International Justice and the Prevention of Atrocities

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Summary of Conference Proceedings

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This summary provides an overview of discussions that were held at the conference on International Justice and the Prevention of Atrocities, convened at – and co-organized by – The Hague Institute for Global Justice on 5 November 2013. At this conference, academics, government representatives, officials from international institutions, scholars, researchers and representatives of NGOs explored the place of courts and other justice-seeking mechanisms in the international response to situations of mass atrocity. The European Council on Foreign Relations commissioned twelve case studies looking at several situations – Bosnia, Kosovo, Sierra Leone, Liberia, Democratic Republic of Congo, Afghanistan, Israel/Palestine, Uganda, Yemen, Darfur, Libya and Syria – which informed the discussions.

The meeting included discussions about three topics, each corresponding to particular context-specific relationships between peace and justice:

- Justice detached from peacemaking;
- Justice deferred, peace prioritized;
- Justice and conflict resolution intertwined.

For each of these topics, invited speakers delivered brief presentations on the experience in particular countries, followed by discussion and debate. The last session was dedicated to wrapping up the discussions and drawing conclusions with some general recommendations.

Session 1: Justice detached from peacemaking

This session focused on the use of international criminal justice as an independent response to situations of conflict and mass atrocity. Questions that guided the discussions included: *What can we learn from the record of the international community "imposing" justice mechanisms as part of its response to humanitarian emergencies? Are there circumstances where investigations and prosecutions can make an immediate contribution to the prevention of atrocities (e.g. through deterrence or isolating those responsible for crimes)? Conversely, are there circumstances where justice mechanisms can make it harder to end atrocities (e.g. by making a negotiated outcome more difficult)? Does this depend on how far the role of courts is coordinated with other forms of international engagement? Or is it right that justice and other international responses should be*

kept separate from each other? And, as regards the ultimate search for accountability, does it seem that implicating courts while conflicts are continuing makes it more likely that perpetrators will be brought to justice? Should referrals to the ICC or other courts in such cases be made on the basis of reducing atrocities, looking to long-term accountability, or building the credibility of courts – or some mixture of these goals? Are there reasons to rethink the desirability of UN referrals to the ICC as a general principle?

The session specifically looked at *Former Yugoslavia (Bosnia and Kosovo), Sudan and Libya.*

A. Presentations

I. Former Yugoslavia (Bosnia and Kosovo)

The case of Bosnia is historically prior to the other case studies in this section and whereas in Sudan and Libya the International Criminal Court (ICC) could play a role, the idea that international justice could be an instrument in response to conflict was then novel and unprecedented. Only once peace was achieved, it was generally assumed, could issues of justice be addressed.

Former ICTY Prosecutor Louise Arbour recently called for the use of "parallel tracks" for the pursuit of peace and justice and one could say this is what happened in former Yugoslavia. In the first phase (1991/92) after the discovery of the detention camps operated by the Bosnian Serbs, pressure from international NGOs to bring justice was crucial in mobilising a response. During the second phase (1992/94) a group of experts was sent to conduct investigations but justice was obstructed in favour of the pursuit of peace negotiations. David Owen, who was leading mediation in the name of the international community, was trying to bring all parties together and claimed that bringing justice into the negotiations would discourage the Serbs, who at that point held the advantage. When the Serbs lost their dominant position after limited military intervention, the issue of justice was no longer obstructed and helped to facilitate, although not by design, the peace talks. In light of the cases of Libya and Syria, one can ask if the outcome of the peace negotiations would have been different if Milosevic had been indicted at that time and not in 1999; there are good reasons to think that the negotiations would not have been significantly affected.

The role of justice arguably had a counter-productive effect in one way: instead of transferring guilt from the collective to the individual level (which had been cited as one of the reasons in favour of an international tribunal), it turned out that the indictment of individuals tended to become a source of mobilisation based on their ethnicity. The rules were also less clear than in the current period: for example when Louise Arbour released the indictment for Milosevic in 1999, there was a notable lack of clarity about what the implications were for how states should behave towards him.

Given that the seat of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague was so far away, and that it used a different legal system that was difficult to understand, it was also easier for people in the region to manipulate the news emanating from the Tribunal.

