

INTERNATIONAL JUSTICE AND THE PREVENTION OF ATROCITY

Anthony Dworkin



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Executive Summary

In the face of crises involving mass atrocities, the European Union and its allies are committed both to ending violence and to holding to account those most responsible for serious crimes. In practice, especially given the limited ability and willingness of outside powers to engage with the deep roots of internal conflicts in third countries, tensions between the objectives of peace and justice regularly arise. At the same time, the International Criminal Court (ICC) is struggling to consolidate its standing in the face of inconsistent state co-operation, and the cause of international justice is under attack.

It is vital that the EU and its allies develop an approach to the use of justice mechanisms in the response to violent conflict that maximises the delivery of peace and accountability and provides the best foundation for the future development of international justice. This report suggests some guidelines for future policy based on a systematic analysis of past experiences of pursuing justice during active conflicts. The paper considers the impact of different approaches to justice both on ending atrocities and on achieving accountability. It draws on a series of expert case studies commissioned by the European Council on Foreign Relations and on an international conference at which the papers were discussed.

Many supporters of international justice believe that it should be judged not according to its impact on current conflicts but rather on its contribution to the longer-term objective of advancing the rule of law. But the goal of a world where those who commit atrocities can reliably expect to be brought to justice is a distant one. The United Nations Security Council (UNSC) is influenced by political considerations in referring situations to the ICC, and state support for international courts has been inconsistent. States may wish to work towards the goal of impunity, but they cannot avoid confronting the complexities of justice and peace in the short term.

All conflict situations are different and one must be cautious in making direct comparisons between them. Nevertheless, some broad conclusions emerge from the case studies examined in this project. There is little reason to think that the introduction of international courts during conflict offers instrumental benefits such as deterring further crimes or marginalising criminals, especially when those responsible for atrocities hold leading positions in ruling regimes or non-state armed groups. While peace agreements have been concluded in situations where courts have jurisdiction, this is most likely to happen when high-level indictees believe they can escape prosecution through retaining power or finding a refuge from justice.

In other cases, there is some evidence that the involvement of courts has been an obstacle to a negotiated end to conflict. However, equally often, outside states deal with the tensions they perceive between peace and justice by failing to offer courts the support they seek. States use non-cooperation as a kind of safety valve when other interests and objectives are at stake. As Western states have lost their commitment to – and faith in – long-term humanitarian intervention, they increasingly look to compromise solutions in which the demands of justice are not given priority. Rather than a binary tension between peace and justice, there is often a triangular equation between peace, justice, and the limits of international engagement.

A key determinant of how far international courts are compatible with peace settlements is the scope that they allow for national justice processes that fall short of full-blown criminal prosecutions. As the ICC's jurisprudence on this question becomes clearer, it will be easier to predict the impact its involvement may have in future conflicts. An approach that shows a reasonable deference to national processes would help secure the Court's place in the international system. At the same time, the UNSC should be willing to defer investigations where it genuinely believes they threaten peace – though not to avoid political controversy.

The ability of international courts to deliver justice is generally dependent on an end having been found to conflict or political transition having occurred. The nature of peace agreements, and in particular the exclusion of those with a vested interest against accountability, may be the most important determinant of whether the rule of law is re-established and justice achieved in practice. In some cases, as in the former Yugoslavia, the existence of an international tribunal did act as a force in the long term to induce a high level of accountability. But the risk in other cases is that courts will achieve little

and their credibility will be undermined through lack of support. The lack of international backing is especially jarring in situations in which it was the UNSC that imposed jurisdiction on the court in the first place.

Against this background, it is important for states to take policy decisions on international justice in co-ordination with their broader approach to conflicts involving mass atrocities. Courts should not be left alone with the burden of shifting the world towards greater respect for the rule of law. The best foundation for combining accountability and the prevention of atrocities would be to promote a role for courts that states are broadly willing to support. This suggests a modest approach to the role of the ICC at a time when it needs to consolidate its position: in the near future, UNSC referrals should be reserved for exceptional circumstances in which they will not conflict with settlements that outside powers would want to support.

The report proposes these guidelines as a basis for future policy:

- States should avoid the use of justice as an instrumental tool to affect the dynamics of conflict.
- The use of conditional or deferred referrals with an automatic trigger is likely to be a mistake.
- Political sanctions should be considered instead of justice mechanisms to influence the behaviour of political or military leaders.
- The UNSC should only refer situations to the ICC in cases of an exceptional level of criminality, and where it is confident it will not later endorse political initiatives in which the demands of the Court are ignored.
- States should be wary of the idea that referrals always help the credibility of the ICC, especially if they are not backed with extra funding and if they embody a partial approach to justice.
- States should consider deferrals by the UNSC under Article 16 of the Rome Statute to be legitimate when they genuinely believe the interests of peace to be at stake.

- The principle that political leaders are not above accountability should be firmly defended.
- The ICC should work to implement a reasonably broad interpretation of complementarity and the interests of justice, facilitating deference to national justice processes.
- States should avoid the endorsement of unconditional amnesties.
- States should devote more attention to ensuring that peace agreements allow space for the future development of accountability and the rule of law, including through excluding suspected war criminals from power.
- States should actively support the documentation of crimes during active conflict, whether or not international jurisdiction exists.
- States should ensure that decisions on international justice are taken in a way that is coherent with other areas of foreign policy, including through establishing cross-departmental working groups on international justice and atrocity prevention.

Introduction

Over the last 20 years, two parallel impulses have shaped the international response to conflicts and crises involving mass atrocities. On the one hand, there has been a growing commitment to the idea that outside powers should do everything possible to bring the abuses to an end – an ambition now formalised in the notion of a “responsibility to protect”. On the other hand, there has been a powerful movement devoted to ensuring that those responsible for atrocities are brought to justice. The aim of ending atrocities and that of holding perpetrators to account spring from a common humanitarian ideal, but the relationship between them is fiercely disputed.

Convinced that there is a worldwide interest in holding to account those people responsible for the most serious crimes, supporters of international justice have promoted the establishment of a series of tribunals for individual situations, and more recently, a permanent International Criminal Court (ICC). The spread of international justice means that these courts increasingly obtain jurisdiction in situations where conflicts are still active and crimes are still being committed. In some cases, the United Nations Security Council (UNSC) has established tribunals or used its power to refer situations to the ICC as a central part of its response to conflicts in which mass atrocities are taking place.

The involvement of international courts in conflict-torn countries raises a series of difficult dilemmas for the international response to mass atrocities. These courts set a benchmark for accountability that cannot be overridden by domestic political considerations. In this way, advocates of international justice believe, courts help to build a global spirit of respect for the rule of law. Supporters of international justice also claim that courts can offer more immediate practical benefits, by deterring crimes or marginalising those responsible for atrocities. But other people argue that the introduction of courts during conflict often makes the short-term goal of preventing further suffering more difficult by impeding political compromises that are necessary for peace.

Countries trying to respond to mass atrocities overseas cannot escape taking a position on the interplay of peace and justice. In the face of a conflict involving widespread civilian deaths, should they seek to give jurisdiction to the ICC whenever crimes of a sufficient gravity appear to have been committed? Or should states assess the possible involvement of the Court on a case-by-case basis, based on their view of the impact that a referral is likely to have on the course of that particular conflict? Should justice be considered in relation to the prospects for a peace settlement and possible transition, so that the search for accountability is linked to local political realities? Or is it preferable for justice to be isolated from political considerations as far as possible, relying only on universal and impartial standards? And should outside states' decisions about bringing in international courts during conflict also be based on an assessment of how far the same states are then willing to support the work of the court in practice?

The European Union has been at the forefront of the development of international justice. All EU member states are party to the ICC and the EU strongly supports the Court in its foreign policy. However, in practice, the approach of the EU to seeking accountability while trying to end conflicts – the most difficult and important question for the future development of international justice – seems improvised and inconsistent. When EU member states have supported the involvement of courts during conflict, they have not seemed to act from any coherent strategic vision: it is unclear whether their aim is only to promote accountability, or also to influence the course of the conflict. At other times, European officials have expressed concerns about the impact of justice mechanisms on the prospects for obtaining peace settlements, or pursued policies in which justice appeared secondary to other, more directly political goals.

The lack of clarity in the EU's approach to international justice is a problem not only because it makes European policy less effective, but also because the cause of global justice urgently needs coherent European backing. More than a decade after the ICC began its operations, it faces a series of challenges and dilemmas that pose a threat to its international standing. The Court has only secured two convictions. The cases against Kenya's President Uhuru Kenyatta and Vice-President William Ruto, charged in connection with a campaign of violence after the disputed election of 2007, have brought longstanding African complaints about the selective nature of the Court's justice to new heights. Moreover, the beginning of President Kenyatta's trial has been repeatedly postponed. The situation in Darfur was referred to the ICC in 2005, but the Court has not obtained custody of any suspects linked to the Sudanese government-backed campaign of violence, including the country's President Omar al-Bashir.

These developments are not necessarily evidence of any failure on the ICC's part. However, they testify to the unresolved nature of the Court's position in international politics, which could undermine the ICC's credibility if its supporters do not develop a strategy to reinforce its position. Critics have attacked the ICC and international justice more broadly on the grounds that its rigid processes do not fit well into the realities of international diplomacy, and that it operates in practice as a tool of the world's great powers. Chinese diplomats have argued that "justice cannot be pursued at the expense of peaceful processes, nor should it impede the process of national reconciliation".¹ African leaders including the former South African president Thabo Mbeki have made similar points.² Concerns that international justice does not show enough flexibility toward domestic political choices and favours the political agenda of the West have widespread resonance. This combination of factors led the former war crimes prosecutor and UN High Commissioner for Human Rights Louise Arbour to observe recently that "resistance to the entire accountability enterprise launched some 20 years ago is at an all time high".³

A more coherent approach from the EU and allied countries to the place of justice in responding to mass atrocities would provide a firmer footing for the cause of international justice in the years ahead. This report aims to contribute to such an approach by looking systematically in the light of past experience at the different options for pursuing accountability during active conflicts. It considers the impact that different policies have had both on the search for accountability and on the prevention of atrocities, and it examines the interplay between these two objectives. The paper marks the culmination of an ECFR project on the relationship between justice and the prevention of atrocities. In particular, it draws heavily on a series of 12 case studies commissioned by ECFR on past attempts to balance the interests of peace and justice, as well as on the proceedings of an international conference at which the studies were discussed.⁴

The central conclusion that emerges from this analysis of past cases is that policies on securing justice and ending atrocities will be most effective if they fit

¹ Li Baodong, Permanent Representative of the People's Republic of China to the United Nations, Statement to the UN Security Council, New York, 17 October 2012. See UN Security Council Record S/PV.6849, p. 12, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6849.

