



Report on Wilton Park Conference WPS08/7

PURSUING JUSTICE IN ONGOING CONFLICT: EXAMINING THE CHALLENGES

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Summary

Legal experts, mediators, policy makers and practitioners met to take stock of issues arising in the exercise of criminal justice during conflict, focusing in particular on Uganda and Sudan. They also sought to identify options available in addressing the tension created by pursuing peace and justice in parallel.

Key issues discussed included:

- the need to keep in mind that no one solution fits all situations;
- adopting a holistic approach towards transitional justice, for example including criminal justice procedures, non-judicial truth commissions and traditional or alternative dispute resolution mechanisms could minimise the tension between peace and justice;
- whether sequencing transitional justice measures, together with improved policy coordination, may be significant in achieving a sustainable peace;
- the international community giving greater support to the effective implementation of complementarity between the International Criminal Court (ICC) and national justice systems, through assistance to strengthen national legal structures, legislation and trained personnel;
- the international community and the ICC strengthening the ICC's legitimacy, whether through more constant consultation by the ICC with states where cases are under consideration or being prosecuted, and/or undertaking outreach with civil society to promote greater understanding of the ICC's role and what can be expected from it.

Introduction

1. There have been major developments in international criminal justice over the last 15 years with the establishment of several ad hoc international tribunals and a permanent International Criminal Court (ICC). The role of international justice is a de facto reality that will play a part in any situation where a state has assumed obligations under the Rome Statute¹. The legal acceptability and international recognition of amnesties is changing.

2. The international community is often trying to achieve in parallel several objectives during ongoing conflict: re-establishing security; providing humanitarian assistance; promoting political dialogue between parties to a conflict; and preparing for reconstruction and development. How can the ICC's decisions be enforced in these situations? Does ICC action jeopardise prospects of peace? While the creation of the ICC was designed to remove politics from the question of legal accountability, experience and common sense suggest that law is never completely distinct from politics.

Challenges for the ICC in pursuing prosecutions during ongoing conflict

3, All four situations under active investigation by the ICC to date² involve, to a greater or lesser extent, armed conflicts which were ongoing as of the time referral was made. Such circumstances mean a political solution is yet to be reached; the apparent tension between peace and justice is clearest. On the one hand, this creates a prospect that prosecution might help end the conflict, by delegitimising persons responsible for its continuation, and as a deterrent to others. Conversely, the threat of prosecution may risk interfering with alternative efforts at conflict resolution.

¹ Rome Statute of the International Criminal Court, 17 July 1998

² Northern Uganda, the Democratic Republic of Congo (DRC), Central African Republic (CAR) and Darfur, Sudan.

4. Ongoing conflict complicates the conduct of investigations by the Office of the Prosecutor (OTP): access to territory is likely to be highly restricted; it destroys evidence; witnesses are placed at greater risk; there is generally a diminished prospect of state cooperation with the ICC in investigations, and executing arrests; the institutions of state have often collapsed, so the principle of complementarity may be rendered inoperative. Yet when no credible alternative accountability mechanism is available, the involvement of the ICC is arguably the more compelling.

5. Where the Court has jurisdiction, the Rome Statute grants the Prosecutor broad prosecutorial discretion, perhaps without sufficient clarity: to choose whether or not to launch investigations, bring charges and to select which crimes and who is charged; to decide whether to oppose a state's challenge to admissibility; and to determine if an investigation or prosecution is not in the "interests of justice".³ This discretion enables rationalising the use of scarce law enforcement resources in a manner which assures that crimes of greatest magnitude are investigated and prosecuted. The Prosecutor has made known the OTP will focus its efforts on those who bear the greatest responsibility, such as leaders of the state allegedly responsible for crimes under investigation. Gravity is also one of the most important criteria for the OTP's selection of situations and cases.

6. Strategic considerations the Prosecutor may take into account are not spelled out in the Rome Statute. Some suggest these may include the impact of its actions on ongoing negotiations; considerations on how the ICC's action is perceived by political actors; the degree of the ICC's dependence on national support, including from international organisations, and cooperation from states parties; the impact of its decisions on the communities where it engages; and the Court's legitimacy in the eyes of the broader public. Others would argue, however, that these are political factors that are not appropriate for an independent justice actor, such as the OTP, to consider. Some

³ Article 53(2) of the Rome Statute

suggest that for the OTP to set out the process to be followed in reaching decisions and the substantive criteria to be taken into account would foster further accountability and legitimacy, by affording the public and others following the Court's work measurable benchmarks against which to assess the Prosecutor's actions. These could take the form of guidelines which are not prescriptive. Further information on how the Prosecutor gauges the interests of victims in any scenario, or views self-referral, would help promote a better understanding of the OTP's work. An OTP policy on positive complementarity, to encourage tackling cases at national level, is under consideration, and would also be helpful.

