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Pursuing Justice in Ongoing Conflict – A discussion of Current Practice

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**PURSuing JUSTICE IN ONGOING CONFLICT:
A Discussion of Current Practice**

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EXECUTIVE SUMMARY

This study seeks to explore current practices in the pursuit of justice within a situation of active hostilities prior to a peace agreement, drawing on recent experiences in Afghanistan, Colombia, the DRC, Liberia, Sierra Leone, Sudan, Uganda, and the former Yugoslavia. In dealing specifically with the complex questions that arise from the exercise of *criminal* justice during conflict, the paper addresses considerations which govern the decisions of the international Prosecutor, in particular regarding the question of the timing of indictments. The paper also takes a thorough look at the view of various constituencies on the question of delivering justice in the context of ongoing conflict, such as the interests of victims, governments, the Security Council and other UN actors, regional organisations, humanitarian organisations, traditional leaders, and mediators. Finally, the paper highlights the challenge of conducting an investigation in a situation of ongoing conflict and elaborates on steps that can be undertaken to preserve justice options for the future. Throughout the paper, reference is made to the experience of the International Criminal Court which, at the moment, only has active investigations operating in contexts of ongoing conflict.

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PURSUING JUSTICE IN ONGOING CONFLICT: A Discussion of Current Practice¹

I. INTRODUCTION

In the past, it would have been unthinkable to pursue justice claims during an ongoing conflict. Wars are often attended by particularly severe forms of criminality, including the perpetration of war crimes, massive or systematic violations of human rights, crimes against humanity, and genocide. Apart from the fact that justice institutions may be inaccessible during active hostilities, many conflicts owe their origins to the fact that justice has not been dispensed fairly or independently. The demand for justice is often postponed to be dealt with (or more likely dismissed) at the negotiating table by those who have committed violations. Those whose rights have been violated often find no place at that table, and their views are frequently not heard. Where justice is implemented, it is usually within a post-conflict context or part of a transition, as was the case in Argentina.

But the past ten years have seen a dramatic new development in the pursuit of justice in times of ongoing armed conflict, with the emergence of international jurisdictions. The first tribunal to be established in a situation of ongoing conflict was the International Criminal Tribunal for the former Yugoslavia (ICTY). Subsequent international jurisdictions established during conflicts have included the Special Court for Sierra Leone (SCSL) and, particularly, the International Criminal Court (ICC). The ICC has issued arrest warrants in at least three ongoing conflicts, including in Uganda, the Democratic Republic of the Congo (DRC), and the Sudan.²

The implications for tensions between peace and justice are obvious. First, there is the question of the legitimacy and accountability of the international prosecutor. What are the experiences to date? How should decisions on tensions be made? What positions have been taken by key stake holders, including victims, and what is their role? What have been the opinions of the UN Security Council and regional organizations? How do these link or clash with those of organizations on the ground, such as humanitarian organizations and traditional and religious leaders? How should states' own efforts to deliver justice, such as the Justice and Peace Law in Colombia, be evaluated, particularly if they seek to meet the "complementarity" threshold of the Rome Statute?

On the other hand, in the absence of an international prosecutor, we need to ask if it is possible to investigate in a situation of ongoing conflict, and what steps might assist in preserving justice options now or in the future. What are the technical dimensions of investigations in situations of ongoing conflict?

This paper sets out to explore current practices in the pursuit of justice within situations of active hostilities before a peace agreement—drawing on recent experiences in Afghanistan, Colombia, the DRC, Liberia, Sierra Leone, Sudan, Uganda, and the former Yugoslavia. The paper deals specifically with the exercise of criminal justice during a conflict; although some of the techniques aimed at preserving future justice options also have obvious utility for other transitional justice mechanisms, such as truth commissions and reparations.

¹This paper was drafted in May 2007 by the Prosecutions Program of the International Center for Transitional Justice, with input by Marieke Wierda, Thomas Unger, Richard Bailey, Cecile Aptel, Abdul Tejan-Cole and Caitlin Reiger.

² This analysis does not deal with the case of Iraq and the work of the Iraqi High Tribunal. The ICTJ has contributed extensively to monitoring the trials of Saddam Hussein and other senior Ba'athists in Iraq, but we consider the circumstances of those trials so unique in terms of problems of security, legitimacy and politicization, that its lessons are also not easily applied elsewhere to date.

II. CONSIDERATIONS GOVERNING THE WORK OF THE INTERNATIONAL PROSECUTOR

A. Early Examples: the ICTY and the Special Court for Sierra Leone

International prosecutors usually have a wider scope of investigative and prosecutorial discretion than national systems, depending on limitations on jurisdiction and any other factors reflected in the statutes of their jurisdictions.³ However, they operate in a complex environment. National courts are closer to affected populations and better equipped to understand the background that led to the commission of crimes. Their legitimacy may be less in doubt, while international jurisdictions may face a constant struggle for legitimacy and comprehension by local populations. The issue of how to communicate with the latter is crucial in a situation of ongoing conflict.

Within these limitations, the early prosecutors of the ICTY have displayed a strict view of their obligation to prosecute. For instance, Richard Goldstone has recently written that when he chose to indict Karadžić and Mladić he believed that the Security Council had mandated him (under Chapter VII of the UN Statute) to investigate and prosecute serious violations of humanitarian law in the former Yugoslavia. As a result, he had no option but to indict because the potential indictees were participating in peace talks.⁴ As he put it, “our duty was clear.”⁵ In dealing with the argument as to whether prolonged conflict could lead to the commission of additional crimes, Goldstone said:

A peace accepted by society with the willingness and ability to heal, with the willingness and capacity to move itself beyond the abuses of the past, is the only really viable peace. Such is the peace the international community should be seeking to promote. A peace masterminded by and in order to accommodate the concerns of vicious war criminals defiant of all fundamental international law prescriptions or norms is no such effective or enduring peace.⁶

Likewise, at the press conference to announce the indictment of Slobodan Milošević, Louis Arbour said:

I do not think that it is appropriate for politicians—before and after the fact—to reflect on whether they think the indictment came at a good time; whether it is helpful to a peace process. This is a legal, judicial process. The appropriate course of action is for politicians to take this indictment into account. It was not for me to take their efforts into account in deciding whether to bring an indictment, and at what particular time.⁷

³ There may be limitations on subject matter and temporal or territorial jurisdiction. Furthermore, the current legal framework is limited in its ability to address the humanitarian consequences of conflict, such as mass displacement, death from disease or other humanitarian circumstances in displacement camps, or the violation of social and economic rights. Temporal limitations are usually framed by political decision, and may seem particularly arbitrary. Other limitations may include a reference to “those bearing the greatest responsibility,” as was the case in Sierra Leone, or references to “gravity” as essential to case selection, as found in the Rome Statute.

⁴ In the period leading up to the issue of the indictment, Goldstone was under close scrutiny, particularly by the UN Secretary General Boutros-Ghali. On various occasions, the Secretary General voiced his disquiet about the decision to indict Karadzic and Mladic while the war was still being fought. He did not, however, attempt to intervene. See Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, 2000, 103. The media too were initially critical of the fact that only the “small fish” had been indicted and asked specifically for an indictment against Karadzic and Mladic, Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, 107.

⁵ G. J. Bass, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals*, 2003, 7.

⁶ Richard J. Goldstone, “Bringing War Criminals to Justice during Ongoing War,” in J. Moore, ed., *Hard Choices, Moral Dilemmas in Humanitarian Interventions* (Lanham, MD, Rowman & Littlefield, 1998), 198.

⁷ Coté, Luc. *Reflections on the Exercise of Final Discretion in International Criminal Law*, JICL, 2005, 9.

Nevertheless, it is clear that prosecutors may have discretion beyond that which they care to admit.⁸ Prosecutors live in a political reality and must use their discretion to make certain choices. In doing so, they may choose to consider the views of important stakeholders. What considerations should govern their decisions? To examine this question in more detail, it is instructive to study the exercise of discretion in the timing of indictments.

B. Considerations Governing the Timing of Indictments

The debate on timing tends to focus on two interrelated concerns. First, could indictments during conflict hinder justice and prolong conflict and suffering—by precluding otherwise optimal political arrangements for peaceful transition to a more just society in exchange for non-prosecutorial alternatives? Second, could indictments possibly have positive effects? Might they deter political actors from expediency when insistence on prosecution would ultimately prove preferable? Can they deter existing or prospective war criminals engaged in the conflict from future crimes? In other words, could early indictment provide a sort of conflict-specific deterrence that is distinct from the goal of general international deterrence?

History offers little empirical evidence to answer these questions, and existing cases caution against easy generalizations. The experience of the ICTY has given rise to two instances in particular that provoked debate about the timing of charging decisions. These are the indictments of self-styled Bosnian Serb President Radovan Karadžić and General Ratko Mladić in 1995 a few months before the Dayton peace negotiations, and the indictment of Yugoslav President Slobodan Milošević in 1999 during NATO's Operation Allied Force. Although some U.S. and European diplomats worried that the indictments would hinder peace negotiations in Bosnia, as mentioned former ICTY Prosecutor Justice Richard Goldstone has argued that the action was essential to peace because Karadžić and Mladić's subsequent exclusion from the negotiation of the historic Dayton peace accord facilitated the participation of Bosnia's Muslim-led government in those talks.⁹

Closer examination of these events, however, fails to yield clear answers. Goldstone's account that the indictments themselves resulted in the exclusion of these individuals from diplomatic negotiations is anecdotal and highly contingent. The chief negotiator for the Bosnian Serbs at Dayton was Serbia's Slobodan Milošević, who would later find himself on trial at the ICTY for crimes such as genocide and crimes against humanity—many of which were committed before Dayton. Croatian President Franjo Tuđman negotiated on behalf of both Croatia and the Bosnian Croat leadership, and provided the international community with an essential, if not wholly welcome, ally in opposing Milošević. But he too has been accused of war crimes and his death sparked much speculation on whether a sealed indictment existed in his case.

The underlying assumption rests on a moral distinction: that is, the international community should refuse to negotiate with indicted war criminals while continuing to deal with known criminals who have not faced the formality of indictment. This is certainly not a correct reading of the situation. Many scholars hold the view that the timing of the Karadžić and Mladić indictments had little if any effect on the resolution of the Bosnian conflict. The marginalization of the Bosnian Serbs resulted not from legal formalities, but from political calculation. It is possible that the indictments affected their political calculation.

Some have pointed out that the turning point in Bosnia was the result of US strategy and not the indictments. The US increasingly saw Karadžić and Mladić as useless interlocutors, in contrast to

⁸ Like his predecessors, David Crane of the Special Court for Sierra Leone also saw his mandate in narrow terms and stated at the time of the indictment of Charles Taylor: "Regarding the timing of our announcement, we reiterate our legal and moral obligations for unsealing the indictment. He has been indicted based on evidence, and [...] my job is to investigate and prosecute." See the press release of June 2003 by Prosecutor David Crane, available on-line at www.sc-sl.org/Press/prosecutor-060503.html (visited May 2007).

⁹ Richard J. Goldstone, *For Humanity, Reflections of a War Crimes Investigator*, 2000, 103.

the way they viewed Milošević. There is also no evidence, before or after these indictments, that the most critical actors in the international community saw amnesty for Karadžić or Mladić as an effective or realistic strategy for achieving peace.