² Thabo Mbeki and Mahmood Mamdani, "Courts Can't End Civil Wars", *New York Times*, 5 February 2014, available at <http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html>.

³ "Are Freedom, Peace and Justice incompatible agendas?", Speech by Louise Arbour at Oxford University, 17 February 2014, available at <http://www.crisisgroup.org/en/publication-type/speeches/2014/arbours-are-freedom-peace-and-justice-incompatible-agendas.aspx> (hereafter, Arbour, "Freedom, Peace and Justice").

⁴ The 12 case studies are available at www.ecfr.eu/ijp, along with other materials from the project.

together as part of a coherent international vision of crisis response. Since the ability or willingness of outside powers to resolve the roots of conflict and rebuild societies is inevitably limited, there will sometimes be genuine tensions between the goals of peace and justice. By failing to acknowledge these tensions and often formulating policies on justice and peacemaking in isolation from each other, international policy currently does not serve the best interests of either objective. There is a risk that states will give courts jurisdiction in situations where this interferes with peace settlements that the same states would otherwise wish to accept. But there is equally a risk that courts will be sidelined by global powers when a peace agreement becomes possible, even though the same countries imposed jurisdiction on the court in the first place.

International justice that finds itself too far from the centre of gravity of global politics is unlikely to contribute significantly either to accountability or to the prevention of future atrocities. This report argues that the most sustainable foundation for the continued development of global justice would be provided by greater convergence between the role assigned to international courts and the broader principles of European and allied foreign policy in crisis situations. This does not mean using international justice as a political tool, which would be short-sighted and self-defeating. Instead it suggests a period of consolidation for international justice within the global political system, based among others on the following possible guidelines: that the UNSC should be cautious about referring further cases to the ICC at a time when the Court's credibility is under attack; that courts should give reasonable deference to national justice processes; that countries should try to avoid inconsistency between their policies on referrals and supporting courts; and that states should pay greater attention to those facets of peace agreements that are most likely to determine whether stability and justice are ultimately achieved.

Chapter 1

Justice and the Goal of Peace

During most of the modern period, with the exception of the trials following World War II, the pursuit of justice played at best a marginal role in the international response to mass atrocities. However, since the establishment of a series of international tribunals in the 1990s and the simultaneous growth of attention to justice after political transitions within countries, accountability has increasingly been understood as a factor that must be taken into consideration in efforts at conflict resolution.

States play a crucial role in determining the place of international justice in global politics, both because they have influence over the jurisdiction of international courts and because courts rely extensively on state support and co-operation for the success of their work. In the past, states acting through the UNSC created a series of ad hoc tribunals for specific situations such as the former Yugoslavia, Rwanda, and Sierra Leone.⁵ The ICC is a treaty-based court that has jurisdiction over crimes committed on the territory or by the nationals of state parties, and the ICC prosecutor can initiate an investigation in a situation where states choose not to refer.⁶ However, the UNSC has the power under the ICC's founding Rome Statute to refer situations in the territory of non-state parties to the Court and to defer any investigation or prosecution for a renewable period of one year.

States also influence the processes of international justice through the support that they give to or withhold from courts. Both single-case tribunals and the ICC today are dependent on the co-operation of states in a wide range of ways. Most importantly, without any enforcement mechanism of its own, the ICC relies on

⁵ The Special Court for Sierra Leone was a hybrid court established by agreement between the UN and the government of Sierra Leone, pursuant to UNSC Resolution 1315.

⁶ The investigation into the situation in Kenya following the 2007 election was launched by the prosecutor after Kenya's parliament failed to agree on the establishment of a domestic tribunal.

states to apprehend suspects or pressure other countries to surrender them. This help is not always forthcoming: a recent position paper from the United Kingdom acknowledges that “the issue of non-cooperation is the biggest challenge which the Court faces”.⁷ The ICC also depends on state assistance to obtain the evidence to conduct prosecutions and needs states to contribute funds for the Court’s running costs. The degree to which states support the work of courts in practice often has as much influence over the effectiveness of international justice as decisions about whether to give courts jurisdiction in the first place.⁸

In their judicial proceedings, international courts and tribunals are supposed to consider only the interests of justice. That objective is complicated enough. But states must balance a range of different goals in their foreign policies – and in the face of conflicts and other campaigns of violence, the aim of putting an end to human suffering inevitably looms large. Moreover, when acting through the UNSC, which has a central role in the system established by the Rome Statute of the ICC, states have a mandate to act in the interests of international peace and security. A fundamental question is how they should understand the value of international justice and its relationship with these other objectives.

Two visions of global justice

The signature institutions of global justice were founded on the powerful if vague claim that justice is not only desirable in itself but also helps to promote peace and security. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UNSC in 1993 on the basis that it would “contribute to the restoration and maintenance of peace” and “to ensuring that [...] violations are halted”.⁹ The preamble to the Rome Statute of the ICC, agreed in 1998, says that unchecked international crimes “threaten the peace, security, and well-being of the world” and that putting an end to impunity for those who commit them will “contribute to the prevention of such crimes”.¹⁰

7 “The International Criminal Court (ICC)”, Foreign and Commonwealth Office, July 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223702/ICC_Strategy_Final.pdf.

8 On the relationship between the UNSC and the ICC, see David Kaye, “The Council and the Court: Improving Security Council Support of the International Criminal Court”, UC Irvine School of Law, May 2013, available at <http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf>.

9 United Nations Security Council Resolution 827, 25 May 1993, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf.

10 Rome Statute of the International Criminal Court, adopted July 1998, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

Assuming that states believe this idealistic rhetoric and wish to act on it, there are two different ways that they could interpret the contribution that justice makes to peace. One takes a long-term view: states should try to work towards expanding the scope and reach of international courts, because a more predictable regime of global justice will lead over time to a climate in which mass atrocities are less likely to occur. In the words of distinguished international judge Theodor Meron, president of the ICTY, countries should be guided by a “spirit of respect for the rule of law”.¹¹ From this perspective, policymakers would seek to involve courts wherever crimes above a certain threshold of gravity had been committed, irrespective of the impact that this might have on the dynamics of the conflict in question, in order to enhance an emerging global norm of accountability. Any potential short-term complications would be overridden by the ultimate goal of solidifying the international community’s rejection of mass atrocities and creating an environment in which future perpetrators could expect to be held to account.

In contrast to this, other supporters of international justice look to the concrete and instrumental impact that the involvement of courts can have in particular cases to help end atrocities and establish a durable peace.¹² It is argued that courts can deter political and military leaders from committing further atrocities. They can highlight the isolation of criminal regimes or armed groups by expressing the world’s condemnation of their actions. They can marginalise the worst elements among governments or armed groups, and allow more moderate figures to emerge and negotiate peace. On occasion, officials have also attempted to use the threat of introducing justice mechanisms to encourage warring groups to end violence or enter peace talks: for instance, United States Secretary of State John Kerry warned the South Sudanese rebel leader Riek Machar that he would face accountability if he failed to join an effort to halt the fighting in South Sudan.¹³ Former ICC Chief Prosecutor Luis Moreno Ocampo has suggested that the UNSC might use the threat of referral to the Court at a fixed date in the future as a tool of coercive diplomacy to alter the calculations of warring parties.¹⁴

¹¹ Theodor Meron, Speech at Chatham House, 2 April 2014, audio recording available at <http://www.chathamhouse.org/multimedia/audio> (hereafter, Meron, Chatham House speech).

¹² For an analysis of the use of instrumental arguments in advocacy for international justice, see Leslie Vinjamuri, “Deterrence, Democracy, and the Pursuit of International Justice”, *Ethics & International Affairs*, Summer 2010.

¹³ Isma’il Kushkush and Michael R. Gordon, “South Sudan Fighting Rages as Kerry Appeals to Rebel Leader”, *New York Times*, 5 May 2014, available at <http://www.nytimes.com/2014/05/06/world/africa/kerry-south-sudan-fighting.html>.

¹⁴ Luis Moreno Ocampo, “Between Bombing or Doing Nothing”, *The World Post*, 4 September 2013, available at http://www.huffingtonpost.com/luis-moreno-ocampo/between-bombing-or-doing-_b_3869088.html.

An uncertain Western approach

In practice, the policy of EU countries and their international partners has appeared to fluctuate between these two approaches. When Libyan leader Muammar Gaddafi unleashed a campaign of violence against protesters in 2011, France, the UK, and Germany took the lead in drafting a UN Security Council resolution that referred the situation to the ICC. The referral sat alongside a series of other measures designed to put pressure on the Libyan leadership, including travel bans and asset freezes, giving the impression that it was intended in large part as a political signal of condemnation for the regime and support for its opponents. This impression was reinforced by the fact that the UNSC referred Libya to the ICC without first waiting for the report of a commission of inquiry, as it had when it referred the situation in Darfur to the ICC in 2005. After the passage of Resolution 1970 on Libya, as the political scientist David Bosco has written, “Western leaders immediately sought to convert the resolution into leverage on the regime” by warning that those involved in further crimes would be held to account.¹⁵

More recently, European countries were involved in an effort to win support at the UNSC to refer the situation in Syria to the ICC. In January 2013 Switzerland organised a public letter signed by 57 countries calling for a referral. The letter argued that the Court’s involvement would both ensure accountability and send a signal to the Syrian authorities, and that even a threat of referral “could have an important dissuasive effect”.¹⁶ Since then, the EU’s commitment to seeking a referral has only strengthened, but at the same time some European diplomats have been willing to concede that the Court’s involvement might present complications in the search for a negotiated end to the conflict. Nevertheless, officials tend to argue that a referral is necessary to demonstrate the international community’s rejection of impunity for crimes on the scale that Syria has witnessed.¹⁷

There is not necessarily a contradiction in any specific situation between these different conceptions of the relationship of international justice and peace, but

¹⁵ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014), p. 168 (hereafter, Bosco, *Rough Justice*).

¹⁶ Letter from the Permanent Mission of Switzerland to the United Nations to the President of the Security Council, 14 January 2013, available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf>.

