective support (including budget) and oversight of the ICC. This work continues today.

Now that the ICC is conducting four investigations, AI is now focusing on campaigning for full cooperation with the ICC. In particular, at present only one of the seven persons charged by the ICC has been arrested and surrendered to it. It is vital that this failure of states is addressed as soon as possible. This month AI issues its first "arrest now" action for AI members to lobby the government of Sudan to arrest and surrender two persons charged by the ICC for crimes committed in Darfur. More "arrest now" actions are planned.

**Q2: After the situation in Darfur was referred to the Prosecutor of the ICC by the UN Security Council in March 2005, how was the ICC's decision made to take up the investigation? Who makes these sorts of decisions?**

As you point out, the UN Security Council's referral provided the ICC with jurisdiction over the crimes in Darfur, but it was not mandatory for the ICC Prosecutor to commence an investigation. Immediately following the referral, the Prosecutor conducted a

preliminary analysis of the situation in Darfur in order to determine whether to launch an investigation. Article 53 of the Rome Statute provides that in making a decision whether to open an investigation, the Prosecutor must consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17 (which says that cases shall be inadmissible for the ICC if national authorities are genuinely investigating and prosecuting the crimes); and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

On 6 June 2005, the Prosecutor announced the launching of an investigation in Darfur stating:

“Following the referral from the United Nations Security Council on 31 March 2005, the Prosecutor received the document archive of the International Commission of Inquiry on Darfur. In addition, the Office of the Prosecutor requested information from a variety of sources, leading to the collection of thousands of documents. The Office also interviewed over 50 independent experts. After thorough analysis the Prosecutor concluded that the statutory requirements for initiating an investigation were satisfied.”

**Q3: What is AI’s position on the situation in Northern Uganda, where there are proposals not to surrender four Lord’s Resistance Army leaders charged with crimes against humanity and war crimes to the ICC, but to instead bring them before traditional mechanisms or national courts? Does Amnesty support the rescinding of the ICC warrants if there are fair trials at the state level?**

In January 2004, the government of Uganda referred the situation of northern Uganda to the ICC on the basis that it was unable to investigate and prosecute the crimes committed in the conflict. The ICC launched an investigation and in July 2005 issued arrest warrants for five Lord’s Resistance Army (LRA) leaders, Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen charging them with crimes against humanity and war crimes. Raska Lukwiya has subsequently died. From the issuing of the arrest warrants, AI has called for their arrest and surrender to the ICC to face trial and is dismayed that the governments of Uganda and neighbouring countries have failed to take steps to arrest the men.

On 29 June 2007, the LRA and the Ugandan government signed an agreement on accountability and reconciliation. The agreement purports to set out a broad framework for addressing impunity in Uganda. The framework is, however, vaguely defined and

there are a number of elements of the agreement (including reference to establishing “alternative penalties” for serious crimes or to establish “alternative justice mechanisms”) which raise concern that the agreement – negotiated between both sides of a conflict that are accused of serious crimes – is not intended to establish an effective and meaningful justice process.

AI is particularly concerned by reports that the negotiations of the agreement focused significantly on avoiding surrendering the four LRA leaders to the ICC through establishing national mechanisms.

The agreement notes that further negotiations are planned to develop additional principles about the framework. The agreement also recognizes that legislation, policies and procedures will need to be established to define the framework. This is a matter that AI will continue to monitor.

The agreement between the LRA and the government is not binding on the ICC. The Ugandan government may, however, decide to challenge the admissibility of the cases before the ICC on the basis that it is now able and willing to prosecute the crimes before national courts. The Rome Statute is however clear that the ICC must not defer its cases to national authorities if it determines that the national proceedings would be (1) undertaken for the purpose of shielding the person from criminal responsibility or (2) would not be conducted independently or impartially and, they would be conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice. Even if the government successfully argues for the ICC to defer the cases, the ICC Prosecutor would be able to monitor the national proceedings and, if it determined the proceedings were not genuine, the ICC could proceed with prosecuting the crimes.

In the circumstances where Uganda has neither challenged the ICC’s jurisdiction nor adequately defined a national system where the men would be investigated and prosecuted genuinely before national courts, AI continues to call for the four men to be arrested and surrendered to the ICC without further delay.