The tribunal did help to promote a judicial system in the region – a number of cases were sent back to the region. Some very important work and trials have been carried out in these countries.

The process has been imperfect but may lead to less ethnic identification and a more widely-held expectation that accountability should be pursued. Ultimately, it was not realistic that the ICTY or any criminal justice system would alone bring reconciliation in the region and ethnic identification may be the price to pay for combatting impunity.

II. Sudan

In the case of Sudan, there was often more violence between groups in South Sudan than between the SPLA (Sudan People's Liberation Army) and the Sudanese government. As the South and North made an agreement, the Darfuris started asking themselves where they would fit in. Many Darfuris felt that when an agreement was reached between them and Khartoum, justice should play a central part. The ICC intervention, and in particular the arrest warrant for President Al-Bashir, triggered attention for the topic of transitional justice. The ICC's involvement, however, generated a lot of rhetoric and tension that convinced people that once the indictment was issued Bashir would disappear. But this did not happen. There were both passionate attacks and defences of the ICC but in general the Court seemed irrelevant for the peace process.

For example, the ICC's impact was relatively minor compared to Chad's realignment away from the rebels and towards the Sudanese government. It did have a positive impact, however, by putting forward issues of justice and forcing the government to scramble for a peace process. But its intervention also damaged international cohesion on Darfur, especially within Africa.

III. Libya

There is no strong evidence of how the referral affected the parties in the situation of Libya but there is much speculation and anecdotal evidence. The referral may have prolonged the conflict but at the same time it helped to de-legitimise Gaddafi.

One participant stated that there were probably never any possibilities for a negotiated outcome after the military action had begun. The ICC indictments possibly played some role but they were not considered to be determinant in the calculations of either side in the conflict.

The ICC has, however, put pressure on all actors to hold proper trials and prioritize accountability. The various armed groups in the country today do in fact worry about the role of the ICC. However, it is not clear if the court has discouraged them from committing more atrocities

Some discretion on the timing of issuing an indictment is paramount in order to take account of the situation on the ground. Actors facing such situations should understand that justice would always form part of any peace agreement. More broadly, the answer to controversies such as that over the ICC in Libya would be to have wider ratification of the Rome Statute and a more consistent standard for referrals.

B. Discussion on imposing justice mechanisms

Discussions following the case studies focused on the problem of referrals made by the United Nations Security Council (UNSC), the impact of ICC referrals on the rebels in Libya, motivations behind referrals to the ICC and ways in which such a situation could be addressed in a more

effective manner. In Libya, the indictments potentially closed certain doors to a settlement. Some believe there could still have been a government under Saif al-Islam before his indictment and regret that the transition moved with the speed that it did. So was the indictment the best strategy? There was a recognition that one needs to be able to speak to people once they are indicted. In terms of the Libyan rebels, they were also implicated in serious abuses just like the government. However, the former perceived that the ICC was on their side and its involvement would come to an end as soon as hostilities ended. As a result, its involvement was not seen to have had a deterrent impact on the rebels.

In fact, the ICC intervention was claimed to have bolstered the rebels' resolve not to negotiate in any format with the regime or make any deals, which some claim were possible (although it was pointed out that Libyan rebels were not a single entity but consisted of different hostile groups with a very limited ability to effectively conduct negotiations). Another key issues is the extent to which indictments were seen as addressing people's underlying grievances beyond the current conflict. The ICC only had jurisdiction over crimes committed since February 2011. This affects our understanding of the conflict. It ignores the rehabilitation of Gaddafi by Western countries and cuts out the social and economic grievances of the Libyans that fuelled the original revolution.

The situation in Sudan contrasts with that of Libya because in the latter situation there is greater international interest in seeking justice and consequently more political (or judicial) will. On Darfur there is a tendency to take a simplistic view. Many view the Bashir indictment as a turning point, but requests that the ICC has made to question key individuals have remained ignored. Since 2004, there have been fifty to sixty UNSC resolutions, which mostly remain unimplemented. Another difference that was pointed out was that Libya was (and is still) in transition. It is an open question how much one can achieve when the regime responsible for atrocities is still in place.