¹⁷ See for instance the comments of Dutch Ministry of Foreign Affairs officials reported in “Justice and accountability in Syria: report on a dinner discussion organized by ECFR in The Hague, 4 November 2013”, available at http://www.ecfr.eu/page/-/ECFR_report_on_syria_dinner_discussion.pdf.

they point in different directions. The rule of law approach looks to the progressive separation of law and politics, ultimately aspiring to a vision of impartial global justice that expresses the world's consistent condemnation of mass slaughter. The instrumental approach looks instead to the incorporation of international justice as part of the arsenal of the world's great powers as they exercise their responsibility to protect civilians against atrocity. Many supporters of international justice are uncomfortable with the second, more explicitly political vision, believing that it undermines the independence of the ICC and encourages an "à la carte" approach to justice.¹⁸ In the words of Juan Mendez, former advisor to the UN Secretary-General for the prevention of genocide, "justice contributes to peace and prevention when it is not conceived as an instrument of either and on condition that it is pursued for its own sake. If the ICC is contemplated simply as a lever it will be undermined as some will expect it to be turned on and off as political circumstances dictate."¹⁹

Limits on the international rule of law

It is appealing to think that the pursuit of international justice for its own sake might lead to a world in which political and military leaders are deterred from killing and terrorising innocent civilians. There are some instances where the existence of the ICC does seem to have had an effect in reducing the threat of violence during periods of tension. Juan Mendez has argued that political leaders in Côte d'Ivoire (which had accepted ICC jurisdiction in 2003) reduced their use of incitement in 2004 after he reminded them of the Court's possible role; according to Mendez, "it was established later that the prospect of ICC prosecution was carefully analysed by persons in authority and their legal advisors".²⁰ However, the risk of prosecution was not enough to prevent the widespread killing of civilians in Côte d'Ivoire after the disputed election of 2010, crimes for which the country's former president, Laurent Gbagbo, now faces trial.

Some people have suggested that the lack of violence after the 2013 elections in Kenya may be due in part to the deterrent impact of the ICC's pursuit of cases

¹⁸ Meron, Chatham House speech.

¹⁹ Juan E. Mendez, "The Importance of Justice in Securing Peace", Paper presented at the First Review Conference of the Rome Statute for an ICC, Kampala, 30 May 2010, p. 7, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/The%20Importance%20of%20Justice%20in%20Securing%20Peace.pdf (hereafter, Mendez, "Importance of Justice").

²⁰ Mendez, "Importance of Justice", p. 5.

²¹ Felix Olick, "Positive Legacy for ICC in Kenya?" Institute for War & Peace Reporting, 28 April 2014, available at <http://iwpr.net/report-news/positive-legacy-icc-kenya>.

from the aftermath of the previous polls in 2007.²¹ Even if this is true, however, it must be set against the fact that the voters of Kenya elected a president and vice-president who face charges for serious crimes – hardly suggesting a victory for the principle of accountability. It is notable that the most frequently cited examples of the ICC’s deterrent effect relate to countries that have chosen to accept the Court’s jurisdiction, though the Central African Republic, which has been convulsed by violence since mid-2013, stands as a powerful counter-example. In any case, the policy decisions that the UNSC faces in deciding whether to refer conflict situations to the ICC arise, self-evidently, in relation to non-party states.

The deterrent effect that the ICC and other international courts can exert over non-party states depends on the likelihood of those who commit war crimes being held to account. Yet the record of the UNSC hardly suggests an impartial and consistent effort to refer situations with serious crimes to the ICC. Instead, the differing political agendas of the members of the Security Council ensure that referral is likely to remain highly selective. Russia can be expected to continue blocking any referral of the situation in Syria, as can China with North Korea. The UNSC failed to refer Sri Lanka to the ICC in spite of widespread evidence of war crimes there. The US was able to ensure that the Israeli-Palestinian conflict was not referred to the ICC after the Goldstone Report accused both the Israeli armed forces and the Palestinian militants of possible crimes against humanity in the Gaza War of 2008-2009. Moreover, any long-term deterrent effect that the ICC might have would depend not only on a more consistent pattern of UNSC referral, but also on much greater support from the world’s leading powers for the Court in practice. As discussed in more detail below, European and other countries have given only lukewarm backing to the ICC in Libya, Sudan, the Democratic Republic of Congo, and elsewhere.

For these reasons, an approach that relies on the separation of international justice and global politics does not seem feasible in today’s world. The goal of an international system where justice is predictably and impartially enforced on those responsible for atrocities appears too distant a prospect to act as a credible deterrent. Many people will still feel that it is desirable to work towards such a system. There are also good reasons to support international justice for

²² For arguments that international justice should aim to promote a sense of accountability or stigmatise those responsible for crimes, see Mirjan R. Damaska, “What is the Point of International Criminal Justice?”, Yale Law School Faculty Scholarship Series, 2008, available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2599&context=fss_papers, and Frédéric Mégret, “Practices Of Stigmatization”, *Law and Contemporary Problems*, March 2014, available at <http://scholarship.law.duke.edu/lcp/vol76/iss3/9>.

mass atrocities wherever possible as a good in itself, as a way of demonstrating the world's condemnation of appalling actions and to advance the sense of accountability.²² But the weight that states give these goals in their foreign policy must be based on an assessment of their relation to other objectives, notably that of stopping atrocities. It should also be based on an assessment of whether – and when – international courts do in fact deliver justice more effectively than other alternative approaches. The next chapter of this report looks at the historical record on these questions.

Chapter 2

The Record of the Past

It is hard to write with certainty about the impact of international tribunals (or the decision to defer any attempt at seeking justice) on the course of different conflicts and peace processes. There are many factors at work in each situation, and attempts to gauge the effect of justice mechanisms often rely on counterfactual judgements that must necessarily be tentative. Each case reflects its own unique circumstances and comparisons between them must be made with caution. Nevertheless, this project is based on the belief that it is possible to draw some provisional lessons by looking systematically at past cases.

The cases included in this survey include all the most significant instances where international courts and tribunals were involved in active conflicts over the last 20 years, as well as two recent situations where outside powers supported peace settlements that neglected accountability. The cases are grouped together and summarised in this chapter according to a few prominent themes.

The Balkans: peace agreements and justice together

There are some ways in which the introduction of courts into conflict situations can work in harmony with the effort to end atrocities. In the former Yugoslavia, the existence of the ICTY (the International Criminal Tribunal for the former Yugoslavia, mentioned above) did not prevent the conclusion of a peace agreement at Dayton in the US in 1995. Indeed, the issuing of indictments in July 1995 against the Bosnian Serbs' political leader, Radovan Karadzic, and military leader, Ratko Mladic, helped the strategy pursued by US negotiator Richard Holbrooke to isolate the Bosnian Serb leadership and deal directly with Serbian President Slobodan Milosevic. However, this does not mean that the indictments played a decisive role in making Dayton possible or ensuring its success. Until the last minute, as Leslie Vinjamuri points out in her case study for this project,

the US was prepared to contemplate some role for Karadzic in the negotiations, and US diplomats continued to meet with him after his indictment was issued.²³ Nevertheless, the indictments reinforced Holbrooke's "Milosevic strategy".

The Dayton Agreement in turn created the circumstances that allowed the ICTY to be effective. Before Dayton, the ICTY had been able to make only negligible progress toward delivering justice. At the time of the peace talks, the tribunal had only one low-level suspect, Dusan Tadic, in custody. And, not surprisingly for such an experimental institution, experts see little evidence that it had any impact in deterring the commission of crimes.²⁴ The peace agreement's provisions on justice were mixed. Parties to the agreement were required to "co-operate fully" with the tribunal (though not to "comply" with its requests, as human rights advocates had sought). And NATO forces were given authority to "help ensure compliance" with Dayton but not specifically tasked with the obligation to arrest indicted suspects. The agreement also required that indicted suspects be prohibited from holding public office in Bosnia; this appears to have contributed to Karadzic's decision to step down in 1996.²⁵

In the period immediately after Dayton, NATO forces made few efforts to apprehend those sought by the tribunal, apparently driven by a desire to minimise Western casualties and by reluctance to jeopardise the country's fragile stability. Over time, reflecting changing Western politics and altered perceptions of conditions in Bosnia, NATO forces began to take a much more aggressive approach, and the tribunal eventually acquired custody of all 161 people it had indicted. There is little doubt that the existence of the ICTY ultimately provided a far greater degree of accountability than would have been achieved otherwise, but this was dependent on an intensive NATO presence and the force of attraction of the EU as an incentive for Balkan states to co-operate.

The open-ended jurisdiction of the ICTY meant that it was empowered to investigate and prosecute crimes committed during the escalation of violence in Kosovo in 1998-1999. It was at the height of the conflict between NATO and Serbia, in May 1999, that the tribunal issued an indictment against President

²³ Leslie Vinjamuri, "Justice, peace and deterrence in the former Yugoslavia", ECFR, November 2013, pp. 3-4, available at http://www.ecfr.eu/ijp/case/bosnia_herzegovina (hereafter, Vinjamuri, "Justice, peace and deterrence"); Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (Princeton: Princeton University Press, 2000), pp. 237-238.

²⁴ Vinjamuri, "Justice, peace and deterrence".

²⁵ "Selling Justice Short: Why Accountability Matters for Peace", Human Rights Watch, July 2009, p. 27, available at http://www.hrw.org/sites/default/files/reports/ijo709webwcover_1.pdf (hereafter, "Selling Justice Short").

Milosevic for “murder, persecution, and deportation” in Kosovo. Nevertheless, in the words of political scientist Dominik Zaum, there is “not really any evidence that the presence of the court and its assertion of jurisdiction in March 1998 [...] had an impact” as a deterrent to atrocities in the conflict.²⁶ However, despite the fears of some US officials, the indictment of Milosevic did not prevent his agreeing to a peace plan less than a week later. Some people have argued that the indictment may even have contributed to Milosevic’s decision to agree to peace terms, as it highlighted his international isolation. But if so, it was “only one amongst a range of factors, including the continued military pressure, or the need to maintain Russian support once it had become involved in negotiations through the G8”.²⁷

The commander of NATO forces, General Wesley Clark, believes that the indictment hardened European resolve to pursue the conflict and “did not significantly affect the ongoing effort to bring the Russians into the peace effort”.²⁸ It was significant that the peace plan did not seek to loosen Milosevic’s hold on power in Serbia. According to one analysis, “because Milosevic did not travel much and felt secure at home, he did not fear ending up in The Hague”.²⁹ Nevertheless, Milosevic lost power in 2000 following a disputed election and mass protests, and the country’s successor government, eager to rehabilitate Serbia’s international standing, transferred him to the ICTY in the following year.