**Q.4: In Uganda, there have been calls for the ICC to stop its cases on the basis that it conflicts with efforts to negotiate peace. What is AI’s position on this?**

AI’s position is that, following a conflict in which crimes and human rights violations have been committed, the pursuit of peace and justice should be complementary and a choice should not be made for one over the other. In too many situations in recent decades conflicts have ended without justice, truth and reparations. In some cases, this has led to continuation of the violence, as resentments between different communities goes unaddressed and perpetrators recognize that there is no deterrent to other crimes. For example, in Sierra Leone in 1999, an amnesty for crimes committed in the conflict did nothing to prevent the conflict re-starting in 2000 resulting in widespread crimes. Of equal importance, by precluding justice, truth and reparations the suffering of victims goes unrecognized and there is little or no help to rebuild their lives.

The situation in Uganda shows how justice can complement peace. Many commentators note that the ICC's investigation has contributed significantly to the progress towards establishing peace. Thanks to the ICC's arrest warrants, peace negotiations continue today with increasing recognition that the justice process cannot be avoided.

**Q5: Is there any system in place to enforce the ICC's judgments? If not, what would one look like? What sort of sentence could the court hand down to an elected official or person in position of power, and could that sentence be enforced without the accused individual's own cooperation?**

If the ICC issues a judgment convicting a person of genocide, crimes against humanity or war crimes, it may impose penalties on the convicted person, including a sentence of imprisonment (life imprisonment being the maximum penalty), fines and forfeiture of property or assets derived directly or indirectly from the crime. The Rome Statute prohibits the ICC from imposing the death penalty. The ICC may also order the convicted person to provide reparations to victims.

The Rome Statute requires states parties to cooperate fully with the ICC in enforcing judgments. If a person is sentenced to imprisonment by the ICC, then states parties should assist the ICC by allowing the convicted person to serve their sentence in national prison facilities. If a person has been fined or ordered to forfeit property or ordered to provide victims with reparations, states are required to cooperate with the ICC in tracing, freezing and seizing their assets.

The ICC is established to investigate genocide, crimes against humanity and war crimes and to prosecute individuals responsible. The Rome Statute expressly provides that the official capacity of the person, whether they are a head of state or government, a member of government or parliament, an elected representative or a government official is irrelevant and shall in no case exempt a person from criminal responsibility. In determining penalties, the ICC will take into account the gravity of the crime and the individual circumstances of the convicted person.

**Q6: If the U.S. government added its name to the treaty, what sort of support would it be expected to provide?**

If the US were to ratify the Rome Statute it would participate in the Assembly of States Parties of the ICC. The Assembly works to ensure that the ICC functions effectively, including providing it with adequate resources and oversight. The US would be able to vote on important issues and be able to nominate a candidate for judge and other elected positions.

As a state party, the US government would be required to cooperate with the ICC on a broad range of issues, including ensuring the arrest and surrender of persons charged by the ICC, responding to requests from the ICC in gathering evidence, responding to ICC requests to assist with the protection and support of victims and witnesses and responding to requests to assist the ICC in enforcing sentences. It is important to note that the US does not need to ratify the Rome Statute to provide such cooperation. Recent statements by US government officials indicate that the government will consider requests for cooperation in relation to the ICC's investigation of crimes in Darfur. To ensure its effective cooperation with the ICC in Darfur and other situations, AI calls on the government to review and amend its national laws, including removing restrictions on assistance contained in the American Servicemembers Protection Act.

**Q7: Has the ICC successfully tried, sentenced and/or enforced the sentence of anyone to date?**

No. The ICC only came into being on 1 July 2002. Since then it has made significant progress in setting up the ICC. It is already conducting four full investigations in Central African Republic, Democratic Republic of Congo, Uganda and Darfur, Sudan. Seven arrest warrants have been issued publicly and one person Thomas Lubanga Dyilo, who is charged with enlisting and conscripting children under the age of 15 into armed forces in the DRC, has been arrested and surrendered to the ICC. That case is currently in the pre-trial phase and the trial is expected to start before the end of 2007.

**Q8: Will the ICC investigate and prosecute allegations of crimes committed by US nationals?**

One of the main concerns raised by the US government about the ICC has been that, even though the US has not ratified the Rome Statute, the ICC could exercise jurisdiction over crimes committed by US nationals if the crimes were committed on the territory of a country that has ratified the Rome Statute. What opponents of the ICC fail to mention when they raise this issue is that if such a situation were to arise, the US would always have primacy over the ICC to investigate and prosecute the crimes before its national courts. Although, the US should review its national laws to ensure that crimes of genocide, crimes against humanity and war crimes are criminalized in accordance with international law.