In Sudan, the impact of the Bashir indictment, was claimed to extend beyond Darfur, with commensurate effects on the Comprehensive Peace Agreement (CPA) between the North and South. Some feared this could have cast the parties back into conflict. From the perspective of the Sudanese government, the referrals did indeed undermine the CPA. The rationale behind the CPA was to re-legitimise the Sudanese government after years of war. The agreement was supposed to be followed by six years of stability, with support of the international community, before a referendum on future status. The issue of Darfur and the ICC involvement interfered with this process. For the Sudanese government it was seen as the international community reneging on their support of the CPA and its re-legitimisation as a government; One participant stressed that one should not exaggerate claims of the threat to the CPA from ICC involvement.

One problem is the lack of follow through with justice mechanisms, which provokes the question of why governments make referrals to the ICC, and whether civil society should be thinking through its recommendations to governments more thoroughly. There is never a single motivation for creating a tribunal or sending a referral, one speaker emphasized.. For some, the justification for referrals ought to be negative: given that the ICC has been created to deal with the most horrendous crimes, any situation where such crimes are not referred to the Court ought to be explained. The enormous pressure from public opinion, media and parliaments, to take the Sudan case as an example, often affects government policy. There is certainly a need for a

comprehensive approach to make sure that the international community is able to react while taking a wider view.

The ICC has received a lot of criticism as regards Libya and Sudan. What the two cases have in common is that in both cases referrals came from the UNSC. Such referrals suffer from a basic handicap: they are political by nature, lack credibility and can ultimately undermine the court. The challenge for states is to make the system for UNSC referrals better, or else change the rules permitting the UNSC to refer. Some participants stressed that one should not yet give up on the UNSC, whose involvement is in principle sound but currently flawed.

How international justice is approached with the ICC needs to be improved, although some questions will remain unanswered: there is no perfect balance of how fast or slow one should move on an indictment, for example. Certainly, there is a need for more support after indictments are issued. The ICTY is an example of unprecedented political support for a tribunal. There should also be room for more flexibility, especially as regards being able to move a tribunal to the regional or local level so that there is not the distance as was the case with former Yugoslavia and the ICTY. More local organisations, such as the African Union, could also play a role here.

Session 2: Justice deferred, peace prioritized

This session explored the option of prioritizing the ending of conflict or obtaining a cease-fire, leaving questions of justice to be settled afterward. Questions that guided the discussions included: Is there sometimes a real trade-off between peace and justice? Are there cases where the realities of power (or the limits of how far the international community wants to become involved) mean a compromise solution is the best option? Or in such cases are there generally alternatives that could have been pursued, if international and domestic actors had different priorities? Might it sometimes be better to allow conflicts to continue in the short term rather than accept a solution in which justice is not recognized? If a peace settlement is silent on the subject of justice, or international accountability principles are violated, what should be the position of the international community? Further, are the currently-accepted minimal guidelines in fact sufficient (keeping space open for later accountability, limiting amnesties, etc.)? What is the longer-term record of such compromise settlements – how far is the lack of accountability an impediment to reconciliation and stability – and does this mean it should have been sought before or during peace negotiations, as opposed to later?

The session specifically looked at *Afghanistan, Yemen and Israel/Palestine.*

A. Presentations

I. Afghanistan

Calls for transitional justice in Afghanistan have failed to translate into concrete action and the last window of opportunity may actually now have been lost.

Two strategic decisions account for this reality: first, the decision to use the light footprint approach, both in political and military terms. On the assumption that this would be a cheap and short operation, the decision was taken to employ a strategy of air strikes coordinated with allied

forces on the ground. These ground forces included numerous warlords with known records of abuse. Such groups then took over Kabul, even though they were asked not to. Framed as 'local ownership,' the group that should have been targeted was actually empowered. The West specifically did not want to get involved in nation building. Hereafter, a framework of 'sequencing' was adopted, making Afghanistan one of few countries where postponing justice for the sake of peace was an explicit policy supported by UN representative, Lakhdar Brahimi, and many others. As a result, key justice issues have been left unaddressed. The absence of any effort at disarmament of warlords has meant it is difficult to do anything effective in enforcing justice.