Liberia and Sierra Leone: War criminals excluded and included in peace deals

Liberia provides another example of a situation in which the involvement of an external tribunal helped to marginalise a potential spoiler in the search for peace. On the opening day of talks in 2003 aimed at ending Liberia’s long-running civil war, the prosecutor of the Special Court for Sierra Leone (SCSL) unsealed an arrest warrant against the Liberian president, Charles Taylor. Taylor immediately left the talks, which were being held in the Ghanaian capital Accra, to return to Liberia. At the time, several of those involved in the negotiations complained that the “overzealous” prosecutor of the SCSL was jeopardising their peace talks.³⁰

²⁶ Dominik Zaum, “Kosovo”, ECFR, November 2013, p. 3, available at <http://www.ecfr.eu/ijp/case/kosovo> (hereafter, Zaum, “Kosovo”).

²⁷ Zaum, “Kosovo”, p. 3.

²⁸ Wesley Clark, *Waging Modern War* (Oxford: Public Affairs, 2001), p. 328.

²⁹ “Selling Justice Short”, p. 19.

³⁰ Abdul Tejan-Cole, “Sierra Leone’s ‘not-so’ Special Court”, in Chandra Sriram and Suren Pillay (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa* (Scottsville: University of KwaZulu-Natal Press, 2009), p. 240 (hereafter, Tejan-Cole, “Sierra Leone’s ‘not-so’ Special Court”).

In retrospect, as transitional justice expert Priscilla Hayner has written, many people now look back on the indictment of Taylor as “the single most important element in changing the Accra peace talks from an effort with little chance of success to a serious meeting where the parties could in fact bargain over the future of the country – and without the ever-present control and manipulation of the seemingly unmovable Taylor”.³¹ Yet Taylor did not finally leave power until he believed he had avoided the danger of prosecution by securing exile in Nigeria with a guarantee that he would not be handed over to the SCSL. In 2006, following an appeal by Liberia’s President Ellen Johnson Sirleaf and evidence of Taylor’s continued meddling in Liberian affairs, the Nigerian government reversed its policy and extradited Taylor to face justice.

Taylor’s case shows how complex the interplay between justice and peace can be: the threat of indictment helped to marginalise Taylor and make a peace agreement easier, but it was only when he believed he had immunised himself from prosecution that he was actually prepared to leave power. Some experienced diplomats believe the precedent of Taylor’s ultimate handover may make current political leaders who fear war crimes charges, such as Robert Mugabe of Zimbabwe, more reluctant to leave power and accept exile abroad.³² Another paradoxical aspect of the Liberian case is that the Accra Peace Agreement, concluded at least partly because of Taylor’s absence from the process itself, provided little foundation for individual accountability for those involved in the conflict. While there was vetting of the security forces, no provisions were made for prosecution of war criminals, and many of those who led or backed armed factions during the war retained their political and social influence. If “the accommodation granted to warring parties in the Accra peace agreement was perhaps accepted as a practical necessity to end the war,” Liberia appears still to be “frozen in the de facto constraints that continue from the war”.³³

The experience of neighbouring Sierra Leone is often taken to indicate that peace agreements concluded without any provisions for justice are inherently fragile. In 1999, after several years of civil war marked by widespread atrocities against the civilian population, a peace agreement was reached in Lomé, Togo, between

31 Priscilla Hayner, “Justice and the Prevention of Violence in the Liberian Peace Process of 2003: Lessons from the International Role”, ECFR, November 2013, p. 2, available at <http://www.ecfr.eu/ijp/case/liberia> (hereafter, Hayner, “Liberian Peace Process”).

32 Mark Malloch-Brown, “The Charles Taylor verdict shows that future despots have nowhere left to hide”, *Financial Times*, 26 April 2012, available at <http://blogs.ft.com/the-a-list/2012/04/26/the-charles-taylor-verdict-shows-that-future-despots-have-nowhere-left-to-hide/>.

33 Hayner, “Liberian Peace Process”, p.5.

the main rebel group, the Revolutionary United Front (RUF), and the Sierra Leonean government. The agreement contained a blanket amnesty covering all combatants and collaborators in the conflict, and several members of the RUF were given positions in a government of national unity. Within months, fighting had broken out again and the RUF again threatened Sierra Leone's capital, Freetown. Following the arrival of British troops to support the government, the rebellion was ended and the hybrid international-domestic Special Court was established to prosecute war criminals from all sides.

Despite the imperfections of the Lomé Peace Accord, it is far from clear that the Sierra Leonean government could have obtained better terms or hoped to gain a military advantage by fighting on, as Priscilla Hayner writes in her case study.³⁴ At the time of the negotiations, Nigeria was on the point of withdrawing its forces from the West African stabilisation forces, and both Nigeria and the UK were strongly pressing for an agreement. As the British Foreign Office minister Peter Hain later said, the only option that Sierra Leone's president Ahmad Tejan Kabbah had "was to strike the best deal that he could".³⁵ Given RUF leader Foday Sankoh's insistence on obtaining a high government position, even the option of vetting war criminals appeared out of reach. At the time of the Lomé talks, international opinion was still evolving on the subject of amnesties; if negotiations had taken place later, Hayner writes, "it is possible that [...] rather than an amnesty the accord may have been silent on the subject, and individual pardons for Sankoh (and others) may have been arranged instead."³⁶

The continuing power of the RUF, rather than the amnesty provisions themselves, created the conditions for the resumption of violence – along with the "slow arrival of UN troops in the country, and the resulting delays in demobilisation and essential peace stabilisation activities".³⁷ It may be true that the Sierra Leonean government had learnt the lesson that "the absence of justice would not lead to peace in Sierra Leone", as one of the country's most prominent lawyers has written.³⁸ However, it was the decision of the British government to send

³⁴ Priscilla Hayner, "Justice and the Prevention of Violence in the Liberian Peace Process of 2003: Lessons from the International Role", ECFR, November 2013, p. 2, available at <http://www.ecfr.eu/ijp/case/liberia> (hereafter, Hayner, "Liberian Peace Process").

³⁵ Peter Hain, Testimony to the House of Commons Foreign Affairs Committee, 22 May 2000, quoted in Andrew Dorman, *Blair's Successful War: British Military Intervention in Sierra Leone* (Farnham: Ashgate, 2009), p. 43.

³⁶ Hayner, "Sierra Leone", p. 3.

³⁷ Hayner, "Sierra Leone", p. 3.

³⁸ Tejan-Cole, "Sierra Leone's 'not-so' Special Court", p. 225.

troops in May 2000 that enabled the Sierra Leonean authorities to regain the military initiative and take the steps that led to the establishment of the SCSL in early 2002.

Uganda: justice as incentive and obstacle

The involvement of the ICC in Uganda further illustrates the complex and contradictory ways in which international courts can affect the dynamics of conflict. Uganda referred the situation involving the rebel Lord's Resistance Army (LRA), which had terrorised the north of the country for several years, to the ICC in January 2004. According to the legal scholar Payam Akhavan, who advised the Ugandan government, its aim was partly "to engage an otherwise aloof international community" and to encourage other countries to provide greater co-operation and support in the fight against the LRA.³⁹ According to one study of the ICC, international opinion on the referral closely tracked countries' views on the likely course of the conflict: "Most involved US diplomats believed that negotiations with the LRA had little promise and favoured aggressive steps to confront Kony [the LRA's leader]; their European and Canadian counterparts tended to be more sanguine about the prospects for negotiations and worried that the ICC's involvement might aggravate the conflict."⁴⁰

Many people believe, as Mark Kersten argues in his case study, that the involvement of the ICC acted as an incentive for the LRA to engage in peace negotiations with the government of Uganda, which began in 2006 in Juba, South Sudan.⁴¹ LRA leaders "constantly talked about the ICC at meetings in the run-up to and during the early phases of the Juba talks", even if this was based in part on a misapprehension that the ICC would send forces to arrest fighters against whom charges had been brought.⁴² At the time of the ICC's involvement, other factors were already putting pressure on the LRA and encouraging the government of Sudan to reduce its support to the group, but the ICC reinforced those trends.

³⁹ Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", *European Journal of International Law*, November 2010, p. 947, available at <http://ejil.oxfordjournals.org/content/21/4/941.full.pdf>.

⁴⁰ Bosco, *Rough Justice*, p. 99.

⁴¹ Mark Kersten, "Peace, Justice and Politics in Northern Uganda", ECFR, November 2013, available at <http://www.ecfr.eu/ijp/case/uganda> (hereafter, Kersten, "Northern Uganda").

⁴² "Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda", Refugee Law Project, October 2012, p. 16, available at http://www.refugeelawproject.org/files/working_papers/RLP.WP22.pdf (hereafter, "Ambiguous Impacts").

Justice quickly emerged as a central issue in negotiations. Discussions ultimately produced a comprehensive peace agreement that included provisions on accountability and reconciliation, specifying a mixture of formal and traditional community justice mechanisms and setting up a special unit of the Ugandan High Court to try those responsible for serious crimes. These measures sat alongside, and in an ambiguous relationship to, an earlier amnesty law for armed rebels that Uganda had put in place in 2000. At the same time, LRA negotiators consistently demanded the removal of the ICC arrest warrants as a condition for signing the agreement. US and European officials monitoring the talks were willing to consider supporting a one-year deferral of the ICC cases under Article 16 of the Rome Statute, and reportedly at one point initialled a draft agreement that called for such a move.⁴³ With the ICC issue unresolved, talks broke down in 2008 after LRA leader Joseph Kony refused to come out of the bush and sign the final peace agreement.

Some analysts are sceptical that either the government of Uganda or the LRA were ever sufficiently serious about negotiations for the agreement to have been signed.⁴⁴ But it is plausible that the ICC arrest warrants contributed to Kony's distrust of the security guarantees he was offered, and that signs of LRA military activity during the later part of the talks reflected the leadership's frustration that the ICC remained a threat.⁴⁵ Nevertheless, even without a peace agreement, the LRA is no longer active in northern Uganda. Its members are dispersed in mobile groups around parts of South Sudan, the Central African Republic, and the Democratic Republic of Congo, where they are engaged in "survival mode activities" including looting and kidnapping, and are being hunted by a task force of the African Union with US assistance.⁴⁶ In the meantime, the International Crimes Division established as part of the Juba negotiations has only brought one case to trial, and that remains mired in legal dispute as to why the defendant's application for amnesty was not accepted. The national amnesty law itself was renewed in 2013.

⁴³ Bosco, *Rough Justice*, p. 130.

⁴⁴ Kersten, "Northern Uganda".

⁴⁵ "Ambiguous Impacts", p. 19.

⁴⁶ Michelle Nichols, "Warlord Kony hiding in disputed South Sudan enclave: U.N.", *Reuters*, 6 May 2014, available at <http://www.reuters.com/article/2014/05/06/us-southsudan-sudan-un-kony-idUSBREA450ZR20140506>.