The indictment of Milošević, four years later and in the middle of NATO's military intervention in Serbia, was the first ever international indictment of a sitting head of state. It provoked similar concerns that the action might inhibit peace negotiations.¹⁰ Although the indictment seemed to have little impact on his behavior during the conflict, Milošević later agreed to a ceasefire that included UN governance of Kosovo backed by NATO troops and contained no promise of amnesty for him. Milošević may have realized that an ICTY indictment had little meaning for his hold on power unless he was first removed by international intervention or domestic effort. It is unlikely that any deterrent threat arising from those prospects would be much amplified by the formal existence of an ICTY indictment. As it turned out, it took both a domestic revolution and extraordinary international pressure to deliver Milošević to The Hague.

As with the Karadžić and Mladić indictments, there is no concrete evidence that the Milošević indictment in and of itself scuttled any realistic effort to trade amnesty for peace. It is also unclear whether it would have deterred international political actors from following that route had it looked otherwise attractive, although it would have probably been difficult. An international indictment may frustrate amnesty deals. This leaves prosecutors with some difficult choices.

Chief Prosecutor David Crane of the Special Court for Sierra Leone faced a similar dilemma when he decided to unveil the sealed indictment of Liberian President Charles Taylor in 2003, while Taylor was attending peace talks in Ghana in August 2003. Although the Special Court for Sierra Leone had already issued the indictment under seal in March 2003, its existence had been the subject of speculation, based on the format of the public indictments in other related cases.¹¹ When Charles Taylor left Liberia to attend peace talks in Accra, Ghana, in August 2003, Crane publicly announced the indictment against him and the Ghanaian authorities were requested to arrest him. Rather than complying with this request and executing the warrant of arrest, Ghana chose to facilitate Taylor's speedy return to Liberia, prompting considerable criticism of the Special Court Prosecutor's timing. The decision to unseal the indictment at that time was clearly intended to reduce Taylor's ability to negotiate in Accra. However, a further explanation was that the Special Court was intended to have a limited lifespan of three years, and the Court was already more than a year into that timeframe when the indictment was unsealed.

But subsequent events also showed the inherently political nature of the exercise. Taylor's unexpected departure from the peace talks risked prolonging the conflict in Liberia, where government forces and the Liberians United for Reconciliation and Democracy (LURD) were engaged in a dangerous deadlock over the center of Liberia's capital, Monrovia (and success at Accra was far from certain). Indeed the conflict continued for another two months while the talks continued in Accra. Nevertheless, on August 11, 2003, Taylor was escorted out of Monrovia by three African leaders: Olusegun Obasanjo of Nigeria, Thabo Mbeki of South Africa, and Joaquim Chissano of Mozambique. It was alleged that, in return for relinquishing power, Taylor was promised asylum in Nigeria, arranged by the African Union (AU) and supported by the Economic

¹⁰ Of Milošević, it was said that the evidence against him would have been sufficient to issue an indictment, even before the Dayton peace accord. Lord Owen said in this respect: "When I met Goldstone or the people close to the Tribunal, I did not recommend against indicting Milosevic or the others. Such a recommendation would not have been wise, since I did not have a word to say about whether they must or must not issue an indictment. On the other hand, I explained to them the details of the negotiations, showed the difficulties [we faced]. The conclusion that they could easily draw was that it would not be very wise to indict the heads of state if we wanted to arrive at a negotiated peace between them and with them. I believe that Goldstone and [his successor Louise] Arbour had this pragmatic attitude, this common sense judgment, and the tribunal only indicted Milosevic when the prosecutor understood that he was no longer an obstacle, politically. Because after Kosovo there were no means to negotiate with Milosevic." P. Hazan, *La Justice à Face a la Guerre, de Nuremberg à La Haye*, Paris: Stok, 2000, 107.

¹¹ Indictees in special court indictments are referred to in capital letters and Charles Taylor was always referred to in capitals in the other indictments. Also, the indictments were numbered, starting with 2.

Community Of West African States (ECOWAS), the UN, the US, and UK governments. The offer of asylum was conditional on Taylor halting his political activities in Liberia and refraining from further interference in Liberian politics.¹²

While some may be of the view that Taylor's departure from the talks prolonged the conflict, it is clear that LURD's attack on Monrovia was preplanned and designed to put pressure on negotiations. Taylor's re-entry into that situation was not necessarily directly related to his indictment, as much would have depended on how long the talks would have lasted in any case.

By all accounts then, it is not possible to claim that the indictment alone forced Taylor out of office, although it probably contributed greatly. For instance, it eroded the potential of his demands to continue in the Presidency. Although international tribunals cannot force political actors to enforce their edicts, the existence of indictments may nevertheless influence public opinion and political thinking in ways that make otherwise appealing amnesty deals, whether formal or de facto, less palatable. Even those willing to promote amnesty in specific contexts must recognize that doing so involves a trade-off. Indictments issued during ongoing conflicts may serve to highlight the nature of this trade-off, encouraging political actors and the publics to which they are accountable to consider more deeply whether moral considerations truly justify forsaking prosecution in particular instances.

C. The International Criminal Court

The ICC is a permanent international criminal institution, which implies that it will usually be active during ongoing conflict. This is borne out in the current caseload of the Court, which deals only with situations of ongoing conflict.

This gives the ICC the difficult role of seeking to prevent ongoing crimes on the one hand, while simultaneously pursuing those who may be committing them. The ICC Statute is more explicit than the statutes of the ICTY or SCSL in recognizing the tensions between peace and justice. For instance, the Prosecutor is given limited discretion to apply to the Pre-Trial Chamber to halt an investigation or prosecution "in the interests of justice" (Art. 53 of the Rome Statute), although the pretrial chamber must make the decision. Also, the Security Council can choose to defer an investigation for a period of 12 months, renewable under Article 16. Finally, admissibility challenges can still be made under Article 19 if a peace process results in a change in the situation whereby a State finds itself in the position to be able genuinely to investigate or prosecute, and embarks on that course.

The ICC has already been confronted with several peace processes of varying promise. In Uganda, there have been two separate peace processes on which the ICC's actions have had the potential to impact: the first was the Betty Bigombe process, which peaked between December 2004 and February 2005. In this case, the ICC announced the opening of its investigation in January 2004. At times, when it looked as if the peace process had a chance of succeeding, the Prosecutor chose to proceed with his investigation. However, he adopted a "low profile" approach, which entailed refraining from public statements and vocal outreach campaigns. Despite this, the ICC's presence was a matter of much controversy and local sentiments could be summed up in the demand: "Peace First, Justice Later." When the Betty Bigombe process faltered in the second half of 2005, arrest warrants against senior LRA leaders were unsealed in October 2005.

In the summer months of 2006, a new peace process began at Juba, mediated by Riek Machar, Vice President of the Government of South Sudan. These talks are known as the "Juba peace talks" and are widely considered one of the best possibilities for achieving peace. The arrest warrants had already been issued, and senior leaders from the Lords Resistance Army (LRA) maintained from an early stage that the ICC arrest warrants are the most important obstacle to the

¹² By asylum we do not mean refugee status in international law.

success of the peace talks.¹³ For instance, the senior LRA leaders, for whom arrest warrants existed, have not been in personal attendance in Juba for fear of being arrested. This has led to complications in determining whether the delegation representing the LRA at Juba, many of whose members are noncombatants, is truly representative of the combatants.

Throughout its interaction with the peace processes in Northern Uganda, the ICC Prosecutor has maintained the following: (1) it is possible for the peace process and the arrest warrants to proceed simultaneously, on “parallel tracks” (2) arrest warrants should be viewed not as a stand-alone option, but as part of a comprehensive solution to conflict. In essence, the parallel tracks approach implies that international actors involved in peace negotiations should do as they see fit to promote a peaceful solution, without being hindered or inhibited by the actions of the Prosecutor. Simultaneously, the OTP should promote the enforcement of the arrest warrants without necessarily deferring to the peace process. In order not to detract from the peace process, the OTP chose to proceed mostly in a non-public manner.

It is too early to state conclusively whether the idea of proceeding with criminal proceedings and peace negotiations on parallel tracks can succeed in practice. Many remain anxious that the arrest warrants, if they remain in place, will scuttle a final agreement at Juba, and senior LRA leaders have repeatedly stressed this in media interviews. The Prosecutor, on the other hand, has said that he believes the pressure to execute arrest warrants to have contributed to the decrease of supplies to the LRA in Southern Sudan and their resulting move to Eastern Congo. The OTP has highlighted that this has drastically reduced the violence in Northern Uganda. The OTP has also argued that the arrest of the key suspects will contribute to the deterrence of further conflict¹⁴ and that “the arrest warrants have helped speed up peace negotiations and the reduction of violence. Their arrest is essential for peace and justice.”¹⁵

Can peace and justice proceed on parallel tracks, and what does this mean for the pursuit of justice in ongoing conflict? Does such a process send out messages that are too blatantly contradictory? For instance, are States Parties motivated to execute arrest warrants in a climate in which they are anxious to reach an agreement?

Sequencing is often referred to as part of the solution to resolving tensions between peace and justice. For instance, there are some who promote the idea that a peace agreement should be silent on the issue of accountability, and that this can be dealt with in the post-conflict situation. However, this neglects the fact that sequencing is often made impossible by demands from perpetrators for assurances that they will not be tried, for instance through an amnesty. It also ignores the fact that once the ICC has issued arrest warrants, the only possibilities for a temporary or permanent discontinuation of the proceedings are found in Articles 16, 19 and 53 of the Rome Statute. It must be presumed that those negotiating peace agreements, including those who have perpetrated crimes, are politically astute and able to calculate the risks of a “peace first, justice later” approach without such assurances. In this respect, while the Charles Taylor situation is considered a victory for justice in many human rights circles, it is also commonly referred to by the LRA as the scenario that they are keen to avoid.

It should be noted that the ICC Prosecutor has not put forward a specific doctrine on deterrence or prevention of crime. This seems prudent, as the link between the prevention of crimes and the existence of the ICC would be very difficult to prove. Moreover, it is well known in national criminal justice systems that it is not the consequences as such, but the likelihood *that there will*

¹³ International Bar Association, *ICC Monitoring and Outreach Programme*, Second Outreach Report, May 2007, 16. at www.ibanet.org/images/downloads/ICC/ICC%20Outreach%20report_%20May%202007.pdf

¹⁴ Fifth Session of the Assembly of States Parties, Luis Moreno Ocampo, prosecutor of the International Criminal Court, “Opening Remarks” (23 November 2006).

¹⁵ Interview with Luis Moreno-Ocampo on May 15, 2007, see at www.la-croix.com/article/index.jsp?docId=2303077&rubId=1094# (visited May 2007)

be consequence, which serves as a deterrent. In other words, the deterrent impact of the Court could be properly measured only if it could count on unwavering support in enforcement.

III. VIEWS OF THE VARIOUS CONSTITUENCIES

The work of any prosecutor must follow the principles that regulate judicial activities, particularly the fundamental principles of the independence and of impartiality of justice, and the correlated concept of the independence of investigatory and prosecutorial organs. Full and unconditional respect for these principles is essential to guarantee the legitimacy and credibility of judicial work, and also to foster its credibility amongst and acceptance by all concerned parties.