II. Yemen

The background to the peace agreement in Yemen sheds light on the neglect of justice issues. Peace agreements are usually between belligerent parties of a conflict not between international actors as was largely the case in this context. The initiative of the Gulf Cooperation Council (GCC) was supported by both Saudis and the US (the UN was not involved at the start). Most international mediators, however, have very limited power, an exception being Richard Holbrooke in the Former Yugoslavia.

In Yemen, there was no agreement between belligerents, only an agreement of (government) partners in crime. The head of the Al-Islah party who was a signatory to the agreement did not really represent the opposition. Thus the grievances of the protestors were not heard. The idea, therefore, that justice would be served as part of the deal was farcical. Most agree that even if justice had been pushed onto the agenda it is difficult to see how it could be implemented.

As part of the deal, President Saleh passed on the presidency to his Vice President, Abd Rabbuh Mansur Hadi, and left Yemen with immunity before a "non-competitive election", which confirmed the succession. A "national dialogue" was begun with four working groups that had judicial reform on the agenda and hence in principle left space to deal with issues of transitional justice. In practice, the balance of power did not change.

Now there is a "war of dates": different parties have argued for different temporal jurisdiction with respect to transitional justice and ensuring accountability in particular. The North was happy to put a limit at crimes from 2011; the South wanted oppression from 2007 to be included; others wanted a whole host of other time periods dating even further back. The debate on transitional justice is only just starting in Yemen but the advent of electoral politics may offer a chance for it to advance further.

III. Israel/Palestine

The case of Israel/Palestine is somewhat of an outlier on these issues and one where the peace process is certainly prioritised over justice. The Goldstone report is a touchstone of this. For the first time it brought up the issue of accountability where it had rarely been raised before. For the Palestinian side it brought attention to international criminal law and international humanitarian law. It is striking that the Western states that have in general spoken most strongly about accountability, in this case have specifically prioritised the peace process over accountability. Some believe this happened because of political relationships with Israel. But it may also reflect

the asymmetry of power between Palestinians and Israelis, the latter having the upper hand militarily without being under much international pressure.

Although there is no real threat of prosecution, the Goldstone report did have some impact. Israeli investigations were set up internally, partly pushed by Goldstone's sixth month window (unfortunately these were not very credible or worthwhile). Looking forward, the Israeli Defence Force (IDF) released new guidelines on fighting in civilian areas and reporting violations. Moreover, arguably for the first time, questions of accountability in this conflict were seriously brought to international consideration.

B. Discussion on prioritizing peace

Transitional moments can be absolutely crucial, especially since it is impossible to go back and undo a process. Surely there have been opportunities where more could have been done, which raises interesting issues about the implications for transition in Syria. But one should be careful not to overstate the opportunities that existed, nor simplify the dynamics of transitional moments. There is usually not just one window of opportunity but a series of political junctures. In both Afghanistan and Yemen, some actors remain untouched by the system, which has made the situation more difficult today.

In Afghanistan, this means warlords enjoy positions of power and are now stronger than they were at the beginning of this process, which leaves a smaller range of options. This was not just postponing justice but actually empowering those that should have been on trial. This began at the Bonn negotiations when decisions were based on the facts on the ground concerning the warlords, and where the international community vaunted Karzai as president.

With groups remaining above the law, disarmament programs failed, when security sector reform (SSR) should have stayed at the top of the agenda. Ultimately this showed that, as stated by one of the participants, justice advocates are looking at the wrong hand. There is a tendency to look at justice institutions, but not at the long-term settlements that allowed impunity for warlords and their participation in SSR institutions, therefore undermining their success. This has prevented justice, but also prevented tackling further violence against the Afghan population.

As both Yemen and Afghanistan had amnesties, the plight of these two countries was compared to Colombia. FARC was brought to the negotiating table but declared it did not want to see anyone in jail. The international community refused to accept a blanket amnesty and the ICC was observing closely. The conflict is still ongoing however, and there is fear that if one pushes too hard, the fragile peace that is emerging will be broken.

As the case of Israel/Palestine shows, fact-finding missions can be ameliorated including by improving follow up. What could have more significant impact is the new status of Palestine at the UN, which enables Palestine to ratify the Rome Statute. It is unclear how this will play out in the peace negotiations; it is clear that the Palestinians are using the possible threat of recourse to the ICC in a political way, initially by deferring any involvement of the Court as an incentive for Israel to negotiate.