UNSC referrals: inconsistent state support

The conflict in Darfur, Sudan, was the first situation referred to the ICC by the UNSC. For the countries that supported the referral, its importance lay in significant part in the credibility it would give the Court, still struggling to establish itself as an influential part of the international system. The Darfur conflict had been under way since 2003, and the atrocities committed by government-backed militias soon began to attract huge international attention: in September 2004 US Secretary of State Colin Powell charged that genocide was taking place in Darfur. Following the recommendation of an international commission of inquiry, the UNSC referred the situation to the ICC in March 2005. In 2008, the Court's prosecutor announced he was seeking an arrest warrant for the Sudanese president, Omar al-Bashir.

Peace talks between rebel groups and the government have continued sporadically since 2004. In 2006, the government of Sudan was ready to sign a peace agreement negotiated by the African Union, but two rebel groups refused to join the accord. The ICC does not seem to have had much impact on peace negotiations. Nevertheless, as legal scholar Sarah Nouwen writes, the warrant against Bashir may have hardened the stance of some armed movements that refused to negotiate with a "génocidaire", and the warrant has also prevented Western states from any involvement in seeking a political settlement.⁴⁸ At the same time, the arrest warrant against Bashir has spurred renewed attention within Sudan to the question of accountability. An African Union panel, set up to investigate alternatives to the ICC, proposed an "integrated justice and reconciliation response" that might meet the Court's threshold for deferring to domestic justice. But political development within Sudan is frozen, and there is evidence that the ICC arrest warrant influenced Bashir against any thought of stepping down in case it made him vulnerable to extradition.⁴⁹

In the absence of a political transition in Sudan, the ICC has seemed powerless to make any headway in securing justice for Darfur's many victims. The only suspects who have appeared before the Court are three rebel fighters and it seems likely that none of their cases will reach trial. Sudan's government has refused any co-operation with the ICC, and made no meaningful attempts to hold government-

47 Sarah Nouwen, "Darfur", ECFR, November 2013, available at <http://www.ecfr.eu/ijp/case/sudan> (hereafter, "Nouwen, 'Darfur'"); Bosco, *Rough Justice*, p. 109.

48 Nouwen, "Darfur", pp. 9-10.

49 Nouwen, "Darfur", p. 5.

backed forces accountable through domestic processes. President Bashir has been forced to restrict his travel significantly to avoid the risk of arrest, though he has been welcomed in some countries that are parties to the ICC as well as several that are not.⁵⁰ But beyond shunning Bashir, the countries that supported Sudan's referral to the ICC have done little to punish Sudan for its lack of co-operation, despite a series of increasingly forceful complaints from the ICC's prosecutor. Nor have they exacted consequences from countries that fail to enforce the arrest warrant against Sudan's president.

The UNSC's referral of Libya to the ICC in 2011, after Colonel Gaddafi responded with force to a wave of protests that then became a full-scale uprising, was framed in part as an attempt to prevent further atrocities. The prosecutor moved very quickly to issue arrest warrants – evidently in the hope that the Court could prove its usefulness in the course of an active conflict. However, there is little evidence that the ICC's involvement deterred atrocities on either side. Nonetheless, the Court appears to have had an impact on the calculations of both parties to the conflict. As Priscilla Hayner writes in her case study, opposition fighters are convinced that the arrest warrants issued against Gaddafi and his associates added to his sense of isolation and helped drive him to fight to the end.⁵¹ It is unclear whether peace talks were ever a serious option, but some efforts at negotiation were made (notably by the African Union) and members of the opposition regarded the indictments as an impediment to getting Gaddafi to leave power.⁵²

The attitude of Western countries participating in the military campaign against Gaddafi would have been influential in determining whether peace negotiations took off. In the summer of 2011, when the rebels' military campaign appeared to falter and a drawn-out conflict seemed likely, both British and French officials floated the idea of a peace agreement in which Gaddafi left power but remained in Libya.⁵³ Assuming such an agreement involved a guarantee that he would not be prosecuted, it would have put Libya in violation of its obligations to the ICC. After the conflict, there was little effort to press Libya to co-operate with the Court

⁵⁰ Beth van Schaack, "President Bashir is no Michelangelo", *Just Security*, 30 January 2014, available at <http://justsecurity.org/6552/president-bashir-michelangelo/>.

⁵¹ Priscilla Hayner, "Libya: The ICC Enters During War", ECFR, November 2013, p. 5, available at <http://www.ecfr.eu/ijp/case/libya> (hereafter, Hayner, "Libya").

⁵² Hayner, "Libya", p. 3.

⁵³ William Booth, "Gaddafi could possibly stay in Libya, France says", *Washington Post*, 20 July 2011, available at http://www.washingtonpost.com/world/middle-east/france-gaddafi-could-possibly-stay-in-libya/2011/07/20/gIQAaMISQL_story.html; Theo Usherwood, "Gaddafi must relinquish power, says William Hague", *Independent*, 26 July 2011, available at <http://www.independent.co.uk/news/world/africa/gaddafi-must-relinquish-power-says-william-hague-2326152.html>.

and hand over Muammar Gaddafi's son, Saif al-Islam. Some Western officials privately expressed sympathy with the idea that Libya would naturally want to try its former rulers, but that it needed time to reach a position where that was possible. "Briefly a key element in the international response to Libya, the court now appeared peripheral," in the words of the political scientist David Bosco.⁵⁴

DR Congo, Afghanistan, and Yemen: Justice and flawed transitions

Anecdotal evidence suggests that in DR Congo, the ICC may have had at least some impact in reducing violence in some regions and raising awareness of international prohibitions on the use of child soldiers.⁵⁵ But the Court's involvement must be assessed against the wider background of repeated political agreements that have done little to isolate those responsible for crimes, or to create conditions in which they could be apprehended and prosecuted. The decision of the Congolese government to refer itself to the ICC in 2004 was prompted by a commitment to accountability in peace negotiations that formally ended Congo's civil war in 2002. But conflict has continued sporadically since then. The ICC has tried three people for crimes in DR Congo, and had some influence in providing a framework for domestic courts and tribunals. But, as the political analyst Laura Davis points out, overall prosecutions for serious crimes remain "pitifully low" and the power-sharing aspect of the country's political settlement "led to a political and military class dominated by belligerents and entrenching impunity for even the most egregious crimes firmly within the political and military institutions".⁵⁶

The most high-profile ICC case from DR Congo has been that of Bosco Ntaganda, a rebel leader from Eastern Congo against whom an arrest warrant was unsealed in 2008. Despite the warrant, Ntaganda was awarded a senior position in the country's armed forces in 2009. Congo's President Joseph Kabila justified his action by claiming that "in Congo, peace must come before justice".⁵⁷ Ntaganda later defected to join the M23 rebellion and eventually surrendered to the US Embassy in Rwanda, asking to be transferred to The Hague. His capitulation

⁵⁴ Bosco, *Rough Justice*, p. 171.

⁵⁵ "Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri", International Refugee Rights Initiative, January 2012, pp. 10-11, available at <http://www.refugee-rights.org/Assets/PDFs/2012/StepsTowardJusticeFinal.pdf>.

⁵⁶ Laura Davis, "The Democratic Republic of Congo", ECFR, November 2013, p. 5, available at http://www.ecfr.eu/ijp/case/dr_congo (hereafter, Davis, "DR Congo").

⁵⁷ David Smith, "Congo conflict: 'The Terminator' lives in luxury while peacekeepers look on", *Guardian*, 5 February 2010, available at <http://www.theguardian.com/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc>.

came as a result of internal divisions within M23; UN forces had never made any move to apprehend him and the Congolese army “was not strong enough to arrest him without external assistance”.⁵⁸

The problems caused by imperfect peace agreements concluded in constrained circumstances are also evident in cases where international justice has not formed part of the equation. In Afghanistan, the UN-sponsored Bonn Agreement in 2001, which was intended to launch a transition that would end decades of conflict, contained no provisions on accountability for international crimes. Negotiators had sought to include a requirement that no one responsible for such crimes should serve in the interim government or in a senior rank in the armed forces. However, this initiative foundered because of the lack of any mechanism for determining guilt, and because the US-led coalition’s support for armed groups meant that powerful military factions were already in control of most of the country.⁵⁹ Efforts to include a provision prohibiting the interim government from declaring an amnesty for war crimes or crimes against humanity were also dropped in the face of opposition from armed groups.⁶⁰ The EU nevertheless gave its support to the agreement.⁶¹

The Bonn Agreement did set up an Afghanistan Independent Human Rights Commission (AIHRC) with a mandate to pursue transitional justice. The AIHRC conducted a nationwide survey and drafted an Action Plan for Peace, Reconciliation, and Justice, which the government of President Hamid Karzai adopted in 2005. But by this point, as Marika Theros and Iavor Rangelov argue in their case study, a pattern had been set of “a transitional process driven by short-term security imperatives and accommodation of perpetrators, who became increasingly entrenched in the post-Taliban power structures”.⁶² President Karzai himself had taken to saying that peace was a necessity and justice a luxury that would have to wait.⁶³ The political power of former leaders of armed groups

⁵⁸ Davis, “DR Congo”, p. 3.

⁵⁹ Barnett R. Rubin, “Transitional justice and human rights in Afghanistan”, *International Affairs*, May 2003, p. 571, available at http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/Blanket%20File%20Import/inta_323.pdf (hereafter, Rubin, “Transitional justice”).

⁶⁰ Rubin, “Transitional justice”, pp. 571-573.

⁶¹ “Statement of Commissioner Patten on outcome of Bonn talks on Afghanistan”, European Commission, 5 December 2001, available at http://europa.eu/rapid/press-release_IP-01-1746_en.pdf.

⁶² Marika Theros and Iavor Rangelov, “Unjust disorder? Impunity and insecurity in post-2001 Afghanistan”, ECFR, November 2013, p. 2, available at <http://www.ecfr.eu/ijp/case/afghanistan> (hereafter, Theros and Rangelov, “Unjust disorder?”).

⁶³ Rubin, “Transitional justice”, p. 574.

allowed them to secure passage of an amnesty law in 2007, which came into force the following year. Against this background, initiatives on transitional justice have stalled.