Opponents state that the ICC could bring politically motivated prosecutions against US nationals, those arguments are however groundless as the Rome Statute contains comprehensive safeguards and fair trial guarantees to prevent such a situation arising.

The ICC has already demonstrated its intention to work within the mandate set out in the Rome Statute. In February 2006, responding to a significant number of complaints about crimes committed in Iraq, the Prosecutor confirmed that he had no jurisdiction to

investigate conduct by non-states parties to the Rome Statute in Iraq (which has not ratified the Rome Statute).

**Q9. Can the ICC investigate allegations that the US committed a crime by going to war in Iraq under false pretenses?**

While the Rome Statute includes the crime of aggression, it provides that the ICC may not exercise jurisdiction over the crime until a definition of the crime and a procedure setting out the conditions under which the ICC may exercise jurisdiction with respect to it are adopted. States Parties to the ICC are currently considering these issues. In accordance with Article 121 and 123, the first opportunity for an amendment to include such provisions will be at a review conference in 2009.

The Office of the Prosecutor's response to communications concerning Iraq states:

In other words, the International Criminal Court has a mandate to examine the *conduct during the conflict*, but not whether the *decision to engage* in armed conflict was legal. As the Prosecutor of the International Criminal Court, I do not have the mandate to address the arguments on the legality of the use of force or the crime of aggression.

**Q10: What do you think is the most groundbreaking contribution of the Rome Statute of the ICC to international justice and human rights more broadly?**

The Rome Statute does far more than simply establish a new permanent international criminal court. Recognizing that in practice the ICC will only have the capacity to prosecute a small number of cases each year, the Rome Statute establishes a new system of international justice based on complementarity. This means that, in all cases, national authorities have the primary obligation to investigate the crimes and prosecute those responsible before national courts. It is only when they are unable or unwilling to do so that the ICC will step in. The ICC will therefore be a catalyst for states to address impunity through national courts. The impact of the system of complementarity is already visible as a majority of those states that have ratified the Rome Statute have or are in the process of reviewing and amending their national laws so that they can prosecute the Rome Statute's crimes in accordance with the Rome Statute.

**Q11: Do you have any advice for activists dedicated to raising awareness about and support for the work of the ICC in the U.S.? Do you have any specific recommendations for how law students can make a difference?**

In recent years there has been so much misinformation about the ICC in the US that it is vital that activists continue to expose it and highlight the reality: the ICC is a fundamental tool towards ending impunity for the worst crimes known to humanity; and there are

comprehensive safeguards to ensure that politically motivated prosecutions will not occur. We have already seen a significant change in the US government's position on the ICC in the last two years. Through developing grass roots support for the ICC and communicating it to decision makers in government, I believe that major progress towards ratification can be achieved in the next years.

As the ICC is fundamentally a legal issue, law students can make an important difference by engaging the next generation of lawyers in supporting the ICC. The following are just a few ideas that you could consider:

- If international criminal law is not included in your law schools syllabus request that it be added.
- Organize debates about the ICC involving both supporters and opponents of the ICC.
- Organize a moot court exercise to test specific aspects of the Rome Statute in a hypothetical case, such as admissibility of cases or fair trial guarantees.

**Q12: What kinds of actions are being taken by Amnesty International activists and other groups around the world for International Justice Day this year?**

Amnesty International sections and structures have been marking International Justice Day for more than five years. This year, our members around the world will be organizing events to raise awareness about the ICC, including organizing film screenings on international justice, organizing seminars and workshops or anniversary celebrations. This year, we have asked members to organize letter-writing and other campaigning calling for Muhammad Harun and Muhammad Ali Abdal-Rahman who have been charged by the ICC for crimes against humanity and war crimes in Darfur to be arrested and surrendered to the ICC without delay.

We have recently learned that Japan is expected to complete its ratification process on or around 17 July, after more than seven years campaigning AI Japan will no doubt be celebrating this achievement.

*Thank you to Jonathan O'Donohue for taking time to be a part of this special Q&A. Thank you also to the AIUSA activists who submitted questions.*

*To learn more about AIUSA's international justice activism and International Justice Day events being organized in your local community, please visit [amnestyusa.org/ija](http://amnestyusa.org/ija). If you would like more information about the AIUSA Program for International Justice and Accountability, please contact us at [ija@aiusa.org](mailto:ija@aiusa.org).*