To make it more effective, the ICC could be improved in several ways. Efforts should entail more visibility and transparency. Although some participants were keen to stress that the ICC has been trying to work on exactly that for the past couple of years and the Office of the Prosecutor (OTP) now reports on an annual basis. There is also concern that going through the ICC is seen as a never-ending process. One of the participants questioned whether the preliminary investigation procedure could perhaps be better used so that it becomes easier to show results. Niger is an example of a lengthy process where the ICC looked at a number of different regions of the country and began looking at crimes committed during the 2009 coup, before having to deal with new reports of abuses committed in 2010.

Session 3: Justice and conflict resolution intertwined

This session touched upon the ways that justice-seeking mechanisms and peace negotiations can interact with each other in cases where the two concepts are pursued simultaneously. The participants explored this interplay as well as the interaction between international engagement and the action of domestic armed groups. Questions that guided the discussions included: can we draw any lessons about the most effective sequencing of peace negotiations and the use of courts or other mechanisms in order to end atrocities and secure accountability? Is there a danger that domestic groups will exploit courts for their own political or military agendas? Is there a trade-off between the credibility of courts and the effectiveness of peace making? Are there situations where a more robust approach to accountability would have been possible and would have made peace more secure? Can we say that an earlier attempt to establish accountability would have been more effective in holding war criminals accountable?

This session specifically looked at *Democratic Republic of Congo, Sierra Leone, Liberia* and *Uganda.*

A. Presentations

I. Democratic Republic of the Congo (DR Congo)

For many years, the Democratic Republic of the Congo (DRC) has experienced multiple entangled conflicts. Some are extremely localized and others are cross-border; some are national, others are regional or international. While all are linked and feed off each other, they are also separate.

In 1999, parties agreed upon a ceasefire, the withdrawal of foreign troops and the deployment of a UN peacekeeping mission. In addition, the Inter-Congolese Dialogue (ICD) process was set up and culminated in a power-sharing deal between the government and main belligerents (Global and All-Inclusive Agreement, 2002). In order to address the atrocities that were committed, criminal justice has been included in the peace agreements since 2002. One of the proposals of the ICD was to set up a court specifically for the DRC with jurisdiction over crimes committed since 1960. However, in 2004 the government referred the situation to the ICC which has only had jurisdiction as of 1 July 2002.

The limitations of the court in the DR Congo are well known: there are only a few indictments of which none target elites; interestingly, none of the people indicted are involved in the ongoing conflict. The only connection is through the personal involvement of Bosco Ntaganda who was indicted for war crimes and crimes against humanity. While the DR Congo authorities initially

cooperated with the ICC and transferred several suspects to The Hague, in the case of Ntaganda the authorities invited him to join the military operations of DR Congo/Rwanda instead of arresting him.

Nevertheless, the court has had considerably more influence on the pursuit of justice in DR Congo than this précis would suggest. As claimed by one participant, the ICC has been critical, despite its many constraints. It has provided a framework and standards against which one can measure national and international engagement in the country. Furthermore, the court's engagement has helped focus the issues. Still, the nature of the peace settlement that officially ended the wars in 2002 -but not the conflicts- had the most important impact on justice (or injustice) and the way power was shared between political institutions but also security institutions.

With respect to the peace deals in DR Congo, what has been agreed upon may include standards and restrictions on amnesties. However, what is agreed upon on paper is just one aspect. After all, what value is the absence of amnesty if there are no prosecutions?

Lastly, one of the lessons from the DR Congo case is that transitional governments are only an aspect of transition and not the moment of transition itself. The establishment of transitional governments is a part of the beginning of transition. The removal of the "big guy" does not automatically entail the end of the system over which he presided.

II. Sierra Leone

Sierra Leone represents one of the cases where peace came before justice. Pressured by the international community, the parties signed a peace agreement in 1999 ending many years of severe human rights abuses. When the peace talks took place, the key actor, Foday Sankoh (leader of the Revolutionary United Front, RUF), was already in jail, convicted of treason and under a sentence of death. When the peace process started, he was taken from jail to take part in the talks.