At the same time, it is obvious that the views of numerous stakeholders will have an influence on the process. The views and mandates of these stakeholders may compete with those of justice actors and may result in tensions. These are some of the key questions that need to be asked:

1. How should the views of victims be taken into consideration?
2. What are the duties of state parties for cooperation and promoting the Rome Statute in ongoing conflict? What are the factors that may guide an exercise of complementarity in such a situation?
3. What should be the role of the Security Council?
4. What has been the experience with UN peacekeeping missions, and what are some of the tensions in mandate that may arise?
5. What has been the experience with regional actors to date?
6. What are some of the views and concerns expressed by humanitarian organizations?
7. How should the Court interact with traditional and religious leaders, who may promote alternative forms of justice?
8. Do mediators interact with international prosecutors?

A. The Interests of Victims

An ethical prosecutorial policy should be informed (but not bound) by the views of victims. Rather than being viewed as simple vessels of evidence or sources of investigative leads to be introduced in the trial at strategic moments, victims should be involved from the outset and be consulted on various decisions. The Rome Statute gives victims a clear position as key stakeholders in the process of justice. This includes initiating prosecutions by communicating information on violations to the prosecutor during the preliminary investigations stage; participating throughout the proceedings, and being able to claim reparations. Victims' interests are also considered when deciding to discontinue a proceeding "in the interests of justice" pursuant to Article 53 of the Rome Statute.

Article 53 states that the Prosecutor can decide to discontinue investigations where, "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation may not serve the interests of justice." The same is true for a prosecution, although additional grounds are given here: "taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime." Also, in such a case, the Pre-Trial chamber has the power to review the Prosecutor's decision.

In a draft Policy Paper on how to interpret "the interests of justice," the Prosecutor argues that the Rome Statute generally implies that the interests of victims will weigh in favor of prosecution, and decisions to halt ongoing investigations or prosecutions should be taken only in highly exceptional circumstances. The Prosecutor acknowledges, however, that due consideration must

be given to the sometimes divergent views of victims, their communities and the broader society. It will be necessary systematically to seek the views of victims and local communities throughout the process.¹⁶ For the Prosecutor, the “interests of victims” includes the victims’ interest in seeing justice done, but includes other essential interests such as their security and protection.¹⁷ In doing so, the OTP takes a view that differs from certain human rights organizations, which have argued that the interests of victims referred to in Article 53 is in justice and justice alone.

The Prosecutor has introduced a number of methods to measure the interests of victims. An important one is dialogue and consultation. The OTP has used this method to in a number of situations under investigation to fully explore the “interests of victims”.¹⁸ Another methodology—not carried out by the ICC itself but by other organizations—is survey work. Surveys enable the gathering the representative views of certain communities, using scientific methodology such as random sampling. For instance, in the report, *The Forgotten Voices*, the International Center for Transitional Justice and Human Rights Center of the University of Berkeley decided to interview 2500 respondents in four districts in Northern Uganda on their views of peace and justice.¹⁹ The report demonstrated that victims’ perspectives on these difficult questions are diverse. Although such reports may be instructive, they cannot replace the need for consultation by official actors, including those involved in peace mediation.

The difficult question of who speaks on behalf of victims remains. Diversity of views will be common. The absence of organized victim groups may be another complicating factor. Another question relates to the depth of victims’ understanding and their ability to make informed choices even when consulted. Studies on ICC outreach activities in the past have shown that victims still have very limited knowledge of the court's existence and actions.²⁰ Conducting meaningful consultation with victims about these issues remains a tremendous challenge.

B. States Parties, Peace and Justice, and the Rome Statute

1. Cooperation

In times of conflict, as in any other time, the principal obligation to investigate and prosecute certain crimes falls squarely on the state. States directly concerned and under a duty to act are those in the territory in which the crimes have been committed, or those whose nationals have either committed or been victims of the crimes. In times of conflict, states have the additional obligation to respect and ensure respect for the norms defined under international humanitarian

¹⁶ The Office of the Prosecutor, Draft Policy Paper on the Interests of Justice.

¹⁷ Article 68(1) places an obligation on the whole court, including the office of the prosecutor, to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses. Article 54(1) (b) requires the prosecutor to respect the interests and personal circumstances of victims and witnesses in carrying out effective investigations. Investigations are likely often to take place in unsafe or unstable circumstances.

¹⁸ According to the OTP, 25 missions to Uganda were undertaken for the purpose of listening to the concerns of victims and representatives of local communities. Two meetings with leaders from several local communities were also held in The Hague. Also, in the DRC, the OTP conducted multiple missions to Kinshasa and Ituri for the purpose of consulting with civil society groups and victim representatives. The purpose was to understand the concerns of local populations. Since 2003, several seminars have also been organized in The Hague, gathering various organizations and victim representatives. Finally, three missions were conducted in Kinshasa, Bunia and Ituri by multidisciplinary teams to analyze the probable consequences of OTP action for local populations, including victims and witnesses.

¹⁹ International Center for Transitional Justice and the Human Rights Center, University of Berkeley, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, July 2005, www.ictj.org/images/content/1/2/127.pdf.

²⁰ See, ICTJ Report, *Sensibilisation à la CPI en RDC: Sortir du “Profil Bas,”* www.ictj.org/images/content/6/3/638.pdf.

law.²¹ If war crimes are committed, the obligation to prosecute or extradite those responsible extends to all states.

In addition to prior existing obligations, the Rome Statute formally commits state parties to “putting an end to impunity for the perpetrators of these crimes and thus to contribute to their prevention.”²² This includes either investigating and prosecuting these crimes themselves, or rendering assistance to the ICC if a state party is unwilling or unable to proceed. The Prosecutor has sometimes referred to this as a “legal revolution.”²³ States parties no longer have the option of foregoing justice options during conflict or conflict resolution. But how is this “legal revolution” manifesting itself?

The reality is that, where it concerns genocide, crimes against humanity and war crimes, states and their structures are often among the main perpetrators, and many of these crimes are pursued as a matter of state policy, as demonstrated in the Balkans over the past few decades. Nonetheless, state cooperation remains essential for international courts without their own police forces. The operational paradox for the ICC makes this particularly clear: on the one hand, the ICC is expected to intervene in countries that are either unable or unwilling to investigate and prosecute those responsible for the worst crimes, while on the other, the ICC has to rely on the support of those very states to carry out its mandate.²⁴ On occasion, a close relationship with a State Party may give rise to a perception of bias in an ongoing conflict, especially where a government has referred cases against ongoing rebellions. For instance, in Uganda, the Prosecutor is dependent on the Ugandan army to provide security for his investigations in the North. Moreover, the Prosecutor first appeared with President Museveni to announce the investigation at a press conference in London in January 2004. The fact that there are currently no arrest warrants for members of the Ugandan army (UPDF) has given further rise to a perception of bias.

Confusion has also arisen about the obligations of state parties under Part 9 of the Statute, which deals with international cooperation and judicial assistance. In Uganda, the question arose whether third states can take steps to support peace processes that involve persons who are the subject of arrest warrants before the ICC. When arrest warrants against senior Lord’s Resistant Army (LRA) leaders were issued, some took the view that they would no longer be able to support peace processes involving those LRA leaders financially or otherwise, as this would contravene Part 9 of the Rome Statute. With time, this position was abandoned and now several state parties give direct support to the Juba talks. The ICC, in endorsing a parallel tracks approach, implicitly seems to reject the view that states are in contravention of Part 9 of the Statute if they support an ongoing peace process (although it has said nothing formally). But how far do state obligations in this respect reach? Do states parties have an active duty to assist a peace process to arrive at a solution that is acceptable under the Rome Statute?

2. Complementarity

With the advent of the ICC, certain states are confronting the challenge of forging solutions based on peace and justice at the national level as they seek to resolve their own conflicts. There is always pressure to take the threat of prosecutions off the table early in a peace process and combatants at all levels of the political and military hierarchies have a tremendous interest in securing an amnesty, or “to ensure that peace prevails over justice.” Nonetheless, if justice actors

²¹ The four Geneva Conventions, adopted on August 12, 1949, define the core of what constitute war crimes. They have been universally ratified. They are complemented when implemented by relevant national legislations. War crimes are also defined in Article 8 of the Statute of the International Criminal Court.

²² Preamble of the Rome Statute.

²³ This evolution in international law is complemented by other developments, such as the UN’s position that it cannot condone amnesties for genocide, war crimes, and crimes against humanity.

²⁴ This tension has been particularly clear in the case of Sudan, where the OTP has taken the view that it should try to elicit Sudanese cooperation where possible.

are unable to act, because the threat of prosecution is constantly trumped by a peace process, its value as a deterrent will be fundamentally compromised.²⁵

The Rome Statute states clearly in Article 17 that, under the principle of complementarity, “a case will be inadmissible if it is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.” Under Article 19, challenges to admissibility may be made either before or at the commencement of a trial. Ideally, complementarity should serve not just to deter the ICC from pursuing cases that are already the subject of a genuine national process, but also to initiate cases because of the existence of the ICC.

There has been much discussion in Uganda about what form of justice should be incorporated into a peace agreement with the LRA. The issue of “accountability and reconciliation” forms Agenda item 3 in the Juba peace talks. While the government has sometimes referred to an amnesty, it is clear that a blanket amnesty would indicate an unwillingness to investigate or prosecute. In this respect, the ICC is not bound by the Ugandan Amnesty Act of 2000 that preceded its investigation. Traditional justice mechanisms have been mentioned by the LRA and other actors as one possibility for a domestic justice approach, but many believe that traditional justice measures alone will not satisfy the test of complementarity due to the references to “investigation or prosecution.” Recent proposals suggest the establishment of a national mechanism that is more likely to meet such a threshold. The Rome Statute, in its preamble, expresses a preference for the exercise of criminal jurisdiction.

As mentioned, the Rome Statute requires states to be willing or genuinely able to investigate or prosecute. It is silent on the requirements for punishing those found guilty. This silence on punishment was cleverly identified and used in the context of Colombia. Colombia has suffered a longstanding conflict between leftwing guerilla fighters (FARC and ELN) and rightwing paramilitary groups. President Uribe came to power in 2002 on an election promise to return security and sovereignty to Colombia. He introduced a scheme known as the Peace and Justice Law (JPL). In its current form, this provides for reduced sentences for ex-paramilitaries (the AUC) in exchange of a full (complete and genuine) disclosure of crimes.

The original intention of the government was to avoid using politically contentious amnesty language by offering demobilized paramilitary combatants judicial pardons within the context of the criminal justice system. The initial law, which was adopted by Congress in 2005, reflected this intention and was heavily criticized by victim groups, human rights organizations, and the Office of the High Commission for Human Rights (OHCHR), which condemned it as too generous to the AUC and in violation of the rights of victims to an effective remedy under the constitution and international law.

The Constitutional Court ruled on 18 May 2006 that some of the law’s main provisions were incompatible with both constitutional and international law. But the court in general terms approved the law as an instrument for overcoming the internal armed conflict, holding that it introduced a new balance between benefits for former combatants and victims’ rights to truth, justice and reparations. The court ruling improved the law regarding reparations to victims; and ruled that all benefits of the law are forfeited if ex-paramilitaries do not confess the whole truth.²⁶ Regarding the provision for reduced sentences, the Court held that prison terms should be no fewer than five years and no more than eight. This, it found, does not disproportionately compromise the rights of victims under the Constitution. The Constitutional Court ruling was generally welcomed by international and local civil society.