There was a “consensus on caution” in Afghanistan at the time of the Bonn negotiations and during the following period, based on a widespread feeling that the political order was too fragile to support any significant measures to hold war criminals accountable.⁶⁴ Looking back, many people now argue that the failure to promote accountability and Afghanistan’s continuing instability have reinforced each other, linked by the country’s failure to develop credible state institutions that enforce the rule of law and operate in the national rather than factional interest.⁶⁵ Behind this, in turn, may have been the US-led coalition’s decision to intervene with a “light footprint” and outsource its security objectives to armed groups with questionable records.⁶⁶ What is clear is that the nature of Afghanistan’s political settlement has meant the passage of time has not opened greater scope for transitional justice and accountability, but rather, has reinforced a dynamic whereby the entrenchment in power of people responsible for human rights violations has prevented any reckoning with past crimes.

More recently, in November 2011 President Ali Abdullah Saleh of Yemen agreed to leave power under an agreement that required the country’s parliament to pass a law granting immunity from domestic prosecution to him and members of his regime. The agreement was brokered by the Gulf Cooperation Council (GCC) with the backing of the US, the UK, and the EU; not only did these countries fail to push for an international justice benchmark, they clearly lent their support to a process that at least deferred any domestic accountability. (The UN, which negotiated a set of implementation mechanisms to facilitate the final signing of the agreement, issued a statement afterwards noting that international law prohibited amnesties for serious international crimes.)⁶⁷

⁶⁴ Rubin, “Transitional justice”, p. 575.

⁶⁵ Theros and Rangelov, “Unjust disorder?”, p. 4.

⁶⁶ This comment was made by a participant at a conference on “International Justice and the Prevention of Atrocities” organised by ECFR and the Hague Institute for Global Justice in November 2013. See Tessa Alleblas and Janek Lasocki, “International Justice and the Prevention of Atrocities: Summary of Conference Proceedings”, ECFR, November 2013, available at http://www.ecfr.eu/page/-/5_November_International_Justice_Conference_report.pdf.

⁶⁷ For an analysis of international reaction to the amnesty provisions, see Beth Van Schaack, “Yemen Immunity in Jeopardy?”, *Just Security*, 20 January 2014, available at <http://justsecurity.org/5975/yemen-immunity-jeopardy/>.

The motivation of outside powers in promoting the agreement, according to Ibrahim Sharqieh, was to try to create the conditions to restore stability in Yemen as quickly as possible, in line with the perceived security interests of outside countries.⁶⁸ President Saleh's consent was necessary to secure a quick agreement, and the amnesty was seen as an inevitable part of any deal to which Saleh would agree without further conflict. Moreover, the agreement was designed to end conflict between rival military factions, who were all linked to political groups that had participated in government under the former regime. None of these groups wished to press for any accounting process that would reach back to cover crimes in which they might have been implicated.

In this sense, the failure of the GCC agreement to deal effectively with the crimes of the old regime was part of a larger and more significant failure to implement any meaningful political transition; in Sharqieh's words, the settlement opted for "regime renovation over regime change".⁶⁹ Nevertheless, the GCC deal did create a mechanism for devising a new political settlement that might have greater legitimacy in the eyes of Yemen's people, in the form of a National Dialogue. The dialogue consisted of six working groups, including one devoted to transitional justice. This proved to be among the most contentious issues in the negotiations; the transitional justice group agreed a process of justice but undercut it by adding a proviso that nothing could go against the amnesty agreed by the national parliament in line with the GCC deal. It is not yet clear whether these agreements will hold. The transitional process in Yemen has been poised between a closed arrangement among existing elites and a genuinely open process that might achieve some national consensus. At the time of writing, however, the entire transition process in Yemen appears to be in jeopardy following the seizure of Sana'a by armed Houthi rebels.

This chapter has summarized a series of cases in which outside powers took a variety of different approaches to balancing justice and an end to violence. As these narratives have already made clear, the interplay between accountability and peace is often complex, and these accounts have only sketched some of the connections and tensions in each case. In the next chapter, the report turns to analyse more systematically the lessons that emerge from comparing these different experiences.

⁶⁸ Ibrahim Sharqieh, "International Intervention, Justice and Accountability in Yemen", ECFR, November 2013, p. 2, available at <http://www.ecfr.eu/ijp/case/yemen> (hereafter, Sharqieh, "Yemen").

⁶⁹ Sharqieh, "Yemen", p. 2.

Chapter 3

Comparative Lessons about Peace and Justice

As the review of past cases in the previous chapter makes clear, a defining feature of international justice is that it aspires to separate the drive for accountability from national political developments. In this way it differs from the related concept of transitional justice, where judicial processes and other measures are explicitly designed to fit within a context of political change.⁷⁰ By contrast, once international courts have obtained jurisdiction, their pursuit of accountability is supposed to follow its own judicial logic, independent of political circumstances on the ground. Tribunals have found themselves working for years in situations where conflict persists and regimes remain unreformed (Sudan); where there have been multiple peace agreements and sporadically continuing conflict (DR Congo); where conflicts have subsided without any peace agreement or meaningful accountability (Uganda); and where conflicts have concluded with the unconditional defeat and dismissal of the country's political leadership (Libya). In the case of Kenya, international justice has even worked in what could be described as a counter-transitional way, as the involvement of the ICC appears to have contributed to the electoral victory of presidential and vice-presidential candidates facing charges of crimes against humanity.

This chapter examines the comparative lessons that can be drawn from this range of situations about the interplay of justice and peace. First it assesses the evidence about the ways that international justice can affect the dynamics of conflicts: whether it is likely to deter crimes, and what impact it may be expected to have on the search for an end to the fighting. As part of this analysis, the chapter explores how states often seek to manage the tension between peace and justice through failing to support tribunals, and looks at the unresolved question of how much leeway international courts should give to national justice processes. Finally,

⁷⁰ In the words of Ruti Teitel, "The problem of transitional justice arises within the distinctive context of transition – a shift in political orders." Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), p. 5.

the chapter examines the factors that determine whether international courts that obtain jurisdiction during active conflicts succeed in the aim of delivering accountability for the most serious crimes.

The limited influence of courts

There is little evidence that the introduction of justice mechanisms into a conflict that is already underway can be expected to deter further atrocities in that conflict. In Kosovo the fact that the ICTY was already pursuing cases for earlier war crimes in the former Yugoslavia did not prevent Serbian forces from committing widespread crimes against civilians. The deterrent impact of the ICC appears weakest in situations referred to the Court by the UNSC, as in Darfur and Libya, where stakes in the conflict are already likely to be high and a pattern of criminal conduct already established. The balance of incentives best suited to deter criminal activity is most likely to be present where courts have jurisdiction prospectively, whereas referrals almost by definition take place after repeated serious crimes have already been committed.

Courts and tribunals have more often had an impact through underlining the isolation and illegitimate nature of the group that is seen as the primary target of their work. By throwing regimes or armed factions onto the defensive and reducing their international support, judicial bodies have at times prompted them to step up peace negotiations, as with the LRA in Uganda and arguably with Milosevic over Kosovo. In other cases, indictments or arrest warrants have made it easier to marginalise those responsible for atrocities in a way that opens the possibility of more constructive peace negotiations. The sidelining of Karadzic and Mladic assisted the Bosnian peace talks at Dayton, and the Special Court's indictment of Charles Taylor facilitated agreement on a peace settlement in Liberia.

Ultimately, though, these examples also suggest that the impact of international justice on the strategic decision-making of indicted war criminals operates within narrowly circumscribed limits. In none of these cases did a political or military leader who retained some room for manoeuvre enter a peace agreement that exposed him to the direct and imminent prospect of criminal prosecution. If the threat of prosecution acts as a spur to seek an end to conflict, this is only true where a settlement is possible in which the threat of prosecution is lifted – an objective which the internal logic of international justice generally forbids. In practice, international justice and peace agreements have proved most compatible under a set of clearly defined circumstances: where the most powerful leaders on each

side of the conflict are not directly linked to atrocity crimes, and can be induced to cut off their associates who are implicated; where targeted leaders can end military campaigns while retaining power, as President Milosevic did in Serbia; and where criminal suspects with political or military power can be persuaded that they will find a refuge beyond the reach of justice, as Charles Taylor believed he had found in Nigeria.

Complications of peace and justice

In other cases, the involvement of international tribunals presents at least a potential complication to efforts to end conflicts or atrocity campaigns through political means. International justice mechanisms can reduce the incentive for fighting groups to reach a settlement and constrain the potential role of intermediary states and international organisations. It seems clear that the involvement of the ICC in Uganda contributed to Joseph Kony's decision to turn his back on the Juba peace agreement. In Darfur, the ICC's arrest warrant against President Bashir has prevented states that are party to the Court from engaging actively in diplomatic efforts to broker a peace agreement between the Sudanese government and rebel forces. In both Sudan and Libya, the involvement of the ICC also appears to have affected the attitude of parties to the conflict, encouraging them to adopt more entrenched positions.

Nevertheless, it is hard to identify cases in which the involvement of international tribunals has definitively prevented deals to end conflicts or campaigns of atrocity. In part this is because we cannot know whether agreements would have been reached and upheld if courts had not been involved. But it is also because states have often been willing to disregard courts' demands when other interests are at stake. In Libya, both France and the UK appeared ready to support a settlement in which ICC arrest warrants against Gaddafi were not enforced. Even after the rebels' victory, there has been little appetite among Libya's international partners to press the country's new rulers to comply with the ICC's requests for co-operation. In Sudan, while Western countries have limited their contact with President Bashir, the UNSC has not taken any action to punish the country for its defiance of the ICC or to sanction other countries that receive Bashir on their territory; for foreign ministries, it was more important to encourage the regime's acceptance of the secession of South Sudan.⁷¹ In DR Congo, international

⁷¹ Bosco, *Rough Justice*, pp. 157-159.

forces did nothing to arrest Bosco Ntaganda and effectively turned a blind eye to President Kabila's decision to incorporate him into the Congolese armed forces between 2009 and 2012.

It would be easy to condemn these instances of non-cooperation as representing simply inconstancy and lack of political will. However, they can also be understood in a different way: non-cooperation often functions as a form of safety valve that outside powers use to regulate the tensions they perceive between peace and justice in a particular situation, especially when there are limits on the extent to which they feel able (or wish) to intervene. A refusal to give their full backing to the ICC or other tribunals can be a way for states to balance the conflicting objectives they have in responding to conflict overseas, even as the same states often deny or minimise these tensions in the context of UNSC referrals. It has proved all too tempting for states to give jurisdiction to courts without contemplating their long-term impact, and to distance themselves from the court's requests when tensions emerge between the demands of justice and other political goals. In this way, the risk of bringing international courts into conflict situations is not only that they will complicate the effort to end atrocities, but equally that domestic groups and foreign powers will reach a settlement in which the obligations imposed by the court are ignored or given at best a low priority.