The peace agreement included a blanket amnesty. Although the resolution contained a disclaimer stating that the UN understood the amnesty not to be applicable to serious crimes, the amnesty was considered to cover all crimes. No one has since been prosecuted in national courts for crimes committed during the war. Sankoh was offered the vice-presidency and the ministry of mines. He held these posts for several months until violence broke out again.

Meanwhile, there were also talks about creating a truth commission. Initially, the proposal focused exclusively on the RUF, though later it covered all actors. The commission was given the power to make mandatory recommendations. Despite robust recommendations, only a few were put in place.

Often the case of Sierra Leone is used as an example to show that amnesties are ineffective at preventing future conflict. However, it must be stressed that at that time it was not clear what the alternatives were. What's more, there is no clear relationship between the amnesties and the resumption of violence. It has been argued that in this specific case amnesties may actually have facilitated the work of the truth commission and led to reconciliation in some cases.

The capture of Sankoh in 2000 required a legal response. The initial idea was to set up a court to remove him as the spoiler of peace implementation. The legal basis for a court was considered to be the fact that Sankoh broke the peace agreement and consequently lost the benefits laid out in the agreement. The Special Court for Sierra Leone was created through an agreement between the government and the UN, and covered all parties. This, as claimed by participants, allowed for the implementation of agreements.

III. Liberia

Liberia represents the case where justice came before peace, with the indictment of Charles Taylor by the Special Court of Sierra Leone issued only hours before the peace talks began. In 2003, the government of Liberia signed a peace agreement with two rebel groups after many years of unsuccessful peace talks. The agreement did not include amnesty but rather focused on a truth commission, reparations for victims and vetting of the security forces. After the peace agreement was signed, warlords threatened war when the truth commission recommended prosecutions and vetting measures.

Some claimed that the situation in Liberia was on the verge of a resumption of conflict as a result of this warrant. Others say that the indictment allowed serious peace talks to take place. Owing to the fact that no violence erupted after the indictment, many now argue that as a result of the warrant the peace talks were taken seriously. It was thus considered to be a risky but positive move. Again, the Special Court had the effect of removing a spoiler. However in this particular case it was done before the talks. Thus, the peace agreement was in part made possible by the indictment.

During the peace talks, led by former Nigerian President Abdusalami Abubakar, justice was not prioritized. Two years after the peace agreement and Taylor's exile to Nigeria, where he was offered asylum, the international community pushed for his arrest and transfer to the Special Court. Ultimately, he was tried by the Court after being extradited by Nigeria.

From 2005 to 2009, a Truth and Reconciliation Commission was part of the national process. It recommended prosecutions through domestic courts and a new hybrid criminal court. However, there were no follow up activities. In addition, it recommended the exclusion of many senior officials from political engagement. This was regarded as very controversial.

IV. Uganda

The participant presenting the case of Uganda urged the others to take into account three issues that have been neglected in previous discussions on the relationship between pursuing international justice and conflict resolution:

First of all, conflict narratives and dominant discourses about a particular conflict should be considered. What do groups in the conflict view the conflict to be about? What are the causes of the conflicts? Who is responsible? Who is guilty? Such issues affect the incentives of parties to enter peace negotiations and commit themselves to the peace process. How does the ICC affect this conflict narrative and therewith the incentives of parties to enter peace process?

A lot of in-depth literature about Uganda points to 'dominant discourse' where the government of Uganda sees itself as a legitimate government that fights terrorists, the Lord's Resistance Army (LRA). This conflict narrative was entrenched by the ICC intervention. Taking part in the Juba peace talks provided an opportunity for Kony to challenge this dominant discourse and to tell his side of the story. The dominant discourse remained, however.

Second, the discussions on peace and justice are mainly focused on parties that are targeted, but the impact of the ICC on non-targeted parties has been neglected. The Ugandan government, for example, was affected by the ICC intervention. It bolstered its legitimacy and covered up its own lack of interest in the peace talks by blaming Kony for their failure.

Third, in the conference discussions, the participants tend to treat rebels and government actors as the same. However, their motivations or incentives should be distinguished, for example in terms of their ability to communicate to the outside world, relationship with the state machinery and relationship with proxy forces.