²⁵ Transcript, *Second Public Hearing of the Office of the Prosecutor, NGOs and Other Experts*, The Hague, 2006, 27.

²⁶ Other conditions are cooperation with judicial authorities in the demobilization process and the making of comprehensive reparation to victims, including release of persons, forfeiting of illegally-obtained assets, public apologies and promises of non-repetition, and collaboration in locating remains of disappeared persons.

However, serious questions remain about the implementation of the JPL. The government has challenged the ruling and seeks to weaken its effect by an executive decree that, it argues, will make the ex-paramilitaries more cooperative. In addition, no effective measures are yet in place to protect witnesses and victims who testify against paramilitary leaders under the JPL. Victims too have been dissatisfied that the focus remains on perpetrators and that they have no opportunity to participate in the truth telling. Moreover, the Peace and Justice Unit of the prosecutor general's office remains under-resourced. Civil society has urged actors in the process to move swiftly if the JPL is to have any significant effect.

The Colombian approach may offer an important model to other governments seeking to resolve internal armed conflict, but the question whether the Colombian Peace and Justice law meets the complementarity threshold under the Rome Statute remains unanswered and it may only be after some of the cases have concluded completely, that it will be possible to make an evaluation. One important incentive for demobilized paramilitaries who have committed serious crimes to opt for prosecution under the JPL is that they believe it will shield them from ICC prosecution in the future.²⁷ A report by the International Crisis Group stated that: "the Uribe administration has been acutely aware of this possibility and has attempted to draft the JPL in such a way that it could preclude ICC prosecution of crimes against humanity because the perpetrators were sentenced sufficiently by Colombia's judicial system"²⁸. The maximum prison term contemplated by the JPL is eight years; if prosecuted under other Colombian criminal statutes law, the paramilitaries could receive maximum sentences of up to 60 years for the kind of crimes of which they are accused. A great deal will depend on whether proceedings in the context of the JPL are conducted independently or impartially with the intention to bring persons to justice. The Constitutional Court ruling and recent Supreme Court prosecutions of political leaders associated with the paramilitary groups show that there may be genuine willingness to end impunity in Colombia but it is too early to be definitive.

C. The Security Council

The international organization most involved in issues relevant to justice and conflict situations is the United Nations (UN). Within the UN, the prime stakeholder in this respect is the Security Council (or UNSC). In view of its specific mandate to preserve international peace and security and its broad powers under the UN Charter, the Security Council is directly involved in matters pertaining to peace negotiations and peace missions.²⁹ It also became directly involved in justice issues when it established the ICTY and the International Criminal Tribunal for Rwanda (ICTR), by way of Chapter VII resolutions.³⁰

Because the primary task of the Security Council is to maintain international peace and security, it may in certain circumstances decide that peace or peace negotiations should prevail over justice, at least temporarily. This paramount role of the Security Council is recognized very explicitly in the ICC Statute, which provides in Article 16 that:

²⁷ The ICC Prosecutor wrote a letter to President Uribe in March 2005, asking for information on what the Colombian government was doing to address crimes that were potentially within the jurisdiction of the ICC.

²⁸ International Crisis Group, "Colombia: Towards Peace and Justice?" *Latin America Report N°16*, March 14, 2006.

²⁹ The term "peace missions" is used loosely in this paper to encompass peacekeeping and peacemaking operations, armed or not, irrespective of their unilateral, bilateral or multilateral character.

³⁰ In so doing, the council referred to the close link between peace and justice in the preamble of resolution 827 of May 25, 1993, when it indicated that the tribunal would "contribute to ensuring that... such violations ... are halted and effectively redressed." It was hoped that by bringing to justice those accused of massacres and similar egregious violations of international humanitarian law, both belligerents and civilians would be discouraged from committing further atrocities. The ICTY was also "to contribute to the restoration and maintenance of peace," according to the terms of Resolution 827. Similarly, in Resolution 955 of November 8, 1994, creating the ICTR, the Council declared itself: "convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."

No investigation or prosecution may be commenced or proceeded under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.³¹

This provision has been criticized by some human rights NGOs as an intrusion on justice and its independence. While this concern may prove to be legitimate, depending on the possible future use of such powers by the Security Council, the provision exists primarily in recognition of the implicit hierarchy that governs the UN—particularly the Security Council—and the ICC. The suggestion has been made that a State Party initiating an Article 6 resolution to allow persons to evade ICC jurisdiction is in breach of the object and purpose of the Rome Statute.

However, it remains to be seen if and how Article 16 will be used in practice. The only occasion to date where it has been used is to grant a form of blanket immunity to peacekeepers—an initiative of the United States but certainly not the purpose for which Article 16 was intended. Recently, some have suggested that an Article 16 deferral may be sought in the case of Uganda. Most prominent in raising this as a possibility has been the International Crisis Group. For this group, Article 16 has the advantage of removing the difficult question of peace and justice to another actor and recognizing that this is a political decision, beyond the scope of the law.

But another question that arises is whether initiating a resolution with the primary purpose of granting a 12-month reprieve to the LRA is an attractive political prospect for governments. After all, the Security Council itself has become increasingly seized with accountability issues. In this respect, several members of the Security Council were slow to put their weight behind the talks facilitated by Riek Machar, believing that any process that entertained the idea of providing amnesty to those indicted by the ICC—even one that began a dialogue with the five commanders—would run the risk of contravening the Rome Statute.³² Following a briefing by former Under-Secretary-General for Humanitarian Affairs Jan Egeland, states remarked that the peace talks must not come at the price of ending impunity—coupling lasting peace with accountability for crimes against humanity.³³ As the talks developed, these same states moderated their positions, and eventually backed a presidential statement welcoming the Cessation of Hostilities Agreement and inviting member states to support efforts to bring an end to the conflict.³⁴ Again, these trends show the difficult issues with which State Parties to the Rome Statute on the Council are struggling.

Some suggest that Article 16 could be used to endorse a deal even if it does not meet the complementarity threshold.³⁵ If that is the case, is the Security Council in a position fundamentally to undermine the complementarity framework? Should criminal justice itself be viewed as a measure for preventing future breaches of peace and security?

D. UN Field Operations and Other UN Actors

The relationship between international courts and UN field operations has often been uneasy. Court officials may require the cooperation and support of the UN peacekeeping mission to carry out their judicial work, including investigations or arrests of suspects or accused. On the other hand, a mandate to arrest war criminals is disruptive and may run counter to other the objectives of a peacekeeping mission. This tension was demonstrated by the relationship between the ICTY and the successive peace keeping missions in Bosnia-Herzegovina—whether UNPROFOR, IFOR,

³¹ Article 16 of the ICC Statute, entitled *Deferral of investigation or prosecution*.

³² *Monthly Forecast, Uganda*. Security Council Report, October 2006.

³³ *Briefing by the Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator*, Security Council 5525th Meeting, Sept 15 2006, S/PV.5525. See also *Briefing by the Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator, Humanitarian situation in the Great Lakes region and the Horn of Africa*, Security Council 5677th Meeting, May 21, 2007. S/PV.5677.

³⁴ *Statement by the President of the Security Council*, S/PRST/2006/45, Nov 16, 2006.

³⁵ ICG, *Northern Uganda: Seizing the Opportunity for Peace*, April 26, 2007.

or SFOR. SFOR and IFOR did not make a single arrest until July 1997.³⁶ NATO's early position was to deny itself any power to execute arrests³⁷ and, until mid-1997, literally to follow a restrictive policy of apprehending only those individuals indicted by the ICTY (when it encountered them in the in the course of IFOR/ SFOR duties). People spoke of high profile war criminals indicted by the ICTY living freely in their neighborhoods, with NATO patrols deliberately modifying their route so as to avoid them.³⁸ It was only after a combination of political and judicial pressure that NATO was persuaded to shift its policy with respect to the arrest of indicted individuals.³⁹

Furthermore, peacekeeping missions may find the mere presence of a court disruptive to their own mandate. In Sierra Leone, the Special Court originally had a quite ambivalent relationship with UNAMSIL, the UN peacekeeping mission. To begin with, UNAMSIL took the view that the SCSL posed a potential threat to Sierra Leone's fragile peace process and thus offered little technical, logistical, or administrative support.⁴⁰ With time and the express support of the Secretary General for the Special Court, the relationship between UNAMSIL and the Court improved. UNAMSIL peacekeepers have also been vital to facilitating arrests for the Special Court.⁴¹

While the relationship between the ICC and the UN is generally governed by an overall relationship agreement that stipulates cooperation between the two organizations, the court may also seek to conclude a further Memorandum of Understanding with the field mission in a particular situation or country. In the DRC, MONUC has committed itself to supporting the Congolese government in fulfilling its obligations under the Rome Statute. This arrangement may go some way toward alleviating tensions that may otherwise exist about issues of sovereignty. All in all, what is needed is an integrated approach by the UN system.

In terms of Darfur, the local peace-keeping mission, UNMIS, expressed some concerns at the outset about how the activities of the ICC might affect its mandate. UNMIS has argued that the ICC investigation gives Sudan a reason to oppose extending a UN peacekeeping mission to Darfur, thereby prolonging the violence and leading to increased casualties. However, it is clear that the causes of the crimes being committed in Darfur are the responsibility of the Sudanese government. Also, as the failures of the African Union Mission in Sudan (AMIS) painfully demonstrated, the presence of peacekeepers does not, in itself, prevent atrocities. Resistance to a UN force for Darfur surfaced at least 18 months before the ICC's referral. The main reason the government has rejected a UN presence is that—unlike the presence of AMIS—it would limit its ability to continue targeting unarmed civilians in its counterinsurgency strategy in Darfur. Theoretically at least, a UN peacekeeping mission could enter on terms that would effectively block it from directly assisting the ICC.

What should be the balance between the goals of peacekeeping and the pursuit of criminal justice? At ICTY, an unusual situation occurred when a UN mission argued for provisional release of a particular accused for the sake of peace. UNMIK (and privately also several states) intervened with the ICTY Prosecutor to dissuade her from proceeding with the indictment of Prime Minister of Kosovo Ramush Haradinaj. They argued that the need to guarantee the stability of Kosovo should be taken into consideration, and that Haradinaj's indictment could result in political unrest.

³⁶ M. P. Scharf, "The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslav Tribunal," *De Paul Law Review*, 2000, 951.

³⁷ R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy*, Oxford University Press, 2004, 154-155; and J. Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century*, London: Lynne Rienner Publishers, Inc., 2004, 157.

³⁸ *Ibid*, 156-157.

³⁹ Zhou, "The Enforcement of Arrest Warrants by International Forces," *ICJ*, Volume 4, No.2, May 2006, 216.

⁴⁰ T. Perriello and M. Wierda, "The Special Court for Sierra Leone under Scrutiny," *International Center for Transitional Justice Prosecutions Case Studies Series*, March 2006, p. 30.
www.ictj.org/static/Prosecutions/Sierra.study.pdf

⁴¹ *Ibid*, 34.

In fact, his indictment went ahead without violence and he voluntarily surrendered to the court. Thereafter, UMMIK again raised the issue of stability, arguing that Haradinaj should be allowed to return to Kosovo on provisional release to await his trial, which was granted by the ICTY.⁴²

There are other grey areas. For instance, the official view taken by the UN so far seems to be that arrest warrants do not rule out meetings with political leaders (although this may vary within the UN system). Both former Head of OCHA Jan Egeland and UN Special Representative Joaquim Chissano have, on several occasions, met with senior LRA leaders such as Joseph Kony and Vincent Otti, despite the arrest warrants issued by the ICC. Is this appropriate, or does it contribute to legitimizing alleged war criminals? On the other hand, would preventing those interactions risk the loss of opportunities to encourage indictees to surrender, to release noncombatants or women and children in their ranks, or to remain engaged in a faltering peace process?