The tendency of Western states to accept peace agreements without strong justice provisions appears particularly marked in cases where they are reluctant to engage deeply in addressing humanitarian crises or have other security interests at stake. Rather than a binary tension between peace and justice, there is often a triangular equation between peace, justice, and the limits of international involvement. It is notable that the Rome Statute of the ICC was the product of a historical moment in the late 1990s when international faith in the idea of humanitarian intervention was at its height. In the intervening years, al Qaeda's attacks on the US have led to an increased priority on security co-operation with partner regimes, and Western reluctance to engage in extended military interventions or "peacemaking" missions overseas has grown. These conditions prompted the US and the EU to accept settlements in Afghanistan and Yemen that preserved the power of elite groups with no interest in pursuing accountability, and influenced the attitudes of international forces in Libya, DR Congo, and elsewhere.

The Central African Republic (CAR) is likely to provide the next test of the ability of a UN-mandated peacekeeping operation to support accountability in a fragile security climate. A cycle of large-scale killing between predominantly Christian and Muslim groups raged in CAR between early 2013 and mid-

2014. Since July 2014, a ceasefire agreement has notionally been in effect, though widespread violence continues. The ICC prosecutor recently opened an investigation into possible crimes in CAR since 2012, following a self-referral by the country's president. In addition, the government signed a memorandum of understanding with the UN in August 2014 to establish a hybrid domestic-international Special Criminal Court to try those who do not come before the ICC. However, the ceasefire agreement contained no provisions on justice. The UN's Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA) has a broad mandate, including to "support and work with the Transitional Authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity".⁷² But there are doubts as to whether the force will have the resources and commitment to meet this objective at a time when even achieving an end to the fighting remains a huge challenge.⁷³

International and national justice

Another key factor in determining how far the demands of international courts conflict with negotiated peace settlements is the scope that these courts allow for national justice mechanisms that fall short of full-blown criminal prosecution. If peace agreements include measures such as conditional amnesties, truth commissions, trials with reduced sentences, or alternative justice mechanisms, under what circumstances should international courts defer to them? It is a striking feature of the ICC system as it stands that the relationship between international and domestic justice remains imprecisely defined. The Rome Statute is based on the principle of complementarity: according to Article 17, a case is inadmissible before the Court if it is being investigated or prosecuted by a state that has jurisdiction, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". Another provision of the Statute, Article 53, provides that the prosecutor may decide not to proceed with an investigation or prosecution if she decides it is not in the interests of justice.

There is little consensus on how these provisions should be interpreted. In practice, they give the Court and above all its prosecutor wide discretion in deciding how far to defer to national processes. Until there is a more developed

⁷² "Security Council Authorizes United Nations Multidimensional Integrated Stabilization Mission in Central African Republic", United Nations Security Council, 10 April 2014, available at <http://www.un.org/News/Press/docs/2014/sc11349.doc.htm>.

⁷³ Benedict Moran, "Hanging by a Thread", *Foreign Policy*, 22 September 2014, available at http://www.foreignpolicy.com/articles/2014/09/22/hanging_by_a_thread_united_nations_central_african_republic.

record of how the Court has chosen to interpret them, it is difficult to speak with confidence about this central aspect of the relationship between international justice and national political decision-making. One detailed scholarly analysis concluded that the ICC's legal framework should be understood to prohibit unconditional or blanket amnesties, but to allow at least some amnesties that are conditional on certain acts from the people who benefit from them (such as testifying before a truth and reconciliation commission), especially when they retain some possibility of prosecution or other sanctions.⁷⁴ This interpretation would bring the requirements of the ICC system closer to one influential strand of international opinion; for instance, the Belfast Guidelines on Amnesty and Accountability formulated in 2013 by an independent group of human rights and conflict resolution experts propose that "amnesties are more likely to be viewed as legitimate where they are primarily designed to create institutional and security conditions for the sustainable protection of human rights, and require individual offenders to engage with measures to ensure truth, accountability, and reparations."⁷⁵

In 2007, the ICC's Office of the Prosecutor issued a policy paper on the "interests of justice" in which it said that a decision not to proceed on these grounds should be a last resort, and made clear that it had not yet halted an investigation or prosecution for this reason. On the other hand, the ICC's first prosecutor, Luis Moreno Ocampo, used the complementarity doctrine to justify his delay in opening a full investigation into the situation in Colombia, at one point saying that a national investigation was under way and "therefore I should not interfere there".⁷⁶ The prosecutor's decision has been criticised in light of the limited results of the procedures set out in Colombia's 2005 Justice and Peace Law; one study in 2011 concluded that "Colombia [...] struggles with significant difficulties to comply with the prerequisites under Art. 17".⁷⁷ Some analysts have suggested that

74 Kai Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC", in Kai Ambos, Judith Large, and Marieke Wierda (eds.), *Building a Future on Peace and Justice* (Berlin: Springer, 2009).

75 "The Belfast Guidelines on Amnesty and Accountability", Transitional Justice Institute, University of Ulster, October 2013, pp. 9-10, available at <http://www.transitionaljustice.ulster.ac.uk/documents/TheBelfastGuidelinesonAmnestyandAccountability.pdf>.

76 "Pursuing International Justice: A Conversation with Luis Moreno-Ocampo", Council on Foreign Relations, 5 February 2010, available at <http://www.cfr.org/human-rights/pursuing-international-justice-conversation-luis-moreno-ocampo/p21418>.

77 Kai Ambos and Florian Huber, "The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?", Paper presented at ICC OTP-NGO roundtable, The Hague, 19-20 October 2010, p. 12, available at <http://www.icc-cpi.int/NR/rdonlyres/7EDB95A1-BE49-4BA7-A64A-7D9DC8F57E98/282850/civil1.pdf>.

Moreno Ocampo's reluctance to involve the ICC in Colombia may have been due to a desire not to antagonise the US.⁷⁸

However, since the beginning of serious peace negotiations and the passage in 2012 of a constitutional amendment on transitional justice (the Legal Framework for Peace), the ICC's non-intervention has come to seem advantageous.⁷⁹ The threat of ICC action has acted to strengthen the hand of those groups within Colombian society pushing for a comprehensive approach to transitional justice, yet without the chilling effect that arrest warrants against high-level rebel leaders might have had.⁸⁰ In this way, the ICC's ability to act flexibly to accommodate peace talks while still lending international weight to the domestic constituency for justice seems at its highest in the period before a formal investigation and prosecutions have begun, especially while the Court's jurisprudence on complementarity and the interests of justice remains undeveloped. However, in order for this interaction between international and national justice to develop fruitfully, the ICC will probably need to accept transitional justice measures that fall short of prosecutions with long-term prison sentences.

There may be other occasions where the ICC's preliminary investigation mechanism can be used in such a way, although it seems applicable only in a narrow range of circumstances where some transitional justice process is already being formulated when the Court obtains jurisdiction.

The Rome Statute system includes another provision explicitly designed to provide some leeway for situations in which ICC investigations may be a threat to peace. Under Article 16, the UNSC acting under Chapter VII of the UN Charter has the power to delay any ICC investigation or prosecution for one year on a renewable basis. Many supporters of international justice are opposed on principle to any use of this provision, believing that it undermines the legitimacy of the ICC as an

⁷⁸ Bosco, *Rough Justice*, pp. 123, 186.

⁷⁹ For accounts of the transitional justice process in Colombia see "Transitional Justice and Colombia's Peace Talks", International Crisis Group, 29 August 2013, available at <http://www.crisisgroup.org/~media/Files/latin-america/colombia/049-transitional-justice-and-colombia-s-peace-talks.pdf>, and Felipe Gómez Isa, "Justice, truth and reparation in the Colombian peace process", NOREF, April 2013, available at http://peacebuilding.no/var/ezflow_site/storage/original/application/5e7c839d7cf77846086b6065c72d13c5.pdf.

⁸⁰ For a similar suggestion, see Christine Björk, "The ICC Preliminary Examination in Colombia: A Mechanism to Support or Overthrow the Peace Negotiations Between the Government and FARC?", *Cambridge Journal of International and Comparative Law*, 13 June 2013, available at <http://cjcil.org.uk/2013/06/13/the-icc-preliminary-examination-in-colombia-a-mechanism-to-support-or-overthrow-the-peace-negotiations-between-the-government-and-farc-2/>

independent judiciary.⁸¹ The only time that the UNSC has invoked Article 16 was to give immunity to all UN peacekeepers from non-party states at the request of the US, which certainly appears at odds with the spirit of the Rome Statute. In other cases where states have requested deferrals, in particular over Darfur and Kenya, the motivation seemed more to avoid political difficulties over the prosecution of a head of state rather than to preserve international peace and security. But if used in the case of a genuine peace process, Article 16 seems in keeping with the distribution of responsibilities within the international system – and is perhaps more honest than leaving such political questions to be addressed without explicit acknowledgement by the ICC under complementarity or the interests of justice. It is not clear, however, how far the suspension of an investigation for one year without a guarantee of renewal would be able to alter the political calculations of high officials or rebel leaders facing the likelihood of future trials.

The impact of transition on justice

If the operation of international courts is supposed to disregard national politics in the country under investigation, it is nevertheless clear that political developments on the ground often have a decisive impact on whether or not efforts at accountability are successful. The chances that indicted individuals will face justice either before international tribunals or national courts are essentially determined in most cases by the dynamics of the conflict. Suspects linked to a regime in power or to an active rebel movement are rarely brought to trial without a reversal in their political fortunes.

In former Yugoslavia, although the ICTY had been set up years before, it was only after peacekeeping forces were deployed under the Dayton Agreement that defendants were handed over to the tribunal in any significant numbers. Milosevic only faced trial internationally after a political transition in Serbia. The absence of any political transition in Sudan has meant the ICC has been unable to obtain jurisdiction over any regime-linked defendants, nor has there been any meaningful domestic accountability. In DR Congo, it was only when Bosco Ntaganda lost the support of the M23 rebel movement that he surrendered himself for transfer to the ICC. In the absence of political change, international

⁸¹ See, for instance, the comments reported in the meeting summary, “The UN Security Council and the International Criminal Court”, Chatham House, 16 March 2012, p. 14, available at <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/160312summary.pdf>.

courts risk a loss of credibility through being able to obtain custody only of minor figures, not of those most responsible for the atrocities that have taken place.