B. Discussion on the interaction between justice-seeking mechanisms and peace negotiations

During the discussion on these aforementioned case studies, many participants argued that DR Congo is a clear case in which the lack of justice brought about the cycle of violence, illustrating a clear relationship between a lack of justice and the continuation of violence.

In the same case, as stated by one of the participants, negotiations between the Congolese government and M23 were bound to fail since from the beginning M23 was a movement led by people mostly interested in their own fate without any incentive to negotiate unless they could get amnesty and integration guarantees. However, the international community decided to stand firm on the issue of amnesty and international crimes were excluded from amnesties, in accordance with international law. Nevertheless, the rebels had no problem with this because (i) there were no prosecutions; consequently the amnesties were of no importance and (ii) they kept political, military and economic power which allowed them to control the entire process.

The Congolese government was forced by the international community to talk with the rebels, however they unanimously rejected this. Because there were no margins in the negotiations, the only solution was through military means. Many participants were very skeptical towards the effectiveness of a military solution.

The ICC played a relatively marginal role in DR Congo. One participant argued that the court marginalized itself by trying to play the role of a protagonist. The ICC, for instance, went after Ituri perpetrators, but when the first indictment against suspects from Ituri came, the crisis moved to the Kivus. The focus of the ICC on Ituri diminished and investigations stopped and moved to the Kivus. In addition, the fact that no people close to the government have been indicted or tried is criticized.

When one looks at Uganda, it was argued that on the one hand it is not possible to say that the LRA entered the peace talks because of the ICC arrest warrants. They rather planned to use the

process *inter alia* in respect of the ICC arrest warrants to tackle that issue. On the other hand, one cannot conclusively say that the involvement of the ICC necessarily led to the collapse of talks. The arrest warrants were a factor among other factors that led to the faltering of talks, but it is not certain how big a factor. Although the peace talks failed, the North is now fairly stable. Thus the talks allowed some movement forward. One should note that it is common in peace negotiations for governments and rebels to maintain military options. This does not mean that the Juba talks were not taken seriously.

Several participants highlighted the relevance of looking at the unintended consequences of both the ICC intervention and the talks. This helps to put the accountability question more centrally on the table and allows the discussion not only to address criminal responsibility, but also the question of whether there should be a truth commission, for example. Looking at Uganda, peace was an unintended consequence. It is interesting to see that a failed peace process lead to peace, but one needs to realize that the conflict in Uganda has been exported.

Is the causal relationship between amnesty and the resumption of violence an overstatement? One participant argued that it may be too limited to conclude that there was a direct causal relationship between amnesty and resumption of violence. The situation is much more complicated and one should rather speak of amnesty within the context of lack of stability. How can the principles related to accountability and justice be reconciled with stopping the conflict and providing some sort of amnesty?

Other participants stated that a causal relationship is not at issue, rather the question concerns how the situation was used by both parties. It can be said that neither party was interested in a comprehensive peace agreement and both undermined the chances of reaching a peace agreement. It should however be recognized that guerrilla forces are extremely difficult to defeat. Many claim that the Ugandan government is not desirous of peace, but, as one participant stressed, other (better equipped) armies have needed many years to defeat guerrilla forces. It is therefore facile to think that the Ugandan government is disinterested in peace. Given the nature of the war in Uganda, the government should be given more credit.

In Liberia, a court was involved, though there was still space for discretion over when and whether people were handed over. How can the passage of time provide for new possibilities? Conditional exile, as was the case with Charles Taylor who was excluded from politics, was put on the table. A participant highlighted that the justice framework referred to in the conference discussions is just one set of standards, but there are more available. On the African continent, unconstitutional transfer of power is an important standard which should be considered.

From a policy maker's perspective, it is important to deal with the rigidity of certain judicial institutions ('once it is out there, one cannot control it anymore'). Many international courts are detached from countries where they operate. For that reason, the impact of the ICC could be improved by bolstering its field presence.

From a human rights and justice advocates perspective, the approach of using Nigeria as a safe haven for Charles Taylor did not cause a problem. Many human rights advocates were not critical

of Nigeria for bringing Charles Taylor out of Liberia. However, this situation lasted only for a couple of years. What if Charles Taylor was still in Nigeria? And what would happen if Bashir was given refuge in a non-ICC State Party?