E. Regional Organizations and Actors

Regional organizations and actors have also started to play an increased role in issues of peace and justice, particularly through the mediation of conflict. A prominent example is the response of regional actors in Africa to the indictment of Charles Taylor by the Special Court for Sierra Leone.

As mentioned, Charles Taylor was President of Liberia when he was indicted. This meant his case had enormous political significance in the region. A Ghanaian Foreign Ministry official denied receiving any documents relating to the arrest warrant. The Special Court said it had not notified Ghana in advance because it could not be certain officials would not warn Taylor. The Ghanaians briskly refused to comply and gave Taylor a presidential plane to return quickly to Liberia. The Ghanaian government complained that it was blindsided and embarrassed by the “surprise” request to send Taylor to the Court. In an interview in *New African Magazine*, Ghanaian President John Kufour said he:

...Felt betrayed by the international community ... Five African presidents were meeting in Accra to find ways of kick starting the Liberian peace process, and Mr. Taylor had been invited as president of Liberia. We were not even aware that a warrant had been issued for his arrest. Incidentally, the African leadership had taken the initiative to convince Mr. Taylor to resign and allow all the factions in Liberia to negotiate. It was when the presidents were leaving my office for the Conference Centre where Mr. Taylor was expected to make a statement that word came in that a warrant had been issued for his arrest. I really felt betrayed by the international community (and) I informed the United States of the embarrassment that the announcement caused.⁴³

African and American officials sponsoring the talks in Accra were angry that their efforts had been thwarted. They complained that the “overzealous” Prosecutor was jeopardizing their peace initiative. The Prosecutor, however, continued to assert that he did as he was mandated; that the parties at the peace talks needed to be aware that they were trying to negotiate with an indicted war criminal whom—in his opinion—could never be trusted, and that Charles Taylor had violated at least 17 prior ceasefires and agreements.

After Charles Taylor had been allowed to seek refuge in Nigeria, political pressure began to mount on Nigeria to hand Taylor over to the Special Court. Due to considerable pressure from the United States at the highest levels, including a threat from President Bush to cancel a planned

⁴² *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, “Decision on Ramush Haradinaj’s Motion for Provisional Release”, June 6, 2005, case No. IT-04-84-PT, at www.un.org/icty/haradinaj/trialc/decision-e/050606.htm

⁴³ Interview with *NewAfrican* magazine, March 2004, at www.ghanacastle.gov.gh/president/castle_newsp_details.cfm?EmpID=195

meet with President Obasanjo, who was in the US at the time, the latter agreed for Taylor to be transferred to Liberia and from there to the Special Court for Sierra Leone in March 2007.

While international justice advocates celebrated Taylor's arrest and surrender to the Special Court, this was privately condemned by many African leaders. The Libyan leader, Mu'ammar Al-Qadhafi expressed the views of many African leaders when he denounced the Taylor arrest, saying, "It means that every head of state could meet a similar fate. This sets a serious precedent."⁴⁴ Many criticized Nigeria for failing to refer the matter to the AU, which had brokered the initial deal. They condemned Nigeria's unilateral decision to hand one of their own to "a white man's court" to be tried in The Hague.⁴⁵

The question of how regional actors may react, considering particularly their role in conflict mediation, has spurred the ICC to reach out to the African Union, clearly a critical actor in its realm of operations. To date, however, the ICC has not succeeded in concluding a Memorandum of Understanding with the AU. Despite this, many would agree that the role of regional actors in seeking peaceful solutions to conflict ought to be encouraged. At the same time, such actors may be beyond the reach of legal standards drawn up by the United Nations and of institutions such as the ICC. What are the implications for impunity? How should these organizations seek to set their own standards?

F. Humanitarian Organizations and Their Considerations

In recent years, with the functioning of international criminal jurisdictions, humanitarian organizations have increasingly sought to consolidate their position on the role of international courts and tribunals. Broadly speaking, the protection-oriented mandate of humanitarian aid is consistent with the underlying principles of international criminal justice. The International Committee on the Red Cross's (ICRC) Note for Humanitarian Organizations on Cooperation with International Tribunals concludes that: "while the primary purpose of most organizations is to provide lifesaving services to populations in need, if those populations are subject to violent attacks many see the value of helping to bring the attackers to justice."⁴⁶ Many humanitarian organizations support international justice in their central policies. At a recent meeting on transitional justice and humanitarian concerns, participants recognized that past failures in justice have frequently led to humanitarian crises, which in turn can lead to repeated violations of human rights.⁴⁷

Nonetheless, there are real tensions between the mandates of international tribunals and humanitarian organizations in terms of activities on the ground.⁴⁸ This has played out dramatically in Uganda. Since the government of Uganda referred the situation concerning the Lord's Resistance Army (LRA) to the ICC in December 2003, humanitarian agencies have voiced strong concern that the court's involvement might have harmful effects on civilian protection and humanitarian access.⁴⁹

The humanitarian crisis in northern Uganda could hardly be more severe. A health and mortality survey-conducted by the World Health Organization (WHO), government of Uganda Ministry of Health and other international organizations in 2005-found that the internally displaced persons in

⁴⁴ Sarah Grainger and John James, "Head Hunted," *Focus on Africa* magazine, October-December 2006, 16.

⁴⁵ The decision to transfer Taylor to The Hague was not announced until after his transfer to the SCSL in Freetown.

⁴⁶ "Note for Humanitarian Organizations on Cooperation with International Tribunals," *Current Issues and Comments*, International Committee of the Red Cross/Red Crescent, March 2004, Vol. 86 No. 853.

⁴⁷ *Meeting on Transitional Justice and Humanitarian Concerns, Conference Report*, Geneva, May 16-17, 2006.

⁴⁸ See *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief*. International Federation of Red Cross and Red Crescent Societies. 1994.

⁴⁹ See CSOPNU press release, "Failure to Embrace Peace a Bitter Blow for Northern Uganda." CSOPNU is made up of the following organizations: Care; Concerned Parents Association; Development Network of Indigenous Voluntary Associations; Gulu NGO Forum; International Rescue Committee; Norwegian Refugee Council; Oxfam; Pader NGO Forum; Save the Children in Uganda; SODANN; Uganda Child Rights NGO Network.

the northern districts of Gulu, Pader, and Kitgum (upwards of 90 percent of the region's population) are "experiencing a very serious humanitarian emergency."⁵⁰

The commencement of the investigation by the ICC in Uganda gave rise to much concern by humanitarian organizations that had been active in the north for some time, and that had widely lobbied for a peaceful solution to the conflict. Concerns about the Court commonly voiced by humanitarian organizations the Court included complaints that: "it is biased; it will exacerbate the violence; it will endanger vulnerable groups—notably witnesses and children; it is spoiling the peace process by undermining the Amnesty and the ceasefire; and it ignores and dis-empowers local justice procedures."⁵¹ Several humanitarian organizations came out with statements urging prudence in moving forward with the investigation. In December 2004, a coalition of international and local humanitarian organizations—named Civil Society Organizations for Peace in Northern Uganda (CSOPNU)—argued that, "removing all possibilities of amnesty means that there is no incentive for the senior command of the LRA to stop fighting. Indeed, it is probable that it will lead to an escalation in violence if the cornered rebels seek to fight to the last."⁵²

While so direct an effect might be difficult to prove in practice, especially in relation to a conflict that has had many ebbs and flows, there was an increase in attacks on humanitarian organizations immediately following the issue of the arrest warrants in October 2005.⁵³ Before that time, humanitarian organizations had generally not been targeted, although attacks on their vehicles had occurred. This caused great alarm and fears that, if targeted violence continued, the mandate of humanitarian organizations to assist victims of violent conflict might conceivably be jeopardized.⁵⁴ However, in retrospect, analysts generally do not believe that these attacks were closely linked to the arrest warrants.

Due to concern about the potential impact of arrest warrants in northern Uganda, many organizations involved in humanitarian issues in this region originally urged the ICC to adopt a "wait and see" policy, or advocate an approach of "Peace First, Justice Later."⁵⁵ In a joint press release, the Refugee Law Project and Human Rights Focus stated that: "given the international community's overriding commitment to contributing to peace, the logic of prosecution is untenable. It unreasonably devalues an opportunity to seek to end a destabilizing humanitarian crisis..."⁵⁶ This created a dynamic in which support of the current pursuit of justice or the ICC became rather unpopular and was seen as reckless. As a CSOPNU press release from before the Juba talks states: "Our greatest concern is to secure peace for the people of Uganda."⁵⁷

⁵⁰ World Health Organization, *Health and Mortality Survey Among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda*. Government of Uganda Ministry of Health, UNICEF, UNFPA, WFP and the International Rescue Committee. July 2005. The humanitarian situation in the north has reached such high crisis levels over the past 20 years that former UN Under-Secretary General for Humanitarian Affairs, Jan Egeland, famously referred to it as "the biggest forgotten, neglected humanitarian emergency in the world today", *War in Northern Uganda World's Worst Forgotten Crisis: UN*. Agence France-Presse, Nov 11 2003, Nairobi. A report issued in 2006 by Oxfam International and the Civil Society Organizations for Peace in Northern Uganda finds that approximately 3500 people die from easily preventable disease each month. *Counting the Cost: Twenty Years of War in Northern Uganda*. Civil Society Organizations for Peace in Northern Uganda. March 30, 2006.

⁵¹ Tim Allen, *War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention*. Crisis States Research Centre, Development Studies Institute, London School of Economics. February 2005, (draft), 44

⁵² *Nowhere to Hide: Humanitarian Protection Threats in Northern Uganda*. Civil Society Organizations for Peace in Northern Uganda, December 2004, 111.

⁵³ *Only Peace Can Restore the Confidence of the Displaced*. Refugee Law Project and the Internal Displacement Monitoring Centre of the Norwegian Refugee Council, Second Edition, October 2006, 14.

⁵⁴ Pierre Perrin, "The Impact of Humanitarian Aid on Conflict Development", *International Review of the Red Cross*, No. 323, June 30, 1998, 319-333.

⁵⁵ Lucy Hovil and Joanna Quinn, "Peace First, Justice Later: Traditional Justice in Northern Uganda". Refugee Law Project, Working Paper No. 17, July 2005.

⁵⁶ "Not a Crime to Talk: Give Peace a Chance in Northern Uganda." Refugee Law Project and Human Rights Focus, Press statement. Kampala, July 24, 2006.

⁵⁷ "Failure to Embrace Peace a Bitter Blow for Northern Uganda". Civil Society Organizations for Peace in Northern Uganda.