Mediation and justice issues

7. It is generally felt that the subject of justice and accountability is generally handled better in mediation now than it was for example 10 years previously. While all conflicts differ, some guidance is currently available to mediators; in particular, United Nations (UN) representatives have guidelines from the UN Secretary-General on justice issues in relation to any mediation role they may play. At the same time, some consider that mediators are still insufficiently prepared, particularly when dealing with justice issues. These are often not addressed with much sophistication. Political issues, such as who will hold power following a settlement, are seen as key and much more difficult to handle. Amnesties are regularly a focus in negotiating peace, rather than justice in its broadest sense. Decisions on dealing with the past are often taken following a peace settlement, rather than contained in it. Belligerent groups often want justice for abuses committed against them, but believe their own acts justifiable, failing to realise they will also be held to account.

8. Mediators should not be caught off guard but understand how justice issues are likely to arise, why and by whom. They need to know the parameters of justice issues, for example what is a satisfactory framework for a truth commission and, conversely, what provisions would render it

ineffectual. Some expertise on transitional justice issues in the mediation team is helpful. Provision of independent legal advice to all parties involved could also facilitate their understanding of the objective of what is being proposed. A mediator should also not reject ideas pertaining to justice on behalf of the negotiating parties, based on a notion that the negotiating parties may not accept them. A peace agreement should set out principled decisions, with some detail, yet leave much more to be worked out later. At the same time, bad proposals should be dismissed. Peace negotiations should be open to civil society input, either as part of the talks, on the margins or in writing. Understanding local conditions is vital.

9. Mediators should not limit justice issues to criminal prosecution or amnesty. There is a need to examine the past through other mechanisms, including vetting, so persons implicated in violations who are not prosecuted are barred from the security forces, or perhaps from holding public office. Truth commissions are not easy to understand, but can hold to account parties involved in violations and assist in understanding political realities of the present. Mediators need to be aware of the range of policy options, including traditional or local alternatives.

Taking stock of experience in Uganda

10. With its 2003 "Referral of the Situation Concerning the Lord's Resistance Army to the International Criminal Court", the Government of Uganda made history by becoming the first state party to refer a situation in part of its own country (northern Uganda) to the ICC. The ICC prosecutor officially opened an investigation in response to the referral in July 2004, and in October 2005 the ICC unsealed arrest warrants charging five of the top commanders of the rebel Lord's Resistance Army (LRA) with war crimes and crimes against humanity.

11. Some regard the ICC action in Uganda as a positive factor in spurring negotiations. Yet there is also a range of views on whether the threat of

international prosecutions undermined the fragile peace initiative undertaken at Juba, and prolonged the conflict by deterring the LRA from negotiating, thereby rendering displaced persons more vulnerable to LRA attacks. It is also argued that the ICC's retributive justice does not take account of local values and culture, which promote reconciliation.

12. There is broad agreement, however, that the ICC is not readily understood in northern Uganda. For instance, there was great disappointment among local people that the arrest warrants were not executed quickly. The ICC could improve its outreach in countries of concern, which may create greater local support for, and understanding of, its action. While the ICC arrest warrants cannot be said by themselves to have pushed the LRA to the negotiating table, some believe the Court's involvement did provide an impetus for negotiations, giving an incentive to remain at the negotiating table. Conversely, the breakdown of talks cannot be solely due to the ICC; there seem to be a range of reasons for the leader of the LRA, Joseph Kony, to have resisted full commitment to the peace process.

13. Uganda's experience demonstrates well the importance of a comprehensive approach to justice, combining different mechanisms, retributive and restorative, rather than preferring one mechanism over another. The threat of the ICC arrest warrants put accountability at the heart of the negotiations. Although in the early days of the talks, proposals for traditional alternatives to criminal justice tended to prevail in the position papers of the parties, increasingly the goal became to try to achieve an accountability solution which was more rigorous. The debate on accountability gave rise to a highly sophisticated document on Accountability and Reconciliation, known as the Agreement on Agenda Item 3. While couched in broad terms, some consider it lays out many important standards and principles and is among the most comprehensive treatment of justice issues in any peace agreement to-date. It can be seen to establish a new standard for the treatment of accountability as part of ongoing negotiations, although it has not received much international recognition.