The approach used with respect to the case of Charles Taylor might only work once. The fact that he was arrested influenced the calculations of many others, including Kony.

Finally, one has to be careful about how to measure success at the ICC. Success cannot be measured solely in terms of convicting everyone brought before the court. Acquittals are extremely important and fair process is fundamental.

Session 4: Wrap-up and conclusions

This session tried to draw provisional conclusions from the discussions on the various case studies, considering what lessons can be learned for future cases. It started by suggesting that the international justice program can have impact in various ways. Justice, for example, can be an incentive that spurs attention to accountability or peacemaking; justice can be used as a threat, handing over people with certain conditions; or justice as a standard. To what extent can this be instrumentalized by the international community? Should the international community consciously think of the different ways in which judicial process is going to have an impact? Does the ICC need to use a more politically nuanced approach? Or is this only appropriate for other institutions which have a more explicit political mandate?

Although the ICC claims not to be political, it arguably has a crime deterrent effect. So how does this correspond with being apolitical? Indeed, the ICC should preferably not play a political role, but sometimes the ICC is forced to take up this role.

Another issue discussed is the passage of time. Things change over time. If it is not possible to build in a justice and accountability component in peace negotiations, what should be the minimum standards for keeping space open for accountability later? In Yemen, in some ways there may be greater opportunities than at the initial moment of transition. The impact of national dialogue and the possibility of democratic elections could change the situation in such a way that it opens more space. On the other hand, in Afghanistan, the passage of time has led to the entrenchment of warlords. Can one anticipate how the passage of time can change things?

Linked to this is the relationship between what should happen domestically and what should happen internationally. It is often said that domestic solutions are necessary when dealing with the aftermath of a conflict. Is there a role for the international community with respect to standard setting and how does that relate to the national dialogue? Should a settlement that fails to secure a transition sometimes be postponed? What are acceptable outcomes?

While discussions can be framed as a contrast between those who would prioritize peace and those who promote justice, some participants pointed to indicators of common ground. There is room for discussion about what forms of interaction are acceptable with indicted individuals, and

there can be flexibility about the timing of indictments. However it is wrong to assess justice mechanisms only on the grounds of deterrence; justice is a value in itself.

During the discussions, participants concluded that it is acceptable to have peace talks that do not address accountability, however codifying amnesty that subsequently precludes justice is not acceptable. Thus, amnesty in itself can be reasonable, though blanket amnesty is problematic.

Moreover, it is crucial to remember how difficult it is for countries to accept international justice from external actors. It should also not be forgotten that justice is not the only solution, there are alternative mechanisms. Furthermore, the ICC is not always the best mechanism to deal with justice issues. For example in terms of the situations in DR Congo, vetting can work without the ICC. Sometimes ad hoc solutions (e.g. ad hoc tribunals) are more appropriate.

Most participants favor some form of accountability to be involved in peace talks. The difficulty is that the ICC or criminal prosecution is always the "headline" even when there are other aspects of accountability and justice that are more appropriate on the table. For that reason, the perception of the ICC needs to be managed in peace processes with perhaps other forms of follow up which are more critical in those environments.

In transitional justice, there are no one size fits all approaches. But to some extent, the ICC does present a challenge to that principle since the court itself is, to some extent, a one size fits all approach and exhibits a lack of flexibility. Nevertheless, there are still some mechanisms in the Rome Statute that allow for some flexibility: article 53[1] of the Statute allows, for example, the OTP to decide not to proceed with prosecution in the interest of justice and article 16[2] of the Rome Statue concerns a UNSC deferral. However, one may need to insert yet more flexibility into the system.

Although it is difficult to draw generic wisdom from the different case studies - such issues are inherently context specific - one can indeed conclude that some form of justice should be addressed in peace negotiations, if only in the form of a threat. While many claim that both concepts are not mutually exclusive, justice remains to some extent at odds with peace. It is up to the entire international community to set out a framework to make sure that both can work

[1] Article 53 of the Rome Statute, paragraph 1: The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall 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; 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.
If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

[2] Article 16 of the Rome Statute: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

effectively, thereby ensuring that those responsible for grave crimes are brought to justice and future atrocities are prevented.

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