The relationship between the ICC and humanitarian organizations is complicated by a further consideration. Apart from concerns about how the ICC may affect an ongoing peace process, humanitarian organizations may also face difficult decisions about whether they should choose to share information with an international court, or legitimately fear being called upon as witnesses in trials, when disclosing such information could ultimately impair their access to victims. A humanitarian organization such as the ICRC, involved specifically in conflicts and abiding by the principles of independence, neutrality and impartiality enshrined in its statute, deems it fundamental to remain neutral in all situations. In the light of the specificity of the ICRC mandate, which is recognized under international humanitarian law, the ICTY recognized in the Simić et al case that the ICRC benefits from a privilege and that its former employees cannot be forced to testify. A similar privilege is recognized in Rule 73 of the ICC Rules of Procedure.⁵⁸

G. Traditional and Religious Leaders

In Northern Uganda, religious and traditional leaders had already pursued several of their own justice-related initiatives when the ICC became involved. For instance, religious leaders lobbied hard for an Amnesty Act of 2000, which orders that any Ugandan who has engaged in war against the government since 1986 should not be prosecuted for their participation in the rebellion.⁵⁹ The main reason why traditional leaders were so strongly supportive of this initiative is because so many of the LRA rank and file combatants had been abducted, and there was a strong push to “welcome our children home.”

Another initiative on behalf of traditional leaders is that of Acholi traditional justice. Traditional justice and particularly the ceremony of the Mato Oput has been put forward assertively by local leaders as an alternative to the International Criminal Court. Zachary Lomo, formerly of the Refugee Law Project, has suggested that: “the people of northern Uganda have the right to self-determination, and this implies the primary prerogative of determining how to end the conflict in northern Uganda.”⁶⁰ The debate about which form of justice is appropriate in this context has become trapped in a broader debate about universalism versus local tradition. Much of the discourse has centered on a resentment at the imposition of “Western” or “retributive” justice on a local population that is more interested, first and foremost, in peace, and then in restorative forms of local justice. This juxtaposition of choosing the route of “forgiveness,” or “reconciliation” and “restorative justice” as opposed to “revenge” and “retributive justice” is often touted by politicians, and has been used in contexts as diverse as in the Colombian transition and the recent resolution granting amnesty passed by the Afghan Parliament. However, research indicates that victims usually have diverse views on forms of justice. In northern Uganda, victims were asked: “what would you like to see happen to those LRA leaders who are responsible for violations.” Twenty-two percent opted for forgiveness (including reconciliation and reintegration) and 66 percent for punishment (including trial, imprisonment or death).⁶¹

Furthermore, some of the claims put forward about traditional justice and its legitimacy deserve to be tested. Following 20 years of armed conflict in the North, the Acholi population is almost entirely displaced and the current generation has known nothing but conflict.⁶² Although the traditional leaders, Rwot Moo, was officially recognized in the Ugandan constitution in 1995, displacement had so disrupted hierarchical relationships and people’s connections to the elders

⁵⁸ *Prosecutor v. Blagoje Simic, Miroslav Tadic, Simo Zaric*. Case No. IT-95-9-T. International Criminal Tribunal for the Former Yugoslavia, Oct 17, 2003.

⁵⁹ Amnesty Act, 2000.

⁶⁰ Zachary A. Lomo, “Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective.” Refugee Law Project, Makerere University Faculty of Law, August 2006.

⁶¹ ICTJ and HRC Berkeley, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, Table 4.

⁶² Uganda Conflict Action Network (UgandaCAN), “Conflict Background”, at www.ugandacan.org/history.php. April 20, 2007.

that those raised in the camps began to lose touch with their cultural legacy.⁶³ Also, public trust began to shift from the elders to agents that could provide for their daily needs, including state representatives (LCs) and camp leaders.⁶⁴

In northern Uganda, traditional structures have been recently revived and are consolidating into a degree of permanence. The Ker Kwaro Acholi was established in 2005, in part as a means to address the ongoing conflict.⁶⁵ The Ker Kwaro Acholi has yet to gain full legitimacy in Acholi. Nonetheless, tradition may be an important coping mechanism in conflict, as suggested in the recent book, *Living with Bad Surroundings*, by anthropologist Finnström, who writes that “cultural life is the lens through which people interpret their surrounding instability, and by which they continuously struggle to build hope for the future.”⁶⁶ Culture may also serve as a building block for future peace and stability. Finnström cites the peace accords in the west Nile in 1986 as an example where two warring parties applied local mechanisms to achieve reconciliation.⁶⁷ In most situations, religious and traditional leaders are essential to finding long-term solutions to conflict and reweaving the social fabric of a society.

A further interesting and unanticipated consequence of the ICC’s engagement in Northern Uganda has been that ICC involvement has assisted in legitimizing local leaders. In northern Uganda, Acholi elders and traditional leaders voiced early concerns that the ICC investigation and subsequent indictment would jeopardize longstanding peace efforts.⁶⁸ In March 2005, a delegation of Acholi religious and traditional leaders traveled to The Hague to meet the Chief Prosecutor of the ICC.⁶⁹ These interactions had the effect of casting traditional leaders as the intermediaries between victim populations and the ICC, thus bolstering their legitimacy.

However, it is not yet clear whether traditional mechanisms are suited to playing a role that deals with atrocities committed during the conflict with the LRA.⁷⁰ Moreover, Acholi rituals do not apply to other affected groups in the north such as the Langi or Iteso (or for that matter to affected groups in south Sudan such as the Dinka). In a situation as complex as this, it will be difficult to devise a traditional justice mechanism that is acceptable to all who have been affected.⁷¹ What is clearer is the fact that traditional justice mechanisms are unlikely to be accepted as meeting the threshold set out in the Rome Statute for a complementarity challenge. During the Juba process, Kony and Otti have suggested they are willing to participate in locally-based justice

⁶³ *Roco Wat I Acoli/Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reconciliation*. Liu Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi, September 2005.

⁶⁴ *Ibid.* In the July 2005 survey, *Forgotten Voices*, a total of 15 percent of respondents in Gulu and 7 percent in Kitgum said they felt that their views were best represented by traditional leaders, while 34 percent and 38 percent, respectively, named their government representatives. Camp leaders were named by 14 percent of Gulu respondents and 17 percent of those in Kitgum. *Forgotten Voices: A Population-Based Survey on Attitudes About Peace and Justice in Northern Uganda*. International Center for Transitional Justice and the Human Rights Center at the University of California at Berkeley, July 2005.

⁶⁵ *Roco Wat I Acoli/Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reconciliation*. Liu Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi. September 2005.

⁶⁶ Sverker Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda*, Uppsala University Library, Uppsala, 2003.

⁶⁷ *Ibid.*

⁶⁸ James Latigo Ojera, *The Acholi Traditional Conflict Management*, February 2006.

⁶⁹ Statements by ICC chief prosecutor and the visiting delegation of Acholi leaders from northern Uganda. International Criminal Court Press Release, The Hague, March 18, 2005.

⁷⁰ For instance, in interviews with clan elders and traditional leaders (Rwodi) a report by the Liu Institute for Global Studies finds that the majority felt that processes such as Mato Oput cannot easily be adapted “to play a role in realizing justice in the current circumstances” as “reconciliation cannot be fostered until the conflict ends; and the specific requirements of Mato Oput do not immediately translate to the scope and scale of the present conflict.” Additionally, the Acholi traditional justice instruments require full consent of all participants; practically speaking, this would mean an admission of guilt on behalf of all parties involved. *Roco Wat I Acoli/Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reconciliation*. Liu Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi. September 2005. See also Thomas Harlacher and Caritas Gulu Archdiocese, *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*, Kampala, 2006.

⁷¹ “War and Justice in Northern Uganda: An Assessment of the International Criminal Court’s Intervention.” Crisis States Research Centre, Development Studies Institute, London School of Economics. February 2005. (draft).

mechanisms, which has given rise to a lot of speculation as to whether these mechanisms will be included in the final peace agreement.⁷² The question of local versus global justice remains. How should a global justice institution gain local legitimacy? How should it interact with religious and traditional leaders that may seek to pose their own solutions?

H. Mediators

The relationship between peace mediators and international courts will likely remain ambivalent. Mediators may take the view that the existence of international courts complicates their work, and may even fear being called to testify, although the risks of this happening are minimal.⁷³ On the other hand, there can be little doubt that the existence of the ICC may complicate the work of a mediator, in that it restricts the options that can be offered as part of an agreement.

The ICC Prosecutor and mediators have embarked on dialogues aimed at better understanding each other's mandates. In recent years, there have been a number of conversations between senior mediators and ICC officials, hosted by the Geneva-based Center for Humanitarian Dialogue. Their goal is to help senior mediators to understand the ICC better, and for the ICC to develop its understanding of the concerns and techniques used by senior mediators. Apart from this initiative, there exists little opportunity for direct interaction between the ICC and mediators.

It can be argued that the existence of the ICC clarifies the stance of mediators in the sense that the issue of future prosecutions by the ICC is outside of their control. Nonetheless, it remains to be seen how mediators will choose to position themselves vis-à-vis that fact. Some mediators, under UN instructions, are in any case bound not to ratify agreements that allow for amnesties for genocide, war crimes and crimes against humanity. On the other hand, mediators from organizations other than the UN are usually free from such restrictions.

Mediators also often face other challenges and concerns, including the halting of ongoing violence. Work on ongoing violations should begin before and not be deferred to the negotiating table. Lastly, it is relevant to note that mediators remain at liberty to approach the Security Council if they deem an Article 16 resolution necessary.

III. PRESERVING JUSTICE OPTIONS DURING ONGOING CONFLICT

In some situations, justice will have to wait, particularly in areas where there is no jurisdiction for the International Criminal Court, or no inclination by the Security Council to act. This may be the case despite the fact that widespread crimes have occurred. Recent examples where the international community has not shown impetus to take action include situations in which there were massive human rights violations, such as Afghanistan, Liberia, DRC (before 2002), and Iraq (for violations other than those committed by Saddam Hussein). In such situations, there are a number of strategies that can assist to preserve or determine justice options at a later stage. These include consultation of the public on justice options and documentation of past and current abuses. Some situations may also require a rapid response in terms of evidence preservation.

Even if investigations do proceed, different approaches that are needed to preserve the investigative effort and narrow the exposure of victims and witness.

A. Consultation on Justice Options

The peace versus justice dilemma has played out dramatically in recent years in Afghanistan. First, while many originally thought that peace would arrive for Afghanistan with the fall of the

⁷² “Ugandan Rebel Leader Ready to Face Justice at Home; officials”, Agence France Presse—English, December 21, 2006.

⁷³ The International Center for Transitional Justice, *The ICC and Conflict Mediation*, June 2005 at www.ictj.org/images/content/1/1/119.pdf

Taliban in December 2001 and the subsequent Bonn Agreement, violence has resurged in the south and conflict between NATO and the Taliban/ Al-Qaeda continues. Second, Bonn and subsequently the international community invited many Northern Alliance leaders into the government, despite the fact that many are known human rights abusers. The current government's lack of credibility has contributed to further violence in the south. Third, international policy makers have always argued that the warlords should not be tackled as they may destabilize Afghanistan further. Instead, Afghanistan remains inherently unstable and the warlords have strengthened their power bases.