14. On the conclusion of the Agreement on Agenda Item 3, there was a period of public consultations in Northern Uganda conducted by both the LRA and Ugandan Government to establish what mechanisms should deal with accountability and reconciliation. The process of undergoing this consultation was significant in two ways. It enabled senior government officials to hear directly the views of people in affected areas, and it identified the strength of opinion in the area for including truth-seeking as part of the full picture of accountability. It may also have helped to show local people that the government had a certain commitment to the process and is aiming to improve their lives.

15. Finally, Uganda's experience represents an important fusion between international and local perspectives. It also raises important questions of complementarity and admissibility. The alternative national criminal process now proposed, some suggest, is likely to have more impact than trials in The Hague; complementarity needs to be given space to breathe. The test on admissibility under the Rome Statute is felt by some to be too mechanical, and needs fleshing out; there should, some propose, be attention to the circumstances of referral, the nature of the request for referral and the situation on the ground.

Taking stock of experience in Sudan

16. In March 2005, the UN Security Council (UNSC) referred the Darfur situation to the ICC. In April 2007, the ICC issued arrest warrants for Ahmed Mohammed Harun, currently Minister of State for Humanitarian Affairs, and Janjaweed commander, Ali Kushayb. Neither has yet been surrendered by the Sudanese authorities to the ICC. In July 2008, the ICC Prosecutor applied for an arrest warrant for President Omar el-Bashir for genocide,

crimes against humanity and war crimes. ICC judges are now deciding whether to issue the arrest warrant for an incumbent head of state.⁴

17. While there is strong sentiment internationally that those responsible for war crimes in Darfur should be prosecuted, there are vocal critics of the ICC's actions, not only among the Sudanese Government and its supporters nationally, but also in other circles. The African Union (AU) and the League of Arab States have called repeatedly on the UNSC to defer the process begun by the Prosecutor against the Sudanese President, invoking Article 16 of the Rome Statute. In particular, there is concern the elections due to take place in 2009 and the referendum on southern succession in 2011 provided for in the Comprehensive Peace Agreement, ambitious deadlines from the outset, will be even more difficult to meet if the President is indicted. If the peace settlement is disrupted, or delayed further, there are implications not only for Sudan but the entire region. Some also argue the conflict in Darfur may worsen, by emboldening rebel groups to resist negotiations; international peacekeepers as well as other foreign nationals in all parts of the country could be subject to attack or expelled.

18. At the same time some consider the Prosecutor's July announcement created pressure on the Sudanese Government and momentum in the Darfur peace process. There was greater attention to Sudan in the international community, perhaps energising more support for international peacekeeping initiatives; otherwise disengaged parties, such as Qatar, have now become involved, offering to host peace talks in Doha, as a result of the discussion around Article 16. While adopting a 'wait and see' attitude to some extent, rebel groups have increased their engagement with the AU/UN Joint Mediator, with each other and even with representatives of the Government of Sudan.

⁴ In November 2008, as part of a third investigation into the situation of Darfur, the Office of the Prosecutor presented evidence to ICC judges against rebel commanders for their alleged responsibility for crimes committed against African Union peacekeepers in North Darfur in September 2007, when 12 peacekeepers were murdered and eight injured.

19. Most agree that Article 16 is an exceptional measure, and it should be employed by the UNSC only carefully. There is a high bar for bringing it into play: a threat to peace and security. What political message would its use send to the Sudanese authorities? Many agree the Prosecutor was acting in accordance with the Rome Statute in requesting an arrest warrant for President Bashir; action of the UNSC should not undermine the ICC. Yet the Prosecutor's action has created a new situation, and additional leverage. Some members of the UNSC have been endeavouring to use this opportunity to encourage the Sudanese authorities to act on a number of issues. These include concrete steps for a cessation of hostilities, improved cooperation with the international peacekeeping force in Darfur and a satisfactory arrangement for Sudan's full cooperation with the ICC over other indictees. To date, there has been no substantial movement by Sudan on a number of the issues raised by UNSC members, despite some positive developments. The ICC judges' decision is imminent.

20. One practical suggestion, as a 'third way' between Sudan's compliance or rejection of cooperation with the ICC, is to establish an independent 'hybrid' tribunal. It could be set up under a special arrangement or act and apply international law since Sudan does not have the necessary legislation to cover all the crimes allegedly committed. Judges would be both Sudanese and international, including African or Arab jurists. Some suggest the UNSC could in parallel continue to use a potential deferral under Article 16 as leverage, spelling out clearly what action Sudan should take to promote reconciliation and justice. The use of Article 16 in this context, however, where national will to promote justice seems lacking, would be highly controversial.