Even when a transition has taken place, the nature of the peace agreement is often decisive as to what degree of accountability can be achieved. And that, in turn, depends on the balance of power in society when transitional arrangements are made. It also depends on the degree to which international actors are willing to engage and on the nature of their agenda. In DR Congo, the ICC's involvement has proved relatively ineffective in securing justice or in motivating significant domestic advances in the rule of law, because the peace settlement did little to disempower the leaders of armed groups whose interests were not served by a transitional justice programme. In Libya, the ICC has been unable to obtain custody of Saif Gaddafi or promote a meaningful national trial because of the absence of an effective domestic rule of law. In Sierra Leone, it was outside intervention led by the UK that allowed the government to regain control of the country and created an environment in which the Special Court could deliver justice.

Correspondingly, in situations where justice has been largely left to one side, as in Afghanistan and Yemen, this reflects not only the absence of a binding international framework but also the collective choice of different factions within the country and of international powers. The balance of political forces and the political structures of transition are the most decisive factors in determining accountability, whether or not international courts have jurisdiction. But experience shows that circumstances can change over time, allowing greater scope for accountability in later years than existed in the aftermath of conflict. After a slow start, the ICTY ultimately gained custody of everyone it had indicted, as the political situation in the former Yugoslav countries evolved. While the dynamics of Afghan politics seem stacked against accountability, there may still be a chance for some limited but meaningful transitional justice process in Yemen. A central lesson of past cases is that, where transitional justice cannot be implemented at once, outside powers should ensure that transitional agreements leave as much space open as possible for the pursuit of justice in later years. It can make a critical difference both to accountability and peace whether the settlement strengthens or weakens the position of people with a vested interest against accountability. Whether or not trials of high-level officials or military leaders are carried out, measures such as vetting for political or military office remain enormously important in achieving sustainable peace and helping to re-establish the rule of law.

Without political transition or military defeat, giving jurisdiction to international courts is primarily a credit note for future action. The role of courts in such cases is to set a benchmark for justice, but they cannot themselves bring forward the moment of transition when justice is generally delivered. Some people have argued that even when they evade justice, the stigmatisation of people indicted for war crimes, such as Sudan's President Bashir, is an achievement in itself.⁸² And there are examples, such as the former Yugoslavia, where the existence of an international tribunal acted over the longer term to implement a degree of accountability that would not have been achieved otherwise; it is impossible to imagine that the Dayton Agreement would have set up any comparable justice process if the ICTY had not already been in place.

But the circumstances that allowed the ICTY ultimately to achieve what it did in the former Yugoslavia – in particular, the level of international engagement and the incentive of EU membership – are unlikely to be often repeated. Against the hope that international courts will exert such a standard-setting effect over the long term must be set the risk that they will languish for years without obtaining custody of the major defendants they seek and that they will receive little support from major powers. Conversely, in situations where a transition takes place and a successor regime actively wants to pursue accountability, it is not necessarily clear that there would be an advantage in having a tribunal already established. The successor regime could in any case accept the jurisdiction of the ICC retrospectively or set up a national or hybrid court itself. In Libya, the ICC has been unable to influence domestic processes beyond the limits set by the national balance of forces and by international pressure. In such circumstances, the most significant step that international bodies or local NGOs can take during the conflict may be to compile a dossier of evidence that could provide the basis for future prosecutions, in whatever forum these ultimately take place.

While judgements about the credibility of international courts are inevitably subjective, there are good reasons to think that the ICC will not benefit if it continues to be handed situations in which it is unable to carry the most significant cases to completion. Given the Court's fledgling status and precarious standing, the damage to its credibility under such circumstances may be judged to outweigh the benefits of stigmatising figures like President Bashir against whom arrest warrants are issued. This is especially true in situations where the Court is left largely isolated by the world's major powers, even though they imposed jurisdiction on it in the first place.

Chapter 4

Guidelines for Future Policy

It is plausible to think that, under ideal conditions, justice provides the best foundation for sustainable peace after conflicts involving mass atrocities. But policymakers confronting urgent humanitarian crises must work in far from ideal circumstances, weighing the options that are available given the balance of forces on the ground and the limited willingness and ability of outsiders to get involved. There is no question in today's world that justice for the worst international crimes is a valuable objective to pursue. But difficult choices between justice and other humanitarian goals often cannot be wished away.

Recent years have seen the emergence of a new global architecture of international justice, centred on the ICC. The EU has played a leading part in this enterprise and has a strong stake in its continued flourishing as an expression of the expanding global rule of law. But there are two possible visions for the next phase of its development. One is a more modest conception of a system that expands its reach primarily through voluntary agreement, as states become party to the ICC or agree to the jurisdiction of the ICC or hybrid courts as part of transitional settlements. Another more ambitious vision would see the continued use of international justice as a form of global legal interventionism, with the UNSC imposing jurisdiction on countries that would not otherwise accept it.

A central message of this report is that policy decisions in these areas must be taken together as part of a consistent and integrated Western response to outbreaks of mass violence. The ICC or other more targeted courts cannot be left alone to bear the burden of shifting the world toward greater respect for the rule of law. State policy on international justice must reflect a wider vision of how to respond to conflicts involving the slaughter of civilians or other grave crimes. There is no point in expecting great achievements from international courts if the policy of the world's leading powers – above all Europe and the US – is not coherent with their efforts. Without such alignment, courts may be left blocking

compromise peace agreements that the West would otherwise hasten to accept or, more likely, be sidelined as an inconvenience when it is time for a deal to be struck. Or they may be left isolated as states adjust to a status quo in which suspected war criminals remain beyond the reach of justice. Nor can the ICC hope to establish itself as a credible and independent judicial institution if the UNSC pursues a policy of referral that is clearly shaped by the political interests of its permanent members, especially when three of those five members are not parties to the Court.

The best approach to the future of international justice at this critical moment would be one that consolidates and reinforces it by focusing on those tasks and objectives which courts are most able to deliver and where they are most likely to receive international support for their work. This suggests a period of moderation, relying primarily on states' voluntary adherence to the Rome Statute and the inclusion of transitional justice (including an international dimension where appropriate) in negotiated political settlements. The UNSC should reserve the use of referrals for exceptional circumstances in which they are not likely to present an obstacle to otherwise desirable political settlements.

As Kenya, Uganda, and the Democratic Republic of Congo (and perhaps soon the Central African Republic) show, difficult questions can arise even in the case of states that are party to the ICC. In such cases, European and other states must try to pick their way through the different demands with which they are faced, while avoiding any violations of their obligations as parties to the ICC or, more broadly, as supporters of the principle of justice. But referrals are a discretionary addition to the burdens on the Court and raise particularly acute problems of co-operation against a background of guaranteed host state hostility. Moreover, in such cases, it is particularly jarring if the world's leading states fail to support the ICC, since it was through the UNSC that the Court obtained jurisdiction.

In more detail, the following guidelines could be considered as a basis for future policy:

- States should avoid the use of international justice as an instrumental tool to affect the dynamics of conflict. There is little evidence that courts can deter atrocities when they are given jurisdiction after mass violence has already started. The effects of justice mechanisms on the outlook of armed groups or criminal regimes are not likely to hasten an end to atrocities except on rare and unpredictable occasions. Moreover, the

selective use of justice as a political tool undermines the independence and legitimacy of the ICC and international justice as a whole.

- For similar reasons, it is a mistake to make use of conditional or deferred referrals, where the jurisdiction of the ICC is triggered automatically if certain conditions are not met. These attempts are likely to be based on an overestimation of the Court's probable impact on the ground, and risk bringing the Court into conflicts without a clear judgement that it is best to do so.
- Political sanctions should be considered instead of justice mechanisms when states want to influence the behaviour of political or military leaders overseas. Measures such as asset freezes and financial sanctions are more likely to alter the political calculations of the individuals they target than is referring situations to international courts. Crucially, political sanctions can be reversed, offering an incentive to change; judicial investigations cannot be ended for political reasons.
- The UNSC should consider very carefully before referring further situations to the ICC at a time when the Court is the focus of such intense global political debate. Referrals should only be undertaken when they are clearly justified by an extraordinary level of crimes, and where the referral will not seem anomalous in comparison to other situations that have not been referred. More importantly, states that support referrals should do so with a clear vision that the Court's role will not stand in the way of a desired and anticipated end to the conflict, and with a commitment not to later endorse political initiatives in which the demands of the Court are ignored. The situation in Syria clearly meets the first requirement; states must also consider whether it meets the second.
- The UNSC should be wary of any idea that referrals will be helpful in establishing the credibility of the ICC, as it appeared to believe in the Darfur referral in 2005. This is especially true when referrals are not backed with any additional funding for the Court, and when they are framed to exclude jurisdiction over citizens of third states.⁸³
- States should consider the use of Article 16 deferrals under the Rome Statute to be legitimate in situations where investigations or prosecutions appear genuinely to threaten peace negotiations. In

these cases, deferrals fit within the division of responsibilities under the current international system. But states should avoid the use of deferrals where meaningful peace talks are not underway, or where they are simply designed to defuse political controversy.

- The principle that political leaders are not above accountability for international crimes should be firmly defended.
- States should sponsor further discussion among lawyers and independent scholars about how provisions in the Rome Statute on complementarity and the interests of justice should be interpreted, although without giving the impression of interfering with the Court's independence. The ICC and other courts should build a record of decision-making that is reasonably broad in interpreting these provisions and accommodating of national transitional justice processes. This would bring the ICC into line with a standard that states would also be able to endorse. At the same time, the prosecutor should avoid using her discretion for purely political reasons.
- Similarly, states should try as far as possible to support the same global standard by avoiding any endorsement of unconditional national amnesties and by using their influence to ensure the requests of courts are honoured.
- The framing of transitional arrangements or peace agreements is often the single most important factor in determining whether accountability for serious crimes is achieved. In peace processes where prosecutions of the most serious offenders do not seem possible, states should make sure that space is left open for other measures of transitional justice, and ideally for the possibility of later prosecutions if circumstances change. In all cases they should look to include measures that isolate suspected war criminals from political and military power.
- Whether or not international justice mechanisms are active during a conflict, outside states should support moves to document serious

crimes committed by both sides, in order to compile evidence that could be used to ensure accountability in the future.

- States should set up internal cross-departmental working groups to meet on an ad hoc basis when decisions about the place of international justice in crisis response are being debated. This will ensure that policy decisions are based on a broad analysis of all relevant considerations, and help to promote greater consistency between decisions on international justice and other aspects of foreign policy.

These suggested guidelines would not remove the difficult choices that countries face in responding to conflicts and mass atrocities. But they might at least help to frame policies that achieve a credible balance between peace and accountability, and provide the best possible foundation for the continued pursuit of both these humanitarian objectives.

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