In the face of this, a powerful local actor created under the framework of the Bonn Agreement, the Afghan Independent Human Rights Commission took important steps to promote the cause of justice in Afghanistan. In 2004, it carried out a nationwide consultation in very difficult security conditions, interviewing over 6500 persons on their views on justice. The AIHRC presented its results and recommendations in an important report, *A Call for Justice*, published in January 2005.⁷⁴ The report showed clearly that most people believed that there is an integral link between justice and security: 76 percent of respondents said that bringing war criminals to justice would increase rather than decrease security.⁷⁵

The report made a strong impact on the government and President Karzai “ordered” its implementation. This led to the formulation of an Action Plan on Peace, Justice and Reconciliation by the government, which was adopted in December 2005. The Action Plan—in itself a very ambitious government commitment to deal with the past—states in its preamble:

To build sustainable peace and stability, deal with past abuses, reconcile victims, perpetrators and other stakeholders, and to move from a divided past into a shared future is a difficult task in almost any post-conflict situation where institutions tend to be weak, there are few resources, unstable security and a war-affected population. In order to transition into a peaceful life and to strengthen national reconciliation in Afghanistan, the past should be dealt with in a bold and just way that avoids revenge. We should explore ways to build co-existence amongst the citizens of this country based on the principles of tolerance, forgiveness and the requirements of a social order premised on law and order.

Nonetheless, warlords remain powerful in Afghanistan. Many are now members of parliament which, on March 10, 2007, passed a resolution for their own amnesty.⁷⁶ This constitutes a setback, and may affect implementation of the Action Plan. At the same time, Afghanistan demonstrates the difference that the power of consultation and a single actor—in this case, the Afghan Independent Human Rights Commission—can make.

B. Evidence Gathering and Documentation

Documenting crimes to a sufficient standard is an essential first step in preserving justice options during an ongoing conflict. Nonetheless, it is rare for actors (domestic or international) to engage in the kind of documentation that goes beyond reporting violations to gathering the kinds of evidence useful to a subsequent criminal procedure. In order to understand the strategies and techniques of documenting mass crime in situations of ongoing conflict, it is important to understand some of the intricacies of investigating and prosecuting these crimes. Crimes such as genocide, crimes against humanity and war crimes differ from ordinary crimes in they are generally of such a scale that they require a degree of organization or system to perpetrate. The

⁷⁴ For a copy of *A Call for Justice*, see: www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf.

⁷⁵ Also, 44.9 percent of respondents were of the view that war criminals should be tried now; 25.5 percent said within two years; 18.8 percent said within 2-5 years, and only 8.4 percent said five years or more from now. When the report was presented to President Karzai in Jan 2005, he mandated a three-person expert committee to work on an action plan to implement the recommendation. The action plan was adopted by the Afghan government in December 2005 and launched in early 2007.

⁷⁶ See also Nader Nadery, “Peace or Justice? Transitional Justice in Afghanistan,” *International Journal of Transitional Justice*, Volume I, 2007, Oxford University Press.

key challenge in prosecuting system crimes does not normally lie in proving that facts occurred, but on the nature of participation and the knowledge and intent of those “behind the scenes.”⁷⁷

Investigation techniques for “system crimes,” as developed initially at Nuremberg and later by the ad hoc tribunals, differ from those of ordinary crimes.⁷⁸ In addition to traditional investigation techniques—such as the reconstruction of the crime-scene and forensic analysis—investigation into system crimes requires a detailed analysis of the particular practices and structure of military and paramilitary organizations.⁷⁹ In order to present an accurate understanding of how these events occurred, it is essential that investigators uncover the nature of political, historical and institutional relationships. An analysis of the local context and dynamics of violence—as well as analyses of documentary evidence—are other important elements in the investigation of system crimes. The testimony of so-called “insiders” can be particularly crucial, but is also very difficult to obtain.

Another important element in investigating system crimes is the recording, recovery and preservation of documentary evidence.⁸⁰ Such evidence offers several key advantages: it is less susceptible to challenges by the defense and does not face the same challenges to credibility likely in the case of human testimony. Documentary evidence, however, is vulnerable to physical destruction.

A key question in the documenting of crimes relates to the admissibility of evidence in criminal trials. In general, common law systems take a more technical approach to admissibility. Civil law systems tend to be more liberal in their admissibility of evidence, due to the role of the investigative judge, and are guided mainly by the criteria of relevance. International criminal courts have followed a hybrid approach, being relatively flexible in the admission of evidence, and taking into account the difficulties of securing evidence in the case of system crimes (e.g. there may be only a few surviving witnesses and physical evidence may have been destroyed). The general standard is that probative evidence is admissible regardless of its format, unless the rights of the accused are to be deemed prejudiced by admission.⁸¹ Hearsay and uncorroborated evidence are admissible in certain circumstances.

Groups active on the ground during an ongoing conflict may contribute to the gathering of documentation and evidence that could assist justice options at a future stage, but will not usually be able to fulfill the same role as an investigative judge or prosecutor if they do not know which procedural rules will apply. However, their efforts in documenting may still be very useful for the following purposes:

- *Identifying, establishing links and maintaining contact with potential witnesses.* The guiding principle when protecting potential witnesses must be to “do no harm” and to ensure their wellbeing, prior, during and after the proceedings.⁸² Apart from protection measures, sensitivity to the needs of witnesses is of the utmost importance. This can be achieved by effective and regular communication with witnesses and by providing treatment that respects cultural and social particularities. The aim should always be to create a relationship of trust and respect with the witness. Civil society organizations can play a very important role in this respect, particularly in situations where there may be significant displacement—in which case potential witnesses may be difficult to locate in the future.

⁷⁷ Paul Seils and Marieke Wierda, “Evidence,” in Dinah L. Shelton, *Encyclopedia of Genocide and Crimes against Humanity* [hereinafter: *Encyclopedia of Genocide and Crimes against Humanity*], Volume 1, 2005, 321.

⁷⁸ OHCHR, “Rule of Law Tools for Post Conflict states,” *Prosecution Initiatives* [hereinafter: OHCHR Rule of Law Tools], 2006, 11, at www.ohchr.org/english/about/publications/docs/ruleoflaw-Prosecutions_en.pdf

⁷⁹ OHCHR, *ibid*, fn 78, 12

⁸⁰ *Encyclopedia of Genocide and Crimes against Humanity*, *supra* fn 77, 321.

⁸¹ *Encyclopedia of Genocide and Crimes against Humanity*, *supra* fn 77, 323

⁸² OHCHR, *supra* fn 78, 18.

- *Retrieving and preserving documentary evidence.* NGOs will usually lack capacity to conduct full investigations into systems and may encounter challenges in attempts to gather relevant documentation, for instance from military archives.
- *Taking statements from victims and witnesses.* It may be common for civil society organizations such as human rights or victim groups to seek to take statements from victims in the immediate aftermath of an event. This area should, however, be approached with care, not least because inconsistencies in prior statements may be used to challenge the credibility of a witness at trial.
- *Documenting statements by perpetrators that may reflect their intent.* On occasion, civil society and particularly the media have played an important role in documenting statements by perpetrators that can subsequently be used to prove knowledge and intent. The role of journalists in this regard is very important and, while they may on occasion provide valuable testimony, their mandate in terms of protecting their sources should also be recognized.
- *Conflict mapping.* Conflict mapping is a particular technique, the purpose of which is to be able to make a quantitative analysis that can help identify trends and patterns of abuses. These documents serve in many instances as a lead for further criminal investigations. Some international NGOs such as No Peace without Justice and the Europe and Eurasia Division of the Rule of Law Initiative of the American Bar Association (ABA CEELI), have engaged in conflict mapping or have trained national actors in these techniques in different contexts, including Kosovo, Sierra Leone, and Afghanistan.⁸³

C. Rapid Response?

Investigations during or in the immediate aftermath of conflict may be considered urgent because evidence may be lost, destroyed or weakened with the passage of time. There may be a risk of intentional contamination or destruction of evidence, particularly by those seeking to distort the course of investigations.⁸⁴ It is important to put mechanisms in place to ensure the effective protection of evidential sites or documents for future investigations. Protocols may be required to govern the chain of custody and other such considerations.⁸⁵ Ad hoc international assistance might be sought on issues such as forensics.⁸⁶ NGOs like Physicians for Human Rights and volunteer teams of forensic scientists have often been deployed to assist the investigation process, or to safeguard the opportunity for a subsequent prosecution.⁸⁷

On the other hand, urgency should not be exaggerated. In the absence of specific attempts to destroy evidence or harm witnesses, system crimes such as genocide or crimes against humanity may generate large numbers of witnesses or other forms of evidence that can be retrieved at a later date, when it may be more secure to do so.

In some situations, states may wish to take steps to preserve evidence but may lack the capacity to do so. A current intergovernmental initiative, known as the Justice Rapid Response Initiative (JRR), seeks to establish an international cooperative mechanism, which could provide a wide range of investigative assistance to states and international institutions on request.⁸⁸ Voluntary assistance could be rendered by a state or by a multi-state team at the request of another state or international institution, in order to identify, collect and preserve information that could assist a wide range of justice mechanisms. The specific functions envisaged for such a JRR include: patterns of violence investigation; conflict mapping; identification of potential witnesses; documentary and physical evidence investigation; forensic mapping; visual image collection;

⁸³ NPWJ, *Conflict Mapping in Sierra Leone, Violations of International Humanitarian Law from 1991 to 2002*, 2004.

⁸⁴ *Encyclopedia of Genocide and Crimes against Humanity*, supra fn 77, 322.

⁸⁵ OHCHR, supra fn 77, 15.

⁸⁶ See discussion in the context of “Justice Rapid Response” initiative, at www.justicerapidresponse.org/.

⁸⁷ Their work has been used by the ICTY, and at national trials and truth commissions. For example, the UN/OAS Mission in Haiti brought in a team of Argentine forensic experts in 1997 to investigate a mass grave and prepare evidence for a trial in the national judiciary where several senior Haitian army officers were accused of murder. Neither the mission’s human rights officers nor the Haitian institutions had the necessary equipment or expertise.

⁸⁸ See JRR outcome document, New York March 13, 2007, at www.justicerapidresponse.org/public_area.htm.

identification and facilitating the preservation of the integrity of massacre and burial sites; and identification of possible focuses for further investigations—in full consideration of the physical and psychosocial safety of those affected by such activities.

The advantage of JRRI is that it could put in place mechanisms that would avoid the need for complex bilateral ad hoc arrangements on the giving of such assistance, or the need to generate a request by the United Nations. JRRI could thus significantly reduce response times by providing assistance that is both impartial and meets international standards.⁸⁹ However, there is still confusion about the cope of such a mechanism. For instance, should assistance be given only at the earlier stages of a process or also during the prosecution that may follow? Can that still be said to constitute rapid response? On the other hand, what is the purpose of collecting evidence when there is no mechanism to feed into? While JRRI may provide a useful contribution, it may still be some time before it becomes a functional mechanism.