21 How long it would take to establish a 'hybrid' court and whether it would deal with all alleged perpetrators of the most serious crimes would need to be considered. Some are sceptical about such a court's viability given the lack of commitment and good faith on the part of the Sudanese Government to date.

Others contend a 'hybrid' court is not a solution, since Sudan is not a state party to the Rome Statute.

Justice and the sustainability of peace

22. Justice is often juxtaposed to the sustainability of peace. Recent research indicates no straightforward claims can be made about accountability and its impact on sustained peace. Transitional justice is a term of art that has been in use only in the last 10 years (although important examples of new justice mechanisms go back further), and much has been learned by recent experiences in a variety of contexts. During this time, there have been numerable cases where peace has been sustained in the absence of either a genuine commitment to war crimes trials or to a truth commission. Over the same period, there have been several cases where conflict has broken out after transitional justice measures have been undertaken. In some contexts, it is suggested, the association between transitional justice and sustained peace is strengthened when mechanisms are deferred for more than two years after a peace settlement. This underlines the importance of sequencing and policy coordination, and the question arises whether the UNSC has the capacity to do this. Some express caution about the interpretation of quantitative data in relation to justice issues, which should be supplemented by a contextual and qualitative approach. Justice also has an intrinsic value.

Securing justice at national level

23. Aside from what international tribunals might achieve directly, they have made an impact on some national justice systems, including through referral of cases to proceedings before domestic courts. Complementarity is a key provision of the Rome Statute,⁵ and the OTP has made clear it will pursue cases mainly when there is a failure to take genuine national action. Among the benefits of domestic proceedings are: a strengthening of the social

⁵ Article 17 of the Rome Statute

contract; giving victims a better hearing; strengthening the justice system; helping justice being seen to be done; providing local ownership; and supporting community cohesion.

24. For a fair trial to be conducted before a domestic court there are a number of requirements including: the law under which prosecutions are to be brought needs to be in place; the judiciary should be independent and impartial; the administration of justice should be in accordance with international standards; and there should be adequate human and financial resources. In conflict, or post-conflict, situations all of these criteria may not be met. A creative approach is being proposed in Kenya. The Commission of Inquiry into Post-Election Violence has recommended that a special tribunal be created under national jurisdiction, to be headed by a Kenyan judge, but with an international component, including an international prosecutor. On presenting the Commission's report to the Kenyan Government, the head of the Commission handed a sealed envelope to former UN Secretary-General Kofi Annan, Chair of the Panel of Eminent African Personalities, which mediated an end to the post-election violence. The sealed envelope contains the names of those persons the Commission found implicated in the election violence; the Commission recommends that if the government fails to set up a national special tribunal to handle these cases, the envelope and accompanying information should be passed to the ICC.

25. The special division of the Ugandan High Court due to hear cases pertaining to LRA crimes, is to be funded by the government and donor community. It may also call in international expertise if possible and appropriate.

26. In addition to strengthening the capacity of national criminal justice systems, some call for the traditional justice system to be similarly supported. Traditional justice is in many contexts based on a 'restorative justice' model, focused more on victims' needs, root causes of conflict and community reconciliation. There was little familiarity with traditional justice mechanisms

in some circles both in and outside Uganda prior to the referral of the northern Ugandan situation to the ICC, but localised mechanisms and traditions have come into more prominence in efforts to create a holistic approach to securing justice.

27. The effectiveness of the ICC varies according to the willingness of states to cooperate with the ICC, and their capability to do so. To give priority to promoting complementarity, the international community should support strengthening effective national criminal justice structures, legislation and trained personnel wherever necessary.

28. Some perceive the ICC's remit as largely restricted to Africa, and its legitimacy is seen to be undermined as a result. By conducting preliminary investigation and analysis, often unpublicised activity, it works and exerts influence elsewhere. The ICC needs to retain a reputation for impartiality and independence, and state parties should act in support of this.

29. The importance of justice in preventing future conflicts, and the mass suffering which invariably accompanies conflict, some believe, could require that consideration be given, even if not acted upon, to pursuing justice outcomes even if they may prolong an existing conflict; the future benefit may outweigh significantly the risks of continued conflict. Justice seeks to bring to war-torn societies retribution, incapacitation, rehabilitation, truth telling and delegitimisation. More broadly, it may help institutionalise human rights and rule of law norms, as well as deterrence. Increasing the risk of punishment through successful ICC prosecutions may help to shift the calculus, particularly when government leaders decide how to deal with challenges to their authority, encouraging behaviour that avoids that risk.

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