At the UN level, the Office of the High Commissioner for Human Rights (OHCHR) in Geneva has an Emergency Response Unit. Its purpose is to respond to directives of the Security Council and the newly established Human Rights Council to deploy fact finding missions. It is also mandated to conduct ad hoc investigations and commissions of inquiry in areas that have recently experienced grave human rights violations, war crimes, and crimes against humanity.⁹⁰ The reports of such commissions of inquiry may be admissible in subsequent criminal trials.⁹¹ In 2006, the Unit responded to requests to send special investigators to the Lebanon (twice), Darfur⁹² (twice), Guinea, Liberia, Chad, Nepal, the Occupied Palestinian Territories, and Timor-Leste. Of particular significance has been the International Commission of Inquiry on Darfur, which led to Security Council resolution 1593, which referred the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC.⁹³ The UN established this commission of inquiry—also known as the “Cassese Commission”—in 2004 to investigate reports of crimes committed in Darfur.⁹⁴

D. Investigations Into Ongoing Conflict: Practices of the ICC

To meet the challenges of investigating in situations of ongoing conflict, the Office of the Prosecutor (OTP) of the ICC developed certain overall strategies and policies aimed at reducing the length and scope of its investigations, thereby minimizing the exposure of victims and potential witnesses.⁹⁵ Consistent with the approach adopted by the Special Court for Sierra Leone (SCSL), the ICC adopted a policy of focusing efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes. This enabled it to deal with only a limited number of cases.⁹⁶ The approach is sequenced, meaning that one case at a time in a situation will be

⁸⁹ Six meetings have taken place to help define and launch the JRR concept: New York (April 2004, December 2004 and 2005, March 2007); The Hague (June 2004) and Venice (June 2006). These involved representatives of governments, civil society and international justice institutions. See also *Justice Rapid Response Feasibility Study*, October 2005, at www.justicerapidresponse.org/public_area.htm.

⁹⁰ William G. O’Neill, *Justice Rapid Response Options*, draft dated February 22, 2007, 6.

⁹¹ OHCHR, *supra* fn 77, 15.

⁹² The Commission of Inquiry on Darfur established by SC Resolution 1564 of September 18, 2004 developed its own working method. The commission made it clear from the outset that it was not a judicial body. The commission discussed the standard of proof that it would apply in its investigations. It decided that it could not comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt), nor with those used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case). It concluded that the most appropriate standard was that, “requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.” The commission did not make a final judgment on criminal guilt; rather, it made an assessment of possible suspects and thus tried to pave the way for future investigations, and possible indictments, by a prosecutor.

⁹³ Security Council Resolution 1593 (2005), March 31.

⁹⁴ Pursuant to Security Council Resolution 1564, September 18, 2004. The commission was presided over by Professor Antonio Cassese, an authority in international law and human rights law, who also served as the first president of the first UN International Criminal Tribunal for the former Yugoslavia.

⁹⁵ Second Public Hearing of the Office of the Prosecutor, NGOs and other Experts, New York, October 18, 2006, 1.

⁹⁶ *Ibid.* This approach was also developed largely for efficiency reasons.

investigated.⁹⁷ Cases are selected according to their gravity.⁹⁸ Criteria for establishing that a case is of particular gravity have been developed by the OTP. In assessing the gravity of the act that constitutes a crime, the Prosecutor has indicated that the scale, nature, manner of commission, and impact of the crimes committed will be relevant.⁹⁹ The degree of participation in the commission of the crime is mentioned as an important criterion to establish gravity.¹⁰⁰ This limited approach should assist the office in reducing the number of witnesses called to testify, which it considers essential to ensuring the security of those affected.¹⁰¹ The approach is also tailored to be sensitive to the political realities of limitations on resources.

However, in taking a narrow approach to investigations, the ICC has faced criticism in its investigations in the DRC, notably from NGOs (including local civil society organizations). For instance, in the case against Thomas Lubanga, a leader of one of the major militias in Ituri associated with the Hema ethnic group, NGOs have argued that the charges are too narrow and do not represent the range and nature of the crimes committed during the conflict.¹⁰² Human Rights Watch (HRW) has argued that sequencing in this case may have negative implications for the perception of the Prosecutor's impartiality by the local population. The organization has also said that the absence of warrants against Lendu leaders has led to a strong perception among the Hema community and others that the ICC is carrying out "selective justice" on charges.¹⁰³ Others have argued that the charges of enlisting and conscripting children and using them to participate in hostilities are too narrow, and that child recruitment is not generally perceived as a crime in eastern Congo, let alone as the gravest. Finally, there are those who have argued that restricting charges to high-level accused eliminates the possibility of dealing with perpetrators who have a direct link with victims. This gives rise to an impression that justice is not being done in their particular case.¹⁰⁴

The question is therefore whether the OTP's approach to narrow investigations lends itself well to effective deployment in complex conflicts. In Uganda, the focused nature of the investigation has generally been acknowledged to be efficient; but progress on investigations on certain other conflicts, including Sudan, has also been slow. A sequential approach may also lead to tensions between different fighting factions. Also, a situation-based focus risks ignoring regionalized aspects of the conflicts. On the other hand, narrow and focused investigations have the advantages of allowing the Court to contact fewer witnesses and strictly limit contact and exposure.

E. Security and Protection of Victims and Witnesses

Situations of ongoing conflict raise particular challenges to the need to provide protection. Some of the obstacles include problems arising from a total collapse of functional institutions, the absence of programs or legislation to protect victims and lack of state cooperation. Effective

⁹⁷ Ibid. In the DRC, the OTP started by investigating the case against Thomas Lubanga, who was associated with the ethnic group of the Hemas. The OTP will announce a second case in the near future.

⁹⁸ See Article 17(1)(d) of the ICC Statute.

⁹⁹ Office of the Prosecutor, International Criminal Court, "Criteria for Selection of Situations and Cases," draft policy paper, June 2006, 5. See also, Office of the Prosecutor, International Criminal Court, "Paper on some policy issues before the Office of the Prosecutor," September 7, 2003.

¹⁰⁰ The PTC has affirmed that focusing on those in leadership positions is a core component of the gravity threshold in the Rome Statute. PTC I found that the gravity requirement under article 17(1)(d) "is intended to ensure that the court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the court allegedly committed in any given situation under investigation." *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, "Decision on the Prosecutor's Application for a Warrant of Arrest", Article 58, February 24, 2006, www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf, para. 50.

¹⁰¹ Second Public Hearing of the Office of the Prosecutor, NGOs, and Other Experts, NY 2006, 1.

¹⁰² Joint letter to the Chief Prosecutor of the International Criminal Court, by Avocats Sans Frontières, Center for Justice and Reconciliation, Coalition Nationale pour la Cour Pénale Internationale—RCD, Fédération Internationale des Ligues des Droits de l'Homme, Human Rights Watch, International Center for Transitional Justice, Redress, Women's Initiatives for Gender Justice, at hrw.org/english/docs/2006/08/01/congo13891_txt.htm

¹⁰³ Second Public Hearing of the Office of the Prosecutor, NGOs, and Other Experts, NY 2006, 6.

¹⁰⁴ Human Rights Watch, *The Selection of Situations and Cases for Trial before the International Criminal Court*, October 2006, 13.

measures of protection have been a constant challenge for the ICC and other tribunals, due to the nature of the crimes. Factored in is the lack of ability to rely on organs of the state, which may not function to full capacity during the conflict, or which may be unreliable. The measures for the protection of victims are kept confidential; court officials have recently reported that to date, no-one identified as a potential witness has been harmed.

A critical question in an ongoing conflict is whether protection should encompass only those who will testify, or whether protection should extend more broadly to victim populations that may be affected by the actions of the court. In Darfur, the court solicited several opinions on this issue—including from the UN High Commissioner for Human Rights and from Professor Cassese, who had headed the ICI in Darfur. Professor Cassese argued that the obligation to protect victims under the Rome Statute encompasses both the protection of victims as potential witnesses in trial proceedings and the protection of victims in general.¹⁰⁵ The obligation to protect therefore goes “beyond the scope of trial proceedings and is more humanitarian in nature.” Its main aims are to terminate and deter serious offences against victims, “in particular for such vulnerable categories as civilians, women and children.”¹⁰⁶ He recommended certain measures in this respect, and took steps to establish expeditiously the criminal responsibility of those causing instability and insecurity in the affected area. He called on the government of Sudan to protect victims, and summoned a Sudanese official to report on specific measures implemented to protect witnesses and to hold perpetrators accountable. He also called on third states and other entities (including NGOs) operating in Darfur to provide full assistance to victims (medical, humanitarian and psychological) of such crimes. Noncompliance with the measures ordered by the chamber should be reported to the Security Council.¹⁰⁷

The High Commissioner for Human Rights argued in her submission to the Court that it is possible to conduct investigations into serious violations of humanitarian law in situations of ongoing conflict without imposing an unreasonable risk of reprisal on victims and witnesses.¹⁰⁸ Furthermore, she observed that the mere presence of the Prosecutor on the ground could have the potential to lead to increased protection of vulnerable groups. The Prosecutor took a different view. He argued that: “the continuing insecurity in Darfur is prohibitive of effective investigations inside Darfur, particularly in light of the absence of a functioning and sustainable system for the protection of victims and witnesses.”¹⁰⁹ As a consequence, investigative efforts by the Prosecutor have so far been conducted outside Darfur.¹¹⁰ According to the Prosecutor, this has not impeded the Court’s ability to gather significant amounts of information and evidence on crimes committed.¹¹¹

In general, the OTP stated that criminal investigations should contribute to the protection of the civilian population in Darfur, in particular by preventing future crimes being perpetrated against the civilian population. But it argued that neither the OTP nor the chamber have the responsibility to enhance security for victims of crimes in Darfur.¹¹² The responsibility for security of the civilian population in Darfur rests solely with the government of Sudan and, where appropriate,

¹⁰⁵ Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, August 25, 2006, ICC-02/05, 3.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, October 10, 2006, ICC -02/05.

¹⁰⁹ Prosecutor’s Response to Cassese’s Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, September 11, 2006 (Prosecutor’s Response to Cassese’s Observation), ICC -02/05.Ibid, 19.

¹¹⁰ In response to the OHCHR, the Prosecutor observed that the risk for victims and witnesses in the context of a criminal investigation is higher compared to inquiries on Human Rights violations as conducted by the OHCHR, since the former will have more severe consequences for the respective perpetrator.

¹¹¹ This was confirmed when the PTC issued arrest warrants against two accused in Darfur. *Prosecutor v. Ahmad Muhammad Harun* (“Ahmad Harun”) and Ali Muhammad AL-ABD-AL-Rahman (“Ali Kushayb”), Decision on the Prosecution Application under Article 58(7) of the Statute, ICC -02/05-01/07.

¹¹² Ibid, Prosecutor’s Response to Cassese’s Observation, 8.

with other actors such as the UNSC and the AU. The Prosecutor also emphasizes that the mandate to protect victims and witnesses, “can not realistically be viewed as a duty to protect all the victims in Darfur regardless of their lack of connection to the investigation.”¹¹³

It is obvious that the Prosecutor cannot be responsible for the broader consequences of violence or even for attacks on persons that may be presumed to be associated with the court. On the other hand, it is equally clear that the Prosecutor has a responsibility to work in way that will minimize the risk of the Court’s activities to broader populations in conflict areas, including victim populations and humanitarian groups. Protection and the monitoring of security are complex imperatives, involving the overlapping responsibilities of numerous actors.

IV. CONCLUSION

This paper has sought to analyze some of the current practices followed when dealing with justice in ongoing conflict. It is not possible to be empirical about experiences to date, in terms of suggesting whether indictments during ongoing conflicts promote or hinder the achievement of peace. However, it is clear that justice will increasingly be pursued before conflicts end. This is particularly true when international initiatives such as the ICC are leading to the exercise of criminal jurisdiction at the domestic level, such as in Colombia.

For these purposes, it is essential to envisage a landscape where a range of actors try to implement their mandates, in order to promote increased understanding of the issues and challenges as viewed by each. This environment is usually complex and emotive. Furthermore, it is also necessary to develop and employ techniques that serve to preserve justice options or to conduct prudent investigations.

¹¹³ Ibid, 30.